THE LAW OF
INSTRUCTIONS TO JURIES
IN CIVIL AND CRIMINAL CASES

Rules and a Complete Collection of
Approved and Annotated Forms

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THIRD EDITION
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Volume 1
RULES

1960 Replacement
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THE BOBBS-MERRILL COMPANY, INC.
A SUBSIDIARY OF HOWARD W. SAMS & CO., INC.
Publishers • INDIANAPOLIS • NEW YORK

PREFACE TO REPLACEMENT VOLUMES

Instructions are supposed to enlighten the jury on the applicable law. There is some basis for the conclusion that too many instructions could not enlighten a seasoned lawyer, let alone a jury of laymen. The hypothetical instruction, for example, usually is incredibly complex, the "ifs" snowballing until an entire page of print may be consumed. A cynic might say that instructions are designed to trap the trial judge into committing error. This is a perversion of the correct use of instructions, but still tried in many cases. Some kind of record, not necessarily enviable, seems to have been established in a recent case in which 582 requests were made by one party!

The advocate who is not the trapper has enough to worry about. Considering the rules that must be followed to insure approval of a request, it is surprising that so many instructions escape the enormous pitfalls. Most of the instructions reproduced in these volumes have been scrutinized by an appellate court. They were given and approved on appeal, or denied and this held to be reversible error on appeal.

Even though so weathered, one cannot over emphasize that instructions must not be isolated from the case in which they were given. An instruction may correctly state the law, yet be erroneous if not supported by the evidence or applicable to the pleadings.

These instructions are like any other forms: one should be careful about their use. Their main function is to serve as a point of beginning. They must be adapted to the peculiarities of the evidence and pleading, even if correctly stating the law. Moreover, there probably isn't an instruction that cannot be semantically improved for better understanding. Certainly, these volumes should not be used as a magician picks rabbits out of a hat.

The main purpose of replacing the volumes is to bring matters up to date. Newer instructions replace old ones; better ones replace instructions not as good. Some entirely new instructions on matters not covered before have been added. A reorganization in classification has been made, especially with a view to eliminate duplication.

A work of this nature cannot be exhaustive. One must read thousands of cases to be sure that the compiler of headnotes in a digest system did not commit a sin of omission. There has been an attempt to be comprehensive by finding instructions in

all the states. But sometimes, appellate courts are wittingly or unwittingly uncooperative. Some judges rarely, if ever, reproduce an approved instruction in their opinions. But, of course, appellate judges do not write opinions for the convenience of editors. On the other hand, editors may write for the convenience of the practicing attorney. This is the purpose of the replacement volumes.

WILLIAM SAMORE

Cleveland, Ohio,
January 20, 1960.

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THE LAW OF INSTRUCTIONS TO JURIES

RULES GOVERNING THE GIVING OR REFUSAL OF INSTRUCTIONS

CHAPTER 1

NATURE AND PURPOSE OF INSTRUCTIONS

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§ 1. Definition.

An instruction is an explanation by the trial judge to the jury of the rules of law applicable to the case in general, or to some branch or phase of the case.

Instructions inform the jury upon the law applicable to the pleadings and the evidence, so as to aid the jury in reaching a correct verdict under the evidence.[1] Instructions are directions in reference to the law of the case, enabling the jury better to understand their duty, and prevent them from arriving at wrong conclusions.[2]

The term does not include the ordinary remarks and admonitions of the court to the jury during the course of the trial.[3] It has accordingly been decided that the character of instructions does not attach to such matters as directions of the court on the manner of returning a sealed verdict;[4] the manner of

[1] Lehman v. Hawks, 121 Ind 541, 23 NE 670; Plummer v. Indianapolis Union R. Co., 56 IndApp 615, 104 NE 601; Hanson v. Kent & Purdy Paint Co., 36 Okl 583, 129 P 7.

[2] Leavitt v. Deichmann, 30 Okl 423, 120 P 983; Butler v. Gill, 34 Okl 814, 127 P 439.

[3] **Illinois.** Hinckley v. Horazdowsky, 133 Ill 359, 24 NE 421, 8 LRA 490.

Kentucky. Wendling v. Commonwealth, 143 Ky 587, 137 SW 205.

Wisconsin. McCormick v. Ketchum, 48 Wis 643, 4 NW 798.

[4] McCallister v. Mount, 73 Ind 559.

answering interrogatories;[5] the form of the verdict to be returned;[6] directions to the jury to find a verdict for one party or the other;[7] rulings as to the admission or exclusion of evidence;[8] a direction to the jury to disregard evidence unless its relevancy is afterward shown.[9]

Theoretically, the instructions merely define the issues in the case on trial.[10] Orally explaining to the jury the manner in which they should mark their verdict does not constitute an instruction.[11] Nor is it an instruction if the judge does no more than read the controlling statute to the jury in an action based on the negligence of an unlicensed automobile operator.[12] Technically, telling the jury that certain orders had been entered in the case prior thereto is not an instruction.[13]

§ 2. Office of charge.

The office of a charge is: first, to explain the issues; second, to notice the positions taken by the parties and state, so far as the case may require it, the principles of evidence and their application; and, third, to declare what rules of law will be applicable to any state of facts which may be found in the evidence.

The charge to the jury includes a general statement of the theories of both parties, without expressing an opinion as to the correctness of any theory. The presiding justice should point out clearly and concisely the precise issues in controversy and the rules of law applicable. He should make the jury understand the pleadings, positions and contentions of the litigants, by stating, comparing and explaining the evidence. In short, he should do all things as in his judgment will enable the jury to acquire a clear understanding of the law and the evidence, and form a correct judgment.[14]

[5] Trentman v. Wiley, 85 Ind 33.

[6] Bradway v. Waddell, 95 Ind 170; Herron v. State, 17 IndApp 161, 46 NE 540; Boggs v. United States, 10 Okl 424, 63 P 969, 65 P 927.

[7] Lehman v. Hawks, 121 Ind 541, 23 NE 670.

[8] Lawler v. McPheeters, 73 Ind 577; State v. Linden, 171 Wash 92, 17 P2d 635.

[9] Stanley v. Sutherland, 54 Ind 339.

[10] Bilsky v. Sun Ins. Office, Ltd. (MoApp), 84 SW2d 171.

[11] State v. Finney, 141 Kan 12, 40 P2d 411, stated in the light of statutory requirement that instructions must be in writing.

[12] Blanos v. Kulesva, 107 Conn 476, 141 A 106.

[13] Delk v. Commonwealth, 243 Ky 38, 47 SW2d 957.

[14] **Federal.** In trials of actions at law the court instructs the jury for the purpose of directing their attention to the legal principles which are applicable to the facts shown by the evidence in the case. Order of United Commercial Travelers v. Nicholson, 9 F2d 7.

Alabama. Desmond v. Wilson, 143 Me 262, 60 A2d 782.

Illinois. Monroe v. Wear, 276 Ill App 570.

Michigan. Souvais v. Leavitt, 50 Mich 108, 15 NW 37.

It is another statement of the principle to say that the province of instructions from the court is to inform the jury what the law is, connected with the case in hand, and show them how to apply it to the particular facts involved;[15] to state to the jury the claims set up by the parties, as disclosed by the evidence, and instruct them upon the law applicable thereto;[16] to assist the jury in correctly applying the law to the facts of the case;[17] to enlighten the jury on questions of law pertinent to the issues of fact submitted to them in the trial of a case;[18] to aid the jury clearly to comprehend the case and render a fair verdict;[19] to enlighten the jury and aid it in arriving at a correct verdict;[20] or to lay before the jury correct principles of law applicable to the evidence in the case.[21]

The office of instructions is to define the legal principles covering facts proved or presumed in a case;[22] or to define for the jury the legal principles governing the facts presented.[23] The object sought in all cases is the enlightenment of the jury,[24] and nothing should be given, in the way of instructions that does not promote this object.[25]

It is the purpose of instructions to direct the conduct of the jurors in the controversy which they are called upon to decide, rather than to teach law to the jurors.[26] It has been declared

Ohio. Walsh v. J. R. Thomas Sons, 91 OhSt 210, 110 NE 454; Lake Shore & M. S. R. Co. v. Whidden, 2 OhCirCt (N. S.) 544, 13 OhCirDec 85.

West Virginia. It is the object and purpose of instructions to define for the jury and to direct their attention to the legal principles which apply thereto and cover the facts proved or presumed in the case. State v. Dodds, 54 WVa 289, 46 SE 228.

[15] **Connecticut.** Morris v. Platt, 32 Conn 75.

Massachusetts. Sawyer v. Worcester Consol. St. R. Co., 231 Mass 215, 120 NE 404.

Nevada. State v. Levigne, 17 Nev 435, 30 P 1084.

[16] Grout v. Nichols, 53 Me 383.

[17] **Iowa.** Behrend v. Behrend, 233 Ia 812, 10 NW2d 651.

Kansas. Sawyer v. Sauer, 10 Kan 466.

Michigan. People v. MacPherson, 323 Mich 438, 35 NW2d 376.

[18] Holman Live Stock Co. v. Louisville & N. R. Co., 81 Fla 194, 87 S 750.

[19] Builders Lbr. & Supply Co. v. Cheek, 139 SC 299, 137 SE 734.

[20] Beck v. Beagle, 28 OhApp 508, 162 NE 810.

[21] First Nat. Bank v. Eitemiller, 14 IllApp 22; Williams v. Walsh, 341 IllApp 543, 95 NE2d 743.

[22] Commonwealth v. Brletic, 113 PaSuper 508, 173 A 686.

[23] Huffman v. People, 96 Colo 80, 39 P2d 788.

[24] State v. Stout, 49 OhSt 270, 30 NE 437.

[25] Baxter v. People, 3 Gilm. (8 Ill) 368; Montag v. People, 141 Ill 75, 30 NE 337; First Nat. Bank v. Eitemiller, 14 IllApp 22.

[26] Lendberg v. Brotherton Iron Min. Co., 75 Mich 84, 42 NW 675.

It is the office of instructions to apprise the jury as to the questions that are involved and to inform them as to the law to be applied in the solution of such questions. People v. Ring, 267 Mich 657, 255 NW 373, 93 ALR 993.

to be the object of instructions to guard against the consideration by the jury of false issues raised by the evidence as well as to inform them of the law applicable to the issues.[27]

The instructions should be sufficient to embody the whole law of the case.[28] The judge may adopt, as his own, a charge prepared by one of the parties and make it the main charge.[29] Instructions are given for the purpose of aiding the jury as to the method of looking at the evidence and applying the law to the facts proved.[30]

§ 3. Law of the case.

The instructions are the law of the case, and it is the duty of the jury to follow them whether the instructions are proper or improper. Even in jurisdictions where the jury are judges of both the law and the facts, they are not free to wholly ignore what the court has declared to be the applicable law since the best evidence the jurors have of the law is the instructions of the court.

The rule in most jurisdictions is that it is the duty of the jury in all cases to follow the instructions given them by the court, whether correct or not. The reasons for the rule are obvious, and any other would lead to endless confusion, sanction an utter disregard of the court's opinion of the law applicable to the pleadings and the evidence, and render its instructions entirely impotent, unless the jury coincidentally reached a verdict consistent with the instructions.[31]

The purpose of instructions is to furnish to the jury a guide for arriving at a just decision of the case. Zabinski v. Novak, 211 Wis 215, 248 NW 99.

[27] Brand v. Herdt (MoApp), 45 SW2d 878.

[28] Morgan v. Commonwealth, 242 Ky 116, 45 SW2d 850.

It is not error to give a very short charge if it states all the law applicable to the case. Lenart v. Cochran, 2 OLA 537.

[29] Walsh v. J. R. Thomas Sons, 91 OhSt 210, 110 NE 454; Kansas City, M. & O. R. Co. of Texas v. Harral (TexCivApp), 199 SW 659.

[30] Keime v. Thum, 238 IllApp 519.

[31] **Federal.** American R. Co. of Porto Rico v. Santiago, 9 F2d 753; Carroll v. United States, 16 F2d 951.

Alabama. Penticost v. Massey, 202 Ala 681, 81 S 637; Copeland v. Benson Hdw. Co., 24 AlaApp 127, 131 S 1.

The trial court may, without committing reversible error, refuse to accept a verdict attempted to be returned contrary to the court's instructions. McShan v. Kilpatrick, 215 Ala 185, 110 S 281.

Arizona. Pacific Gas & Elec. Co. v. Almanzo, 22 Ariz 431, 198 P 457.

California. Sharpless v. Pantages, 178 Cal 122, 172 P 384; Redo y Cia v. First Nat. Bank, 200 Cal 161, 252 P 587.

Georgia. Jackson v. State, 118 Ga 780, 45 SE 604.

It is not error in a criminal case to instruct the jury that if the court erred in giving a principle of law, the responsibility does not rest with the jury, but it is their duty to accept the law as given by the

If the jury refuse or fail to follow the court's instructions, the losing party may ask the court to set aside the verdict and grant a new trial. But even though the jury disregard or violate the instructions in arriving at their verdict, the motion should not be granted unless the result was prejudicial to the losing party.[32]

Hence, many courts will not ordinarily reverse for the failure of a jury to follow an *erroneous* instruction.[33] Thus, in a damage action for personal injuries against a railway company,

court. Holton v. State, 137 Ga 86, 72 SE 949.

Iowa. Mahoney v. Dankwart, 108 Ia 321, 79 NW 134; Bowell v. Draper, 149 Ia 725, 129 NW 54; Seevers v. Cleveland Coal Co., 158 Ia 574, 138 NW 793, AnnCas 1915D, 188; State v. Anderson, 209 Ia 510, 228 NW 353, 67 ALR 1366; Hall v. Great American Ins. Co. of New York, 217 Ia 1005, 252 NW 763.

Kentucky. Barney v. Jolly Hoop Co., 172 Ky 99, 188 SW 1094; Parris' Admx. v. Molter, 251 Ky 432, 65 SW2d 52.

Maine. State v. Wright, 128 Me 404, 148 A 141.

Massachusetts. Commonwealth v. Davis, 271 Mass 99, 170 NE 924.

Michigan. People v. McMurchy, 249 Mich 147, 228 NW 723.

Montana. King v. Lincoln, 26 Mont 157, 66 P 836.

Nebraska. Boyesen v. Heidelbrecht, 56 Neb 570, 76 NW 1089; Barton v. Shull, 62 Neb 570, 87 NW 322.

The rule is that it is the duty of the jury in all cases to follow the instructions given them by the court, whether correct or not; and, if they fail to do so, the verdict will be deemed to be contrary to law, and should be set aside and a new trial ordered. The reasons for the rule are obvious, and any other would lead to endless confusion, sanction an utter disregard of the court's opinion of the law applicable to the pleadings and the evidence, and render its instructions entirely impotent, except when willed otherwise by the jury. A refusal or failure to follow the instructions of the court is sufficient ground for setting aside a verdict and granting a new trial. Barton v. Shull, 62 Neb 570, 87 NW 322.

New Jersey. Queen v. Jennings, 93 NJL 353, 108 A 379; Cikatz v. Milwid, 5 NJMisc 768, 138 A 305.

New Mexico. State v. Reed, 39 NM 44, 39 P2d 1005. See State v. Wallis, 34 NM 454, 283 P 906.

[32] Gambon v. New York, 153 Misc 401, 274 NYS 653.

New York. Lang v. Interborough Rapid Transit Co., 193 AppDiv 56, 183 NYS 270; Trulock v. Kings County Iron Foundry, 216 AppDiv 439, 215 NYS 587; Oatka Cemetery Assn. v. Cazeau, 242 AppDiv 415, 275 NYS 355.

Ohio. Wallace v. Ennis, Dayton (Oh) 414; New Jerusalem Church v. Crocker, 7 OhCirCt 327, 4 OhCirDec 619. See Globe Ins. Co. v. Sherlock, 25 OhSt 50.

Oregon. State v. Wong Si Sam, 63 Or 266, 127 P 683.

Pennsylvania. Commonwealth v. Long, 100 PaSuper 150.

Texas. McAllister & Co. v. Grice, (TexCivApp), 286 SW 1001; Indemnity Ins. Co. of North America v. Williams (TexCivApp), 69 SW2d 519.

Utah. State v. Hoben, 36 Utah 186, 102 P 1000.

Virginia. Messer v. Commonwealth, 145 Va 872, 134 SE 565; Buchanan v. Norfolk Southern R. Co., 150 Va 17, 142 SE 405.

Washington. Waldon v. Seattle, 182 Wash 493, 47 P2d 978.

[33] **Arkansas.** St. Louis, I. M. & S. R. Co. v. Dooley, 77 Ark 561, 92 SW 789.

where the court erroneously withdrew from the jury the issue based on the last clear chance doctrine but the jury nevertheless returned a contrary verdict, it was held that the verdict should not be disturbed.[34]

There are cases, however, which hold that a verdict rendered in plain disregard of the instructions of the court should be set aside without an examination of the instructions to determine whether they are correct or not.[35]

If it be made to appear that the verdict was rendered contrary to the instructions, it is generally held that the court has no discretion to refuse to set aside the verdict upon proper application. "The instructions of the trial court are the law as far as the jury is concerned. They must be followed by it. A verdict arrived at in opposition to the directions of the court will not be permitted to stand. The trial court has no discretion in ruling where this ground is made to appear in an application to set aside the verdict so arrived at. It is a plain legal duty of the court to set it aside, and refusal to do so is reversible error."[36] Thus, if the jury return a verdict assessing the value of an automobile traded in, contrary to the charge of the court as to the law of the case, it will be set aside.[37] In any event, an instruction submitted to the jury without objection becomes the law of the case.[38]

Illinois. McNulta v. Ensch, 134 Ill 46, 24 NE 631; West Chicago St. R. Co. v. Manning, 170 Ill 417, 48 NE 958.

South Carolina. Campbell v. Western Union Tel. Co., 74 SC 300, 54 SE 571.

Wisconsin. Loew v. State, 60 Wis 559, 19 NW 437.

[34] Gore v. Market St. R. Co. (Cal App), 37 P2d 1059, 38 P2d 804.

[35] **Illinois.** Browder v. Beckman, 275 IllApp 193.

Montana. McAllister v. Rocky Fork Coal Co., 31 Mont 359, 78 P 595.

Nebraska. Haslan v. Barge, 69 Neb 644, 96 NW 245.

[36] Bowers, The Judicial Discretion of Trial Courts, § 542, citing:

Federal. Stetson v. Stindt, 279 F 209, 23 ALR 302.

Alabama. Holcombe & Bowden v. Reynolds, 200 Ala 190, 75 S 938.

Georgia. Kennedy v. McCook, 23 GaApp 422, 98 SE 390.

Iowa. Jensen v. Duvall, 192 Ia 960, 185 NW 584.

Kentucky. Dunn v. Blue Grass Realty Co., 163 Ky 384, 173 SW 1122.

Massachusetts. Peterson v. Patrick, 126 Mass 395.

Missouri. Laclede Power Co. v. Nash Smith Tea Co., 95 MoApp 412, 69 SW 27.

Montana. Lish v. Martin, 55 Mont 582, 179 P 826.

Nevada. Hoffman v. Bosch, 18 Nev 360, 4 P 703.

New York. Bigelow v. Garwitz, 61 Hun 624, 15 NYS 940.

Oregon. British Empire Ins. Co. v. Hasenmayer, 90 Or 608, 178 P 180.

Contra: Loew v. State, 60 Wis 559, 19 NW 437.

[37] Eggie v. Denof, 6 NJMisc 199, 140 A 417.

[38] **Montana.** Instruction that guest in automobile which collided with defendant's truck could not recover if the negligence of the driver of the car in which plaintiff was rid-

In a few jurisdictions, state statutes or constitutions declare that the jury are the judges of both the law and the facts.[39] In most of these states this broad jury power is exercised only in criminal cases. In Maryland, although the jury in criminal cases may be the judges of the law, as well as the facts, they have no province to pass on constitutionality.[40] In spite of the clear language in these state statutes or constitutions, it is questionable whether, in reality, the jury do determine the law, for the court is the proper source from which they are to be informed.[41] This statement is supported by the latest pronouncement by the Indiana Supreme Court on the jury function of deciding in a criminal case both law and fact:

> "Although the constitution gives the jury the right to determine the law in criminal cases, it does not follow, nor is it true, that it is an 'exclusive' right. It is a coordinate right to be exercised with that of the judge or court. Neither does it follow, nor is it true, that the jury is the judge of the law at every step in the proceedings. Neither does it follow, nor is it true, that it is totally irresponsible in determining the law, and has no duty in the exercise of that right to seek the law from the best and most reliable source available, namely the court. A jury may not cast aside such advice or instructions lightly, and should be so instructed in view of their general lack of such knowledge. A consciousness of their responsibility, oath and duty in that respect is an aid to the proper performance of their constitutional duty. Nevertheless upon final analysis after being so informed and cautioned the jury has the power to go its own way, and determine the law for itself when it renders a

ing was the proximate cause of the collision, became the law of the case. Ashley v. Safeway Stores, Inc., 100 Mont 312, 47 P2d 53.

Rhode Island. Andrews v. Penna Charcoal Co., 55 RI 215, 179 A 696.

Virginia. Standard Dredging Co. v. Barnalla, 158 Va 367, 163 SE 367.

[39] **Indiana.** Carter v. State, 2 Ind 617; Driskill v. State, 7 Ind 338.

Louisiana. See also State v. McLofton, 145 La 499, 82 S 680.

Maryland. In a jurisdiction where the jury are the judges of the law as well as the facts in criminal cases, and the court is entitled to give advisory instructions, where the court does instruct the jury that he had held a certain matter to be the law in passing upon the admissibility of evidence, it was held that the court properly refused to charge at the request of the defendant that the jury were not to pay any attention to the remarks of the court. Dick v. State, 107 Md 11, 68 A 576; Midgett v. State, 216 Md 26, 139 A2d 209.

Tennessee. Dykes v. State, 201 Tenn 65, 296 SW2d 861.

In Howe, "Juries as Judges of Criminal Law," 52 HarvLRev 582 at 614 (1939), it is stated that only Indiana and Maryland still adhere to this rule.

[40] Hitchcock v. State, 213 Md 273, 131 A2d 714.

[41] Dykes v. State, 201 Tenn 65, 296 SW2d 861.

verdict. If the defendant is found guilty, its determination of the law, if in error, will be overridden by the court's better understanding of the law in the interest of justice and constitutional law."[42]

§ 4. Necessity of instructions—Duty of court to charge the jury.

The parties to an action, either civil or criminal, have the right to a charge from the court outlining and explaining to the jury the law of the case and the issues which are to be decided between the parties.

Every party to an action in court goes before the jury with a definite legal theory as to his cause of action or defense and as to the facts and circumstances upon which he relies to sustain his cause of action or defense. The case proceeds through its various phases to the ultimate decision of the jury, upon these theories of the parties. The trial judge, from his training, education, experience, and familiarity with legal procedure and principles, brings to the case an informed understanding of the theories of the parties from the issues tendered by the pleadings, which he assumes the respective parties will present evidence to sustain. But the jury do not bring this informed understanding into their consideration of the case. It is therefore the province and duty of the trial judge to impart to them this understanding of the theories of the parties upon which their contentions are presented and to instruct the jury distinctly and precisely upon the law of the case.[43] As a general rule,

[42] Beavers v. Indiana, 236 Ind 549, 141 NE2d 118.

[43] **Federal.** Massee v. Williams, 207 F 222; Northern Central Coal Co. v. Hughes, 224 F 57; Chesapeake & O. R. Co. v. Moore, 64 F2d 472; Little v. United States, 73 F2d 861.

Alabama. Dwight Mfg. Co. v. Word, 200 Ala 221, 75 S 979; Alabama Produce Co. v. Smith, 224 Ala 688, 141 S 674.

California. Buckley v. Silverberg, 113 Cal 673, 45 P 804; Raymond v. Hill, 168 Cal 473, 143 P 743; Tognazzini v. Freeman, 18 CalApp 468, 123 P 540; People v. Fox, 43 CalApp 399, 185 P 211; Hellman v. Los Angeles R. Corp., 135 CalApp 627, 27 P2d 946, 28 P2d 384.

Colorado. Denver City Tramway Co. v. Doyle, 63 Colo 500, 167 P 777.

Florida. Seaboard Air Line R. Co. v. Kay, 73 Fla 554, 74 S 523.

