may provide him with an action against the issuer or seller provided by section 12 of the Securities Act.[10]

Conceivably, however, the statute was designed not only to prevent the sale of poor securities without adequate disclosure, but also to expose those who violate or attempt to violate the act. Section 24 provides that wilfully violating the act or rendering the registration statement misleading by either making an untrue statement of a material fact or omitting material facts is punishable by fine or imprisonment.[11] Thus, even if no stock has been issued and the registration statement has not yet become effective, the registrant is subject to criminal prosecution. Although this section is by no means conclusive upon the question of withdrawal, it does tend to show that the scope of the act comprehends more than the mere sale of securities. The entire statute is pervaded with the idea that full and adequate disclosure is necessary to protect the investing public. It is submitted that exposure though no stock has been sold is consistent with this protection. Such exposure is desirable to inform the investing public as to the character of the registrant who tried to and might again attempt to sell securities. To discourage attempts by registrants to "get by" with defective registration statements would also seem to be consistent with the protection of the investors' interests. It is submitted, therefore, that withdrawal should be denied the registrant even in the *Jones* case situation. In any event the instant case is no doubt a logical and desirable limitation upon that doctrine.

Criminal Law—Power of Judge To Comment on the Guilt of the Accused—[Federal].—The defendants were convicted in a federal district court for the crime of intimidating a witness appearing before a federal commissioner. In his instructions to the jury, the trial judge (1) directed the jury to dismiss the accuseds' version of certain controverted facts from their minds and (2) intimated that he preferred the testimony of a witness for the prosecution because it was probably "the first time that he has ever been in a court, and he meticulously tried to tell the truth," while the accused had much experience in and about courts of law. On appeal, *held*, reversed and remanded. Instruction (1) was in error as withdrawing facts from the consideration of the jury to the prejudice of the accused, and instruction (2) was in error as adding to the evidence. A concurring opinion by two of the court, written by Major, J., advocated a restriction of the power of judicial comment to the jury and concluded that in criminal cases the Supreme Court has never sanctioned comment on the ultimate issue, *i.e.*, the guilt of the accused, except where the facts were uncontroverted. *United States v. Meltzer*.[1]

The concurring opinion departs from what has been the accepted rule of comment in the federal courts. While a majority of the states have delimited or abolished the power to comment by constitutional provision, statute, or judicial decision,[2] the federal

[10] 48 Stat. 84 (1933), 15 U.S.C.A. § 77l (2) (supp. 1938). The seller is civilly liable if he induced the sale by fraudulent or misleading statements even if securities are not registered.

[11] 48 Stat. 87 (1933), 15 U.S.C.A. § 77x (supp. 1938).

[1] 100 F. (2d) 739 (C.C.A. 7th 1938).

[2] See Rest., Code of Criminal Procedure Ann. § 325 (1930); Otis, "Governor of the Trial" or "Referee at the Game," 21 J. Am. Judic. Soc. 105 (1937). See also Sunderland, The Problem of Trying Issues, 5 Texas L. Rev. 18, 32 (1926). For an explanation of the reason for the difference in rules, see Thayer, Preliminary Thesis on Evidence 181n (1898).

courts invest the trial judge with broad discretion. Comment, in civil cases, may pertain to the credibility of witnesses, conclusions from the testimony, and the weight and sufficiency of the evidence.[3] This phraseology is adopted for criminal practice.[4]

The lower federal courts have inferred from such general statements a right to express an opinion as to the guilt or innocence of the accused.[5] The soundness of this conclusion is challenged by the concurring opinion, on the ground that in criminal cases the power of the trial judge in dealing with the jury is strictly limited. The judge may not overrule the jury's verdict of acquittal,[6] therefore, he cannot direct a verdict of guilty, for what is prohibited to him directly, he may not do indirectly.[7] On their oath, the jury have a duty to bring in a verdict in compliance with the law stated to them and the facts proved, but this duty is legally unenforceable;[8] in criminal trials, the jury may base a verdict on whatever considerations they choose. The avowed purpose of the federal rule is to enable the judge to guide the jury in its deliberations. It has been suggested that "a judge should not be a mere automatic oracle of the law, but a living participant in the trial, and so far as the limitations of his position permit should see that justice is done."[9] The area of permissible comment is circumscribed by considerations of policy.[10] The test most frequently applied in the lower courts requires that the judge express his opinions judicially and dispassionately.[11] When the

[3] Vicksburg & Meridian R. Co. v. Putnam, 118 U.S. 545, 553 (1886); Capitol Traction Co. v. Hof, 174 U.S. 1, 13, 14 (1898). See also 1 Univ. Chi. L. Rev. 335 (1934).

[4] Patton v. United States, 281 U.S. 276, 288 (1930); Quercia v. United States, 289 U.S. 466, 469 (1932); Simmons v. United States, 142 U.S. 148 (1891).

