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Richard B. Spindle

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## JUDICIAL DISCRETION IN COMMON LAW COURTS

RICHARD B. SPINDLE\*

The term judicial discretion is one of the most general expressions in the law. Bouvier's Law Dictionary (first edition, published in 1839) gives a definition:

"The discretion of a judge is said to be the law of tyrants; it is always unknown; it is different in different men; it is casual and depends upon constitution, temper, and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly, and passion, to which human nature is liable. Optima lex quae minimum relinquit arbitrio iudicis; optimus iudex qui minimum sibi."

It is attributed to Lord Camden, and is quoted in *Ex Parte Chase*,<sup>1</sup> in which a mandamus was awarded to compel a change of venue, and in *State v. Cummings*,<sup>2</sup> a prosecution of a clergyman for preaching without having taken the oath prescribed by the Missouri "New Constitution" (that he had not among other things expressed sympathy for those engaged in the rebellion). Despite this caustic animadversion the doctrine has continued to develop, and we find constantly increasing powers so vested in the trial courts by Legislative designation and by Appellate Court decision. It is of considerable importance, therefore, to trial lawyers and to trial judges to have some clear idea of what is meant by this general expression with which they have to deal almost daily.

Many definitions given by the Appellate Courts are stated in the negative: Judicial discretion is not to be exercised at the arbitrary will of the judge;<sup>3</sup> not invoked maliciously, wantonly or arbitrarily or against logic and the effect of facts;<sup>4</sup> not applied against reasonable,

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\*Judge of The Corporation Court, Norfolk, Va.

<sup>1</sup>43 Ala. 303 (1869). This case was overruled in 1875 by *Kelly v. State*, 52 Ala. 361, which went to the other extreme and held that the trial court's action on change of venue was not reviewable.

<sup>2</sup>36 Mo. 263 (1865). Reversed by Supreme Court of the United States in *Cummings v. State of Missouri*, 4 Wall. 277 (U. S. 1866).

Lord Camden's definition is also quoted in *Delno v. Market St. Ry. Co.*, 124 F. (2d) 965 (C. C. A. 9th, 1942) as a matter of contrast with current views, not as authority.

<sup>3</sup>City of Sioux Falls v. Marshall, 48 S. D. 378, 204 N. W. 999 (1925).

<sup>4</sup>Neal v. State, 214 Ind. 328, 14 N. E. (2d) 590, 593 (1938).

probable and actual deductions;<sup>5</sup> not employed to defeat the ends of justice.<sup>6</sup> Probably the old definition of Lord Coke is about as specific as any: *Discernere per legem quid sit justum*—to see what would be just according to the law in the premises. And to the same end is the definition of Chief Justice Marshall in *Osborn v. The Bank of the United States*:<sup>7</sup> “discretion to be expressed in discerning the course prescribed by law.”

Many matters of equity jurisdiction are spoken of as embodying judicial discretion, such as the allowance of fees, the amount of alimony, confirmation of a receiver's sale, deficiency decree for foreclosure of a mortgage, acceptance or rejection of a report of reference, issue out of chancery, granting or refusing an injunction, specific performance and the like, but these are more analogous to the determination of facts without a jury, and will not be discussed herein. It is our purpose to try to deduce something more specific than the general terms so customarily used in judicial definitions as applied to the matters that confront the trial courts in the administration of civil and criminal law in the courts.

The rationale that has caused the development of the doctrine is well set forth in *Moody v. Rowell*:<sup>8</sup> “It is desirable that rules of general practice be as few, simple and practical as possible, that distinctions should not be multiplied without good cause, and that it would not be useful to engraft a distinction not in general necessary to attain the purposes of justice in the investigation of the truth of facts, that it would often be difficult of application and that all practical good to be expected from it may be as effectually attained by the exercise of the discretionary power of the court.”

### REVIEWABLE DISCRETION

Judicial discretion falls into two classes—reviewable and non-reviewable. The reviewable class is much more extensive—as it ought to be. Review for abuse, as lies in the power of the Appellate Courts, is an easier process too, since it is easier to appraise the ends of justice when all the evidence is in and the case concluded. Few of us will deny the old adage that hindsight is better than foresight.