Georgia. Savannah Elec. Co. v. Johnson, 12 GaApp 154, 76 SE 1059; Banks v. State, 89 Ga 75, 14 SE 927; Parks v. State, 24 GaApp 243, 100 SE 724.

Illinois. Keokuk & Hamilton Bridge Co. v. Wetzel, 228 Ill 253, 81 NE 864; Sampsell v. Rybcynski, 229 Ill 75, 82 NE 244; Klofski v. R. Supply Co., 235 Ill 146, 85 NE 274; Kokoshkey v. Chicago City R. Co., 162 IllApp 613; Krieger v. Aurora, E. & C. R. Co., 242 Ill 544, 90 NE 266.

Indiana. Hipes v. State, 73 Ind 39; Bloom v. State, 155 Ind 292, 58 NE 81; Baltimore & O. R. Co. v. Peck, 53 IndApp 281, 101 NE 674; Walsh Baking Co. v. Southern Indiana Gas & Elec. Co., 97 IndApp 285, 186 NE 341.

Iowa. Biggs v. Seufferlein, 164 Ia 241, 145 NW 507 (LRA 1915F, 673);

whether so requested or not, the court should instruct on every essential question in the case so as properly to advise the jury of the issues.[44] The object of a charge is to define for the jury, and to direct their attention to, the legal principles which apply to and govern the facts, proved or presumed, in the case, and hence the charge should be full, clear, and explicit. The proper procedure is for the court to state correctly in the charge both the claims made by the prosecution and those made by the de-

Monoghan v. Bowers, 185 Ia 708, 171 NW 38.

Kansas. Binkley v. Dewall, 9 Kan App 891, 58 P 1028.

Kentucky. Julius Winter, Jr., & Co. v. Forrest, 145 Ky 581, 140 SW 1005; Pack v. Camden Interstate R. Co., 154 Ky 535, 157 SW 906; Golubic v. Rasnich, 249 Ky 266, 60 SW2d 616.

Louisiana. State v. Tucker, 38 LaAnn 536.

Maryland. Lion v. Baltimore City Passenger R. Co., 90 Md 266, 44 A 1045, 47 LRA 127.

Massachusetts. Commonwealth v. Kneeland, 20 Pick. (37 Mass) 206.

Michigan. Wildey v. Crane, 69 Mich 17, 36 NW 734.

Minnesota. Virtue v. Creamery Pkg. Mfg. Co., 123 Minn 17, 142 NW 930, 1136, LRA 1915B, 1179.

Mississippi. Gambrell v. State, 92 Miss 728, 46 S 138, 17 LRA(N.S.) 291, 131 AmSt 549, 16 AnnCas 147.

Missouri. State v. Chick, 282 Mo 51, 221 SW 10; Young v. Wheelock, 333 Mo 992, 64 SW2d 950; State v. Markel, 336 Mo 129, 77 SW2d 112; Nat. Warehouse & Storage Co. v. Toomey, 181 MoApp 64, 163 SW 558; Boles v. Dunham (MoApp), 208 SW 480; Helstein v. Schmidt, 227 MoApp 1200, 61 SW2d 264.

Montana. Power & Bro. v. Turner, 37 Mont 521, 97 P 950.

Nebraska. Hancock v. Stout, 28 Neb 301, 44 NW 446; McKennan v. Omaha & C. B. St. R. Co., 95 Neb 643, 146 NW 1014; Brooks v. Thayer County, 126 Neb 610, 254 NW 413; Goldman v. State, 128 Neb 684, 260 NW 373.

New Jersey. Scott v. Mitchell, 41 NJL 346.

New Mexico. Territory v. Baca, 11 NM 559, 71 P 460.

New York. Kearns v. Brooklyn Heights R. Co., 60 AppDiv 631, 69 NYS 856; Jacobson v. Fraade, 56 Misc 631, 107 NYS 706.

North Dakota. Putnam v. Prouty, 24 ND 517, 140 NW 93; State v. Lesh, 27 ND 165, 145 NW 829.

Ohio. Lytle v. Boyer, 33 OhSt 506; Walsh v. J. R. Thomas Sons, 92 OhSt 210, 110 NE 454; Perry v. Edwards Mfg. Co., 18 OhNP (N. S.) 293, 26 OhDec 301; McKinnon v. Pettibone, 44 OhApp 147, 184 NE 707, 12 OLA 668.

It is not error for a justice to submit a case to a jury without a charge where he is not requested to make one. Myer v. State, 10 OhCir Ct 226, 6 OhCirDec 477, 3 OD 198.

Oklahoma. Johnson v. Harris, 166 Okl 23, 25 P2d 1072; McIntosh v. State, 8 OklCr 469, 128 P 735; Crittenden v. State, 13 OklCr 351, 164 P 675.

This court has repeatedly held that it is error for the trial court to fail and refuse to instruct on the law applicable to a theory of the defense which the evidence tends to support, when such evidence affects a material issue in the case. Peyton v. State, 16 OklCr 410, 183 P 639.

Oregon. Cerrano v. Portland R. Light & Power Co., 62 Or 421, 126 P 37; State v. Hill, 63 Or 451, 128 P 444; De Vol v. Citizens Bank, 92 Or 606, 179 P 282, 181 P 985.

Pennsylvania. Tiribassi v. Parnell, Cowher & Co., 106 PaSuper 168, 161 A 477.

It is the duty of the trial judge not only to state the rules of law that are pertinent to the particular

fendant and the theories which the evidence for each respectively tends to establish.[45]

The extent and limitation of the court's duty in this regard is to give instructions that are correct in law, adapted to the issues, and sufficient for the guidance of the jury.[46] That the trial judge believes the jury is already familiar with the principles of law that apply to the case is not an excuse for failing to charge the jury.[47] A party is entitled to have his theory of his case as disclosed by the evidence submitted to the jury under proper instructions, and when such an instruction is tendered to the court, refusal to give it is reversible error.[48] Issues of fact must be submitted for determination by the jury, with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured to litigants by the rules of the common law.[49] It is not required that any formal statement of the issues be made by the court if the court directs the jury as to the facts necessary to be found to justify or to defeat a recovery;[50] nor need the court explain to the jury his reason for giving particular instructions.[51] When the trial court instructs the jury as to what issues are submitted for their determination, it is not required that the court should tell the jury the reason for so limiting the issues.[52]

case, but also to inform the jury as to their relevancy to the particular showing made by the evidence so that the jury may intelligently apply the law as thus given to the facts that the parties have presented. Commonwealth v. Principatti, 260 Pa 587, 104 A 53.

South Carolina. Osteen v. Southern R. Co., 101 SC 532, 86 SE 30, LRA 1916A, 565, AnnCas 1917C, 505.

Tennessee. Memphis St. R. Co. v. Newman, 108 Tenn 666, 69 SW 269.

Texas. Barnes v. Dallas Consol. Elec. St. R. Co., 103 Tex 387, 128 SW 367, revg. 119 SW 122; Jones v. State, 86 TexCr 371, 216 SW 884; Southern Trac. Co. v. Jones (Tex CivApp), 209 SW 457; Cannaday v. Martin, (TexCivApp), 69 SW2d 434.

Utah. Miller v. Southern Pacific Co., 82 Utah 46, 21 P2d 865.

Vermont. Rowell v. Vershire, 62 Vt 405, 19 A 990, 8 LRA 708.

Virginia. Miller & Co. v. Lyons, 113 Va 275, 74 SE 194; Norfolk & W. R. Co. v. Parrish, 119 Va 670, 89 SE 923.

West Virginia. State v. Alie, 82 WVa 601, 96 SE 1011; Becher v. Spencer (WVa), 170 SE 900.

Wisconsin. Zabinski v. Novak, 211 Wis 215, 248 NW 99.

[44] Grammas v. Colasurdo, 48 NJ Super 543, 138 A2d 553; Borcherding v. Eklund, 156 Neb 196, 55 NW2d 643.

[45] People v. Viscio, 241 AppDiv 499, 272 NYS 213.

[46] Baer v. Baird Mach. Co., 84 Conn 269, 79 A 673.

[47] Wolfe v. Ives, 83 Conn 174, 76 A 526, 19 AnnCas 752.

[48] Mentz v. Omaha & C. B. St. Ry. Co., 103 Neb 216, 170 NW 889, 173 NW 478. See also Omaha St. Ry. Co. v. Boesen, 68 Neb 437, 94 NW 619.

[49] Schiedt v. Dimick, 70 F2d 558, affd. in 293 US 474, 79 LEd 603, 55 SupCt 296.

[50] Kenny v. Bankers Acc. Ins. Co., 136 Ia 140, 113 NW 566.

[51] King Solomon Tunnel & Dev. Co. v. Mary Verna Min. Co., 22 ColoApp 528, 127 P 129.

[52] Corn Exch. Nat. Bank v.

Of course, judicial duty to instruct the jury does not go to the extent of charging the jury relative to a theory that is opposed to the legal principles that govern the case;[53] nor is there such an obligation to instruct if there are no questions of law involved, even in a jurisdiction where an existing statute directs the trial court to give such instructions upon the law as may be necessary.[54] Moreover, the court cannot be required to charge the jury as to mere common sense propositions or as to matters which the jurors themselves know in common with other men of knowledge and experience.[55]

Unnecessary instructions should not be given, for the effect is to mislead and confuse, rather than to assist, the jury.[56]

§ 5. Discretion of trial court in giving instructions.

A trial judge does not have the discretionary power to give or to refuse to give instructions as he may elect.

Since it is an absolute right of the parties to an action triable to a jury to have the court charge the jury as to the issues and theories in the case and as to the law applicable thereto when the jury undertake to determine the facts, it necessarily follows that it becomes the duty of the court to give such charge. The presence of a judicial duty excludes the opposite legal element —judicial discretion. If the court is required to charge, he has no discretion to refuse to charge. Judicial discretion does not enter into the general duty of trial courts to instruct juries in the trial of cases before them. In the giving of instructions the presiding judge is bound to the observance of established rules of law as to their range, scope, contents, and the like, from which he has no administrative authority to depart.[57]

Ochlare Orchards Co., 97 Neb 536, 150 NW 651.

[53] Sturm v. Central Oil Co., 156 IllApp 165.

[54] Hamill v. Hall, 4 ColoApp 290, 35 P 927.

[55] **Federal.** Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co., 114 F 133, 52 CCA 950.

Alabama. Birmingham Ry. & Elec. Co. v. Wildman, 119 Ala 547, 24 S 548.

California. Davis v. McNear, 101 Cal 606, 36 P 105; In re Nutt's Estate, 181 Cal 522, 185 P 393.

Iowa. Bailey v. LeMars, 189 Ia 751, 179 NW 73.

Missouri. State v. Garth, 164 Mo 553, 65 SW 275.

[56] **Alabama.** Moss v. Mosely, 148 Ala 168, 41 S 1012.

California. People v. Epperson, 38 CalApp 486, 176 P 702.

Florida. Farnsworth v. Tampa Elec. Co., 62 Fla 166, 57 S 233.

Iowa. Bell v. Chicago, B. & Q. Ry. Co., 74 Ia 343, 37 NW 768.

Mississippi. Keys v. State, 110 Miss 433, 70 S 457.

Missouri. Edwards v. Schreiber, 168 MoApp 197, 153 SW 69.

Texas. Thomson Bros. v. Lynn, 36 TexCivApp 79, 81 SW 330.

[57] Bowers, The Judicial Discretion of Trial Courts, § 339.

CHAPTER 2

PROVINCE OF THE COURT AND THE JURY

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§ 10. Relative functions of court and jury.

The functions of the court and jury are distinct and each is supreme in its own domain. In most jurisdictions in this country it is the exclusive province of the court to determine all questions of law arising in the progress of the case and upon the

whole case after evidence and argument, and it is the equally exclusive province of the jury to determine all questions of fact in the case. Hence an instruction or a request for an instruction which takes away from the court or jury a matter within its exclusive province amounts to an invasion and is erroneous.

In delineating the provinces of judge and jury, no statement is made more categorically by the courts than that the jury decides the facts and the judge decides the law and that an invasion by either is ground for reversal.[1] In another way,

[1] **Federal.** Dunagan v. Appalachian Power Co., 23 F2d 395; Reid v. Maryland Casualty Co., 63 F2d 10.

Alabama. Thomason v. Odum, 31 Ala 108, 68 AmDec 159; Riley v. Riley, 36 Ala 496; International Harvester Co. v. Williams, 222 Ala 589, 133 S 270; Morgan-Hill Paving Co. v. Fonville, 224 Ala 383, 140 S 575.

Instruction that certain acts would not justify wife in assaulting husband or put him at fault invades the province of the jury. Johnson v. Johnson, 201 Ala 41, 77 S 335, 6 ALR 1031.

Arkansas. Williams v. Carson, 126 Ark 618, 191 SW 401.

California. People v. Ivey, 49 Cal 56; People v. Fox, 43 CalApp 399, 185 P 211; Haney v. Takakura, 2 CalApp2d 1, 37 P2d 170.

Colorado. If there are any questions of fact which should be submitted to the jury, findings thereon by the court are of no force. Walker v. Bennett & Myers Inv. Co., 79 Colo 170, 244 P 465; McLagen v. Granato, 80 Colo 412, 252 P 348.

Connecticut. Spring v. Nagle, 104 Conn 23, 131 A 744 (instruction held erroneous in leaving to jury determination whether an enforceable contract had been entered into by the parties).

Florida. Baker v. Chatfield, 23 Fla 540, 2 S 822.

Georgia. Webb v. State, 149 Ga 211, 99 SE 630; Williams v. State, 24 GaApp 53, 99 SE 711.

Illinois. Pennsylvania Co. v. Conlan, 101 Ill 93; People v. Kuchta, 296 Ill 180, 129 NE 528; Brownlie v. Brownlie, 351 Ill 72, 183 NE 613; Sugar v. Marinello, 260 IllApp 85.

Indiana. Riley v. Watson, 18 Ind 291; Automobile Underwriters v. White, 207 Ind 228, 191 NE 335; Chicago I. & L. Ry. Co. v. Pope, 99 IndApp 280, 188 NE 594.

Iowa. Bruckshaw v. Chicago, R. I. & P. R. Co., 173 Ia 207, 155 NW 273.

Kentucky. It was erroneous to submit to jury question whether arrest was lawful or unlawful. Indemnity Ins. Co. of North America v. Bonta, 217 Ky 265, 289 SW 231.

Michigan. People v. Williams, 208 Mich 586, 175 NW 187; Daleiden v. Stevens, 235 Mich 111, 209 NW 94.

Mississippi. Myrick v. Wells, 52 Miss 149.

Missouri. State v. Magruder (Mo App), 219 SW 701 (not necessary to instruct in misdemeanor cases in Missouri); Williams v. Connecticut Fire Ins. Co. (MoApp), 47 SW2d 207.

The jury should not be allowed to decide whether the facts in the case, though undisputed, constitute a contract. Clower v. Fidelity-Phenix Fire Ins. Co., 220 MoApp 1112, 296 SW 257.

It is error to charge that expert testimony is not binding on the jury and that it does not tend to prove the facts on which based. Brees v. Chicago R. I. & P. Ry. Co. (MoSup Ct), 4 SW2d 426.

Nebraska. First Nat. Bank v. Guenther, 125 Neb 807, 252 NW 395.

New Hampshire. Williams v. Boston & M. R. R. Co., 82 NH 253, 132 A 682.

New Jersey. Morril v. Morril, 104

it is sometimes declared that whatever the judge decides is law and whatever the jury decides is fact. Yet it has been questioned whether these statements are wholly accurate.[2] Rather than to state the maxim as an invariable formula, it would seem that the safest approach is to investigate the cases to determine what questions are for the jury and what questions are for the judge. Depending upon one's definition, it may be possible to show a consistent division of functions.

It has been said that the power of the court is the power to determine the law, while that of the jury is to determine the facts.[3] The court may not give instructions taking the decision of questions of fact from the jury,[4] and neither may it

NJL 557, 142 A 337, 60 ALR 102.

New York. Puleo v. Stanislaw Holding Corp., 126 Misc 372, 213 NYS 601.

Ohio. Cincinnati Gas & Elec. Co. v. Archdeacon, 80 OhSt 27, 88 NE 125; Walsh v. J. R. Thomas Sons, 91 OhSt 210, 110 NE 454; Miami Conservancy District v. Ryan, 104 OhSt 79, 135 NE 282; Crawford v. Merrell, 5 OhApp 146, 25 OhCirCt (N. S.) 537, 27 OhCirDec 104; Hough v. Stone, 21 OhApp 444, 153 NE 313 (error in instruction for leaving to jury the interpretation of contract); Zimmerman v. State, 42 OhApp 407, 182 NE 354; State v. Mueller, 6 OLR 542, 54 OhBull 94; Perry v. Edwards Mfg. Co., 18 OhNP (N. S.) 293, 26 OhDec 301.

Court is without right to leave to the jury determination of whether speed ordinance is reasonable. Liberty Highway Co. v. Callahan, 24 OhApp 374, 157 NE 708.

In an automobile collision case, it is improper to leave to the jury the determination of whether at the time of the accident certain traffic laws and ordinances were in effect. Peaney v. Davis, 26 OhApp 414, 160 NE 486.

Oklahoma. Farmers' Guaranty State Bank v. Bratcher, 112 Okl 254, 241 P 340; Board v. State ex rel, Walcott, 117 Okl 10, 242 P 522; Jarman v. State (OklCr), 47 P2d 220.

Oregon. White v. East Side Mill Co., 84 Or 224, 161 P 969, 164 P 736.

Pennsylvania. Huston v. Barstow, 19 Pa 169.

South Carolina. Griggs-Paxton Shoe Co. v. A. Friedham & Bro., 133 SC 458, 131 SE 620.

Tennessee. Brady v. Clark, 12 Lea (80 Tenn) 323; Kendrick v. Cisco, 13 Lea (81 Tenn) 247.

Texas. Northern Texas Trac. Co. v. Weed (TexCivApp), 297 SW 534; Haynes v. Taylor (TexComApp), 35 SW2d 104, revg. (TexCivApp), 19 SW2d 850; Reed v. Hester (Tex ComApp), 44 SW2d 1107, revg. (Tex CivApp), 28 SW2d 219.

Washington. Underhill v. Stevenson, 100 Wash 129, 170 P 354 (duty of chauffeur under last clear chance doctrine).

Virginia. Keen v. Monroe, 75 Va 424.

West Virginia. Stewart v. Blackwood Elec. Steel Corp., 100 WVa 331, 130 SE 447; State v. Wamsley, 109 WVa 570, 156 SE 75.

[2] Thayer, "Law and Fact in Jury Trials," 4 Harv. L. Rev. 141 (1890-91); Fox, "Law and Fact," 12 Harv. L. Rev. 545 (1898-99).

[3] Dimick v. Schiedt, 293 US 474, 79 LEd 603, 55 SupCt 296, 95 ALR 1150, affg. 70 F2d 558.

[4] **Federal.** Bethlehem Shipbuilding Corp., Ltd. v. West & Dodge Co., 10 F2d 289.

Alabama. American Ry. Exp. Co. v. Henderson, 214 Ala 268, 107 S 746.

Florida. Rivers v. Gainesville, 115 Fla 602, 155 S 844.

speculate with the rights of parties by submitting matters to the jury where no question of fact is involved.[5] The jury is as independent of the court in determining the facts as the court is independent of the jury in determining and declaring the law.[6] The mere circumstances that the solution of certain facts in a case may require a decision based upon scientific knowledge and expert opinions does not convert the fact questions into matters of law or take from the jury the duty of determining such facts.[7] The trial judge is not justified in taking from the jury the decision of a controverted fact in the case, even though the judge may feel that the evidence upon one side of a fact issue is so overwhelming that a verdict opposed to it ought not to be permitted to stand.[8] In determining whether a jury question results from the testimony, the court is to consider the possibilities and not the probabilities in connection with problems of credibility.[9] Contradictions and inconsistencies in the evidence are for the jury to untangle.[10]

An exception to the foregoing rule as to the invasion of the province of the jury by the court, which may be more apparent than real, occurs where the court directs a verdict for want of evidence, or decides some of the operative facts. For example, the questions of negligence[11] and approximate cause[12] are frequently decided by the court "as a matter of law," where the conceded facts are such that reasonable minds could come to but one conclusion. The question in such a case is really one

Georgia. Central of Georgia R. Co. v. Radford, 34 GaApp 484, 130 SE 363.

Illinois. Shannon v. Nightingale, 321 Ill 168, 151 NE 573.

Maine. Hayden v. Maine Cent. R. Co., 118 Me 442, 108 A 681.

North Carolina. Rich v. Andrews Mfg. Co., 190 NC 877, 130 SE 610 (where the character of the charge to the jury was indicated by statute).

Oklahoma. Tapedo v. State, 34 Okl Cr 165, 245 P 897; Plemons v. State, 53 OklCr 263, 10 P2d 285.

Pennsylvania. Kindell v. Franklin Sugar Ref. Co., 286 Pa 359, 133 A 566.

Texas. Michaelson v. Green (Tex CivApp), 85 SW2d 1116.

[5] J. C. Penney Co., Inc. v. Robison, 128 OhSt 626, 193 NE 401.

[6] State v. Harmon, 317 Mo 354, 296 SW 397.

[7] Travelers Indem. Co. v. Parkersburg Iron & Steel Co., 70 F2d 63.

[8] Great Barrington Sav. Bank v. Day, 288 Mass 181, 192 NE 533.

[9] Hardin v. Illinois Cent. R. Co., 334 Mo 1169, 70 SW2d 1075.

[10] Lazor v. Banas, 114 PaSuper 425, 174 A 817.

[11] Patton v. Pennsylvania R. Co., 136 OhSt 159, 24 NE2d 597; Mahoning Sav. & Trust Co. v. Kellner, 131 OhSt 69, 1 NE2d 616; Porter v. Toledo Terminal R. Co., 152 OhSt 463, 90 NE2d 142; Johnson v. Citizens Nat. Bank, 152 OhSt 477, 90 NE2d 145.

[12] Smiley v. Arrow Spring Bed Co., 138 OhSt 81, 33 NE2d 3, 133 ALR 960; Orose v. Hodge Drive-It-Yourself Co., Inc., 132 OhSt 607, 9 NE2d 671; Drakulich v. Industrial Comm., 137 OhSt 82, 27 NE2d 932.

of law, for it amounts to a determination that no question of fact has been presented for the jury to consider.[13] Yet it may be argued with more plausibility that when a judge directs a verdict, he is finding that the facts necessary to the losing party's case do not exist. Where the untruth or inherent improbability of the plaintiff's testimony is so apparent from the physical facts disclosed in a case that no reasonable person could accept it as true or possible, then the decision becomes one of law for the court.[14] This apparent exception occurs only where there is an entire lack of evidence, and not where there is some evidence which is contradicted and the determination of the question depends on the credibility of the witnesses. In this situation the question is solely for the jury.[15]

Another apparent exception to the main rule occurs in those cases where the question to be submitted or decided is so close to the border line between law and fact that it might with pro-

[13] **United States.** Parks v. Ross, 11 How. (54 US) 362, 13 LEd 730.

Federal. N. Jacobi Hdw. Co., Inc. v. Vietor, 11 F2d 30; Berlin v. United States, 14 F2d 497; Cummings v. United States, 15 F2d 168.

Alabama. In a criminal case it is for the court to say whether there is any evidence of guilt. Barnett v. State, 21 AlaApp 646, 111 S 318.

Iowa. Dubuque Fruit Co. v. C. C. Emerson & Co., 201 Ia 129, 206 NW 672.

Kentucky. Insurance Co. of North America v. Gore, 215 Ky 487, 284 SW 1107; Commonwealth v. Russell, 237 Ky 101, 34 SW2d 955 (holding that the power of the court to direct a verdict is the same in criminal as in civil cases).

Montana. Morton v. Mooney, 97 Mont 1, 33 P2d 262.

New Mexico. Lane v. Mayer, 33 NM 28, 262 P 182.

New York. Gabler v. Isaac Goldman Co., 215 AppDiv 333, 213 NYS 342 (holding that the court has no power to direct a verdict after the jury has passed upon the case); Weston v. State, 236 AppDiv 873, 260 NYS 914, reh. den. in 263 NYS 122.

Ohio. Pancero v. Pancero, 21 Oh App 427, 152 NE 146.

[14] Oliver v. Union Transfer Co., 17 TennApp 694, 71 SW2d 478.

