Special Instructions on Law by Counsel Before Argument

Norman W. Shibley*

When the evidence at the trial of a law suit is concluded, counsel for either party may present written instructions[1] to the court concerning matters of law and request that they be given to the jury. Such instructions must be given or refused by the trial judge before oral argument of counsel is commenced. The basis for this procedure is found in Section 11420-1 (5), Ohio General Code.[2]

The present law, which applies only to civil actions[3] is a direct descendant of a long series of related statutes which had their inception in the Code of Civil Procedure in 1853.[4]

---

* Of the firm of Harrison, Thomas, Spangenberg and Hull, Cleveland, Ohio; Editorial Board, Ohio State Law Journal, 1947-49.

[1] Also known or referred to in the cases as special instructions, special requests, or special charges. Hereinafter for convenience referred to as "special instructions".

[2] Section 11420-1(5) "When the evidence is concluded, either party may present written instructions to the court on matters of law, and request them to be given to the jury, which instructions shall be given or refused before the argument to the jury is commenced:" 114 V 193 (208). Eff. 8-3-31.

[3] The statutory rule governing requests for special instructions in criminal cases is found in Section 13442-8, Ohio General Code: "(5) When the evidence is concluded, either party may request instructions to the jury on the points of law, which instructions shall be reduced to writing if either party requests it."

Under this section of the General Code, the court is authorized but not required to give special instructions to the jury before argument in a criminal case. The mandatory requirement for special instructions before argument, Section 11420-1, General Code, applies only to civil cases. State of Ohio v. Petro, 148 Ohio St. 473, 76 N.E. 2d 355 (1947); approving and following Wertenberger v. State, 99 Ohio St. 353, 124 N.E. 243 (1919).

[4] In Jones v. State, 20 Ohio 34, 46 (1851), it was held that although customary to do so, there was no law imposing the obligation upon courts to charge a jury unless requested by counsel, either upon the whole case or upon some particular part thereof. On March 14, 1853 two laws were passed to become effective July 1, 1853. Section 266.

(5) "Where the evidence is concluded, either party may request instructions to the jury on points of law, which shall be given or refused by the court; which instructions shall be reduced to writing, if either party require it." 51 Ohio Laws, 100, Code of Civil Procedure.

(7) "The court may again charge the jury after the argument is concluded," 51 Ohio Laws, 101, Code of Civil Procedure.

These two provisions of the law enacted almost 100 years ago were the forerunners of paragraphs five and seven of Section 11420-1 as we know it today.

Paragraph 5 above provided that counsel could request the court to charge but these charges may or may not have been in writing, and may or may not

Judge Sherick in the leading case of *Booksbaum, a Minor v. Christian,*[5] cogently stated the reason for the rule thus:

> The reason for the rule is found in the right of counsel so requesting to present his case to the jury in argument

---

have been given before argument, although the language of paragraph 7 by using the word "again" suggests that the instructions were to be given before argument.

The first amendment to these sections occurred on April 13, 1867 (64 Ohio Laws, 138). There was no change to paragraph 5 but paragraph 7 was supplemented by language requiring that any charge or charges given after argument should be reduced to writing by the court, if either party requested it, "Which charge or charges when so written and given, shall in no case be orally qualified, modified, or in any manner explained to the jury by the court . . ."

The Act was amended again in 1868 (65 Ohio Laws, 190). There was once more no material change to paragraph 5, but paragraph 7 was altered to read as follows: "The court, after argument is concluded, shall immediately, and before proceeding with other business, charge the jury; which charge or any charge given after the conclusion of the argument, shall be reduced to writing by the court, if either party request it, before the argument to the jury is commenced; and such charge or charges, or any other charges or instruction provided for in this section, when so written and given, shall in no case be orally qualified, modified, or in any manner explained to the jury by the court; and all written charges and instructions shall be taken by the jury in their retirement, and returned with their verdict into court, and shall remain on file with the papers of the case."

The limitation on the right of a court to modify, qualify or explain was now all-inclusive and reached every charge or instruction in writing that the court may have given upon request of counsel.

Another amendment to these two sections was enacted on March 3, 1892 (89 Ohio Laws, 59). Paragraph 5 read as follows:

"When the evidence is concluded, either party may present written instructions to the court on matters of law, and request the same to be given to the jury, which instructions shall be given or refused by the court before the argument to the jury is commenced."

The only difference between paragraph 5 as it existed in 1892 and present paragraph 5 of Section 11420-1, formerly Section 11447, is that in the present section the word "them" has been substituted for the words "the same".

Paragraph 7 was amended by deleting some of the excess words. After the amendment of 1892, it read the same as paragraph 7 of Section 11420-1 reads today.

So while paragraphs 5 and 7 of Section 11420-1 had their origin in the Code of Civil Procedure enacted in 1853, their present wording, with the minor exception noted above, came into being in 1892.

Before these last amendments were adopted, it was a matter in the discretion of the trial judge whether or not he would give the charges requested before argument, or before final submission of the case. Shortly after the amendment the question as to its effect and meaning was considered by the supreme court in the case of Village of Monroeville v. Root, 54 Ohio St. 523, 44 N.E. 237 (1896). The court in the syllabus of that case stated the law as follows: "Section 5190 Revised Statutes, as amended March 3, 1892 (89 Ohio Laws, 60), confers upon parties the *right* to have such correct written instructions as may be requested given to the jury *before* argument."

[5] 53 Ohio App. 384, 5 N.E. 2d 177 (1935).

> grounded upon the law which the court will have already given to the jury. If a court refuses or fails to so instruct upon request, counsel may know that his conception of the law of the case is not the law applicable to his controversy, and that the court will thereafter generally charge otherwise . . . . If the request be given, counsel then is informed thereby that he may proceed to argue the law and facts of his case without fear of being made ridiculous in the minds of his client and the jury. It is therefore apparent that the giving of a correct request before argument is of value to a litigant, and if a correct request be not given the litigant may thereby be deprived of a valuable right.

There have been other although less adequate explanations given for the rule.[6]

The reader is cautioned at the outset to bear in mind there is a distinction between special instructions requested *before* argument and those requested *after,* or in conjunction with the court's general charge. It is also of particular importance when dealing with special instructions to observe the well known distinction between situations which are merely erroneous and those which are prejudicially erroneous resulting in a reversal of the judgment.

This article excludes all material concerning the court's general charge except in so far as it relates to special instructions requested by counsel. Rules governing the preservation of exceptions to the giving or refusing to give of special instructions have also been omitted[7] as has any reference to substantive law in special instructions. With the foregoing word of introduction, we turn our attention to the law of special instructions in Ohio.

I. Force And Effect Of Special Instructions Submitted By Counsel Before Argument

When counsel submits a special request to charge before argu-

---

[6] "The purpose of the statute is manifest. It is to afford the counsel opportunity to present their views of the law and have them considered by the judge, and to obtain, so far as may be, the opinion of the judge thereon, before argument. This in order that they may shape their arguments as to the law in their discussion to the jury in an intelligent manner, and also avoid useless or superfluous discussion." The American Steel Packing Co. v. Conkle, 86 Ohio St. 117, 99 N.E. 89 (1912); "An instruction before argument, in writing, under the statute, in character has a different legal entity and significance than an instruction given in the general charge at the conclusion of the argument. In the former case it becomes the unquestioned law of the case upon the subject incorporated in the instruction. It is the voice of the court pronouncing the law upon that question. Counsel may read the same repeatedly to the jury, and it is of such legal import that it goes to the jury under instructions to be considered by them in their deliberations upon the case." Presti v. The Cleveland Ry. Co., 26 Ohio App. 536, 539-40, 160 N.E. 508 (1927).

