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THE PROBLEM OF JURY INSTRUCTIONS*

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The question of instructions to juries is a perennial problem with practitioners and judges. Having in mind the seriousness of this subject, the Judicial Council of West Virginia, some months ago, formulated a program for thorough investigation and consideration of the instructions enigma. In response to the council's request that it render assistance in the matter, the faculty of the College of Law of West Virginia University caused to be made a synopsis of all the state statutes dealing with instructions. Only a few of the states have no such statutes. Virginia is among that small number.

Though I am no longer a member of the Judicial Council, my interest having been aroused in this important procedural matter by the discussions which took place in the council, I have made some investigation of the subject within recent weeks.

Logically, the initial inquiry should be directed to the extent of the seriousness of the problem. First: Within what measure does the giving of erroneous instructions or the refusal of correct instructions contribute to the reversal of cases? Second: Does the giving of instructions under the present system actually assist juries in the rightful determination of cases? To this latter inquiry, perhaps the correct composite answer is this: If the instruction or charge is clear and concise and not voluminous, the jury is thereby substantially assisted, but prolixity, volubility, and multiplicity necessarily tend to confusion. Sometimes instructions

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are tendered almost *en masse*. Under present law, all instructions offered, if technically correct and not repetitious, must be read by the court to the jury unless the court embodies them substantially in a charge. The query therefore arises whether this is a wholesome situation.

It is not my purpose in this discussion to attempt to advocate particular views, or to urge reform. I am simply endeavoring to state the facts of the case as a basis for study.

It is not infrequently considered that the matter of instructions in jury cases is a prolific source of prejudicial and therefore reversible error. The situation is relative. On a statistical basis, there may be room for difference of opinion as to the seriousness of the problem. Examination of Volumes 108-116, inclusive, of the West Virginia Supreme Court Reports, reveals these facts:

In civil jury cases reversed, thirteen and eight-tenths per centum of the reversals were in whole or in part on account of instructions. Consideration of the reported opinions of the criminal jury cases in the same nine volumes discloses that instructions contributed to or controlled the reversals of seventeen per centum of such cases. To clinch the thought in round numbers, the civil reversals on account of instructions were one in seven, and the criminal, one in six.

I propound attendant queries, but do not undertake to answer them. (1) Are these percentages, in both civil and criminal cases, higher than they ought to be in the proper administration of justice under the jury system? (2) If so, what change in our method of instructing juries would tend to correct the situation?

With the foregoing survey of actual results in cases reviewed by the Supreme Court of Appeals as a background for the development of our thesis, let us turn attention primarily to the law controlling the West Virginia procedure.

West Virginia's first statute in respect of instructions to juries was Chapter 38 of the Acts of the Legislature of 1907. Prior thereto, the common law obtained in this state. The rule of the common law is thus stated by Blackstone:

> "When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel, and all others, sums up the whole to the jury; omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their

direction, and giving them his opinion in matters of law arising upon that evidence."[1]

The practice in West Virginia prior to 1907 seems not to have been uniform in all of the circuits, though, according to the information which I have received, the trial judges, as a general rule, required instructions to be tendered in writing by counsel.

From several gentlemen who have personal knowledge of the events, I have received the information that the statute of 1907 requiring that "all of the instructions of the court to the jury shall be plainly written in longhand or typewritten before given to the jury by the court and not changed in any way thereafter," was enacted because of the recalcitrant attitude of one of the circuit judges. It is narrated that he would have much to say to a jury but that the lawyers would have great difficulty in obtaining from him bills of exception which correctly set forth what had been stated to the jury. Undoubtedly, as the law then stood, a trial judge could with all propriety, instruct the jury orally, on his own motion or on motion of counsel.

Inquiries recently made of several of the senior members of the West Virginia bar have brought forth the information on which is based the foregoing statement that instructions were ordinarily in writing; further, that some judges would occasionally instruct orally as to burden of proof and upon other more or less stereotyped matters; sometimes, more elaborate and involved matters were also orally instructed upon. In some of the circuits, oral instructions were more frequent than in others. In several circuits, there was no designated time when the instructions were to be given nor who should read them. Some of the judges, after they had passed on the instructions, would have opposing attorneys read their own instructions to the jury.

It is interesting to note from communications received from senior brethren, to whom inquiry on the subject was addressed, that their impressions of the merits of the prior and present practices differ widely. The following excerpts from different letters illustrate the point. One eminent gentleman wrote with respect to the 1907 Act:

"I felt at the time that it was unfortunate to have such a law passed. My view has always been that the judge should have the power to see that the jury was properly informed of

[1] 3 BL. COMM. 375.

the law governing the case before it, and with the proper kind of a judge, there would be no abuse of such a privilege and right, and I felt that it was wrong to take away from the majority of the courts of the State this power, because it was being abused by some one or more judges."

