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Trial - Instructions to Jury - Instructions before Argument

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which an unauthorized signer is personally liable on his signature to any person who takes the instrument in good faith. As stated it is not intended to effect criminal liability for forgery or any other crime or civil liability to the drawer or to any other person.[33]

With reference to the recent amendment to the Minnesota NIL, it is stated in the annotation that the extension of the bearer paper concept promotes expediting and safety in circulation of negotiable instruments.[34] The proposed changes of the UCC do not further extend this theory but effect even more desirable results by abrogating the theory completely. Section 3-405 does this by requiring indorsement no matter by whom made.

Applying §3-405 to the hypothetical case presented earlier, the result would seem to place the loss on the corporation on whom it rightfully belongs. If adopted, this same section would in all likelihood prevent much litigation, not benefiting the lawyer directly but the community as a whole.[35] Ezekiel would be happy to see his prophecy come true, if only in this one small phase of the law.[36]

FRANCIS BREIDENBACH.

TRIAL — INSTRUCTIONS TO JURY — INSTRUCTIONS BEFORE ARGUMENT. — Although the purpose of the instruction by the court to the jury has been defined in a multitude of ways, it may be said, in general, that its purpose is to inform the jury as to the law of the case as it applies to the facts in such a manner that the jury is not misled.[1] In order that this might best be accomplished the practice was adopted at common law of giving the instructions after the argument of counsel and immediately preceding the retiring of the jury.[2] The reasoning assigned as afixing this time for giving the instructions was that after argument of counsel had pulled the jurors hiteher and yon the judge had the final word to see that they retired with a clear, unbiased and unemotional statement of the facts and the applicable law fresh in their minds. A further reason was that

33. U.C.C. § 3-405 (comment 5).
34. See Minn. Stat. § 335.052 (3) (1945).
35. See 18 U. of Chi. L. Rev. 281, 289 (1951).
36. See Prophecy of Ezekiel c. 18, v. 20: "The soul that sins the same shall die. The son shall not bear the sins of the father, the father shall not bear the sins of the son. The justice of the just shall be upon him. The wickedness of the wicked shall be upon him."

1. See Order of United Commercial Travelers of America v. Nicholson, 9 F.2d 7 (1925).
2. Busch, Law and Tactics in Jury Trials § 443 (1950).

in England the judge had the right to sum up and comment upon the evidence in the case.[3] Though this practice flourished at common law many states, by statute, changed the time of giving instructions so that it came at the close of the evidence and before argument. Thus by 1894 it was reported that instructions were usually given before counsel entered upon the argument of the case.[4] Among the reasons for this change was the tendency of the various states to limit the power of the judiciary to sum up and comment upon the evidence.

Practice in the Various States

A study of the various states indicates the varying practices that are followed. At least fifteen states specifically provide by statute that the giving of instructions shall precede the argument of counsel.[5] At least ten states provide, on the other hand, that the instructions shall come after argument of counsel.[6] To each of these lists can be added a number of states whose case law has indicated a definite time at which instructions shall be given. Thus Kentucky,[7] Maryland,[8] and Mississippi[9] can be apparently added to

