THE PROPRIETY OF JUDGES ACTING AS WITNESSES

Recent developments have led to a reconsideration of the problem of members of the judiciary appearing and testifying as witnesses.[1] The conflict, in certain types of cases, between the rights of the accused and the preservation of the dignity and impartiality of the courts, has given rise to a dilemma reminiscent of the one posed by King Henry IV[2] on a related aspect of the same basic problem.

It is not at all difficult to visualize a case wherein a judge cannot seek to preserve the dignity and respect of the courts by remaining wholly impartial, and at the same time be assured that justice, in the moral sense, will prevail. On the other hand, the average case coming within the scope of this subject, presents no such insoluble problem, or at least the lines of conflict are not so sharply drawn. The many ramifications of this subject, however, will serve to bring into focus the crux of the controversy.

Compulsory Process on Members of the Judiciary

The general policy of the law is that all persons are subject to compulsory process and that it is the duty of every person to come forward and disclose the truth when called upon. In *Ex Parte Fernandez* the court declared:

> Every person in the kingdom, except the sovereign, may be called upon and is bound to give evidence, to the best of his knowledge, upon any question of fact material and relevant to an issue tried in any of the Queen's courts, unless he can show some exception in his favor.[3]

Some exceptions have been allowed in the United States in favor of members of the judiciary in certain limited instances. The general rule, however, would seem to be that pronounced by the court in *United States v. Caldwell,* in which case two justices failed to answer a subpoena. The court stated:

> We pay no respect to persons. The law operates equally upon all, the high and low, the rich and poor. If we issue

1. See the American Bar Association report of the special committee to inquire into the propriety of members of the judiciary appearing and testifying as witnesses.

2. The dilemma concerned whether a judge, who was the sole witness to a murder, could use his personal knowledge to direct a verdict for an innocent person being tried before him for the crime.

3. 10 C.B.N.S. 3, 29, 142 Eng. Rep. 349, 364 (1861).

> a subpoena to a justice or a judge, and it is not obeyed, we should be more strict in our proceedings against such characters, than against others, whose office did not so strongly point out their duty.[4]

Other cases have admonished counsel not to call judges as witnesses if the rights of their clients can otherwise be protected, but admitted that if summoned a judge cannot refuse to give his testimony.[5]

A few states have established the rule that a presiding judge cannot be called as a witness without making proper averments stating facts showing the necessity of his testimony;[6] and in one jurisdiction at least, it is held that the presiding judge, in a single judge court, cannot be called at all as this would destroy the court.[7] But aside from these few qualifications it seems to be immutably established that a judge is as compellable a witness as any other person.[8]

Privilege of a Judge to Refuse to Testify

One writer,[9] in discussing certain types of evidence which is excluded on the grounds of public policy, states that a judge cannot be called upon to testify to what took place before him in the trial of another cause. It should be noted that this involves more nearly a question of privilege than it does of compulsory process. Even so, the authority supporting such a statement is meager and unconvincing.

Authority for the proposition that a judge cannot be called upon to testify to what took place before him in the trial of another cause is supposedly found in *Regina v. Gazard*[10] and *Agan v. Hey*.[11] In the former case a grand jury was investigating an alleged perjury committed before a former grand jury and they proposed to call the chairman of that session as a witness. The presiding judge advised against it, stating that the proposed witness was president of a court of record and that it would be dangerous to allow such an examination

4. 2 Dall. 333, 334 (U.S. 1795).
5. Woodward v. City of Waterbury, 113 Conn. 457, 155 Atl. 825 (1931).
6. State v. Owens, 125 Okla. 66, 256 Pac. 704 (1927); Gray v. Crockett, 35 Kan. 66, 10 Pac. 452 (1886). *Contra* State v. Sefrit, 82 Wash. 520, 144 Pac. 725 (1914).
7. Crawford v. Hendee, 95 N. J. L. 372, 112 Atl. 668 (1921).
8. 70 C. J. Witnesses § 15 (1935).
9. 1 Greenleaf, Evidence § 254c (16ed. 1899).
10. 8 C. and P. 595, 173 Eng. Rep. 633 (1838).
11. 37 N.Y. Sup. Ct. Rep. (30 Hun.) 591 (1883).

as he might be called upon to state what occurred before him in court. The grand jury accepted the advice and chose not to call him. The second case holds that it is error for a judge to testify as to the grounds upon which he decided a previous case in a new trial involving the same cause of action.

