North Dakota Law Review

Volume 27 | Number 2 Article 4

1951

Evidence - Jury Trials - Weight of Evidence - Credibility of Witnesses - Judicial Comment Thereon

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bailor against the third person;[40] while in earlier cases negligence was imputed in a suit by the bailor,[41] but not when the third party sued the owner.[42]

It is important to note that liability under the statutes is gauged in proportion to the consent of the bailor,[43] so that an express limitation of the bailment may relieve the bailor from liability and in effect negative the value of the procedural aid provided by the statute.[44]

It is submitted that the preservation of rights in the bailor given by the interpretation of Minnesota and New York courts achieves the purpose of the statute in providing only a limited armor from the common law for the third person. Mesmerized by the logical appeal of the "Two Way Rule," the minority courts have unwittingly blessed the concurrently negligent defendant with an immunity from suit which by accepted rules of statutory interpretation can not be justified.

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EVIDENCE—JURY TRIALS—WEIGHT OF EVIDENCE—CREDIBILITY OF WITNESSES—JUDICIAL COMMENT THEREON. Perhaps the most heavily criticized factor in the administration of justice, subject to vicious attack by both laymen and practitioners, is the trial by jury. Arguments center not upon abolition of this constitutionally established right but upon the obvious defects in its practical results.

Among the many suggestions for improving this important aspect of democratic justice is the granting of greater powers to the trial judge, particularly permitting him to comment upon the weight of the evidence and credibility of witnesses. Such a suggestion is neither new nor untried, but has been a controversial question within our country for nearly 150 years.

HISTORICAL ORIGIN AND DEVELOPMENT

No study of the problem of judicial comment may be adequately undertaken without a thorough understanding of the political impli-

[40] See Note, 6 A.L.R. 316 (1920) for recent cases illustrating the change to the modern viewpoint taken by the courts after 1908.

[41] Puterbaugh v. Reasor, 9 Ohio St. 484 (1859); Welty v. Indianapolis & V. Ry., 105 Ind. 55, 4 N.E. 410 (1886).

[42] Premier Motor Co. v. Tilford, 61 Ind. App. 164, 111 N.E. 645 (1916); Pease v. Montgomery, 11 Me. 582, 88 Atl. 973 (1913).

[43] Chaika v. Vandenberg, 252 N.Y. 101, 169 N.E. 103 (1929); Stapleton v. Hertz Drivurself Stations, 131 Misc. 52, 225 N.Y. Supp. 661 (Sup. Ct. 1927).

[44] Note, 17 Corn. L.Q. 158 at 161 (1931).

cations which ultimately led to the radical departure from the common law judicial prerogatives which allowed judicial comment upon the weight of the evidence and credibility of witnesses. At common law it was never questioned that this judicial power was an inherent part of the right to trial by jury.[1] As the judicial systems of the American colonies originated from the common law of England the practice of allowing judicial comment by the presiding judge in jury trials was naturally assumed.

The political controversies raging in that period following the adoption of our Constitution by the freed colonies were not confined merely to legislative groups, but, unfortunately, were carried by many judges into the performance of their judicial offices. Perhaps the most infamous examples arose from the enforcement by the judiciary of the Alien and Sedition Acts[2] enacted in 1798 by a Federalist-controlled Congress. The acts were bitterly attacked by Jeffersonian-Republicans condemning them as unconstitutional. "The courts interpreted and applied the law with extreme partisanship. The selection of juries was generally in the hands of Federalist officials, and the courts not only refused to allow the constitutionality of the law to be challenged, but also deprived the accused of the protection of the provision in the law which permitted the truth of the alleged libel to be offered as a valid defense. In their charges to the juries, moreover, the judges repeatedly expounded Federalist political principles and made conviction almost inevitable."[3] The controversy was further aggravated when President Adams packed the federal courts with loyal Federalist supporters in his famous "midnight session."[4] It is amazing that, with a change of political power through the election of President Jefferson, federal judges were neither censured nor restricted.