[15] **United States.** Orleans v. Platt, 99 US 676, 25 LEd 404; Moulor v. American Life Ins. Co., 101 US 708, 25 LEd 1077.

Federal. Ng Sing v. United States, 8 F2d 919; Great Atlantic & Pacific Tea Co. v. Chapman, 72 F2d 112.

But in Benash v. Business Mens Assur. Co., 25 F2d 423, it was held that if the evidence, though conflicting, is so conclusive in favor of one party that the court ought to set aside a verdict if rendered for the other, the court should direct the verdict.

Alabama. Gosa v. State, 21 Ala App 269, 108 S 75, cert. den. in 214 Ala 391, 108 S 76.

California. In re Finkler's Estate, 3 Cal2d 584, 46 P2d 149.

Colorado. Freeman v. Boyer Bros., 82 Colo 509, 261 P 864, 55 ALR 1285.

Florida. Atlantic Coast Line R. Co. v. Roe, 91 Fla 762, 109 S 205; W. B. Harbeson Lbr. Co. v. Cosson, 116 Fla 495, 156 S 482.

Kentucky. Sipes v. Commonwealth, 213 Ky 701, 281 SW 806; Stanley's Admr. v. Duvin Coal Co., 237 Ky 813, 36 SW2d 630.

Massachusetts. Bacon v. Boston Elev. R. Co., 256 Mass 30, 152 NE 35, 47 ALR 1100.

Michigan. Lau v. Fletcher, 104 Mich 295, 62 NW 357; Dirkes v. Lenzen, 239 Mich 270, 214 NW 84.

priety be determined by either court or jury. In such cases it is not error for the court to submit the question to the jury.[16] It is a question for the court whether there is in the case sufficient evidence on which to base a verdict, and for the jury as to what fact finding the evidence leads.[17] The conflict of evidentiary facts requiring sending the case to the jury may exist though all of the witnesses testifying be called by one party.[18]

Ordinarily mixed questions of law and fact are to be decided by the jury under proper instructions from the court.[19] Negligence and contributory negligence are generally mixed questions of law and fact.[20]

Negligence *per se* is generally for the court, but proximate cause is generally for the jury.[21] However, as to negligence *per se*, the question of fact as to whether there has been a violation of a specific requirement of law is for the jury in the first instance.[22]

The allowance of exemplary damages is entirely within the discretion of the jury and an instruction that a party is "entitled" to such damages invades the province of the jury.[23] In an action on an oral contract where the evidence is in conflict, the court should not submit to the jury the question as to the meaning of the contract, for it is the court's duty to determine

Missouri. Parrent v. Mobile & O. R. Co., 334 Mo 1202, 70 SW2d 1068.

Montana. Conrad Mercantile Co. v. Siler, 75 Mont 36, 241 P 617.

New Jersey. State v. Benton (NJ), 133 A 73, affd. in 103 NJL 714, 137 A 919; Klucznik v. Shaikofsky, 6 NJMisc 652, 142 A 420.

Ohio. Taylor v. Schlichter, 118 OhSt 131, 160 NE 610; State v. Axe, 118 OhSt 514, 161 NE 536.

Pennsylvania. McKnight v. Bell, 168 Pa 50, 31 A 942; Jackson v. Wafer, 87 PaSuper 83; Foster v. Wehr, 114 PaSuper 101, 173 A 712.

Texas. Stevens v. Karr, 119 Tex 479, 33 SW2d 725; Haywood v. State, 102 TexCr 296, 277 SW 685.

Washington. Coles v. McNamara, 136 Wash 624, 241 P 1.

[16] Illustrative of such a case, a seller of machinery furnished to the buyer a mechanic to install the machinery, the agreement being partly written and partly oral. A person was injured by a fall of the machinery, and in a damage action that ensued there was an issue as to whether the mechanic was the servant of the seller or of the buyer under the contract. It was held not error for the court to submit this question to the decision of the jury. Dougherty v. Proctor & Schwartz, 317 Pa 363, 176 A 439.

[17] Pugh v. Ladner, 8 FSupp 950.

[18] Ray v. Hutchison, 17 TennApp 477, 68 SW2d 948.

[19] Kroll v. Close, 82 OhSt 190, 92 NE 29, 28 LRA (N. S.) 571.

[20] Cleveland, C. & C. R. R. Co. v. Crawford, 24 OhSt 631; 15 AmRep 633.

[21] Smith v. Zone Cabs, 135 OhSt 415, 21 NE2d 336.

[22] Swoboda v. Brown, 129 OhSt 512, 196 NE 274.

[23] **Alabama.** Birmingham Elec. Co. v. Shephard, 215 Ala 316, 110 S 604.

Missouri. Lewellen v. Haynie (Mo), 287 SW 634.

Wisconsin. Marlatt v. Western Union Tel. Co., 167 Wis 176, 167 NW 263.

the legal effect of the contract.[24] It is error for the court to leave to the jury the determination of what are the material allegations of the plaintiff's petition by instructing that plaintiff must establish the material allegations.[25]

In some jurisdictions the jury are made judges of both the law and the facts.[26] In such a jurisdiction it is not strictly proper to charge that they should impartially judge law as it is found in the statutes, for it is plain that the law is not all found in the statutes.[27]

§ 11. Function of court to outline issues and state theories and contentions of parties.

Under the general rule, it is the exclusive function of the court to outline the issues made by the pleadings, and it is the duty of the jury to accept the court's interpretation of these issues.

In submitting a case to the jury, it is the duty of the court to separate and definitely state to the jury the issues of fact made in the pleadings; on the other hand, the jury must accept the court's interpretation of these issues.[28]

Under this principle it is the duty of the court to point out and state the contentions of the parties;[29] to state the legal

[24] Machen v. Budd Wheel Co., 294 Pa 69, 143 A 482.

[25] Morris v. Davis (TexCivApp), 3 SW2d 109.

[26] **Georgia.** Hill v. State, 148 Ga 521, 97 SE 442; Danzley v. State, 25 GaApp 170, 102 SE 915.

Illinois. People v. Moretti, 330 Ill 422, 161 NE 766. But in People v. Bruner, 343 Ill 146, 175 NE 400 (1931) the statute providing that juries shall be judges of the law and facts was held unconstitutional.

Indiana. Cole v. State, 192 Ind 29, 134 NE 867; Kellar v. State, 192 Ind 38, 134 NE 881.

Maryland. Delcher v. State, 161 Md 475, 158 A 37.

The judge in this state cannot bind the jury by his definition of the crime with which a defendant is charged nor as to the legal effect of evidence submitted. State v. Coblentz (Md), 180 A 266.

See also § 3, *supra*.

[27] Bowen v. State, 189 Ind 644, 128 NE 926.

[28] **Alabama.** Montgomery Light & Water Power Co. v. Thombs, 204 Ala 678, 87 S 205.

California. Edson v. Mancebo, 37 CalApp 22, 173 P 484.

Texas. Arguments on the law applicable to a criminal case are addressed to the sound discretion of the court and not to the jury. Leonard v. State, 56 TexCr 84, 119 SW 98.

[29] **Federal.** Hersh v. United States, 68 F2d 799.

California. Ritchey v. Watson, 204 Cal 387, 268 P 345.

Idaho. Packard v. O'Neil, 45 Id 427, 262 P 881, 56 ALR 317.

Iowa. Monoghan v. Bowers, 185 Ia 708, 171 NW 38; Conner v. Henry, 201 Ia 253, 207 NW 119 (holding that where there is but one issue in the case a party has the right to an instruction particularly directing the jury's attention to that issue).

Kentucky. American Ry. Exp. Co. v. McGee, 223 Ky 681, 4 SW2d 679.

Massachusetts. Hadlock v. Brooks, 178 Mass 425, 59 NE 1009.

effect of any circumstances offered;[30] to define the claim of one party, without expressing an opinion as to its soundness or validity;[31] to instruct on all the issues made by the testimony, whether raised by the testimony of the plaintiff or the defendant;[32] to inform the jury as to a party's theory of the case and show wherein his evidence has a tendency to substantiate such theory,[33] and under proper circumstances to state the converse

Nebraska. Johnson v. Nathan, 161 Neb 399, 73 NW2d 398.

Ohio. Parmlee v. Adolph, 28 Oh St 10; Telinde v. Ohio Trac. Co., 109 OhSt 125, 141 NE 673; Baltimore & O. R. Co. v. Lockwood, 72 OhSt 586, 74 NE 1071; Jones v. Peoples Bank Co., 95 OhSt 253, 116 NE 34; Simko v. Miller, 133 OhSt 345, 13 NE2d 914.

Oklahoma. Schaff v. Richardson, 120 Okl 70, 254 P 496; Tibbets & Pleasant v. Benedict, 128 Okl 106, 261 P 551.

Pennsylvania. Snyderwine v. McGrath, 343 Pa 245, 22 A2d 644.

South Carolina. Bryce v. Cayce, 62 SC 546, 40 SE 948.

Wisconsin. McCann v. Ullman, 109 Wis 574, 85 NW 493.

[30] Stem v. Crawford, 133 Md 579, 105 A 780.

[31] **Delaware.** Richards v. Richman, 5 Penn. (Del) 558, 64 A 238.

Kentucky. Louisville R. Co. v. Jackey, 237 Ky 125, 35 SW2d 28.

Missouri. Houchin v. Hobbs (Mo App), 34 SW2d 167.

New Mexico. Salazar v. Garde, 35 NM 353, 298 SW2d 661.

Ohio. Whitaker v. Michigan Mut. Life Ins. Co., 77 OhSt 518, 83 NE 899.

Oklahoma. Pate v. Smith, 128 Okl 29, 261 P 189.

Pennsylvania. Thus, the court may explain to the jury the contentions of the prosecution in a murder case, as long as he refrains from giving an indication of his own views. Commonwealth v. Prescott, 284 Pa 255, 131 A 184.

Texas. Jones v. State, 86 TexCr 371, 216 SW 884.

West Virginia. Morris v. Parris, 110 WVa 102, 157 SE 40.

[32] **Alabama.** Glover v. State, 21 AlaApp 423, 109 S 125.

California. Murero v. Reinhart Lbr. Co., 85 CalApp 385, 259 P 494; Graham v. Consolidated Motor Transp. Co., 112 CalApp 648, 297 P 617.

Kentucky. Chesapeake & O. R. Co. v. Hay, 248 Ky 69, 58 SW2d 228.

Nebraska. Frazier v. Brown, 124 Neb 746, 248 NW 69.

New York. People v. Viscio, 241 AppDiv 499, 272 NYS 213.

North Carolina. State v. Graham, 194 NC 459, 140 SE 26.

Ohio. Morgan v. State, 48 OhSt 371, 27 NE 710; Fugman v. Trostler, 24 OhCirCt (N. S.) 521, 34 OhCirDec 746.

Oklahoma. Nonnamaker v. Kay County Gas Co., 123 Okl 274, 253 P 296.

Oregon. Stotts v. Wagner, 135 Or 243, 295 P 497.

Texas. Medford v. State, 86 Tex Cr 237, 216 SW 175; Chicago, R. I. & G. Ry. Co. v. Pipes (TexCivApp), 33 SW2d 818; Texas & Pacific Ry. Co. v. Hancock (TexCivApp), 59 SW2d 313.

It is the court's duty to explain the contentions of the prosecution arising from the evidence in a criminal case, as well as the theories of the defendant. Jaggers v. State, 104 TexCr 174, 283 SW 527.

Virginia. Thomas v. Snow, 162 Va 654, 174 SE 837; Campbell v. Commonwealth, 162 Va 818, 174 SE 856.

Washington. Alexiou v. Nockas, 171 Wash 369, 17 P2d 911.

[33] **Kentucky.** Equitable Life Assur. Soc. of United States v. Green, 259 Ky 773, 83 SW2d 478.

Michigan. Rogers v. Ferris, 107 Mich 126, 64 NW 1048.

of the theory expounded;[34] to instruct seriatim on each of several issues of fact;[35] and even to instruct that there is only one issue before the jury where, although defendant's pleas raise several issues, he admits upon the trial all of plaintiff's contentions except one.[36] It is error to read the pleadings to the jury and then say to the jury, and not otherwise to define the specific issues, that these constitute the pleadings in the case, which make up the issue and from which they will try and determine the controversy between the parties.[37]

The court cannot properly charge at length upon the theory of the case in behalf of one of the parties and ignore the theory of the other. There should be no one-sided charge.[38]

In a criminal case, the instructions are not sufficient unless they present the case in such manner that the guilt or innocence of the defendant will be determined by the jury from the transaction in question. So, if the court has charged the jury to convict the accused if they find the stated essentials of the crime charged, the converse charge should be given and a direction to acquit if they fail to find such essentials established.[39] Where the court has properly stated to the jury the material allegations of the indictment which the prosecution is required to establish beyond a reasonable doubt, it is not error to instruct that a conviction should follow if all the material allegations of the indictment have been proved beyond a reasonable

Missouri. Fenton v. Hart (Mo App), 73 SW2d 1034.

Nebraska. Goldman v. State, 128 Neb 684, 260 NW 373.

New Mexico. Southern Pacific Co. v. Stephens, 36 NM 10, 6 P2d 934.

Ohio. Ross v. Hocking Valley R. Co., 40 OhApp 447, 178 NE 852.

Oklahoma. Atchison, T. & S. F. R. Co. v. Ridley, 119 Okl 138, 249 P 289; Kirschner v. Kirschner, 169 Okl 129, 36 P2d 297.

Texas. Hoover v. Smallwood (Tex CivApp), 45 SW2d 702; Green v. Texas & Pacific Ry. Co. (TexCom App), 81 SW2d 669, revg. (TexCiv App), 50 SW2d 353.

[34] Edwards v. State, 125 TexCr 427, 68 SW2d 1049.

[35] **Alabama.** Morris v. Corona Coal Co., 215 Ala 47, 109 S 278.

Missouri. Coleman v. Drane, 116 Mo 387, 22 SW 801.

Texas. Hulen v. Ives (TexCiv App), 281 SW 350.

[36] De Graffenreid v. Menard, 103 Ga 651, 30 SE 560.

[37] Baltimore & O. R. Co. v. Lockwood, 72 OhSt 586, 74 NE 1071; Jones v. Peoples Bank Co., 95 OhSt 253, 116 NE 34; Simko v. Miller, 133 OhSt 345, 13 NE2d 914.

[38] **Federal.** United States v. Messinger, 68 F2d 234.

California. Hellman v. Los Angeles R. Corp., 135 CalApp 627, 27 P2d 946, 28 P2d 384.

Delaware. Island Express v. Frederick, 5 W. W. Harr, (35 Del) 569, 171 A 181.

Idaho. Nash v. Meyer, 54 Idaho 283, 31 P2d 273.

[39] **Federal.** Little v. United States, 73 F2d 861.

Missouri. State v. Gillum, 336 Mo 69, 77 SW2d 110; State v. Buckner (Mo), 80 SW2d 167.

Ohio. Daugherty v. State, 41 Oh App 239, 180 NE 656.

doubt.[40] Where a positive instruction for the prosecution has been given, it is then proper that the converse of the proposition be given for the defendant.[41] In a criminal case, it is proper to instruct that the case should be decided upon the law and the evidence without regard to the personal ideas of the jurors as to what the law ought to be.[42] In a prosecution for murder, if the court explains to the jury the law applicable to principals in the commission of the offense, failure to charge the converse is reversible error.[43] Unless it is necessary in order to present the theory of either the prosecution or the defense, the court need not give an instruction for which there is no support in the evidence.[44]

But it is to be remembered that a party, either in a criminal or civil case, may not demand an instruction on a matter which he may deem important unless it is legally essential for him. A matter may be important in the judgment of the party without being legally essential.[45]

§ 12. Function of court to determine legal principles applicable to case.

It is the exclusive function of the court to determine and declare the general principles of law applicable to a case on trial and not to submit questions of law to the jury.

Since it is the court's function to determine questions of law, it is the positive duty of the court to refrain from submitting questions of law to the jury.[46] The rule does not apply, of

[40] McCaughey v. State, 156 Ind 41, 59 NE 169.

[41] State v. Hill, 329 Mo 223, 44 SW2d 103.

[42] People v. Stone, 154 IllApp 7; State v. Taylor, 57 WVa 228, 50 SE 247.

[43] Cammack v. State, 102 TexCr 579, 278 SW 1105.

[44] Dalrymple v. Commonwealth, 215 Ky 25, 284 SW 104.

[45] Haefeli v. Woodrich Engineering Co., 255 NY 442, 175 NE 123; State v. Samaha, 93 NJL 482, 108 A 254.

[46] **Federal.** Dunagan v. Appalachian Power Co., 23 F2d 395.

Alabama. Dominick v. Randolph, 124 Ala 557, 27 S 481; Jeffries v. Pitts, 200 Ala 201, 75 S 959; United States Fidelity & Guaranty Co. v. Millonas, 206 Ala 147, 89 S 732, 29 ALR 520; Metropolitan Life Ins. Co. v. Chambers, 226 Ala 192, 146 S 524; Greenwood Cafe v. Walsh, 15 Ala App 519, 74 S 82.

Arkansas. The court may in its instructions limit the jury to a consideration of the only ground of negligence alleged in a damage action as long as the jury are left free to determine the question of fact whether the allegation is sustained by the evidence. St. Louis-San Francisco R. Co. v. Pearson, 170 Ark 842, 281 SW 910.

California. Tompkins v. Montgomery, 123 Cal 219, 55 P 997; W. F. Boardman Co. v. Petch, 186 Cal 476, 199 P 1047; Parker v. James E. Granger, Inc. (CalApp), 39 P2d 833.

Thus, in an action for personal injuries sustained by being thrown from defendant's vehicle, an instruction was properly refused which told the jury that if they found that a

course, in those states where in either civil or criminal cases, or in both, the jury is made the judge of both law and facts.[47]

certain companion of the plaintiff, "by reason of having hired the team, wagon and driver from the defendant, had become, as it were, the owner or proprietor of said team, wagon and driver for that day," then the defendant was not responsible. The effect of the instruction would have been to submit to the jury a proposition of law rather than of fact. Tompkins v. Montgomery, 123 Cal 219, 55 P 997.

Colorado. Small v. Clark, 83 Colo 211, 263 P 933.

District of Columbia. Reid v. Anderson, 13 AppDC 30.

Georgia. Telfair County v. Webb, 119 Ga 916, 47 SE 218.

Illinois. Harmison v. Fleming, 105 IllApp 43; Bradley v. Schrayer, 204 IllApp 231; Pedroni v. Illinois Third Vein Coal Co., 205 IllApp 119 (matter of law whether under the evidence there was a violation of a statute).

It is not permissible for the court to state to the jury the conditions under which a purported confession of the accused in a criminal case is inadmissible. People v. Costello, 320 Ill 79, 150 NE 712.

Indiana. Jackson v. Rutledge, 188 Ind 415, 122 NE 579 (matter of law whether rules of employer were in force and effect); Trainer v. State, 198 Ind 502, 154 NE 273.

Iowa. Hanley v. Fidelity & Casualty Co., 180 Ia 805, 161 NW 114; Spitler v. Perry Town Lot & Imp. Co., 189 Ia 709, 179 NW 69; In re Dolmage's Estate, 204 Ia 231, 213 NW 380.

A defendant in a criminal case has no right to have his theories in the case submitted to a jury where they are based wholly on contentions of law. State v. Brundage, 200 Ia 1394, 206 NW 607.

Kansas. Shrader v. McDaniel, 106 Kan 755, 189 P 954.

Kentucky. Sanders v. Commonwealth, 176 Ky 228, 195 SW 796; Louisville Bridge Co. v. Iring, 180 Ky 729, 203 SW 531; Black v. Davenport, 189 Ky 40, 224 SW 500; Penn Furn. Co. v. Ratliff, 194 Ky 162, 238 SW 393; Perry's Admx. v. Inter-Southern Life Ins. Co., 254 Ky 196, 71 SW2d 431; Smith v. Cornett, 18 KyL 818, 38 SW 689.

Maryland. Roth v. Shupp, 94 Md 55, 50 A 430; Murrell v. Culver, 141 Md 349, 118 A 803; Bowie v. Evening News Co., 151 Md 285, 134 A 214.

Massachusetts. Goodrich v. Davis, 11 Metc. (52 Mass) 473; Horan v. Boston Elevated R. Co., 237 Mass 245, 129 NE 355.

Michigan. Anderson v. Thunder Bay River Boom Co., 57 Mich 216, 23 NW 776.

Missouri. Hoagland Wagon Co. v. London Guarantee & Acc. Co., 201 MoApp 490, 212 SW 393; Niehaus v. Gillanders (MoApp), 184 SW 949; Bollmeyer v. Eagle Mill & Elev. Co. (MoApp), 206 SW 917; Stewart v. Chicago, B. & Q. R. Co. (MoApp), 222 SW 1029; Marden v. Radford (MoApp), 84 SW2d 947 (holding that question of law had not been submitted to the jury).

Montana. Gallick v. Bordeaux, 31 Mont 328, 78 P 583.

New Jersey. State v. Lupton, 102 NJL 530, 133 A 861.

New York. Ierardi v. Reisberg & Reiner, Inc. (AppDiv), 279 NYS 963.

Ohio. Montgomery v. State, 11 Oh 424; State v. Cowles, 5 OhSt 87; Miami Conservancy Dist. v. Ryan, 104 OhSt 79, 135 NE 282.

Oklahoma. Missouri, O. & G. R. Co. v. Davis, 54 Okl 672, 154 P 503.

Texas. Houston & T. C. R. Co. v. Hubbard (TexCivApp) 37 SW 25; Missouri, I. & T. Ry. Co. of Texas v. Norris (TexCivApp), 184 SW 261; Varnes v. Dean (TexCivApp), 228 SW 1017.

Virginia. Keen v. Monroe, 75 Va 424.

West Virginia. Lawrence's Admr. v. Hyde, 77 WVa 639, 88 SE 45.

[47] See Witt v. State, 205 Ind 499, 185 NE 645 and § 3, *supra*.

Thus in an action to recover damages for false imprisonment, a requested instruction submitting to the jury the question whether "plaintiff was illegally imprisoned" was rightly refused, as requiring the jury to determine a matter of law.[48] So, in a civil action for assault and battery, a question of law was submitted to the jury by an instruction that the burden was on defendant to prove justification, where the instruction also left it for the jury to determine what facts would satisfy the law and constitute a good defense.[49] It is error to submit to the jury the question whether a passenger in an automobile involved in a collision was a guest under the state vehicle act.[50] In a criminal case, it is a question of law as to what is prima facie evidence of guilt, and this question should not be submitted to the jury.[51]

The court should make plain to the jury the issues they are to try, and an instruction which refers the jury to the pleadings is faulty.[52]

Generally, there can be no valid objection to an instruction which merely empowers the jury to determine whether the proof adduced sustains the issue made by the pleadings but does not leave the jury to determine the materiality or the legal effect of any averments in the declaration.[53] So, while a charge, standing alone, which tells the jury they may determine whether plaintiff "has a right to recover in this action" may be open to

[48] Roth v. Shupp, 94 Md 55, 50 A 430.

[49] Barnhill v. Poteet (MoApp), 211 SW 106.

[50] Rocha v. Hulen (CalApp), 44 P2d 478.

[51] State v. Donovan, 77 Utah 343, 294 P 1108.

[52] **Georgia.** See Georgia Power Co. v. Whitlock, 48 GaApp 809, 174 SE 162.

Illinois. Randall Dairy Co. v. Pevely Dairy Co., 274 IllApp 474.

Iowa. Erb v. German-American Ins. Co. of New York, 112 Ia 357, 83 NW 1053.

Mississippi. Gurley v. Tucker, 170 Miss 565, 155 S 189.

Missouri. Markowitz v. Markowitz (MoApp), 290 SW 119; Priestly v. Laederich (MoApp), 2 SW2d 631; Bullmore v. Beeler (MoApp), 33 SW2d 161. But see Elstroth v. Karrenbrock (MoApp), 285 SW 525.

In a personal injury action, it is error to refer the jury to the plaintiff's petition for a specification of the alleged acts of negligence upon which the action is based. Elders v. Missouri Pacific R. Co. (MoApp), 280 SW 1048.

It has been held that it is not error to refer the jury to the pleadings unless for the purpose of directing their attention to the facts. Mackey v. First Nat. Bank (Mo App), 293 SW 66.

