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INSTRUCTIONS TO JURIES: A SURVEY OF THE GENERAL FIELD*

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THE JUDGE

Examination of the subject of instructions to juries, from the standpoint of fundamentals, should begin with the author of instructions, the judge himself. An incompetent judge shows at his worst in charging a jury. The elimination of judicial incompetence is, in the main, a problem of selection. In Missouri, you have taken a step in respect to judicial selection which has focused upon you the spotlight of legal attention the country over. It is the prevailing view of our profession that you have adopted what, so far as we can now see, is the best plan thus far devised for application to the judicial systems of those states wherein judges are elected. We are all watching you and wish you success.

THE SUBSTANTIVE LAW

The next step in consideration, it is submitted, should go to the substantive law itself. It is the stuff of which instructions are made. So far as possible, all hindrance to its understanding and application by jurors should be removed.

There, in my judgment lies an important ingredient of today's subject. It is an obstacle which is insurmountable without substantial changes in substantive law. A serious trouble with the latter, for juries, is that too many of its rules lack realism and are widely out of adjustment to the accomplishments of progress. Some such rules never had more than artificial or fictional basis.

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At too many points, present in many ordinary run of court lawsuits, American common law is just impractical, if not unjust, from the realistic, every day, common sense viewpoint of intelligent jurors.

Of that, there is no better illustration than the doctrine of contributory negligence. Every lawyer of experience must know, as does every judge who has presided over or reviewed the trial of many negligence cases, that jurors are constantly applying the rule of comparative, even though they have been mandatorily instructed concerning that of contributory, negligence, and do not know that there is such a legal notion as that of the comparative rule.

The point is that the doctrine of contributory negligence in very many cases is just plainly out of line with the demands of simple justice. Jurors refuse as matter of conscience to deny all recovery to a badly hurt plaintiff, whose negligence in comparison with that of the almost unhurt defendant is relatively slight. Even though they see plainly that the plaintiff was somewhat careless, and that the want of care on his part has perceptibly contributed to the result, yet, perceiving that the main fault lies with the defendant, they justly hold that the latter shall pay a substantial part of the resulting damage.

An anachronism of our law, in some states, is the rule that, however formally the parties may proceed, a creditor cannot, without new consideration, forgive his debtor part of a liquidated debt, and upon payment of the residue acquit him finally. That rule is so absurd that, however solemnly it is given a jury, they are very apt to ignore it, and cannot be much blamed for doing so.¹ The rule has been changed by statute in at least ten states. Being a judge-made rule (it is said to have had its ancient source in a reporter's error rather than a decision), no vested rights depending on it, judges are just as competent to get rid of it is any legislature. The sooner they do so, the better it will be for all concerned, particularly for the law itself.

It is fundamental in our law that liberty of contract shall be unrestrained except as established public policy and statute impose limitations upon it. Yet it is the rule that a creditor cannot release one of several joint debtors without automatically releas-

1. It was "discarded" in *Rye v. Phillips* (1938) 203 Minn. 567, 282 N. W. 459.

ing all the others. The theory is that by release of one he discharges his cause of action against all. But, will you tell me please, why it is not competent for the creditor in such case to release one of his joint debtors, and at the same time expressly reserve his cause of action against the others, with the only result that his recovery against the latter is subject to reduction by the amount received from the one acquitted of further liability?

A release is a contract. There is no statutory law against a release of the sort just supposed. There is nothing in it against public policy. The policy of the particular case, appraised from any standpoint, will more often than not favor such a contract. Yet our substantive law forbids it.

It doesn't stop there. It legitimizes that otherwise illegitimate offspring of legal ingenuity known as the covenant not to sue.

In some future time, it may be safely predicted, that curiosity will be labeled as a museum piece, preserved in the alcohol of legal history, shelved and catalogued as one of the excrescent fungi which formerly disfigured our law.

Suppose the creditor has covenanted not to sue one of his joint debtors and, in violation of that covenant, he sues them all. According to authority, the covenantee cannot interpose the covenant as a defense in that action. He is relegated to the remedy of an independent suit on the covenant. There is a prime example of the circuitry of action which, if a judge has occasion to instruct concerning it, he will have difficulty in making clear to a jury. And, if he does make it clear, you may imagine just how far jurors will go in approving it and to what extent their natural disapproval will tempt them to ignore and disobey the instruction.

However unintended by the releasor, the effect of his release of the joint tortfeasor is given this anomalous reach. A is in his person the victim of a tort committed by B. Without negligence, A employs and is treated by Dr. X. In the course of that treatment, A's injury is much aggravated by the malpractice of Dr. X. In the meantime, A has settled with and released B. The law is that he has thereby also released the doctor, albeit A intended no such result and there is no reason in either sense or ethics why that result should follow.

