DEPARTMENT OF PRACTICE, PLEADING AND EVIDENCE.

THOMPSON *v.* PEOPLE.[1] SUPREME COURT OF ILLINOIS.

EDITOR-IN-CHIEF.

(The nature of the subject of this annotation makes it improper that Judge DALLAS' name should be connected with it. The general editors are alone responsible.)

Assisted by

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Trial—Absence of Judge.

It is reversible error for the judge, during the argument of the case before the jury, to go out of the court-room to a private room where he cannot hear the argument nor pass on objections made by the prisoner's counsel to the statements of the State's attorney.

STATEMENT OF FACTS.

John K. Thompson was indicted for assault with intent to kill, and was convicted. During the argument of the case before the jury, the trial judge left the court-room and remained out of the court-room during the entire closing argument of the State's attorney. The judge had retired for the purpose of preparing his instructions to the jury, but he could not, and the record shows, did not, hear the argument to the jury. Counsel for the defendant repeatedly objected to the remarks of the State's attorney, but as the judge was absent from the court-room and there was no presiding judge present to pass upon the questions raised, or attempted to be raised, they were never decided. Upon these facts CRAIG, J., said: "The argument before the jury is a part of the trial of a cause as well as the introduction of evidence to prove the innocence or guilt of a defendant, or any other fact at issue in the trial. If the

[1] 32 N. E. Rep., 968 (1893).

presiding judge may leave a court-room and engage in other business during the argument before the jury, he may upon the same ground leave while the evidence is being introduced during the progress of the trial, at any any other stage of the proceeding. . .. . Under the law the defendant, who was on trial for a serious crime—one which deprived him of his liberty—had the right to the presence of the presiding judge during the argument of the case before the jury, and the absence of the judge was, in our opinion, an error of sufficient magnitude to reverse the judgment."

MISCONDUCT OF A JUDGE AS GROUND FOR NEW TRIAL.

The purity of the judiciary is the perpetuation of order and equality. When the bench becomes the object of criticism and contempt, the death warrant will be read to an institution which the civilized world recognizes to-day with awe and admiration. To the honor and credit of the judiciary, be it said that its decorum has been, as a rule, worthy of its praise; but instances of misconduct, legal, if not wilful, may be noted which the law recognizes as culpable and affording sufficient ground for granting a new trial.

Absence of the Judge during Trial.—The record in Meredith *v.* People, 84 Ill., 479, homicide, shows that the judge of the Circuit Court before whom the cause was tried, during the argument before the jury was absent for nearly two days from the court-room and employed in the trial of other causes in an adjoining room, and his place upon the bench was occupied successively by two members of the bar. Justice SCOTT in setting aside the verdict said: "It is not material whether the judge of the Circuit Court was absent from the court-room during the trial of the cause by consent of counsel for the defense. Neither accused nor his counsel for him could consent that the judge of the court before whom the cause was being tried might be elsewhere employed in other official duties. It is no less error than if he had been in another county. Where the judge is engaged in trying causes, there is the court, and he can hold no court elsewhere by proxy at the same time. . . . This court has decided in two civil cases that a member of the bar, even with the consent of the parties, cannot exercise judicial power." See also Cobb *v.* People, 84 Ill., 511.

Private Communications between Judge and Jury.—It is a well established and salutary rule, and one very essential to the proper and effectual administration of justice, that the instructions of the judge to the jury should be openly and publicly imparted. The right of a suitor to have the trial of his cause conducted openly, with the opportunity to be present and to except to and review any unwarranted instruction or procedure, is a substantial one, and if any infraction of it occurs the burden rests