[7] See the excellent summation of these principles by Mr. Earl Morris of the Columbus Bar in the Ohio Bar for September 12, 1948.

ment which correctly states the law and is pertinent to one or more of the issues in the case and the same subject has not been covered by other charges given before argument, it is error on the part of the trial court to refuse to give such a charge before argument.[8] This error is prejudical[9] and therefore reversible error.[10]

However, it is essential that the requested pre-argument instruction to the jury not only be a correct statement of the law and relate to an issue in the case[11] but it must be timely and properly made;[12] must be applicable to the evidence adduced[13] or concerning an issue of fact in the case which is supported by some evidence[14] or pertinent to the proof.[15]

The right[16] to have such a special instruction given by the trial court is held to be absolute[17] and one which the litigant may not be deprived of without resulting in reversible error.[18]

The duty[19] that devolves upon the trial court to give such a special instruction has been described in the cases as "mandatory",[20] or a "must[21] about which there is no question",[22] and "never dis-

---

8 Chesrown v. Bevier, 101 Ohio St. 282, 128 N.E. 94 (1920).

9 Leonardi v. A. Habermann Provision Co., 143 Ohio St. 623, 52 N.E. 2d 232 (1944); Bartson v. Craig, 121 Ohio St. 371, 169 N.E. 291 (1929).

10 Rogers v. Ziegler, 21 Ohio App. 186, 152 N.E. 781 (1925).

11 Sheen v. Kubiac, 131 Ohio St. 52, 1 N.E. 2d 943 (1936). The Patton Motor Trucking Co. v. Knapp, 25 Ohio App. 89, 157 N.E. 402 (1926).

12 Behan v. The Cincinnati Street Ry. Co., 78 Ohio App. 129, 69 N.E. 2d 160 (1946).

13 Kubiac v. Harris, 20 Ohio L. Abs. 79 (1935); Washington Fidelity National Insurance Co. v. Herbert, 125 Ohio St. 591, 183 N.E. 537 (1932).

14 *Supra* note 12.

15 Bartolas, Admr. v. Coleman, 27 Ohio App. 119, 161 N.E. 20 (1927).

16 *Supra* note 13.

17 *Ibid.*

18 Scharff v. Levine, 29 Ohio App. 340, 163 N.E. 581 (1928).

19 The Ohio Electric Railway Co. v. Burkham, 7 Ohio App. 434, 27 Ohio C.C. (N.S.) 366 (1916).

20 Booksbaum, a Minor, v. Christian, 53 Ohio App. 384, 5 N.E. 2d 177 (1935); Cheney v. Garrett, 50 Ohio L. Abs. 150, 76 N.E. 2d 96 (1947); Travelers Indemnity v. Benkert, et al., 13 Ohio L. Abs. 579 (1932); The Cincinnati Traction Co. v. Kroger, 114 Ohio St. 303, 151 N.E. 127 (1926); Baltimore & Ohio Rd. Co. v. Shober, 38 Ohio App. 216, 176 N.E. 88 (1930); Lima Used Car Exchange Co. v. Hemperly, 120 Ohio St. 400, 166 N.E. 364 (1929); As to how the test is applied see Scott, Admx., v. Hy-Grade Food Products Corp., 131 Ohio St. 225, 230, 2 N.E. 2d 608 (1936), where it was stated: "Upon this record the verdict of the jury in favor of the defendant should not be disturbed unless it is *clear* that the instructions requested by the plaintiff, which were refused, are such as *clearly* fall within the mandatory requirements of the statute with reference to instructions requested to be given before argument."

21 Bartolas, Admr. v. Coleman, *supra* note 15; Keesey v. Glass, 8 Ohio App. 88, 28 Ohio C.C. (N.S.) 134 (1917).

22 Leonard, Crosset and Riley v. Weidner & Co., 14 Ohio App. 421 (1921).

cretionary".[23]

The above rights and duties apply to special instructions even though the language of the charge is not the exact language the court would have selected;[24] or even where the court forgets to give the requested instructions by an oversight.[25]

Since the duty imposed upon the court is mandatory, counsel making the request for a special instruction need not inquire whether or not the court overlooked the charge, but may assume, on the court's failure to give the instruction, that it refused to do so.[26]

II. Preparations Of The Special Instruction

Certain fundamental rules set forth below should be applied by counsel in the preparation of special instructions to be submitted to the court before argument.

Scope

The scope of the requested special instruction has been defined many times both by the supreme court and the appellate courts of Ohio.

It is not necessary, nor does the statute contemplate, that a special request should cover all the legal questions[27] or every branch[28] and feature[29] of the case.[30]

A party may request the court to give only one rule of law and if that rule correctly states the law and is applicable to an issue in the case which is supported by some evidence, the court must grant the request.[31] Furthermore, where the record discloses instructions given before argument at the plaintiff's request, which are correct statements of the law from the plaintiff's standpoint, but do not cover every branch and feature of the case, including the effect of affirmative defenses such as contributory negligence, but such defenses are fully covered in the court's general charge, the giving of such special instructions before argument is not prejudicially erroneous.[32]

---

[23] Dunham v. Mulby, 24 Ohio App. 509, 156 N.E. 608 (1926); The United States Board & Paper Co. v. Wallace Browne, 1 Ohio C.C. (N.S.) 345, 15 Ohio C.D. 347 (1903).

[24] *Supra* note 8.

[25] Booksbaum, a Minor, v. Christian, *supra* note 20.

[26] *Ibid.*

[27] Behan v. The Cincinnati Street Ry. Co., 78 Ohio App. 129, 69 N.E. 2d 160 (1946).

[28] Curlis v. Brown, 9 Ohio App. 19, 31 Ohio C.C. (N.S.) 364 (1917).

[29] Hunter v. Brumby, 131 Ohio St. 443, 3 N.E. 2d 353 (1936).

[30] Swing, Trustee, v. Rose, 75 Ohio St. 355, 369, 79 N.E. 757 (1906).

[31] Behan v. The Cincinnati Street Ry. Co., *supra* note 27.

[32] Makranczy v. Gelfand, Admr., 109 Ohio St. 325, 142 N.E. 688 (1924). At page 338 the court reasoned, "Thus, when the entire instructions both before and after argument, are taken in conjunction, we feel that the jury were properly instructed in the premises . . ."

Looking at the other side of the coin, we find decisions holding that no error intervened where the trial court refused to grant a special instruction that contained more than one proposition of law.[33]

The reason for this rule concerning "scope" is a practical one inasmuch as it is impossible to state all the law in a single paragraph or in a single charge.[34]

However, as a written instruction before argument becomes the unquestioned law of the case, such instruction must state the law clearly and correctly and be complete in itself.[35]

Stated in simple language, the rule as to the scope of a special instruction is this: while the instruction need not cover every branch and feature of the case, the branch and feature which it does cover must be clear, correct and complete in itself. It is readily apparent that the application of this rule results in a great deal of individual discretion.

Giving or refusing to give a requested pre-argument special instruction which is simply an abstract statement of the law applicable to any case is a matter of discretion for the courts.[36]

An abstract charge, if given, however, does not constitute basis for reversal.[37]

Undue Repetition: Number And Length

In the leading case of *The American Steel Packing Co. v. Conkle*,[38] the supreme court enunciated the important "unduly repetitious" rule. Stated simply this rule provides that no proposition of law should be given to the jury in such a manner that it presents a view of the case that is one-sided and unfair.

It is not every repetition of a legal proposition that results in prejudicial error. The degree of repetition must be unreasonable.[39]

The undue repetition rule has been applied to the requests for special instructions by one party;[40] the general charge of the

[33] The Central Casulty Co. v. Fleming, 22 Ohio App. 129, 153 N.E. 345 (1926).

[34] The Cincinnati Interurban Co. v. Haines, 8 Ohio C.C. (N.S) 77, 18 Ohio C.D. 443 (1906), *aff'd* 77 Ohio St. 621, 84 N.E. 1126 (1907).

