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INSTRUCTIONS TO JURY AND THE PROPOSED RULE

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FOR nearly fifty years this subject has, from time to time, been one of semi-acrimonious discussion in West Virginia. This state occupies a position not unique but nearly so in this regard. Its judges have been manacled as have those of few, if any, other states where instructions are given. The topic is of peculiar interest today on account of the proposed Rule 51 in the preliminary draft of "West Virginia Rules of Civil Procedure" published by The West Virginia State Bar.

In considering this the bench and bar should be familiar with our history of this part of trial procedure. Tradition has it that, sometime prior to 1907, a certain judge (unidentified and now unidentifiable) was wont to charge a jury extemporaneously at great length and, apparently, without the services of a reporter. The result of this was a practical impossibility of a proper bill of exceptions.¹

It will be remembered that, prior to 1907, we had no statute on the subject. "The good old common law and the uncommon law were sometimes interpreted and applied very differently in different courts in this state." This remark was made by the Honorable William P. Hubbard at the 1914 meeting of the West Virginia Bar Association in an effort to interest the members of the profession in "a standard method even if it were not the best method".² (It would seem the Act of 1907 was unsatisfactory from the beginning).

Whatever the purpose, we know that the legislature of 1907 placed upon the books an act that has given rise to controversy ever

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¹ Maxwell, *The Problem of Jury Instructions*, 43 W. VA. L.Q. 1 (1936).

² Baker, *Instructions to Juries*, 48 PROC. W. VA. BAR ASS'N 196, 197 (1932).

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since.³ The real purpose of this act seems to have been to enable counsel to show error, if any. The act required all instructions to be written and submitted to counsel before being read to the jury. These instructions might be offered by either counsel *or by the court*; and if by the court they were to be submitted to counsel before being read, just as were counsel's instructions. The instructions other than the court's were recognized as given on motions of respective counsel and all were to be given before argument and in the following order:—

- (1) Those given by the court upon its own motion;
- (2) Those given upon the motion of the plaintiff
and
- (3) Those given upon the motion of the defendant.

(There were other provisions).

Apparently there was no thought of a connected charge. This may well have been the reason for the Act of 1915.⁴ While by no means relaxing the record requirements, this second act expressly provided that the court might *in writing* instruct upon the law, "putting such instructions in the form of an orderly and connected charge, incorporating therein the substance and as far as may be the language of the instructions prayed upon either side or prepared by the court." (Why the court was bound to incorporate its own language we leave to the curious).

It seems (for there is no way in which this statement can be fully checked) that the system of separate instructions, grown up under the Act of 1907, would not down. The complaints (as to instructions) passed upon by our appellate court after 1915 almost altogether concern separate instructions—not charges. The charge was probably not unknown but it was rare. As this bad practice continued, Mr. Kemble White, President at the 1925 meeting of the West Virginia Bar Association, attacked the system and pointed out its evils as clearly as it has ever been done as far as recent research goes.⁵ Casual comment followed from year to year. At the meeting of 1932 the Association had in contemplation the rule-making power (as enlarged in 1935) of the Supreme Court of Appeals and the creation of a judicial council. Also, the matter of uniform rules of practice received special attention resulting in a tentative draft. This draft included the precursor of our present rule. Further,

³ W. Va. Acts 1907, c. 38.

⁴ Chapter 72. As revised, W. VA. REV. CODE c. 56, art. 6, §§ 19-22 (1931), W. VA. CODE §§ 5653-6 (Michie 1955).

⁵ 41 PROC. W. VA. BAR ASS'N 60-62 (1925).

a paper on the subject of instructions was read by the Honorable Charles G. Baker (and discussed by Mr. Lon H. Kelly). Considerable further discussion was had at the meeting of 1934, Mr. Kelly then President.⁶ In 1935 came the acts creating the Judicial Council and enlarging the rule-making power of the court. These resulted in the recommendation by the council of the "Rules of Practice for Trial Courts" and these rules, after amendment and modification, were promulgated by the court on April 10, 1936. Of these, Rule VI (e) is our present rule on instructions to juries.