Extreme political partisanship was not restrained solely to the Federal judiciary, but similar action on the part of state justices gave rise to a breach occurring between bench and bar in North Carolina, resulting in the first restriction of judicial powers in 1795. In 1786 the legislature of the State of North Carolina enacted a measure forbidding loyalists, those supporting the English cause during the Revolutionary War, from bringing suit to recover property which had been confiscated by the American Revolutionists. The judges of the state

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[1] Solarte v. Melville, 7 B. & C. 430, 108 Eng. Rep. 784 (K.B. 1827), 3 Bl. Comm.* 375.

[2] The Alien and Sedition Acts in essence made it illegal for any person to write, print, or publish "any false, scandalous and malicious writing against the Government of the United States, Congress or the President with the intention to defame or to bring into contempt or disrepute". Kelly and Harbison, The American Constitution 196 (1948).

[3] *Id.* at 197.

[4] The enforcement of the Alien and Sedition Acts under Justice Samuel Chase, who proceeded in such a partisan manner, and who spoke so vehemently against the Republicans, resulted in some of his trials becoming utter and complete travesties upon justice. His conduct further aroused controversy over the measure. For an excellent illustration see United States v. Callender, 25 Fed. Cas. No. 14,709, at 239 (C.C.D. Va. 1800).

were quite willing to enforce the measure, and, as this had been a profitable field of litigation for the attorneys, they blamed the judges for their loss of business.[5] The attorneys of the state were further inflamed when the court banished from the state two loyalists who were attempting to recover their property. An attempted impeachment of the judges failed. The final result of this broiling feud was a legislative enactment forbidding the judges in their charges to the jury to express any opinion upon the facts.[6]

Subsequently, residents of North Carolina, migrating westward, settled the state of Tennessee, and incorporated within the Tennessee constitution[7] a provision similar to the North Carolina legislative enactment. The Tennessee constitution was considered outstanding among existing state constitutions and, as a result, was adopted by many later territorial constitutional conventions with little consideration for its specific content.[8]

It would be erroneous to leave the impression that adoption of the North Carolina rule through an extension of the Tennessee constitution was not in accord with popular opinion of the times. Many factors, among which were the spasmodic outdistancing of judicial enforcement of law by the rapidly expanding American frontier, and the unparalleled low quality of the average justice, helped crystalize the layman's antagonism towards judicial comment.

Thus five factors, historical in nature, but of some present day importance contributed to the departure from the common law rule and resulted in restrictions being imposed upon the trial judge. These were: (1) Failure of the judiciary to recognize and exercise the solemnity of their office; (2) Indiscreet exercise of the "spoils system" in the appointment of state and federal judges; (3) Scarcity of competent legal talent available for judicial positions; (4) The pioneer spirit prevalent at the time, which enjoyed the excitement of the

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[5] Johnson, *The Province of The Judge in Jury Trials*, 12 J. Am. Jud. Soc'y. 76 (1928).

[6] *Id.* at 79.

[7] Tenn. Const. Art. V, § 5 (1786); Same provision today, Tenn. Const. Art. VI, § 9; Johnson, *supra* note 5.

[8] As a corallary of this era, it is said that in Massachusetts General Ben Butler had had a disastrous experience with a certain judge and, being a member of the Revision Committee of the Legislature avenged himself by being instrumental in having a restrictive statute adopted which accomplished the result reached in North Carolina.

In Illinois a certain judge would instruct the jury in such a way as to obtain a verdict, desirable to him, and when a correct bill of exceptions was presented him he would refuse to sign it and deny he had instructed the jury as stated. As a consequence of such arbitrary action, leading practitioners of his district went to the legislature for relief, which resulted in a statute restraining judicial comment. See Cartright, *Present But Taking No Part*, 10 Ill. L. Rev. 537 (1916). A Judge in South Carolina felt that "this was a deliberate design on the part of two or three able criminal lawyers in the Constitutional Convention to prevent verdicts of guilty in criminal cases." Johnson, *The Province of The Judge in Jury Trials*, 12 J. Am. Jud. Soc'y 76, 81 (1928).

adversary method of trial; and (5) a rise of a democratic spirit accompanied by a reform movement placing broader powers in the hands of the electorate while removing it from public officials.[9]

PRESENT COMMENTARY POWERS OF THE TRIAL JUDGE

The rules governing judicial comment upon questions of fact and credibility of witnesses may be classified in two broad categories: (1) those jurisdictions which adhere to the common law concept of the function and authority of the trial judge to comment upon the weight of the evidence and credibility of witnesses, exercised with discretion, while leaving the ultimate determination of the facts to the jury, and (2) those jurisdictions which, by constitutional provision, statutory enactment, or judicial determination, restrict the presiding trial judge solely to charges upon questions of law.