[35] Scott, Admx., v. Hy-Grade Food Products Corp., 131 Ohio St. 225, 2 N.E. 2d 608 (1936); Presti v. The Cleveland Ry. Co., 26 Ohio App. 526, 160 N.E. 508 (1927); Ohliger v. The City of Toledo, 20 Ohio C.C. 142, 10 Ohio C.D. 762 (1900).

[36] Karras v. Mosley, 16 Ohio L. Abs. 116 (1933); Michalsky, a Minor, v. Gaertner, 53 Ohio App. 341, 5 N.E. 2d 181 (1935); Long v. Taplin-Rice-Clerkin Co., 38 Ohio App. 546, 177 N.E. 55 (1931).

[37] Kennard v. Palmer, 143 Ohio St. 1, 53 N.E. 2d 908 (1944); Weigel v. The Cottage Building & Loan Co., 68 Ohio App. 467, 42 N.E. 2d 171 (1941).

[38] 86 Ohio St. 117, 99 N.E. 89 (1912).

[39] Feher v. Motor Express, Inc., 45 Ohio L. Abs. 513, 68 N.E. 2d 140 (1945).

[40] The American Steel Packing Co. v. Conkle, *supra* note 38.

court;[41] the general charge of the court considered in the light of special instructions already given before argument;[42] special instructions requested and given after the court's general charge.[43]

Where undue repetition results in any of the above four situations, it is prejudicial and reversible error on the part of the trial court.[44] The converse is equally true, to wit: Where undue repetition would result, it is proper for the trial court to refuse requested special instructions even though they correctly state the law.[45]

Special instructions should not be excessive in length or number.[46] What constitutes "excessiveness" depends upon the nature and issues of each case.[47]

Reference To The Required Degree Of Proof

The Supreme Court of Ohio in *Hunter v. Brumby*[48] considered the question of whether or not a special instruction given before argument is erroneous because it employs the phrase "if you find" without any reference to the required degree of proof upon which such a finding could be made by the jury.

At the conclusion of all the evidence in that case the trial court at plaintiff's request gave the following special instruction:

> The court says to you, as a matter of law, that the statute of the State of Ohio in force and effect on June 26, 1932, provided as follows:
>
> (Here the statute was quoted.)
>
> And I say to you further that *if you find by the greater weight of the evidence,* that the defendant's driver in the operation of his taxicab at the time of this accident did violate this statute then the defendant would be guilty of negligence, and I say to you *further that if you find* that such negligence was the sole, direct and proximate cause of this accident, then your verdict must be for the plaintiff.[49]

It was the defendant's position on appeal that such a special instruction was erroneous as it omitted any reference to the required degree of proof following the second "if you find".

---

[41] The National Life & Accident Ins. Co. v. Kelley, 42 Ohio App. 255, 182 N.E. 46 (1932).

[42] The Cincinnati Traction Co. v. Nellis, 81 Ohio St. 535, 91 N.E. 1125 (1909).

[43] Jacob Ohliger v. The City of Toledo, 22 Ohio C.C. 142, 10 Ohio C.D. 656 (1900); see Feher v. Motor Express, Inc., *supra* note 39, for the many cases, reported and unreported, cited therein.

[44] *Supra* notes 38, 39 and 42.

[45] Jacquemin v. Bunker, 15 Ohio App. 491 (1922).

[46] The American Steel Packing Co. v. Conkle, *supra* note 38; Jacquemin v. Bunker, *supra* note 45.

[47] *Ibid.*

[48] 131 Ohio St. 443, 3 N.E. 2d 353 (1936).

[49] Emphasis supplied.

Chief Justice Weygandt, speaking for a unanimous court, held the instruction perfectly proper.[50]

Neither the question nor the result was new to the supreme court.[51] The rationale for the decision was that a requested special instruction need not cover every branch and feature of the case.

This rule was reaffirmed by the supreme court in 1938.[52]

Assumption of Material Facts as True

One of the easiest but most costly mistakes that counsel can make is the preparation of special requests to charge which are based on the assumption that a material fact is undisputed although in reality it is in dispute between the parties.

The Supreme Court of Ohio has held on numerous occasions that where such a situation exists, it is proper to refuse to give such a requested special instruction and that if it is given, prejudicial error results.[53]

In the leading case of *Plotkin v. Meeks*,[54] the following request was involved:

> *If you find* from the evidence *that the negligence* of the plaintiff either directly caused or directly contributed in the slightest degree to cause the injuries of which she complains, your verdict must be for the defendant.[55]

The court held that this request was properly refused because it assumed that the plaintiff was negligent and left as the only question for the jury to decide the issue of proximate cause.[56]

The request correctly worded would have been as follows: "*If you find* from the evidence *that the plaintiff was negligent* and

---

[50] "Of course in the exercise of an abundance of caution it might be well in each instance to insert phraseology relating to the necessary degree of proof, but this is far from suggesting that the omission so to do is either prejudical or erroneous." Hunter v. Brumby, *supra* note 48, at p. 445.

[51] Lima Used Car Exchange Co. v. Hemperly, *supra* note 20; The Cincinnati Traction Co. v. Young, et al., 115 Ohio St. 160, 152 N.E. 666 (1926).

[52] Simko v. Miller, 133 Ohio St. 345, 13 N.E. 2d 914 (1938), wherein the doctrine was extended; unlike the instruction approved in Hunter v. Brumby, *supra* note 48, there was no reference to any degree of proof anywhere in the instruction.

[53] Plotkin v. Meeks, 131 Ohio St. 493, 3 N.E. 2d 404 (1936); Binder v. Youngstown Municipal Ry. Co., 125 Ohio St. 193, 180 N.E. 899 (1932); Northern Ohio Ry. Co. v. Rigby, 69 Ohio St. 184, 68 N.E. 1046 (1903); Schweinfurth, Admr. v The C.C.C. & St. L. Ry. Co., 60 Ohio St. 215, 54 N.E. 89 (1899); Cline v. The State, 43 Ohio St. 332, 1 N.E. 22 (1885); Weybright v. Fleming, 40 Ohio St. 52 (1883); Bellefontaine Ry. Co. v. Snyder, 24 Ohio St. 670 (1874); DuBois, Admr. v. Schell, 5 Ohio App. 30, 25 Ohio C.C. (N.S.) 17 (1915) *aff'd* 94 Ohio St. 93, 113 N.E. 664 (1916); The Cincinnati Traction Co. v. Edwards, Admr. 22 Ohio C.C. (N.S.) 539, 28 Ohio C.D. 436 (1915); Weller v. The State of Ohio, 19 Ohio C.C. 166, 10 Ohio C.D. 381 (1899).

[54] *Supra* note 53.

[55] *Id.* at 494 (emphasis ours).

[56] *Id.* at 498.

that *such negligence* either directly, *etc.* . . . ."[57]

This example does not assume the negligence of the plaintiff but leaves that question open for the jury.

The reason advanced for the rule which forbids the assumption of the existence or non-existence of a material fact in issue where there is a conflict in the evidence, is that it invades the province of the jury.[58]

The rule applies both to special instructions and to the court's general charge.[59]

There was an interesting extension of this general rule by the supreme court in 1944 which indicates the fine distinctions in wording that can become crucial.[60] The plaintiff brought an action for damages arising from the sale of infected or unwholesome pork in violation of the pure-food statutes of the state. At the close of all the evidence and before argument, the plaintiff submitted the following special instruction to the court:

> I say to you that under the laws of Ohio it is unlawful to sell meat which is unwholesome or diseased; and if you find that the defendant sold meat to Ben Sanguedolce *which was unwholesome or diseased* by reason of the presence of trichinae, that was negligence as a matter of law; . . .[61]

In upholding the action of the trial court, the supreme court stated that it was not error to refuse to give a charge from the language of which a jury might reasonably infer that the court assumed the existence of material facts that were in dispute.[62]

The court went on to suggest that the charge should have been in form or substance, "if you find the defendant sold meat to Ben Sanguedolce, *and that it was unwholesome or diseased,* then such sale so made constituted negligence as a matter of law".[63]

---

[57] This is not the only possibility but it would correct the error.