Under the lash of precedent, or the fear of it, I have written

one of the pieces of judicial nonsense on that subject which mar the reports.²

The law's view of release of one of several joint debtors, particularly as applied in such cases as that now supposed, illustrates the law's capacity to place pitfalls in the path of the unwary. Jurors have sympathy neither for them nor for the unrealistic and unjust rules from which they result.

I hope you will not think that these references to substantive law, and what seems to me to be the need for some drastic changes in it, constitute a digression from the topic. I cannot so consider them. If you do, my rejoinder is that instructions to juries can be made satisfactory, workable and efficacious only in proportion as they give to juries rules, against which the conscience of the ordinary man and woman will not be in stubborn and ethically well-founded rebellion.

If you care for an exercise in exact expression, try your hand at writing an instruction which will make plain to a jury the present law of joint tort feasons and release as it applies to our hypothetical case of A, B, and Dr. X.

When that is done, fancy yourself a layman and a juror. Then inquire of yourself concerning the justice of the release of Dr. X, forced on the unwilling A, against both his intention and plain, ethical right. Next ask yourself just how eager you would be, as a juror, to avoid the release of B, on any ground at all.

Finally, if you care to go on, examine the numerous judicial refinements of the doctrine of consideration in the law of contracts. Ponder the extent to which "valuable consideration" is overworked as a test of actionability. Weigh its propensity to prevent obligation where obligation is intended and, in practice, should result. In doing so, remember that "consideration" is peculiar to English and American common law and wholly repudiated by every other.

So long as our substantive law insists upon rules which, in many cases, jurors will stubbornly refuse to apply, there is little use in talking about the precise form of the instruction which gives to them the objectionable doctrine.

The historical record of obstinate jurors is not all bad. London has, or until recently, did have, a well deserved monument to one group of them.

2. *Smith v. Mann* (1931) 184 Minn. 485, 239 N. W. 223.

PRESUMPTIONS

One wide and oft-used avenue for a jury's disobedience of the law of a case is an instruction giving them liberty to indulge in presumption. A subject which has filled volumes of legal treatise and still is in process of settlement by, and remains a topic of pronounced disagreement in, the profession will seldom be correctly appraised and applied by a jury.

There is general and increasing agreement that presumptions should not be given to the jury. From that statement should be excepted, for criminal cases, the presumption of innocence, which is in a category by itself. Whatever theory of presumptions is accepted for their treatment in the law of evidence, they are in no proper sense evidence, and so there should be no attempt to instruct concerning them as presumptions.

There is some authority that presumptions are evidence. The weight of judicial conclusion and the reason of the matter are the other way.³ If a presumption is not evidence, why should it go to the jury for any purpose? A negative answer is compelled if the presumption is given its proper weight and no more. The function of a presumption, as shown first by Thayer and later by Wigmore,⁴ is solely to control decision on a group of unopposed facts. Decision in such case is controlled by a rule of law. That is the true and limited function of any presumption other than those which are conclusive. It controls rather than permits decision.

The rebuttable presumption is properly appraised as a mere procedural device compelling decision on certain unopposed facts, or for allocation of the burden of going on with evidence. That view has long been widely held and now has the support of preponderant authority. Recently it was adopted by the Supreme Court of the United States.⁵

There is authority authorizing submission of a presumption to aid the jury if they find the evidence in doubt or equipoise.⁶ But in such case, is it not the jury's duty to find for the negative, the

3. Annotation, 103 A. L. R. 185.

4. Thayer, *Preliminary Treatise on Evidence* (1st ed. 1898) 339; 5 Wigmore, *Evidence* (2d. ed. 1923) 449-453, secs. 2490-2491.

5. *New York Life Ins. Co. v. James* (1938) 303 U. S. 161.

6. Annotation, 103 A. L. R. 185, 191. This whole discussion of presumptions is but a repetition of what is said in *Ryan v. Metropolitan Life Ins. Co.* (1939) 206 Minn. 562, 289 N. W. 557, discussed in Note (1940) 24 Minn. L. Rev. 651.

affirmative not having produced that preponderance of evidence necessary for decision in its favor? To instruct them that by use of a presumption they may tip for the affirmative a scale, otherwise in balance, is to allow them to base decision upon something which is not evidence. There being no legitimate purpose to be served by an instruction allowing a jury to give weight to a presumption as of law, in addition to the facts upon which it is based, it seems logically improper and practically indefensible.