[5] United States v. Notto, 61 F. (2d) 781 (C.C.A. 2d 1932); Buchanan v. United States, 15 F. (2d) 496 (C.C.A. 8th 1926); Stroud v. United States, 2 F. (2d) 658 (C.C.A. 4th 1924); Dillon v. United States, 279 Fed. 639 (C.C.A. 2d 1921); Savage v. United States, 270 Fed. 14 (C.C.A. 8th 1920); Perkins v. United States, 228 Fed. 408 (C.C.A. 4th 1915). See also Wiborg v. United States, 163 U.S. 632, 657 (1895). *Cf.* Dinger v. United States, 28 F. (2d) 548 (C.C.A. 8th 1928). Instructions of guilt have been sustained, though disapproved. Breese v. United States, 106 Fed. 681 (C.C.A. 4th 1904); Endelman v. United States, 86 Fed. 456 (C.C.A. 9th 1898). An opinion of guilt given after jury had been recalled on their inability to agree on a verdict was held prejudicial. Fostor v. United States, 188 Fed. 305 (C.C.A. 4th 1911); *contra* Dwyer v. United States, 17 F. (2d) 696 (C.C.A. 2d 1927). See also Tuckerman v. United States, 291 Fed. 958 (C.C.A. 6th 1923); Vecchio v. United States, 53 F. (2d) 678 (C.C.A. 8th 1931). *Cf.* Simmons v. United States, 142 U.S. 148 (1891).

[6] Sparf and Hansen v. United States, 156 U.S. 51 (1895); United States v. Taylor, 11 Fed. 470 (C. C. Kan. 1882), criticizing United States v. Anthony, 11 Blatchf. (Fed.) 200 (1873) where the court directed a verdict of guilty.

[7] Vecchio v. United States, 53 F. (2d) 678 (C.C.A. 8th 1931); United States v. Taylor, 11 Fed. 470, 474 (C.C. Kan. 1882); Dillon v. United States, 279 Fed. 639 (C.C.A. 2d 1921).

[8] See Horning v. District of Columbia, 254 U.S. 135 (1920), noted in 19 Mich. L. Rev. 324 (1920). "It is the duty of the judge, in all cases of general justice, to tell the jury how to do right, though they have it *in their power* to do wrong, which is a matter only between God and their own consciences." Lord Mansfield in Rex v. Dean of St. Asaph, 21 How. St. Trials 847, 1039 (1783). See Sokolov, Judge's Charge to Jury in Criminal Cases, 10 Can. Bar Rev. 228 (1932).

[9] Rudd v. United States, 173 Fed. 912, 914 (C.C.A. 8th 1909).

[10] Quercia v. United States, 289 U.S. 466 (1932).

[11] Cook v. United States, 18 F. (2d) 50 (C.C.A. 8th 1927); Buchanan v. United States, 15 F. (2d) 496 (C.C.A. 8th 1926); Stroud v. United States, 2 F. (2d) 658 (C.C.A. 4th 1924);

comments of the judge are too vigorous, the advocacy too strong, there is an invasion of the province of the jury and a denial of the right to have the jury decide the issue.[12] Generally the appellate courts have adhered to a policy of laying down negative rules by criticizing defective charges, rather than setting up positive rules as to what they should contain.

It is on the ground of advocacy that the Supreme Court has customarily challenged instructions sought by the concurring opinion to be distinguished from permissible comment.[13] Nevertheless, in *Horning v. District of Columbia*,[14] the court tacitly sustained a vigorous opinion of guilt by the trial judge. In *United States v. Murdock*[15] the Court recently took occasion to remark that comment on the guilt may be made in "rare and exceptional cases," citing the *Horning* case, where the evidence of the commission of the crime was undisputed and the only question was whether the particular acts constituted a violation of the statute. The attempt of the concurring opinion to restrict the rule in the federal courts to the precise fact situations where comment on the guilt has been sustained may be justified by the distinction between civil and criminal cases.[16] Judicial comment, and the recognized influence comments have on the decisions of juries[17] may well elude the rule against directing a verdict of guilty.[18] The concurring opinion further contends that such comment is a violation of the constitutional right to a jury trial. This is questionable in view of the repeated statements by the high court that the historical right of trial by jury includes as a necessary incident judicial comment.[19] Whether the Supreme Court is to be read as intending the restriction suggested and thus favoring less control over the jury raises the perennial

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Wallace v. United States, 291 Fed. 972 (C.C.A. 6th 1923); Rudd v. United States, 173 Fed. 912, 914 (C.C.A. 8th 1909). The rule as often stated appears to be a contradiction of terms. Thus,while it is all right "for a federal judge to express his opinion as to the guilt of the accused, he must be impartial in doing so." O'Shaughnessy v. United States, 17 F. (2d) 225 (C.C.A. 5th 1927).

[12] See cases cited in note 11 *supra*. "The judge is not merely a moderator or umpire; neither is he an advocate." Cook v. United States, 18 F. (2d) 50 (C.C.A. 8th 1927). "The true rule is that the expression of opinion should not be expanded into what may be termed an argument, as of counsel." Egan v. United States, 22 F. (2d) 776 (C.C.A. 8th 1927), *cert. denied* 289 U.S. 757 (1932).