Reviewable discretion takes in a large part of trial procedure. The

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<sup>5</sup>*McFarland v. Fowler Bank*, 214 Ind. 10, 12 N. E. (2d) 752 (1938).

<sup>6</sup>*Deeds v. Deeds*, 108 Kan. 770, 196 Pac. 1109 (1921).

<sup>7</sup>9 Wheat. 737 (U. S. 1824).

<sup>8</sup>17 Pick. 490, 499, 28 Am. Dec. 317, 323 (Mass. 1835).

Vermont case of *Hubbard v. Hubbard* enumerated many of these and observes:

“But certain matters seem hardly to admit of the form of inflexible rules in advance and to be most wisely left to the sound judgment of the magistrate, leaving same to be governed by the general analogies of the law and his own sense of justice.”<sup>9</sup>

Without attempting to make complete the various functions to which it has been held applicable, let us examine at least some of them.

#### *Continuances*

The granting or refusal of a continuance is almost universally held to be a matter of judicial discretion. It is performing lip service only to say that a person is entitled to due process of law unless such person has a full opportunity to meet the issue raised, or that he is entitled to a day in court without the opportunity of producing witnesses or having counsel. So when a motion is made for a continuance the judge must bear in mind what the law has laid down—due diligence in the procurement of process, sufficient time for preparation, materiality of absent witness and future availability; and failure to observe these rules is abuse of judicial discretion. Two cases illustrating are: *Wright's Case*<sup>10</sup> and *Howard v. Commonwealth*.<sup>11</sup> Both were cases of rape in which the penalty fixed was death.

Wright was indicted on June 29, 1912 at a special term of court, tried, convicted and sentenced on the same day for the offense committed on June 27, 1912. The judgment was affirmed in a two page opinion that disposed of the motion for a continuance and for a change of venue on the basis of judicial discretion.

Howard was indicted on January 17, 1939 for the offense committed on December 7, 1938, and was arrested next day in Williamson, West Virginia. A leading member of the bar was appointed to defend him on January 24, 1939. The defense was an alibi, the accused claiming that he was in Ashland, Kentucky the day the offense was committed, and he gave his counsel the names of several persons there. Counsel wrote these persons on March 2. On March 4th the trial judge called a special session of court to convene on March 21st to try this case. Counsel received replies to his letter of March 2, on March 6, 7, 13 and 14, the information, however, being somewhat vague. Counsel pre-

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<sup>9</sup>77 Vt. 73, 58 Atl. 969, 970 (1904).

<sup>10</sup>114 Va. 872, 77 S. E. 503 (1913).

<sup>11</sup>174 Va. 417, 4 S. E. (2d) 757 (1939).

sented this information to the National Association for the Advancement of Colored People in Richmond, Virginia, and was told the Association would furnish funds to bring the witnesses from Ashland to Farmville. On March 14th counsel asked for a continuance, which was granted to March 28th. The Association in the meantime declined to furnish the funds for the witnesses. On March 28th counsel again moved for a continuance, but was unable to assert future availability of these witnesses. The motion was overruled and the trial had. The action of the trial court was affirmed but by a four-three division of the justices. In the *Wright* case "hindsight" (The Appellate Court) said "It is not pretended that time has developed any facts other than those adduced at the trial,"<sup>12</sup> and in the *Howard* case (in the dissenting opinion) it is asserted, "As it is there remains at least the possibility that the accused has been deprived of presenting evidence in his favor and so long as this possibility remains there is a doubt that he has been afforded a fair opportunity to make his complete defense."<sup>13</sup> Now it is submitted that "foresight" would dictate a continuance in the *Wright* case, and in the other that a full opportunity had been afforded.