The jury gets all the facts. Theirs is the *exclusive* function of reasonable inference therefrom. In addition, they should not get, ready-made, a deduction to which they are authorized to attach independent and added probative value. To allow that would be to assign evidentiary value to something which is not evidence.

Where a presumption prevents a case from going to a jury, it is because the facts under the law permit of but one decision. If the issue reaches the jury, it is because the evidence will support a verdict either way. That much the judge decides as matter of law. In doing so, he determines no issue of fact. All he does is to say as matter of law that there is an issue of fact. That being so, it should go to the jury on the evidence for their own inferences, to be drawn without artificial aid of any suggestion by the judge that the law has one, ready-made, to which they may give independent probative value.

In my own view, there is one situation wherein it would not be error for a judge to instruct, not that any presumption should control, but that on a stated condition the jury should make a definite finding. To illustrate: The evidence of suicide may consist *wholly* of testimony which the jury may discredit. In such a case, it would seem proper to charge them that, if they did reject all such evidence it would be their duty under the law to find the death accidental. That would be by reason of the presumption against suicide, as rule of law, operating on unopposed facts. The discredited evidence rejected, the presumption is brought into operation, not as evidence but as law controlling decision. It may be suggested in passing that a judge trying a case without a jury should use the ordinary, rebuttable presumption in just that fashion.

In proportion as rebuttable presumptions, other than of innocence, are not mentioned to a jury, will their task be simplified and the probability of error and unjust verdict be lessened. To

the extent that juries are given liberty by instructions to use presumptions as evidence, they are invited to arrive at a verdict by processes other than that of impartial appraisal of real evidence.

JURORS

I cannot agree with those who assume that all jurors are "dumb" or oblivious to the solemn obligation of their oaths as jurors. My memory recalls many jurors who were anxious not only to hear, but also to understand and apply, every word concerning the law of the case given them by the judge.

In my personal experience as a trial lawyer, I have had convincing evidence (it was sometimes devastating) that the charge of the judge settled the whole matter for the jury. Furthermore, some of us in Minnesota think that the ladies who serve on our juries have for the most part been inclined, more than their masculine associates, to apply the law exactly as given by the judge.

More comment along this line would lead into the related problem of selection of jurors, with which we are now only incidentally concerned. My whole submission postulates that jurors are selected with reasonable care; that those who are obviously unfit are rejected; and that the result is a jury of at least average intelligence and normal disposition to abide by their oaths, and in consequence do their duty as sworn triers of fact in a court of justice.

WRITTEN AND ORAL INSTRUCTIONS

Your kind indulgence is now invoked and will be needed. I am but a provincial judge, all my experience both as advocate and on the bench much confined to practice in a state which in all respects (other than college football) is at least a generation nearer frontier conditions than the great commonwealth in which it is my privilege now to appear. Circumstance compels me to draw upon that experience for such narrative and conclusions as are now offered. To the extent that they meet with your disapproval, you will appreciate and allow for the measure in which they are the result of the limitations imposed by my confining matrix of experience and ability.

In Minnesota, we have long been the advocates of "written instructions." But the fact is that we provincials at the headwaters of the Mississippi simply do not know what written instructions are.

In our district, corresponding to your circuit courts, the record of a jury trial, including the charge, is stenographically recorded, and transcribed if there is an appeal. Juries may and occasionally do return to the court room asking to have some portion of the charge read again, or for additional instructions. If given, a record is made. Counsel need not be present. If they are not, their right to except is saved.

Our experience is that the trial judge who reduces his instructions to writing, a process conducive to care, is in the long run more apt to escape reversal than the one who does not resort to that labor before charging the jury.

It is not true that mere "writing maketh an exact man." But careful writing, with rewriting until the wanted expression is as plain and in as few words as possible, does characterize and tend to produce the exact lawyer or judge.

My own practice was begun before the Honorable Calvin L. Brown, then on the district bench in western Minnesota, where he served for a long time. Later and for a longer period he was Chief Justice of the Supreme Court of Minnesota. Always, without exception, he wrote his charge in longhand. He then read it to the jury, impressively but with no undue stress on any of its parts. If the occasion seemed to require, he included appropriate admonitions, as distinguished from instructions.

He was never reversed for an error in a charge. What is more important, he seldom was confronted by an appeal wherein error was assigned as to any portion of his instructions. (That a trial judge is seldom challenged by appeal is a much greater tribute to the quality of his work than whatever record he may make in respect to reversal or affirmance.) I have always thought, and those who knew Judge Brown agree with me, that the admirable record of his instructions was due to the extreme care with which he reduced them to writing. If need be, he would let jurors and counsel wait while he put his charge in the precise form in which he thought it should be.