This rule was a compromise. In itself, it did not settle anything. The debate it aroused clearly showed the futility of further effort at that time. A paper on the problem by the Honorable Haymond Maxwell was read at the 1936 meeting of the Association and published in the *West Virginia Law Quarterly* in December of that year. Since then, as far as substantial effort is concerned, nothing has been done until the preparation of the present proposed rule.

Before considering that rule it may be well to remind ourselves of the purpose of instructions. We know their purpose but we bury that knowledge in considering this question. That purpose is generally stated to be "to enlighten the jury as to the law of the case", but that is a mere abstract of the purpose. Instructions are given on the theory that jurors are literate, intelligent men, and this theory is generally true in practice. Those who direct the verdicts may, in most though not in all instances, be depended on as men above the average. Furthermore, they listen to instructions and heed them. The one exception to this is found in the case the jury finds easy to decide—the case of the quick verdict. A jury with its mind made up will not unsettle that mind by considering instructions; but the jury obliged to think and to debate will go over a charge (if it is available) again and again. These men should be advised not merely what is the general law applicable to the facts they find from the evidence but of the exact limits of their inquiry, the exact questions they must answer on the issues presented and the exact course they are to follow and the exact rules they are to observe in answering those questions and, as follows, in reaching their verdict. That system which best does this is the system we should seek to adopt.

All this we know. Yet we often seem to seek the exact reverse of that which we know we should have. As side matters, we hear

⁶ 50 PROC. W. VA. BAR ASS'N 55-58 (1934).

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discussion of what system produces the fewest reversals, what will cost least effort and even whether juries should be instructed at all. This last suggestion is not made flippantly. It is merely another "men not laws" proposal, but, as there is no substantial movement to abolish instructions, we may dismiss that with one more remark—it would be better to abolish instructions altogether than to give them in the form in which they are generally given in this state today.

Why? Or, what are the defects of our present system? For the fact that is outstanding *now* is that the Bar once more has an opportunity of setting this particular room of its house in order; and it is showing every indication of using that opportunity to make sure its last estate shall be worse than its first.

Surely we know that any step in the direction of making it more difficult for a jury to understand its duties is wrong. In the light of that knowledge, the first defect of our present system is the requirement of writing.

If this seems strange, let it be remembered that we are trying to be practical. There is no objection in theory to a written charge. It is possible that it may do everything a charge should do. But, in practice, the first objection is that *charges* are written so seldom that it is doubtful if they should be much considered by the Bar in this connection; and, obviously, the requirement of writing is the prevention of the charge.

If there is no charge, we then perforce have the "crazy-quilt" instructions—an undigested and indigestible mass of statements, abstract and otherwise, jumping from subject to subject and back to subject again, telling the jury under some conditions to find for the plaintiff and under some (which may sound surprisingly similar to the first) to find for the defendant. I have personally known one hundred and twenty-five of these to be offered in one case, and in another was confronted with a *sentence* of nearly two typewritten legal size pages. Of course each of these problems had to be solved by the preparation of a charge, and, it is submitted, under our present system that should always be done except, possibly, in the very simplest cases. (In these last counsel generally consent to an unwritten charge).

It is easy to say "that should always be done." There are two answers. First, the preparation of a charge, except of the very simplest, requires more time than is ordinarily available. (I have known it to consume all the weekend between adjournment of the jury session and late Sunday). It is generally done at the expense

of the time the judge would ordinarily devote to rest—not even recreation. A jury is slow to understand a long break in a trial and this may lead to misinterpretation on their part.

The second answer is that, because of the first, many judges decline to write charges and who shall say that they are wrong?