The aforementioned cases have been used by another author to justify the statement that the rule at common law was that communications concerning matters occurring before a judge are privileged.[12] The cases of *Welcome v. Batchelder*[13] and *Hale v. Wyatt*,[14] which tend to support such a rule, show that it is not the communication which is privileged, but rather a personal privilege on the part of the judge. In the first case the court held that public policy authorizes a judge to excuse himself from testifying to what witnesses have testified to on trials before him but that it furnishes no ground of exception for him to not insist upon his right. In the second case the appellant Hale sought to probate a will and the appellee called as a witness the judge of probate who testified to a statement made by the appellant before the judge in open court in inquisition proceedings. The statement was to the effect that the appellant had expressed the belief that the testator was insane. On appeal the appellant objected to the competency of the judge as a witness and made no objection to his testimony. The court held that it was not incompetent to receive the testimony of a judge as to what took place before him in a former trial of a cause, but recognized the rule given in *Welcome v. Batchelder*[15] that a judge had a privilege not to testify if he so chose. In speaking of this privilege the court used the following language:

> The privilege accorded to a judge, on the ground of public policy, that he shall not be required against his will to give in testimony at the trial of a case a statement made before him, is a personal privilege of which he may avail himself or not, as he chooses. Such a statement is not privileged; it lacks the element of confidentiality which is essential to a privileged communication.[16]

The public policy argument used to sustain the proposition that a judge has a privilege not to testify as to what occurred

12. 1 ELLIOTT, EVIDENCE § 643 (1904).
13. 23 Me. 85 (1843).
14. 78 N.H. 214, 98 Atl. 379 (1916).
15. 23 Me. 85 (1843).
16. 78 N.H. 214, 216, 98 Atl. 379, 381 (1916).

before him in a trial is based upon the fact that it is objectionable to have the conduct of a judge subject to cross examination and comment.[17] Such an objection seems both substantial and justifiable on its face but the fact remains that many judges do not choose to avail themselves of this privilege and thereby subject their testimony and conduct to both cross examination and comment. Under such circumstances, if a judge chose to exercise such a privilege, it might reasonably be inferred that the judge felt that he would be unable to justify what occurred before him in the previous trial of a cause.

At any rate, the rule does not seem to have gained widespread acceptance. In a case involving the privilege of a labor commissioner to refuse to testify as to what was said before him in a labor-management dispute, the court said:

> While it is stated generally in the textbooks and in some cases that a judge of a court of record cannot be required to testify as to matters occurring before him in court the right does not appear to have often deprived the triers of the benefit of such knowledge. . . . If such privilege exists, it has been honored by breach rather than by observance.[18]

The court then held that the labor commissioners had no such privilege and that whatever privilege existed should be confined to judges of courts of record, where everything which they can testify to can properly be proved by others.

It has also been held that it is not error for a judge to refuse to leave the bench and testify in a cause where his evidence would be merely cumulative, if he had not been notified in advance of trial that he would be called, but the decision does not seem to turn on the point of either compellibility or privilege.[19]

ADVERSE PARTY STATUTES

A review of the cases would seem to lead to the general conclusion that members of the judiciary have no privilege against testifying, other than those accorded to witnesses in general, with the possible exception of a judge in regard to a case tried before him.

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17. Buccleuch v. Metropolitan Bd., L.R. 5 H.L. 418 (1872).
18. White Mountain Freezer Co. v. Murphy *et al.*, 78 N.H. 398, 402, 101 Atl. 357, 360 (1917).
19. O'Neill and Hearne v. Bray's Admx., 262 Ky. 377, 90 S.W.2d 353 (1936).

COMPETENCY OF A JUDGE AS A WITNESS IN CIVIL TRIALS

A. Over which he does not preside:

No case has been found, and there is little reason to believe that any exist, declaring that a judge is not a competent witness merely because he is a judge. The general policy of the law, as mentioned previously, is that every person is under a duty to come forward and disclose the truth when called upon, and judges, as a class, are well qualified and competent to perform this duty. The question of the propriety of a judge voluntarily offering his testimony is another matter which will be subsequently discussed.