Oklahoma. Particularly is it reversible error to refer the jury to the pleadings for ascertaining the issues, where the pleadings are voluminous and complicated. Lambard-Hart Loan Co. v. Smiley, 115 Okl 202, 242 P 212.

Texas. Hewitt v. Buchanan (Tex CivApp), 4 SW2d 169; Standard Acc. Ins. Co. v. Cherry (TexCivApp), 36 SW2d 807.

[53] Central Ry. Co. v. Bannister, 195 Ill 48, 62 NE 864; Sitts v. Daniel (MoApp), 284 SW 857.

criticism, it cannot be prejudicial where a different part of the charge instructs the jury that "the court is the exclusive judge of the law governing the case and you are the exclusive judges of the facts from the testimony in the case and of the credibility of the witnesses."[54] The judge may state the reasons for legal rules, provided he leaves the determination of issues of fact to the jury.[55] The court did not encroach upon the functions of the jury to determine the facts by stating that home brew containing in excess of a stated percentage of alcohol would be deemed intoxicating.[56]

§ 13. Function of court to interpret papers and documents.

Generally, it is the exclusive function of the court to interpret and declare the meaning of papers and documents. The interpretation of these papers and documents may not be submitted to the jury.

Interpretation, properly used, is the determination of the meaning of language by examining the words used and relevant surrounding circumstances. On the other hand, construction determines the legal effect of the language as interpreted. The courts do not always observe the distinction in their usage of the words. The legal effect of words, a question of law, is clearly for the judge to determine. The meaning of language, interpretation, would seem to be a question of fact, since the meaning finally decided upon was in fact given by one of the parties involved. If this is so, whose function interpretation is, should be settled as any other question of fact. That is, if the evidence leads reasonable minds to but one conclusion, then the issue is taken away from the jury. Although the courts may not always be articulated in their reasoning on this problem, perhaps the cases can be reconciled on this basis.

Many cases broadly state that it is the exclusive function of the court to construe and declare the meaning of papers and documents.[57] Included as papers and documents are letters,[58] tele-

[54] Gillett v. Corum, 7 Kan 156.

[55] Flick v. Ellis-Hall Co., 138 Minn 364, 165 NW 135.

[56] Topeka v. Heberling, 134 Kan 330, 5 P2d 816.

[57] **Federal.** Burrows & Kenyon, Inc. v. Warren, 9 F2d 1; Union State Bank & Trust Co. v. Northwestern Life Ins. Co., 55 F2d 1070.

Whether instrument complies with statute is question of law for the court. Missouri, K. & T. Ry. Co. v. United States, 178 F 15.

Arkansas. Pope County Real Estate Co. v. Clifton, 148 Ark 655, 232 SW 579.

Connecticut. Wladyka v. Waterbury, 98 Conn 305, 119 A 149; In re Spurr's Appeal, 116 Conn 108, 163 A 608.

Delaware. Schilansky v. Merchants & Mfrs. Fire Ins. Co., 4 Penn. (Del) 293, 55 A 1014.

District of Columbia. O'Brien v. Pabst Brew. Co., 31 AppDC 56.

grams,[59] contracts,[60] corporate charters,[61] leases, [62] mortgages,[63] deeds of trust,[64] deeds,[65] tax titles,[66] wills,[67] plead-

Georgia. McCullough Bros. v. Armstrong, 118 Ga 424, 45 SE 379.

Illinois. Warner Constr. Co. v. Lincoln Park Comrs., 278 IllApp 42.

Indiana. Zaharek v. Gorczyca, 87 IndApp 309, 159 NE 691, 161 NE 683.

Maine. Libby v. Deake, 97 Me 377, 54 A 856.

Maryland. Bond v. Humbird, 118 Md 650, 85 A 943.

Massachusetts. Jacobson v. Jacobson, 334 Mass 658, 138 NE2d 206.

Ohio. Blackburn v. Blackburn, 8 Oh 81; Townsend v. Lorain Bank, 2 OhSt 345; Potts v. Park Inv. Co., 27 OhApp 235, 161 NE 40.

Oregon. Abramson v. Brett, 143 Or 14, 21 P2d 229.

South Carolina. Thompson v. Family Protective Union, 66 SC 459, 45 SE 19; Bedenbaugh v. Southern R. Co., 69 SC 1, 48 SE 53; Miller v. Atlantic Coast Line R. Co., 94 SC 388, 77 SE 1111.

Texas. Blair v. Baird, 43 TexCiv App 134, 94 SW 116; Marsh v. Phillips (TexCivApp), 144 SW 1160; Sherman Slaughtering & Rendering Co. v. Texas Nursery Co. (TexCiv App), 224 SW 478; Moore v. Wooten (TexComApp), 280 SW 742, revg. (TexCivApp), 265 SW 210.

Vermont. State v. White, 70 Vt 225, 39 A 1085 (abbreviations contained in documents); Mellen v. United States Health & Acc. Ins. Co., 85 Vt 305, 82 A 4.

Virginia. Norwich Lock Mfg. Co. v. Hockaday, 89 Va 557, 16 SE 877; Baker Matthews Lbr. Co. v. Lincoln Furn. Mfg. Co., 148 Va 413, 139 SE 254; Buchanan v. Norfolk Southern R. Co., 150 Va 17, 142 SE 405.

Washington. State v. Comer, 176 Wash 257, 28 P2d 1027.

[58] Barcus v. Wayne Automobile Co., 162 Mich 177, 127 NW 23; Anderson v. Frischkorn Real Estate Co., 253 Mich 668, 235 NW 894; Thompson v. Family Protective Union, 68 SC 459, 45 SE 19.

[59] D. L. Fair Lbr. Co. v. Dewey, 241 Mich 573, 217 NW 776.

[60] **United States.** Goddard v. Foster, 17 Wall. (84 US) 123, 21 LEd 589; Hamilton v. Liverpool, London & Globe Ins. Co., 136 US 242, 34 LEd 419, 10 SupCt 945; Hughes v. Dundee Mtg. Co., 140 US 98, 106, 35 LEd 354, 11 SupCt 727.

Arizona. Timmons v. McKinzie, 21 Ariz 433, 189 P 627.

California. O'Connor v. West Sacramento Co., 189 Cal 7, 207 P 527; Weil v. California Bank, 219 Cal 538, 27 P2d 904.

Connecticut. Brown Bag Filling Mach. Co. v. United Smelting & Aluminum Co., 93 Conn 670, 107 A 619.

Georgia. McCullough Bros. v. Armstrong, 118 Ga 424, 45 SE 379.

Kentucky. E. F. Spears & Sons v. Winkle, 186 Ky 585, 217 SW 691 (what constitutes breach of contract is a question of law); Elkhorn & B. V. R. Co. v. Dingus, 187 Ky 812, 220 SW 1047.

Maine. Libby v. Deake, 97 Me 377, 54 A 856.

Michigan. Keystone Coal & Coke Co. v. Forrest, 213 Mich 76, 181 NW 30.

Missouri. Black River Lbr. Co. v. Warner, 93 Mo 374, 6 SW 210; Weston ex rel. Maley & Kelly Contracting Co. v. Chastain (MoApp), 234 SW 350.

Ohio. Farmers Ins. Co. v. Ross & Lennan, 29 OhSt 429.

Oregon. Wade v. Johnson, 111 Or 468, 227 P 466.

Texas. Blair v. Baird, 43 TexCiv App 134, 94 SW 116.

[61] Norwich Lock Mfg. Co. v. Hockaday, 89 Va 557, 16 SE 877.

[62] **Indiana.** Miller v. Citizens Bldg. & Loan Assn., 50 IndApp 132, 98 NE 70.

Pennsylvania. Dumn v. Rothermel, 112 Pa 272, 3 A 800.

Texas. Midkiff v. Benson (TexCiv App), 235 SW 292; Booth v. Campbell (TexCivApp), 240 SW 559.

[63] **United States.** United States v. Hodge, 6 How. (47 US) 279, 12 LEd 437.

ings,[68] judgments,[69] ordinances,[70] life insurance policies,[71] and domestic statutes.[72]

The question of the applicability of these instruments to the facts in issue is, however, a question of fact for the jury, where their applicability depends on the facts.[73] The pertinent rule has been expressed to be that it is for the court to determine whether language involved can have the effect attributed to it by a party, and finally for the jury to determine whether it in fact had that effect.[74] Again the question may be for the jury where the instrument is ambiguous and the meaning sought is

New York. St. John v. Bumpstead, 17 Barb. (NY) 100.

Texas. J. M. Radford Groc. Co. v. Jamison (TexCivApp), 221 SW 998 (chattel mortgage).

The court must determine as a matter of law the sufficiency of the description of property in a chattel mortgage. Chapman v. Head (Tex CivApp), 279 SW 906.

[64] City Bank Farmers Trust Co. v. Ernst, 263 NY 342, 189 NE 241; Gibson v. Morris (TexCivApp), 47 SW2d 648.

[65] **United States.** Brown v. Huger, 21 How. (62 US) 305, 16 LEd 125.

Alabama. Humes v. Bernstein, 72 Ala 546.

Massachusetts. Eddy v. Chace, 140 Mass 471, 5 NE 306.

Missouri. Garrett v. Limes (Mo App), 209 SW 295.

Ohio. Cleveland Co-op. Stove Co. v. Cleveland & P. R. Co., 23 OhCir Ct (N. S.) 260, 34 OhCirDec 236.

Oregon. Johnson v. Shively, 9 Or 333.

South Carolina. Metz v. Metz, 106 SC 514, 91 SE 864.

Vermont. Hodges v. Strong, 10 Vt 247.

[66] Johnson v. Scott, 205 Mass 294, 91 NE 302.

[67] **Georgia.** Downing v. Bain, 24 Ga 372.

Mississippi. Sartor v. Sartor, 39 Miss 760; Magee v. McNeil, 41 Miss 17, 90 AmDec 354.

New York. Underhill v. Vandervoort, 56 NY 242.

North Carolina. Green v. Collins, 28 NC 139.

[68] Laughlin v. Hopkinson, 292 Ill 80, 126 NE 591; Cowell v. Employers Indem. Corp., 326 Mo 1103, 34 SW2d 705.

[69] Young v. Byrd, 124 Mo 590, 28 SW 83, 46 AmSt 461.

[70] **Federal.** Sadler v. Peoples, 105 F 712.

Georgia. Idle Hour Club v. Robinson, 42 GaApp 650, 157 SE 125.

Illinois. Geschwindner v. Comer, 222 IllApp 417.

Indiana. Indianapolis Trac. & Terminal Co. v. Howard, 190 Ind 97, 128 NE 35; Indianapolis Trac. & Terminal Co. v. Smith, 190 Ind 698, 128 NE 38.

Missouri. Hogan v. Fleming, 317 Mo 524, 297 SW 404; Williams v. St. Joseph, 166 MoApp 299, 148 SW 459.

[71] Cope v. Central States Life Ins. Co. (MoApp), 56 SW2d 602.

[72] **United States.** South Ottawa v. Perkins, 94 US 260, 24 LEd 154.

California. Parker v. James E. Granger, Inc. (CalApp), 39 P2d 833.

Kansas. Hutchings, Sealy & Co. v. Missouri, K. & T. R. Co., 84 Kan 479, 114 P 1077, 41 LRA (N. S.) 500.

New York. Winchell v. Camillus, 109 AppDiv 341, 95 NYS 688.

Tennessee. Gallatin Tpk. Co. v. State, 16 Lea (84 Tenn) 36.

Washington. Ongaro v. Twohy, 57 Wash 668, 107 P 834 (no dispute as to law of sister state).

[73] Miller v. Atlantic Coast Line R. Co., 94 SC 388, 77 SE 1111.

[74] McKnight v. United States, 78 F2d 931.

that of the parties as shown by their conduct and transactions.[75] The question may be for the jury where the effect of the instrument depends, not merely on its construction, but on collateral facts and circumstances.[76] So, where the question of handwriting on a document in evidence is in dispute, and another writing has been submitted for purposes of comparison, it is for the jury to determine whether the disputed document is genuine.[77]

The question of the existence of a foreign law is always one of fact, but not usually for the jury, and its interpretation is for the court after its existence is established by proof.[78] The law of a foreign country is not judicially recognized, but must be proved like any other fact. The proof of the law of a foreign country may be by the introduction in evidence of its statutes and decisions, or by the testimony of experts learned in the law, or by both. If the law is found in a single statute or in a single decision, the construction of it, like that of any other writing, is a question of law for the court.[79] It is said, however, that where the foreign law "is to be determined by considering numer-

[75] Cleveland, C., C. & St. L. R. Co. v. Gossett, 172 Ind 525, 87 NE 723; Dykema v. Muskegon Piston Ring Co., 348 Mich 129, 82 NW2d 467.

[76] Fuller v. Smith, 107 Me 161, 77 A 706; O-N-L Mills, Inc. v. Union Pacific R. Co., 151 Neb 692, 39 NW2d 501.

[77] Poole v. Beller, 104 WVa 547, 140 SE 534, 58 ALR 207.

[78] **Kentucky.** Collins v. Norfolk & W. R. Co., 152 Ky 755, 154 SW 37.

Massachusetts. Ely v. James, 123 Mass 36.

Nebraska. United Bank & Trust Co. v. McCullough, 115 Neb 327, 212 NW 762.

New Hampshire. Baribault v. Robertson, 82 NH 297, 133 A 21.

New Jersey. Robins v. Mack International Motor Truck Corp., 113 NJL 377, 174 A 551.

New York. Osgood Co. v. Wilkinson, 265 NY 70, 191 NE 779, revg. 239 AppDiv 676, 268 NYS 802; Schweitzer v. Hamburg-Amerikanische Packetfahrt Actien Gesellschaft, 149 AppDiv 900, 134 NYS 812.

North Carolina. Howard v. Howard, 200 NC 574, 158 SE 101.

Ohio. Whelan v. Kinsley, 26 OhSt 131; Evans v. Reynolds, 32 OhSt 163; Larwell v. Hanover Sav. Fund Soc., 40 OhSt 274; Alexander v. Pennsylvania Co., 48 OhSt 623, 30 NE 69.

The failure to submit to the jury an issue regarding the law of another state is not error when such foreign law was not pleaded. Lutton v. Mount Ida School, 44 OhApp 322, 185 NE 429, 37 OLR 579.

Wisconsin. New York Life Ins. Co. v. State, 192 Wis 404, 211 NW 288, 212 NW 801.

Vermont. Jenness v. Simpson, 84 Vt 127, 78 A 886; Rainey v. Grand Trunk R. Co., 84 Vt 521, 80 A 723; Bradley v. Bentley, 85 Vt 412, 82 A 669.

[79] **California.** Hawi Mill & Plantation Co., Ltd. v. Finn, 82 CalApp 255, 255 P 543.

Massachusetts. Elec. Welding Co. v. Prince, 200 Mass 386, 86 NE 947, 128 AmSt 434; Coe v. Hill, 201 Mass 15, 86 NE 949; Lennon v. Cohen, 264 Mass 414, 163 NE 63.

Ohio. Alexander v. Pennsylvania Co., 48 OhSt 623, 30 NE 69.

ous decisions which may be more or less conflicting, or which bear upon the subject only collaterally, or by way of analogy, and where inferences may be drawn from them, the question to be determined is one fact and not of law."[80] After a foreign statute has been admitted in evidence the construction of it is within the province of the court.[81]

The determination of the existence of facts which bring a case within the operation of federal statutes, when denied by answer or reply, is a question for the jury.[82]

§ 14. Function of court to determine competency and materiality of evidence.

The question of the competency and materiality of evidence is for the court alone and may not be submitted to the jury.

The competency and admissibility of evidence is for the court, and not for the jury, to decide.[83] It is another statement of the rule to say that the question of the admissibility of evidence is

[80] Ames v. McCamber, 124 Mass 85.

[81] Masocco v. Schaaf, 234 AppDiv 181, 254 NYS 439; Alexander v. Pennsylvania Co., 48 OhSt 623, 30 NE 69.

[82] Erie R. Co. v. Welsh, 89 OhSt 81, 105 NE 189.

[83] **Federal.** Cooper v. United States, 16 F2d 830; Eierman v. United States, 46 F2d 46; United States v. Becker, 62 F2d 1007.

Alabama. Leahy v. State, 214 Ala 107, 106 S 599.

Arizona. Miller Cattle Co. v. Francis, 38 Ariz 197, 298 P 631.

Arkansas. McGill v. Miller, 183 Ark 585, 37 SW2d 689.

Florida. Atlanta & St. A. B. R. Co. v. Kelly, 77 Fla 479, 82 S 57.

Illinois. People v. Franklin, 341 Ill 499, 173 NE 607

Indiana. Townsend v. State, 2 Blackf. (Ind) 151.

Louisiana. State v. Hayes, 162 La 917, 111 S 327.

Michigan. People v. Hurst, 41 Mich 328, 1 NW 1027.

Minnesota. The court may direct attention of jury to the relevancy of the evidence to particular issues but must leave them free to determine the issue. Flick v. Ellis-Hall Co., 138 Minn 364, 165 NW 135.

Nebraska. Clarence v. State, 86 Neb 210, 125 NW 540.

New Hampshire. Whether photograph of murder victim would be of aid to jury in considering evidence is a question for the court. State v. Mannion, 82 NH 518, 136 A 358.

North Carolina. State v. Whitener, 191 NC 659, 132 SE 603; Kitchen Lbr. Co. v. Tallassee Power Co., 206 NC 515, 174 SE 427; Lincoln v. Atlantic Coast Line R. Co., 207 NC 787, 178 SE 601.

Ohio. Crew v. Pennsylvania R. Co., 21 OhApp 143, 153 NE 95; Barnes v. State, 15 OhCirCt 14, 8 OhCirDec 153.

Oklahoma. Jacobs v. State, 35 OklCr 179, 249 P 435.

The materiality of testimony is a question of law for the court as a general rule, but there are occasions where the materiality depends upon disputed facts and it then becomes a mixed question of law and fact, and should be submitted to the jury under proper instructions. Coleman v. State, 6 OklCr 252, 118 P 594.

Oregon. State v. Roselair, 57 Or 8, 109 P 865.

South Dakota. State v. Carlisle, 30 SD 475, 139 NW 127.

for the court and its weight and comparative value for the jury.[84]

It is the prerogative and duty of the court to determine the qualification of a witness, but his credibility is for the jury.[85] The competency of a proposed witness to testify is a question of law for the court to decide and for such purpose the court may conduct an examination of such witness out of the hearing of the jury. However, where the competency of a witness depends upon the existence of a certain fact, which is controverted, the witness should be permitted to testify, and the jury instructed that unless such disputed fact is established by a preponderance of the evidence, his testimony should be disregarded.[86] Whether there is any evidence of a fact is for the court, and whether testimony tends to prove a fact is for the jury.[87]

The competency of an insane person to testify as a witness lies in the discretion of the trial judge and a reviewing court will not disturb the ruling thereon where there is no abuse of discretion.[88] When a witness is precluded from testifying on the ground of his alleged incompetency as a witness and not on the ground that his proposed testimony is incompetent, his exclusion, if erroneous, will be presumed to be prejudicial, and it is not necessary to proffer his proposed testimony in order to challenge or review the action of the court as to his exclusion.[89]

In criminal cases, it is for the court to determine whether a sufficient foundation has been laid to admit testimony of

[84] **Federal.** Ford v. United States, 10 F2d 339, affd. in 273 US 593, 71 LEd 793, 47 SupCt 531; United States v. Sands, 14 F2d 670.

Alabama. Ward v. State, 4 Ala App 112, 58 S 788.

California. People v. Douglas (CalApp), 48 P2d 725.

Georgia. Rouse v. State, 136 Ga 356, 71 SE 667; Smalls v. State, 6 GaApp 502, 65 SE 295.

Indiana. Fehlman v. State, 199 Ind 746, 161 NE 8.

Michigan. People v. Dungey, 235 Mich 144, 209 NW 57.

Ohio. Miami Conservancy Dist. v. Ryan, 104 OhSt 79, 135 NE 282; Scaccuto v. State, 118 OhSt 397, 161 NE 211.

Oklahoma. Caido v. State, 7 Okl Cr 139, 122 P 734.

Texas. Newton v. State, 62 Tex Cr 622, 138 SW 708.

[85] Smith v. Rarrick, 151 OhSt 201, 85 NE2d 101; 8 ALR2d 1087; Kornreich v. Industrial F. Ins. Co., 132 OhSt 78, 5 NE2d 153; Schneiderman v. Interstate Transit Lines, Inc., 394 Ill 569, 69 NE2d 293 [same case, 401 Ill 172, 81 NE2d 861].

[86] Smith v. Barrick, 151 OhSt 201, 85 NE2d 101. See also, Hastings v. Allen, 14 Oh 58, 45 AmDec 522 and Burdge v. State, 53 OhSt 512, 42 NE 594.

[87] Berry v. State, 31 OhSt 219, 27 AmRep 506; Kaufman v. Broughton, 31 OhSt 424.

[88] State v. Wildman, 145 OhSt 379, 61 NE2d 790.

[89] Totten v. Miller, 139 OhSt 29, 37 NE2d 961.

threats;[90] whether a hostile demonstration against the defendant in a criminal prosecution had been made by the deceased, as bearing upon the admissibility of evidence that the deceased was armed, the defendant asserting self-defense;[91] whether a confession or admission is sufficiently free and voluntary to be competent evidence,[92] though many courts hold that while it is the duty of the presiding judge to determine in the first instance whether an alleged confession is admissible in evidence, yet it is a question for the final determination of the jury where there is a conflict in the testimony as to the voluntariness of the alleged confession;[93] whether evidence should be suppressed as having

[90] State v. Williams, 111 La 205, 35 S 521.

[91] State v. Joiner, 161 La 518, 109 S 51.

[92] **Federal.** Harrold v. Territory, 169 F 47, 17 AnnCas 868; Pearlman v. United States, 10 F2d 460; Hale v. United States, 25 F2d 430.

The court, if it decides the admissions are admissible, may leave it to the jury to say whether the admissions were voluntary acts of defendant and direct the jury to reject the admissions if satisfied they were not voluntarily made. Gin Bock Sing v. United States, 8 F2d 976. See also Kercheval v. United States, 12 F2d 904 (laying down much the same rule as to a plea of guilty later withdrawn).

Alabama. McKinney v. State, 134 Ala 134, 32 S 726; Fowler v. State, 170 Ala 65, 54 S 115 (admission); Burns v. State, 226 Ala 117, 145 S 436.

Arizona. Laub v. State, 24 Ariz 175, 207 P 465.

California. People v. Castro, 85 CalApp 228, 259 P 117; People v. Mellus, 134 CalApp 219, 25 P2d 237.

It is for the jury's determination where the evidence conflicts, as to whether an alleged confession was the result of a promise to the defendant to charge him with a lower degree of crime. People v. Howard, 211 Cal 322, 295 P 333, 71 ALR 1385.

Colorado. Osborn v. People, 83 Colo 4, 262 P 892; Saiz v. People, 93 Colo 291, 25 P2d 1114.

Florida. Kirby v. State, 44 Fla 81, 32 S 836; Sims v. State, 59 Fla 38, 52 S 198; Nickels v. State, 90 Fla 659, 106 S 479; Padgett v. State, 117 Fla 75, 157 S 186.

Georgia. Price v. State, 114 Ga 855, 40 SE 1015; McNair v. State, 38 GaApp 365, 143 SE 904.

Illinois. People v. Fox, 319 Ill 606, 150 NE 347; People v. Bartz, 342 Ill 56, 173 NE 779; People v. Albers, 360 Ill 73, 195 NE 459.

Indiana. Hauk v. State, 148 Ind 238, 46 NE 127, 47 NE 465; Mack v. State, 203 Ind 355, 180 NE 279, 83 ALR 1349; Hamilton v. State, 207 Ind 97, 190 NE 870.

Iowa. State v. Fidment, 35 Ia 541; State v. Storms, 113 Ia 385, 85 NW 610, 86 AmSt 380.

In State v. Kress, 204 Ia 828, 216 NW 31, it was declared to be a question for the jury whether a signed statement of the accused was a voluntary statement.

Louisiana. State v. Silsby, 176 La 727, 146 S 684; State v. Florane, 179 La 453, 154 S 417.

Maryland. McCleary v. State, 122 Md 394, 89 A 1100.