upon the party maintaining the regularity of the proceedings to show that the communication or act or question could not have tended to the injury of the defeated party. If it appears affirmatively and beyond dispute that the instructions, instead of being prejudicial to the party complaining were really favorable, to him and could not have worked any injustice, or in any way have affected the result, or if the irregularity has been cured by the waiver (see Alexander *v.* Gardiner, 14 R. I., 15) or assent of the party alleging it, it is not a sufficient reason for ordering a new trial; but it may be stated generally that the party moving for a reversal is not required to show affirmatively that the communication tended to his hurt, the principle underlying the rule being that such communications are so dangerous and impolitic that it should be presumed conclusively that harm was done. The source of the danger lies in the secrecy attending the act. Graham and Waterman on New Trials, Vol. II, p. 360, say: "The practice of the courts addressing private notes to the jury cannot be sufficiently condemned." In Watertown Bank *v.* Mix, 51 N. Y., 559, the judge answered somewhat vaguely a written question relating to the evidence sent to him by the jury, by writing his answer beneath and returning it, but without informing counsel. JOHNSON, C., said: "It is, in my opinion, better and safer to adhere to the rule as affirmed by the adjudged cases and by what I understand to be the settled usage in this State, that there ought to be no communication between the judge and jury after they have gone from the bar to consider of their verdict, in relation to the oral evidence or his instructions to them, unless it take place openly in court or with the express consent of the parties." In Sargent *v.* Roberts, 1 Pick., 337, the Court said: "We are all of the opinion, after considering the question maturely, that no communication whatever ought to take place between the judge and the jury after the cause has been committed to them by the charge of the Court unless in open court, and where practicable in the presence of the counsel in the case."

Wiggins *v.* Downer, 67 How. Pr., N. Y., 65, a leading case, reviews the authorities. Here the jury returned to *open* court at the close of the evening session, when neither parties nor counsel were present, and requested the Court to repeat certain propositions, which was granted. The attendance of counsel was impossible. Verdict sustained. See also Goldsmith *v.* Solomons, 2 Groble, S. C., 296; Rogers *v.* Moulthrop, 13 Wend., N. Y., 274.

A distinction has been drawn between a written communication to the jury involving law and one involving fact. In Thayer *v.* Van Vleet, 5 John., N. Y. 111, a justice's court jury while deliberating sent for the justice, who entered their room and answered a question of law: *Held*, no such misconduct as commended a new trial. See also Allen *v.* Aldrich, 29 N. H., 63; School Dist. *v.* Bragdon, 23 N. H., 517. And the judge may give written instructions to the jury after they have retired, at their request, upon questions of law, even in the absence of counsel: Shapely *v.* White, 6 N. H., 172; Basset *v.* Salisbury Co., 28 N. H., 438. But

in Plunkett *v.* Appleton, 51 How. Pr., N. Y. 469, a verdict was set aside because the judge, without the knowledge of counsel, sent written communications to the jury answering questions of law addressed to him by the jury. A reversal was allowed in Bunn *v.* Croul, 10 Johns., N. Y., 239, where the question was one of fact and not a matter of law. See also Mahoney *v.* Decker, 18 Hun., N. Y., 365. In Neil *v.* Abel, 24 Wend., N. Y., 185, the judge was reversed because he permitted the jury, without the consent of the parties, to use his minutes sent for by them. Similiter, State *v.* Alexander, 66 Mo., 148.

In Shapely *v.* White, PARKER, J., said: "The principle to be deduced from these cases seems to be a sound one. If the jury, after an adjournment, put a question respecting the facts of the case to the court, it will be irregular to state the evidence relating to it; but if they desire instruction upon a mere question of law, that may be answered. It should undoubtedly be answered in such a way that the parties may have an opportunity to have it corrected if there is any error in the answer, and in this way all the rights of both parties are secured as effectually as if the answer was given in open court."

In Taylor *v.* Betsford, 13 Johns., N. Y., 487, the justice went into the jury room and deliberated with them privately and apart from the parties and without their consent. Judgment reversed. See also Benson *v.* Clark, 1 Con. (N. Y.), 258. The Court, in Hobery *v.* State, 3 Minn., 262, said: "A judge has no more right to communicate with a jury after it has retired than any other person, and we must look upon his visit in this case in the same light that we would view the entry of any third person into the jury room while the jury was in consultation." The Court, in Wiggins *v.* Downer, 67 How. Pr., N. Y., 65, said: "From these cases and others of like character that might be cited, it is clear that a judge should not privately communicate with the jury, either by entering the room where they are deliberating or by means of written communications. The principle upon which the rule rests is that such communications are so dangerous and impolitic that they will be conclusively presumed to have influenced the jury improperly. The source of the danger is the secret nature of communication." But see Thayer *v.* Van Vleet, 5 Johns., N. Y., 111.