On the other hand, another distinguished practitioner wrote:

"During the trial and giving of instructions attorneys often complained of the remarks of Judges and the manner in which they would give and interpret the instructions. The remarks and interpretations would not be written and it was difficult to take exceptions to what the Judges had said and done so as to use the same in a writ of error. There was much complaint by many lawyers over the State about the arbitrary disposition and rulings of the Courts. Much more in some Circuits than others. . . . May I say that I am of the opinion that this statute (1907) and the Acts of 1915 which extended and improved the 1907 Act was a progressive step in our practice and fairly well limits the instructions and what is said to the jury concerning them to the record, so that any part and all of it can be reviewed upon writ of error. I believe, that a number of lawyers practicing in the Federal Courts would be pleased to have a similar proceeding to govern them."

In respect of the whole matter, another gentleman of wide experience both as a judge and as a lawyer, has this to say:

"Our present method of giving instructions to juries is in many instances a farce. I have often talked to juries after they have returned a verdict about the instructions and found that in many cases, they did not understand the instructions and paid no attention to them. If, after the evidence has been introduced, our courts were authorized to deliver to the juries in plain language a charge dealing with the issues raised, I am firmly confident that juries would be able to return more intelligent verdicts than they usually do. I know in one meeting of the Judges of the State to consider this question, it was stated by a Judge that he had had as many as a hundred written instructions prepared by the attorneys passed up to him which he had to go over and inspect before the argument. I, when on the bench, never had this many instructions handed me for consideration, but on many occasions have had to delay the trial and the argument while I considered as many as twenty-five typewritten requests for instructions before allowing the argument to begin. As you know, instructions are very often prepared by counsel not for the purpose of assisting the jury, but rather to get error in the record. If we required our trial Judges to instruct juries, the practice would develop the Judge. He would become, as they do in other states, skilled in the practice of preparing charges and in-

structions and soon be able to deliver to the jury succinct and plainly written instructions that the jury would understand and be guided thereby. We will admit that this practice, when first adopted, would no doubt be a source of error, but this would soon be corrected, and, at any rate, conditions could be no worse than they are now. . . . I sincerely hope that a change will be made in this practice, which will permit our Judges to assume the dignity equalling the dignity of the Judges of other states."

In pondering this voluminous and complex equation, and in undertaking to determine whether the West Virginia practice in respect of instructions to juries is what it ought to be, or whether it should be changed, we come now to consider the existing West Virginia statute on the subject together with the applicable rule of practice promulgated by the Supreme Court of Appeals, April 10, 1936.

In substance, the statute provides[2] that the court may give to the jury instructions prepared by either party, submitted by him to the opposing party, and then presented to the court, provided they are not covered in substance by other instructions; that in lieu of giving separate instructions, the court may, in writing, charge the jury upon the law governing the case, putting the proper instructions tendered by the parties in an orderly and connected charge incorporating therein the substance and, so far as may be, the language of the instructions prayed for upon either side or prepared by the court on its own motion, which written charge shall first be submitted to counsel on each side with opportunity to object to any part thereof. All instructions shall be read by the court to the jury as the action of the court, without disclosing the party by whom they were tendered. Each instruction tendered shall be plainly marked by the court as to its action with respect thereto. All instructions tendered, whether given or not, with notations thereon, shall constitute a part of the record, without the formality of a bill of exceptions embracing the same. It is further provided by the statute that its inhibitions shall not be deemed to affect the power of the court to instruct the jury orally concerning matters not proper for their consideration or concerning the conduct of any person in connection with the trial. The statute does not prescribe whether the court's instructions or charge shall be read to the jury before or after argument of counsel.

[2] The statutory provisions are found in W. VA. REV. CODE (1931) c. 56, art. 6, §§ 19, 20, 21, 22.

The pertinent provision of the rules of procedure and practice for trial courts, promulgated by the Supreme Court of Appeals a few months ago, reads as follows:

> "All instructions to juries shall be reduced to writing and a copy presented to opposing counsel at the conclusion of the evidence. The Court will instruct the jury prior to argument. Supplementary instructions may be given later. Objections, if any, to each instruction shall be made when the same is offered; specific grounds of objection only will be considered. Exceptions to the refusal to grant or to granting the same or to modified instructions shall be made at the time, or the same shall be deemed to be waived. Counsel may comment upon the instructions in their argument, but may not read the instructions to the jury, but the Court in its discretion may reread one or more of the instructions. Counsel may not argue against the correctness of any instruction, nor comment upon any evidence ruled out, nor misquote the evidence, nor make statements of fact dehors the record, nor contend before the jury for any theory of the case that has been overruled. Counsel shall not be interrupted in argument by opposing counsel, except as may be necessary to bring to the Court's attention objection to any statement to the jury made by opposing counsel, and obtain a ruling on such objection. No portion of a law book shall be read to the jury by counsel."