B. Over which he presides:

Supervening considerations arise in the case where a judge is called to testify in a trial over which he is presiding and the general rule in such a case is well established that under such circumstances a judge is not a competent witness. The basis for such a rule is that the office of the judge and witness are incompatible and not capable of reconciliation. Another major factor in such a situation is that when the judge takes the witness stand the court, regardless of intention in so doing, loses the air of impartiality.

Many jurisdictions allow a juror to take the stand and testify, and, although the office of juror and witness would seem to be equally incompatible to that of judge and witness, there are numerous reasons for drawing a distinction between the two. Counsel appearing before the Supreme Court of Washington argued for the analogy, but the court rejected the argument, saying:

> But it seems to us there are many reasons why the judge should not be allowed to testify that would not weigh in the case of a juror. If the defendant is entitled to the testimony of the judge, the plaintiff is equally entitled to his testimony, and it might eventuate, if this practice were to be tolerated, that the judge, upon a motion for a non-suit, would be compelled to pass upon the weight of his own testimony; and, considering the inclination of the human mind to attach more importance to its own statements than to those of others, it is easy to see that the rights of litigants might be prejudiced in such a case. Again, while upon the witness stand he would have a right to all the protection that any other witness would have under the law. He could refuse to answer questions which, in his judgment, might

> tend to criminate him. He might decline to answer questions the admissibility of which it would be necesary for the court to determine, and which would bring him as a witness in conflict with himself as a court. Again, it would to a certain extent lead to the embarrassment of the jury, who are subordinate officers of the court, and under its directions, to have to weigh the testimony of the judge in the same scales with the testimony of other witnesses in the case whose testimony was opposed to that of the judge. And in many ways it seems to us that this practice would lead to embarrassment and would have a tendency to lower the standard of courts, and bring them into contempt.[20]

The court then goes on to point out that there is no necessity for such a situation to arise because the law makes liberal provisions for calling in another judge to preside, if a party desires to avail himself of the testimony of the judge scheduled to hear the case.

The United States Judicial Code as amended June 26, 1948, requires any judge or justice to disqualify himself in any case in which he is or has been a material witness.[21] This, of course, only applies to judges in the Federal courts and the states have not generally adopted a similar provision. On the contrary, most states which have adopted statutory provisions regarding the competency of judges as witnesses have been interpreted to allow a judge both to preside and testify in the same cause.[22] Strangely enough this procedure has been most often condoned in criminal cases shortly to be averted to. No case has been found upholding the testimony of a judge in a civil action over which he is presiding, based on a statutory provision. As a matter of fact the courts have, in the absence of a statute allowing it, uniformly denounced such a procedure.

In *Powers* et al. *v. Cook* et al.[23] the judge refused to disqualify himself and during the progress of the trial took the witness stand and gave material and damaging testimony against the plaintiff's case. On appeal an objection was taken to this and the court remonstrated the lower court in the following language:

> The trial judge in this case acted in two capacities, as judge and witness, passed upon objections to certain portions of

20. Maitland v. Zanga, 14 Wash. 92, 95, 44 Pac. 117, 118 (1896).
21. 28 U.S.C. § 455 (1948).
22. See footnotes to 6 WIGMORE, EVIDENCE § 1909 (3d ed. 1940).
23. 48 Okla. 43, 149 Pac. 1121 (1915).

> his testimony, and, after he had finished testifying, returned to the bench and continued to try the case. To our minds, this was prejudicial to the rights of the plaintiff and fundamentally wrong, and, as was stated by Justice Folger, in the case of People v. Dohring, "because such practice, if sanctioned, may lead to unseemly and embarrassing results to the hindering of justice, and to the scandal of the courts." It tends to lessen the dignity of the courts, and bring it into disrepute. It is well known to every practicing lawyer that the testimony of the trial judge, upon a material point, will outweigh the testimony of ordinary witnesses, and to permit him to testify gives an undue advantage to the the party for whom he testifies. It is wrong both in principle and in morals.[24]

While it is not always reversible error for a judge to testify in a civil case over which he is presiding,[25] and certainly not if no objection is made to it,[26] it has met with almost unanimous disapproval.