3. Diamond, Instructions to Jury 1 (1946).
4. Fitnam, Trial Procedure § 629 (1894).
5. Arkansas; Ark. Stat. Ann. § 43-2134 (1947).
Arizona; Ariz. Code Ann. § 21-1021 (1939).
Colorado; Comp. Laws Colo. § 7104 (1921).
Idaho; Idaho Code Ann. § 7-206 (1932).
Kansas; Kansas Gen. Stat. § 60-2909 (1949) (Instructions after argument previous to 1881).
Michigan; Comp. Laws Mich. § 691.432 (1948).
Missouri; Mo. Rev. Stat. § 546.070 (Supp. 1945).
Montana; Mont. Rev. Code § 9349 (1935).
New Mexico; New Mex. Stat. § 19-101 (51) (c) (1941). (Prior to 1935 instructions were after argument in criminal cases).
Oklahoma; Okla. Stat. tit. 12, § 577 (1951).
South Dakota; S. D. Code § 33.1307 (1939).
Texas; Tex. Stat. Rule 275, Rules of Civil Procedure (Vernon, 1948).
Utah; Utah Code, Rule 51, Rules of Civil Procedure (1953).
West Virginia; W. Va. Code, Rule 6, Rules of Practice for Trial Courts (1949).
Wyoming; Wyo. Comp. Stat. § 3-2408 (1945).
6. California; Calif. Code of Civil Procedure § 607 (Deering, 1953).
Florida; Fla. Stat. § 918.10 (1951).
Indiana; Ind. Stat. Ann. § 584 (Burn's, 1926).
Iowa; Iowa Code Ann. Rule 196, Rules of Civil Procedure (1951).
Minnesota; Minn. Stat. § 546.14 (1945).
Nevada; Rev. Laws of Nev. § 5210 (1912).
New York; N. Y. Code of Crim. Proc. § 388 (1953).
North Dakota; N. D. Rev. Code § 28-1410 (1943).
Ohio; Ohio Gen. Code Ann. § 11447 (Page, 1926).
Oregon; Ore. Code Ann. § 2-301 (1930).
7. Whittaker v. Comm. 188 Ky. 95, 221 S.W. 215 (1920); Paducah Traction Co. v. Sine, 33 Ky. Law Rep. 792, 111 S.W. 356 (1908) "The giving of an additional instruction after argument . . . was not error . . . where it appeared that such instruction was indispensable."
8. Weant v. Southern Trust and Deposit Co., 112 Md. 463, 77 Atl. 289 (1910) "An instruction after argument of the case . . . in view of what had been said in argument . . . was not error." See Soper, *The Charge to the Jury in Maryland Under the New Rules of Practice and Procedure*, 6 Md. L. Rev. 35 (1941).

those giving instructions before argument, while Louisiana,[10] North Carolina,[11] Pennsylvania[12] and Vermont[13] seemingly follow the practice of instructing after argument of counsel. At least one state provides for the giving of requested instructions before argument and the general charge after the arguments.[14] A considerable number of states do not provide for any specific time for the giving of instructions. In such a case the state may follow the common law rule as to the time for instructions or may allow the various courts of the state to set their own rules as to trial procedure.[15]

Interpretation of the Rules

While it has been held that the court may not vary from the time fixed by statute as to the giving of instructions,[16] the general rule is that such a departure is not reversible error providing no prejudice results to the parties, or where justice demands it.[17] Thus where it is provided that instructions shall be given before argument such regulation has been held not to prevent the giving of additional instructions after argument.[18] In Missouri instructions

9. Maxey v. State, 140 Miss. 570, 106 So. 353 (1925) (after the argument in the case has opened it is error to give an instruction without stopping the case and giving the opposite party a chance to comment thereon); Montgomery v. State, 85 Miss. 330, 37 So. 835 (1905) (Instructions after argument has commenced should be given in only rare occasions.).

10. State v. Williams, 192 La. 713, 189 112 So. (1939) "After argument of counsel judge should give instructions immediately . . .".

11. State v. Morgan, 225 N.C. 549, 35 S.E.2d 621 (1945) (Requests for special instructions must be in before the beginning of argument).

12. Pa. Stat. Ann. tit. 12, § 678 (Purdon's, 1953) "If any of the parties shall request the court to charge the jury . . . such charge shall be drawn up and handed to the court before argument . ..and the judge . . . shall read them . . . before they retire."

13. Belock v. State Mut. Fire Ins. Co., 108 Vt. 252, 185 Atl. 100 (1936) (Instructions are given after all evidence and arguments of counsel).

14. Neb. Rev. Stat. § 25-1107 (1943).

15. Kelly v. United Benefit Life Ins. Co., 275 Ill. App. 112 (1934) (Circuit court could relax its own rules so as to allow the handing of instructions to the judge at a later time than the rules provided); State v. Cobbs, 40 W.Va. 718, 22 S.E. 310 (1895) (When the state does not fix any time for instruction the court may fix it by rule).