The language above quoted—"a fair opportunity to make his complete defense"—contains the essence of what the trial court must determine. A case in the trial court illustrates: Three girls whose respective ages were just under sixteen, just over sixteen and seventeen, under investigation in the Juvenile Court, revealed an extensive use of taxi cabs in prostitution, and some forty odd taxi cab operators were indicted for pandering. The first case tried before a jury resulted in a conviction and a sentence of three years in the penitentiary. The sundry defendants were represented by sundry lawyers and a mad scramble for continuance ensued. The girls were being held in custody as witnesses. One Matson was given a continuance at the first term on account of the crowded condition of the docket. At the second term his counsel filed a doctor's certificate that he was ill, which was taken at its face value without inquiry. At the third term counsel filed a doctor's certificate that defendant's wife, a material witness, was confined in a hospital, for an operation not specified except by the abbreviation D. & C. The dates showed the wife entered the hospital the day after service of a subpoena. The court acting on its general knowledge of local conditions refused the third continuance.

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<sup>12</sup>114 Va. 872, 874, 77 S. E. 503 (1913).

<sup>13</sup>174 Va. 417, 428, 4 S. E. (2d) 757, 761 (1939).

### Bail

Bail as a matter of judicial discretion is so dependent on Constitutional and Statutory provisions of the jurisdiction in question that it is not deemed advisable to include a detailed discussion in this paper. The factors involved are probability of guilt, status of accused, moral turpitude of offense, extent of penalty and probability of non-response. *City of Sioux Falls v. Marshall*<sup>14</sup> contains a discussion and adds the additional factor of what is likely to be the course of conduct of accused during the period of his liberty on bail. Such factors as these are so difficult to set forth accurately in a written record that it is not surprising that a reasonable investigation and appraisal thereof by the trial court is almost conclusive.<sup>15</sup>

### Matters of Procedure

Matters of procedure likewise involve substantial rights of the litigant. Such matters adjudicated are: change of venue;<sup>16</sup> setting aside order of dismissal;<sup>17</sup> setting aside motion for default;<sup>18</sup> setting aside default judgment;<sup>19</sup> extension of time;<sup>20</sup> separation of defendants on joint trial;<sup>21</sup> consolidating several tort actions;<sup>22</sup> amendment of pleadings;<sup>23</sup> pretrial examination of state's evidence in a criminal case;<sup>24</sup> changing plea;<sup>25</sup> compelling election;<sup>26</sup> order of putting on evidence;<sup>27</sup> declaring a mistrial.<sup>28</sup> The statement of Chief Justice Marshall that discretion is to be exercised in discerning the course prescribed by law resolves itself in these matters to an appraisal of the substantial rights

<sup>14</sup>48 S. D. 378, 204 N. W. 999, 45 A. L. R. 447 (1925).

<sup>15</sup>Rossi v. United States, 11 F. (2d) 364 (C. C. A. 8th, 1926); *Ex Parte Grimes*, 99 Cal. App. 10, 277 Pac. 1052 (1929).

<sup>16</sup>Thomson v. Com., 131 Va. 847, 109 S. E. 447 (1921).

<sup>17</sup>Alexander v. Smith, 20 Tex. Civ. App. 304, 49 S. W. 916 (1899).

<sup>18</sup>Hanthorn v. Oliver, 32 Ore. 57, 51 Pac. 440 (1897).

<sup>19</sup>Coos Bay etc. v. Endicott, 34 Ore. 573, 57 Pac. 61 (1899).

<sup>20</sup>McFarland v. Fowler Bank, 214 Ind. 10, 12 N. E. (2d) 752 (1938).

<sup>21</sup>Neal v. State, 214 Ind. 328, 14 N. E. (2d) 590 (1938).

<sup>22</sup>Stancato v. Chicago, etc. Ass'n, 246 Ill. App. 464 (1927).

<sup>23</sup>Schlitz v. Ins. Co., 96 Vt. 337, 119 Atl. 513 (1923).

<sup>24</sup>Massie v. People, 82 Colo. 205, 258 Pac. 226 (1927); *Abdell v. Com.*, 173 Va. 458, 2 S. E. (2d) 293 (1939).

<sup>25</sup>State v. Terranto, 112 Ohio 667, 148 N. E. 362 (1925).

<sup>26</sup>Pointer v. United States, 151 U. S. 396, 14 S. Ct. 410 (1894); *Mitchell v. Com.*, 141 Va. 541, 127 S. E. 368 (1925).