Federal courts and a growing minority of states[10] which appear to follow the leadership of federal decisions adhere to the common law concept of the function and authority of the trial judge. Since its inception the Federal rule has remained the same, permitting the trial judge in either civil or criminal cases to express to the jury his opinion on questions of fact whenever, in his opinion, such will assist the jury in arriving at a just verdict. The rule is well stated in *Simons v. United States*.[11] Such right of the trial judge is a right guaranteed every citizen in federal courts as a part of the trial by jury.[12]

The power of the federal judge to comment on the facts may be exercised regardless of the practice in local state courts, or prohibitory state constitutional provisions.[13] The judge is never required to express his opinion but may do so at his discretion, assuming the proper circumstances.[14] His right extends even to the point of stating to the jury that in his opinion the defendant is guilty of a criminal charge.

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[9] Hoyt, *The Judge's Power To Comment on The Testimony in His Charge To The Jury*, 11 Marq. L. Rev. 67 (1927).

[10] Thirteen states now follow the common law rule. They are: Colorado, Connecticut, Michigan, Minnesota, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Utah and Vermont. Weissberger, *Right To Comment On Evidence In Federal Courts*, 5 Brooklyn L. Rev. 272, 274 (1936). Also, California, Cal. Const. Art. VI, § 19, and New Mexico, N.M. Stat. § 19-101 (51) (e), (f), 42-115 (1941).

[11] 142 U.S. 148, 155 (1891); *cf.* Patton v. United States, 281 U.S. 276, 288 (1930). In an excellent article by Otis, *Comment To The Jury By The Trial Judge*, 21 Ore. L. Rev. 1, 2 (1941) itemized characteristics of the charge to the jury in common law trials are discussed.

[12] Capital Traction Co. v. Hof, 174 U.S. 1, 13 (1899), cited with approval in Patton v. United States, 281 U.S. 276, 289 (1930). But for a state court's reasoning that judicial comment is not an element of trial by jury see People v. Kelly, 347 Ill. 221, 179 N.E. 898, 901 (1931).

[13] Nudd v. Burrows, 91 U.S. 426 (1875), subsequently approved in Herron v. Southern Pacific Company, 283 U.S. 91, 94 (1931).

[14] Allen v. United States, 4 F.2d 688, 695 (7th Cir. 1925).

Such was the case in *Horning v. District of Columbia*[15] where the court stated that the trial judge still allowed the jury "the technical right, if it can be called so, to decide against the law and the facts."[16] However, the facts of this case were undisputed, and it was upon this point that a later decision in *United States v. Murdock*,[17] a case with disputed facts, was distinguished, the court there holding that a comment by the trial judge stating that in his belief the defendant was guilty was improper.

However broad the federal rule may appear to be, it is adequately surrounded by safeguards to prevent arbitrary and prejudicial action by the court. It was early established that an opinion of the trial judge must be stated as an opinion, not as an instruction of law, and that the judge must expressly leave the ultimate determination of the facts to the jury.[18] A duty is placed upon the trial judge who will comment on the facts to state to the jury in unequivocal terms that his comment is merely his opinion and that the jury is in no way bound by such opinion.[19] Failure to fulfill such duty inevitably results in prejudicial error.[20] The judge must confine himself to the record and the circumstances in the proceedings before the court,[21] and his remarks must be dispassionate, not argumentive, and free from advocacy.[22] Furthermore, no patently excessive expression of opinion can be cured by telling the jury that they are not bound thereby.[23] Where the line may be drawn between permissive and non-permissive comment can be determined only by the language and a consideration of the circumstances of each case.[24]

These judicial expressions have been merely a clarification of the rule which stood unchanged for nearly 150 years. However, in 1932 the Supreme Court, confronted by an unusual case, *Quercia v. United States*,[25] where the defendant had been convicted of a violation of a narcotics charge, issued its decision which has aroused considerable discussion by its apparent limitations upon the well-established principle. On certiorari to the Court of Appeals, the following charge by the trial court had been upheld: "And now I am going to tell you

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[15] 254 U.S. 135 (1920). An extreme application of this rule is found in United States v. Notto, 61 F.2d 781, 783 (2nd Cir. 1932) where an instruction "that on the undisputed evidence this man is guilty and it is your duty in convict him" was not held to be error.