COMPETENCY OF A JUDGE AS A WITNESS IN CRIMINAL TRIALS

A. Over which he does not preside:

Only one case has been found which fits this category, and it was there held that the judge, who had presided at a civil trial, was a competent witness at a subsequent criminal trial involving an alleged perjury which had been committed during the civil action.[27] No distinction is made in this regard between civil and criminal actions and the very paucity of cases which have litigated the point would seem to be mute evidence that, as a general rule, a judge is as competent and compellable a witness as any other person.

B. Over which he presides:

1. *Cases involving statutory provisions.*

The practice of allowing a judge to testify in a criminal trial over which he is presiding has, by virtue of statutes in a few states, been sanctioned. The statutes averted to usually make the judge a competent witness in a trial over which he presides without regard to whether it is a criminal or civil action. A signal development of this has been that all of the litigated

24. *Id.* at 49, 149 Pac. at 1123.
25. Feinstein v. Politz, 103 S.C. 238, 87 S.E. 1005 (1916).
26. *In re* Elam, 357 Mo. 922, 211 S.W.2d 710 (1948).
27. La Dow v. State, 23 Ohio App. 288, 155 N.E. 502 (1925).

cases concerning the competency of a judge to testify in a trial over which he is presiding, by virtue of statutory authority, have been criminal actions.

In the case of *O'Neal v. State*[28] the defendant introduced evidence of good character in support of his application for a suspended sentence. To refute this the district attorney took the stand and testified that he was acquainted with the defendant's reputation and that it was bad. Following this, the district attorney called the presiding judge to the stand; he testified to the same effect. On appeal this was held not to be error since a statute specifically provided that the trial judge is a competent witness for either the state or the accused.

A provision of the Code of Civil Procedure of the State of California,[29] which provides that the presiding judge may be called by either party, was held to permit the trial judge to testify, over objections of the defendant, to preliminary matter.[30] The court qualified its decision, however, by stating that it would be deemed an abuse of discretion if the judge's testimony discloses facts without the proof of which the issue such testimony is designed to support cannot be sustained.

In *McCoffrey v. State*[31] the defendant was being tried for perjury committed in a former trial. The judge presiding had also presided at the trial of the civil action during which the alleged perjury of the defendant occurred. The prosecution called the judge to the stand and he testified as to the time and place of the former trial, that he had presided at that trial and that the defendant has been a witness and given testimony at that trial. The defendant was convicted and appealed on the ground that he had been denied a fair and impartial trial and that the presiding judge was not a competent witness. The court held that a provision of the general code to the effect that all persons of sound mind over ten years of age were competent witnesses precluded the de-

28. 106 Tex. Cr. Rep. 158, 291, S.W. 892 (1927).

29. CAL. CODES Part IV, Tit. 2, c. 3, § 1883 (Deering 1949) states: "The judge himself, or any juror, may be called as a witness by either party; but in such case it is in the discretion of the court or judge to order the trial to be postponed or suspended, and to take place before another judge or jury."

30. People v. Connors, 77 Cal. App. 438, 246 Pac. 1072 (1926); see also People v. Madison, 3 Cal.2d 668, 46 P.2d 159 (1935).

31. 105 Ohio St. 508, 138 N.E. 61 (1922).

fendant from contending that the presiding trial judge was not a competent witness. Still the court recognized that such a procedure was dangerous and should not be encouraged, intimating that it could be carried too far.

An Arkansas Code provision almost identical with the above mentioned California Code Section was construed not to be applicable to criminal cases, the court further saying:

> . . . in the interest of the dignity and decorum of the circuit court and the orderly procedure therein, we feel compelled to hold that a judge presiding at a criminal trial cannot, against the objection of the defendant, be sworn and testify as a witness on the part of the prosecution.[32]

It should be added that not only in the interest of the dignity and decorum of the court, but also in the interests of justice and fair play, a presiding judge should not be a competent witness in a criminal trial. A judge or a court is a symbol of justice largely because of the fact that it is deemed to be impartial. Anything which detracts from that feeling of impartiality is to be deplored because when that is lost, so will the faith and respect of the people be lost. Even the appearance of partiality, by a presiding judge, may be enough in itself in a close case, to remove the last reasonable doubt from the minds of the jury. It is to be regretted that some courts have been so easily led away from the salutary effect of the general common law rule.

