

INSTRUCTIONS TO JURIES—THEIR RÔLE IN THE JUDICIAL PROCESS

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IN the standard works on instructions to juries one is confronted by a mass of descriptive classes of instructions. There is usually a division into definitions and distinctions, province of the court and jury, abstract and concrete statement, confinement to pleadings and evidence, presumptions and inferences, resolution of issues, commenting on the weight of evidence and cautionary instructions. The case-books either omit the matter entirely or often give so highly strained and inadequate a treatment as to be misleading. At first glance such a method as above outlined seems quite unsatisfactory but as one progresses in analysis the more difficult it becomes to devise an improvement.

Significant is a paragraph in the publisher's preface to one of the late works on the subject:

"The supervising editor, for more than a generation has constantly watched the stream of current decisions which has flowed into the reservoir of reported cases; he has observed the questions debated and decided in these cases; and one thing that has been borne in upon him is the fact that almost one-half of the legal warfare inscribed on the pages in these opinions deals with the subject of the Province of the Court and Jury, and the delimitation of that province in the instructions of the trial judge in the court below. In this stream of opinions he has seen the same case come several times before the same appellate court, indicating tragic consequences in the administration of justice, due wholly to the failure of the trial judge to instruct the jury according to the established law."¹

No one who has observed the prevalence of cases involving instructions will question these observations, though he may wonder just what is an instruction "according to the established law." It is submitted that it is practically impossible to write an instruction

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1. RANDALL, INSTRUCTIONS TO JURIES (1922) iii.

of any consequence as such that could not be subjected to valid criticism as erroneous under the "established law." Similarly it is impossible to correlate the various artificialities of definition and description into a satisfactory body of doctrine. Therefore the object of a paper on instructions may well be to consider their limitations and the art and artifices in the use of them which tend to make such a correlation impossible.

An adequate presentation of the subject requires an examination of the growth of these functions. This will necessitate a sketch of the development of the jury from the standpoint of the use of the attain and fine as early methods of control and their eventual displacement by the more effective procedure of granting new trials.²

Following this historical predicate, the subject will then be divided into:

- I. The Theoretical Function of Instructions to Enlighten the Jury on the Law.
- II. The Function of Instructions as a Method by which Appellate Courts Control Juries and Trial Courts.
- III. The Function of Instructions from the Lawyer's View-Point as Traps for the Courts.
- IV. The Function of Instructions as a Method by Which the Trial Court Maintains Its Integrity.
- V. Procedural Problems Arising as a Result and the Escapes from These Problems.

Historical Introduction

THE origin of trial by jury is unknown to the authorities.³ It is certain, however, that by the time of Henry III in criminal cases it had all the essential features known to us except that the same body sometimes discharged the functions of both a grand and petit jury.⁴ And by the time of Henry VI the requirement of personal

2. The authorities drawn on most extensively are FORSYTH, HISTORY OF TRIAL BY JURY (1852); Thayer's series of articles in (1891-92) 5 HARV. L. REV. (the material here utilized is also found in his PRELIMINARY TREATISE ON EVIDENCE (1899)); BIGELOW, HISTORY OF PROCEDURE IN ENGLAND (1880); and Appendix II of Quincy's Reports (Massachusetts 1761).

3. The Statute of 13 EDW. I, c. 30 (1285) had enacted that the justices of assise should also hold inquests of trespass and other pleas wherein small examination was required and even of more important matters requiring great examination, if both parties desired it.

4. FORSYTH, *op. cit. supra* note 2, at 200. Even this separation had occurred by the time of Edward III. *Id.* at 206.

knowledge on the part of the jurors was the only substantial dissimilarity to the modern jury in civil cases.⁵

That juries were originally bodies of witnesses, probably furnished the dominant factor in attitude for several hundred years. The more or less arbitrary control of them by the judge in earlier days⁶ was as much a matter of course as is today the directing of witnesses to retire to the proper room after being sworn. There could have been no sharp cleavage between law and fact in a country where the testimony consisted of legal conclusions and God was the ruling principle.⁷ As yet no importance was attached to the separation of principle from evidence or to the invasion of respective provinces.⁸ If the jury took upon themselves the peril of a general verdict,⁹ the recourse for dissatisfaction in civil cases was to be found in the attain, wherein a contrary holding by a second jury of twenty-four was proof of the untruth of the first verdict and of the perjury of the twelve who had rendered it.

5. FORSYTH, *op. cit. supra* note 2, at 159, quoting FORTESCUE, *DE LAUDIBUS LEGUM ANGLIAE*.

6. If doubt was entertained by the judge on the verdict, he interrogated the jurors, and if he suspected them of concealing the truth examined them separately. FORSYTH, *op. cit. supra* note 2, at 206, 207. In civil cases he might re-summon them for further questioning. *Brac. N. B. II*, Case 887 (1232); *Id.* III, case 1226 (1237).

7. "You shall tell us by the oath which you have made whether B be fully tenant of 14 acres or not. . . . The assise came and said that B was tenant of 14 acres and that such an one was tenant of the remaining acre of the fifteen acres." *Y. B. Trin. 20 Edw. I, f. 2* (1291). "N, who is here present accused of such and such a felony comes and denies it wholly, and puts himself upon your tongues concerning this for good and evil; and therefore we charge you by the faith ye owe to God, and by the oath which you have taken, that ye make us to know the truth thereon, and omit not for fear or love or hate, but having only (the fear of) God before your eyes . . .", etc. FORSYTH, *op. cit. supra* note 2, at 206, 207.

8. "The twelve knights may either say, directly and shortly, that one party or the other has the greater right, or merely set forth the facts and thus enable the justices to say it—what we call a special verdict." Thayer, *The Jury and Its Development* (1892) 5 *HARV. L. REV.* 249, 261.

"While the juror's oath," said Bracton, "has in it three associated things (*comites*) truth, justice and judgment, it is truth that is to be found in the juror, *justitia et iudicium* in the judge. But sometimes judgment seems to belong to jurors since they are to say on their oath, yet according to their belief, whether so and so disseised so and so, or not." THAYER, *PRELIMINARY TREATISE ON EVIDENCE* (1898) 195, citing Bracton, f. 186 b.

9. WESTMINSTER II (13 EDW. I) c. 30 (1285) (from Statutes at Large, Owen Ruffhead, 1763) "II, . . . (4) And also it is ordained, That the Justices assigned to take Assises shall not compel the jurors to say precisely whether it be Disseisin, or not, so that they shew the Truth of the Deed, and require aid of the Justices. (5) But if they of their own Head will say, that it is Disseisin, their verdict shall be admitted at their own Peril."

The use of the attaint while known as early as the eleventh century,¹⁰ seems not to have extended to all actions in the thirteenth.¹¹ Its application was gradually enlarged by successive statutes,¹² until in 1360 it was finally provided "that every man against whom they [the jurors] shall pass may have the attaint both in pleas real and personal, even those too poor to pay a fee for it."¹³ But the prevalence of 'perjured' verdicts continued despite all statutes. It was felt that the juries were primarily at fault, not the directions of the judges,¹⁴ although there were occasions when the judges also were taken to task.¹⁵ As the law progressed in refinement, the judges, chafed no doubt by the realization of their superiority as experts, began using the threat of the attaint to affright the juries into rendering special verdicts. Attaint as a method of control was not entirely effective, however, because the gentlemen preferred to pay a mean fine rather than meet to slander and deface the honest yeomen, their neighbours.¹⁶ Its utility gradually declined although measures were passed from time to time in the hope that by making the punishment less rigorous, the attainting jury would be encouraged to meet and chasten the 'honest yeomen'.¹⁷

In criminal cases the fine seems not to have functioned much better than the attaint. There are a number of instances¹⁸ where the jury was fined for going against the direction of the court "but these doings were even then accounted very violent, tyrannical and contrary to the liberty and custom of the realm of England". And often the juries were not afraid to "take the bit in mouth and go head-strong against the Court", much to the disgust and fury of some of the judges.¹⁹

10. *Gundulf v. Pichot* (Big. Pl. A. N.) 34 (1879) cited and summarized by Thayer, *The Jury and Its Development*, *supra* note 8, at 253; also summarized and discussed in FORSYTH, *op. cit. supra* note 3, at 100 *et seq.*

11. Y. B. Trin. 20 Edw. I, f. 18 (1291). "Note, after the Great Assise an Attaint never lies." See also Brac. N. B. II, case 350 (1229).

12. WESTMINSTER I (3 Edw. I) c. 38 (1274); 5 Edw. III, c. 7 (1331); 23 Edw. III, c. 8 (1354). See also 3 BL. COMM. *403, 404.

13. 34 EDW. III, c. 7 (1360).

14. 11 HEN. VI, c. 4 (1433); 15 HEN. VI, c. 5 (1436).

15. Brac. N. B. II, case 564 (1231); Brac. N. B. III, case 1166 (1235); 3 BL. COMM. *409.

16. Com. of England, Book III, c. 2; 3 Blackstone *404, *Bright v. Eynon*, 1 Burr. 390 (Mansfield, 1757).

17. 11 HEN. VII, c. 21 (1495); 11 HEN. VII, c. 24 (1495); 23 HEN. VIII, c. 3 (1531); 13 ELIZ. c. 25 (1571).

18. 1 How. St. Tr. 862, 869 (1554); T. Raymond 98 (K. B. 1664); *Hardres* 409 (Ex. 1665); *Kelyng* 50 (K. B. 1666); 2 *Keble* 180 (K. B. 1667); 6 How. St. Tr. 951 (1670) (Penn & Mead's case).

19. 1 *Keble* 864 (K. B. 1665).

In 1670 came Vaughan's memorable decision in *Bushel's Case* and in 1688 came the Revolution. Just how far this decision is a reflection of the then current thought is a matter for conjecture. Certain it is that for the next two centuries more and more dependence was placed on the jury. Heretofore, since it was necessary to trust either court or jury, there had been practically no question of the proper supremacy of the court. That there should be a specific remedy as a matter of right for the invasion of the 'province' of the jury was practically unheard of.²⁰ The question had been viewed wholly from the perspective of the propriety of special verdicts as a means of giving the judges some voice in the application of the law. "The precedents run all for trust on the side of the court." But now the respective provinces had to be determined since this revolutionary decision had entirely splintered both principal clubs which the judges had been wont to wield as threats to the jury, the attain and the fine.