Against this there is nothing novel proposed. All that is suggested is that, at the conclusion of the evidence, court and counsel confer. Let counsel submit written requests if they choose. If the case presents different theories and the court must decide between them, let each counsel write his own view and submit it as part of the record. (This should be done as early as possible in the trial or even before trial). Let the court decide then and there which theory will be adopted in the charge and let counsel be so advised. Let them be further advised what else will be told to the jury, *i.e.*, what subjects will be covered and what the purport will be. Then, fully advised of what the court will say, let the arguments be made and then the charge given. The important exceptions will have already been taken down by the reporter at the conference. Let the reporter now take the charge. Let counsel listen attentively for any departure from the court's promise or for any other slip or any other misstatement. Let that immediately be called to the court's attention for correction or exception. And, of course, let the charge and all exceptions thereto be made a part of the record.

(Should insuperable objection be made to argument *before* charge, let the charge come first but the procedure be otherwise the same. This will be mentioned further).

Of course the great defect in our present procedure is that that procedure permits these "crazy-quilt" charges; but this is largely the result of the requirement of writing. The negative argument—that against these fugitive and unrelated instructions—is far stronger than is any positive argument for the orderly and connected charge. As in many cases that reach appellate courts the records themselves are the best briefs for those prevailing, so here the strongest argument in favor of the charge is found in the unconnected sets of instructions read to juries in most of our cases. It is strongly recommended that anyone genuinely interested in the enlightenment of juries, and not merely trying to find a rule best fitted to his own practice, take at random any long set of instructions; read them from instruction *A* through instruction *Z*. What he will find requires no comment; but if he would emphasize it, let him call in his most intelligent (lay) friend, read them aloud

to him, then put them aside and ask his friend a few intelligent questions.

However, the fact that the unwritten charge makes instruction cheaper in both work and time is by no means the only argument in its favor. There is another at least equally weighty and it is one that goes right to the essential purpose—the enlightenment of the jury. A *talk* to the jury is invariably more understandable than is a long list of “stock” and other instructions and even more so than is the written charge. This may be the fault of the courts. Let us see.

As indicated above, there has been much talk about the number of reversals brought about by bad instructions. The statements of President White and Judge Baker indicate that between 1925 and 1932 this number was substantially reduced. Our decisions since 1932 have not been checked but it is probably safe to say that this number has not increased in that time—probably has grown less. This decline, as Judge Baker pointed out, has been largely due to the fact that our court has approved a great many instructions, bench and bar have familiarized themselves with those and they are used whenever at all possible. It may even be added they are sometimes offered to the exclusion of all others and, also sometimes, whether they fit the facts or not. These include that good-sized body of what we call “stock” instructions.

These instructions are sound. They are helpful. Unfortunately many of them are not in simple language and some dangerously approach the technical. The giving of a written charge does not eliminate this objection for the court may well take the view (as *perhaps* it must) that all of these that are offered must, if justified by the facts, be given in the language in which they are submitted. If this procedure is followed, several pages of the charge will be devoted to statements of sound law in lawyers’ words, formal and tiresome to hear, hence likely to pass unheeded. That does not matter? It does, for the meaning of those words is important.

If we assume, as it is believed we may, that all now required of a court *when it prepares a written charge* is to incorporate therein all the substance of what counsel properly offer, the remedy for this is in the hands of the judges. Let the judge write as he would speak and translate law words into layman’s English. But this assumes that charges will be written and delivered and this will seldom be true. The bar can make intelligent and intelligible charges both practical and customary if it will.

As an example of the twisted meanings taken from some of our

language, a frequent objection is made to "if the jury believe from the evidence" on the ground that it should be "believe from a preponderance of the evidence". The objector obviously overlooks the fact that if a juror *believes from the evidence*, what he so believes is proved to him by a preponderance. The offeror of the instruction overlooks the fact that it is not necessary that the jury *believe* anything—it is necessary only that they find from the evidence which story is more likely to be true. These are lawyer's mistakes, but we proceed on the assumption laymen will not make them.