2. *Cases interpreting the common law:*

As was said in *Brashier v. State:*

> It is a tribute to our judicial system that the words and actions of trial judges have great weight with trial juries. They observe closely the judge's actions and weigh carefully his words and are greatly influenced by what they think are his reactions. . . . And, while the trial judge may be very reluctant to take the stand and complies with the request solely to serve the ends of justice by making a full disclosure, which unquestionably was the case here, the greater the character and standing of the judge the greater the danger of this procedure. It is the supreme duty of a trial judge, insofar as it is humanly possible, to hold the scales of justice evenly balanced between the litigants. As a witness, regardless how careful and conscientious he may be, he necessarily takes on the appearance

32. Rogers v. State, 60 Ark. 76, 29 S.W. 894 (1894).

> of a partisan, endeavoring to uphold by his testimony one side against the other, and to some extent at least detracts from the dignity and impartiality of his office.[33]

It has been repeatedly held that a proper administration of the law demands that the courts and judicial officers not only refrain from actual bias but also from any appearance of bias,[34] and that for the presiding judge in a criminal trial to take the stand and testify tends strongly to influence the jury and deprive an accused of a fair and impartial trial.[35] This, together with the necessity of public faith and confidence in the impartial administration of justice, would seem ample reason for denouncing the practice of allowing a judge to testify in any case over which he was presiding, much less one of a criminal nature.[36] The common law is strongly opposed to it and that remains the majority rule today.

THE PROPRIETY OF A JUDGE ACTING AS A WITNESS

As previously brought out, the general policy of the law requires that every person, when called upon, come forward and disclose the truth. Moreover, as a general rule, members of the judiciary are as compellable and competent a witness as any other person and have only those privileges accorded by the law to all witnesses in general. Furthermore, the successful administration of the entire judicial system and the dispensation of justice depends upon the knowledge and confidence of the people that the judges and the courts are completely impartial and free from bias. With these postulates in mind, it remains to examine the question of how to reconcile these basic concepts when they come into conflict in a given case.

Perhaps the best example of such a case is a criminal trial in which the defendant calls upon a member of the judiciary, to which the case might eventually go on appeal, to testify as to the defendant's reputation. Diametrically opposed are the rights of the defendant to have compulsory process to compel the attendance of witnesses on his behalf and the duty of the

33. 197 Miss. 237, 242, 20 So.2d 65, 66 (1945).

34. Powers v. Cook, 48 Okla. 43, 149 Pac. 1121 (1915); Maitland v. Zanga, 14 Wash. 92, 44 Pac. 117 (1896); People v. Silverman, 252 App. Div. 149, 297 N.Y. Supp. 449 (2d Dep't. 1937).

35. People v. McDermott, 180 Misc. 247, 40 N.Y.S.2d 456 (Sup. Ct. 1943).

36. 6 WIGMORE, EVIDENCE § 1909 (3d ed. 1940) advances arguments *contra*.

courts to remain impartial and free from any conduct which might be looked upon as taking sides in any justiciable controversy. There is no doubt that this conflict arises because of a popular misconception of the nature of character evidence. To those untrained in the law character evidence is naturally looked upon as the witness' own opinion, whereas according to legal theory, it is the opinion of the community as a whole. Nevertheless, the legal profession cannot ignore the fact that the layman has this misconception and consequently feels that the judge is siding with the accused. In times of stress this public misconception of the partiality of our courts could easily become of critical importance. And this evil is not altogether eliminated by the fact that the judge must disqualify himself from hearing the case on appeal.

The issue thus narrows down to which of the two conflicting interests is paramount, that of the accused or that of the whole judicial system. The answer seems self-evident. Without the latter the former would not exist. It would seem, therefore, that if this conflict arises frequently enough to cause the public to entertain any doubt as to the integrity of our judicial system, the rights of the accused must give way.