In the course of his opinion Vaughan examined the maxim²¹ that questions of law are for the court and questions of fact for the jury. It might be well to pause and briefly to trace the origin of this concept. So far as this writer can ascertain, the first clear enunciation of the principle was made by Plowden in his report of *Townsend's Case* wherein he comments "For the office of 12 men is no other than to enquire of Matters of Fact and not to adjudge what the Law is, for that is the Office of the Court and not of the Jury. . . ." ²² And although the same idea was voiced by other writers of that and the immediately succeeding period,²³ it remained for Coke to turn it into that neat phraseology, the magic of which has captivated lawyers and judges from that day to this. It may be found in his report of *Heydon's Case*,²⁴ *Altham's Case*,²⁵ *Dowman's Case*,²⁶ *Abbott of Strata Mercella's Case*,²⁷ *Priddle and Napper's*

20. Since the Statute of WESTMINSTER II (13 Edw. I) c. 31. (1285), there had been provision for excepting to the judge's direction which on rare occasions had been availed of but never as being an invasion of the province of the jury. See also 3 COKE, LAW OF ENGLAND *1556 (Thomas ed. 1836, p. 365, n. 7) (Hargrave's ed. 1794, *1556, n. 5).

21. Vaughan 135, 149 (C. P. 1670):

22. 1 Plowden 110a, 114a (K. B. 1554).

23. Hobart 53 (K. B. 1615); Dyer 362a 15 (K. B. 1557); Moore 105 (K. B. 1575); Hard. 16 (Ex. 1655); 2 Bulst. 314 (K. B. 1614).

24. 2 Co. Rep., pt. 4, 41a, 42b (K. B. 1585).

25. 4 Co. Rep., pt. 8, 150b (K. B. 1610).

26. 5 Co. Rep., pt. 9, 7b, 13a (K. B. 1585).

27. 5 Co. Rep., pt. 9, 23b, 25a (K. B. 1591).

Case,²⁸ in his commentary on Littleton,²⁹ and in his Law of England.³⁰ But even though Coke had stated it repeatedly, Vaughan was not ready to accept it as an abstract principle of functional delimitation. Since the jury often had knowledge of facts not brought out in court, he thought it obvious that they were best fitted to decide them. But even though he recognized that the jury was incapable of deciding the law, he nevertheless insisted that whenever a verdict was returned upon general issues "they resolve the law and the fact complicately."³¹

After the Revolution the fight for the ascendancy of the jury's power continued. Then indeed did it become the bulwark of liberty and the palladium of the rights of freemen in the war with tyrannical judges. Eventually the fight crystallized around trials for libel,³² and the great Mansfield, in upholding his directions to juries, became involved in the attack led by Camden, Erskine and Fox, and was made a target of "that common slanderer Junius".³³ The Society for Constitutional Information published and distributed its tract for the information of juries on their "rights under the constitution".³⁴ The pot was boiling. The House of Lords submitted the questions which had arisen as to libels to all the judges and after they had reported a view substantially in accord with that theretofore announced by Lord Mansfield, the Fox Libel Bill was tardily passed in 1792.³⁵ In the meantime the United States of America had come into being and the provinces of judge and jury were there also in process of delimitation. But before turning to this country, another development in English law should be noted—that of granting new trials.

Blackstone says, "The exertion of these superintendent powers of the king's courts, in setting aside the verdict of a jury and

28. 6 Co. Rep., pt. 11, 8b, 10b (K. B. 1612).

29. Co. Litt. *228b (2 Hargreave's ed. 1794).

30. *155b (3 Thomas ed. (1836) p. 365).

31. *Supra* note 21, at 149, 150.

32. Seven Bishop's case, 12 How. St. Tr. 183 (1688); Bayard's case, 14 How. St. Tr. 471, 502 (1702); Fuller's case, 14 *id.* 517 (1702); Tutchin's case, 14 *id.* 1095 (1704); Francklins' case, 17 *id.* 625 (1731); Owen's case, 18 *id.* 1203 (1752); Almon's case, 20 *id.* 803 (1770); Miller's case, 20 *id.* 869 (1770); Woodfall's case, 20 *id.* 895 (1770); Dean of St. Asaph's case, 21 *id.* 847 (1784). See note in 8 How. St. Tr. 35 (1860).

33. For a full discussion of Lord Mansfield's part see FORSYTH. *op. cit.* *supra* note 2, c. XII.

34. Copy set out in full in account of Dean of St. Asaph's case, *supra* note 32, at 850. This was the case in which the famous Erskine distinguished himself as the champion of liberty.

35. 32 GEO. III, c. 60 (1791).

granting a new trial, on account of misbehavior in the jurors, is of a date extremely ancient. There are instances in the Year-Books of the reigns of Edward III, Henry IV, and Henry VII of judgments being stayed (even after a trial at bar) and new *venires* awarded, because the jury had eat and drank without consent of the judge, and because the plaintiff had privately given a paper to a jurymen before he was sworn. And upon these the chief justice Glynn, in 1655, grounded the first precedent that is reported in our books for granting a new trial upon account of *excessive damages* given by the jury."³⁶

In this first precedent,³⁷ the actual ground for granting the new trial is significant. "If the court do believe that the jury gave a verdict against their direction, they may grant a new trial." The particular in which the jury had gone against direction was in giving excessive damages; yet in the earlier days it had not been thought necessary to have a new trial for excessive damages, the damages being summarily moderated at the discretion of the judge without regard to the jury's verdict. But that was done to avoid and to relieve from possible attain of the jury,³⁸ and the attain was now in desuetude.

After *Bushel's Case*, the new trial became more and more popular although it took some time to realize its possibilities in connection with instructions as a method of control. But after the agitation of the succeeding century on the right of the jury to decide the law, its potentialities were fully sounded. The common law courts were at first somewhat reluctant, but besides Vaughan's decision and the general heresy of jurors there was the arrogant Chancery to be considered:³⁹ "Juries are wilful enough and denying a new trial here will but send parties into the Chancery."⁴⁰

Coeval with the granting of new trials on the ground of failure to observe the directions of the court was the development of complete separation of witness and jury,⁴¹ a necessity more pronounced

36. 3 BL. COMM. *387, 388, citing the instance in the Year Books: 24 EDW. III, 24 (Trin. 1359); 11 HEN. IV, 18 (Mich. 1409); 14 HEN. VII. 1 (Mich. 1498).

37. *Wood v. Gunston*, Style 462 (K. B. 1655).

38. Bracton IV, tr. 1, c. 19, § 8 and Bracton IV, tr. 5, c. 4. Cited in 3 BL. COMM. *389.

39. 3 BL. COMM. *388.

40. *Martyn and Jackson*, 3 Keble 398 (K. B. 1674). "Twisden and Wild refused to grant it, the jury being judges of the fact, though verdict be against the evidence, it is not to be set aside without a new law" but Rainsford, C. J., favored granting a new trial on account of the Chancery.

41. Style 253 (K. B. 1650), 2 Salk 405 (K. B. 1702).

after Vaughan's decision which still acknowledged the possibility of the jury having information not otherwise known to the court.

By 1773 the practice of granting new trials on account of misdirection by the court or the jury's failure to follow its directions, seems to have been well established and encouraged. We find Lord Chief Justice DeGrey prefacing an opinion with:

"I have always considered this mode of application for a new trial as very satisfactory to the suitors, who may be injured by mistakes; and likewise to the jury, as it reforms their errors, if they commit any and is a happy substitute for the much more grievous proceeding that the common law directed. . . . It is possible that in many instances that mistake may arise from the direction of the Court; for the Court may direct the jury to attend to a circumstance that in point of law is not proved, or is not the subject-matter for their consideration; or it is possible that the jury may mistake the evidence as to believe the fact to be true, when it is not so; then it comes to be a proper motion for a new trial, because the verdict is contrary to the evidence." ⁴²

Developments in America proceeded along the same general lines. Appendix II of Quincy's Reports (Massachusetts) concludes:

"It is worthy of notice how the history of this question [the powers and rights of juries] after the English Revolution of 1688 repeated itself in America nearly a century later. The great constitutional lawyers and judges of either Revolutionary period—Somers and Holt; Adams, Jay, Wilson, Iredell, Chase, Marshall, Hamilton, Parsons and Kent—with one voice maintained the right of the jury upon the general issue to judge of the law as well as the fact. But they had hardly passed away, or fifty years elapsed since either Revolution, when the courts of the new government began to assert as much control over the consciences of the jury, as had been claimed by the most arbitrary judges of the Monarch whom that Revolution had overthrown." ⁴³

The rights and powers of juries were tested in libels in colonial America as well as in England. The trial of John Peter Zenger, printer, before Hon. James de Lancey, Esq., Chief Justice of the Province of New York in 1735, "made a great noise in the world," and one Mr. Hamilton, a Philadelphia lawyer, successfully argued both law and fact to the jury despite the protest of the Chief Justice.

John Adams did not fare so well as counsel in a civil action for libel in 1767 when he attempted to argue to the jury whether the words were actionable or not. Justices Lynde, Cushing, Oliver and Trowbridge, of the Massachusetts Bay Province, would not permit

42. *Fabrigas v. Mostyn*, 20 How. St. Tr. 82, 175 (1773).

43. Quincy, *op. cit. supra* note 2, at 559.

it. But in the *Trial of the British Soldiers*, although the same Justice Trowbridge instructed the jury that they were to take the law from the Court, John Adams nevertheless argued the law at length to the jury and continued thereafter in the opinion that juries may decide the law even in civil cases notwithstanding the instructions of the court.

