Criminal Law Review
1989

Should judges sum up on the facts?

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Subject: Criminal procedure

Keywords: Evidence; Jury directions; Trials

Case: R. v Berrada (Rachid) (1990) 91 Cr. App. R. 131; Times, February 20, 1989 (CA (Crim Div))

In the recent case of Berrada Judge Norwood had directed the jury that they should not give too much weight to the appellant's good character, as it was no defence to a criminal charge. As to his lack of a criminal record the jury were to "make of it what you will." She further observed that allegations by the appellant that the police officers had fabricated an interview were "really monstrous and wicked" and "utterly monstrous." Quashing conviction on account of the judge's "shrieking omission" to explain the relevance of the appellant's good character to his credibility as a witness, the Court of Appeal stressed that it was the duty of the judge, in giving directions to the jury, "to state matters impartially, clearly, and logically, and not inappropriately to inflate evidence to [sic ] sarcastic and extravagant comment." 2

The actual ratio concerned a defective direction on the relevance of character to credibility, that is, a direction on a matter of law. But the court's undoubted anxiety over the judge's other comments, which were on matters of fact, and the apparent contribution which that unease made to the decision, afford a timely occasion for examining the old and long debated question whether criminal trial judges should comment on the facts at all when summing up to the jury. Is the practice consonant with the interests of justice in the adversarial process? Does it accord with the public's expectation of the proper confines of the judge's role? Indeed, should judges even recapitulate the facts? Do the benefits, if any, of so doing justify the time and expense involved? The topic complements that of partisan intervention by the trial judge during evidence and speeches but that branch of the subject is beyond the scope of this article. 3

Recapitulation

Judges can hardly sum up the facts or properly comment on them without a minute of the evidence conveniently to hand. The State Trials reveal that note-keeping by the judge is a comparatively recent practice. It is more or less unknown before 1722, when the first instance is recorded of a long and detailed summing-up clearly presupposing the maintenance of a full note. 4 Whilst as late as 1745 it could still be said that the judge presides at trial for the sole purpose of explaining the law to the jury and not to sum up the evidence, 5 from mid-century cases become frequent in the State Trials in which the judge summed up from what must have been a reasonably detailed minute. 6

The habit of note-keeping by criminal trial judges probably developed as a consequence of the increasing tendency of judges during the middle 50 years of the eighteenth century to grant prisoners accused of felony and treason leave to instruct counsel for the purpose of cross-examining witnesses. 2 The art of cross-examination grew up because professional advocates, appearing in court for defendants day in and day out, soon recognised that with defendants incompetent to testify under oath often the only hope for the prisoner lay in destroying the credibility of prosecution witnesses. 2 An absolutely essential handmaiden of cross-examination is an accurate record of testimony, for without it there can be no means of checking the witness's consistency. Without a precise record of testimonial narrative cross-examination will degenerate into disputes of recollection over what exactly a witness has earlier given in evidence. In the absence of a national body of short-hand writers (it is most unlikely they were employed in cases other than state trials, when the Government would have wanted a record for the purposes of intelligence or posterity 2 ) the judges obviously found it expedient to keep fairly accurate notes, if only to prevent trials getting bogged down in collisions between the advocates. The necessity of introducing pauses into the narrative while the judge wrote it down in longhand must have so slowed down the proceedings that in lengthy trials it became impossible to get in all the evidence in one day, albeit as long a day as the old time courts used to sit. By the end of the eighteenth century adjournments over night were allowed in treason
trials. 18

With the advent of the practice of note-keeping judges were now properly equipped to recapitulate the evidence before the jury retired. After 1836, in which year defence counsel in felony trials were given the right to address the jury, judges would have felt a particular temptation to go through the evidence, and to exercise the right of comment on it, in order to safeguard against possible distortions uttered by counsel in their enthusiasm to secure acquittal.11

Dominion over the facts

Whilst the judge enjoys no power to decide issues of fact beyond determining whether a prima facie case has been established, the discretion to comment on the facts is in the nature of what has been called an informal control over the jury.12 It is now seen as his right, “to predigest the evidence,” that is, to state what impression it “has produced in his mind in order to prevent the jury being misled by worthless evidence.”13 He is *Crim. L.R. 784 entitled, indeed, to express his opinion robustly, giving “confident opinions upon questions of fact.”14

Judicial habits vary, of course. Summings-up range from the completely neutral to those in which firm opinion is expressed on certain of the issues or on the value or probative tendency of particular parts of the evidence. But it is very unusual to hear an overall condemnation of the accused's case,15 though not all that uncommon to hear strong hints at acquittal.