Of a committee composed of five members of the American Bar Association which made a report on this subject,[37] three members agreed that nothing should be done at the present time because the problem was not serious enough. Of the three members, two agreed that if any form of a remedy were attempted, that it should take the form of legislation, the other member contending that it should be by a new canon of ethics. Two of the members, however, considered the problem serious enough to require immediate attention, one of them favoring legislation and the other a new canon of ethics for both lawyers and judges. The author does not feel qualified to pass judgment on any of the views advanced by that committee, but he takes the liberty to select the viewpoints which most appealed to him and to incorporate them with his own.

CONCLUSION

First, rarely should a judge or justice voluntarily appear and give testimony in any case, especially evidence as to character and reputation in a criminal trial. Such a voluntary

37. See American Bar Association Report, note 1, *supra*.

appearance is certain to be misunderstood by the public and bring the judicial system into disrepute.

Second, such occurrences have been infrequent and, as yet, the reputation of the judiciary has not been appreciably affected thereby. But it is submitted that the time to take action is before it is so affected, rather than afterwards.

Third, a canon of ethics would not be effective to prevent the harm from occurring which it would be designed to suppress. A new canon directed at the judiciary would still leave a judge subject to compulsory process. A reciprocal canon directed at counsel should not deter him from respecting canon five, i.e., "presenting every defense that the law of the land allows." Moreover, canon 32 requiring counsel to uphold the the respect for the judicial office should deter counsel from calling a judge as a witness merely because he is a judge.

Fourth, legislation exempting a justice or judge from compulsory process would not be in violation of the Sixth Amendment to the Constitution.[38] The right to have compulsory process does not give one a right to have the law of evidence regarding the competency of witnesses or of testimony remain forever as it now is. Congress is free to legislate regarding the competency of witnesses or of testimony in accordance with sound public policy.

Fifth, legislation should be passed prohibiting the testimony of any justice or judge in any case as to the character or reputation of any person. The committee of the American Bar Association unanimously opposed an absolute prohibition on such testimony. It was felt that the "door should be left open for such evidence in cases where justice requires." Perhaps so, but it is difficult to accept the basic premise that a possible detriment to the rights of an accused in an exceptional case is entitled to greater protection than the harm which might result to the reputation of the judiciary from the giving of such testimony. Moreover, each case is an exceptional case to all of those immediately concerned. Furthermore, it is difficult to visualize such an exceptional case that the testimony of one person as to the reputation of another would be so vital

38. U. S. CONST. AMEND. VI states: "In all criminal prosecutions, the accused shall enjoy the right to . . . have compulsory process for obtaining witnesses in his favor."

39. 70 C.J., WITNESSES § 5 (1935).

as to result in a miscarriage of justice if it were not allowed. It would seem that if a person had a reputation in the community in which he lives that the testimony of one witness, without considering the personal influence of that witness, would not be crucial. Admittedly, the testimony of the Chief Justice of the United States Supreme Court, for instance, would carry greater weight with a jury than that of the ordinary citizen who had equal knowledge of the defendant's reputation. The net result, however, of allowing the personal influence of the witness to be given weight amounts to a perversion of the legal theory behind its admissibility. This, in reality, is the basic cause of the problem which needs to be solved. The problem is not met by allowing it to flare up and be given widespread publicity in the exceptional case.

Therefore, the author would recommend that the bill now before Congress H.R. 5671,[40] introduced by Representative Keating of New York, be amended by adding the words "judge or" and striking out the words "or as to any matter of opinion" and be passed as so amended. The amended bill would then read:

> No judge or justice of the United States shall testify as to the character or reputation of any person in any action in any court of the United States.[41]

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40. H.R. 5671, 81st Cong., 1st Sess. See also H.R. 5623. The American Bar Association committee criticized the draftsmanship of the Keating bill because (1) the single word "justice" may be held not to include a judge; (2) the words "or as to any matter of opinion" are too broad; (3) it was not clear as to whether the word "action" pertained only to civil actions or both civil and criminal suits.

41. It is to be noted that the language of this legislation refers only to the competency of the testimony of a judge in a very limited instance and does not exempt him from compulsory process. Thus, the advantage of the testimony of a judge in other instances, in which the advantages may outweigh the evils, is retained.