16. Baltimore & O. R. Co. v. Shober, 38 Ohio App. 216, 176 N.E. 88 (1931) (Provisions of statutes as to giving instructions to jury before argument are mandatory); Cincinnati Traction Co. v. Kroger, 114 Ohio St. 303, 151 N.E. 127 (1926); International and G.N. Ry. Co. v. Parke, 169 S.W. 397 (Tex. Civ. App. 1914) (The statutes which require the court to prepare and read its charge to the jury before argument are mandatory); Foster v. Turner, 31 Kan. 58, 1 Pac. 145 (1883) (Court can instruct after argument only in answer to comment made by counsel in his argument).

17. Sams v. Commercial Standard Ins. Co., 157 Kan. 278, 139 P.2d 859 (1943) (Notwithstanding the requirement to instruct before argument, such argument and other things may sometimes justify instructions afterward, but such instructions should not go beyond what is fairly authorized by the argument of counsel or some other good reason).

18. Crain v. St. Louis, San Francisco Ry. Co., 206 Ark. 465, 176 S.W.2d (1944) (Although statute directs that instructions shall be given prior to argument, trial court may for sufficient reasons give instructions after argument); Jones v. Stanley, 27 Ariz. 381, 233 Pac. 598 (1925) (giving of instructions after argument, contrary to statute is not prejudicial); Paducah Traction Co. v. Sine, 33 Ky. Law Rep. 792, 111 S.W. 356 (1908) (The giving of additional instructions after argument was not error where it appeared such instructions were indispensable); Cluskey v. City of St. Louis, 50 Mo. 89 (1872) (Instruction after argument, although irregular is no ground for reversal); Rhea v. Territory, 3 Okla. Cr. 230, 105 Pac. 314 (1909) (judge has discretion to give additional instructions before jury retires).

have been upheld which were given after the plaintiff's argument and before that of the defendant despite a statute providing for instructions before argument.[19] California provides by statute that, for good reason, the order of trial may be departed from.[20] The Supreme Court of Idaho has held that a departure from the prescribed order of trial is not reversible error in absence of timely objections.[21] Washington has upheld instructions given after the defendant's closing argument and before the plaintiff's.[22] The giving of such instructions after argument and contrary to the customary procedure must usually be for the purpose of correcting or qualifying statements made by counsel during argument or to cure a misconduct of counsel therein.[23]

Likewise it has been held that a provision that instructions shall be given after argument does not forbid the giving of specific instructions before argument.[24]

In North Dakota the statutory order of trial prescribes that instructions shall be given after the argument of counsel.[25] This section further provides the trial must proceed in the prescribed order, unless the judge for special reasons directs otherwise. North Dakota has allowed such a departure by permitting instructions to be given before argument of counsel, and the practice was upheld on appeal, although upon the ground that no objection was made at the time.[26] Other cases have permitted a departure from the prescribed order of trial.[27] Although this indicates that the order of trial is clearly not mandatory, the fact remains that in only the barest minimum of cases will there be such a departure. In view of the fact that both South Dakota and Montana charge the jury before argument and of the growth in that direction, a summary of possible arguments for and against a possible change seems indicated.

Arguments for the Change

The practice of requiring the attorney to argue the case before the instructions have been made known is a most difficult one from

19. Proctor v. Home Trust Co., 221 Mo. App. 577, 284 S.W. 156 (1926); Dyer v. Griffith, 261 S.W. 100 (Mo. App. 1924) (error to give an instruction for plaintiff after opening argument for plaintiff had been made).
20. Cal. Penal Code § 1094 (Deering 1949).
21. Schmidt v. Wilson, 34 Idaho 723, 203 Pac. 1075 (1921).
22. Kuhnhausen v. Woodbeck, 2 Wash.2d 338, 97 P.2d 1099 (1940).
23. Weant v. Southern Trust & Deposit Co., 112 Md. 463, 77 Atl. 289 (1910); Yore v. Mueller Coal, Heavy Hauling & Transfer Co., 147 Mo. 679, 49 S.W. 855 (1899).
24. Zimmerman v. Second Nat. Bank, 24 Ohio App. 48, 156 N.E. 157 (1926).
25. N.D. Rev. Code § 28-1410 (1943).
26. Bormann v. Beckman, 73 N.D. 720, 19 N.W.2d 455 (1945).
27. See Otter Tail Power Co. v. Von Bank, 72 N.D. 497, 8 N.W.2d 599 (1943).