Intoxication of the Judge.—Such culpable decorum is undoubtedly ground for a new trial. Says the court, in Repath *v.* Walker, 13 Col., 109: "It would be better to submit questions in dispute to the arbitration of chance than to the decision of a tribunal which is not thoroughly upright and scrupulously fair as between litigants; and can it be said that an upright judge, a scrupulously fair man, one who appreciates the dignity of his office, can impartially determine the interests of litigants and fairly administer the law when in a state of intoxication. Such conduct on the part of a judge is not only reprehensible, but is indeed criminal."

Judicial Recognition of Scandal.—In Rickabus *v.* Gott, 51 Mich., 227, the trial judge permitted to be admitted needless scandal and gratuitous attacks on the character of a party. Upon reversal the

Supreme Court said: "There was no color of excuse for the practice. It was equally a violation of propriety and the rules of evidence. It was not only hearsay, but irrelevant, and could have no other object than to wound and disparage the proponent. . . . The testimony had no legal connection with the question that was being tried, and the end to which it was obviously directed is utterly indefensible. The duty of the trial judge to repress needless scandal and gratituitous attacks on character is a very plain one, and good care should be taken to discharge it fully and faithfully."

Misconduct of Court toward the Evidence.—In Belmore *v.* Caldwell, 2 Bibb., Ky., 76, the judge refused counsel permission to argue a question of fact before the jury. Upon reversal the Supreme Court said: "The right of appearing by counsel and arguing matters of fact involved in the cause is a right which the Court ought not to have denied to the party." Similiter Olds *v.* Com., 3 Marsh., Ky., 467; Hunt *v.* State, 49 Ga., 255.

Attitude of Judge—The manner and demeanor of the judge which indicates a bias and obviously influenced the jury will afford ground for a new trial. In Wheeler *v.* Wallace, 53 Mich., 355, the trial judge apparently sanctioned an abuse of cross-examination, the purpose of which was to entrap a witness into making inadverdent statements; volunteered his own notion of the purpose of a question; reflected before the jury upon the capacity and memory of counsel; and stated as a fact, when there was doubt about it, that a witness had sworn to a particular statement. Chief Justice COOLEY, upon reversal, said: "It is very unusual to have exception taken on writ of error to the manner and deportment of the trial judge in the conduct of the trial, and under ordinary circumstances a court of review would not scrutinize very closely his methods when no error in his rulings was alleged. Still, it is possible for a judge to deprive a party of a fair trial, even without intending to do so, by the manner in which he conducts the case, and by a plain exhibition to the jury of his own opinions in respect to the parties or to the case."

State *v.* Richards, 72 Io., 17, was reversed by the higher court because the judge's charge was prejudicial to the defendant as tending to impair his credibility as a witness when it was possible for the jury to reconcile it with the evidence of other witnesses.

Remarks of Court to Counsel.—It is misconduct, warranting a new trial, for the Court to compliment one attorney to the detriment of the other, or to resort to language which unjustly casts a stigma upon counsel, or where his remarks to an attorney show an unfavorable opinion toward either party to the suit.

In McDuff *v.* Journal Co., 47 N. W. Rep., 671, the Court said: "I don't want to compliment Mr. Pound (the plaintiff's attorney), but I am well aware of the fact that Mr. Pound knows how to try a law suit." Judgment reversed. Upon exceptions to the court's remarks to counsel during trial and argument, Judge SHERWOOD, in setting aside the verdict of Cronkhite *v.* Dickerson, 51 Mich., 177, said: "It is insisted by the defendant's counsel that these suggestions by the Court were calculated to make an

impression unfavorable to the defendant, upon the minds of the jury. Of course, nothing of the kind was intended by the court; still, we think, the suggestions open to the criticisms made by the defendant's counsel, and it is impossible to tell to what extent the defendant's rights may have been prejudiced by the remark. Certainly, the natural tendency was in that direction, and in this there was error. Jurors are very vigilant in scrutinizing all that is said by the trial judge in the progress of a cause before them, and great care should be observed that nothing is said which can, by any possibility, be construed to the prejudice of either party. Courts cannot be too circumspect in this regard." See, also, People *v.* Hare, 57 Mich., 505; Mittel *v.* Chicago, 9 Ill. Ap., 534.

