POWER OF A MISSOURI COURT TO INSTRUCT THE JURY IN A CRIMINAL CASE THAT IT MAY RETURN A GENERAL VERDICT OF GUILTY AND PERMIT THE COURT TO FIX THE PUNISHMENT

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There has been much discussion within the last few years among those interested in the reform of the criminal practice in Missouri, of the wisdom and practicability of compelling the jury in a criminal case to perform the function of fixing the punishment of the defendant in the event his guilt is established. This double duty imposed upon juries, namely, to determine the question of guilt and then to fix the punishment if guilt is established, often results in the complete disagreement of a jury who are in entire harmony upon the actual guilt of the defendant.

It is the practice in the federal courts and in many states to permit the jury in a criminal case to pass upon one issue only, namely, the guilt or innocence of the defendant; and in the event of a verdict of guilty, it then becomes the duty of the court, trained by education and experience, to fix the nature and amount of the punishment.

Curiously, in Missouri there is a statute which permits a jury agreed upon the guilt of the defendant, but in disagreement upon the punishment to be inflicted, to return a general verdict of guilty and report its inability or failure to agree upon the punishment; and in such event the court will determine and fix the punishment. This law has been upon the statute books for almost a century. It is an Act approved January 12, 1831, and found in Laws of Missouri, 1824-1835, page 221, reading as follows:

> In all cases under the provisions of this Act, where a jury upon the trial of any indictment, shall find a person guilty of any crime or misdemeanor, and fail to agree on the amount of punishment, the person convicted shall receive, then and in that case it shall be the duty of the Judge to assess the penalty or punishment, as is now provided for by law.

This Act was later amended slightly and in R. S. Mo., 1835, Article II, Sec. 4, page 493, it is provided:

> Where the jury find a verdict of guilty, and fail to agree in the punishment to be inflicted, or do not declare such punishment

> by their verdict, or assess a punishment not authorized by law, and in all cases of judgment on confession, the Court shall assess and declare the punishment, and render judgment accordingly.

This section remained upon the statute books unchanged from 1835 until 1925 and the identical wording of the 1835 law is contained in Sec. 4048, R. S. Mo. 1919.

In 1925 the Legislature slightly revised the wording of the statute, retaining, however, the same meaning. Sec. 4048, R. S. Mo. 1919, was repealed, and a new section with the same number became the present law, which is:

> Where the jury agree upon a verdict of guilty but fail to agree upon the punishment to be inflicted or do not declare such punishment by their verdict, the court shall assess and declare the punishment and render judgment accordingly. Where the jury finds a verdict of guilty and assess a punishment not authorized by law, and in all cases of judgment by confession, the court shall assess and declare the punishment, and render judgment accordingly. Laws of Missouri, 1925, Sec. 4048, page 197.

The purpose of this article is to suggest an instruction to be given by Missouri *nisi prius* courts, informing a jury in a criminal case *in the first instance* of the provisions of this statute, so that they may be informed of their rights in this regard when they retire for their deliberations. Despite the fact that this law has been upon the statute books for at least ninety-six years, almost no juryman and few lawyers, not identified with the practice of criminal law, are aware of its existence. It is the invariable practice that juries leave for the jury-room instructed by the court to fix the punishment if they determine that the defendant is guilty; and they are given no alternative by the court except to perform this double duty or acquit the defendant.

The writer suggests that an instruction advising the jury of the law and at the same time impressing upon them the duty to fix the punishment should they be able to agree upon it, would produce beneficial results. Such an instruction, it is suggested, should be given in the first instance along with the other instructions, so that when the jury retired they would be completely advised of all of the law governing the case.

To reduce this suggestion to concrete terms, the following instruction is proposed:

> The Court instructs the jury that if, under the evidence and under the other instructions given you by the Court, you find the

> defendant guilty herein, then it is your duty under the law of this State, to determine and to assess the punishment which the defendant herein shall suffer; but the Court further instructs you that if, under the evidence herein and under the other instructions given you by the Court, you find the defendant guilty herein, but you are unable to agree upon the punishment to be assessed, then you shall so state in your verdict, and in that event, but not otherwise, the Court will assess the punishment.

It is not intended that this proposed instruction could not be phrased equally as well, and perhaps better, in a number of other ways. The above proposal is merely an attempt to state the contents of the statute and the duties of the jury in a simple, succinct manner for their guidance. In the writer's investigation of the adjudicated cases, he finds no decision which directly passes upon an instruction of this character, advising the jury of their duty under the law and at the same time informing them that there is an alternative in the event an agreement is reached upon the question of guilt but none upon the punishment to be inflicted.