[58] Cline v. The State, *supra* note 53; The Columbus Mutual Life Insurance Co. v. The National Life Insurance Co., 100 Ohio St. 208, 125 N.E. 664 (1919).

[59] Plotkin v. Meeks, *supra* note 53.

[60] Leonardi v. The A. Habermann Provision Co., 143 Ohio St. 623, 56 N.E. 2d 232 (1944).

[61] *Id.* at 628 (emphasis ours).

[62] The extension does not appear in the syllabus which in accordance with the well established rule held: ". . . a jury might reasonably infer that the court assumed the existence of material facts *that were in dispute*". The decision however indicated that it was wrong to permit "the jury to assume that the meat was unwholesome or diseased by reason of the presence of trichinae, *a fact necessary to be proven.*" *Supra* note 60 at 634. The rule appears to be that it is not only wrong to assume a material fact which is in dispute but it is also wrong to assume a material fact that isn't in dispute but which must be proven.

[63] *Supra* note 60 at 634. The distinctions that are drawn when this rule is being applied get exceedingly thin at times. The court recognized this and

III. Submission Of The Special Instruction

Although a special instruction may be properly prepared with reference to the rules cited in the above section, certain procedures must be observed in the submission of the special instruction if a party is to receive the full benefit and force of the mandatory provisions of Section 11420-1(5), Ohio General Code.

Affirmative Record Doctrine

The meaning and intent of the legislature in enacting Section 11420-1(5), Ohio General Code, is clear and unambiguous to court and counsel alike. When counsel have rested their respective cases, each may present his version or theory of the law of the case to the court in form of written special instructions and request that they be given to the jury. The statute commands the court to give or refuse to give these special requests before argument to the jury is commenced.

For the most part litigation arising out of the mechanics of this simple procedure has resulted (1) when the bill of exceptions has failed to show affirmatively that the requested special instructions were in writing and (2) when the bill of exceptions has failed to show affirmatively that the request was made before argument.

In the first instance, the cases are unanimous is holding that where the record fails to show affirmatively that the special instruction requested was submitted in writing, it is not error on the part of the trial court to refuse to give such instruction.[64] This is so even where the appellate court feels there is every reason to believe the requested special instruction was in fact in writing.[65] In this situation, the reviewing court will not even inquire into the correctness of the instruction.[66]

It is the instruction itself and not the request to give it that the law requires to be writing.[67] Further, one court has held "written instructions" to mean "typewritten instructions".[68] The

said, "even if it be conceded that the trial court erred in refusing to give such charge . . .", then it decided the case upon an additional ground.

[64] Haugh v. Detroit, Toledo and Ironton Ry. Co., 25 Ohio L. Abs. 123 (1937); Toledo, Fremont and Norwalk Ry. Co. v. Gilbert, 2 Ohio C.C. (N.S.) 432, 14 Ohio C.D. 181 (1902); The Commonwealth Casualty Co. of Phil. v. Wheeler, 13 Ohio App. 140, 30 Ohio C.C. (N.S.) 481 (1919).

[65] Goldsberry v. Lefevre, 24 Ohio L. Abs. 146 (1937).

[66] Clark, Administrator v. Boltz, 10 Ohio C.C. (N.S.) 1, 19 Ohio C.D. 665 (1906).

[67] The Hocking Valley Ry. Co. v. James, Trustee, et al., 1 Ohio App. 355, 18 Ohio C.C. (N.S.) 210 (1913).

[68] Karras v. Mosley, 16 Ohio L. Abs. 116 (1935). Typewritten instructions were required by a local rule of court. It is interesting to note that the appellate court did not reverse even though the trial court would not permit counsel time in which to comply with the rule of court.

affirmative record doctrine is grounded on the fundamental adherence of the decisions to the literal wording of the statute in holding that it is not error for the trial judge to refuse to give a correct special instruction that is not in writing.[69]

In the second instance, the cases are unanimous in holding that where the record fails to show affirmatively that the request for special instructions was made before argument, error can not be predicated upon the refusal of the trial court to give such instructions.[70]

The record must show more than a mere request made before argument. The request itself must include a statement of the desire of counsel to have the special instruction given before argument.[71]

The several decisions which spell out the law that the record must affirmatively show that the court was requested to give such instructions before argument reach this result by implication from the statute.[72]

This question, however, remains: Do the words "before the argument is commenced" mean the argument considered as a whole or the argument of each party? In an early court of appeals case[73] it appeared from the record that the defendant submitted a special request to charge while counsel for the plaintiff was arguing to the jury. The charge was refused by the trial court. The court of appeals reversed the lower court holding that the charge was proper and the fact that it was not asked until the argument was in progress was not sufficient reason for refusing to give it.

Inspection Of Special Instructions By Court And Opposing Counsel

There is little authority in Ohio on how much time, if any, should be given to the court or opposing counsel to consider and act upon tendered special instructions. As we have already seen, special instructions in order to fall within the mandatory rule must be submitted in writing to the court before argument. How long before seems to be a practical matter depending upon the ebb and flow of the trial as well as the progress of the case in respect to court sessions. It is clear that there must be adequate time for

---

[69] The Central Casualty Co. v. Fleming, 22 Ohio App. 129, 153 N.E. 345 (1926); The Hocking Valley Railway Co. v. James, Trustee, et al., *supra* note 67.

[70] Dunham v. Mulby, 24 Ohio App. 509, 156 N.E. 608 (1926).

[71] Newport and Cincinnati Bridge Co. v. Jutte, et al., Ohio C.C. (N.S.) 189, 17 Ohio C.D. 541 (1905).

[72] The Village of Monroeville v. Root, 54 Ohio St. 523, 44 N.E. 237 (1896); The Cincinnati Street Railway Co. v. Jenkins, 20 Ohio C.C. 256, 11 Ohio C.D. 130 (1900).

[73] Stark v. Cress, 4 Ohio App. 92, 22 Ohio C.C. (N.S.) 88 (1914); *cf.* The Cleveland Punch and Shear Works Co. v. The Consumers Carbon Co., 75 Ohio St. 153, 78 N.E. 1009 (1906).

the court to inspect and consider all requests to charge.[74]

There is not now nor has there ever been any statutory requirement that requested special instructions be shown to opposing counsel before submission to the court. Such a practice, however, appears customary.[75] Stated in another way, it has been said that opposing counsel can not be wholly ignored.[76] The reason advanced for this thought is that opposing counsel upon seeing the requests may, and frequently do, desire to present counter-propositions.[77]

In the leading case of *The American Steel Packing Co. v. Conkle*[78] the defendant submitted twenty-seven special instructions, all long and involved. The plaintiff objected especially on the ground that neither the court nor counsel could within a reasonable time fairly examine and pass upon the twenty-seven requests. Although the supreme court ultimately sustained the plaintiff's position on appeal, it was upon the "stronger" ground of undue repetition. Nevertheless, the court indicated there was much force in the plaintiff's objection.

Author Identification Of Special Instructions

The Supreme Court of Ohio has never directly[79] considered whether it is proper for either the trial court or counsel to disclose which party composed and requested the giving of a special instruction. Nevertheless, the three appellate courts which have passed upon the question make it clear that any indication, written or oral, to the jury on the part of either the trial judge or counsel is improper and undesirable.[80]

This is so because special requests are not the law of the parties but the law of the court[81] and should be considered as such by the jury.