[16] *Id.* at 139

[17] 290 U.S. 389 (1933). The majority cited with approval Quercia v. United States, 289 U.S. 466 (1932), unanimously decided by the same court a year earlier.

[18] Starr v. United States, 153 U.S. 614 (1894).

[19] Schaffer & Co. v. West Tennessee Grain Co., 271 Fed. 820, 826 (6th Cir. 1921).

[20] Fuller v. New York Life Ins. Co., 199 Fed. 897 (3rd Cir. 1912); *cf.* Anderson v. Avis, 62 Fed. 227 (4th Cir. 1894).

[21] United States v. Breitling, 20 How. 252 (U.S. 1857).

[22] Rudd v. United States, 173 Fed. 912 (8th Cir. 1909).

[23] Malaga v. United States, 57 F. 2d 822, 828 (1st Cir. 1932).

[24] Stokes v. United States, 264 Fed. 18 (8th Cir. 1920).

[25] 289 U.S. 466 (1933).

what I think of the defendant's testimony. You may have noticed, Mr. Foreman and Gentlemen, that he wiped his hands during his testimony. It is a rather curious thing, but that is almost always an indication of lying. Why it should be so, we don't know, but that is the fact. I think that every single word that man said, except when he agreed with the Government's testimony, was a lie."[26] Then the trial judge in an effort to bring his opinion within the established rule continued: "Now that opinion is an opinion of evidence and is not binding on you, and if you don't agree with it, it is your duty to find him not guilty."[27] The Supreme Court, in reversing the case, stated that the trial judge's characterization of the manner and testimony of the defendant was such as would excite a prejudice sufficient to preclude a fair and dispassionate consideration of the evidence.[28] The court proceeded further and stated that because of the great influence which the trial judge has on the jury he must use great care to see that his expressions of opinion on the evidence are fair and not misleading, and he must studiously avoid deductions and theories not warranted by the evidence.[29]

Taking notice of the major argument used by those jurisdictions defending the limitations placed upon the trial judge, the Supreme Court recognized that the influence of the trial judge on a jury is necessarily of great weight, and that even his lightest word might prove controlling. The late Professor John H. Wigmore in a highly critical analysis of the *Quercia* case states that the Supreme Court was confronted with an extreme case, and, in a moment of indiscretion, allowed itself to do harm to the federal trial judge's judicial powers.[30]

Whatever arguments may rage as to the accuracy of the court's decision in the *Quercia* case, no question remains but that this decision has had a decided influence not only upon federal courts[31] but also upon state courts[32] following the federal rule.

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[26] Quercia v. United States, 62 F. 2d 746, 747 (1st Cir. 1933).

[27] *Id.* at 748.

[28] Quercia v. United States, *supra* n. 25, at 472.

[29] *Id.* at 470.

[30] 9 Wigmore, Evidence § 2551 n. 7 (3rd ed. 1940).

[31] Sullivan v. United States, 178 F.2d 723 (D.C. Cir. 1949); United States v. Meltzer, 100 F.2d 739 (7th Cir. 1938).

[32] People v. Maron, 72 Cal. App. 2d 704, 165 P.2d 483 (1946); Snyder v. Cearfoss, 190 Md. 161, 57 A.2d 786, 791 (1948); State v. Shetsky, 229 Minn. 569, 40 N.W.2d 339 (1949).