The earliest reported case upon this question is *Fooxe v. State,* 7 Mo. 251, decided in 1842 and later overruled. In this case the defendant was tried upon an indictment for grand larceny. The jury retired to consider their verdict, and on the following day returned into court and said they could not agree. After some interrogation of the jury, the court instructed that they had the right and authority to return a general verdict of guilty, without assessing any punishment. This instruction was promptly objected to by counsel for the defendant and upon appeal the Supreme Court held it to be error. The opinion is based upon the provisions of R. S. Mo. 1835, p. 493, *supra,* and the Court said:

> This law imposes on the jury the duty of inflicting the punishment, nor has the court any right to fix the punishment, unless the jury disagree, or do not by their verdict inflict any punishment. But the Court in this case, told the jury in substance that it was no part of their duty, and they had authority to bring in a general verdict. Whereas the power of the court is merely contingent, not primary, and only to be exercised where a failure of duty, or a disagreement on the part of the jury requires its exercise.

In *State v. Emery,* 76 Mo. 348, the defendant was indicted for assault with intent to kill and was found guilty. The prosecutor in his closing argument told the jury, "If you find him guilty and cannot agree as to the term of punishment you ought to inflict, you can return

into this court this general verdict of guilty, and His Honor, the judge, will fix the punishment." The Supreme Court, through Judge Sherwood, held this not to be error, though it cited the Fooxe case. In so holding Judge Sherwood stated:

> Nor do we discover any ground for reversing the judgment because of the concluding remarks of the prosecuting attorney. If every random or hasty remark of such an official, made in the heat of debate, is to be tortured into a reason for reversing a judgment of conviction, few such judgments would stand, and few punishments be inflicted. Besides, the prosecuting attorney in telling the jury that if "you find the defendant not guilty we have no appeal, and your verdict ends the case so far as the State is concerned," was simply telling the jury the truth; what each juror doubtless knew before the statement was made. Has it come to this, that the truth is to be assigned for error in this court?

The jury in *State v. Robb,* 90 Mo. 30, returned a verdict: "We, the jury, find the defendant guilty of the charges under the indictment, but can't agree as to his punishment." The court accepted the verdict and fixed the punishment. Upon appeal the action of the court was upheld.

Among other instructions given in *State v. Gilbreath,* 130 Mo. 500, was one which read: "Should you find the defendant guilty, and be unable to agree as to the punishment that should be inflicted, you will so state in your verdict." This the Supreme Court held was error, citing the Fooxe case. The instruction complained of was given with the general instructions prior to the retirement of the jury for deliberation, and Judge Gantt took the position that the doctrine in the Fooxe case should be sustained. In the Fooxe case, however, the jury had reported their disagreement, whereas in this case the instruction was given in the first instance. However, the instruction in the Gilbreath case, even if it were to be considered good law today, does not meet the suggestion of the writer, in that there was absent the positive admonition to the jury that their plain duty was to fix the punishment, provided they found the defendant guilty. It does not appear that the Court considered the Emery case in coming to its conclusions, and it is significant that the Emery case is not cited in the briefs before the Court.

The doctrine of the Fooxe case is severely shaken in *State v. Hubbs,* 294 Mo. 224. Therein the jury could not agree in their deliberations, and the court was then informed that the guilt of the defendant had been agreed upon but that the jury could not agree as to the punish-

ment, and inquiry was made of the court whether that sort of a verdict could be returned by the jury. The court apparently advised the jurors they could return a verdict in such form.

The opinion of the Supreme Court through David E. Blair, J., reviews all of the earlier decisions and holds:

> Whatever may be said of the soundness of the rule announced in the Fooxe case on the facts therein, the facts in this case do not call for the application of that rule. There, as here, the jury agreed on the question of guilt and disagreed on the punishment. But in the Fooxe case the jury did not ask for further instructions, and did not even inform the court of the character of their disagreement. Here the jury not only informed the court of the exact nature of their disagreement, but also inquired whether they could return a verdict without fixing the punishment. Section 4047, Revised Statutes, 1919, which is in all respects identical with Article VII, Section 3, Revised Statutes 1835, provides that where there is any discretion or alternative concerning the kind or extent of the punishment, the jury may assess and declare the punishment and the court shall render judgment accordingly. Section 4048 provides that when the jury finds a verdict of guilty and fails to agree on the punishment, then the court shall assess and declare it.
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> It is the primary duty of the jury to assess the punishment. To permit the court in the first instance to point out the way for the jury to avoid its duty in this regard, as was done in the Gilbreath case, may well be regarded as contrary to the policy of the law. But in the absence of a mandatory provision of the statute that the jury shall assess the punishment, no good reason appears why the court may not tell a jury, agreed upon guilt but unable to agree upon the punishment and in response to inquiry from the jury, that such verdict will be received. Is it error to tell the jury what the law is when it makes such inquiry? We think not. If the jurors had experimented by returning such a verdict on their own motion, they would have learned just what the court told them when they asked about the law, to-wit, that their verdict was perfectly legal and entirely acceptable in that form. . . .
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> We think the rule laid down in the Fooxe case should not be followed here. We do not say the court should be permitted to instruct the jury in the first instance that it may agree upon a verdict of guilt and make no finding as to punishment, and thus avoid its primary duty. But where, as here, the jury has agreed upon the guilt of the defendant and has disagreed as to the punishment and reports such disagreement to the court and asks for further instructions, it is not error for the court to tell the jury what