Yet courts have been slow to approve new definitions. It is suggested we should look carefully for new *and clear* definitions and then, as far as possible, use the language of the definition rather than the original word. For example, give a clear definition and illustration of the phrase "preponderance of the evidence" (not only "greater weight of the evidence") and thereafter, if possible, omit the phrase itself. Yet we have courts on record as believing it dangerous to attempt to define "reasonable doubt". With all deference to those judges of yesteryear⁷ who so expressed themselves, is it not plain that *if* we are using words we dare not define it will be well to abandon those words? (Of course it is not seriously suggested that we are using any such words).

We are today, with the advantage of pre-trial, with the law on so much of our jury work settled, with able counsel and, it is hoped, able judges, in position to arrange a system that will unshackle judges and enable them to tell juries in juror language what are their duties and how they are to perform them. With this opportunity, the following rule is proposed by the Committee on Civil Rules.

"Rule 51. INSTRUCTIONS TO JURY: OBJECTION. At the close of the evidence, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall pass upon all requested instructions and the objections thereto, if any, before arguments to the jury, and the court shall instruct the jury before such arguments are begun. All instructions given by the court shall be in writing and counsel shall have opportunity to object thereto before such instructions are given. Neither pleadings nor instructions shall be taken to the jury room. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its ver-

⁷ Mullins v. Commonwealth, 113 Va. 787, 75 S.E. 193 (1912); McCoy v. Commonwealth, 133 Va. 731, 112 S.E. 704 (1922); State v. Donahue, 79 W. Va. 260, 90 S.E. 834 (1916).

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dict, stating distinctly for the record the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

It is most respectfully submitted that this is a step backward and farther backward than our own state or any other state has ever before gone. There is another matter here to be observed. In the statement of purpose of the committee made in 1952, we are told that these proposed rules are "based essentially on the Federal Rules of Civil Procedure, with such changes as might be required by the substantive law of the state." This rule is the direct antithesis of the federal rule. The federal rule is subject to not one of the following six objections.

All this is plain because:

- (1) The proposed rule requires written instructions and only written instructions in every civil case.
- (2) It makes no provision for a charge. (The federal rule assumes a charge will be given—no express provision is necessary).
- (3) It requires the court to pass upon every submitted instruction and the objections thereto and, presumably, to give every one to which it cannot sustain an objection.
- (4) It *requires* instructions before argument.
- (5) It gives a *right* to counsel to withhold all requested instructions until the close of the evidence.
- (6) It forbids the taking of instructions to the jury room.

This rule seemingly provides all protection possible to jurors against judicial enlightenment.

While it may be urged that the language of this rule is not open to all of the above objections, it should be carefully considered in their light. As to (1), the matter of writing, undoubtedly it so provides. On this subject enough has been said. As to (2) it may be argued that our present rule makes no more provision for a charge than does this one. That is true, and the first sentence of our present rule, in using the words "opposing counsel" after "all instructions" can be construed as a rule that only counsel may prepare instructions. It has not been so construed. Charges are given without criticism and quite possibly would continue so to be given were this proposed rule adopted. But why leave a matter as important as this for construction?

This is emphasized by (3) above. If the court cannot prepare a charge or even if it may, the language of the proposed rule gives every instruction a right to be read unless bad law. This is wholly without regard to its fairness to the other side. To illustrate: a very

common practice, particularly on the part of defendant's counsel, is the preparation of a great number of separate instructions reciting, with no more variation than necessary to avoid the objection of repetition, circumstances under which the jury may find for the defendant. The purpose, as we all know, is to let the jury hear the court say "you shall find for the defendant" so often they will believe that is the court's will. As matters stand today, the court may give the substance of all these in a charge with the reverse propositions also clearly stated or it may add one of these reverse propositions, under which the jury may find for the plaintiff, to each separate instruction. If a court may not do this it may easily be forced to instruct for one side without presenting the case of the other. Further, this greatly encourages multiplicity.