<sup>27</sup>State v. Satterfield, 207 N. C. 118, 176 S. E. 466 (1934); *Duncan v. Broadway Bank*, 127 Va. 34, 102 S. E. 577 (1920); *Hambrick v. Fahrney*, 157 Va. 396, 161 S. E. 43 (1931).

<sup>28</sup>State v. Tyson, 138 N. C. 627, 50 S. E. 456 (1905); *State v. Hansford*, 76 Kan. 668, 92 Pac. 551 (1907).

of the parties to the end that no party is to be penalized for an act of inadvertence or the like (if possible), and that the issue shall be fairly met on the merits without undue advantage to the adversary. Frequently in such matters it is easy to see the crowded dockets and an undue sense of the importance of judicial time have led trial judges into an abuse of discretion. In *Jerrell v. N & P Belt Line Ry.*<sup>29</sup> the trial court allowed thirty minutes to a side to argue a case that the Appellate Court thought was involved, and a reversal ensued on that ground. In *Smith v. Commonwealth* the Appellate Court said: "An ideal system of laws would be one in which speedy justice is administered, but justice not speed should be its paramount purpose."<sup>30</sup>

#### *Evidence*

Discretion in the realm of evidence involves the substance of trial on the merits and places a still greater responsibility on the trial judge to discern the course prescribed by law. This means that rules of evidence are always to be considered. Take *res gestae* as an illustration. Materiality, proximity in time and spontaneity of statements are vital, and yet no general rule can be laid down for their application to the facts of each case. In *C. & O Ry. v. Mears*<sup>31</sup> is a general outline of the requirements for admissibility, as follows: (1) some shock to the feelings to render the statement spontaneous, (2) before time to contrive and misrepresent—i.e., while nervous excitement is supposed to dominate and the reflective powers are in abeyance—(3) and the statement must relate to the circumstances causing the shock to the feelings.

And in *Huffman v. Commonwealth* the statements of the deceased in a murder case were held admissible and the court said:

"It is reasonably clear that they were not designedly made; that they were not fabricated; that Riddle at the time they were made was still crying out in pain and agony from the mortal wound he has just received, and that they formed a part of the occurrence or transaction which they characterized."<sup>32</sup>

The trial court must apply these requirements to the situation of the declarant and admit or reject the statement accordingly.

The competency of a child as a witness is a matter involving legal requirements to be applied. Another trial court case involved a mature

<sup>29</sup>166 Va. 70, 184 S. E. 196 (1936).

<sup>30</sup>155 Va. 1111, 1117, 156 S. E. 577, 579 (1931).

<sup>31</sup>64 F. (2d) 291, 292 (C. C. A. 4th, 1933).

<sup>32</sup>168 Va. 668, 682, 190 S. E. 265, 271 (1937).

man charged with contributing to the delinquency of two girls aged nine and six years, respectively. The testimony of the children was vital to establish the charge. The man was doing some repair work to a dwelling house and the little girls were playing around. The man invited them into the house and some exhibitionism took place. The defendant challenged the competency of the children, and the court made a preliminary examination of each in the presence of the jury, but took a general survey of their schools, Sunday schools and family background and declared them competent. There was a conviction, and on the motion for a new trial it was urged that neither child had been questioned about the consequence of not telling the truth. Questions to children found in the reports such as ,Who is God? What is Truth? Where will you go if you do not tell the truth?, are not very edifying—and in fact are rather difficult for the court itself to answer with any degree of assurance. The court relied on its general observation of the intelligence and general moral development of the girls.<sup>33</sup> A writ of error was refused.