the law provides, to-wit, that it may agree on the guilt of the defendant and leave his punishment to the court.

It will be noted that the Court did not specifically hold that to instruct the jury in the first instance of the provisions of the statute would be error, but it is evident that such an instruction would have been looked upon by the Court with disfavor in 1922, when the opinion was rendered.

Two years later, in 1924, the Fooxe case is clearly overruled by the Supreme Court in *State v. Levan,* 306 Mo. 507, the opinion being written by Higbee, Commissioner. Therein, after the jury had been out about eight hours, they reported to the court that they had agreed on a verdict of guilty, but could not agree on the punishment to be inflicted. The court then prepared a form of verdict which was returned, finding the defendant guilty and stating, "we are unable to agree upon the punishment," and the court thereupon fixed the punishment. The Supreme Court, sustaining the action of the trial judge, discussed the statute and held:

> The Court did not instruct the jury that it was not a part of their duty to assess the punishment, but instructed them that they should do so if they found the defendant guilty. The statute was enacted to avoid a mistrial if the jury were unable to agree on the punishment by empowering the court to assess the punishment in that contingency. Why should not the jury be distinctly advised of this wise provision of the statute in order that a mistrial might be avoided? *This very case affords an illustration of the propriety of so instructing the jury in advance.* (Italics ours.) They reported they had disagreed. Had they known in advance of the statute they could have governed themselves accordingly. They were presumed to know the law, but that is a mere legal fiction. When the judge learned the cause of disagreement was not as to the defendant's guilt but as to the punishment, the form of verdict was submitted that enabled the jury to act in accordance with the statute. It cannot reasonably be said that this was a suggestion on the part of the court to return such a verdict, in view of the report the jury had just made. The law is framed for men of plain common sense and should not be emasculated by refined construction.

The Supreme Court here points the way for an instruction advising the jury of this little known statute to be given in advance, in order that the knowledge of the law may be used by the jurors in coming to their conclusions. It is idle to presume, as the Court points out, that the jury knows the law governing the case, for if

that were a legal presumption and it were held error to so instruct the jury, all instructions would likewise be error. It is not unusual that a jury disagrees and is discharged, when the sole issue of disagreement was not the question of guilt, but the measure of punishment. In the majority of such instances, the court does not learn of the situation until after the jury is discharged, and then, of course, it is too late to instruct the jury upon the law applicable. In the absence of a mandatory statutory provision denying the court the right to tell the jury in advance what is the law, it is difficult to see a good reason why the court does not have that power.

The instruction suggested aims to meet the objections of Judge Blair, in that it points out to the jurors their plain duty if they find the defendant guilty, but it does show them the way to bring in simply a verdict of guilty if they cannot agree upon the question of punishment.

In civil cases a co-relative instruction is almost invariably given by the court on its own motion, namely, that nine or more of the jurors concurring may return a verdict. This has been upheld by Supreme Court in many cases, and that Court has said that since the validity of that law has been established "the court committed no error in giving the instruction on its own motion." *Taussig v. Railroad,* 186 Mo. 269, l. c. 280.

The instruction suggested herein merely states the law; it follows the suggestion in the Levan case that an instruction of this character might with propriety be given the jury in advance.

The Supreme Court has rapidly moved forward within the last decade in interpreting the criminal laws in the light of progressive opinion, and to do substantial justice to the State as well as to the defendant. Shall it now be said, as vigorously announced by Judge Sherwood more than a half-century ago: "Has it come to this, that the truth is to be assigned for error in this court?"

It is stated in the *Missouri Crime Survey* published in 1926, page 182, that there is a decided prevailing sentiment among judges and prosecutors in the state that the question of the guilt or innocence of the defendant should be decided by the jurors and that the punishment should be fixed by the court in all felony cases.

If the suggestion made by the writer is sound, no further legislation upon this subject would be essential. If the jury are all agreed upon the measure of punishment, society will not suffer in the long

run by the verdicts returned, but there need be no strained compromise or entire disagreement of juries where guilt is certain and the problem of punishment proves too difficult for the jury to solve.

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