It has been said that the old time preference was for simple recapitulation of the evidence in the order in which it had been given; only later did marshalling and arrangement catch on.16 Yet, anyone familiar with the Crown Court knows that among large numbers of trial judges, permanent as well as part-time, the older, more rudimentary, practice of reading notes and making running comments on the evidence as they go along17 remains the fashion. To be fair, though, with a high turn-over of short trials, judges have little time to spare for the preparation needed in marshalling even short cases.

Law and practice in the United States

Whenever the subject comes up of criminal trial judges being allowed to comment on the facts, comparison is invariably made with the United States. In a majority of the state jurisdictions the judge in a criminal trial must express no opinion on the weight or credibility of the testimony of a witness or on the merits of either side.18 A form of the rule prevailing in most of the states was first introduced by the North Carolina legislature in 1796, requiring the judge to state in full and explicit manner the facts given in evidence but prohibiting any expression of opinion on them.19

*Crim. L.R. 785 The inception of this restraint has been attributed to that distrust of officialdom which characterised the revolutionary period, to that contempt in particular for judges of the type who formerly held office at the pleasure of the Crown. This led to judicial—not only with almost every other—office being made elective in the state jurisdictions in accordance with the theoretically complete regime of democracy advocated by Jefferson.20 In parallel, judges in early United States history were “deprived of almost all the powers which together constitute judicial status as we know it.”21 An additional factor in this development may have been that after the Revolution nearly all the judges were laymen.22 The jury became the adjudicators of all questions of fact and law. Judges apparently “held office, not for the purpose of deciding causes but merely to preserve order and to see that the parties were given a fair chance to put their case before the jury.”23 In due course, when the American jury surrendered its right to decide questions of law, American judges were denied the full extent of the powers of their English counterparts.24

In those states where there is no express prohibition against comment the practice seems to be to avoid any detailed examination of the evidence.25 The same tends to be true of the federal courts, in which comment is permissible.26 No doubt this is strongly influenced by the nurturing of federal judges in the states tradition.27

Discussing the provenance of the American way, Professor Thayer pointed to the fact that, in having propounded the axiom that the law is for the judge while the facts are for the jury, Coke…sometimes gets quoted [in the United States] for a doctrine that would have much amazed him or any other English judge, from the beginning down; namely, for the notion that the court, at common law has no right to indicate to the jury its own views of the fact…Trial by jury, in such a form as that, is not trial by jury in any historic sense of the words.28
Thayer is decisively supported in this by Coke’s admonishment to criminal trial judges that they refrain from “delivering” their opinion on the facts until all the evidence has been taken, implying, of course, that it is perfectly proper to express an opinion thereafter and, in particular, before the jury retire.29

The rationale for allowing comment

In the view of most American commentators, it seems, the limitations on the power of the American judge to comment are unfortunate.30 Thus, in the opinion of Wigmore, withdrawal of the power was “an act of intertemperate folly,”31 whilst Dean L. Green believed it was the power of comment which had “given trial by jury its chief, if not its only dependability.”32 On the other hand, it might be argued, if the purpose of the English system of summing up is to give the jury a lead which it is hoped they can usually be relied upon to follow, why have a jury?33

Presumably the rationale for trial by a combination of judge and jury is that the judge provides the jury “so to speak, with the agenda for their discussions... All the analysis should be done for them so that there is in the end served up to them for their decision only the big questions.”34 In Bacon’s words, he should be a “light to jurors to open their eyes, not a guide to lead them by the noses.”35

But whilst this sounds all very decorous, how in practice is the line to be drawn between instructive, proper, comment, and ugly partisanship in favour of the prosecution? How is the generalised notion of fairness to be translated into working criteria for identifying excess? It might be argued that the occasional tendency of judges to be too emphatic in their opinions is no good reason for prohibiting comment entirely and that the Court of Appeal is a safeguard against abuse.36 Yet in 1910 the Court of Criminal Appeal was not prepared to express disapproval of a comment as extreme as this: “He practically stands convicted by the evidence of the prosecution.…. You must do your duty.”37 The decision was perhaps as clear a recognition as there could be of the practical obstacles which stand in the way of making an objective assessment of abuse. In the end it is always a subjective judgment of “fair play,” and there are as many variations of that as there are individual appellate judges.