While none of the reported decisions have gone so far as to

---

[74] The American Steel Packing Co. v. Conkle, 86 Ohio St. 117, 99 N.E. 89 (1912).

[75] Stark v. Cress, 4 Ohio App. 92, 22 Ohio C.C. (N.S.) 88 (1914).

[76] The American Steel Packing Co. v. Conkle, *supra* note 74.

[77] *Id.* at 127.

[78] 86 Ohio St. 117, 99 N.E. 89 (1912).

[79] Lima Used Car Exchange Co. v. Hemperly, 120 Ohio St. 400, 404, 166 N.E. 364 (1929). In deciding another point the court said, "instructions . . . are not to be regarded as the law of any particular party".

[80] Haney v. Dayton Street Transit Co., 45 Ohio L. Abs. 312, 67 N.E. 2d 794 (1944); Harper v. McQuown, 30 Ohio L. Abs. 389 (1939); Manchester v. Youngstown Sheet and Tube Co., 24 Ohio L. Abs. 658, 18 Ohio Op. 503 (1937); but see Travelers Indemnity Co. v. Benkert, 13 Ohio L. Abs. 579 (1932) wherein the trial court identified the author of the special instruction and the court of appeals made no comment on this aspect of the case.

[81] Manchester v. Youngstown Sheet and Tube Co., *supra* note 80.

hold that the disclosure was prejudicial error, their language can be construed as a warning signal against such a practice.[82]

Submission: Independent Or Series

Special requests to charge before argument should be offered as separate and independent propositions of law and not as one series. Where they are not so offered and where one or more of the requests does not correctly state the law applicable to the facts submitted to the jury, it is not prejudicial error on the part of the court to refuse to give any of the instructions requested.[83]

Where the record does not disclose whether the requested special instructions before argument were asked to be given as a whole or separately, there is a presumption that such instructions were offered as a series and the rule noted above applies.[84] This is true even though the requests were written on separate sheets of paper and even though they were separately numbered.[85]

IV. Mandatory Rules: Exceptions

As the text below indicates, it is not every special instruction submitted by counsel before argument that falls within the mandatory provisions of Section 11420-1(5), Ohio General Code. Further as previously noted there is a sharp distinction in procedure, force and effect between special instructions submitted before argument and special instructions requested after argument.

Special Instruction Already Given

In one important situation it is not error for the trial court to have refused to give a special instruction which meets every procedural and substantive requirement of the law. This is when the subject matter is covered by another special request which is given to the jury.[86] To hold otherwise would violate the already discussed rule with respect to undue repetition.[87]

Whether or not the substance of a refused special instruction

---

[82] Harper v. McQuown, 30 Ohio L. Abs. 389, 393 (1939).

[83] Cleveland Metropolitan Housing Authority v. Sacheroff, 35 Ohio L. Abs. 376, 40 N.E. 2d 951 (1942); First National Bank of Sardis v. Patton, 21 Ohio L. Abs. 202 (1935); see Reed Warehouses, Inc. v. Shelly, 20 Ohio L. Abs. 270 (1935).

[84] Pugh v. Akron-Chicago Transportation Co., 64 Ohio App. 479, 28 N.E. 2d 1015 (1940), *aff'd* 137 Ohio St. 164, 28 N.E. 2d 501 (1940); MacDonald v. The State, *ex rel* Fulton, Supt. of Banks, 47 Ohio App. 223, 191 N.E. 837 (1934).

[85] The Schatzinger Consolidated Realty Co. v. Stonehill, 19 Ohio C.C. (N.S.) 403, 29 Ohio C.D. 587 (1912).

[86] Chesrown v. Bevier, 101 Ohio St. 282, 128 N.E. 94 (1920); Limbaugh v. The Western Ohio Railroad Co., 94 Ohio St. 12, 113 N.E. 687 (1916); The Premier Service Co. v. Sefton, 31 Ohio App. 154, 166 N.E. 140 (1924); see Michalsky, a Minor, v. Gaertner, 53 Ohio App. 341, 5 N.E. 2d 181 (1935).

[87] Jacquemin v. Bunker, 15 Ohio App. 491 (1922); Rogers v. Garford, 26 Ohio App. 244, 159 N.E. 334 (1927).

has been covered by another special instruction is determined by the appellate court considering all the special instructions that were given and not by putting itself in the place of the trial court as he was about to proceed.

For example, if counsel's second request for special instruction is a correct statement of the law but refused; and subsequently the same ground is covered in counsel's sixth request, which is given, there is no error.[88]

More interestingly, if counsel's correct request for a special instruction is refused but the subject matter is properly covered by a special instruction given at the request of opposing counsel, still there is no error.[89] It is submitted that this is an additional reason why the identification of the author of special instructions should not be revealed.

One court has even gone so far as to say there is no error when counsel's correct request for a special instruction is refused where the court covers the ground *before* argument with its own special instruction voluntarily given.[90]

Request For Special Instructions After The General Charge

So far we have been dealing with the law concerning requested special instructions submitted by counsel at the conclusion of the evidence and *before* argument.

Counsel for either party may also submit requests for special instructions in connection with or *after* the court's general charge. The basis for these requests is not statutory but judicial[91] and therefore the rules are somewhat different.

It is not essential that the request be in writing[92] but good practice suggests the wisdom of reducing such a charge to writing.

The duty upon the court to give such requested special instructions is not mandatory in the same sense that it is when deal-

---

88 Boenke v. The Cincinnati Street Ry. Co., 56 Ohio App. 227, 10 N.E. 2d 232 (1936); Gottesman, Admr. v. City of Cleveland, 46 Ohio L. Abs. 474, 70 N.E. 2d 149 (1946); United States Fidelity & Guaranty Co. v. Commercial Shearing and Stamping Co., 14 Ohio L Abs. 565 (1933).

89 Jacquemin v. Bunker, *supra* note 87.

90 Zimmerman v. Second National Bank of Bucyrus, 24 Ohio App. 48, 156 N.E. 157 (1926). While this procedure does not directly violate the prohibition against modification in any respect of a special instruction requested by counsel before argument, the practical result is that it does.

91 Beeler v. Ponting, 116 Ohio St. 432, 156 N.E. 599 (1927) where it was stated on page 434, "It has been many times held by this court that a certain duty devolves upon counsel to request an instruction upon certain questions arising during the trial of a case, where the court has omitted to do so." Clark v. Clark, 16 Ohio C.C. 103, 8 Ohio C.D. 752 (1898).

92 The Cincinnati Traction Co. v. Lied, 9 Ohio App. 156, 160, 29 Ohio C.C. (N.S.) 136 (1917).

ing with special instructions submitted before argument. It is, however, reversible error to refuse a special instruction requested in connection with the court's general charge on a matter not covered by that charge.[93]

The fundamental difference between the two situations is that after the general charge, the court may properly refuse to give a requested instruction where all the propositions therein contained have been fully and fairly covered by the court in substance although in different form, language or words in his general charge.[94]

Even where instructions which are requested by a party after argument are given, the court is not required to use the precise terms or language submitted; it is sufficient if the substance thereof be given.[95]

Where a party excepts to the court's general charge which is free from prejudicial error as given but which fails to cover all the questions involved in the case, such failure is not a ground for reversal unless the omission is called to the attention of the court and further instructions are requested.[96]

Nor is it reversible error for the trial judge to decline to give an additional instruction to the jury where counsel fails to formulate a specific rule of law in his request that such an additional instruction be given.[97]

Stated another way, it is essential that counsel indicate clearly what he claims the law to be and what charge he desires the court to give.[98]

A general exception to the charge of the court is effectual only as to errors of law existing in the charge as given, *i.e.*, errors of commission, and does not bring in review on error, an omission or failure to give further proper instructions.[99]

---

[93] Union Central Life Ins. Co. v. Hoyer, 66 Ohio St. 344, 64 N.E. 435 (1902).