Taking judicial notice of matters that might be proved means an end to the litigation in question or a time consuming second trial because of a technicality. Venue is essential, and failure to prove it is usually inadvertent. In former times it was the cause of many new trials. In the recent case of *Randall v. Commonwealth* the trial court took judicial notice that "Half-Way House" was within the court's jurisdiction and the Appellate Court said. "whether it will do so or not depends partly in the nature of the subject, the issue, the apparent justice of the case, partly on the information of the court and the means of information at hand and partly on the judicial disposition." <sup>34</sup>

Determination of the competency of a juror sometimes requires a searching examination into the jurors' mental processes. In *Temple v. Moses*<sup>35</sup> there was a verdict for injuries sustained in an automobile collision. The case had developed considerable feeling in the community. When the motion for a new trial came on to be heard, an affida-

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<sup>33</sup>The Louisiana Supreme Court in *State v. Washington*, 49 La. Ann. 1602, 22 So. 841 (1897), Note (1899) 42 L. R. A. 553, held that a belief in God and a sense of responsibility to Him for false swearing are indispensable whether the witness be child or adult; but the General Court of Virginia in *Perry v. Com.*, 3 Gratt, 632 (Va. 1846) held as early as 1846 that no person is incapacitated from being a witness on account of his religious belief. See also *State v. Orlando*, 115 Conn. 672, 163 Atl. 256 (1932); *Crowson v. Swan*, 164 Va. 82, 178 S. E. 898 (1925).

<sup>34</sup>183 Va. 182, 186, 31 S. E. (2d) 571, 572 (1944).

<sup>35</sup>175 Va. 320, 8 S. E. (2d) 262 (1940).



vit was filed that one of the jurors previous to the trial had made statements indicating he was biased, and a counter affidavit was also filed. The court called both affiants before it and examined them at length after counsel had finished, and at the conclusion thereof said: When we examine the testimony of this juror we certainly find from him a straightforward statement of his own position. In searching the conscience of a man, the result of that search is worth what his character is worth, We can take no photograph of his mind. We can only judge the sincerity of the words he utters by the character he reveals in his appearance on the stand and the way in which he answers the questions, and the cross examination he is subjected to. The juror was declared competent.

Other matters are: particular incidents in a case of circumstantial evidence, the test being materiality, but materiality in a broad sense because it is the cumulative strength of many incidents that gives assurance to the deduction to be made;<sup>36</sup> the qualification of an expert witness, expertness being such an intangible matter not capable of reduction to rules;<sup>37</sup> asking leading questions, when the witness from unwillingness, bias, lack of memory, or embarrassment has been unable or unwilling to divulge the whole truth;<sup>38</sup> scope of cross examination, to expedite the trial without impairment of the ordinary tests of credibility;<sup>39</sup> experiments in evidence, the test being sufficient similarity to the circumstances of the case on trial to add weight to the evidence;<sup>40</sup> exhibiting inquiries to the jury, where the probative value of the exhibit is deemed to counterbalance possible emotional reaction on the jury;<sup>41</sup> tangible objects, the best probative value;<sup>42</sup> and taking exhibits into the jury room, the danger being to give undue emphasis to certain parts of the testimony over others.<sup>43</sup>

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<sup>36</sup>Karnes v. Com., 125 Va. 758, 99 S. E. 562 (1919).

<sup>37</sup>Morris v. State, 25 Ala. App. 494, 149 So. 359 (1933); Wessells v. Com., 164 Va. 664, 180 S. E. 419 (1935).

<sup>38</sup>Arnold v. United States, 7 F. (2d) 867 (C. C. A. 7th, 1925); Banca v. Columbia, 252 Mass. 552, 148 N. E. 105 (1925); Flint v. Com., 114 Va. 820, 76 S. E. 308 (1912).

<sup>39</sup>Alford v. United States, 282 U. S. 687, 51 S. Ct. 218 (1931); Robinson v. Com., 165 Va. 876, 183 S. E. 254 (1936).

<sup>40</sup>People v. Ely, 203 Cal. 628, 265 Pac. 818 (1928); State v. Newman, 101 W. Va. 356, 132 S. E. 728 (1926); Abdell v. Com., 173 Va. 458, 2 S. E. (2d) 293 (1939).

<sup>41</sup>Wilson v. Thayer County Agricultural Soc., 115 Neb. 579, 213 N. W. 966, 52 A. L. R. 1393 (1927).

<sup>42</sup>Carlson v. Kansas City etc., 221 Mo. App. 537, 282 S. W. 1037 (1926); Worcester v. McClurkin, 174 Va. 221, 5 S. E. (2d) 509 (1939).