Conceivably, the only way to prevent any manifestation of bias may be to prohibit the judge from dealing with the evidence altogether, for “the mode of presentation to the jury is likely to influence them just as much as any express comment.”38 Certainly, with any exercise in marshalling the facts, as Stephen pointed out, the judge may of necessity be unable to conceal his opinion of them:

“...if he arranges the evidence in the order in which it strikes his mind. The mere effort to see what is essential to a story, in what order the important events happened, and in what relation they stand to each other must of necessity point to a conclusion. The act of stating for the jury the questions which they have to answer and of stating the evidence bearing on those questions and showing in what respects it is important generally goes a considerable way towards suggesting an answer to them, and if a judge does not do as much at least as this he does almost nothing.”39

However, even when judges stick to doing “almost nothing”–“the pattern that cannot go wrong”–of simply recapitulating the evidence in the order in which it was given–they are still notoriously capable of performing the role of prosecuting counsel. Thus, with a studied mix of intonation, inflexion, timing, and movements of head, eyes and hands, the determined judge can make his opinion of the facts known in a way that will never find is way onto the official written transcript.40 On the other hand, the Court of Appeal have accepted the principle that evidence from eye-witnesses may be received before them as to “non-verbal communication” by the trial judge in an attempt to swing the case against the accused.41 Yet, to attempt to match the recollection of vocal and physical mannerisms against a transcript only made available later might defy the memory power of even the most observant and articulate witness. Furthermore it is hardly satisfactory to be relying on the contingent presence in court of potential lay witnesses to the judge’s conduct who, since they would usually be supporters of the accused anyway, could be of no more than limited objectivity. Counsel engaged in the case might fare little better in trying to describe the subtle details. One means of placing markers for later reference against the more extreme instances might be for counsel to interrupt the summing-up with appropriate protest. This would stand little prospect of becoming an institution. Few counsel would consider it seemly to provoke the almost inevitable clashes that would result and what irritation the jury might feel with the judge, would probably be turned against counsel who was doing the interrupting.
The answer may lie in that modern panacea for most monitoring problems, video-recording. But one can envisage insuperable resistance among the judiciary to having their style thus cramped.

Judge’s Expertise

Perhaps the most important argument in favour of permitting the judge a wide discretion to comment on facts during the summing up is that it affords the opportunity of “rescuing the case from the false glosses of powerful advocates.” In the absence of such a discretion, it might be urged, counsel are at liberty, unchecked, to “address appeals to juries which would have no weight with experts” and the jury are deprived of the opinion of the only impartial expert present. The result is likely to be that the trial will tend “to become debased into a contest of skill between the opposing counsel.”

The argument presupposes that most jurors can be hoodwinked by speciousness. But we live in sophisticated times and, where issues of pure fact fall to be decided, 12 lay citizens are together unlikely to be seduced by hocus-pocus. It is an appreciation of this rather than the knowledge that disingenuous assertion will be met by a swingeing rebuttal from the bench which almost certainly explains the generally business-like presentation of most closing speeches. Indeed, Stephen observed that “few stronger proofs are to be found of the simplicity of English taste in the matter of making speeches than the exceedingly prosaic character of speeches in defence of prisoners,” which he attributed to the “critical temper of the age.”

If Stephen could describe the early 1880s in these terms, how might one have addressed the practice only a few years later following the passage of the Criminal Evidence Act 1898? It was the granting by that Act of testimonial competence to accused persons which Sir Travers Humphreys considered to be the decisive factor in converting the defence speech from an exercise in fanciful conjecture into one of balanced analysis. With the evidence in earlier days usually confined to that called by the Crown the defence had to rely upon cross-examination and, to a much larger extent than was afterwards the case, upon the speech to the jury. Accordingly, the trial would resolve itself:

“...into a controversy whether any explanation could be put forward by the defence consistent with the proved facts of the case. This was the chance for a skilful and eloquent advocate, and it was upon this topic that the energies of some of the most distinguished orators have been expended... It may be said, I think with truth, of the criminal advocate of today, that his difficulty usually consists in trying to fit in his client's evidence with the facts proved by the prosecution. How mundane a task compared with the flights of imagination permitted to his predecessors!”