Judicial Coercion of Jury.—Language coming from the bench, obviously tending to coerce the jury into agreement, affords ground for a new trial. Any improper remark of the court in the presence and hearing of the jury, liable to influence that action is misconduct.

The jury, in Green *v.* Telfair, 11 How. Pr., N. Y., 260, after having been absent several hours in consultation, returned into court, and stated their inabiltty to agree. The judge informed the jury that it was very important that they should agree upon a verdict; that the case had excited considerable feeling, which would be increased if they should separate wlthout agreeing; that no one juror should control the result, or otherwise the verdict would be the verdict of one man, and not of the twelve; that both parties had taken exceptions to decisions made during the progress of the trial, and it was necessary before these decisions could be reviewed, that there should be a verdict of some kind; that for five years he had discharged but one jury, because they were unable to agree, and that he would return Monday morning to receive their verdict. A verdict was rendered almost instantly. HARRIS, J., in reversing the lower court said: "A judge may also keep the jury together as long as in his judgment there is any reasonable prospect of their being able to agree; but beyond this I do not think he is at liberty to go. An attempt to influence the jury by referring to the time they are to be kept together, or the inconvenience to which they are to be subjected, in case they shall be so pertinacious as to adhere to their individual opinions, and thus continue to disagree, cannot be justified. A judge has no right to threaten or intimidate a jury in order to affect their deliberations. I think he has no right even to allude to his own purpose as to the length of time they are to be kept together. There should be nothing in his intercourse with the jury having the least appearance of duress or coercion."

In Slater *v.* Mead, 53 How. Pr., 57, the lower court said: "You must agree upon a verdict, I cannot discharge you until you agree upon a verdict." The Court of Appeal declared that "these remarks of the justice presiding at the trial were such as would very probably induce the jury to come to an agreement, from a desire to escape longer confinement. . . . The verdict cannot be said to be the judgment of the jury, acting "without restraint, and in the discharge of their obligations, to render a true verdict

according to the evidence, and, therefore, it ought not to stand." See, also, Phœnix Insurance Co. *v.* Moog, 81 Ala., 335. The inferior court was reversed in R. R. Co. *v.* Jackson, 81 Ind., 19, for sending word by the bailiff to the jury that "if they do not agree to a verdict I will keep them there until Saturday," that was to say four days. The reversal in Fushman *v.* Mayor, 54 Ala., 263, was based on a remark by the judge to the jury that the proceeding "was a civil suit, but if the jury considered the evidence they would find it decidedly criminal." The higher court said "we cannot shut our eyes to the fact that juries . . . watch with anxiety to gather from the court some intimation as to what the judge thinks should be their finding."

Upon the jury stating their inability to find a verdict, in State *v.* Ladd, 1 La. An., 271, the judge said that the case was one of peculiar character, and that he "had reason to believe from information received that some of the jury had been approached and tampered with previous to the trial." *Held*, that such remarks had a tendency to coerce the jury into a verdict, from improper motives, and was sufficient grounds for remanding the case for a new trial.