<sup>43</sup>State v. Corbin, 117 W. Va. 241, 186 S. E. 179 (1936).

## NON-REVIEWABLE DISCRETION

In those jurisdictions where the jury determines guilt and the judge imposes punishment, the quantum of punishment imposed is held not reviewable. But where the penalty seems to the reviewing minds to be unreasonable, subtle approach to reversible error usually takes place. Take *Griffin v. State*<sup>44</sup> as an example. Defendants, pursuant to negotiations with the prosecuting attorney, entered pleas of guilty to an indictment charging a violation of the Banking Code, with recommendation of punishment for a misdemeanor. The trial judge, however, sentenced them to five years in prison, and the Supreme Court held there was abuse of discretion in refusing their motion to set aside the judgment and withdraw the pleas of guilty.

Another illustration of Appellate Court reaction to harsh judgment of the trial court is found in *Snarr v. Commonwealth*.<sup>45</sup> The case involved a violation of the Prohibition Law, which contained a minimum punishment of \$50.00 and thirty days in jail with a provision that, if it should appear to the court trying the case there had been no intentional violation but an unintentional and inadvertent one, the court should instruct the jury that they could not impose a jail sentence. There was also a provision authorizing the trial court to require upon conviction a bond not to violate the Prohibition Law for a period of twelve months ensuing. The defendant was a physician of good standing in the community, and he started out in his own car to meet his brother, also a physician, and then to proceed by train to the wedding of a nephew. He took a drink (in those days they called it ardent spirits) before starting, and on the way had a traffic accident as a result of which it was discovered he had a bottle containing about six ounces of whiskey in his overcoat pocket. On his trial for this the trial judge refused an instruction on the inadvertent feature, and when the jury imposed the penalty of \$50.00 and thirty days in jail, the judge required a \$1500.00 bond not to violate the law again. The Appellate Court reviewed certain evidence about the traffic violation and said that its first impression was that it should be held to be harmless error, but upon mature consideration it deemed the error injurious, and said (Prentis J):

"Feeling as the members of this court do, that if they had been vested with the discretion which is vested in the trial court, the instruction would have been given, we are of opinion that

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<sup>44</sup>12 Ga. App. 615, 77 S. E. 1080 (1913).

<sup>45</sup>131 Va. 814, 109 S. E. 590 (1921).

the error in admitting this irrelevant testimony must have prejudiced the prisoner's cause with the learned and upright judge when he was asked to instruct the jury not to impose a jail sentence, and therefore he should review his own judgment on that point."<sup>46</sup>

The court further found that the bond required was an unnecessary humiliation and not in contemplation of the General Assembly and reversed the case for a new trial.

### *Probation*

The most striking instance of the development of the function of judicial discretion is contained in the comparatively modern procedure of suspended sentence and probation. This power has been expressly conferred by legislative bodies upon the trial courts and is now in effect in most of the States and in the Federal Courts. It is based on the theory of rehabilitation as against retribution. Its exercise requires a balancing of the claims of the defendant and the demands of society, circumstances in mitigation of the offense and its being compatible with the public interest.

The granting or refusing of probation is entirely a matter for the trial judge. The writer knew one trial judge who openly stated he did not believe in it and did not propose to entertain it. There seems no way to have such an attitude reviewed, but the query is—has any trial judge the moral right to refuse to consider a matter entrusted to him by law for his decision? *City of Sioux Falls v. Marshall*<sup>47</sup> did not involve probation but it did involve granting of bail after conviction, the statute giving bail as a matter of right if the penalty was by fine only, and in discretion in other cases. The record showed the trial judge had stated he had never granted bail in such cases and "as long as God gives me breath I will never grant a stay in these cases." The Appellate Judge said very mildly "I have considerable misgivings whether those words do not indicate the establishment of an arbitrary rule for all cases rather than a result of the application of sound judicial discretion to the case at bar,"<sup>48</sup> and the Appellate Judge then proceeded to review the law and the facts and deny bail.