his position. Since the lawyer, in such argument, must base his plea on legal principles it is of paramount importance that he know what those legal principles are. He is required to make a difficult choice. He can argue the case based on what he thinks the judge will charge and run the risk of correction by the court. Or he can play safe and omit any controversial points in his argument with the result that his argument is thereby weakened and made less effffective. It is unfair to the advocate to require him to say to the jury "The judge will probably charge you thus and so." He is entitled to *know* what those instructions will be. With such knowledge the trial lawyer has an infinitely better chance of making an effective argument. His charge can be based on certainty as to the instructions instead of mere speculation. The aid which such knowledge provides is of inestimable value in his preparation for such charge.

A change to giving the instructions before argument will aid not only counsel, but substantial benefits will inure to the jury as well.

After the evidence is all in the jury needs a disinterested party to point out the gist of the controversy, to arrange it in a systematic and orderly fashion, and to point out and charge them as to the principles of law by which those facts must be governed. Thus the jury will be in a far better position to follow the arguments of counsel more intelligently and to weigh them in the light of the applicable principles of law which have already been given. It is also better that the jury go into the jury room with the arguments of counsel fresh in their minds rather than a charge on abstract principles of law. This is for the reason that they thus retain the atmosphere of the controversy. The jury system is thus given greater vitality through depriving the judge of his ability to influence the decision through a possible "slanted" charge which cannot be dealt with by counsel. Too often, when the charge is given last, the jury is lulled into an atmosphere of complacency by a long charge on abstract principles of law and find that on their retirement they must restore themselves to the mood of the controversy. It is better that the jury retire with the final impact of the argument rather than the charge of the court.

Such a change would also work substantial benefits to the judge. To start with, once the evidence is all in, the logical time arrives when all concerned need to know the law which applies to the controversy. Later arguments of counsel are of no concern to the judge unless they are in some manner irregular. The judge has

the opportunity of having his attention called to possible errors by counsel before argument so that they may be corrected before the argument is heard. The judge also has the advantage of correcting any possible errors or supplementing his instructions after argument has concluded. Thus a double check exists to insure that the instructions are not only correct but also complete.

Since it is of great advantage for the jury to have the instructions in written form on their retirement, this system allows time for typing up the charge during argument so that copies are available to the jury immediately on their retirement.[28]

Arguments Against the Change

The argument against changing the age-old, common law rule of giving the charge last is substantially as follows: It would involve a radical change, something that law has always abhorred. It is most important that the jury retire in an unbiased frame of mind since on them, once they retire, rests the whole burden of judging the right and wrong of the case. Therefore the last words they hear before retiring should be dispassionate and nonpartisan. The last thing that is desired is an inflamed jury, stirred up by the argument of the advocate of great oratorical and emotional appeal which may easily lead them to decide the case on emotional considerations having no relation to the legal merits of the case. Allowing counsel to argue after the instruction gives undue advantage to the lawyer of unusual oratorical ability, and even in case such ability is equal the advocate who argues last has the advantage. The greater the oratorical skill of counsel the more necessary is the position of the judge to instruct after argument so that the jury may be restored to a calm and considered state of mind.

The argument that the jury system would be strengthened by allowing counsel a chance to counter a "slanted" charge is entirely fallacious. To the extent that the control of the court over the proceedings is lessened, the control of partisan counsel is increased, and with it an increased danger of a miscarriage of justice.

The judge has the greater advantages under the present system. He speaks last and therefore has the benefit of everything that has been previously said. He can correct, within the limits of his authority, any mistakes of counsel. It is not necessary for him to "correct"

28. These arguments are gathered from a number of sources, the principal ones being: Blatt, *Judge's Charge to Jury Should Precede Arguments of Counsel*, 33 J. Am. Jud. Soc'y. 56 (1949); 6 Md. L. Rev. 35, 46 (1941); Busch, Law and Tactics in Jury Trials § 443 (1950).

mistakes of his own in his first charge since in speaking last he can give the correct charge so that no confusion results to the jury.