In America by the time of the Revolution and for some time thereafter, the power to decide the law in criminal cases seems to have been almost universally accorded the jury and quite generally, it determined the law in civil cases.⁴⁴ Chief Justice Jay in 1794 in a civil cause "regarded as of first importance," instructed the jury on

"the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this and on every other occasion, however, we have no doubt, you will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed that juries are the best judges of facts; it is, on the other hand, presumable that the court are the best judges of the law. But still both objects are lawfully within your power of decision."⁴⁵

And in the next year Justice Iredell digressed to remark that even though instructed by the court to find for the defendant, much as they may respect the sentiments of the court on points of law, "they are not bound to deliver a verdict conformably to them."⁴⁶

Already some one had conceived the utility of distinguishing between *power* and *right* but Justice James Kent smashed it such a blow that it did not show signs of recovery in New York for some years. He found it impossible to meet the stream of authority that the jury can make up a verdict of fact and law against all direction of the judge. And as for denying that they can rightfully and lawfully exercise such a power without "compromitting their consciences," the law must

"have intended in granting this power to a jury, to grant them a lawful and rightful power, or it would have provided a remedy against the undue exercise of it. The true criterion of a legal power, is its capacity to produce a definitive effect liable neither to censure nor review. And the verdict of not guilty, in a criminal case, is, in every respect absolutely

44. For a full discussion see Quincy *op. cit. supra* note 2, at 567 *et seq.*

45. *Georgia v. Brailsford*, 3 Dall. 1, 4 (1794).

46. *Bingham v. Cabbot*, 3 Dall. 19, 33 (1795).

final. The jury are not liable to punishment, nor the verdict to control. No attain lies, nor can a new trial be awarded. The exercise of this power in the jury has been sanctioned, and upheld in constant activity, from the earliest ages."⁴⁷

He admitted however that in civil cases, the opinion of the court on questions of law ought ultimately to be enforced by the power of setting aside the verdict and granting new trials.⁴⁸

There is small room for doubt that the jury reached its zenith before 1835, when Justice Story, as circuit judge, instructing a jury, made a point upon which he had had a decided opinion during his whole professional life. He said that regardless of physical *power* and the necessity of compounding law and fact, the jury had no *moral right* to decide the law according to their own notions. On the contrary, he held it the most sacred constitutional right of every party accused of crime that the jury should respond as to the facts and the court as to the law. Indeed, he said that if he had thought otherwise, he would abstain from instructing them on the law at all.⁴⁹

The heyday of the appellate courts had arrived. The reversal of the lower courts and the granting of new trials had become a common-place. The fear of judges had passed.⁵⁰ But the jury proponents did not surrender without a struggle. In Massachusetts, Pennsylvania, and New York, the contest was particularly prolonged.⁵¹ Vermont, too, attempted to stem the tide.⁵²

It would be interesting and no doubt possible to correlate to an unusual degree the rise and fall of the notion of the necessity of jury supremacy with the advance and recession of the frontier in its

47. *People v. Croswell*, 3 John. Cas. *337, *356 (N. Y. 1804).

48. *Id.* at *376.

49. *U. S. v. Battiste*, Fed. Cas. No. 14545 (1835).

50. *Williams v. State*, 32 Miss. 389, 396 (1856); see *Sparf v. United States*, 156 U. S. 51, 90 (1895).

51. Massachusetts: *Coffin v. Coffin*, 4 Mass. 1, 25 (1808); *Commonwealth v. Blanding*, 3 Pick. 304 (1825); *Commonwealth v. Knapp*, 10 Pick. 477, 496 (1830); *Commonwealth v. Kneeland*, 20 Pick. 206, 227 (1838); *Commonwealth v. Porter*, 10 Metc. 263 (1845); *Commonwealth v. Martin*, 5 Gray 303, note (1855); *Commonwealth v. Rock*, 10 Gray 4 (1857). New York: *People v. Croswell*, *supra* note 47; *People v. Thayer*, 1 Parker C. C. 595 (1825); *People v. Videto*, *id.* 603 (1825); *People v. Pine*, 2 Barb. 566 (1848); *Carpenter v. People*, 8 Barb. 603, 611 (1850); Pennsylvania: *Albertson's Lessee v. Robeson*, 1 Dall. 9 (1764); *Wilcox v. Henry*, 1 Dall. 69, 71 (1782); *Pennsylvania v. Bell*, Addison R. 156, 160, 161 (1793); *Guffy v. Commonwealth*, 2 Grant 66, 68 (1853).

52. See the majority and dissenting opinions in *State v. Croteau*, 23 Vt. 14 (1849).

progress through the various states. The last frontier faded out in the nineties and it is significant perhaps that during that decade the question was finally refined and resolved into its present status. During that period there stand out three compelling decisions in the cases of *Commonwealth v. McManus*,⁵³ *State v. Burpee*,⁵⁴ and *Sparf et al. v. United States*,⁵⁵ in each of which there was dissent.

While the provinces of court and jury were being defined by the judiciary, the legislatures had not been inactive. Among other problems which had received the attention of the latter, was the need of accurately recording just what the judges had stated the law to be so that appellate courts might know certainly⁵⁶ whether the juries had failed to follow it. Under the common law, instructions were oral⁵⁷ and before the statutory change it was incumbent upon the person excepting to get them reduced to writing, for recordation was discretionary with the trial judge.⁵⁸

The requirement that instructions be written,⁵⁹ innocent enough in its avowed objective, has furnished one of the most effective

53. 143 Pa. 64, 21 Atl. 1018, 22 Atl. 761 (1891).

54. 65 Vt. 1, 25 Atl. 964 (1892).

55. *Supra* note 50.

56. *People v. Hersey*, 53 Cal. 574 (1879).

57. See *Vicksburg Rr. Co. v. Putnam*, 118 U. S. 545 (1886). "In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to a jury, may at his discretion, whenever he thinks fit to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion on the facts . . ."

58. *Smith v. Crichton*, 33 Md. 103 (1870).

59. ALA. CODE (Michie, 1928) § 9508; ARIZ. CODE (Struckmeyer, 1928) §§ 3809, 3810; ARK. CONST. OF 1874 Art. VII § 23; CAL. PEN. CODE (Deering, 1931) § 1127c; and CAL. CODE CIV. PROC. (Deering, 1931) § 608; COLO. ANN. STAT. (Mills, 1930) §§ 2214, 2215; FLA. COMP. LAWS (1927) §§ 4364, 4365; GA. CODE (Michie, 1926) § 4847; IDAHO COMP. STAT. (1919) § 6847; ILL. REV. STAT. (Smith-Hurd, 1931) c. 110, § 73; IND. ANN. STAT. (Burn's, 1926) § 584, cl. 5; IOWA CODE (1931) §§ 11491, 11506; KAN. REV. STAT. ANN. (1923) § 60-2909 cl. 5; KY. CODE ANN. (Carroll, 1927) Civ. Prac. § 317, cl. 5, Crim. Prac. § 225; LA. CODE OF PRACTICE (Dart, 1932) art. 515; ME. REV. STAT. (1930) c. 96, § 104; MISS. CODE ANN. (1930) § 586; MO. REV. STAT. (1929) Civ. § 967, Crim. § 3694; MONT. REV. CODE (1921) Civ. § 9349, Pen. § 11969; NEB. COMP. STAT. (1929) §§ 20-1107, 20-1111, 29-2016; N. M. STAT. ANN. (Court-right, 1929) §§ 70-104, 70-108; N. C. CODE (1931) § 566; OHIO GEN. CODE (Page, 1926) § 11447; N. D. COMP. LAWS ANN. (1913) §§ 7620, 10822; ORE. CODE ANN. (1930) § 2-301, cl. 6; TENN. CODE (1932) Civ. §§ 8809, 8810, Crim. §§ 11749, 11750; TEX. ANN. CIV. & CRIM. STAT. (Vernon, 1925) Civ. §§ 2184, 2185, Crim. §§ 658, 659, 663; UTAH COMP. LAWS (1917) Civ. § 6802, Crim. § 8975; WASH. COMP. STAT. (Remington, 1922) §§ 339, 2158; W. VA. CODE (1931) c. 56, art. 6, § 19; WIS. STAT. (1931) §§ 270-271; WYO. REV. STAT. (1931) Civ. § 89-1306, cl. 6, Crim. § 33-902, cl. 6. (While a number of these

devices for the supremacy of appellate courts, not only in the control of the jury but of the trial court as well. By means of interpretative rules as to the giving and refusing of instructions, and the form and necessity of written instructions, many of the attempted lines of cleavage between law and fact and the provinces of court and jury, have been drawn. Since the court's province was the law, it was quite logically provided in the majority of the states either by statute, judicial decisions or constitutional enactment that in giving the instructions, the court should not charge the jury with respect to the facts or the weight to be accorded them.⁶⁰

At last this troublesome phase of administration had been coordinated, articulated and perfected—or so it may have been thought. Each branch of the administration now had seemingly a well-defined province of activity.

I

The Theoretical Function of Instructions to Enlighten the Jury on the Law

On the theory that at the end of a hearing the court is cognizant of the legal issues in question, and the jury is in full possession of the relevant facts, nothing would seem more simple than for the

statutes make written instructions mandatory, others provide that they shall be reduced to writing upon request of either party.)