The Virginia Court in *Ramey v. Commonwealth*, a similar case, bluntly stated; "This the trial court had no right to do."<sup>49</sup>

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<sup>46</sup>131 Va. 814, 827, 109 S. E. 590, 595 (1921).

<sup>47</sup>See note 14, *supra*.

<sup>48</sup>48 S. D. 378, 204 N. W. 999, 1000 (1925).

<sup>49</sup>145 Va. 848, 851, 133 S. E. 755, 756 (1926).

The Appellate Courts, not being concerned with the granting of probation, have enunciated no guiding principles for its application. Several U. S. District Court opinions are found in the Federal Reporter—e.g. *U. S. v. Nix*,<sup>50</sup> *U. S. v. Meagher*,<sup>51</sup> *U. S. v. Johnson*<sup>52</sup>—all denying probation. An able opinion by Judge Hertz, of the Court of Common Pleas of Cuyahoga County, Ohio, granting probation gives the following analysis of what is compatible with the public interest:

“The requirements of the public good as thus defined demand, first that we deny ourselves the luxury of moral wrath in dealing with offenders but comfort ourselves, if we must, with the recollection that vengeance belongs to the Lord; second, that we remember that certainty of punishment may accomplish a deterrent purpose, but severity defeats that purpose by making conviction more difficult and by making men worse not better; and third, that in the performance of our duty to society, we remember that because felons must leave prisons as well as enter them, we give society only ephemeral protection unless our correctional methods leave them better than they were when we took them.”<sup>53</sup>

Experience will demonstrate that in considering motions for suspended sentence that (1) time should elapse between the making of the motion and its determination; (2) a report should be filed by the Probation Officer to be preserved with the papers of the case; (3) the period of probation should be definite and the conditions thereof general; (4) some formality should be enforced in the granting, with the Probation Officer present and the defendant made to know he is under a supervisory type of discipline; (5) if execution of sentence is suspended, then the quantum of punishment fixed should be reasonable, not greatly increased because suspended.

Revocation requires the presence of the probationer, or due process in his absence. As Mr. Justice Cardozo points out in *Escoe v. Zerbst*, the probationer is entitled “to have a chance to say his say before the word of his pursuers is received to his undoing.”<sup>54</sup> Observing this, the discretion to revoke is in most jurisdictions held not reviewable. A case of harsh judgment in South Carolina illustrates that. In *State v. Renew*<sup>55</sup> we find that the defendant on February 19, 1924 entered a plea

<sup>50</sup>8 F. (2d) 759 (S. D. Cal. 1925).

<sup>51</sup>36 F. (2d) 824 (D. C. Mont. 1929).

<sup>52</sup>56 F. (2d) 658 (N. D. Cal. 1932).

<sup>53</sup>Ohio v. Emonds. The full text of Judge Hertz's opinion was published in (1938) 29 J. Crim. L. 427.

<sup>54</sup>295 U. S. 490, 493, 55 S. Ct. 818, 820 (1935).

<sup>55</sup>136 S. C. 302, 132 S. E. 613 (1926).

of guilty to the possession of two Coca Cola bottles of contraband liquor, and had been sentenced to a fine of \$1,000.00 and to serve eight months on the public works. Upon payment of \$50.00 the balance of the sentence was suspended. Defendant was arrested at his home on January 10, 1925 for the possession of other contraband liquor. At the February Term the suspended sentence was revoked. In October, 1925 defendant was acquitted in Federal Court for the liquor found in his possession on January 10, 1925, and on February 15, 1926 was acquitted in the State Court for possessing the same liquor. The revocation was set aside, the Appellate Court holding the probationer was entitled to a jury trial on the question of revocation. In *State v. Gleaton* the *Renew* case was overruled, in this language:

"The reason for the reversal [of the *Renew* case] is so apparent that no comment is necessary, and it is also perfectly clear why the Court should have given utterance to that portion of the opinion upon which appellant here relies."<sup>56</sup>

The reasoning is that the defendant is not compelled to accept a suspended sentence but having done so he must obey the conditions or suffer the consequences.<sup>57</sup>

But the Appellate Court reserves the right to scrutinize the conditions imposed. In *Jones v. Commonwealth*<sup>58</sup> some high school boys were charged with throwing rocks at a dwelling, adjudged delinquent in the Juvenile Court, and placed on probation conditioned among other things to attend Church and Sunday School for one year. The Appellate Court held that this requirement violated the constitutional guaranty of religious freedom.