RESTRICTION OF COMMENTARY POWERS BY STATES

A majority of the states, either by statutory enactment,[33] constitutional provisions,[34] or judicial decision[35] restrict the presiding trial judge solely to charges upon questions of law. Certain states do permit the trial judge to review the evidence in his instructions.[36] However, these states do not permit an opinion to be expressed, but merely allow a marshalling of the evidence so that the jury may better understand its application to the issues.[37] For that reason one may treat both groups in that class which has abrogated the common law powers of the trial justice. Further, a diversity of opinion exists among state jurisdictions as to whether comments on questions of fact by the trial judge constitute error *per se* or are merely error to which exception must be taken and prejudice shown. Aside from this problem little remains in explanation of the restrictive rules.

RESTRICTION OF COMMENTARY POWER IN NORTH DAKOTA

North Dakota may well serve as an example of those states completely restricting the trial judge in commentary powers.

"The court in charging the jurors shall instruct only as to the law of the case."[38] So limited by statute, the North Dakota judge stands in that position occupied by his colleagues in thirty-four other states.[39] This has been the rule governing trial judges since the origin of the state. In *Territory v. O'Hare*,[40] the first criminal case ever reviewed by the North Dakota Supreme Court, the court laid out the rule in unequivocal terms, by stating: "Where a trial court assumes to remark upon the weight of the testimony, or upon testimony affecting the credibility of witnesses, it is treading upon delicate and dangerous ground, and cannot be too cautious about revealing its own opinion to the jury."[41] The court then concluded its opinion by stating "it be-

[33] Ala. Code Ann. § 9507 (1928); Fla. Stat. § 54.17 (1941); Ga. Code Ann. §4863 (1926); Idaho Code Ann. § 19-2132 (Bobbs-Merrill 1949); Smith-Hurd's Ill. Stat. Ann. c. 110, § 191 (1948); Iowa Code §780.9 and § 780.35 (1946); La. Code Prac. § 516 (Dart. 1932); Me. Rev. Stat. c. 100, § 105 (1944); Mass. Gen. Laws c. 231, § 81 (Ter. ed. 1932); Miss. Code § 1530 (1942); N.C. Gen. Stat. § 1-180 (1943); N.D. Rev. Code § 28-1411 (1943); Ore. Code Ann. § 2-308 (1930); S.D. Code § 33.1317 (1939); Vernon's Tex. Stat. § 271 (Rules of Civil Procedure) (1948).

[34] Ark. Const. Art. VII, § 23; Ariz. Const. Art. VI, § 12; Del. Const. Art. IV, § 22; Nev. Const. Art. VI, § 12; Tenn. Const. Art. VI, § 9; S.C. Const. Art. V, § 26; Wash. Const. Art. IV, § 16.

[35] For a collection of cases see Weissberger, *Right To Comment On Evidence In Federal Courts*, 5 Brooklyn L. Rev. 272, 274, n. 10 (1935).

[36] S.D. Code § 33.1317 (1939) where it is stated: "In charging the jury the court shall instruct as to the law of the case; if it states the testimony it must in addition inform the jury that they are the exclusive judges of all questions of fact. . . ."

[37] For a broad collection of cases see 3 Am. Jur., Appeal and Error, § 1055, n. 12,13,14,15.

[38] N.D. Rev. Code § 28-1411 (1943).

[39] See *supra* notes 33,34,35.

[40] 1 N.D. 30, 44 N.W. 1003 (1890).

[41] *Supra* note 40, at 1010.

hooves this court, as a court of last resort in deciding the first criminal case ever brought before it for review . . . not to allow a prejudicial charge upon the facts . . . to pass unchallenged and thereby become a precedent. Our duty is, on the contrary . . . to uphold with a strong hand the safeguards of life and liberty which the law throws around all who invoke its protection."[42] In *State v. Barry*[43] the court squarely stated the opinion that the rule of the common law permitting judges to instruct juries as to the credibility of witnesses and the weight of the evidence has never been established in this state. In early state history the trial judge was permitted to marshall the testimony of the case if he informed the jury that they were the exclusive judges of all questions of fact,[44] but this statute was strictly construed to prohibit any comment[45] and was later repealed.[46]