60. Daniel v. Wade, 203 Ala. 355, 83 So. 99 (1919); Southern Pacific Rr. v. Hogan, 13 Ariz. 34, 108 Pac. 240 (1910); Free v. Maxwell, 138 Ark. 489, 212 S. W. 325 (1919); McNeil v. Barney, 51 Cal. 603 (1877) (See also CAL. CONST. art. VI, § 19); Farnsworth v. Tampa Electric Co., 62 Fla. 166, 57 So. 233 (1911); Owen v. Palmour, 111 Ga. 885, 36 S. E. 969 (1900); Jennings v. Baltimore & Ohio Rr. Co., 195 Ill. App. 543 (1915); Virgin v. Lake Erie & Western Rr. Co., 55 Ind. App. 216, 101 N. E. 500 (1913); Carroll v. Chicago, St. Paul Rr. Co., 103 Iowa 134, 84 N. W. 1035 (1901); Ennis-Bayard Petroleum Co. v. Mill & Elevator Co., 118 Kan. 202, 235 Pac. 119 (1925); Louisiana & Northern Rr. Co. v. Lynch, 137 Ky. 696, 126 S. W. 362 (1910); State v. King, 135 La. 117, 64 So. 1007 (1914); Hayden v. Me. Central Rr. Co., 118 Me. 442, 108 Atl. 681 (1920); Western Md. Rr. Co. v. Shivers, 101 Md. 391, 61 Atl. 618 (1905); Davis v. Jenney, 42 Mass. 221 (1840); Kearney v. State, 68 Miss. 233, 8 So. 292 (1890); Winter v. Supreme Lodge Knights of Pythias, 96 Mo. App. 1, 69 S. W. 662 (1902); State v. Mahoney, 24 Mont. 281, 61 Pac. 647 (1900); Hanika v. Lincoln Trac. Co., 98 Neb. 583, 153 N. W. 568 (1915); Victor American Fuel Co. v. Melkusch, 24 N. M. 47, 173 Pac. 198 (1918); Ray v. Patterson, 170 N. C. 226, 87 S. E. 212 (1915); Commercial Security Co. v. Jolly, 103 Okla. 8, 229 Pac. 193 (1924); State v. McAllister, 67 Ore. 480, 136 Pac. 354 (1913); Moore v. Cummings, 87 S. C. 166, 69 S. E. 154 (1910); Fellows v. Christensen, 28 S. D. 353, 133 N. W. 814 (1911); Earp v. Edington, 107 Tenn. 23, 64 S. W. 40 (1901); Kansas City Rr. Co. v. Corn, 186 S. W. 807 (Tex. Civ. App. 1916); Schuyler v. Southern Pacific Rr. Co., 37 Utah 581, 109

court to announce the law appropriate to the occasion and for the jury thereupon to reach a just verdict by applying it. This is the theory of instructions. Their avowed function is to state the substantive law as a text-book for the jury against a back-ground of the individual case, with due care not to make it abstract and at the same time not to be so particular as to trench on the facts. That this of course is practically a physical impossibility, is easily apprehended. Consequently, the trial judge undertakes to give an exposition of the principles of law appropriate to the case,⁶¹ restricted to the matters in issue,⁶² in such manner as to be readily understood by the mind untrained in the law.⁶³ The issues must be presented in the most intelligible form,⁶⁴ and the principles of evidence suggested wherever necessary.⁶⁵ The sum total must be addressed to the facts to be found by the jury,⁶⁶ in order to enable them better to understand their duty and to prevent them from arriving at wrong conclusions. But nevertheless care must be taken not to overstep the *plain* boundary that separates the provinces of court and jury.⁶⁷

Taking some such operating theorem as the foregoing, the standard works treating of instructions proceed to reduce it to its logical heads and sub-heads. But regardless of the particular choice of topical analysis, it will be readily seen from a perusal of the cases that, except for the matter based on necessity for written instructions and the procedure in excepting, the crux of instructional administration lies in the constant attempt at description of the elusive lines of demarcation between law and fact, the duty of the court to give the law applicable to the particular case without invading the province of the jury, and the duty of the jury to receive that law and obediently apply it to the proper facts. And to make bad matters worse there is the apparent occasional compromise when

Pac. 458 (1910); *Guntner v. Hughes*, 143 Va. 36, 129 S. E. 239 (1925); *State v. Greer*, 22 W. Va. 800 (1883); *Hempton v. State*, 111 Wis. 127, 86 N. W. 596 (1901), and see Wis. CONST. art. 5, § 26.

61. *Lehman v. Hawks*, 121 Ind. 541, 23 N. E. 670 (1889); *Terry v. Davonport*, 170 Ind. 74, 83 N. E. 636 (1908).

62. *St. Louis, Iron Mountain & Southern Ry. Co. v. Thurman*, 110 Ark. 188, 161 S. W. 1054 (1913).

63. *Pagels v. Meyer*, 193 Ill. 172, 61 N. E. 1111 (1901).

64. *Owen v. Owen*, 22 Iowa 270 (1867); *Louisiana & Northern Rr. Co. v. King's Adm'r.*, 131 Ky. 347, 115 S. W. 196 (1909).

65. *Souvais v. Leavitt*, 50 Mich. 108, 15 N. W. 37 (1883); *Welch v. Ware*, 32 Mich. 77 (1875).

66. *Hanson v. Kent & Purdy Co.*, 36 Okla. 583, 129 Pac. 7 (1912); *Rio Grande Southern Rr. Co. v. Campbell*, 44 Colo. 1, 96 Pac. 986 (1908).

67. *Gillett v. Webb*, 17 Ill. App. 458 (1885).

the court may submit so-called mixed questions of law and fact to the jury under proper instruction.⁶⁸

After a reading of the ordinary materials on instructions one is impressed with the distinct hazard of asking for any instructions whatsoever. Of course the great variety of procedure in obtaining instructions—varying from the rule in Mississippi,⁶⁹ where the court is forbidden to give any instructions not asked for, to the practice in the federal courts, where the court is allowed the utmost leeway—tends to accentuate the confusion and to make difficult a general treatment of the rules. But aside from this, the refinement of the larger principles themselves appear to be such as to make an instruction that escapes Scylla fall directly into Charybdis: For an example, take one principle—the relation of the pleadings and evidence.

In general, the instructions must be within the purview of the pleadings and predicated thereupon.⁷⁰ They must be neither broader nor narrower than the pleadings nor suggestive of issues not raised thereby.⁷¹ These issues must be restricted further to those raised and supported by the evidence,⁷² and care must be exercised not to assume the existence or non-existence of any facts.⁷³ Yet there must be no omission or exclusion of any issues, theories, or defenses, even though the evidence is very slight.⁷⁴ And the whole must be so balanced as neither to give undue prominence to particular evidence, theories or issues,⁷⁵ nor to call specific attention to the claims

68. For example: "The submission of the question [proximate cause] to the sound discretion of the jury, under proper instructions, was a disposition of the case in harmony with the long line of authorities cited by counsel on both sides." *Chester Nat'l Bank v. Southern Pipe Line Co.*, 40 Pa. Sup. Ct. 87, 96 (1909). This is probably of most common occurrence today in negligence cases.

69. MISS. CODE ANN. (1930) § 586; see *Watkins v. State*, 60 Miss. 323 (1882).

70. *Degonia v. St. Louis Rr. Co.*, 224 Mo. 564, 123 S. W. 807 (1909); *Gracy v. Atlantic Rr. Co.*, 53 Fla. 350, 42 So. 903 (1907); *Healea v. Keenan, Ex'r*, 244 Ill. 484, 91 N. E. 646 (1910); *Tullis v. Chase & Co.*, 162 Iowa, 264, 144 N. W. 17 (1913); *Bowlin v. Archer*, 157 Ky. 540, 163 S. W. 477 (1914); *Riley v. City of Independence*, 258 Mo. 671, 167 S. W. 1022 (1914); *Swift v. Holoubek*, 60 Neb. 784, 84 N. W. 249 (1900); *Kirk v. Territory*, 10 Okla. 46, 60 Pac. 797 (1900); *Barker v. Coats*, 34 S. D. 291, 148 N. W. 134 (1914); *Smith v. Clark*, 37 Utah 116, 106 Pac. 653 (1910).

71. See I BLASHFIELD, INSTRUCTIONS TO JURIES (1916) 177, n. 39 for a compilation of authorities.

72. *Id.* at 183, n. 67.

73. *Id.* at 233, n. 2.

74. *Id.* at 218, n. 1.

75. *Id.* at 335, n. 1.

of one without adverting to the corresponding claims of the other party.⁷⁶

When one considers the apparent nicety required in framing an instruction that will conform to the above very small portion of the law of instructions pitfalls seem inescapable. But when there is added the myriad of rules having to do with credibility of witnesses, presumptions, circumstantial evidence, degrees of proof, commenting on the weight of the evidence or the sufficiency of it, cautionary instructions, etc.—then one is tempted to picture the trial judge's task as beset with the difficulties confronting an amateur tight-rope walker.

The net result, however, is not to bring the trial judge into disrepute, but rather to give unexpected functions to instructions—to furnish trial judges with a means of controlling the jury and to provide appellate courts with an instrument whereby they control both the trial court and the jury.

Although, under our system, it is deemed essential that instructions be made intelligible to a jury,⁷⁷ there is no requirement that they be useful to a jury.⁷⁸ Whether or not they can be useful to a jury will depend primarily upon whether the crystallization of the law of the

76. *Hayes v. Pennsylvania Rr. Co.*, 195 Pa. St. 184, 45 Atl. 925 (1900); *Flowers v. Flowers*, 92 Ga. 688, 18 S. E. 1006 (1893); *Banner v. Schlessinger*, 109 Mich. 262, 67 N. W. 116 (1896); *Prine v. State*, 73 Miss. 838, 19 So. 711 (1896).

77. The function of instructions to serve as a guide to substantive principles of law, is well-recognized. This is attested by the general requirement of separate findings of fact and specific declaration of law where the case is tried without a jury. In at least one state (Maryland) it is required that the court instruct itself as a jury. It is quite essential that the reviewing court have access to the theories on which the case was tried. See *Alexander v. Capital Paint Co.*, 136 Md. 658, 111 Atl. 140 (1920); *Richardson v. Anderson*, 109 Md. 641, 72 Atl. 485 (1909); *Murphy v. Smith*, 112 Ill. App. 404 (1903); *Harbison v. School District*, 89 Mo. 184, 1 S. W. 30 (1886); *White v. Black*, 115 Mo. App. 28, 90 S. W. 1153 (1905); *McKeon v. McDermott*, 22 Cal. 667 (1863); *Shuler v. Lashorn*, 67 Kan. 694, 74 Pac. 264 (1903); *Jennings v. Frazier*, 46 Ore. 470, 80 Pac. 1011 (1905); *Kinn v. Nat'l Bank*, 118 Wis. 537, 95 N. W. 969 (1903).