To compensate for abolishing judicial comment counsel for both sides could be invited to add supplementary remarks, if they wished, in the light of points made during the main closing speeches. In this way arguments could be countered by an opponent rather than by the judge in conformity with adversarial tradition. If the judge thought that counsel on one side or the other had overlooked a particular argument the point could be brought to counsel's attention by the judge in the absence of the jury. Counsel might then have the opportunity to make additional comments. (Indeed, many prosecuting counsel resent comments in favour of their case and would prefer to be consulted before being gratuitously offered a “helping hand,” which they often take to be misconceived anyway.)

Maintaining the judge’s attention

A complaint about the American states rule expressed by “many writers” is that trial judges have been degraded to mere moderators with the consequence that they may not therefore give to their work the attention it deserves. Not infrequently trial judges have been reported busying themselves with extraneous matters during testimony so that when called upon to rule on an objection, the pertinent portion of the record must be read back to them. With such a lack of interest in the proceedings displayed by the judge, the jury may be tempted to assume that the outcome is of little importance.

But on the face of it not an instance of neglectful inattention is the practice of a certain judge in Oklahoma who customarily left the bench and made himself inconspicuous during speeches. He would do this, it was said, in order to impress on the jury the importance of their responsibility as sole judges of the facts. In the reported case from which his habit came to light he had actually retired to his office and when arguments occurred between the attorneys he had to be fetched to rule on
objections.  

On the other hand, other examples enjoying the benefit of no such ingenious extenuation are on record, in particular reading a newspaper, writing letters and chatting with friends. How are these explained? The answer may in part lie in the relatively poor calibre of judges chosen by popular election. But it might also be contended that with no function of reviewing and discussing the facts American judges have less incentive to keep detailed notes, and therefore less reason to follow the evidence closely, than do English ones. Yet it is an implicit function of any judge, English or American, to watch carefully as the prosecution case unfolds in order to fulfill the vital task of monitoring whether a prima facie case has been established. Practitioners know how often no case submissions require the judge to scrutinise the prosecution evidence with a fine tooth comb. Discussion involves instant reference by judges to a familiar note, their own, with rulings of necessity having to be given on the spot with no opportunity to call for a transcription from the short-hand, stenographic, or taped record of the evidence. Thus, even under a regime in which judges no longer had to sum up the facts, they would still need to take down the prosecution case in long hand as comprehensively as they do now.

But the position would be quite different during the defence case. Apart from having to jot down the salient features of the defence evidence, for the purpose of making occasional rulings on such matters as whether there is a defence in law, or whether the defence case has repercussions on the admissibility of prosecution evidence provisionally admitted, it would be quite unnecessary for them to take it down in fine detail, if they did not need to sum it up. However, it is difficult to believe that freed from that particular discipline, the competent judge’s mind would naturally start to wander. The obligation of laboriously writing down everything in longhand seems a strange way to tether judges to their duty.

Does recapitulation help the jury?

“Gentlemen of the jury, the facts of this distressing and important case have already been put before you some four or five times, twice by prosecuting counsel, twice by counsel for the defence, and once at least *Crim. L.R. 791* by each of the various witnesses who have been heard; but so low is my opinion of your understanding that I think it is necessary, in the simplest language, to tell you the facts again.”

So begins Swallow J.’s summing-up.  

In short trials the recapitulation of facts is unnecessary because the jury’s collective memory is likely to be good. In long trials a lengthy summary probably serves little to refresh their memory. What would be of help in such cases is some kind of schedule or memorandum of the salient points of evidence which counsel for both sides could be jointly responsible for drafting, with the judge maintaining overall supervision. Relevant detail could be expanded upon in speeches. Whatever time it took to prepare would be more than adequately offset by the time saved by much shorter summings-up from the bench and by the judge not having to write out the defence evidence in longhand. Proposing a system of furnishing written summaries C. G. L. Du Cann argued:

“By such a procedure the jury would have better guidance than that supplied by an oral summing-up, three quarters of which their memory forgets directly it is uttered, and the other quarter of which is often tendentious rhetoric reflecting not the case but the idiosyncrasies of the judge concerned.”