[94] Rice v. City of Cleveland, 144 Ohio St. 299, 58 N.E. 2d 768 (1944).

[95] The National Machinery Co. v. Towne, 11 Ohio App. 186, 30 Ohio C.C. (N.S.) 225 (1919).

[96] Columbus Ry. Co. v. Ritter, 67 Ohio St. 53, 65 N.E. 613 (1902); Slosser v. Lagorin, 44 Ohio App. 253, 185 N.E. 210 (1933); Karras v. Mosley, 16 Ohio L. Abs. 116 (1933).

[97] Chauncey Taft v. Eden Wildman, 15 Ohio 123 (1846); Bachman v. Ambos, 50 Ohio L. Abs. 97, 79 N.E. 2d 177 (1947); The Cincinnati Traction Co. v. Lied, 9 Ohio App. 156, 29 Ohio C.C. (N.S.) 136 (1917).

[98] Haley et al. v. Dempsey, Exr., 14 Ohio App. 326 (1921). Good practice suggests that the request for further instructions be made out of the hearing of the jury before it retires. The record should show that the request was made, that an instruction was tendered, and the substance of the tendered requested instruction, all of which was refused.

[99] The Columbus Railway Co. v. Ritter, *supra* note 96; Varner v. Epply, Admr., 125 Ohio St. 526, 182 N.E. 496 (1932).

Further, where counsel does not call the court's attention to the matter omitted from the charge, error, if any, in omitting such matter is cured.[100]

V. Curing Of Error In Giving Or Refusing Special Instruction

Special Instruction Refused: Covered In General Charge

Once the court erroneously refuses to give a requested special instruction before argument, does the fact that the subject matter is substantially covered in the court's general charge correct this error? It is well settled that it does not.[101]

As we have already seen the duty to give a correct special instruction is mandatory upon the trial court and non-compliance with this rule results in prejudicial error irrespective of what the court states in its general charge to the jury.[102]

This is true even though the special request itself is subsequently read and even though the pre-argument omission was not intentional but to the contrary due to an oversight on the part of the trial court.[103]

The basis for this non-curability rule is the same as the underlying reason for statutory special instructions in Ohio, to wit, the right of counsel to know what the law is *before* argument to the jury.[104]

Withdrawal Of Special Instruction

The trial judge may properly withdraw from the jury's consideration a special instruction, already given, which upon further reflection seems erroneous.[105] Similarly, counsel who makes the initial submission, may request a withdrawal, if in his later opinion, the instruction seems erroneous.[106]

In this situation it has been said that the court has an inherent power to strip the record before verdict of any prejudicial error,

---

[100] Sorochak, a Minor, v. Reed, 31 Ohio App. 401, 166 N.E. 918 (1928).

[101] Washington Fidelity National Ins. Co. v. Herbert, 125 Ohio St. 591, 183 N.E. 537 (1932); Lima Used Car Exchange Co. v. Hemperly, *supra* note 79; Michalsky, a Minor, v. Gaertner, 53 Ohio App. 341, 5 N.E. 2d 181 (1935); The Premier Service Co. v. Sefton, 31 Ohio App. 154, 166 N.E. 140 (1924); McKay v. Ohio Fuel Gas Co., 39 Ohio L. Abs. 146, 51 N.E. 2d 909 (1942).

[102] Leonardi v. A. Haberman Provision Co., 143 Ohio St. 623, 633, 56 N.E. 2d 232 (1944); Industrial Commission of Ohio v. Austin, 51 Ohio App. 469, 1 N.E. 2d 649 (1935); Cheny v. Garrett, 50 Ohio L. Abs. 150, 76 N.E. 2d 96 (1947); Travelers Indemnity Co. v. Benkert, 12 Ohio L. Abs. 579 (1932); Grain Company v. Fronizer, 25 Ohio C.C. (N.S.) 151 (1912); Keiper v. Selfe, 22 Ohio C.C. (N.S.) 507, 34 Ohio C.D. 6 (1906); Mueller v. Busch, 11 Ohio C.C. (N.S.) 353, 21 Ohio C.D. 49 (1908).

[103] Booksbaum, a Minor, v. Christian, *supra* note 20.

[104] *Supra* note 6.

[105] Rogers v. Garford, 26 Ohio App. 244, 159 N.E. 334 (1927).

[106] Warn v. Whipple, 45 Ohio App. 285, 187 N.E. 88 (1932).

even though the error be of the court's own commission.[107]

Whether or not an instruction may be withdrawn after the jury has begun its deliberation has not yet been determined.[108]

VI. Unresolved Questions

No area of the law is without its ambiguities and uncertainties. Although special instructions requested by counsel have been a part of our judicial system for ninety-seven years, they are no exception.

The two most prominent areas of conflict concern: (1) the application of the so-called "two-issue" rule to proper special instructions which have been erroneously refused by the court and (2) whether the court in its general charge can comment upon, qualify or in any manner modify a special instruction already given.

Two-Issue Rule

The two-issue rule[109] applies to special instructions given before argument.[110] It is not within the scope of this article to discuss the various cases in which this rule has been applied for these decisions concern for the most part the substantive law stated in the instructions or involved in the case.

The two-issue rule is important here, however, in the question of whether or not it is to be applied to a situation where a special

---

[107] Rogers v. Garford, *supra* note 95 at page 257.

[108] The court in Rogers v. Garford, *supra* note 95, indicated that as long as the jury was in the box, the trial was still under the control of the court. In this case, the special charge had been given in the morning before argument and was withdrawn in the afternoon before the court's general charge.

[109] This rule had its origin in Ohio in the case of Sites v. Haverstick, 23 Ohio St. 626 (1873), in which a verdict for the defendants was sustained where two separate and distinct defenses were made, either one of which in itself, if established, was sufficient to defeat the cause of action of the plaintiff. The rule as generally stated is as follows: "Where there are two causes of action or two defenses, thereby raising separate and distinct issues, and a general verdict has been returned, and the mental processes of the jury have not been tested by special interrogatories to indicate which of the issues was resolved in favor of the successful party, it will be presumed that all issues were so determined; and that, where a single determinative issue has been tried free from error, error in presenting another issue will be disregarded". H. E. Culbertson Co. v. Warden, 123 Ohio St. 297, 175 N.E. 205 (1931).

[110] Bush, Admr. v. Harvey Transfer Co., 146 Ohio St. 657, 67 N.E. 2d 851 (1946), wherein the application of the rule to special instructions was restated and reclarified. In that case the plaintiff claimed that before the two-issue rule applied: (I) There must be independent and separate issues, neither of them being an element of or dependent on the other; or (II) if the two issues constituted both a primary and secondary issue, such as negligence and contributory negligence where the latter is dependent upon the former, the rule may be applied if the primary issue is submitted free from error and the secondary issue is erroneously submitted, but that the rule can not be applied conversely. The supreme court adopted the plaintiff's contentions.

instruction has been refused erroneously. We have already discussed the mandatory duty of the trial court to give a special instruction requested before argument which correctly states the law.[111] But in a case with two issues, will failure to do so result in prejudicial error?

To focus the problem, suppose the trial court fails to give a correct special instruction and there is more than one issue in the case, does the two-issue rule apply? Stated another way, which rule is stronger?

On this point there is much confusion in the law.

In an early supreme court case decided seven years after the leading case of *Sites v. Haverstick*[112] it was clearly held that where a verdict for the plaintiff may have been rendered upon either of two causes of action, but it did not appear upon which, a refusal to give a proper instruction on behalf of the defendant, as to either cause of action, entitled him to a new trial.[113]

Since this decison, one court of appeals has agreed[114] saying that while it was undoubtedly correct to apply the two-issue rule with reference to instructions contained in the general charge, it was not proper to do so where the court erred in refusing to give proper special instructions submitted before argument. These cases indicate that the mandatory special instruction rule dominates the two-issue rule where the special instruction was erroneously refused.