78. "As I write these lines I hear that a very learned committee of the American Bar is engaged on a re-statement of the law of torts. Nothing but good can come of this if it is borne in mind that the object of any such statement is not to effect a verbal reconciliation of all the authorities but to frame such a rule as a well-informed Court of last resort might lay down; and that, if in any case the result is a proposition which cannot be made intelligible to a jury, there is like to be something wrong either with the drafting (which should not happen to a committee including such expert draftsmen) or with some of the less authoritative decisions." POLLOCK, *LAW OF TORTS* (13 ed. 1929) preface.

subject is such that its rules may be reduced to intelligible propositions. Take for comparison, the following two types of instructions as illustrative:

(1) "The court instructs the jury that if the plaintiffs were taken over the farm by the defendants or (and) were shown the bounds so that the plaintiffs knew where the farm was and what was comprised within the bounds, it would not be of any consequence that representations may have been made by the defendants in relation to acreage."⁷⁹

This instruction serves as a definite statement of the doctrine of *caveat emptor* in the law of vendor and purchaser. When any given phase of the law is in such status that it is capable of being reduced to such a criterion then it has at least some degree of predictability and applicable content. But consider the next:

(2) "Every person is negligent when, without intending to do any wrong, he does such an act or omits to take such precaution that under the circumstances he, as an ordinarily prudent person, ought reasonably to foresee that he will thereby expose the interests of another to an unreasonable risk of harm. In determining whether his conduct will subject the interests of another to an unreasonable risk of harm, a person is required to take into account such of the surrounding circumstances as would be taken into account by a reasonably prudent person and possess such knowledge as is possessed by an ordinarily reasonable person and to use such judgment and discretion as is exercised by persons of reasonable intelligence under the same or similar circumstances."⁸⁰

This instruction was devised by Chief Justice Rosenberry in a very scholarly attempt, based on the Restatement of Negligence and other works, to re-define negligence in terms of wrongful invasion of legally protected interests and the consequences thereof. It was offered as preferable to an instruction approved in a previous case,⁸¹ which was criticized because it indicated "no standard by which the conduct of the defendant is to be measured"!

It is unnecessary to call attention to the fact that this instruction makes the purported standard the ordinarily prudent person, with the foresight, knowledge, judgment, discretion and intelligence of a reasonable man. This means that the jury, despite all efforts to the contrary, fixes the standard of law which it will apply to the facts, or at least that if the jurors pay any attention to the instruction at all, they will use themselves as the standards by which

79. *Mabardy v. McHugh*, 202 Mass. 148, 88 N. E. 894 (1909).

80. *Osborne v. Montgomery*, 203 Wis. 223, 234 N. W. 372 (1931).

81. *Hamus v. Weber*, 199 Wis. 320, 226 N. W. 392 (1929).

to judge the negligence of the defendant.⁸² But appellate courts do not really permit the jury to fix the standard, however much they may appear to.⁸³ On appeal judges set themselves up as ordinarily prudent men and arrive at their decision accordingly, though they may reason it in terms of metaphysical distinctions. The standard loses all objectivity⁸⁴ as this ordinarily prudent person fades into coincidence with the personality of the one judging, projected by imagination into the "same or similar circumstances", and becomes of little value as a principle guiding the jury.

Concerning the first illustrative instruction there may be differences of opinion as to what the law *ought* to be but there can be little room for doubt as to what the court has declared the law *is*. The factual issue is clear cut and its determination will automatically apply the law on account of the wording of the instruction. The respective functions of court and jury in actuality approach theoretical purpose. The verdict of the jury must necessarily reflect the finding of fact.

II

The Function of Instructions as A Method by Which Appellate Courts Control Juries and Trial Courts

Except for the hectic years immediately preceding and succeeding the Revolution of 1688, the English trial judges have exercised quite candidly a moderate and approved control over the jury. So it is with no surprise that we read in one of the early texts that:

"It is the practice for the judge at nisi prius not only to state to the jury all the evidence that has been given but to comment on its bearing and weight, and to state the legal rules upon the subject and their application to the particular case, and even to advise them as regards the verdict they should give, so that it may be in accord with his view of the law and justice; so that in effect, in general, the jury only give their opinion on the existence of the facts, and even then, in general, they follow the advice of the judge, and therefore in substance, the verdict is found or anticipated by the judge's direction, except indeed, as regards the amount of damages, and which also are greatly influenced by the observa-

82. See *Freeman v. Adams*, 63 Cal. App. 225, 218 Pac. 600 (1923). But see *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408 (1891); and see discussion in GREEN, JUDGE AND JURY (1930) c. v, *The Negligence Issue*.

83. Cf. GREEN, *op. cit. supra* note 82, at 69, *The Duty Problem*.

84. See Seavey, *Negligence—Subjective or Objective* (1927) 41 HARV. L. REV. 1.

tions of the judge, or may be corrected, if excessive or too small, by the Court in Banc."⁸⁵

The pronounced fear and distrust of the power of judges evinced by the democratic temper, resulting in England in the mere passage of Fox's Libel Bill, found expression in America in innumerable statutes and constitutional provisions attempting to safeguard the power of juries in general. Moreover, England, despite its Revolution, never felt the sway of the spirit of the frontiersman to whom submission to any kind of court was to an extent a magnanimous compromise of individual sovereignty.

Shams permit the growth of social habits without revolutionary change. It is trite to say that this is the secret of the adaptability of the common law procedure. American courts could not forthrightly overturn constitutional and statutory dogma that questions of fact are for the jury, and, as pointed out by Dean Green,⁸⁶ they least of all now are desirous of such drastic change. By upholding this sham, the appellate courts have been enabled actually to transform it into one of their most effective methods of control of both trial judges and juries.

It is possible that some of those who decry the use of juries and long for more power in the judges believe too literally the pronouncements of prohibitive strictures in decisions. It is an almost universal rule, imposed either by *stare decisis* or statute, that on appeal the court shall not weigh the evidence or, stated differently, that the findings of fact by a jury are binding and final. Yet this does not impede in any wise the examination of the instructions employed in the lower court. The court on appeal does not consider the verdict proper. Instead it philosophizes on whether or not the jury *might* have been misled by the error in the statement of the law, or whether or not they *might* have been influenced by an instruction which trenched in some manner on the province of fact, or whether or not they *might* have found differently had some requested instruction been given. The decision is that the learned trial judge erred in giving Instruction No. 12 or in refusing Instruction No. 18 and therefore the judgment should be reversed and a new trial granted.

On the other hand, if no fault can possibly be found with the ritual, which is well-nigh inconceivable, the appellate court which

85. 3 CHITTY'S GENERAL PRACTICE (1836) 913. "Indeed without this assistance from the learned judge, few juries would, in a contested cause, be able to come to an unanimous opinion, being frequently left in a state of great perplexity by the influence of speeches of the contending leaders."

86. GREEN, *op. cit. supra* note 82, at 375-376.

trusts in the constitution but keeps its powder dry, has no qualms of conscience about discovering that the jury manifestly failed to observe the directions of the trial judge—and this of course is strictly a matter of *law* and not of *fact*.

There are a number of other devices by which appellate courts have wrested control from trial judges and juries, but were they all abolished, it is probable that the errors of misdirection, non-direction and failure to observe directions would be sufficient to assure them such control. And this power, once garnered, is grudgingly surrendered even to legislative assault. Let the legislature attempt to restore some wonted prestige to the jury and such a decision as that in *Thoe v. C. M. St. Paul Railway Company*⁸⁷ will be forthcoming, wherein the court will rise to abide its oath to uphold and maintain the constitution by preserving inviolate its power to reverse a judgement which is contrary to the evidence. Of course, should the organic law creating the court itself forbid the entertainment of a motion for a new trial based on the verdict being contrary to the evidence, the court may feel constrained to abide by the restriction, but nevertheless it may examine the evidence without compunction to determine whether on account of its lack, the verdict was contrary to law⁸⁸ or whether the jury failed to observe the directions of the court. These are questions of law and of the very essence of judicial power, which may even be implied from the constitutional division of government into three coördinate branches.

The federal courts, hampered only by the broad constitutional provision preserving the right of trial by jury, followed to an extent the English practice. They now consistently charge the jury orally, sum up the evidence, comment on it and even give the jury the benefit of opinion provided it is made clear that the jury is not to be controlled by it. And since the jurors are for the most part ordinary individuals, impressed by the solemnity and atmosphere of the court into an unwonted timidity and docility, the federal judge usually has it in his power, if he so wills, to mold a verdict in accord with his own views.

But to preserve trial by jury 'inviolatè' in the states, such practices as prevail in the federal courts were circumvented by various taboos. Quite the natural reaction of the state appellate courts then was to utilize these taboos and their power to protect the jury from inaccuracies of judicial statement to subjugate the trial court and jury.

87. 181 Wis., 456, 195 N. W. 407 (1923).

88. *Monroe County v. Driskell*, 3 Ga. App. 583 (1907).

Thus, the Supreme Court of California (Department One) held that the use of the disjunctive "or" between the words "aid" and "abet" was not fatal error, because to the ordinary mind one who aids or assists in the commission of forgery is guilty; and this is true because to such a mind criminality is included as an element in the act of the party aiding or assisting. But the court *en banc*, decided that the use of the disjunctive was prejudicial error because "the word 'aid' does not imply guilty knowledge or felonious intent, whereas the definition of the word 'abet' includes knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime."⁸⁹

In a somewhat similar situation, the court of Montana expressed the attitude of the state courts generally in its gentle admonition: "In this connection we may observe that it is far safer for a trial court to make use of instructions generally approved by the courts rather than to risk the danger of invading the province of the jury by formulating new ones."⁹⁰ The use of instructions that have been repeated over and over is "the safe practice and obviates the necessity of a consideration of instructions on the subject differently worded."⁹¹

Thus are instructions reduced to formalism. From the taboos calculated to safeguard the province of the jury have been derived the means for surreptitiously scaling its walls. The original purpose of giving instructions for the actual enlightenment of the jury, to assist them in applying the law to the facts, has become inconsequential.⁹²

The priests, however, are not fooled by the system evolved. The lawyers and judges are perfectly aware that juries pay scant attention to the type of instructions commonly given them on the law applicable to the facts, and that as a rule they are incapable of the

89. *People v. Dole*, 122 Cal. 486, 55 Pac. 581 (1898); approved in 123 Cal. 403, 56 Pac. 44 (1899).