That is what, "up north," we have always considered the written charge, as distinguished from the oral one. That notion is erroneous, a confession made now so that none of you may feel under any compulsion to prove the error.

From your standpoint, all our instructions are oral. But they are stenographically transcribed and the record made as com-

pletely and accurately, given a competent reporter, as though they had been in the form of your written instructions.

With us, the arguments of counsel come before the charge. I have seen many a bombastic advocate completely deflated by a dignified judge, speaking accurately the language of a mandate of law.

REQUESTED INSTRUCTIONS

It is our permissive but not required practice to submit, at the close of the evidence and before arguments of counsel, written requests for instructions. Ordinarily, that is done only in the unusual or complicated case. But counsel who on appeal assigns as error an omission to instruct on any point is in hard luck if he has not requested a correct instruction concerning it.

In charging a jury, Minnesota judges are apt to be altogether on their own. They know it and conduct themselves accordingly.

At that point, the Supreme Court in Minnesota has had occasion to apply some corrective influence. We have never reversed because a trial judge, in the course of his charge, said that certain instructions were given at the request of one party or the other. But it is safe to say that now only a novice on our bench would make the mistake (we would so consider it) of giving an instruction with any intimation that it was at the request of either party.

For what it may be worth, here, in the words of Mr. Justice Loring, is what I hope may be the last utterance of our court upon this subject:⁷

Before passing to the consideration of this charge, we wish to express our disapproval of the action of some trial courts in announcing, as was done in this case, that any portion of the charge is given by request of either party. A requested charge should be given only when the trial court approves of and adopts as its own the law contained in the request, and it should preferably be incorporated in the appropriate part of the body of the charge so as not to destroy its symmetry.

Your supreme court is of another view. An assignment of error, predicated on a judge's stating to the jury that he gives stated instructions at the request of a party to the case, is here considered "simply frivolous."⁸

7. *Carlson v. Sanitary Farm Dairies* (1937) 200 Minn. 177, 273 N. W. 665.

8. *State v. Gatlin* (1902) 170 Mo. 354, 70 S. W. 885, 891.

The office of instructions is to declare the law of the case. It is given to jurors because it is the law, and not because it is the idea of the law entertained by partisan advocates. That being so, what justification can there be, in the reason of the matter, for an intimation from the judge that what he is saying to a jury concerning the law is anything other than his own statement of it?

In proportion as instructions are permitted to have any, even the slightest, appearance of coming from a source other than the court, may they not take on for the jury the aspect of argument rather than law and by so much invite disobedience or disregard? In charging a jury, the judge speaks with sovereign authority. *Pro tempore*, he is oracle of the law. Why let it appear that what he says of it has any other source or a lesser sanction than that of sovereign law?

One question more. However much one may advocate the common law, adversary scheme of jury trial, must he not admit that when the evidence is in and the arguments of counsel submitted, it is time for a neutral spokesman of the law itself to take over and speak in terms of impartial analysis and direction? At that point, certainly, the adversary features should end and, from there on, the proceeding be, in process and result, neutral and impartial. It cannot be that, or at least is likely not to be, in proportion as anything of the earlier and adversary elements are permitted to remain.

It is respectfully submitted also that, in proportion as judges are permitted to look to counsel for both form and substance of instructions, they may on occasion be tempted to shirk the responsibility which is theirs. On the other hand, by the measure in which responsibility for instructions, not only sound in substance but also simple and accurate in form, is put exclusively upon the mental shoulders of judges, will they have added incentive to maintain the ideal which the law sets for them. A judge's habitual dependence upon counsel for the whole, or even much of his instructions, will not stimulate his juridical metabolism.

ADMONITIONS AND COMMENT ON EVIDENCE

Admonitions, as distinguished from instructions, have their proper place in many a charge. They are not only useful but frequently necessary to proper understanding by jurors of their

duty. No judge should be loath to resort to them in a proper case. That is particularly true where he is dealing with a panel, some of the members of which are having their first experience as jurors.

Beyond that, I am utterly out of sympathy with the notion that a judge is guilty of impropriety, to say nothing of reversible error, in commenting upon evidence so long as he says that it is for the jury to determine the truth, and makes it clear that they will fail in their duty in proportion as they omit to do so by the use of their own faculties and independent opinions rather than those of anyone else, counsel or judge.

No one may reasonably suggest that it is not the province of the judge clearly to define the issues. Not only that, it is his duty fearlessly, if the evidence has made an issue one of law, to say so and himself decide it accordingly, telling the jury that, whether they like it or not, they must take his decision and abide by it in their consideration of the other issues.