Maintaining the popular conception of impartiality

When the defence call no evidence the Court of Appeal have said that prosecuting counsel should only rarely exercise the right to make a closing speech. Yet they sometimes refrain from dealing with the facts in their closing speech even where the defence have called evidence. When that happens judges are often observed assuming the role of prosecutor, trying to ensure that the case against the accused is adequately put to the jury. The old-time pretext for denying accused traitors and felons the right to representation was that so zealous were the courts to protect defendants against weak or spurious cases that only could the judge properly act as counsel for the prisoner. It has been suggested that it is even more lamentable than this that judges should need to act as counsel for the Crown. Making this very point, Lord Devlin attributes such diffidence in counsel to a fear of being accused of an excess of fervour.
Lord Devlin is charitable. In the experience of this writer second prosecution speeches from the bench far outnumber cases in which prosecuting counsel pull their punches. It is always, of course, possible that things have changed in two decades. They have certainly done so since that more elegant time than ours when Serjeant Sullivan could suggest to a registrar at the Old Bailey that the jury foreman should be asked whether the jury found for his "Crim. L.R. 792" Lordship or against him. Referring to this incident in his memoirs Sullivan observed that treated to exhortations from the bench a jury must either "do as the judge has implored or they must slap him in the face, and they are deprived of moral freedom to exercise their unfettered judgment when doing so might involve a slight upon a judicial officer." But from the fortunately numerous acquittals which follow desperate attempts by the judge to get a conviction and those happily less frequent convictions when the judge has summed up for acquittal, it seems few juries can be apprehensive of slapping the judge in the face. Indeed, if as widely supposed, there exists a counter-productive effect in borderline cases this would not only demonstrate that juries felt little significant deprivation of moral choice by attempts from the bench to influence them but would suggest, indeed, a marked resentment at the apparent double-standard implicit in telling the jury that the facts are for them and then going on to try to hijack the verdict. Coupled with outspoken comment the traditional refrain "but it's entirely a matter for you" reeks of an unbecoming mock humility, whilst the prefatory caution "Disregard any opinion which I may appear to express, unless you happen to agree with it" sounds just plain silly.

But there is a far more important consideration than jury reaction. As every practitioner knows, summings-up for conviction invariably induce a considerable sense of grievance in defendants, their family and friends. Whatever rationale for comment may have been dreamt up over the years the fact remains that the lay public clearly see the trial judge as an impartial umpire and believe that this is how it should be. Old hands in the dock may long have resigned themselves to the reality, but the resentment is rarely absent nevertheless. One of the objects of the criminal trial, it might be supposed, is to leave defendants with the feeling that they have been justly convicted by their peers after a fair trial. In this way, it might be said, the process of atonement is initiated. It might even be supposed, is to leave defendants with the feeling that they have been justly convicted by their peers after a fair trial. In this way, it might be said, the process of atonement is initiated. It might even be supposed, is to leave defendants with the feeling that they have been justly convicted by their peers after a fair trial. In this way, it might be said, the process of atonement is initiated. It might even be supposed, is to leave defendants with the feeling that they have been justly convicted by their peers after a fair trial. In this way, it might be said, the process of atonement is initiated. It might even be supposed, is to leave defendants with the feeling that they have been justly convicted by their peers after a fair trial. In this way, it might be said, the process of atonement is initiated. It might even be

Crim. L.R. 1989, Nov, 781-792


2. In Marr., *The Times*, June 14, 1989, the same judge, in a trial which took place a month before Berrada was decided, failed similarly to direct the jury on the relevance of good character to credibility. Not only that, but, referring to the appellant's 20 character testimonials as an "inordinate number of letters from friends and acquaintances," she observed: "The furtive little crime of this kind is not the kind of thing that people tell their friends about, or that their friends would be likely to know about." This was held to be capable, to say the least, of meaning that the sort of crime in question was one which a man might be committing regularly without any of his friends knowing about it and that here was a man who was very likely to possess a good reputation which he did not deserve.

3. For a recent discussion on intervention during testimony and closing speech see Doran, N.L.J., September 1, 1989, 1147. The relevant authorities have spanned the questioning of witnesses by the judge in order to convey a preconceived belief in the defendant's guilt; cross-examination of defendants during evidence-in-chief to a degree which denies them the chance to develop their account under the lead and guidance of counsel (in some cases stress has been laid on the mere excess of the number of such questions as against those put by defence counsel; in others emphasis has been laid on the more theoretical idea that intervention undermines adversarial tradition); and impatient interruption of defending counsel when questioning witnesses or addressing the jury which prevents effective presentation of the defendant's case, distracts the jury from the submissions being made or signals to the jury a dismissive view of counsel's ability and thus diminishes the authority of his advocacy.