The present system results in no real inconvenience or disadvantage to the advocate. In the vast majority of cases the law is not seriously controverted; the decision will turn largely on the facts. Counsel thus has little danger of being corrected by the judge. Experienced counsel can easily anticipate what the judge will charge in a given situation. Inexperienced advocates can find out easily by a small amount of research. Thus there is no advantage to having the charge precede argument.

As to the infrequent situations when an involved principle of law arises the judge is frequently allowed, in his discretion, to give a preliminary instruction on it before argument of counsel.[29]

The Federal Practice

Both the Federal Rules of Civil and Criminal Procedure declare that the court shall instruct after the arguments are completed.[30] The rule, however, goes on to state that counsel may submit written requests for instructions at the close of the evidence or at any previous time, and the court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. It has been held that if the court, in its charge, includes matter contained in a rejected request for instructions counsel may call the attention of the court to this and request the right to argue that matter to the jury.[31]

The purpose of the rule thus is to permit counsel to be informed as to which of his requested instructions will be given so that he can argue with the knowledge that certain of his requests will be given. Insofar as this is accomplished the purpose is commendable. However it can be immediately seen that this goes only part way, in that counsel is still uninformed as to instructions requested by his opponent and other general charges by the court itself. However it does have the laudable advantage of allowing counsel to submit requests on all the possible points of doubt so that, after the court rules on these requests, he may judge what the court will charge on the points of law involved.

Several states have adopted rules of procedure somewhat

29. Again these arguments are gathered from a number of sources of which the leading are: Hartshorne, *The Timing of the Charge to the Jury*, 33 J. Am. Jud. Soc'y. 90 (1949); 6 Md. L. Rev. 35, 46 (1941).

30. Federal Rules of Civil Procedure, Rule 51; Federal Rules of Criminal Procedure, Rule 30.

31. Terminal R. Assn. of St. Louis v. Staengel, 122 F.2d 271 (1941).

similar to the Federal practice. Minnesota provides for the granting or refusal of requests before argument and allows counsel to read the approved requests to the jury in their argument.[32] The charge then comes at the conclusion of the argument. The purpose of this provision is to enable litigants to have the applicable principles of law discussed by counsel in their final argument.[33] The benefit to litigants of having such applicable principles of law discussed by counsel in final argument is not to be underestimated.[34] Florida has a statute similar in effect to Minnesota.[35] Statutes in Ohio and Wyoming require the giving of requested instructions before argument and the general charge after.[36] It has there been held that such requested instructions must be given before argument and the defect cannot be cured by giving them in the general charge after argument.[37]

It would seem that there is considerable to be said for the argument that counsel has a right either to have the instructions given before argument or to know what the instructions will be when given. The argument that the last voice the jury is to hear before retiring should be that of the judge calmly restoring them to the main elements of the controversy and the law which they are to use as a guide to their verdict, is likewise of great force. While these two statements seem beyond reconciliation it is to be noted that it is not impossible to combine much of the better arguments on either side into a single, workable rule.

ROBERT H. LUNDBERG.

VENDOR AND PURCHASER — RECORDS — EFFECT OF ERROR BY RECORDING OFFICER. — One of the most difficult problems faced by the law arises when one of two innocent parties must bear a loss occasioned by the act of a third party. This situation is presented to a court when a party acquiring an interest in property presents his instrument of title to a recording officer and receives it back believing in good faith that it has been recorded in compliance with the law only to discover later that as the result of an error by the recording officer another party has acquired an interest in the same property without having been able reasonably to discover the inter-

32. Minn. Stat. § 546.14 (1945).
33. Lataurelle v. Horan, 212 Minn. 520, 4 N.W.2d 343 (1942).
34. Zickrick v. Strathern, 211 Minn. 329, 1 N.W.2d 134 (1941).
35. Fla. Stat. § 918.10 (1951).
36. Ohio Gen. Code § 11447 (Page's, 1926); Wyo. Comp. Stat. § 3-2408 (1945).
37. Industrial Comm. v. Austin, 51 Ohio App. 469, 1 N.E.2d 649 (1935).