Too often, reversals come because where several issues are submitted to a jury, one of them either should not have been submitted at all, because it is out of the case or should have been disposed of by the judge as one of law.

Beyond all that, there is a broad area wherein the judge, more experienced than any juror as an appraiser of evidence, may go far in assuring a just result by appropriate and wholly legitimate comment on evidence. In proportion as many of our states enforce a different rule, it is my deferential submission that they are in error, and that by so much they have amended the common law rules of trial by jury to an undesirable extent, one which in many cases has spelled disaster for justice itself.

Either a judge should be competent to discharge the common law duties of his office, or he should not occupy it.

One does not hear any other than sporadic criticism of our federal district judges concerning their comment on evidence while instructing juries. And when you do find any, investigation will disclose, nine times out of ten, that it comes from justly worsted counsel.

I have known judges who on occasion have abused their power to comment on evidence. One reversal for such an abuse is ordinarily enough to prevent its recurrence. In these days an added remedy is becoming available. I refer to an integrated and class conscious bar, to lawyers as officers of courts, inclu-

sively organized to protect, and on all proper occasions to assert, their own rights as such officers. With a bar fully integrated and alert both to its rights and its duties, I cannot see how any state judge, even though his tenure be for good behavior, would much or long permit himself to overstep the bounds of propriety in commenting on evidence.

In that connection, the judicial council is not to be ignored. If it performs properly its duty as inspector general of the administration of justice, no judge will be guilty of much repetition of impropriety. It has in its hands the weapon of publicity. It will speak with authority. In cooperation with an integrated bar, its corrective process should be quick and efficient.

The greatest evil today, in our courts, is perjury, too often both obvious and successful. The most efficacious remedy is prosecution and condign punishment. No judge, convinced that provable perjury has been committed in his presence should hesitate for a single moment after verdict to instruct the prosecuting attorney to investigate. There will be little perjury before a judge with a reputation for that sort of swift action.

The next best method of combatting perjury is by proper and timely comment on evidence by the trial judge. His errors are susceptible of correction. Those of the jury too often are not.

IN CONCLUSION

Before this audience, it is almost supererogation to stress the need for putting instructions into easily understandable English. It will be such in proportion as it is orderly and simple. Foreign words or phrases are out of place. Even English words with Greek or Latin roots should give way, wherever possible, to synonyms of Northern European origin. Once, with an upcountry witness, I was having difficulty in getting him to say which of two events was "*prior*" to the other. The trouble lay in that Latin word "*prior*." When its middle English equivalent, "*before*," was substituted, understanding and answer were quick.

A charge is no proper hanger for the ornaments of oratory or classical appendage. Its intelligibility and effect depend to a substantial degree upon the orderly arrangement of its propositions. As Judge Seth Thomas said, in speaking before the Judicial Conference of the Eighth Circuit at Kansas City in January of 1940:⁹

9. (1940) 1 F. R. D .141.

Symmetry is as necessary to legal exposition for easy understanding as it is to literary exposition in any form.

It is in order here to inquire why instructions may not be, and why in practice they are not, standardized in form and substance, to a greater extent than they are. In California it has been attempted, with apparent success, in Los Angeles County.¹⁰

With standardized instructions, a judge should have less trouble than too many seem to have now. He would remain, however, under the same duty by illustration and explanation to make clear their proper application to the facts, as the jury may find them to be.

Lest it be thought that they are ignored, two more factors are mentioned. The first is that appellate courts, insofar as they have not done so, should subject themselves to a self-imposed rule against attenuation of technicality and refinement in finding error. Or if error be present, let them forego reversal by the process of imagining a prejudice which realistic consideration cannot even suggest.

Finally, let us all remember that rules of law must, in expression, be arbitrary and somewhat inflexible. A main justification of trial by jury is its ability to soften somewhat the law's rigor, and to introduce a quality of practical adaptability, not otherwise attainable, to the kaleidoscopic facts of litigation.

After all, are not the two main prerequisites of proper instructions to be found in the competence of the judge and the quality of the law of which he is the voice? With proper attention to them, will not all that is desirable follow as matter of course?

It is so submitted; and that in proportion as stress is placed accordingly will be achieved the ideal for which we strive. If your effort of today is continued and becomes general, the error, if any, will not consist in whatever of failure may disappoint, but in whatever of faulty aim may contribute to such lack of success as there may be.

10. Palmer, *Standardized Jury Instructions Succeed* (1940) 23 J. Am. Jud. Soc. 177.