Four other courts of appeals, however, have arrived at the opposite result.[115] The picture is further complicated by the fact that in one appellate district a decision each way can be found.[116]

This then was the background and the situation when the Supreme Court of Ohio found itself faced with this precise point in 1944.[117] Unfortunately the problem remains cloudy, as the syllabus in that case failed to reflect the action taken by the court.[118]

---

[111] *Supra* notes 8 to 26.

[112] *Supra* note 109.

[113] The Penna Co. v. Miller & Co., 35 Ohio St. 541 (1880).

[114] Mulvihill v. Frohmiller, 21 Ohio App. 210, 153 N.E. 115 (1926).

[115] Lowenstein v. Schwallie, 67 Ohio App. 395, 36 N.E. 2d 191 (1941); Zimmerman v. Second National Bank of Bucyrus, 24 Ohio App. 48, 156 N.E. 157 (1926); Doran v. Hempey, 6 Ohio L. Abs. 622 (1928); Hoffman v. Pittsburgh & Lake Erie Railroad Co., 13 Ohio L. Abs. 153 (1932).

[116] Mulvihill v. Frohmiller, *supra* note 114 (two-issue rule not applied); Lowenstein v. Schwallie, *supra* note 115 (two-issue rule applied).

[117] Leonardi v. The A. Habermann Provision Co., 143 Ohio St. 623, 56 N.E. 2d 232 (1944).

[118] Hart, J., speaking for the court on page 634 said: "Even if it be conceded that the trial court erred in refusing to give such charge, the judgments should be affirmed for another reason . . . Under the two-issue rule, error as

Paragraphs 5 and 7 of Section 11420-1, General Code

In view of the language of paragraph 7, Section 11420-1,[119] does the law permit the trial court to comment, modify or explain a special instruction submitted by counsel in writing before argument? To answer this question we must first divide the problem into two situations: (1) before argument when the special request is given by the court; (2) after argument during the court's general charge.

As to the first situation — before argument — there seems to be no question but that where requests for special instructions embody the correct law, a party has a right to have them given precisely as submitted[120] without modification; or entirely refused.[121]

Further, it is not only the giving but also the refusing to give that must be done without qualification or comment by the trial court.[122] It is the requesting party who is entitled to have his special instruction given as submitted. His opponent can complain only if the law as given is prejudicial.[123]

A trial judge has no right of his own volition to change the context of any written pre-argument request to charge.[124] This is true even though the language of the charge is not the exact language the court would have selected.[125] However, where counsel who requested the charge consented to the change, there is no prejudicial error.[126]

The extent to which this rule has been carried is best il-

---

to the requested charge could not vitiate the verdict." But see the third syllabus of the case where the court held: ". . . error in the *charge of the court* . . . does not, under the two-issue rule . . . require a reviewing court to reverse a judgment rendered upon such verdict". *Quaere,* Are the two congruent?

[119] "The court, after the argument is concluded, before proceeding with other business, shall charge the jury; any charge shall be reduced to writing by the court, if either party, before argument to the jury is commenced, request it; *a charge or instruction, when so written and given, shall not be orally qualified, modified, or in any manner explained to the jury by the court;* and all written charges and instructions shall be taken by the jurors in their retirement, and returned with their verdict into court, and shall remain on file with the papers of the case."

[120] The Lake Shore & Michigan Southern Ry. Co. v. Schultz. Admx., 19 Ohio C.C. 639, 10 Ohio C.D. 264 (1899).

[121] The Premier Service Co. v. Sefton, 31 Ohio App. 154, 166 N.E. 140 (1924).

[122] Columbus Railway v. Patrick J. Connor, 7 Ohio C.C. (N.S.) 361 (1905).

[123] Bittner v. The Northern Ohio Traction & Light Co., 23 Ohio C.C. (N.S.) 604, 34 Ohio C.D. 429 (1912).

[124] Warn v. Whipple, 45 Ohio App. 285, 187 N.E. 88 (1932).

[125] Chesrown v. Bevier, 101 Ohio St. 282, 128 N.E. 94 (1920).

[126] Glenny v. Wright, 53 Ohio App. 1, 4 N.E. 2d 158 (1936).

lustrated by the case of *The Premier Service Co.v. Sefton*[127] wherein the defendant requested the court to give the following special instruction before argument:

> The Court charges you that the plaintiff cannot recover if you find that she was guilty of negligence that directly contributed in *the slightest* degree to the injury sustained.

The trial court in granting the request substituted the word "any" for the words "the slightest" in describing the degree of negligence which would prohibit a recovery by the plantiff. The court of appeals reluctantly[128] held this substitution of words to be reversible error.

While a trial judge cannot modify the language of a special instruction submitted before argument, a reversal has been denied where the trial judge refused to give the instruction when he had given one of his own that covered the same ground.[129]

There does, however, appear to be at least one instance where it may be proper for the trial court to explain a pre-argument written instruction and that is when the instruction contains doubtful words or phrases. Although the precise question was not before the supreme court in *Simko v. Miller*,[130] that decision indicates that such may be the case. The trial court gave the plaintiff's first request to charge containing the words "prima facie". No attempt was made to define these words in either the special or general instructions of the court. Nor was any request to do so made by opposing counsel. In holding there was no reversible error on the part of the trial court for a failure to explain doubtful words or phrases, the supreme court indicated that if such a request had been made, it would have been proper for the trial court to have explained the words.[131]

---

[127] 31 Ohio App. 154, 166 N.E. 140 (1924).

[128] The specific special instruction sought by the defendant had been previously considered by the Supreme Court of Ohio in Chesrown v. Bevier, *supra* note 125, and although it was then conceded that the instruction was a correct statement of the law, the court indicated its preference of the word "any" to the words "the slightest" in describing the degree of negligence which would bar a recovery by the plaintiff. While the court of appeals in The Premier Service Co. case felt substantial justice had been done and wanted to affirm and even though it "heartily disapproved" of the practice of "deliberately" using a term which the supreme court said was the law but not the best statement of it, the court felt the mandatory provisions of Section 11420-1 demanded a reversal. The salt in the wound came when the defendant used the very case which disapproved of the expression "the slightest degree of negligence" to secure the reversal.

[129] Zimmerman v. Second National Bank of Bucyrus, 24 Ohio App. 48, 156 N.E. 157 (1926).

[130] 133 Ohio St. 345, 13 N.E. 2d 914 (1938).

[131] *Id.* at 348.

As to the second situation — after argument and during the court's general charge — there is much confusion and conflict in the law.

The heart of the problem is whether Section 11420-1, paragraph (7)[132] refers to both special instructions and the court's general charge or only to the court's general charge. Stated more specifically, does the word "instruction" which appears twice in Section 11420-1 (7) refer to the special instructions provided for in Section 11420-1 (5) or is the word used only as a synonym for "charge" meaning the court's general charge?

From 1868 to 1892 there was no question but that "instruction" as used in paragraph 7 meant special instructions provided for by paragraph 5 for the statute clearly said so[133] and no qualification, modification or comment on a special instruction was permitted during the court's general charge to the jury.

After paragraphs 5 and 7 were amended in 1892[134] to read as they do today, this precise question first arose three years later in 1895.[135] The Circuit Court[136] for Lucas County reaffirmed the rule that the two paragraphs must be read in connection with each other and no qualification, comment or modification of the special instruction was allowed.