4. *Layer* (1722) 16 St.Tr. 94. In a note to Grahme (1691) 12 St.Tr. 646, 805, the series editor states that Pratt C.J. is supposed never to have taken notes and, curiously, he cites *Layer*. But this is certainly not the impression one gains from reading the summing-up in that case. As to the earlier practice, the editor observes in a note to *Annesley* (1743) 17 St.Tr. 1140, p. 1420, that from "very many parts of this work it appears that formerly judges omitted to minute down the evidence." Eight at least can be found in the series: see *Throckmorton* (1554) 1 St.Tr. 869, 897 (not cited by ed.; the prisoner "did help the judge's old memory with his own recital"); *Turner* (1664) 6 St.Tr. 566, 612 (not cited by ed.; "You take notes of what hath been delivered; I have not your memories; you are young"); *Colledge* (1681) 8 St.Tr. 550, 712 ("for me to speak out of memory, I had rather you should refer to your own notes"); *Cornish* (1685) 11 St.Tr. 382, 437 (reference in summing-up to the evidence of a certain witness "so far as I am able to remember, after so long a discourse, and so much time that hath been spent"); *Seven Bishops* (1691) 12 St.Tr. 183, 422 ("I will put the jury in mind of the most material things, as well as my memory will give me leave"); *Grahme*, supra (not cited by ed., "Truly, gentlemen, my memory will not serve me to repeat all the particulars but I question not your notes will bring them to your minds"); *Rookwood* (1696) 13 St.Tr. 140, 221 (ed.'s reference to p. 186 incorrect, "Gentlemen, I must leave to you,
upon the evidence that you have heard"); *Annesley*, *supra* (Dublin; action for ejectment on same facts as previous murder trial; "Gentlemen, if I mistake the evidence on either side, impute it to my memory … when you come to look upon your own notes you will see how this fact stands"). In *Cornish* and in *Grahme* the fact that no note was kept did not inhibit the judge from making robust comments in support of conviction.


6. See, *e.g.* Blandy (1752) 18 St.Tr. 1118, at pp. 1170-82; *Hensey* (1758) 19 St.Tr. 1342, at pp. 1379-82; *Horne* (1777) 20 St.Tr. 652, 771.


9. The verbatim recording of important trials begins at about the time the first shorthand system was published by Dr. Bright in 1588; see his *Characterie: An Arte of Shorte Swifte and Secrete Writing by Character*.

10. Power to adjourn established in *Hardy* (1794) 24 St.Tr. 268, 414, and see Stephen, *op. cit.*, i, p.403. During the Lords consideration of the Prisoners Counsel Bill in 1836 Lord Wynford disclosed that trials for felony had still to be concluded at one sitting: 34 P.D. 760, at col. 771, June 24.

11. 6 & 7 Will. iv, c.114, s.1. Significantly, as Glenville Williams points out in *op. cit.*, p. 303, the entitlement to comment dates at least from an 1841 case, Davidson v. Stanley, 2 M. & G. 721, 728. That speech-making by defence counsel would have a tendency to provoke judicial comment was advanced as an objection against the Bill introduced unsuccessfully in 1826 to permit defence counsel to address the jury: see 15 P.D. 606, *et seq.*, April 25.


13. Glenville Williams, *op. cit.*, pp. 303-4. But it is apparently his *duty* in complicated and lengthy cases to assist the jury by dealing with the salient features of the evidence, although in a short case and one in which the issue of guilt or innocence can be simply stated, it is not necessarily a fatal defect to a summing-up that the evidence has not been discussed: see *Attfield* (1961) 45 Cr.App.R. 309.


17. Lord Devlin, in *op. cit.*, at p.118, draws an ironic comparison between the satirical description by Charles Dickens of the judge in *Pickwick Papers* (ch. 34) employing this method and the author's son, Sir Henry Dickens, who sat as Common Sergeant when Devlin was first in practice at the bar, also doing so. In Lawrence (1981) 71 Cr.App.R. 1, at p.5, Lord Hailsham L.C. stated that a "direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge's notebook."