Massachusetts. Commonwealth v. Antaya, 184 Mass 326, 68 NE 331. The judge in the first instance determines whether a confession was voluntarily made. If satisfied that it was, he admits it, with instructions to the jury to disregard it if they are satisfied that it was not voluntarily made. Commonwealth v. Makarewicz, 333 Mass 575, 132 NE2d 294.

Michigan. People v. Howes, 81 Mich 396, 45 NW 961.

Mississippi. Hunter v. State, 74 Miss 515, 21 S 305; Draughn v. State, 76 Miss 574, 25 S 153.

Missouri. State v. Williams, 309 Mo 155, 274 SW 427.

Montana. State v. Walsh, 72 Mont 110, 232 P 194; State v. Dixson, 84 Mont 181, 260 P 138.

Nevada. State v. Williams, 31 Nev 360, 102 P 974.

New Jersey. State v. Young, 67 NJL 223, 51 A 939; State v. Genese, 102 NJL 134, 130 A 642; State v. Yarrow, 104 NJL 512, 141 A 85; State v. Fiumara, 110 NJL 164, 164 A 490; State v. Locicero, 12 NJMisc 837; 175 A 904.

New Mexico. State v. Ascarate, 21 NM 191, 153 P 1036; State v. Anderson, 24 NM 360, 174 P 215.

New York. People v. Doran, 246 NY 409, 159 NE 379; People v. Weiner, 248 NY 118, 161 NE 441.

North Carolina. State v. Christy, 170 NC 772, 87 SE 499.

Ohio. Spears v. State, 2 OhSt 583; Burdge v. State, 53 OhSt 512, 42 NE 594; Edinger v. State, 12 OhApp 362, 32 OCA 529; Dupuis v. State, 14 OhApp 67; Snook v. State, 34 OhApp 60, 170 NE 444; State v. Lukens, 6 OhNP 363, 9 OhDec 349; State v. Strong, 12 OhDec 701.

The judge may conditionally admit confession in evidence and require jury to determine admissibility. Neiswender v. State, 28 OCA 545, 30 Oh CirDec 417.

Oklahoma. Dold v. State, 51 OklCr 426, 2 P2d 97.

Oregon. State v. Jordan, 146 Or 504, 26 P2d 558, 30 P2d 751.

Pennsylvania. Commonwealth v. Aston, 227 Pa 112, 75 A 1019.

Rhode Island. State v. Jacques, 30 RI 578, 76 A 652.

South Carolina. State v. McAlister, 133 SC 99, 130 SE 511.

South Dakota. State v. Landers, 21 SD 606, 114 NW 717.

Texas. Marshall v. State, 108 Tex Cr 561, 2 SW2d 233; Wheatley v. State, 117 TexCr 599, 34 SW2d 876.

Character of confession as voluntary or otherwise held to be a question for the jury. Snow v. State, 106 TexCr 222, 291 SW 558.

Washington. State v. Mann, 39 Wash 144, 81 P 561 (mixed question of law and fact).

West Virginia. State v. Richards, 101 WVa 136, 132 SE 375; State v. Brady, 104 WVa 523, 140 SE 546.

Wisconsin. Hintz v. State, 125 Wis 405, 104 NW 110; Voss v. State, 204 Wis 432, 236 NW 128; Sweda v. State, 206 Wis 617, 240 NW 369; Pollack v. State, 215 Wis 200, 253 NW 560, 254 NW 471.

[93] **Federal.** Wilson v. United States, 162 US 613, 40 LEd 1090, 16 SupCt 895; United States v. Oppenheim, 228 F 220; Lewis v. United States, 74 F2d 173.

Alabama. Godau v. State, 179 Ala 27, 60 S 908; Kinsey v. State, 204 Ala 180, 85 S 519; Winslett v. State, 21 AlaApp 487, 109 S 523; Nowling v. State, 24 AlaApp 597, 139 S 577.

Arizona. Kermeen v. State, 17 Ariz 263, 151 P 738; Wagner v. State (Ariz), 33 P2d 602.

Arkansas. Iverson v. State, 99 Ark 453, 138 SW 958; Thomas v. State, 125 Ark 267, 188 SW 805.

California. People v. Dutro, 75 CalApp 138, 242 P 84; People v. Dye, 119 CalApp 262, 6 P2d 313.

Iowa. State v. Crisman, 244 Ia 590, 57 NW2d 207.

It is an invasion to instruct that if confessions were shown to have been understandingly made, and correctly remembered by the witnesses and substantially repeated by them on the witness stand, they were "entitled to great weight." State v. Willing, 129 Ia 72, 105 NW 355.

Kentucky. Commonwealth v. McIntosh, 257 Ky 465, 78 SW2d 320.

Michigan. People v. Mathinson, 235 Mich 393, 209 NW 99.

Mississippi. Brown v. State, 142 Miss 335, 107 S 373.

Missouri. State v. Cartwright (Mo), 278 SW 694 (holding that the jury should determine the issue if the voluntariness of the confession be denied).

New York. People v. Borowsky, 258 NY 371, 180 NE 87; People v. Alex, 265 NY 192, 192 NE 289.

Oklahoma. Lucas v. State, 26 Okl Cr 23, 221 P 798; Howington v.

been seized illegally without a warrant;[94] whether evidence of experiments should be admitted, it being discretionary with the court;[95] whether the general reputation of a witness in the place of former residence is too remote in point of time to be allowed as impeaching evidence;[96] whether a photograph of scene of alleged crime is accurate;[97] whether evidence of a distinct crime is relevant to any issue in the case;[98] whether there was probable cause for going upon premises to arrest without a warrant;[99] whether sufficient foundation has been laid for admission of testimony given by absent witness at former hearing;[1] whether the existence of a conspiracy has been sufficiently established to admit evidence of declarations and acts of one defendant against all;[2] whether there was probable cause or sufficient information to justify an officer in searching an automobile, evidence having been offered that was obtained through the search;[3] whether a search and seizure had been shown illegal;[4] whether photographs offered in evidence are sufficiently authenticated;[5] whether evidence shall be admitted without

State, 35 OklCr 352, 250 P 941; Edwards v. State (OklCr), 48 P2d 1087.

The court should hear argument on the question of voluntariness in the absence of the jury. Kirk v. Territory, 10 Okl 46, 60 P 797.

South Carolina. State v. McAlister, 133 SC 99, 130 SE 511.

South Dakota. The question of the competency of a confession should be submitted to the jury where the evidence is conflicting and leaves any question of the competency in the mind of the court. State v. Allison, 24 SD 622, 124 NW 747.

Texas. Morris v. State, 39 TexCr 371, 46 SW 253; Overstreet v. State, 68 TexCr 238, 150 SW 899; Rueda v. State, 101 TexCr 651, 277 SW 116; Hanus v. State, 104 TexCr 543, 286 SW 218; Clark v. State, 119 TexCr 50, 45 SW2d 575; Smith v. State, 123 TexCr 95, 57 SW2d 163; Crockett v. State (TexCr), 75 SW2d 454.

Washington. State v. Vaughn, 172 Wash 263, 19 P2d 917.

Wisconsin. Pollack v. State, 215 Wis 200, 253 NW 560, 254 NW 471.

[94] State v. Thornton, 137 Wash 495, 243 P 12.

[95] State v. Newman, 101 WVa 356, 132 SE 728.

[96] People v. Cord, 157 Cal 562, 108 P 511.

[97] State v. Matthews, 191 NC 378, 131 SE 743.

[98] People v. Cook, 148 Cal 334, 83 P 43.

[99] Mapp v. State, 148 Miss 739, 114 S 825; Hamilton v. State, 149 Miss 251, 115 S 427; McPherson v. State, 108 TexCr 265, 300 SW 936.

[1] State v. Budge, 127 Me 234, 142 A 857.

[2] **California.** See People v. Collier, 111 CalApp 215, 295 P 898.

Connecticut. State v. Thompson, 69 Conn 720, 38 A 868.

Iowa. State v. Walker, 124 Ia 414, 100 NW 354.

Michigan. See People v. Dellabonda, 265 Mich 486, 251 NW 594.

Texas. Brady v. State, 122 TexCr 539, 56 SW2d 879.

[3] McNutt v. State, 143 Miss 347, 108 S 721.

[4] Occinto v. United States, 54 F2d 351; Shore v. United States, 56 F2d 490; Schwartz v. State, 120 TexCr 252, 46 SW2d 985.

[5] State v. Hale, 85 NH 403, 160 A 95.

proof of corpus delicti;[6] and whether the evidence for the state has sufficient probative force to raise an issue of fact.[7]

Where the accused's palm prints had been taken by the officers for purposes of identification, and the results were submitted in evidence, it was held a question for the jury whether the taking of the prints was against the will of the accused or whether he voluntarily permitted it.[8] Where there is no proof of venue it is a question for the court to pass upon, but where the question is as to the sufficiency of the evidence tending to prove the venue, it then becomes a question for the jury.[9] It is for the court to say whether the corpus delicti has been established.[10] It is for the court to determine whether the War Department's records of fingerprints is a public record.[11] In the presence of uncontradicted showing of facts relied upon to constitute probable cause for search without warrant, the court is authorized to determine the sufficiency of the showing made.[12] And it is generally held that it is a legal question to be decided by the court whether the evidence discloses probable cause for a search.[13] While the question of the existence of probable cause to search an automobile for liquor is primarily one for the court to determine as a matter of law, it becomes a jury question if the facts on which the officer testified he acted are in dispute.[14]

§ 15. Direction of verdict in civil cases.

A peremptory instruction should be given commanding the jury to return a verdict without the consideration of any evidence whatsoever where the evidence is such that all reasonable minds can draw but one conclusion therefrom.

A motion for a directed verdict or, in some jurisdictions, a demurrer to the evidence or a motion for a compulsory nonsuit, raises the question whether there is sufficient evidence to permit the issues of fact to be decided by the jury. Because the judge, by whatever standard, decides the sufficiency of proof, it is often said that he is deciding a question of law. But in directing a verdict, the judge is really determining that an operative fact does or does not exist because of insufficiency of proof. For

[6] Delcher v. State, 161 Md 475, 158 A 37.

[7] State v. Claybaugh, 138 MoApp 360, 122 SW 319.

[8] People v. Les, 267 Mich 648, 255 NW 407.

[9] Pearson v. State, 5 AlaApp 68, 59 S 526; Shaffer v. Territory, 14 Ariz 329, 127 P 746.

[10] Foster v. State, 107 TexCr 376, 296 SW 537.

[11] State v. Bolen, 142 Wash 653, 254 P 445.

[12] Webster v. State, 114 TexCr 187, 23 SW2d 1118.

[13] Bedenarzik v. State, 204 Ind 517, 185 NE 114; Gartman v. State, 123 TexCr 12, 57 SW2d 137.

[14] McGee v. State (TexCr), 81 SW2d 683.

this reason, it is probably more accurate to say that the judge is deciding a question of fact.

In any event, the standard used by the judge in determining the sufficiency of proof is far from uniform, not only among the states, but within the same jurisdiction. The most commonly applied standard is that if reasonable minds could find only for one party, a verdict will be directed in his favor, but if reasonable minds could disagree, a verdict will not be directed.[15]

[15] **Federal.** Wheeler v. Fidelity & Deposit Co. of Maryland, 63 F2d 562.

Arkansas. St. Louis I. M. & S. Ry. Co. v. Martin, 61 Ark 549, 33 SW 1070; McGeorge Contracting Co. v. Mizell, 216 Ark 509, 226 SW2d 566.

Arizona. Collins v. Riverside Amusement Park Co., 61 Ariz 135, 145 P2d 853.

Colorado. Fedderson v. Goode, 112 Colo 38, 145 F2d 981.

Florida. Dawes v. Robinson, 91 Fla 99, 107 S 340.

Illinois. Chicago v. Babcock, 143 Ill 358, 32 NE 271.

Indiana. Lake Shore & M. S. Ry. Co. v. Pinchin, 112 Ind 592, 13 NE 677; Kostial v. Aero Mayflower Transit Co., 119 IndApp 377, 85 NE 2d 644.

Iowa. Calvert v. Mason City Loan & Inv. Co. (Ia), 259 NW 452.

Kansas. Chanute v. Higgins, 65 Kan 680, 70 P 638.

Kentucky. Newport News & Mississippi Valley Co. v. Dentzel's Admr., 91 Ky 42, 14 SW 958.

Maine. Watson v. Portland & C. E. Ry. Co., 91 Me 584, 40 A 699, 44 IRA 157, 64 AmSt 268; Froling v. Howard, 125 Me 507, 131 A 308.

Maryland. State v. Baltimore & O. R. Co., 69 Md 339, 14 A 685, 688; Bush v. Mohrlein, 191 Md 418, 62 A2d 301.

Michigan. Garbacz v. Grand Trunk Western Ry. Co., 323 Mich 7, 34 NW2d 531.

Minnesota. Swanson v. Minneapolis St. Ry. Co., — Minn —, 90 NW2d 514.

New Jersey. Epstein v. Nat. Casualty Co., 1 NJ 409, 64 A2d 67.

New York. McDonald v. Long Island R. Co., 116 NY 546, 22 NE 1068, 15 AmSt 437.

North Carolina. Emry v. Raleigh & G. R. Co., 109 NC 589, 14 SE 352, 15 LRA 332.

Ohio. Hamden Lodge No. 517, I.O.O.F. v. Ohio Fuel Gas Co., 127 OhSt 469, 189 NE 246; Metropolitan Life Ins. Co. v. Huff, 128 OhSt 469, 191 NE 761; Winslow v. Ohio Bus Line Co., 148 OhSt 101, 73 NE 2d 504; Belshaw v. Agricultural Ins. Co., 150 OhSt 49, 80 NE2d 675.

Oklahoma. Myers v. Chamness, 114 Okl 220, 245 P 879; Keist v. Cross, 118 Okl 142, 247 P 85.

Oregon. Camirand v. De Lude, 124 Or 189, 264 P 355; Judson v. Bee Hive Auto Service Co., 136 Or 1, 294 P 588, 297 P 1050, 74 ALR 944; Gresham Transfer, Inc. v. Oltman, 187 Or 318, 210 P2d 927.

Pennsylvania. Bare v. Pennsylvania R. Co., 135 Pa 95, 19 A 935.

Rhode Island. Jamestown Bridge Comm. v. American Employers' Ins. Co., — RI —, 128 A2d 550.

South Carolina. Miles v. Record Pub. Co., 134 SC 462, 133 SE 99, 45 ALR 1112.

Tennessee. Smith v. Sloan, 189 Tenn 368, 225 SW2d 539, 227 SW2d 2.

Texas. Garrett v. Hunt (TexCom App), 283 SW 489, mfdg. (TexCiv App), 275 SW 96.

Utah. Saunders v. Southern Pacific Co., 13 Utah 275, 44 P 932.

Washington. Northern Pacific R. Co. v. O'Brien, 1 Wash 599, 21 P 32.

Wisconsin. Salladay v. Dodgeville, 85 Wis 318, 55 NW 696, 20 LRA 541; Finkelston v. Chicago, M. & St. P. Ry. Co., 94 Wis 270, 68 NW 1005; Maanum v. Madison, 104 Wis 272, 80 NW 591; Agen v. Metropolitan Life Ins. Co., 105 Wis 217, 80 NW 1020, 76 AmSt 905.

Other standards have been used: if there is but a scintilla of proof, the case will be taken from the jury;[16] if there is a fair conflict in the evidence on a material issue, the jury must decide.[17] Conflict of evidence here is not necessarily confined to witnesses arrayed side against side; the conflict may arise when all the evidence is produced by one of the parties.[18] Still the standard is stated by other courts in other ways: if substantial evidence has been presented supporting the non-moving party, a directed verdict will be denied;[19] or if any evidence which tends to prove the case for the non-moving party is presented, the motion for a directed verdict will be denied.[20] Although this last test comes perilously close to the "Scintilla Rule," the courts

Wyoming. Wright v. Conway, 34 Wyo 1, 241 P 369, 242 P 1107.

[16] Hardy-Burlingham Min. Co. v. Baker, 10 F2d 277; Hartmann v. Boston Herald-Traveler Corp., 323 Mass 56, 80 NE2d 16.

[17] **Alabama.** Sovereign Camp, W.O.W. v. Graham, 214 Ala 239, 107 S 98; Superior Fire Ins. Co. v. Whelchel, 22 AlaApp 51, 112 S 95.

Arizona. Collins v. Riverside Amusement Park Co., 61 Ariz 135, 145 P2d 853.

California. In re Fleming's Estate, 199 Cal 750, 251 P 637; Davis v. Pezel, 131 CalApp 46, 20 P2d 982; James v. White Truck & Transfer Co., 1 CalApp2d 37, 36 P2d 401; Locke v. Meline (CalApp), 48 P2d 176.

District of Columbia. Gas Consumers Assn., Inc. v. Lely, 57 F2d 395.

Florida. City Groc. Co. v. Cothron, 117 Fla 322, 157 S 891.

Iowa. Brinsmaid v. Order of United Commercial Travelers, 157 Ia 651, 138 NW 465.

Kentucky. Domestic Life & Acc. Ins. Co. v. Smith, 259 Ky 158, 82 SW2d 293.

Michigan. Wendt v. Richmond, 164 Mich 173, 129 NW 38.

Missouri. Redman v. Chicago, R. I. & P. Ry. Co. (MoApp), 278 SW 95.

New Jersey. Steinrock v. Hartford Acc. & Indem. Co., 115 NJL 180, 178 A 806; Handler v. Newman & Lowy Beef Co. (NJ), 136 A 597.

New York. Bergman v. Scottish Union & Nat. Ins. Co., 264 NY 205, 190 NE 409, revg. 240 AppDiv 714, 265 NYS 1006.

Ohio. Painesville Utopia Theatre Co. v. Lautermilch, 118 OhSt 167, 160 NE 683; Hamden Lodge No. 517, I. O. O. F. v. Ohio Fuel Gas Co., 127 OhSt 469, 189 NE 246.

Pennsylvania. Raftery v. Pittsburgh & W. V. R. Co., 284 Pa 555, 131 A 470; Rieseck v. Costa Bros., 103 PaSuper 51, 157 A 803; Szczygielski v. Travelers Ins. Co., 114 PaSuper 352, 174 A 662.

Tennessee. Prudential Ins. Co. v. Davis, 18 TennApp 413, 78 SW2d 358.

Texas. Friesenhahn v. Tips Engine Works (TexCivApp), 283 SW 341; Wharton v. Mortgage Bond Co. (TexCivApp), 48 SW2d 519.

Vermont. Scott v. Bradford Nat. Bank (Vt), 179 A 149.

Virginia. Gaines v. Campbell, 159 Va 504, 166 SE 704.

West Virginia. Wharton v. Goddard (WVa), 177 SE 451.

Wisconsin. Cuddy v. Foreman, 107 Wis 519, 83 NW 1103.

[18] Isham v. Trimble (CalApp), 43 P2d 581; Painesville Utopia Theatre Co. v. Lautermilch, 118 OhSt 167, 160 NE 683.

[19] Wilkeson v. Erskine & Son, Inc., 145 OhSt 218, 61 NE2d 201; Durham v. Warner Elev. Mfg. Co., 166 OhSt 31, 139 NE2d 10; Ayers v. Woodard, 166 OhSt 138, 140 NE2d 401.

[20] Gorczynski v. Nugent, 402 Ill 147, 83 NE2d 495; Hughes v. Bandy, 336 IllApp 472, 84 NE2d 664.

applying the tendency test deny that it is tantamount to the scintilla rule.[21]

Another standard, often stated in the alternative to the reasonable minds test, is that if the judge would be required to set aside a verdict in favor of the non-moving party as against the weight of the evidence, a directed verdict for the other party should be given.[22] Yet other courts emphatically deny that the test for setting aside a verdict as against the weight of the evidence is the same test in passing on a motion for a directed verdict.[23]

It would seem that the latter view is the better one. The effect of setting aside a verdict is to have the case retried. In directing a verdict, the case on its merits has ended, except, of course, for appeal. It takes more evidence favoring the moving party of a directed verdict than it does to set aside a verdict for the other party as against the weight of the evidence. In other words, it is true that wherever a judge grants a motion for a directed verdict, he of necessity would grant a motion by the same party to set aside a verdict for the opposing party as against the weight of the evidence. However, the converse is not necessarily true. A judge may set aside a verdict as against the weight of the evidence, but still would not have granted a motion for a directed verdict.

It also appears to be contradictory to apply the same test since in passing on a motion for a directed verdict, a judge does not weigh the evidence, but views the evidence most favorably to the non-moving party.[24] But in deciding on a motion to set

[21] Robson v. Pennsylvania R. Co., 337 IllApp 557, 86 NE2d 403. See, also, Piggott v. Newman, 338 IllApp 198, 86 NE2d 670, and Hyde v. Saunders, 338 IllApp 205, 86 NE2d 843.

See § 18, *infra*.

[22] **Federal.** Ewing v. Goode, 78 F 442 (CCSDOh).

Colorado. Fedderson v. Goode, 112 Colo 38, 145 P2d 981.

Iowa. Potter v. Robinson, 233 Ia 479, 9 NW2d 457.

Minnesota. Caron v. Farmers Ins. Exchange, — Minn —, 90 NW2d 86; Erickson v. Strickler, — Minn —, 90 NW2d 232.

[23] **Illinois.** Hughes v. Bandy, 336 IllApp 472, 84 NE2d 664.

Massachusetts. Hartmann v. Boston Herald-Traveler Corp., 323 Mass 56, 80 NE2d 16.

Mississippi. Buntyn v. Robinson, — Miss —, 102 S2d 126.

Ohio. Hamden Lodge No. 517, I. O. O. F. v. Ohio Fuel Gas Co., 127 OhSt 469, 189 NE 246; Wilkeson v. Erskine & Son, Inc., 145 OhSt 218, 61 NE2d 201.

[24] **Federal.** Whitney v. Johnson, 14 F2d 24; United States v. Russian, 73 F2d 363; Garrett Constr. Co. v. Aldridge, 73 F2d 814; Muth v. United States, 78 F2d 525.

Arkansas. Burcher v. Casey, 190 Ark 1055, 83 SW2d 73.

California. Swigert v. Pacific Elec. R. Co. (CalApp), 47 P2d 353.

District of Columbia. Grubb v. Groover, 62 AppDC 305, 67 F2d 511.

Florida. Commercial Credit Co. v. Parker, 101 Fla 928, 132 S 640.

Illinois. Vaughn v. Chicago Junction R. Co., 249 Ill 206, 94 NE 40;

aside the verdict as against the weight of the evidence, the judge does weigh the evidence.

Although rarely done, a motion for a directed verdict may be granted to the plaintiff. Here, the judge views the evidence in defendant's favor. If he finds that no facts are proven which constitute a defense, the plaintiff's motion will be granted.[25] Or if the defendant offers no defense, or if the evidence is in-

Miles v. Long, 342 Ill 589, 174 NE 836; Williams v. Consumers Co., 352 Ill 51, 185 NE 217; Minnis v. Friend, 360 Ill 328, 196 NE 191.

Indiana. Phelan v. Edgely, 98 Ind App 429, 189 NE 636; Kostial v. Aero Mayflower Transit Co., 119 Ind App 377, 85 NE2d 644.

Iowa. Blecher v. Schmidt, 211 Ia 1063, 235 NW 34; Wareham v. Atkinson, 215 Ia 1096, 247 NW 534; Thompson v. Anderson, 217 Ia 1186, 252 NW 117.

Kentucky. Edwards v. Storms, 219 Ky 675, 294 SW 165; Jackson v. Cook, 222 Ky 409, 300 SW 853; Louisville v. Hale's Admr., 238 Ky 182, 37 SW2d 20; Globe Indem. Co. v. Daviess, 243 Ky 356, 47 SW2d 990; Spencer's Admr. v. Fisel, 254 Ky 503, 71 SW2d 955. See Adkins v. Harlan County, 259 Ky 400, 82 SW2d 425.

Massachusetts. Hoye v. Boston Elevated R. Co., 256 Mass 493, 152 NE 738; Boyd v. Boston Elevated R. Co., 264 Mass 364, 162 NE 735.

Michigan. Bullen v. Wakefield Crushed Stone Co., 235 Mich 240, 209 NW 124; Contractors Equipment Co. v. Reasner, 242 Mich 589, 219 NW 713; Groening v. Opsata, 323 Mich 73, 34 NW2d 560; Dasovich v. Longacre, 324 Mich 62, 36 NW2d 215.