CONCLUSION

Welcome or not, there appears to be a discernible trend of professional opinion towards restoring to the trial judges the common law judicial power which was legislated away during a century and a half of democratic change. Within the past twenty years, four states have moved forward on this difficult path.[47] The American Bar Association Committee on Trial Practice has recommended that the common law concept of the function and authority of the trial judge be uniformly restored in all states, and that restrictive states reform their provisions so that after both counsel have concluded their arguments to the jury, the trial judge can instruct the jury orally as to the law, advising, analyzing, and summarizing the evidence, commenting upon the weight and credibility of the evidence as he deems necessary, while always leaving the final decision on questions of fact to the jury.[48]

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[42] *Ibid.*

[43] 11 N.D. 428, 92 N.W. 809. (1902).

[44] N. D. Comp. Laws § 10863 (1913).

[45] *Supra* note 43 at 817.

[46] 12 N. D. Rev. Code § 29-2130 (1944) eliminated this portion of the former statute in combining N.D. Comp. Laws §§ 10822, 10863 (1913).

[47] (1) California, by constitutional amendment to Cal. Const. Art. VI, § 19 adopted in 1934, now permits judicial comment upon questions of fact. An important corollary to this movement was the adoption on the same date by the people of California of Art. VI, § 26 providing for selection of judges by a method similar to the Missouri Plan, a program intended to improve the quality of the members of the bench. For an excellent explanation of the plan see Ford, *The Missouri Plan for Selection and Tenure of Judges*, 26 N.D. Bar Briefs 444 (1950); (2) Colorado; see Kolkman v. People, 89 Colo. 8, 300 Pac. 575 (1931); (3) Michigan; see Mich. Comp. Laws § 768.29 (1948); (4) New Mexico; see N.M. Stat. § 19-101 (51) (e),(f), 42-115 (1941).

[48] American Bar Association Committee on Trial Practice, Report of the Section on Judicial Administration 41 (1938), set out in 9 Wigmore, Evidence § 2551a (3d ed. 1940).

These proposals have been embodied within the Uniform Code of Criminal Procedure.[49]

Few seasoned practitioners in state courts have found these suggestions attractive. They have steadfastly argued that the influence of the judge upon a jury is of such great weight as to preclude a true trial by jury where comment is permitted. To the trial attorney, particularly the criminal practitioner, the prospect of losing his overweighted control of the jury is decidedly unpleasant. It is not surprising that attempts to reform restrictive state legislation have met with strong opposition from members of the bar.[50] Yet one may ask, what is the ability of the common juryman to weigh the mass of conflicting evidence and properly apply intricate questions of law, unguided by any other than opposing counsels' biased arguments?[51]

In the final analysis it would appear that the cause of this departure from the common law rule was due to censurable conduct on the part of trial judges, professionally incompetent to assume proper responsibility in the conduct of trials, and to opposing counsel, overzealous in demanding their assumed prerogatives which they felt arose from the adversary system of litigating disputes. If a partial solution for the improvement of trial by jury lies in a return to the common law powers of the trial judge, the success of such a return must necessarily depend upon ever-improving qualities among members of the bench and the bar.

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[49] American Law Institute, Code of Criminal Procedure, § 325 (1930). "Charge of Court to jury. (1) The Court shall instruct the jury regarding the law applicable to the facts of the cause, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause. It shall if requested inform the jury that they are the exclusive judges of all questions of fact and, whether requested or not, the Court shall so inform them, if it comments on the evidence, the testimony or the credibility of any witnesses."

[50] Levenson, *Comment To The Jury By The Trial Judge—A Reply*, 21 Ore. L. Rev. 168 (1942).

[51] In 1896 the North Dakota Supreme Court gave these words of guidance for the trial counsel. In speaking of the limits to which counsel may extend in their arguments to the jury the court stated: "He is allowed a wide latitude of speech, and must be protected therein. He has a right to be heard before the jury upon every question of fact in the case, and in such decorous manner as his judgment dictates. It is his duty to use all the convincing power of which he has command, and the weapons of wit and satire and of ridicule are all available to him so long as he keeps within the record. . . ." State v. Pancoast, 5 N.D. 516, 67 N.W. 1052, 1064 (1896). Quaere: Are these words spoken in the promotion of justice?