For the purpose of obtaining further information apropos of the problem whether our present practice with respect to instructions is what it should be, and, if not, what changes should be made, reference should be had to the procedure obtaining in the federal courts, and in the courts of sister states.

The federal rule is familiar to all lawyers. It is thus stated:

> "The judge may comment upon the facts, provided that, when the evidence is conflicting, he makes it clear to the jury that they are not bound by his opinion."[3]

Further, it is stated in Simkins' *Federal Practice*[4] that where the general charge substantially covers the case the judge may refuse special instructions, otherwise it is error to refuse such instructions which correctly propound the law. Points to be covered in an oral charge may be specifically requested by counsel. Instructions in federal practice are given after argument, and if there be objection to any portion of an oral charge, such objection must be made known to the court before the jury retires to consider the case.

[3] 3 FOSTER, FEDERAL PRACTICE (6th ed. 1920) § 473j.
[4] SIMKINS, FEDERAL PRACTICE (2d ed. 1934) § 175.

In response to recent inquiries of Virginia lawyers the information has been received that the Virginia courts have never adopted the English practice of charging the jury, or summing up as it is sometimes denominated. In Virginia, written instructions have been employed since the early days of the commonwealth. The courts also instruct orally, as occasion may require. In the very recent case of *Drinkard v. Commonwealth*,[5] the Supreme Court of Appeals of Virginia said:

> "The recognized practice in this State is for the court to give written instructions requested by the litigants, when satisfied that they correctly state the law applicable to the evidence, and to give oral instructions only in the event such instructions are requested or to clarify a general statement contained in the written instruction."

The statutes of the several states, reported by the law faculty to the judicial council a few months ago, are so variant that it is almost impossible to make a satisfactory analysis thereof within a brief compass.

The North Carolina statute provides that a trial judge shall not express any opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury; but he shall state in plain and correct manner the evidence given in the case and declare and explain the law arising thereon. At the request of a party, the charge shall be reduced to writing and read to the jury.

About three-fourths of the states have statutes providing for the giving of a charge by the court to the jury. In addition to the authorization that the court propound the principles of law applicable, a few of the states provide that the charge may contain a statement of the evidence, upon the condition, however, that the judge make it plain to the jury that his views of the evidence need not be controlling. Some of the states in this large group make no provision for instructions tendered by the parties; others provide for such instructions, while a number provide only for requests by parties as to matter to be incorporated in the charge. Of the practice in an extensive number of states there may safely be made the generalization that much more emphasis is placed on charges by the court than on instructions tendered by the parties.

Many of the states require that the charge be in writing at the time it is given to the jury, or if made orally, it must be

[5] 165 Va. 799, 183 S. E. 251 (1936).

transcribed by the court stenographer and preserved as part of the record. In states which admit of oral charges, upon request of either party the charge must be taken down by the court reporter and signed by the judge.

Some of the statutes permit the court's charge to be supplemented upon the request of parties. In such instance, either party may tender in writing to the court additional points to be included in the charge or to be given specially to the jury. The court may give or refuse such additional requests as would seem proper and indicate his decision thereon in the manner most commonly employed in ruling upon written instructions.

As to the time of giving the charge, the statutes are at variance. Some specify that it shall be given before argument, others after argument. A few states provide that written charges may be taken by the jury upon retirement; that the charge may be reread by counsel in argument to the jury; that the parties may waive making the charge a part of the record.

A number of the states having statutes treating of the subject of charges to the jury, have provisions governing instructions. And though adopting a few general principles applicable to both, for the most part the statutes place instructions in a distinctly separate category from that of the charge.

Some of the provisions dealing with instructions are these: First, that instructions to juries shall be in writing. Second, that the court *shall* either give or refuse instructions as tendered by the parties, or *may* give, modify or refuse the same. Third, that instructions given may be taken by the jury upon retirement. Fourth, that after retirement, the jury may request further instructions. Fifth, that instructions constitute part of the record in the case.

Many of the statutes are conspicuous in the generality of the treatment of the procedural steps in instructing juries, but a few of the statutes descend to great particularity. Typical of the latter group, are the statutes which treat of the time and mode of giving instructions; objections and exceptions thereto; presentation; ruling and indorsement by the court; and additional instructions. In the latter group, there are those which provide that instructions (written) be tendered by the parties at an early stage of the trial; that there be settlement of the instructions so tendered, giving the parties opportunity to state their objections and exceptions thereto and be heard in argument thereon. Extended minutia of procedure appears in many of the statutes.

Some of the statutes, whether dealing with charges or instructions, differentiate as to civil and criminal cases. In this discussion, no attempt has been made to segregate them in respect of their applicability to the particular kind of action.

The problem of instructions to juries dovetails with the question whether, as a general rule, juries should be required to return general verdicts, as in West Virginia, or whether they should only make specific findings of fact, the courts to render judgment on the facts as determined. Such innovation, of course, would solve the difficulties relating to instructions.