It is believed a court has a duty to give a fair charge (whether connected or by instructions) and that this duty persists even where one counsel is negligent. Not infrequently one attorney offers many instructions, the other none. Further, although it seems generally agreed that judges do not know how to instruct juries while attorneys do (an ability they lose upon demotion to the bench), the melancholy fact remains that we have a few—of course a very few—attorneys to whom the law of instructions is a sealed scroll with none worthy to open and to loose the seals thereof. Sometimes one attorney will submit a perfect set of instructions, the other a series totally bad. If it be contended it is the court's duty to take things as they come and that ignorance or laziness of counsel should be charged to the litigant, this rule will serve beautifully.

The general belief found in precept and example is that it is best to have the charge of the court the last word the jury hears before retiring. This is the custom in states where judges are trusted. However, for some reason not clear, our bar seems committed to the belief that the last word should be that of plaintiff's counsel. However inflammatory or unfair, that is to be the end. Yet counsel are not required to set forth their arguments in writing and submit them in advance for objection. If this seems more facetious than serious, be assured it is not. If it so seems, our decisions on improper argument show the contrary. (Of course, as said above, counsel should be fully apprised, before argument, of what the court is going to say).

(5) and (6) are both important. The rule gives a right to counsel to stand mute on instructions until the close of the evidence. There is no intent to suggest that counsel should not be given a free rein at that time but to make it vain for the court to call on

them before then is simply to provide for unnecessary delay. The ban on taking instructions to the jury room has been often argued but seldom convincingly. Why should not a jury have every opportunity to understand what the court has said? (Of course if the charge is not written it cannot be taken to the jury room; but the jury will understand that charge and, in emergency, the reporter's notes will be available.) It is contended the jury will pick out one sentence or paragraph, read it without its context and base its verdict thereon. This *may* happen. It has never been officially brought to attention and is nothing more than a possibility, but *suppose* it is true—is this worse than letting the jury go uninstructed? For—let us not be hypocrites—under a literal compliance with this rule the jury will not be *instructed* at all. It will merely hear words. Far better for us to be honest and say “We do not trust our judges correctly to state the law or our juries to apply it if they do; so let us just tell the jury to use its own judgment—by our silence let it do as it pleases.”

The bar has here a magnificent opportunity for service. The best way in which advantage can be taken of that opportunity is the simplest. *Abolish the rule on instructions.* It will still be the court's duty to instruct and to instruct correctly and fully. Counsel will be in no manner limited in their requests. And the court may itself decide between the oral and the written charge as well as when to call for instructions, whether to charge before or after argument and whether to send instructions to the jury room. For different cases present different problems. The court need not be in a straight-jacket with the same procedure prescribed for all.

If this cannot be done, why not adopt the federal rule? The federal rule adds nothing except a requirement that the court must notify counsel of what it intends to say and must not instruct before argument. No one could object to this requirement as to notice. While the committee will probably object to instructions after argument, although that is in the federal rule, it is doubtful if the bar as a whole will have any such objection. We are supposed, should these rules be adopted, to bring ourselves into conformity with federal practice; and it may indeed be inquired how this can be stated when such a rule as this is contained in the proposed Code.

Failing this, let the rule provide for a charge, with provision it may be written or unwritten (but, of course, recorded—no rule is necessary for that). If it must definitely give counsel the right to submit and request instructions, let it do so—this adds nothing but is harmless. Then let it expressly leave to the trial court's

discretion the respective times of argument and instructions and the matter of taking instructions to the jury room.

What is here said contains *nothing* new. It does endeavor to call attention to much that is forgotten or overlooked.⁸

It has not been my privilege to practice law for the last thirty-one years. It may be said this is written from the standpoint of the bench. It is hoped this is not true. Most sincerely is it hoped that experience on the bench does not render one blind or deaf to what is expedient in the administration of justice, but that rather it makes plain what is fair, not to any one party or set of parties, but to all whom necessity sends into our courts. And they, rather than ourselves, are the ones to be considered.

⁸No consideration has been given to the right of a court to comment on the evidence for that has not been a matter of rule. Also, no consideration is given to instructions in criminal cases as we are not presently concerned therewith. The Honorable David A. McKee in his address as President to the Judicial Association in 1954 devoted a considerable part of his able paper to this latter subject but, unfortunately, this part is not published.