Minnesota. Merchants & Farmers Mut. Cas. Co. v. St. Paul-Mercury Indem. Co., 214 Minn 544, 8 NW2d 827.

Mississippi. Yates v. Houston & Murray, 141 Miss 881, 106 S 110.

Missouri. Bramblett v. Harlow (MoApp), 75 SW2d 626.

Montana. Mellon v. Kelly (Mont), 41 P2d 49.

Nebraska. Roberts v. Carlson, 142 Neb 851, 8 NW2d 175; Kohl v. Unkel, 163 Neb 257, 79 NW2d 405.

New Jersey. Hunke v. Hunke, 103 NJL 645, 137 A 419; Palmer v. Tomlin, 104 NJL 215, 141 A 2; O'Neil v. Jacobus, 112 NJL 145, 169 A 703; Shields v. Yellow Cab, 113 NJL 479, 174 A 567; Wilkinson v. Walsh, 115 NJL 243, 178 A 721; Schwartz v. Rothman, 1 NJ 206, 62 A2d 684; Van Brunt v. Wiener, 10 NJMisc 298, 158 A 923; Heenan v. Horre Coal Co., 12 NJMisc 263, 170 A 894.

New York. Stiles v. Annabel, 138 Misc 811, 246 NYS 524.

Ohio. Hamden Lodge No. 517, I. O. O. F. v. Ohio Fuel Gas Co., 127 OhSt 469, 189 NE 246; Pence v. Kettering, 128 OhSt 52, 190 NE 216; Wilkeson v. Erskine & Son, Inc., 145 OhSt 218, 61 NE2d 201.

Oklahoma. Midland Valley R. Co. v. Neeley, 114 Okl 277, 246 P 859; Crowe v. Peters, 171 Okl 433, 43 P2d 93.

Oregon. Meany v. Wight (Or), 46 P2d 82; Gresham Transfer, Inc. v. Oltman, 187 Or 318, 210 P2d 927.

Rhode Island. Kent v. Draper Soap Co., 75 RI 30, 63 A2d 571.

South Carolina. Waring v. South Carolina Power Co. (SC), 181 SE 1.

Tennessee. Hodge v. Hamilton, 155 Tenn 403, 293 SW 752; Smith v. Sloan, 189 Tenn 368, 225 SW2d 539, 227 SW2d 2; Finchem v. Oman, 18 TennApp 40, 72 SW2d 564.

Texas. Garuth v. Dallas Gas Co. (TexCivApp), 282 SW 334.

Washington. Smith v. Keating, — Wash2d —, 326 P2d 60.

West Virginia. Nichols v. Raleigh-Wyoming Coal Co., 112 WVa 85, 163 SE 767.

Wisconsin. Finkelston v. Chicago, M. & St. P. Ry. Co., 94 Wis 270, 68 NW 1005.

[25] Mahoning Nat. Bank v. Youngstown, 143 OhSt 523, 56 NE2d 218.

sufficient to justify a verdict in his favor, there is nothing for the jury to pass upon, and a verdict should be directed for the plaintiff if the evidence establishes a prima facie case for the plaintiff.[26]

Where a party is entitled to a directed verdict, his opponent may not complain of error in the charge, since such error, if any exists, is without prejudice.[27]

Since the issues of fact are formulated by the pleadings, it is proper to direct a verdict for the defendant if there is a fatal variance between the complaint and the proof at the trial; the plaintiff has failed to present any proof to support a material allegation. This defect may be overcome if the court permits the complaint to be amended to conform to the proof.[28]

It has been clearly established that in some circumstances, a judge may be justified in directing a verdict for the defendant, if the opening statement of plaintiff's counsel does not disclose evidence which, if taken to be true, would warrant the jury in finding for the plaintiff.[29]

Under Louisiana practice the common law motions for judgment, directed verdicts and demurrers to the evidence are unknown and unauthorized, and they may not be invoked by disguising them with the label of "no right or no cause of action." If the defendant doubts the sufficiency of the evidence submitted by plaintiff to sustain his demand, and does not see fit to contradict such evidence, he has the right to have the court determine the sufficiency of plaintiff's evidence by resting his case. In such event a judgment should be rendered on the merits in favor of one side or the other. An exception of "no cause of action" addresses itself to the sufficiency in law of the petition and exhibits attached thereto. In considering whether

[26] **Colorado.** Piccoli v. Paramount Lubricants Co., 80 Colo 175, 250 P 149.

Georgia. Guthrie v. Rowan, 34 GaApp 671, 131 SE 93.

Ohio. Whelan v. Kinsley, 26 OhSt 131; Hamden Lodge No. 517, I.O.O. F. v. Ohio Fuel Gas Co., 127 OhSt 469, 189 NE 246; Campbell v. Eddy, 27 OhApp 13, 160 NE 640.

Oklahoma. Colonial Sugar Co. v. Waldrep, 121 Okl 31, 246 P 628.

[27] Carver v. Sherman, 172 Mich 264, 137 NW 519; Mehurin & Son v. Stone, 37 OhSt 49; Thompson v. Jones, 13 OhCirCt (N. S.) 493, 23 OhCirDec 182; Cleveland R. Co. v. Selzer, 1 OLA 219.

[28] **Florida.** G. I. Miller & Co. v. Carmichael-McCalley Co., 91 Fla 1071, 109 S 198.

Kansas. Peckinpaugh v. Lamb, 70 Kan 799, 79 P 673.

Mississippi. See Gower v. Strain, 169 Miss 344, 145 S 244.

[29] Wilkinson v. New England Tel. & Tel. Co., 327 Mass 132, 97 NE2d 413; note, Directing a Verdict for Defendant after Plaintiff's Opening Statement, 44 IaLRev 182 (1958); Annot., 83 ALR 221 (1933), 129 ALR 557 (1940). See also Corfeld v. Douglas Houghton Hotel Co., 324 Mich 459, 37 NW2d 169.

such exception is well founded, the court does not consider the evidence.[30]

It cannot be said in strictness that there is a direction of a verdict in the foregoing sense where the court sets out the facts of which there is evidence constituting the cause of action or defense of one of the parties and informs the jury that if these alleged facts are found to be true from the evidence, then the jury should return a verdict in favor of such party. In cases of this character the question of finding the truth of these recited facts is left with the jury,[31] as well as the credibility of the witnesses testifying.[32] Such an instruction must, however, include all the material facts necessary to warrant the recovery indicated or it will be erroneous.[33] It would seem that such a charge could not be requested where the case is submitted to the jury on special issues.[34]

§ 16. Direction of verdict where evidence undisputed.

If the jury as reasonable men could come to but one conclu-

[30] Home Ins. Co. v. I. R. & G. Co., — LaApp —, 43 S2d 504.

[31] **Alabama.** Karpeles v. City Ice Delivery Co., 198 Ala 449, 73 S 642; United Order of Good Shepherds v. Richardson, 202 Ala 305, 80 S 370; Lawson v. Mobile Elec. Co., 204 Ala 318, 85 S 257; Stewart Bros. v. Ransom, 204 Ala 589, 87 S 89.

California. Baillargeon v. Myers, 180 Cal 504, 182 P 37; Metcalf v. Romano, 83 CalApp 508, 257 P 114.

Georgia. Waynesboro Planing Mill v. Perkins Mfg. Co., 35 GaApp 767, 134 SE 831.

Illinois. Conrad v. St. Louis, S. & P. R. Co., 201 IllApp 276.

Missouri. State ex rel. Duvall v. Ellison, 283 Mo 532, 223 SW 651; Brown v. Callicotte (Mo), 73 SW2d 190; Cole v. Long, 207 MoApp 528, 227 SW 903; Jepson v. Shaw Transfer Co., 211 MoApp 366, 243 SW 370; Privitt & Jewett (MoApp), 225 SW 127; Lester v. Hugley (MoApp), 230 SW 355; Riner v. Riek (MoApp), 57 SW2d 724.

North Carolina. Proffitt Mercantile Co. v. State Mut. Fire Ins. Co., 176 NC 545, 97 SE 476.

Ohio. Richardson v. Curtiss, 33 OhSt 329.

West Virginia. Venable v. Gulf Taxi Line, 105 WVa 156, 141 SE 622.

[32] Kerr Grain & Hay Co. v. Marion Cash Feed Co., 179 NC 654, 103 SE 375.

[33] **Alabama.** Louisville & N. R. Co. v. Abernathy, 197 Ala 512, 73 S 103.

Georgia. Skellie v. Skellie, 152 Ga 707, 111 SE 22.

Illinois. Snyder v. Steele, 287 Ill 159, 122 NE 520; Farmers League & Community Tel. Assn. v. Ohio & Mississippi Valley Tel. Co., 194 Ill App 166; Gage v. Vienna, 196 Ill App 585; Richards v. Illinois Cent. R. Co., 197 IllApp 282; Hackl v. Tower Hill Coal Co., 202 IllApp 497 (must limit recovery to acts declared on).

Indiana. Public Utilities Co. v. Handorf, 185 Ind 254, 112 NE 775; Chicago, I. & L. R. Co. v. Lake County Sav. & Trust Co., 186 Ind 358, 114 NE 454. See also Southern Surety Co. v. Calverly, 195 Ind 247, 143 NE 626.

Missouri. Nichols v. Chicago, R. I. & P. Ry. Co. (MoApp), 232 SW 275; Franklin v. Kansas City (Mo App), 260 SW 502.

[34] Buchanan v. Williams (TexCiv App), 225 SW 59.

sion on evidence which is undisputed, it is the duty of the court to direct a verdict.

Although many courts refuse to direct a verdict where the evidence is disputed, it does not necessarily follow that a directed verdict will be given if the evidence is undisputed. Yet it is a fact that many courts solely on the premise of undisputed evidence, conclude that there is nothing left for decision but a question of law and it is the court's duty to direct a verdict.[35] If the defendant offers no evidence after evidence for the plaintiff has been admitted sufficient to prove his cause of action, the court should direct a verdict for the plaintiff.[36] On the other hand, where the undisputed defense facts disprove the plaintiff's right to a recovery, a nonsuit should be entered or a verdict directed for the defendant.[37] But if a directed verdict for the defendant is not warranted at the conclusion of plaintiff's case, only undisputed evidence sustaining an affirmative defense will justify the direction of a verdict for defendant at the close of the case.[38] If certain facts essential to a plaintiff's recovery are not disputed, there is no question in the case as to the proof as to these facts, and it is not required that the court shall charge that as to them the burden of proof is upon the plaintiff.[39] Adding all reasonable inferences favorable to the plaintiff to the evidence as it exists at the close of his case, the showing may be such as to render it improper for the court to direct a verdict for the defendant; but if the defendant thereupon produces undisputed evidence of facts, consistent with that of the

[35] **Federal.** Traffic Motor Truck Corp. v. Claywell, 12 F2d 419; Wheelock v. Clay, 13 F2d 972; United States Potash Co. v. McNutt, 70 F2d 126.

Alabama. Alabama Power Co. v. Sides, 229 Ala 84, 155 S 686.

Kansas. Wilson v. Gonder, 121 Kan 469, 247 P 631.

Kentucky. Modern Woodmen of America v. Lemonds, 212 Ky 83, 278 SW 532.

North Carolina. Moore v. Lambeth, 207 NC 23, 175 SE 714.

Ohio. Miller v. Uhl, 37 OhApp 276, 174 NE 591, 33 OLR 294.

Where the facts are admitted or undisputed, the matter of applying the law is for the court. Webb v. Western Reserve Bond & Share Co., 115 OhSt 247, 153 NE 289, 48 LRA 1176.

Oklahoma. Eagle Loan & Inv. Co. v. Starks, 116 Okl 149, 243 P 723.

Pennsylvania. Campagna v. Ziskind, 287 Pa 403, 135 A 124.

[36] Moore v. Morris, 116 Okl 224, 243 P 933.

[37] Flippin v. Cent. of Georgia R. Co., 35 GaApp 243, 132 SE 918.

[38] Shannon v. Nightingale, 321 Ill 168, 151 NE 573; Campbell v. Prudential Ins. Co. of America, 16 IllApp 65, 147 NE2d 404.

[39] Boillot v. Income Guaranty Co. (MoApp), 83 SW2d 219 (action on accident policy where it was undisputed that after the injury to plaintiff he was taken from hospital and treated by a physician, and the fact and times and details of such treatment were not disputed).

plaintiff, showing affirmatively a complete defense, a verdict should be directed for the defendant.[40]

It may be, however, that in spite of the fact that the evidence is undisputed, reasonable minds could disagree.[41] In that event, if the judge instructs to jury to find a certain fact "if you believe the evidence," this is not a directed verdict, because the jury is still determining the issues of fact.

§ 16A. Effect of both parties moving for directed verdict.

There is a split of authority on the effect of both parties, without reservation, moving for a directed verdict, some courts holding that the issues of fact are for the court, others holding that if neither party is entitled to a directed verdict, the case must go to the jury.

The manner in which both parties make a motion for a directed verdict may arise in different ways. Both parties may make the motion consecutively, so that the judge has both motions before him at the same time. Or one party may make his motion after the judge has denied the other party's motion.

Which procedure is followed makes a difference. If the second procedure is followed, the jury will still decide any issues of fact, even though neither party reserves a jury trial.[42]

It is in the first procedure, that is, consecutive motions, that the authorities are not in agreement. It would seem that it is the rule in all jurisdictions that if either party expressly reserves jury trial, consecutive motions do not deprive the parties of a jury trial. On the other hand, if both parties expressly waive jury trial, then consecutive motions take the case away from the jury.

Where the courts disagree is in the situation where there is no express waiver or reservation. Some courts reason that under these circumstances the parties have impliedly waived a jury trial and that they have agreed there is no question of fact for the jury. Hence, the judge withdraws the case from the jury and decides the issues of fact on the weight of the evidence.[43]

Those courts deciding the other way reason that it is inconsistent and illogical to conclude from a request to decide a

[40] Paulsen v. Cochfield, 278 IllApp 596.

[41] Bruce Constr. Corp. v. The State Exchange Bank, — Fla —, 102 S2d 288.

[42] Satterthwaite v. Morgan, 141 OhSt 447, 48 NE2d 653; Byford v. Gates Bros. Lbr. Co., 216 Ark 400, 225 SW2d 929.

[43] **Indiana.** Foudy v. Daugherty, 118 IndApp 68, 76 NE2d 268.

Michigan. Where both parties to an action ask directed verdicts without reservations, the court may determine the case and need not submit it to the jury, though the testimony warrants conflicting inferences. It follows also that one may reserve

question of law that this gives the court the power to decide controverted questions of fact. Unless both parties expressly waive the jury, the court does not become the trier of facts. Instead, the judge passes on separate questions of law. He may find that on the evidence, one of the motions should be granted. But if the judge finds that he cannot sustain either motion, then he must overrule both, and the issues of fact are then submitted to the jury without the necessity of a request by counsel for submission.[44]

§ 17. Direction of verdict in criminal cases.

In criminal cases, the courts in most jurisdictions have the power to direct an acquittal where there is an entire lack of evidence to support a guilty verdict, or if all of the evidence is as consistent with innocence as with guilt.

In most jurisdictions, a verdict of guilty cannot be directed.

The courts are not in agreement either on a directed acquittal or directed verdict of guilty. In most jurisdictions, the judge has the power to direct a verdict of not guilty. Here, as in the motion for a directed verdict in civil cases, the test used in

his right to go to the jury, on denial of his motion to direct, by any definite claim to the court to that end, made upon the record. The reservation need not be by written request to charge. Cole v. Austin, 321 Mich 548, 33 NW2d 78.

But, if in addition to a motion to direct a verdict in his favor, a party presents a request to charge the jury on a certain issue, it negatives his intent to waive his right to have the jury pass upon the case, and, if his motion to direct is denied, he is entitled to go to the jury on any proper issue of fact, even though the opposing party also moves for a directed verdict in his favor. In re Snow's Estate, 319 Mich 333, 29 NW2d 826.

Nebraska. Witthauer v. Employers Mut. Casualty Co., 149 Neb 728, 32 NW2d 413.

New York. Trustees of East Hampton v. Vail, 151 NY 463, 45 NE 1030; Clason v. Baldwin, 152 NY 204, 46 NE 322.

North Dakota. Whittier v. Leifert, 72 ND 528, 9 NW2d 402; Farm Machinery Inc. v. Bry, — ND —, 82 NW2d 593.

[44] **Florida.** Catlett v. Chestnut, 107 Fla 498, 146 S 241, 91 ALR 212.

Illinois. Wolf v. Chicago Sign Printing Co., 233 Ill 501, 84 NE 614.

Iowa. Home Indem. Co. v. State Bank of Fort Dodge, 233 Ia 103, 8 NW2d 757; in re Farley's Estate, 237 Ia 1069, 24 NW2d 453.

Minnesota. Poppitz v. German Ins. Co., 85 Minn 118, 88 NW 418.

New Hampshire. Stevens v. Mut. Protection Fire Ins. Co., 84 NH 275, 149 A 498, 69 ALR 624.

Ohio. Carter-Jones Lbr. Co. v. Eblen, 167 OhSt 189, 147 NE2d 486, *overruling* applicable syllabi in: First Nat. Bank v. Hayes, 64 OhSt 100, 59 NE 893; Strangward v. American Brass Bedstead Co., 82 OhSt 121, 91 NE 988; Perkins v. Board of County Commrs., 88 OhSt 495, 103 NE 377; Industrial Comm. of Ohio v. Carden, 129 OhSt 344, 195 NE 551; Levick v. Bonnell, 137 OhSt 453, 30 NE2d 808.

Vermont. See Mason v. Sault, 93 Vt 412, 108 A 267, 18 ALR 1426.

passing on the motion is varied and uncertain, perhaps understandably so.

In many jurisdictions, the judge has the power to direct an acquittal if there is no evidence to support a guilty verdict,[45] or if all the evidence is as consistent with innocence as with guilt.[46] Or if the evidence merely raises a suspicion that the accused is guilty, the motion for acquittal should be granted.[47] Many other standards are used, stated either negatively or affirmatively: has the state introduced evidence fairly and reasonably tending to show accused's guilty beyond a reasonable doubt;[48] is there substantial evidence which reasonably tends to prove the accused's guilt;[49] is there some competent evidence favoring the prosecution;[50] would a verdict of guilty, if rendered, be required to be vacated;[51] is the evidence such that reasonable minds can make but one conclusion.[52] There is also, as in civil cases, a comparable scintilla rule in criminal law,

[45] **Federal.** Duff v. United States, 185 F 101; Gargotta v. United States, 77 F2d 977.

Alabama. Jackson v. State, 178 Ala 76, 60 S 97; Miller v. State, 21 Ala App 653, 111 S 648.

Kentucky. Sloan v. Commonwealth, 258 Ky 461, 80 SW2d 553; Wilson v. Commonwealth (Ky), 121 SW 430; Spencer v. Commonwealth, (Ky), 122 SW 800.

New York. People v. Gresser, 124 NYS 581.

Ohio. State v. Channer, 115 Oh St 350, 154 NE 728.

Oklahoma. Pilgrim v. State, 3 OklCr 49, 104 P 383; Huffman v. State, 6 OklCr 476, 119 P 644; Nash v. State, 8 OklCr 1, 126 P 260; Brady v. State (OklCr), 46 P2d 963.

Oregon. Where facts were stipulated, and, as stipulated, excluded all inferences of guilt, the court should have directed an acquittal. State v. Williams, 117 Or 238, 243 P 563.

Pennsylvania. Commonwealth v. Yost, 197 Pa 171, 46 A 845.

South Carolina. In this state a circuit judge cannot direct a verdict in a criminal case. State v. Sanders, 52 SC 580, 30 SE 616.

Wisconsin. It is discretionary with the trial court to direct an acquittal when there is no evidence against the accused except the uncorroborated testimony of accomplices. Murphy v. State, 124 Wis 635, 102 NW 1087.

[46] Romano v. United States, 9 F2d 522; Moore v. United States, 56 F2d 794; Parnell v. United States, 64 F2d 324.

[47] State v. Rayfield, — SC —, 101 SE2d 505; State v. Hart, 119 Vt 54, 117 A2d 387.

[48] State v. Severance, — Vt —, 138 A2d 425.

Florida, by statute (F. S. A. Sec. 918.08), permits a directed verdict for acquittal if the evidence is insufficient to warrant a conviction. The wording of the statute is confusing. After stating that an accused does not waive such motion by his subsequent introduction of evidence, the statute then requires the motion to be renewed at the close of all the evidence. A Florida District Court of Appeals, criticising the statute for its inept phrasing, construed the statute as not requiring the renewal of the motion. Wiggins v. State, 101 S2d 833 (1stDistCtofApp, Fla).

[49] State v. Rayfield, — SC —, 101 SE2d 505.

[50] People v. Urso, 129 Colo 292, 269 P2d 709.

[51] State v. Donahue, 125 Me 516, 133 A 433; People v. Broderick, 146 Misc 566, 262 NYS 602.

[52] Smith v. United States, 61 App DC 344, 62 F2d 1061.

that is, the court should not direct an acquittal so long as there is evidence, however slight, which points toward the guilt of the accused.[53] It should be the rule that if the facts as proved do not constitute a crime, an acquittal should be directed.[54]

A verdict of acquittal cannot be directed before the evidence for the state is all in.[55] In determining the question whether the defendant is entitled to a directed verdict of acquittal, the court must view the evidence most favorably to the prosecution.[56]

In some states, the power to grant a directed verdict of acquittal is discretionary, and the directed verdict may not be demanded as a matter of right.[57] Where the statute gives the court merely the power to advise, but not to direct a verdict,

[53] **Federal.** Wilson v. United States, 77 F2d 236.

Alabama. Thompson v. State, 122 Ala 12, 26 S 141; Coker v. State, 147 Ala 701, 41 S 303; Smith v. State, 165 Ala 50, 51 S 610; Davis v. State, 165 Ala 93, 51 S 239; Black v. State, 1 AlaApp 168, 55 S 948; James v. State, 25 AlaApp 335, 146 S 424.

Kentucky. Commonwealth v. Boaz, 140 Ky 715, 31 SW 782; Riley v. Commonwealth, 258 Ky 725, 81 SW2d 582; Frost v. Commonwealth, 259 Ky 689, 83 SW2d 23; Ferrell v. Commonwealth (Ky), 127 SW 162.

Michigan. People v. Henssler, 48 Mich 49, 11 NW 804.

Mississippi. Justice v. State, 170 Miss 96, 154 S 265.

Missouri. State v. Sharp, 233 Mo 269, 135 SW 488.

Montana. State v. Koch, 33 Mont 490, 85 P 272, 8 AnnCas 804.

New Jersey. State v. Cammarata, 114 NJL 274, 176 Atl 323, affg. 12 NJMisc 115, 169 A 646.

Ohio. State v. Axe, 118 OhSt 514, 161 NE 536.

Oklahoma. Faggard v. State, 3 OklCr 159, 104 P 930.

South Dakota. State v. Egland, 23 SD 323, 121 NW 798, 139 AmSt 1066.

Texas. Diaz v. State (TexCr), 53 SW 632.

[54] Tinsley v. Commonwealth, 222 Ky 120, 300 SW 368.

[55] State v. May, 153 NC 600, 68 SE 1062; Commonwealth v. Popp, 87 PaSuper 193.

[56] **Federal.** Hodge v. United States, 13 F2d 596 (stating the rule that in considering a motion to direct, the evidence must be construed most favorably to the prosecution); Dowdy v. United States, 46 F2d 417.

Kentucky. Cummings v. Commonwealth, 221 Ky 301, 298 SW 943.

North Carolina. State v. Sigmon, 190 NC 684, 130 SE 854.

South Carolina. State v. Rayfield, (SC), 101 SE2d 505.

Vermont. State v. Gignac, 119 Vt 471, 129 A2d 499.

[57] **Connecticut.** State v. Boucher, 119 Conn 436, 177 A 383.

Florida. Menefee v. State, 59 Fla 316, 51 S 555; Ryan v. State, 60 Fla 25, 53 S 448; Hughes v. State, 61 Fla 32, 55 S 463.

Georgia. Harvey v. State, 8 Ga App 660, 70 SE 141.

Idaho. State v. Cacavas (Id), 44 P2d 1110.

Maine. State v. Shortwell, 126 Me 484, 139 A 677.

New Jersey. State v. Brown, 72 NJL 354, 60 A 1117; State v. Lieberman, 80 NJL 506, 79 A 331; State v. Rose (NJ), 136 A 295.