90. *State v. Allen*, 34 Mont. 403, 87 Pac. 177 (1906). See also *McQueary v. People*, 48 Colo. 214, 110 Pac. 210 (1910); *State v. Murray*, 91 Mo. 95, 3 S. W. 397 (1886); *Lawless v. State*, 4 Lea 179 (Tenn. 1879).

91. *Minich v. People*, 8 Colo. 440, 9 Pac. 4 (1885). "Its very novelty was a sufficient reason for its refusal. It is a maxim of the law that 'the old way is the safe way.'" *McAlpine v. State*, 47 Ala. 78, 82 (1872). See also *Berkovitz v. Gravel Co.*, 191 Cal. 195, 215 Pac. 675 (1923).

92. *Anderson v. Horlick's Malted Milk Co.*, 137 Wis. 569, 579, 119 N. W. 342 (1909): "While a trial judge, as an original matter, may be able to state a rule of law more concisely and in language more easily understood by the ordinary juror than the examples given by this court for stating the same rule, such departures are to be avoided, generally speaking, since they are quite liable to result in just the difficulty we are now dealing with."

fine discrimination such an application requires. But it is impressive to the public and it clothes the jurors with a sanctimonious mantle of enlightenment which gives them a sense of peace and accord with authority. Trial lawyers may consume a great deal of time on instructions, but little of it is wasted on attempting to force the jury's attention to them. It is usually as futile as reading a decision of the supreme court to a justice of the peace or arguing the Constitution with a policeman.

III

The Function of Instructions from the Lawyer's Viewpoint as Traps for the Courts

Under the common law the court has the right to instruct the jury of its own motion⁹³ and in some states it is under a duty to do so.⁹⁴ But in all jurisdictions exceptions can be taken to instructions whether they be offered by court or by counsel, written or oral, in time or out. They may also be suggested either in whole or in addition, so that ultimately the language, form and substance of the instruction or charge will be guided in large measure by the wit and ingenuity of counsel. In those states where written instructions are required, they are usually wholly devised and offered by counsel, subject to modification by the court.

Insofar as the lawyer is concerned, the least of his worries is the conveyance of a correct dissertation on the law to the jury for the jury. For the instructions will profit him little if he has not been able to get in enough helpful evidence to enable him to appeal to the emotions of the jurors in his summation. But what a grave error the grant or refusal of a phrase, or even a single word chosen from the host of others, can be made to appear to an appellate court in a brief!

For counsel having that side of the cause which is weaker in law or less captivating in emotion, instructions are an ever-present help in time of trouble. He has everything to gain by requesting a great number. Aside from the greater force on appeal thereby

93. *City of Chicago v. Keefe*, 114 Ill. 222, 2 N. E. 267 (1885).

94. *People v. Byrnes*, 30 Cal. 206 (1866); *New London Water Comm'rs v. Robbins*, 82 Conn. 623, 74 Atl. 938 (1910); *Central Rr. v. Harris*, 76 Ga. 501 (1886); *Tretter v. Chicago Ry. Co.*, 147 Iowa 375, 126 N. W. 339 (1910); *Heilman v. Commonwealth*, 84 Ky. 457, 1 S. W. 731 (1886); *Maxwell v. Mass. Title Insurance Co.*, 206 Mass. 197, 92 N. E. 42 (1910). In other states the rule is sometimes confined to criminal cases. See BLASHFIELD, *op. cit. supra* note 71, at 358, notes 12 and 13.

afforded his argument that the jury failed to observe the instructions granted, he has high hopes that a harassed trial judge will refuse at least a few, and the more the better. Especially is this true in representing defendants in criminal and tort cases. In criminal cases if the jury should acquit, any erroneous instructions will be no weapon for the state's attorney. And in tort cases, a plaintiff who can not win in the first trial, while the story is fresh and the witnesses responsive, may be expected to fare no better after the facts are cold and some of the witnesses absent. Moreover, most plaintiffs in tort cases, are not financially capable of sustained litigation and so the defendant's counsel is very careful to "perfect the record." One of the prime attributes of such "perfection" is to have a grand climax of errors in granting or refusing instructions with the exceptions properly noted.⁹⁵

That "to launch such a mass of legal conundrums upon a court which can never enlighten a jury, but are drawn generally with the real, if not avowed purpose of getting error into the record and entangling the court in some technical contradiction that may be used in a higher court, is a perversion of the law of instructing juries", was discovered by the Illinois Appellate Court in 1885.⁹⁶ But the censure did not discourage subsequent counsel for defendants in that state,⁹⁷ and the appellate court, realizing the futility and impropriety of an arbitrary rule limiting the number, decided that "a trial judge in the throes accompanying the examination of fifty or more instructions has our sincere sympathy, but relief rests with counsel not with the court."⁹⁸

The Missouri court in a similar situation lost patience with the trial court:

95. "Counsel for the defendant will usually not be solicitous to have the court correct a mistake in his charge to the jury because in event of an unfavorable verdict, the erroneous instructions given to the jury may constitute reversible error and he will be able to overturn the verdict by a motion for a new trial or on appeal. In such case counsel cannot be expected to urge his objections very strenuously to an erroneous instruction. He will probably take an exception to the erroneous portion of the charge and let the matter rest there and if the plaintiff does not take steps to see that all erroneous instructions are corrected, the verdict of the jury will avail him nothing." CORNELIUS' TRIAL TACTICS (1932) 291.

96. Citizens Gaslight Association v. O'Brien, 19 Ill. App. 231 (1885).

97. Chicago Athletic Club v. Eddy Electric M'f'g Co., 77 Ill. App. 204 (1898) (84 instructions asked); La Salle Coal Co. v. Eastman, 99 Ill. App. 495 (1902) (93 instructions asked). See also Grudzinske v. Chicago Ry. Co., 165 Ill. App. 152 (1911); Casey v. Reedy Elevator Co., 166 Ill. App. 595 (1912).

98. Daily v. Smith-Hippen Co., 111 Ill. App. 319 (1903); see also Chicago City Ry. Co. v. Sandusky, 198 Ill. 400, 64 N. E. 990 (1902), *aff'd* 99 Ill. App. 164 (1900).

"The changes rung on all phases of this case, and some not of this case, remind one of what Judge Scott used to say was 'like the multiplication table set to music.' We have remonstrated with the trial courts for years about the great impropriety and frequent injustice resulting from writing or giving instructions by the acre, but without avail, and so resort must be had to more drastic measures. We therefore hold that the great number of instructions given in this instance, of itself, warrants a reversal of the judgment."⁹⁹

If the jury is to be given a rounded view of the applicable law, it must get it from the trial judge, who is least prepared by immediate study and preparation for the task. The cause probably has original features but if the judge attempts original instructions, he will step into innumerable pitfalls of precedent. The plaintiff offers few suggestions, fearing these dangers. The defendant seductively offers many or perhaps indignantly demands them. Assuming that they are all legally correct, there is still the hazard of error in influencing the jury, by repetition, to believe that the court is on the defendant's side. If the judge refuses some of them, he is no doubt walking into the trap as planned. If he modifies and combines several of them without technical error he is a genius. It is no wonder, then, that any action he may take will be couched as far as possible in ritualistic statement, with his whole attention fixed on the probable reaction of the appellate judges and not on the twelve good men and true.

And so the three officers of the court to whom is entrusted the duty of acquainting the jury with the law are too busily engaged in dealing with the importunate artifices which are employed for the benefit of the appellate court to attend the theoretical arts. It is not intended generally that the jury should get an enlightened dissertation on the law under our present system—and who wishes that they should?

IV

The Function of Instructions as A Method by Which the Trial Court Maintains Its Integrity

Although bearing the same label, there are two distinct types of instructions which are so different from all other members of the

99. *Sidway v. Missouri Land Co.*, 163 Mo. 342, 63 S. W. 705 (1901). For a full discussion see Note, *Ann. Cas.* 1918A, 1087.

class, as to be commonly identified by the adjectives: *cautionary* and *peremptory*. The so-called cautionary instructions are not instructions of law, although occasionally they are mistaken and treated as such by appellate courts. They are in large part suggestive, psychological guides to bring into the open the possibility of unduly influential emotional ferment. They tend to put the jury in the right attitude insofar as their own consciences are concerned. But it is doubtful that the mere enunciation of rules can increase the measure of comprehension and inhibit the natural reactions to evidence, or regulate arbitrarily the interpretations which other minds will make on the expressions or directions theretofore voiced.

Chief Justice McBride of Oregon, after delivering an opinion on cautionary instructions, said:

"The writer when upon the circuit bench was in the habit of giving such an instruction as a matter of course in cases of this character and in trials of homicide, but it is not certain that it ever had a particle of effect, as no juryman is ever aware that his opinion is being affected by the subtle influence of sympathy."¹⁰⁰

It is difficult to conceive of the phlegmatic utterance of such a bromide as, the jury "should not lose their heads and return a verdict for a lady on general principles,"¹⁰¹ having any very serious chance of counteracting the tender sympathies of sturdy jurors.

But cautionary instructions are not confined to guarding against sympathy and prejudice. They fulfill a very distinct need for the trial court when it is called upon to rule on innumerable and unexpected questions of law from the beginning of the trial to the end. Especially is this true as to questions dealing with the taking of testimony, the predication of evidence, conformity to the pleadings and admission and competence generally. It is imperative that he make some immediate disposition of the problem if the trial is not to drag out interminably. In a vast number of instances, counsel have not foreseen the particular issue and their resulting argument substitutes vehemence for erudition. Many trial courts in such a dilemma adopt the crafty practice of admitting such questionable testimony for the time being, and then in the light of subsequent developments excluding such phases as seem incompetent by an

100. *Sheurmann v. Mathison*, 67 Ore. 419, 136 Pac. 330 (1913).