State *v.* Bybee, 17 Kan., 462, is an exhaustive case. The defence was alibi. The court intimated to a divided jury that a reflection would be cast upon them if they did not agree; that there should be concession in matters of detail and minor importance; that they should bring their minds together, as an apothecary mixes different ingredients and ascertains the product, and that they need not hope to be discharged for a long time. BROWN, J., in a learned opinion said "the general impression of these instructions is that the jury ought by compromise and surrender of individual convictions, of necessity to come to an agreement, and that a failure to do so would be an imputation upon both jury and court. . . . No juror should be influenced to a verdict by fear of personal disgrace or pecuniary injury. No juror should be induced to agree to a verdict by a fear that a failure to so agree would be regarded by the public as reflecting upon either his intelligence or his integrity. Personal considerations should never be permitted to influence his conclusions, and the thought of them should never be presented to him as a motive for action. Nor do we think the illustration given by the learned court a happy one. . . . We are constrained to believe that he passed beyond the line which should limit the counsel and instructions of a court to a jury that thereby the material rights of the defendant were prejudiced."

In Spearman *v.* Wilson, 44 Ga., 473, a judge threatened to carry a jury into another county, where he was about to hold court, if they did not agree. The Supreme Court set aside the verdict.

C. J. JACKSON, in Physioe *v.* Shea, 75 Ga., 466, said: "The new trial was properly granted (by the Superior Court) on the ground that the court erred in his remarks to the jury, in regard to allowing them their meals only at their own expense, after they had been out all night without supper or breakfast. It operated as a threat to starve such as had no money into finding a verdict, for in ten minutes, after being hung all night, they agreed

on a verdict. The old idea of starving juries to coerce a verdict has passed away." See, also, Hancock *v.* Elam, 3 Baxter (Tenn.), 33.

The circuit judge, in R. R. Co. *v.* Barlow, 86 Tenn., 537, upon the jury's report of disagreement, said, that it seemed "to be a very difficult matter for juries at the present term of the court to decide questions of fact submitted to them;" that it seemed to the court that "nearly every jury had returned and said they could not agree;" that they "ought to agree and decide cases, for they had to be decided by juries;" and that he had no idea of discharging them, but would keep them together on the case "during the entire term, if it lasted three weeks," unless they sooner agreed upon it. *Held*, reversible error.

In Wannak *v.* Mayor of Macon, 53 Ga., 163, the trial judge said: "Why, gentlemen of the jury, I saw that Christmas exhibition myself, and was alarmed, but I am not a witness in this case, and was not at the firing, and I know nothing about how the fire occurred on Cherry Street, nor intimate my opinion;" and the judge further expresses an opinion that certain testimony was "of but little value." WARREN, C. J., said the remarks of the court "were erroneous and improper." Judgment reversed.

In charging the jury in Hair *v.* Little, 28 Ala., 236, that they might give exemplary damages if the trespass was accompanied with circumstances of aggravation, the judge playfully remarked, in the way of illustration, "such damages as would teach the old gentleman not to violate the Sabbath, nor injure his health by riding in the night, nor interfere with the rights of others." CHELTON, C. J., said the remark "was calculated to impress them (the jury) with the belief that the judge thought the facts such as would require them to give exemplary damages." Verdict set aside. See, also, Moncallo *v.* State, 12 Tex. Ap., 171.

Bowman *v.* State, 19 Neb., 523, was a peculiar case. The defendant, when arraigned for a felony, moved for a continuance, on the ground of absence of witnesses, including his father. Whereupon the judge, in the presence of certain of the regular panel of petit jurors, some of whom afterwards sat in the trial of the cause, said that the father told him that he would have nothing to do with the defendant; that the defendant had committed perjury, and that a grand jury would be called upon to investigate the same, COBB, J., said, "It may be granted that such declarations or expressions of the court did not cause the future juror to form or express an opinion as to the guilt or innocence of the accused; but it did prevent him from entering the jury box with his mind a *tabula rasa*, so far as the guilt or innocence of the prisoner was concerned, whether he was himself aware of what had been written thereon or not." Reversed and remanded.

In Taylor *v.* Jones, 2 Head (Tenn.), 565, the lower court made the following remark: "There are some cases in which I have been sometimes, in case of hung juries, almost been constrained to tell the jury that it would be better for them to find a wrong verdict than not to agree at all, as any error we may commit may be corrected by the Supreme Court."

The Supreme Court, per CARUTHERS, J., said: "The effect of such