## CONCLUSION

Summarizing, we find that the trial court must (1) apply the general rules of law, both of substance and of procedure, to (2) his observation of the parties in question and (3) his determination of the issue joined, and (4) his general knowledge of local conditions, plus (5) a searching inquiry into the honesty of statements made of positions taken, and (6) without unconscionable advantage to either party to the controversy (7) bring about a determination of the issue joined, on the true merits of the controversy.

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<sup>56</sup>172 S. C. 309, 311, 174 S. E. 12, 14 (1934).

<sup>57</sup>See *United States v. Burns*, 287 U. S. 216, 53 S. Ct. 154 (1932); *State v. Marsh*, 225 N. C. 648, 36 S. E. (2d) 244 (1945); *State v. Cowdry*, 73 N. D. 630, 17 N. W. (2d) 900 (1945); *Slayton v. Com.*, 185 Va. 352, 38 S. E. (2d) 479 (1946).

<sup>58</sup>185 Va. 335, 38 S. E. (2d) 444 (1946). See Note (1946) 4 Wash. & Lee L. Rev. 35.

Reviewing the cases in which it has been held that judicial discretion has been abused we can find three general conclusions as contributing factors: (1) failure to observe the rules of law applicable; (2) an undue sense of time; and (3) extra-judicial views of the trial judge.

Failure to observe the rules of law applicable is in effect just another case of reversible error, an erroneous decision or a judgment rendered in violation of law. It was so classified in *Griffin v. State*<sup>59</sup> and in *DeForge v. R. R. Co.*<sup>60</sup>

*Jerrell v. N & P. Belt Line*<sup>61</sup> and *Smith v. Commonwealth*<sup>62</sup> both show that undue haste, particularly in the light of hindsight, is not to be countenanced at the expense of substantial justice.

The extra-judicial views of the trial judge are not so definitely expressed but are not hard to trace. *Ex Parte Chase*<sup>63</sup> and *State v. Cummings*<sup>64</sup> both reflect the emotional upheaval of the War Between the States. *State v. Renew*,<sup>65</sup> *Snarr v. Commonwealth*<sup>66</sup> and *Ramey v. Commonwealth*<sup>67</sup> were products of the Prohibition Era when the whole county was divided into two factions, "Wet" and "Dry." Sufficient time has now elapsed to give a perspective that the harsh actions reversed on those cases reflected the "Dry" philosophy of the judges.<sup>68</sup> The trial judge in *Jones v. Commonwealth*<sup>69</sup> doubtless thought it would be wholesome for the boys to go to Church and Sunday School (and maybe it would), but when he brought his religious views into his judgment he was deemed to have invaded constitutional limitations.

In conclusion it may be said that the exercise of judicial discretion in these times affords an opportunity (in the language of Dean Pound) "for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument."<sup>70</sup>

<sup>59</sup>12 Ga. App. 613, 77 S. E. 1080 (1913).

<sup>60</sup>178 Mass. 59, 59 N. E. 669 (1901).

<sup>61</sup>See note 29, supra.

<sup>62</sup>See note 30, supra.

<sup>63</sup>See note 1, supra.

<sup>64</sup>See note 2, supra.

<sup>65</sup>See note 55, supra.

<sup>66</sup>See note 45, supra.

<sup>67</sup>See note 49, supra.

<sup>68</sup>In *Boorde v. Com.*, 134 Va. 624, 114 S. E. 731 (1922) a judgment of contempt was enforced for public characterization of a judge as a Wet Judge and the opinion contains an analysis of the terms Wet and Dry.

<sup>69</sup>See note 58, supra.

<sup>70</sup>Pound, *Mechanical Jurisprudence* (1908) 8 Col. L. Rev. 605, 609.

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