Oregon. State v. Harvey, 117 Or 466, 242 P 440.

But see Tippie v. State, 1 OhApp 13, 15 OhCirCt (N. S.) 522, 24 Oh CirDec 203; State v. Tippie, 89 OhSt 35, 105 NE 75.

See also Bowers, The Judicial Discretion of Trial Courts, § 335, and cases there cited, where it is doubted

the accused is not prejudiced by the refusal to advise a verdict of acquittal.[58]

In the great majority of states, a verdict of guilty cannot be directed.[59] A few states do permit such a directed verdict. Apparently, a directed verdict of guilty is permitted in Michigan. But a verdict of guilty should not be directed unless the facts are undisputed or admitted.[60] This also seems to be the test in Massachusetts: only where there is no issue of fact for the jury because of an agreement of all the facts material to the proof of the crime charged can a judge properly direct a verdict of guilty.[61] The granting of a motion for a directed verdict of guilty is sometimes limited to particular crimes: it is permissible in a misdemeanor case when the proof of guilt is undisputed and the punishment is by fine only.[62]

whether in such cases the trial court has any discretion, in the sense in which discretion is understood in legal parlance.

[58] **California.** People v. Stoll, 143 Cal 689, 77 P 818; People v. Hatfield, 129 CalApp 162, 18 P2d 366.

The opening statement is not evidence within the provision of the California Penal Code that "at any time after the evidence on either side is closed," the court may advise the jury to acquit. People v. Stoll, 143 Cal 689, 77 P 818.

Maryland. Klein v. State, 151 Md 484, 135 A 591.

North Dakota. State v. Gammons, 64 ND 702, 256 NW 163; State v. Schell, 65 ND 126, 256 NW 416.

Oklahoma. Davis v. State, 32 Okl Cr 436, 241 P 500.

South Dakota. State v. Stone, 30 SD 23, 137 NW 606.

[59] **Federal.** Cain v. United States, 19 F2d 472.

It amounts to a direction of a verdict of guilty for the court to tell the jury that they must convict the accused if they believe the testimony for the government, and a conviction will be set aside. Dinger v. United States, 28 F2d 548.

Alabama. Grimmett v. State (Ala App), 152 S 262.

Arizona. Pruitt v. State, 37 Ariz 400, 294 P 629.

Kansas. State v. Wilson, 62 Kan 621, 64 P 23, 52 LRA 679.

Michigan. People v. Warren, 122 Mich 504, 81 NW 360, 80 AmSt 582.

New York. People v. Walker, 198 NY 329, 91 NE 806.

North Carolina. Everett v. Williams, 152 NC 117, 67 SE 265.

Pennsylvania. Commonwealth v. Bloom, 88 PaSuper 93.

Texas. Potts v. State, 45 TexCr 45, 74 SW 31, 2 AnnCas 827; Castoria v. State, 119 TexCr 193, 47 SW2d 325; Lopez v. State (TexCr), 79 SW2d 1095.

Washington. State v. Christiansen, 161 Wash 530, 297 P 151.

Wisconsin. Where the facts are undisputed, the court may instruct that the jury have the power to acquit the defendant but in case they do so they will disregard the facts and the law applicable to the case. Schmidt v. State, 159 Wis 15, 149 NW 388, AnnCas 1916E, 107.

But see Boyle v. State, 229 Ala 212, 154 S 575; Martin v. State, 3 AlaApp 90, 58 S 83; Brasher v. State, 21 AlaApp 360, 108 S 266; People v. Neal, 143 Mich 271, 106 NW 857.

[60] People v. Anschutz, 335 Mich 375, 56 NW2d 224.

[61] Commonwealth v. Moniz, — Mass —, 143 NE2d 196.

[62] Taylor v. Pine Bluff, 226 Ark 309, 289 SW2d 679.

In a criminal prosecution the issue as to former jeopardy is triable by jury, and the judge may direct a verdict for the defendant or the prosecution, as in the trial of a civil case, as to this issue, since the decision on this issue is not a determination of the guilt or innocence of the defendant.[63]

§ 18. Direction of verdict where there is scintilla of evidence.

The scintilla rule as known in the law of evidence and trial practice means the requirement that the trial judge shall submit the case to the decision of the jury as a matter of fact whenever there is any evidence, however slight, which tends to support any material issue.

The precedents are not in harmony in their views upon the scintilla rule. Some courts may have their own pet definition of the scintilla rule, so that superficially, they are classified as following the scintilla rule. However, upon examination of their definition of the rule, they cannot be classified as following the rule herein described, that is, when there is any evidence, *however*

[63] **United States.** Durland v. United States, 161 US 306, 40 LEd 709, 16 SupCt 508.

Alabama. Evans v. State, 24 Ala App 390, 135 S 647.

Where material evidence is conflicting, the issue as to former jeopardy should be submitted to the jury. Blevins v. State, 20 AlaApp 229, 101 S 478.

Arizona. State v. Phillips, 27 Ariz 349, 233 P 586.

California. People v. Wilkison, 30 CalApp 473, 158 P 1067; People v. Conson, 72 CalApp 509, 237 P 799; People v. Brain, 75 CalApp 109, 241 P 913; People v. Kelley, 132 CalApp 118, 22 P2d 526; People v. Frank, 134 CalApp 211, 25 P2d 486.

Georgia. Bailey v. State, 26 Ga 579; Daniels v. State, 78 Ga 98, 6 AmSt 238.

Idaho. State v. Crawford, 32 Idaho 165, 179 P 511; State v. Douglass, 35 Idaho 140, 208 P 236.

Indiana. Farley v. State, 57 Ind 331; Walter v. State, 105 Ind 589, 5 NE 735.

Iowa. State v. Folger, 204 Ia 1296, 210 NW 580.

Kentucky. Lemon v. Commonwealth, 171 Ky 822, 188 SW 858.

Minnesota. State v. Eaton, 180 Minn 439, 231 NW 6.

Mississippi. Brown v. State, 72 Miss 95, 16 S 202.

Missouri. State v. Toombs, 326 Mo 981, 34 SW2d 61.

New Jersey. State v. Turco, 99 NJL 96, 122 A 844; State v. Cosgrove, 102 NJL 255, 132 A 231.

New Mexico. Territory v. West, 14 NM 546, 99 P 343.

New York. People v. Richards, 44 Hun (NY) 278, 5 NYCr 355, revd. on other grounds in 108 NY 137, 15 NE 371, 2 AmSt 373.

North Dakota. State v. Bronkol, 5 ND 507, 67 NW 680; State v. Panchuk, 53 ND 669, 207 NW 991.

Oklahoma. Jeter v. Dist. Court, 87 Okl 3, 206 P 831.

South Carolina. State v. Bilton, 156 SC 324, 153 SE 269.

Tennessee. Jacobs v. State, 4 Lea (72 Tenn) 196.

Texas. Dunn v. State, 92 TexCr 126, 242 SW 1049; Yantis v. State, 95 TexCr 541, 255 SW 180; Van Hatten v. State, 97 TexCr 123, 260 SW 581; Cloninger v. State, 101 TexCr 1, 274 SW 596; Gentry v. State, 105 TexCr 629, 290 SW 543.

Utah. State v. Thompson, 58 Utah 291, 199 P 161, 38 ALR 697.

slight, which tends to support the issues in a case, a motion for directed verdict should not be granted. For example, Iowa, which has disowned the rule as just stated,[64] continues to call the rule it follows the scintilla rule. But the rule there applied is whether a judge would be required to set aside the verdict as against the weight of the evidence.[65]

Another example is South Carolina. Although the Supreme Court of South Carolina explicitly states that the scintilla rule prevails in South Carolina, it is probably more accurate to classify that state as following the substantial evidence rule. The courts there state that the evidence must be real, material, pertinent, and relevant, and not merely speculative and theoretical deductions.[66] This conclusion regarding the rule in South Carolina is further supported by a recent announcement of the South Carolina Supreme Court: "Under the scintilla rule which prevails in South Carolina, if there is a scintilla of evidence, which is any material evidence that, if true, would tend to establish the issue in the mind of a reasonable juror, the case should be submitted to the jury for its determination."[67]

In Illinois, there appears to be hopeless confusion. Some of the Courts of Appeals will state the rule in its classical form, that is, "any evidence, however slight."[68] Yet other Courts of Appeals in the same state will deny the application of the scintilla rule in Illinois.[69]

The scintilla rule has been applied in Alabama,[70] Kentucky,[71] and Missouri.[72] On the other hand, the rule has been denounced in New York,[73] New Jersey,[74] Texas,[75] North Carolina,[76] and

[64] Vande Stouwe v. Bankers Life Co., 218 Ia 1182, 254 NW 790; Wion v. Hayes, 220 Ia 156, 261 NW 531.

[65] Potter v. Robinson, 233 Ia 479, 9 NW2d 457.

[66] Turner v. American Motorists Ins. Co., 176 SC 260, 180 SE 55.

[67] Scott v. Meek, 230 SC 310, 95 SE2d 619.

[68] Marchetti v. Lumachi Coal Co., 13 IllApp2d 526, 142 NE2d 815; Edsall v. Creek, 13 IllApp2d 571, 142 NE2d 717.

[69] Martin v. Sterling Casualty Ins. Co., 277 IllApp 258; Robson v. Penn. R. Co., 337 IllApp 557, 86 NE2d 403. See, also, Piggott v. Newman, 338 IllApp 198, 86 NE2d 670, and Hyde v. Saunders, 338 Ill App 205, 86 NE2d 843.

[70] Commonwealth Life Ins. Co. v. Clark, 25 AlaApp 588, 151 S 604; Great Atlantic & Pacific Tea Co. v. Smalley, 26 AlaApp 176, 156 S 639; United Ben. Life Ins. Co. v. Dopson, 26 AlaApp 452, 162 S 545.

[71] Aetna Life Ins. Co. v. Daniel, 251 Ky 760, 65 SW2d 1025; Dolle v. Melrose Properties, 252 Ky 482, 67 SW2d 706; Kentucky Utilities Co. v. Wiggins, 254 Ky 629, 72 SW2d 12.

[72] Hardin v. Illinois Cent. R. Co., 334 Mo 1169, 70 SW2d 1075. See Williams v. St. Louis-San Francisco R. Co., 337 Mo 664, 85 SW2d 624.

[73] Bank of United States v. Manheim, 264 NY 45, 189 NE 776.

[74] Schmid v. Haines, 115 NJL 271, 178 A 801.

[75] Wichita Royalty Co. v. City Nat. Bank (TexCivApp), 74 SW2d 661.

[76] Jones v. Bagwell, 207 NC 378, 177 SE 170.

Arizona.[77] In the federal courts, it is frequently stated directly that the scintilla rule does not obtain in these courts.[78] The rule was formerly applied in Ohio, but it has now been expressly abandoned in that jurisdiction.[79]

In criminal cases, the same contrariety of views is evident among the courts, although there is observable an inclination in some of them to vary their conclusions in individual cases where prosecutions for crime are before them.[80]

§ 19. Summing up evidence by court.

In most jurisdictions, it is within the province of the court to sum up the evidence adduced upon the trial, so that the jury may see the application of rules of law thereto.

The purpose of summarizing the evidence is to enlighten the jury as to the issues and to enable them better to comprehend the principles of law in their concrete application to the facts.[81] But the courts disagree on the extent of the power possessed by trial judges to sum up the evidence. In some states, it is within the discretion of the judge as to how far he will go, this discretion being subject to review only if it has been abused.[82] The judge may exercise discretion by stating all or a part of the facts,[83] or he may inform the jury that any or all

[77] Casey v. Beaudry Motor Co., 83 Ariz 6, 315 P2d 662.

[78] Jones v. Travelers Protective Assn., 70 F2d 74; Gill v. Fidelity-Phenix Ins. Co., 5 FSupp 1 (district of Kentucky). In Evans v. United States, 6 FSupp 107 (district of Idaho), however, the scintilla rule was adopted.

[79] Hamden Lodge No. 517, I.O.O. F. v. Ohio Fuel Gas Co., 127 OhSt 469, 189 NE 246.

[80] **Federal.** West v. United States, 68 F2d 96; Nicola v. United States, 72 F2d 780.

Alabama. Grimmett v. State, 26 AlaApp 56, 152 S 262.

Kentucky. Murphy v. Commonwealth, 255 Ky 676, 75 SW2d 341.

New Jersey. State v. Cammarata, 12 NJMisc 115, 169 A 646.

[81] **Federal.** Bu-Vi-Bar Petroleum Corp. v. Krow, 47 F2d 1065.

California. Bruce v. Western Pipe & Steel Co., 177 Cal 25, 169 P 660.

Massachusetts. Moseley v. Washburn, 167 Mass 345, 45 NE 753.

New Hampshire. Dimock v. Lussier, 86 NH 54, 163 A 500.

New Jersey. Silverstein v. Schneider, 110 NJL 239, 164 A 480.

Ohio. Hulse v. State, 35 OhSt 421; Morgan v. State, 48 OhSt 371, 27 NE 710; Fugman v. Trostler, 24 Oh CirCt (N. S.) 521, 34 OhCirDec 746; Kenney v. Schmidt, 13 (OLA) 582.

Pennsylvania. Katzenberg v. Oberndorf, 70 PaSuper 567.

[82] Commonwealth v. Polian (Mass), 193 NE 68, 96 ALR 615; Schiavo v. Cozzolino, 134 Conn 388, 57 A2d 723.

[83] **Federal.** Order of United Commercial Travelers v. Nicholson, 9 F2d 7; Russell v. United States, 12 F2d 683; Davis v. United States, 78 F2d 501.

Georgia. It is not required that the judge state every material fact. Lazenby v. Citizens Bank, 20 GaApp 53, 92 SE 391.

Massachusetts. Shaw v. Tompson, 105 Mass 345; Neelon v. Hirsch & Renner, 255 Mass 285, 151 NE 302.

of the facts so summarized, if believed by the jury, are to be weighed in conjunction with other facts in evidence.[84] So, under a California code provision which makes it incumbent upon the court, whenever the testimony is reviewed, to inform the jury that they are the sole judges of the facts, the court, after stating the evidence, may tell the jury that they may find for the defendant if they "are satisfied this testimony is true" or may award such damages as they may think proper if they do not believe such evidence.[85] Under an Alabama code provision which gives the court authority to "state the evidence when the same is disputed," it is permissible for the court to say what the testimony of a certain witness was, where there is doubt as to what it was.[86] In another state, the court may state that a particular fact was testified to by all the witnesses where that is true.[87]

In some jurisdictions, the judge's power to sum up the evidence is prohibited or restricted. In Georgia, it is not within the province of the trial court to sum up the evidence, that task belonging to the jury.[88] It is provided by statute in South Carolina that the "judge shall not charge juries in respect to matters of fact"; in such case, the court should state the disputed facts purely in a hypothetical manner.[89] Even where the presentation of facts to the jury is forbidden by the laws of a state, as in Oregon, the court may direct the jurors to the theories of the parties by instructing that there is evidence tending to show certain features of the case.[90] In Oklahoma, if the judge states

Ohio. If the judge sums up the evidence he must do it fairly and present all material evidence of both sides. Morgan v. State, 48 OhSt 371, 27 NE 710.

[84] District of Columbia v. Robinson, 180 US 92, 45 LEd 440, 21 SupCt 283. See also O'Neill v. Blase, 94 MoApp 648, 68 SW 764.

[85] Gately v. Campbell, 124 Cal 520, 57 P 567.

[86] Folmar v. Siler, 132 Ala 297, 31 S 719; Glover v. State, 21 AlaApp 423, 109 S 125.

[87] Jordan v. Boston & M. R. R., 80 NH 105, 113 A 390.

[88] Griffin v. State, 34 GaApp 526, 130 SE 368.

[89] Bradley v. Drayton, 48 SC 234, 26 SE 613.

And so it is within the prohibition of the constitution of the state of Washington (Const., art. 4, § 16) to charge that the memoranda made by the presiding judge showed that a certain witness testified as to certain facts and that the court did not remember whether the witness gave testimony as to a certain other fact, and this is true notwithstanding that the jury asked for the instruction and the court informed the jury that it was their duty to remember the evidence. State v. Hyde, 20 Wash 234, 55 P 49.

In its instructions, the court should adopt a hypothetical statement of controverted matters of fact in evidence. Nicolle v. United Auto Transp. Co., 138 Wash 48, 244 P 127.

[90] Smitson v. Southern Pacific Co., 37 Or 74, 60 P 907.

the testimony, he must admonish the jury that they are the exclusive judges of all questions of fact.[91]

In a criminal case in the federal courts, if the court reviews the evidence to aid the jury, the statement must not be confined to the facts on one side only.[92]

§ 20. Inferences of fact from the evidence.

The judge ordinarily does not have the authority to instruct the jury as to what specific inferences of fact may be drawn by the jury from the evidence.

Here is another difficult area of the law because of non-conformity of nomenclature and application. If anything is well-settled in the usage of the terms "inference" and "presumptions," it is that there is no settled usage. What one court calls "a presumption," another calls "an inference;" and, often enough, the same court may use the terms interchangeably. Common to both terms is that they relate to the proof in support of issues of fact. Also common to both is that they cause the issue of fact at least to go to the jury.

Broadly, an inference is the relationship between two facts, that is, one fact exists because another fact exists. A presumption, by the better view, is a kind of inference, so that all presumptions are inferences, but not all inferences are presumptions. The difference is that in a presumption, the jury *must* accept the inference if the basic fact has been established and there is no contrary evidence as to the fact inferred. Some presumptions are irrebuttable, so that no contrary evidence is permitted. In all other inferences, the jury *may or may not* accept the inference, the judge determining upon proper request (for example, requested peremptory instruction on the particular issue) whether such an inference is reasonable or not. The judge may decide that the inference is not justified.[93] Even in this kind of inference, it may happen that the inference is so strong, that

[91] Gaddy v. State, 57 OklCr 171, 46 P2d 380 (applying Stat. 1931, § 3062).

[92] Cline v. United States, 20 F2d 494.

[93] **Alabama.** Alabama Great Southern R. Co. v. Demoville, 167 Ala 292, 52 S 406.

Colorado. It is improper to instruct the jury that they may consider not only all the evidence and all the circumstances surrounding the question in dispute, but may also find any fact established which they may think rightfully and reasonably inferable from the evidence. The inference must be one which grows logically out of the facts and be a legitimate inference under the pinciples pertaining to the introduction of testimony. Henry v. Colorado Land & Water Co., 10 ColoApp 14, 51 P 90.

Illinois. Lepman v. Employers Liability Assur. Corp., Ltd., 170 Ill App 379.

the judge will instruct that the fact inferred does exist.[94] It may be said that when this happens, the inference closely resembles a presumption.

Which inferences are presumptions and which are not is part of the established rules within each jurisdiction. This section refers only to those inferences which are not presumptions. So far as these inferences are concerned, the rule is that ordinarily, a trial judge does not have the power to instruct the jury as to what inferences of fact may be drawn.[95] However, the court may instruct generally that the jury may draw reasonable and natural inferences from facts proved to its satisfaction.[96]

[94] In re Rumsey Mfg. Corp., 296 NY 113, 71 NE2d 426.

[95] **Alabama.** Burns v. State, 229 Ala 68, 155 S 561.

Arkansas. Smith v. Jackson, 133 Ark 334, 202 SW 227; Ft. Smith Light & Trac. Co. v. Phillips, 136 Ark 310, 206 SW 453 (no presumption of due care by servants).

California. People v. Walden, 51 Cal 588; Linforth v. San Francisco Gas & Elec. Co., 156 Cal 58, 103 P 320, 19 AnnCas 1230; Hackelberry v. Sherlock Land & Cattle Co., 39 CalApp 764, 180 P 37.

Colorado. Wolfe v. People, 90 Colo 102, 6 P2d 927.

Florida. Southern Pine Co. v. Powell, 48 Fla 154, 37 S 570.

Georgia. Standard Cotton Mills v. Cheatham, 125 Ga 649, 54 SE 650.

Illinois. Wood v. Olson, 117 Ill App 128.

Indiana. Louisville, N. A. & C. R. Co. v. Falvey, 104 Ind 409, 3 NE 389, 4 NE 908; Schillinger v. Savage, 186 Ind 189, 115 NE 321; Metropolitan Life Ins. Co. v. Glissman, 224 Ind 641, 70 NE2d 24.

Iowa. Warfield v. Clark, 118 Ia 69, 91 NW 833.

Since the jury have the right to draw inferences from the evidence or the lack of evidence, the court has no right to give an instruction that limits them to a consideration of the evidence before them. State v. Patrick, 201 Ia 368, 207 NW 393.

Kansas. Misner v. Hawthorne, 168 Kan 279, 212 P2d 336.

Maryland. Coffin v. Brown, 94 Md 190, 50 A 567, 55 LRA 732, 89 AmSt 422; Baltimore Transit Co. v. Swindell, 132 Md 274, 103 A 566.

Michigan. Blackwood v. Brown, 32 Mich 104.

Where there is evidence of accused's flight, any inference of guilt therefrom is to be drawn by the jury. People v. Cipriano, 238 Mich 332, 213 NW 104.

Minnesota. Carson v. Turrish, 140 Minn 445, 168 NW 349 (due care by guests of operator of automobile).

New Jersey. State v. Headley, 113 NJL 335, 174 A 572.

New York. Weil v. Glove Indem. Co., 179 AppDiv 166, 166 NYS 225.

Ohio. Fastbinder v. State, 42 Oh St 341; Doe v. State, 14 OhApp 178; Zimmerman v. State, 42 OhApp 407, 182 NE 354, 12 OLA 140; Harrison Co. v. Blacker, 15 OhNP (N.S.) 377. But see Petticrew Real Estate Co. v. Wonderheide, 16 OLA 481.

Oregon. De War v. First Nat. Bank, 88 Or 541, 171 P 1106.

South Carolina. Izlar v. Manchester & A. R. Co., 57 SC 332, 35 SE 583.

Utah. Schuyler v. Southern Pacific Co., 37 Utah 581, 109 P 458.

Wisconsin. Hawkins v. Costigan, 21 Wis 545.

[96] **Indiana.** Vandalia Coal Co. v. Moore, 69 IndApp 311, 121 NE 685.

Missouri. Burtch v. Wabash R. Co. (Mo), 236 SW 338.

Nebraska. Hornby v. State Life Ins. Co., 106 Neb 575, 184 NW 84, 18 ALR 106.

The court may not indicate a specific inference of fact, however potent it may be in determining the question at issue.[97] Under this rule the court exceeds its privileges where it attempts to instruct, as a matter of law, that the existence of one fact depends upon the existence of another,[98] or to charge that the presumption of law is that an employee, at the time he accepted employment as a brusher, was a competent person to fill such position.[99] It is likewise an invasion of the province of the jury for the court to tell the jury the meaning and construction to be placed on oral language used by the parties in negotiating an alleged contract.[1] It is the jury's right, in an action for a wrongful death, to determine the question of contributory negligence, as this is a matter to be inferred from the evidence.[2]

It is not for the court to say that if they believe the testimony of any witness as to certain facts, then they should make certain findings, for the jury may believe the witness and yet, quite properly, be governed in their action by the inferences to be drawn from the entire proof. The jury should be left free to

[97] **Alabama.** Rungan v. State, 25 AlaApp 287, 145 S 171.

California. People v. Carrillo, 54 Cal 63.

Illinois. Herkelrath v. Stookey, 63 Ill 486.

Indiana. Union Mut. Life Ins. Co. v. Buchanan, 100 Ind 63.

Iowa. State v. Huckins (Ia), 247 NW 480.

Texas. McGhee Irr. Ditch Co. v. Hudson, 85 Tex 587, 22 SW 398; Mitchell v. Stanton (TexCivApp), 139 SW 1033.

It is never proper for the court to instruct the jury as to presumptions arising from certain facts, except where the presumption is one of law and therefore conclusive, or one of fact required by positive law, but rebuttable. White v. McCullough, 56 TexCivApp 383, 120 SW 1093.

[98] **California.** People v. Walden, 51 Cal 588.

Georgia. It is an invasion of the jury's province, in an action for personal injuries, to charge that, with reference to one of the material facts to be considered by the jury in determining whether plaintiff himself was guilty of negligence, "he would have the right to presume that the belt, once shifted from the tight to the loose pulley, and the machine thereby stopped, would remain stopped until again started." The court, in so instructing, in effect disposed of a material question of fact for the jury. Standard Cotton Mills v. Cheatham, 125 Ga 649, 54 SE 650.