101. But perhaps it did have some influence in the case in which it was uttered as the jury found against the lady. *Bingham v. Bernard*, 36 Minn. 114, 30 N. W. 404 (1886).

instruction cautioning the jurors to disregard it¹⁰² or limit their consideration of the testimony to particular purposes.¹⁰³ This may make the lawyer excepting tear his hair, since he realizes the great unlikelihood of the jury being able to divest itself of particular sentences heard in a composite narrative some time earlier. But it is a great thing for the trial court over whom hovers the omnipresent, ominous cloud of reversal. With a fair amount of common sense and a modicum of 'legal hunch', a trial judge can by means of cautionary instructions, knock innumerable props from under otherwise dynamic exceptions—leaving the record cured of a multitude of sins. Even an incursion into the province of the jury may be rectified by judiciously reminding the jurors that they are the sole judges of the facts¹⁰⁴ and they should not attempt to infer what the court's opinion may be.¹⁰⁵ If counsel oversteps decorum in his speech to the jury, the trial judge may brush away his sophistries,¹⁰⁶ weaken his protestations,¹⁰⁷ or possibly cure his improprieties by a word of warning to the jury.¹⁰⁸

Cautionary instructions, of which there are many others not indicated in the foregoing, are generally held to be within the discretion of the trial court.¹⁰⁹ This adds excellence to their use as weapons to fend off the technical designs of the lawyer on appeal, however trivial their effect may be in influencing the jury.

Mention has already been made of that other very significant weapon which the trial court has developed for the maintenance of its integrity by overt direction of the verdict—the peremptory instruction. The use of this device seems to have developed alongside the obsolescence of the demurrer to evidence and some

102. *Foxworth v. Brown*, 120 Ala. 59, 24 So. 1 (1897); *Williams v. State*, 515, 134 S. W. 1169 (1911); *State v. McKowen*, 126 La. 1075, 53 So. 353 (1910). 107 Ga. 721, 33 S. E. 648 (1899); *Chesapeake & Ohio Ry. Co. v. Stein*, 142 Ky.

103. *James v. State*, 167 Ala. 14, 52 So. 840 (1910); *People v. Gray*, 66 Cal. 271, 5 Pac. 240 (1884); *Porter v. State*, 173 Ind. 694, 91 N. E. 340 (1910); *State v. Collins*, 121 N. C. 667, 28 S. E. 520 (1897); *Farwell v. Warren*, 51 Ill. 467 (1869); *Giddings v. Baker*, 80 Tex. 308, 16 S. W. 33 (1891); *People v. Hagenow*, 236 Ill. 514, 86 N. E. 370 (1908).

104. *Doll v. Chicago Consolidated Traction Co.*, 153 Ill. App. 442 (1910).

105. *North Chicago Street Rr. Co. v. Kaspers*, 186 Ill. 246, 57 N. E. 849 (1900).

106. *State v. Way*, 38 S. C. 333, 347, 17 S. E. 39 (1892).

107. *Smith v. State*, 95 Ga. 472, 20 S. E. 275, 20 S. E. 291 (1894).

108. *Morehouse v. Remson*, 59 Conn. 392, 22 Atl. 427 (1890).

109. *Day v. State*, 54 Fla. 25, 44 So. 715 (1907); *State v. Barton*, 70 Ore. 470, 142 Pac. 348 (1914). *City of Tacoma v. Wetherby*, 57 Wash. 295, 106 Pac. 903 (1910); *Birmingham Fire Insurance Co. v. Pulver*, 126 Ill. 329, 18 N. E. 804 (1888); *Dinsmore v. State*, 61 Neb. 418, 85 N. W. 445 (1901).

courts apply the same test.¹¹⁰ Various other tests are applied, such as scintilla of evidence¹¹¹ and reasonable inference,¹¹² but the results are very much the same and the general rule is that a verdict should be directed if a contrary finding of the jury would be set aside.¹¹³ It is also generally held that the court has no right to direct a verdict of guilty in a criminal trial,¹¹⁴ although the direction in favor of the accused is both frequent and unquestioned.¹¹⁵

The peremptory instruction has become so unrelated to all other types of instructions that it is now seldom treated under that classification. Of course it is a palpable invasion of the "province" of the jury and in direct contravention to those rules which are ordinarily regarded as fundamental.¹¹⁶ Its progress from the scintilla rule

110. *Anderson v. Southern Cotton Oil Co.*, 73 Fla. 432, 74 So. 975 (1917); *Chicago Bank v. Northwestern National Bank*, 152 Ill. 296, 38 N. E. 739 (1894); *Hayward v. North Jersey Street Ry. Co.*, 74 N. J. L. 678, 65 Atl. 737 (1906).

111. *People v. People's Insurance Exchange*, 126 Ill. 466, 18 N. E. 774 (1888); *Anfensen v. Banks*, 180 Iowa 1066, 163 N. W. 603 (1917).

112. *Philadelphia Rr. Co. v. Gatta*, 4 Boyce 38 (Del. 1913), 85 Atl. 721; *Habeck v. Chicago Ry. Co.*, 146 Wis. 645, 132 N. W. 618 (1911).

113. *Empire State Cattle Co. v. Atchison Ry. Co.*, 210 U. S. 1 (1907); *Bell v. Carter*, 164 Fed. 417 (C. C. A. 8th, 1908); *Livesay v. Denver Bank*, 36 Colo. 526 (1906); *Wolf v. Chicago Co.*, 233 Ill. 501, 84 N. E. 614 (1908); *Moore v. McKenney*, 83 Me. 80, 21 Atl. 749 (1890); *Lutz v. Atlantic Rr. Co.*, 6 N. M. 496, 30 Pac. 912 (1892); *Supreme Tribe v. Owens*, 50 Okla. 629, 151 Pac. 198 (1915); *Dwight v. Germania Life Insurance Co.*, 103 N. Y. 341, 8 N. E. 654 (1886); *Hemmens v. Nelson*, 138 N. Y. 517, 34 N. E. 342 (1893); *Morris v. Warwick*, 42 Wash. 480, 85 Pac. 48 (1906); *Norvell v. Kanawha Rr. Co.*, 67 W. Va. 467, 68 S. E. 288 (1910).

114. *Sparf v. U. S.*, *supra* note 50; *Konda v. U. S.*, 166 Fed. 91 (C. C. A. 7th, 1908); *State v. Koch*, 33 Mont. 490, 85 Pac. 272 (1905); *State v. Godwin*, 145 N. C. 461, 59 S. E. 132 (1907). The Arkansas court has held that even a verdict of guilty may be directed, where the punishment does not include imprisonment. *Paxton v. State*, 114 Ark. 393, 170 S. W. 80 (1914).

115. *Jackson v. State*, 178 Ala. 76, 60 So. 97 (1912); *State v. McCaffrey*, 181 Ind. 200, 103 N. E. 801 (1914); *People v. Minney*, 155 Mich. 534, 119 N. W. 918 (1909); *Isbell v. U. S.*, 227 Fed. 788 (C. C. A. 8th, 1915); *State v. Torello*, 100 Conn. 637, 124 Atl. 375 (1924); *State v. Gomez*, 58 Mont. 177, 190 Pac. 982 (1920); *Stare v. McHenry*, 93 W. Va. 396, 117 S. E. 143 (1923); *State v. Myer*, 69 Iowa, 148, 28 N. W. 484 (1886); *Combs v. Commonwealth*, 162 Ky. 86, 172 S. W. 101 (1915); *State v. Grondin*, 113 Me. 479, 94 Atl. 947 (1915); *State v. Young*, 237 Mo. 170, 140 S. W. 873 (1911); *People v. Ledwon*, 153 N. Y. 10, 46 N. E. 1046 (1897); *State v. Norman*, 153 N. C. 591, 63 S. E. 917 (1910); *State v. Fiester*, 32 Ore. 254, 50 Pac. 551 (1897); *Devoy v. State*, 122 Wis. 148, 99 N. W. 455 (1904).

116. In the earlier cases even where a verdict was directed in civil matters it was considered that the direction must be that if the jury believed all the testimony they should so find, otherwise the court would be infringing on the

through the equivalent of the demurrer to evidence concept, to setting aside the verdict, has got it where the most elegant circumlocution would be required to make it appear other than an infringement.¹¹⁷ While the warrant for a directed verdict on the ground that if a contrary verdict were returned the court would be under necessity of setting it aside, seems logical enough in the setting of present-day attitudes, there is a vast difference. Setting aside the verdict means a new trial by a new jury with time intervening for mutations in evidential strengths with always the possibility of compromise; but a directed verdict constitutes *res adjudicata*.¹¹⁸

To the ordinary mind, all the reasons for directing a verdict for the plaintiff in a civil suit apply with equal cogency to the direction of a verdict for the state. In a criminal trial and in one of the earlier cases on the subject, Circuit Justice Hunt so far lost his judicial equilibrium over the unheard of temerity of a female by the name of Susan B. Anthony, who, knowing she was a woman, yet had the effrontery to vote in a congressional election, that he came right out and reasoned along such lines to sustain his action in having directed the jury to find her guilty.¹¹⁹ This grave error in presuming that there was no distinction between the inviolability of jury trials in civil cases and in criminal cases, was of course unpardonable, particularly at a time when the judiciary was quietly

inherent right of the jury to pass on the credibility of the witnesses. See again the opinion in 11 Fed. 478 (C. C. R. I. 1882). See also Gwyn Harper Co. v. Carolina Central Rr., 128 N. C. 280, 38 S. E. 894 (1901). Under present practice the instruction is a mere matter of form after the motion is granted and judgment is usually given regardless of what the jury may think. When a peremptory instruction is granted, the jury may even be compelled to return a verdict accordingly. Curran v. Stein, 110 Ky. 99, 60 S. W. 839 (1901); W. B. Grimes Dry Goods Co. v. Malcolm, 164 U. S. 483 (1896). Or the court may direct entry of verdict without their assent. Cahill v. Chicago etc. Ry. Co., 74 Fed. 285 (C. C. A. 7th, 1896). See also *In re Sharon's Estate*, 179 Cal. 447, 177 Pac. 283 (1918); Banfill v. Byrd, 122 Miss. 288, 84 So. 227 (1920); Kirshenbaum v. Mass. Bonding etc. Co., 107 Neb. 494, 186 N. W. 529 (1922).

117. But cf. Catlett v. St. Louis Ry. Co., 57 Ark. 461, 21 S. W. 1062 (1893); Hopkins v. Nashville Rr. Co., 96 Tenn. 409, 34 S. W. 1029 (1896).