[13] "Argumentative matter of this sort should not be thrown into the scales by the judicial officer who holds them." Starr v. United States, 153 U.S. 614, 625 (1893); Hickory v. United States, 160 U.S. 408 (1895); Allison v. United States, 160 U.S. 203, 217 (1895).

[14] 254 U.S. 135 (1920) (four judges dissented, arguing that it was necessary for the judge to inform the jury when he was invading their province with advice). See also United States v. Notto, 61 F. (2d) 781 (C.C.A. 2d 1932). *Cf.* Simmons v. United States, 142 U.S. 148 (1891).

[15] 290 U.S. 394 (1933). See also Hartzell v. United States, 72 F. (2d) 569 (C.C.A. 8th 1934). *Cf.* Wiborg v. United States, 163 U.S. 632, 657 (1895) (might be distinguished on its unusual facts).

[16] See note 6 *supra*. Comment in the Horning case was really comment on the law, not on the facts, and therefore fully within the province of the court.

[17] Hicks v. United States, 150 U.S. 442, 452 (1893).

[18] The exception permitted, *i.e.*, comment in the "Rare and exceptional case" where the facts are uncontroverted, may have the same effect.

[19] See cases cited in notes 3 and 4 *supra*. See also dissent in People v. Kelly, 347 Ill. 211, 179 N.E. 898 (1931); 5 Wigmore, Evidence § 1551 (2d ed. 1923), and § 1551 a (suppl. 1934);

controversy of the efficacy of the jury as a trier of facts.[20] The restriction has the advantage, if it be an advantage, of bringing federal practice into closer conformity with the practice of a majority of the states.[21]

The vagueness of the present test in the lower federal courts, that the comments should not be arguments, would not be avoided by the limitation urged. In addition to the test of advocacy questions of what constitutes an opinion of guilt would now arise. It would seem that any expression of opinion by the judge might effect the conclusions of the jury on the ultimate issue; that is the intention of the comment. The line of permissible comment has always been a difficult one to draw, for more depends on the intonation of the comment than on the actual words used.

The immediate effect of the instant decision as precedent is limited. Being dictum, it does not bind the court but serves merely as a gratuitous opinion by two of the court as to how they may treat similar cases in the future. It is interesting to note that Evans, J., who wrote the opinion of the court, but did not join in the concurring opinion, pointed out the same distinction urged by Major, J., in a decision rendered over a decade ago.[22]

Divorce—Moral Turpitude—Harrison Narcotic Act—[Federal].—The petitioner applied for a divorce under a District of Columbia statute permitting the granting of an absolute divorce decree if one of the spouses had undergone a "final conviction of a felony involving moral turpitude and sentence for not less than two years in a penal institution," and had served part of the sentence.[1] The respondent had been convicted of a violation of the Harrison Narcotic Act[2] and sentenced for a period extending beyond the statutory minimum. *Held:* Divorce granted. Violation of the Harrison Narcotic Act involves moral turpitude within the meaning of the above statute. *Menna v. Menna*[2a]

Sokolov, *op. cit. supra* note 8; and Children, Judge's Charge to the Jury in Criminal Cases, 3 Can. Bar Rev. 169 (1925).

[20] A discussion of the merits of jury trial is not in the province of this note. See Howe, Juries as Judges of Criminal Law, 52 Harv. L. Rev. 582 (1939). There is a movement toward the federal court rule permitting comment among the state courts. Wigmore, Evidence § 1551a (suppl. 1934). The Code of Criminal Procedure, of the Amer. Law Inst. (1930) follows the federal court rule. § 325. An attempt recently to abolish the rule in the federal courts was defeated, but not until the bill had passed in the house. See 23 A.B.A.J. 521 (1937); and Otis, *op. cit. supra* note 2.

[21] The Conformity Act does not apply to the "personal conduct and administration of the judge in the discharge of his separate functions." Nudds v. Burrows, 91 U.S. 426 (1875). But see Fostor v. United States, 188 Fed. 305 (C.C.A. 4th 1911) where conformity is urged. The instant case follows the trend of Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[22] Fryer v. United States, 11 F. (2d) 707 (C.C.A. 7th 1926). "Comment upon the evidence, we think, is to be distinguished from expressing an opinion upon the ultimate issues determinative of the guilt or innocence. No doubt there are times when a case justifies, even calls for, such expression of opinion. But the practice of thus expressing an opinion in the ordinary case is not to be commended, even when accompanied by a clear and positive statement to the effect that the members of the jury are the sole judges of the facts. . . . ."

[1] D.C. Code, Supp. III 1937, c. 14, § 63, 49 Stat. 539 (1935).

[2] 38 Stat. 785 (1914); 26 U.S.C.A. §§1040–1054, 1383–1391 (1927).

[2a] 6 U.S. Law Week 638 (Jan. 17, 1939).