Three more decisions, two in 1901 and one in 1916, reached the same result under the new amendment.[137] On April 24, 1929, Judge Day, speaking for a unanimous supreme court in *Lima Used Car Exchange Co. v. Hemperly*[138] said, "Instructions given *before* argument, *under paragraph 7* of Section 11447 [now Section 11420-1], General Code, 'shall not be orally qualified, modified, or in any manner explained to the jury . . .'."[139]

---

[132] *Supra* note 119.

[133] ". . . and such charge or charges, *or any other charge or instruction provided for in this section,* when so written and given, shall in no case be orally qualified, modified, or in any manner explained to the jury by the court;" 65 Ohio Laws 190 (1868). See note 4 for complete text and history.

[134] 89 Ohio Laws 59 (1892).

[135] Caldwell v. Brown, 9 Ohio C.C. 691, 6 Ohio C.D. 694 (1895).

[136] Now known as the Court of Appeals.

[137] City of Cincinnati v. Eva Lochner, 8 Ohio Nisi Prius 436, 10 Ohio Dec. 596 (1901), where the court in its general charge said, "That is what I meant when I said to you in my special charge . . ."; Rupp v. Shaffer, 21 Ohio C.C. 643, 12 Ohio C.D. 154 (1901); Tuscarawas County Commissioners, et al. v. Swansen, 7 Ohio App. 405, 27 Ohio C.C. (N.S.) 167 (1916) where a statement to the jury to the effect that the instruction as given was not conclusive, nor more than a tentative statement of the law which might be modified in the general charge, constituted error. See also, Diehl v. Cincinnati Trac. Co., 35 Ohio C.D. 581, 29 Ohio C.C. (N.S.) 369 (1918).

[138] 120 Ohio St. 400, 404, 166 N.E. 364 (1929).

[139] Emphasis supplied.

This does not mean, however, that the court once having given the special instruction as requested is thereby prevented from treating the same subject in its general charge.[140]

Further where it appeared that the comment by the trial court in its general charge only served to emphasize the special instruction, this was held to be not prejudicial.[141] Nor do comments which tend to explain the function of special instructions violate the rule against qualification, modification or explanation.[142]

Although the law had been firmly settled for 61 years and although the supreme court had spoken only two months before on the subject,[143] the Court of Appeals for Hamilton County on June 17, 1929 said clearly and emphatically that paragraph 7 of Section 11447 did not prohibit the trial court from commenting on special instructions in the general charge because paragraph 5 referred only to special instructions whereas paragraph 7 was confined to the general charge.[144]

Judge Day's statement in the *Lima* case [145] was not even mentioned by the court of appeals in its decision which became the focal point for an unbroken series of appellate court decisions down to the present day upholding the right of the trial judge in his general charge to comment on special instructions requested and given before argument.[146]

---

140 Rupp v. Shaffer, *supra* note 137.

141 Johnson v. The City of Cincinnati, 20 Ohio C.C. 657, 11 Ohio C.D. 318 (1900).

142 The Cincinnati Traction Co. v. Pierce, 3 Ohio App. 1, 21 Ohio C.C. (N.S.) 489 (1913).

143 Lima Used Car Exchange Co. v. Hemperly, *supra* note 138.

144 Gano, et al. v. The Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., 33 Ohio App. 142, 168 N.E. 566 (1929). The court did caution, however, that if the comment on the special instruction was such that it resulted in another or conflicting rule of law, a reversal would result because the jury would then be presented with two rules of law on the same issue and it could not be determined which instruction the jury followed. This particular rule of law is well grounded. Industrial Commission of Ohio v. Ripke, 129 Ohio St. 649, 196 N.E. 640 (1935); Booksbaum, a Minor v. Christian, 53 Ohio App. 384, 5 N.E. 2d 177 (1935); Rapp et al. v. Becker et al., 4 Ohio C.C. (N.S.) 139, 16 Ohio C.D. 321 (1904); Eureka Fire & Marine Insurance Co. v. Purcell, 19 Ohio C.C. 135, 10 Ohio C.D. 528 (1899), *aff'd* 66 Ohio St. 678, 65 N.E. 1129 (1902); but see The Ohio Stock Food Co. v. Gintling, 22 Ohio App. 82, 153 N.E. 341 (1926).

145 *Supra* note 138.

146 The Cincinnati Street Ry. Co. v. Adams, 33 Ohio App. 311, 169 N.E. 480 (Hamilton County—1929); Pratt v. Byers, 41 Ohio App. 112, 11 Ohio L. Abs. 514 (Franklin County—1931); Stocker v. Arnold, 18 Ohio L. Abs. 213 (Darke County—1934); Hatter v. McMunn, 18 Ohio L. Abs. 601 (Summit County—1935). After the requested special instruction was given, the trial court added, "I will fully explain that just a little later." *Held* that paragraphs 5 and 7 are separate and distinct, and further that paragraph 7 does not qualify

Further proof of the fact that paragraphs 5 and 7 of Section 11420-1 are to be read together and that the word "instruction" which appears twice in paragraph 7 means special instructions provided for by paragraph 5, is apparent in the cases which without exception hold that special instructions given before argument are to be taken by the jury to the jury room in their deliberations of the case.[147]

This requirement is statutory[148] and is found in paragraph 7 and not paragraph 5.[149]

To deny counsel this right is prejudicial error.[150]

On the basis of the legislative history of Section 11420-1 (5) and (7); the cases immediately following the last major amendment of 1892; the uncontradicted statement by the supreme court in 1929; and the fact that special instructions are sent to the jury room under paragraph (7) not (5), it is difficult to draw any conclusion other than that the four courts of appeals which followed the Gano[151] decision are wrong.

---

or control paragraph 5. In Pratt v. Rogers, *supra*, Judge Hornbeck in addition to relying upon the Gano decision, *supra* note 13, found support for his views in an historical analysis of Section 11447 (now Section 11420-1). He felt that the statute enacted in 1868 ". . . and such charge or charges, or any other charge or instruction provided for in this Section, when so written and given, shall in no case be orally qualified, modified, or in any other manner explained to the jury . . ." was clearly all-inclusive but that the amendment in 1892 to its present form, ". . . a charge or instruction, when so written and given, shall in no case . . ." made "charge" and "instruction" synonomous, thereby restricting the limitation of paragraph 7 to the general charge should it be in writing. It is submitted that when paragraph 7 was amended in 1892 by deleting certain words, the legislature merely eliminated the words without changing the meaning of the section. The amendment struck out the following words: "and such . . . or charges, . . . any other charge or . . . provided for in this section, . . ." It would seem that by simplifying and generalizing the language, and removing the qualifying phrases, the legislature had no intention to narrow the meaning.

147 Lima Used Car Exchange Co. v. Hemperly, *supra* note 138 at 405; The American Steel Packing Co. v. Conkle, *supra* note 38 at 126; Hrovat v. The Cleveland Railway Co., 125 Ohio St. 67, 72, 180 N.E. 549 (1932); Presti v. The Cleveland Ry. Co., 26 Ohio App. 536, 539-540, 160 N.E. 508 (1927); Dominick Foy, Jr. v. The Toledo Consolidated Street Railway Co., 10 Ohio C.C. 151, 6 Ohio C.D. 396 (1895).

148 Hrovat v. The Cleveland Railway Co., *supra* note 147; The American Steel Packing Co. v. Conkle, *supra* note 38 at page 126; Baltimore and Ohio R.R. Co. v. Shober, 38 Ohio App. 216, 231, 176 N.E. 88 (1930).

149 ". . . and all written charge and instructions shall be taken by the jurors in their retirement . . . ." OHIO GEN. CODE § 11420-1 (7).

150 Lima Used Car Exchange Co. v. Hemperly, *supra* note 138; Cone and O'Dell v. Bright, 68 Ohio St. 543, 68 N.E. 3 (1903).

151 *Supra* note 144.