118. *Denver v. Home Savings Bank*, 200 Fed. 28, (C. C. A. 8th, 1912) *aff'd*, 236 U. S. 101 (1915); *In re Sharon's Estate*, *supra* note 116; *Andrews v. School District*, 35 Minn. 70, 27 N. W. 303 (1886); *Dunseth v. Butte Electric Ry. Co.*, 41 Mont. 14, 108 Pac. 567 (1910); *Reams v. Sinclair*, 97 Neb. 542, 150 N. W. 826 (1915); *Wicks v. Sanborn*, 72 Ore. 321, 143 Pac. 1007 (1914); *H. F. Watson Co. v. Citizens Concrete Co.*, 28 R. I. 472, 68 Atl. 310 (1907); *McCown v. Muldrow*, 91 S. C. 523, 74 S. E. 386 (1912); *Morgan v. Chicago Ry Co.*, 83 Wis. 348, 53 N. W. 741 (1892).

119. 24 Fed. Cas. 829 (1873).

curbing the jury in civil cases without disturbing the public mind. The worst of it was that his deductions appeared unanswerable in view of the precedents as to the duty of the jury to take the law from the court.¹²⁰ But a few years later matters were very neatly set back into their former paths by Justice McCrary in a decision which became the leading case on the rule that verdicts can not be directed for the state in a criminal case. This decision deserves a large place in our legal history as a monumental example of judicial ingenuity in reconciling conflicting principles for the purpose of preserving expeditious tendencies. After a facile discourse on constitutional provisions and the respective provinces of the court and jury the justice offers this unexpected yet judicially satisfactory solution:

"It is now well settled in civil cases, where the facts are undisputed and the case turns upon questions of law, the court may direct a verdict in accordance with its opinion of the law; but the authorities which settle this rule have no application to criminal cases. In a civil case the court may set aside the verdict, whether it be for the plaintiff or defendant, upon the ground that it is contrary to the law as given by the court; but in a criminal case if the verdict is one of acquittal, the court has no power to set it aside. It would be a useless form for a court to submit a civil case involving only questions of law to the consideration of a jury, where the verdict when found, if not in accordance with the court's view of the law would be set aside. The same result is accomplished by an instruction given in advance to find a verdict in accordance with the court's opinion of the law. But not so in criminal cases. *A verdict of acquittal cannot be set aside and therefore if the court can direct a verdict of guilty, it can do indirectly that which it has no power to do directly.*"¹²¹

On such a foundation much of the later law of peremptory instructions or directed verdicts has been built. Since there can be no directed verdicts for the state in criminal cases the integrity of jury trials has been preserved as a sop to traditional guaranties; but the inroads upon jury trials in civil cases have been considerable by both courts and legislatures. It is probable that, in an age when juries are coming more and more into disrepute as a drag on efficient administration, the possibilities of peremptory instructions will be more deeply probed. An observation of the cases in the last decade will convince one that direction of the verdict is fast becoming one of the most customary and efficient tools of the trial court.

120. On reflection, however, Justice Hunt seems to have relented for in the trial of the election officers growing out of the same matter, he modified his instruction. 11 Fed. 470, 473 (C. C. Kan. 1882).

121. *Id.* at 474 (Italics supplied).

V

*Procedural Problems Arising as A Result and the Escapes
from these Problems*

A critical examination of a decision seldom reveals the precarious snares baited for appellate judges. Neither does it reveal their extremity at times in extricating themselves in accordance with their convictions and yet in a rational manner. Many appellate judges no doubt suffer from conflicts between the past promises of *stare decisis* and the present virtues of personal conviction. Some blindly follow a literal interpretation of precedent and justify themselves with loyalty to their oaths. Others follow conscience and rationalize as best they can, or overrule as occasion requires. Still others, with more of a penchant for "state-craft", shape the materiality of the facts to fit the salient principles of the past and in this manner forecast what they consider the genius of the law—at the same time preserving their sacred oaths unsullied. But regardless of methods, on them is cast the ultimate responsibility of weaving the seamless web. An enumerated treatment of the obvious specific problems suggested by the varied functions of instructions would result in too burdensome a reiteration of much of the matter hereinbefore detailed. A few general observations should suffice to terminate this discussion.

The fallacy of the use of law and fact as a categorical test for the various phases of jury trial was effectively shown by Dean Thayer in an excellent article published in 1890, in which he pointed out that a great deal of confusion resulted from defining the terms in verbal equivalents.¹²² More recently Dean Green has discussed the desirability of such expansible and collapsible terms which elude the strictures of definitive bonds:

"No two terms of legal science have rendered better service than 'law' and 'fact'. They are basic assumptions; irreducible minimums and the most comprehensive maximums at the same instant. They readily accommodate themselves to any meaning we may desire to give them. In them and their kind a science of law finds its strength and durability. They are the creations of centuries. What judge has not found refuge in them? The man who could succeed in defining them would be a public enemy. They may torture the souls of language mechanics who insist that all words

122. "But if we ask the question what sort of thing it is that is for the court and what for the jury, we do not get on, for we are told that matters of law are for the court and matters of fact for the jury, ad questionem, etc. . . . We do not then escape the necessity of trying to determine what is a matter of fact and what is a matter of law." Thayer, *Law and Fact in Jury Trials* (1890) 4 HARV. L. REV. 147.

and phrases must have a fixed content but they and their flexibility are essential to the science which has to do with the control of men through power to pass judgment on their conduct." ¹²³

Dean Green further develops these terms in the allocation of the functions of judge and jury generally and with particularity in deceit, assault and battery, and malicious prosecution.¹²⁴

Professor Bohlen considers the dissertation on law and fact the least satisfactory of Dean Green's book.¹²⁵ But be that as it may, the criticism merely emphasizes the more important point that there continue to be many cavil-breeding procedural problems which result from the piling up of decisions based on the province of court and jury. Law and fact are used as the basic criterions for the content of instructions and charges which in turn become devices for the variety of untheoretical uses and functions in the hands of trial judges, lawyers and appellate courts. And aside from the procedural confusion, there is the assertedly graver problem of the crystallization of rules, preventing growth to meet new social developments.

Professor Bohlen, as he himself indicates in his review of Dean Green's book,¹²⁶ has considered these matters with respect to negligence (though not specifically from the stand-point of instructions) in his "Mixed Questions of Law and Fact."¹²⁷ In the tendency of the courts to usurp the functions of the jury in the fixing of negligence standards he sees two great dangers:

(1) "undue rigidity which results from the unfortunate feeling that any decision of a court creates a rule of law which, as law, is absolutely and eternally valid"; and (2) the fixing of "standards of conduct so definite and precise as to give to unscrupulous practitioners extraordinary opportunities for the successful coaching of witnesses."

Finally, he hopes that in the usurpation of this function of the jury, the courts will realize that "they are exercising an administrative function and that such decisions are not like their decisions declaring those principles which are fundamental to our concept of law, sacrosanct from judicial re-examination and change under changing conditions."

The second danger suggested by Professor Bohlen may be dismissed with few words. It is patent that there is presently less

123. Green, *op. cit. supra* note 82, at 270.

124. *Id.* at 278 *et seq.*

125. (1932) 80 U. OF PA. L. REV. 783.

126. *Ibid.*

127. (1924) 72 U. OF PA. L. REV. 111.

precision in the law of negligence as to standards of conduct than in any other branch of the law. Yet no unscrupulous lawyer being a 'reasonable man' should anticipate any greater difficulty in coaching a witness in such manner as easily to "escape a non-suit or a directed verdict for the defendant". The net difference, if any, is probably to cause the manufacture of a much better quality of lie for the sake of safety. But admitting the efficacy of this danger, the courts cannot very well afford to adopt the policy of either retaining a standard in its own bosom for fear the unscrupulous lawyer will learn what it is, or occasionally overruling a prior decision in order to bring him up with a jerk.

As to the first danger and the suggestion advanced, Professor Bohlen perhaps overlooks the manner in which lawyers and judges work and have worked since time immemorial. There is apparently nothing more hateful and ill-advised to them than a frontal attack on a problem. It simply does not jibe with the legal mind or the spirit of our system. Flanking movements have made the significant history of our law, to the amazement and occasional disgust of all except those who practice it. In stating the danger, Professor Bohlen himself suggests the antipathy for change but he fails to take into account that even if a rule which has become a "scandal and a hissing" goes for a long time unchanged, it does not follow that its force persists unimpaired when once the court has become convinced of its pernicious social value. Has any ingenious judge had serious difficulty in accomplishing desired results indirectly?

The courts have sufficient means of administration. What they need is convictive guidance; direction is more important than directness. Appellate judges could scarcely wish for freer rein in causes tried by juries. While the myriad of precise rules laid down for the instruction of juries and the apparent impossibility of satisfying all of them in a particular case would seem to have reduced the procedure to such precarious technicalities that the appellate court would be bound to grant a new trial, yet everyone knows such is not the truth. Misdirection, non-direction and failure to observe directions were manufactured by the courts themselves from the raw materials of law and fact for the control of others, and it should not be expected that clever courts will be entrapped in their own devices. There are three more or less arbitrary escapes by which the judgment of the lower court may be affirmed without even leaving the semblance of a track: (1) by ignoring questions raised in the record, (2) memorandum decisions and (3) discretionary appeals. None of these, however, is the prevailing mode. The use of the two latter will no doubt receive favorable expansion as the appalling

rate of printed reports renders some such drastic action necessary. But by far the most frequently used now is that ubiquitous exit, non-prejudicial error,¹²⁸ at the door of which the unanswerable logic of an appeal brief premised on *stare decisis* falls.

128. It should be noted that the verdict is now tested by the courts considering whether or not the jury *was* misled instead of whether it *may* have been misled. A host of authorities may be found for harmless and non-prejudicial error under *Appeal and Error* in the AMERICAN DIGEST SYSTEM and CORPUS JURIS as well as in other standard works. Of course some states have provision for it by constitution and statute, (*e.g.*, CAL. CONST. art. VI. § 4½), but since the provision is made flexible enough so that injustice may not result, the decisions are scarcely different from those of other states having no such written provision. This may be seen from a casual perusal of TREADWELL'S ANNOTATIONS (6th ed. 1931).