19. The statute was examined in detail by Ruffin J. in *State v. Moses* (a slave) 2 Dev. N.C. 452, at pp.456-63 (1830).


25. Devlin, op. cit., p.119, instancing the Hiss case.
26. An observation repeatedly expressed to the writer by American lawyers and jurists.
28. A Preliminary Treatise on Evidence at the Common Law, Boston 1898, p.188. At p.185 he notes that the maxim was a favourite saying of Coke, citing Isaac v. Clarke (1613) Rolle i. 132. Lord Devlin states that the Founding Fathers “fell victim to the deceptive brocade that the facts were for the jury and the law for the judge, into supposing that there could be no proper reason why the judge should meddle with the facts”: op. cit. p. 120.
29. Institutes, pt. iii, ch. 2 (Petty Treasons), 29.
30. See Smith, op. cit., p. 88. He reports that most of those who have examined the American experience are agreed that the power to comment should be restored: ibid., p. 89, citing in particular the “Crime Surveys” set out in Orfield, op. cit., p. 458. See also Prof. E. Morgan, Foreword to the American Law Institute's Model Code of Evidence (1942) cited in Williams, op. cit., p.306.
32. Judge and Jury, p.402.
33. The point is well made by Glanville Williams, op. cit., at p. 307: the explanation of the jury’s success that the English system of summing up enables the judge to give the jury a lead which they follow sufficiently often to give an appearance of reliability to the mode of trial “is not one that yields any very strong argument for a continuation of the system.” Sidgwick observed that the compromise does not obviate the objections against entrusting decisions to an inexperienced tribunal, for “even supposing the conclusion of the judge to be always plainly stated, it does not follow that the jury will adopt it: indeed, to prove this would prove too much, as it would show that the intervention of the jury was no less superfluous than harmless”: cited ibid. An intriguing answer to the fundamental point raised as to why we have juries at all if the system depends on them generally doing what judges tell them to do was suggested by Stephen in explaining the provenance of the petty jury: “It saves judges from the responsibility—which to many men would appear intolerably heavy and painful—of deciding simply on their own opinion upon the guilt or innocence of the prisoner”: op. cit., i, 573. Developing the point, Pollock and Maitland observe: “It saved the judges of the middle ages not only from this moral responsibility, but also from enmities and feuds. Likewise it saved them from that as yet unattempted task, a critical dissection of testimony”; History of English Law before the Time of Edward I, (2nd ed., 1898), ii, 627. Holdsworth, History of English Law, (3rd ed., 1922), vol. i, 318, note 3, cites Roper in his life of More for More’s view of judges that “[t]hey see, that they may, by the verdict of the jury, cast off all quarrels from themselves upon them, which they account their chief defence.”
34. Devlin, op. cit., pp.115 and 116.
36. Ibid.
37. Hepworth, 4 Cr. App.R. 128, cited by Devlin, op. cit., p. 119. The facts are slightly unusual. There were two charges of falsifying accounts which were tried consecutively by the same jury. In the first, the defendant gave evidence, admitted altering the books to conceal a deficit but denied any fraudulent intent, and was acquitted. On being tried for the second count he did not give evidence, counsel explaining on appeal that this would have been “merely to repeat before the same jury the evidence he had given before” and arguing, therefore, that it was unfair to comment on the defendant's absence from the witness box. Conceding the comment was “very strong,” Darling J. nevertheless explained it away as the recorder only administering an antidote to defending counsel’s attempt to laugh the case out of court.
38. Devlin, op. cit., p.119.
41. This point was admirably made by Ruffin J. in State v. Moses, supra, at p. 458.
42. Hircock [1969] 1 All E.R. 47. The trial judge muttered “Oh God,” groaned and sighed during defending counsel’s speech. The Court of Appeal conceded a discretion to hear evidence from witnesses as to the judge’s behaviour, but in the event decided the behaviour did not reflect any view of the defendant’s case but merely implied a view of counsel's conduct of the defence.
43. Ibid., at p. 462.
44. Williams, op. cit., p. 307, citing Sidgwick.


52. Commonwealth Fund Committee report, *loc. cit.*


55. See *Bryant and Oxley* [1978] Crim.L.R. 307, C.A.


58. *The Last Serjeant*, 1952, p. 288. Cf. the truculent complaints of unfairness addressed to the judge after summing-up which recently brought a certain member of the Bar before a disciplinary tribunal: see *Law Society Gazette*, March 22, 1989. Yet a delicacy of touch in terms which are both graphic and droll can still occasionally be encountered. In a conspiracy trial of very recent memory repeated reference had been made to the hackneyed analogy of the bus picking up some passengers and dropping off others along the way. All who rode, no matter when, no matter for how long or short a distance, joined the same conspiracy. In his speech counsel for one of the defendants described his opponent for the Crown tinkering with a pair of spanners in a vain effort to get the bus moving. He continued: “Perhaps, who knows, His Honour will come along in a break-down truck.”