Oregon. It is proper for the court to tell the jury that there must be some fact legally proved as a basis for an inference, and that it cannot be based on another inference. Oregon Box & Mfg. Co. v. Jones Lbr. Co., 117 Or 411, 244 P 313.

[99] Alverson v. Little Cahaba Coal Co., 201 Ala 123, 77 S 547.

[1] Hawkins v. Costigan, 21 Wis 545.

[2] Althage v. Peoples Motorbus Co., 320 Mo 598, 8 SW2d 924 (holding it error for the court to refuse to submit the question of contributory negligence to the jury in an automobile accident case, and to instruct the jury that plaintiff could not recover if the deceased had run in front of defendant's bus without looking or listening); Pulsifer v. Albany, 226 MoApp 529, 47 SW2d 233; Perez v. San Antonio & A. P. R. Co., 28 TexCivApp 255, 67 SW 137.

find the ultimate facts, as it is their duty to do.[3] It cannot be said, however, that an instruction drew a conclusion from the evidence where, on the question of negligence in a personal injury action, the jury were told that "the plaintiff, as a passenger, was not required by law to exercise extraordinary care or manifest the highest degree of prudence to avoid injury" and that "all the law required of him, while traveling as a passenger, was that he should exercise ordinary care and prudence for his safety, such as ordinarily careful persons would exercise under the same circumstances as those shown in evidence."[4] Neither is an inference drawn by an instruction which tells the jury that "if you find that the plaintiff was guilty of any negligence in going upon said platform or in getting off of said train, and that such negligence, if any, either caused or contributed to his said injury, if any, then your verdict must be for defendant."[5]

An instruction in a criminal case invades the province of the jury where it in effect authorizes a conviction for larceny on the unexplained recent possession alone.[6] In a prosecution of a wife for the murder of her husband, it was held proper to refuse a requested instruction that it is presumed that the wife loved her husband.[7] An instruction is invasive which tells the jury that a man is presumed to intend that which he does, and if accused, with a deadly weapon on slight provocation, gave decedent a mortal blow, he is prima facie guilty of wilful killing and has the burden of showing extenuating circumstances, and is guilty of murder in the first degree.[8] But it is proper to instruct that if a person takes the life of another by an act intentionally done, naturally calculated to produce the result, the presumption is that the result was intended.[9]

It has been stated, and disputed by others, that an inference of fact cannot be predicated upon another inference, but must be based upon a fact supported by the evidence.[10]

[3] **Arkansas.** Garrett v. State, 171 Ark 297, 284 SW 734.

Georgia. Tanner v. State, 163 Ga 121, 135 SE 917.

Illinois. Chicago Union Trac. Co. v. Shedd, 110 IllApp 400.

Iowa. State v. Huckins, 212 Ia 283, 234 NW 554.

[4] West Chicago Street R. Co. v. McNulty, 166 Ill 203, 46 NE 784.

[5] Williams v. Galveston, H. & S. A. R. Co., 34 TexCivApp 145, 78 SW 45.

[6] **Arkansas.** Crosby v. State, 169 Ark 1058, 277 SW 523.

Minnesota. State v. Hoshaw, 89 Minn 307, 94 NW 873.

Ohio. Petticrew Real Estate Co. v. Wonderheide, 16 OLA 481.

Texas. Stewart v. State (TexCr), 77 SW 791.

Instruction that possession of stolen property is not of itself sufficient to authorize a conviction is invasive. May v. State, 40 TexCr 196, 49 SW 402.

[7] People v. Madison (Cal), 46 P2d 159.

[8] State v. Hertzog, 55 WVa 74, 46 SE 792.

[9] Cupps v. State, 120 Wis 504, 97 NW 210, 98 NW 546, 102 AmSt 996.

[10] Simon v. United States, 78 F2d 454; Hoppe v. Industrial Comm., 137

In Ohio and most other states, the rule of res ipsa loquitur is not a rule of substantive law but is a rule of evidence which permits the jury, but not the court in a jury trial, to draw an inference of negligence where the instrumentality causing the injury was under the exclusive management and control of the defendant and the accident occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed. The trial court, in a jury trial, in a case which calls for the application of the rule of res ipsa loquitur, is without authority to declare, as a matter of law, that the inference of negligence which the jury is permitted to draw, has been rebutted or destroyed by an explanation of the circumstances offered by the defendant, and such action on the part of the trial court is an invasion of the province of the jury. Where the allegations in a petition and the evidence offered in support thereof call for the application of the rule of res ipsa loquitur, and the defendant has offered evidence tending to meet and explain the circumstances, it is the duty of the court, when requested so to do, to submit the question to the jury under proper instructions. The weight of the inference of negligence which the jury is permitted to draw in such a case, as well as the weight of the explanation offered to meet such inference, is for the determination of the jury.[11]

§ 21. Hypothetical statement of facts.

There is an invasion of the province of the jury where the judge: (1) states an uncontroverted fact hypothetically; or (2) asserts a controverted fact instead of stating it hypothetically; or (3) fails to hypothetically state all the essential facts necessary to be found as a basis for the indicated verdict.

Hypothetical instructions, or formula instructions, are frowned upon by some courts. The general form of these instructions is to state hypothetically, that is, "if you so find," all the essential facts required for a party to win a verdict, concluding with, "then you must find for the party." This is not an instruction directing a verdict, since the jury still decides the issues of fact. Obviously, these instructions may become involved and confusing. Certain rules limit their use.

(1) A requested instruction is properly refused where it puts to the jury as hypothetical an uncontroverted fact.[12]

OhSt 367, 30 NE2d 703; Sobolovitz v. Lubric Oil Co., 107 OhSt 204, 140 NE 634.

[11] Fink v. New York Cent. R. Co., 144 OhSt 1, 56 NE2d 456.

[12] Houston & T. C. R. Co. v. Harvin, (TexCivApp), 54 SW 629.

Where there is no conflict in the evidence the court may charge the jury upon the facts directly without setting them out hypothetically. Bynon v. State, 117 Ala 80, 23 S 640, 67 AmSt 163.

(2) Where the testimony is of an indeterminate character and such as to require inferences of fact, a charge in the form of a statement of fact rather than in the form of an hypothesis infringes upon the province of the jury.[13]

There is an obvious violation of the rule where the instruction contains a hypothesis which is opposed to all the testimony.[14] The court, however, does not overstep its authority in giving an instruction, in the form of a hypothetical statement of fact, where the instruction does not assume as undisputed the truth of the facts upon which it is founded and where there is sufficient evidence to justify the submission of the question to the jury,[15] or where there is an alternative statement of the evidence.[16] And, while the court should not charge hypothetically upon a state of facts directly opposed to all the proof, yet where there is contradictory evidence as to the existence of a fact, the court may hypothetically state the fact as existing and predicate his charge upon it.[17]

The rules do not forbid the use of figures by the way of illustration in directing the jury how to estimate the present value of the loss of future earnings where they are plainly told that the figures are used merely by way of illustration and not with the intention of indicating what the verdict should be.[18] In giving hypothetical instructions the court should caution the jury that they are not to assume the existence or nonexistence of any of the facts recited.[19] If the court charge is predicated upon the assumption of a fact unsupported by evidence, it will be error which should be corrected.[20] If the charge is unobjectionable in the abstract, yet contains a statement that the rule applies to the facts of the case, being based upon an assumption of the existence of controverted facts, the court may properly eliminate that portion asserting the applicability of the proposition to the facts of the case.[21]

[13] Westbrook v. Fulton, 79 Ala 510.

[14] Wise v. Wabash R. Co., 135 MoApp 230, 115 SW 452.

[15] **Federal.** United States v. Oppenheim, 228 F 220.

Minnesota. Chandler v. DeGraff, 25 Minn 88.

Ohio. Lexington Fire, Life & Marine Ins. Co. v. Paver, 16 Oh 324; Sackett v. Kellar, 22 OhSt 554; Cleveland, C. & C. R. Co. v. Crawford, 24 OhSt 631, 15 AmRep 633; Gage v. Payne, Wright (Oh) 678.

[16] Watson v. Musick, 2 Mo 29.

[17] Carlisle v. Hill, 16 Ala 398.

[18] Reed v. American Dyewood Co., 231, Pa 431, 80 A 873.

[19] People v. Chadwick, 143 Cal 116, 76 P 884; Sackett v. Kellar, 22 OhSt 554.

[20] State v. Collins, 30 NC 407.

[21] **Illinois.** Lord v. Board of Trade, 163 Ill 45, 45 NE 205.

In criminal cases it is proper to state hypothetically the facts to which a certain rule of law is to be applied if the facts are proved by the evidence beyond a reasonable doubt. Kyle v. People, 215 Ill 250, 74 NE 146.

(3) If an instruction authorizes the rendition of verdict on an affirmative finding of hypothesized facts, the hypothetical statement must be of a complete case.[22]

§ 22. Disparaging comments on merits of case.

The judge invades the province of the jury when he makes disparaging comments on the merits of the case as made by either of the parties.

Where the evidence is conflicting and it is possible for different inferences to be deducted from the testimony, it is error to confine the jury to one view of the case. So where the court charges that "it seems to me the plaintiff has made out a better case here and that your verdict ought to be for him," prejudicial error is committed.[23] Where the principal issue is whether there was an intent to defraud on the part of the defendant, the question being one for the jury, the court commits prejudicial error in charging that "I think it is a very thin case and I hesitate in submitting the case to you."[24] So, in an action for personal injuries sustained by reason of a defective bridge, a comment by the court that "it is useless to talk about that being old and rotten along there, or anything of the kind" and that "any verdict that the jury would find that is contrary to what I know to be the fact from my own personal

South Carolina. Battle v. DeVane, 140 SC 305, 138 SE 821.

The use of a hypothetical case to illustrate a charge upon the law is not open to the objection that it charges in respect to matters of fact. State v. Aughtry, 49 SC 285, 26 SE 619, 27 SE 199.

Virginia. Barton v. Camden, 147 Va 263, 137 SE 465.

[22] **Arkansas.** Temple Cotton Oil Co. v. Skinner, 176 Ark 17, 2 SW2d 676.

California. An instruction which omits to bring out clearly the element of contributory negligence may be harmless when not misleading. Ward v. Read, 219 Cal 65, 25 P2d 821, superseding 16 P2d 799. Bickford v. Pacific Elec. R. Co., 120 Cal App 542, 8 P2d 186.

Connecticut. Bunnell v. Waterbury Hospital, 103 Conn 520, 131 A 501.

Illinois. Margolies Groc. Co. v. Kopman, 244 IllApp 451.

Indiana. Garner v. Morgan, 92 Maine. Gilman v. F. O. Bailey Carriage Co., Inc., 127 Me 91, 141 A 321.

Missouri. McDonald v. Kansas City Gas Co., 332 Mo 356, 59 SW2d 37; Mott v. Chicago, R. I. & P. R. Co., (MoApp), 79 SW2d 1057.

Ohio. Jenkins v. Little Miami R. Co., 2 Disn. 49, 13 OhDec 31.

Oregon. Riley v. Good, 142 Or 155, 18 P2d 222.

Pennsylvania. Sweeney v. Floyd, 90 PaSuper 14.

Virginia. Levine v. Levine, 144 Va 330, 132 SE 320; Thomas v. Snow, 162 Va 654, 174 SE 837.

West Virginia. Read v. Wiseman, 106 WVa 287, 145 SE 388.

[23] **Arizona.** Globe v. Rabogliatti, 24 Ariz 392, 210 P 685.

Illinois. See People v. Fisher, 295 Ill 250, 129 NE 196.

Pennsylvania. Samuel v. Knight & Co., 9 PaSuper 352.

[24] Sieling v. Clark, 18 Misc 464, 41 NYS 982, 75 NYSt 1360.

knowledge I would not allow to stand for a minute" is a distinct invasion of the jury's province.[25]

The rule is infringed by criticism of doctrines on which a defense is based,[26] or the character of the evidence introduced on an issue.[27] And so, likewise, where in an action on promissory notes, the defense was referred to by the court as "a fraudulent scheme," the charge was held to amount to an improper influence over the jury's action.[28] Where the trial court, in submitting special questions to the jury, said: "I want the jury to understand that these questions are got up to befuddle and mislead the jury so that there will be error in the trial of this case, so that the verdict may be set aside," the remark was prejudicial.[29]

But where the language used in a charge amounted simply to a statement of the contradictory position in which defendant placed himself by his pleading and his evidence, it was held that the defendant was not prejudiced thereby.[30] Nor is it a disparagement to admonish the jury to give close scrutiny to testimony in support of an alibi.[31] So, likewise it is not fatal that the court told the jury in a criminal case that they represented the state without charging that they also represented the defendant.[32] In one of the cases it was held that a charge "If you arrive at the point where damages are assessed," was not open to criticism, as giving the jury to understand it was questionable whether they would ever arrive at that point.[33]

§ 23. Assumption of facts—General rule and illustrations.

The exclusive province of the jury to pass upon the facts is violated by instructions which assume as a fact material matters in dispute not established by the evidence.

A trial judge must not incorporate into his charge assumptions or positive statements as to facts which are in dispute, since this practice may impress his interpretation of the evidence upon the jury.[34] The rule forbids the assumption of disputed

[25] Shafer v. Eau Claire, 105 Wis 239, 81 NW 409.

[26] Bergen Point Iron Works v. Shah, 249 F 466 (assumption of risk).

[27] State v. McLaughlin, 138 La 958, 70 S 925; Twinn v. Noble, 270 Pa 500, 113 A 686.

[28] Alexander v. Bank of Lebanon, 19 TexCivApp 620, 47 SW 840.

[29] Cone v. Citizens Bank, 4 Kan App 470, 46 P 414.

[30] McCusker v. Mitchell, 20 RI 13, 36 A 1123. See also O'Rourke v. Blocksom, 69 PaSuper 93.

[31] People v. Carson, 49 CalApp 12, 192 P 318.

[32] State v. Johnson, 119 SC 55, 110 SE 460.

[33] Gardner v. Russell, 211 Mich 647, 179 NW 41.

[34] **Federal.** United States v. Ellis, 67 F2d 765; Carpenter v. Connecticut General Life Ins. Co., 68 F2d 69.

Alabama. Birmingham R. & Elec. Co. v. City Stable Co., 119 Ala 615,

24 S 558, 72 AmSt 955; Dorlan v. Westervitch, 140 Ala 283, 37 S 382, 103 AmSt 35; Smith v. Bachus, 201 Ala 534, 78 S 888 (assumption of location of boundary); Bradley v. Powers, 214 Ala 122, 106 S 799; Alabama Oil Co. v. Gibson, 229 Ala 269, 156 S 771.

An instruction that the burden was on defendant to prove that the transferee had knowledge of defenses assumes that he was a purchaser for value. Citizens Nat. Bank v. Buckheit, 14 AlaApp 511, 71 S 82.

Arizona. Mutual Benefit Health & Acc. Assn. v. Neale, 43 Ariz 532, 33 P2d 604.

Arkansas. Taylor v. Martin, 151 Ark 200, 235 SW 411.

California. Rogers v. Manhattan Life Ins. Co., 138 Cal 285, 71 P 348; Jolly v. McCoy, 36 CalApp 479, 172 P 618; Ellis v. McNeese, 109 CalApp 667, 293 P 854.

Colorado. Barrows v. Case, 63 Colo 266, 165 P 779; Alley v. Tovey, 78 Colo 532, 242 P 999.

Delaware. Daniels v. State, 2 Penn (Del) 586, 48 A 196, 54 LRA 286.

Florida. Southern Pine Co. v. Powell, 48 Fla 154, 37 S 570.

Georgia. Crummey v. Bentley, 114 Ga 746, 40 SE 765.

Idaho. Drumheller v. Dayton, 29 Idaho 552, 160 P 944 (assumption of value of property).

Illinois. Illinois Cent. R. Co. v. Anderson, 184 Ill 294, 56 NE 331; Muenter v. Moline Plow Co., 193 IllApp 261; Rasmussen v. Nelson, 217 IllApp 209; Holcomb v. Magee, 217 IllApp 272; Wilson Groc. Co. v. Nat. Surety Co., 218 IllApp 584; Goldstein v. Greenstone, 223 IllApp 511.

An instruction in a will contest is erroneous which assumes that testator's actions were different as to the provisions of the will than they would have been had they not been based on false beliefs instilled into his mind to influence him. Dowdey v. Palmer, 287 Ill 42, 122 NE 102.

Indiana. Carter v. Pomeroy, 30 Ind 438; Cleveland, C., C. & St. L. R. Co. v. Cloud, 61 IndApp 256, 110 NE 81.

Iowa. Hutton v. Doxsee, 116 Ia 13, 89 NW 79; Seevers v. Cleveland Coal Co., 179 Ia 235, 159 NW 194.

Kansas. Wilson v. Fuller, 9 Kan 176; Haines v. Goodlander, 73 Kan 183, 84 P 986.

Kentucky. Security Benefit Assn. v. Payne, 222 Ky 332, 300 SW 861; Henderson County v. Dixon, 23 KyL 1204, 63 SW 756.

Maryland. Bonaparte v. Thayer, 95 Md 548, 52 A 496; Maryland Ice Cream Co. v. Woodburn, 133 Md 295, 105 A 269; Surry Lbr. Co. v. Zissett, 150 Md 494, 133 A 458.

There is no principle better established than that which denies to the court the right of assuming any fact, in aid of a prayer, where the onus of proving such fact rests upon the party asking the instruction, no matter how strong and convincing his proof on the subject may be. Baltimore & O. R. Co. v. State ex rel. Hendricks, 104 Md 76, 64 A 304. See also Provident Trust Co. v. Massey, 146 Md 34, 125 A 821.

Massachusetts. Clough v. Whitcomb, 105 Mass 482; Dunham v. Holmes, 225 Mass 68, 113 NE 845; Bisbee v. McManus, 229 Mass 124, 118 NE 192.

Michigan. Chadwick v. Butler, 28 Mich 349; Rimmele v. Huebner, 190 Mich 247, 157 NW 10.

Minnesota. Burnett v. Great Northern R. Co., 76 Minn 461, 79 NW 523.

Missouri. Quinn v. Van Raalte, 276 Mo 71, 205 SW 59; Henson v. Kansas City, 277 Mo 443, 210 SW 13; Hunt v. St. Louis, 278 Mo 213, 211 SW 673; Orris v. Chicago, R. I. & P. R. Co., 279 Mo 1, 214 SW 124; Boyd v. Kansas City, 291 Mo 622, 237 SW 1001; Connor v. Metropolitan Life Ins. Co., 78 MoApp 131; Aubuchon v. Foster, 202 MoApp 225, 215 SW 781; Laughlin v. Gorman, 209 MoApp 692, 239 SW 548; Land v. Adams (Mo), 229 SW 158; Sooby v. Postal Tel.-Cable Co. (MoApp), 217 SW 877; Weddle v. Tarkio Elec.

facts whether made directly or indirectly,[35] and the error is not, as a general rule, cured by another portion of the charge which submits the issue to the jury.[36] In general, an instruction cannot be construed as an assumption of facts if it begins with the

& Water Co. (MoApp), 230 SW 386; Boyer v. General Oil Products (Mo App), 78 SW2d 450.

Montana. Gallick v. Bordeaux, 31 Mont 328, 78 P 583.

Nebraska. South Omaha v. Wrzesinski, 66 Neb 790, 92 NW 1045; Wiseman v. Carter White Lead Co., 100 Neb 584, 160 NW 985; Van Dorn v. Kimball, 100 Neb 590, 160 NW 953; Beeler v. Supreme Tribe of Ben Hur, 106 Neb 853, 184 NW 917.

New Jersey. Cavanagh v. Ridgefield, 94 NJL 147, 109 A 515.

New York. LeRoy v. Park Fire Ins. Co., 39 NY 56.

North Carolina. Ward v. Odell Mfg. Co., 123 NC 248, 31 SE 495; Perry v. Seaboard Air Line R. Co., 171 NC 158, 88 SE 156, LRA 1916E, 478.

Ohio. Northern Ohio R. Co. v. Rigby, 69 OhSt 184, 68 NE 1046; Toledo R. & Light Co. v. Mayers, 93 OhSt 304, 112 NE 1014; Columbus Mut. Life Ins. Co. v. Nat. Life Ins. Co., 100 OhSt 208, 125 NE 664.

Oklahoma. Archer v. United States, 9 Okl 569, 60 P 268; Peters Branch of International Shoe Co. v. Blake, 74 Okl 97, 176 P 892; Muskogee Elec. Trac. Co. v. Thompson, 100 Okl 169, 228 P 963; Chicago, R. I. & P. R. Co. v. Garrison, 169 Okl 634, 38 P2d 502.

Pennsylvania. Greenfield v. East Harrisburg Passenger R. Co., 178 Pa 194, 35 A 626; Fern v. Pennsylvania R. Co., 250 Pa 487, 95 A 590; Bell v. Jacobs, 261 Pa 204, 104 A 587; Browning v. Rodman, 268 Pa 575, 111 A 877; Dodson Coal Co. v. New Boston Land Co., 276 Pa 452, 119 A 173.

South Dakota. Richardson v. Dybedahl, 17 SD 629, 98 NW 164; Egan v. Dotson, 36 SD 459, 155 NW 783, AnnCas 1917A, 296 (assumption of falsity of publication of alleged libel).

Texas. Clark v. Clark, 21 TexCiv App 371, 51 SW 337; Fidelity & Deposit Co. v. Anderson (TexCiv App), 189 SW 346; Anders v. California State Life Ins. Co. (TexCiv App), 214 SW 497; West Lbr. Co. v. Keen (TexCivApp), 221 SW 625; McCallum v. Houston Elec. Co. (Tex CivApp), 280 SW 342.

Virginia. Mankin v. Aldridge, 127 Va 761, 105 SE 459; Reliance Life Ins. Co. v. Gulley's Admx., 134 Va 468, 114 SE 551.

Washington. Phoenix Assur. Co. v. Columbia & P. S. R. Co., 92 Wash 419, 159 P 369; Larson v. McMillan, 99 Wash 626, 170 P 324.

West Virginia. Williams v. Schehl, 84 WVa 499, 100 SE 280.

Wisconsin. Kuklinski v. Dibelius, 267 Wis 378, 66 NW2d 169.

[35] **California.** People v. Williams, 17 Cal 142.

Illinois. Clark v. Public Service Co., 278 IllApp 426.

Maryland. Baltimore & O. R. Co. v. State ex rel. Hendricks, 104 Md 76, 64 A 304.

Ohio. Columbus Mut. Life Ins. Co. v. Nat. Life Ins. Co., 100 OhSt 208, 125 NE 664.

[36] **Arkansas.** But see Brinkley Car Works & Mfg. Co. v. Cooper, 75 Ark 325, 87 SW 645.

California. Cahoon v. Marshall, 25 Cal 197.

Illinois. Bressler v. Schwertferger, 15 IllApp 294.

Ohio. Alleged error in general charge in assuming that plaintiff was injured was held cured by submitting defendant's written requests embracing practically all issues involved. Clark Restaurant Co. v. Rau, 41 OhApp 23, 179 NE 196, 35 OLR 318.

Utah. Marti v. American Smelting & Ref. Co., 23 Utah 52, 63 P 184.

conditional statement, "If you find and believe from the evidence," or similar expression.[37]

Illustrations of assumptions of facts in various important fields of law follow:

(1) *Contracts.* The rule against the assumption of controverted matters in instructions is violated by instructions which assume the existence of a contract relation where that is a question in dispute on conflicting evidence.[38] If there is a conflict in the evidence as to whether there was ever the relation of attorney and client between the defendant and an attorney suing for fees, it is error to assume in the charge to the jury that such relation existed.[39] The examples are numerous where the court has assumed the existence of the agency relation,[40] the master and servant relation,[41] the passenger and carrier relation,[42] the independent contractor relation,[43] or the shipper and carrier relation.[44]

[37] Killough v. Lee, 4 CalApp2d 309, 40 P2d 897; Pearson v. Kansas City (Mo), 78 SW2d 81.

[38] **California.** See O'Connor v. West Sacramento Co., 189 Cal 7, 207 P 527.

Georgia. Latimer v. Bruce, 151 Ga 305, 106 SE 263; McDonald v. Dabney, 161 Ga 711, 132 SE 547.

Kentucky. Knoxville Tinware & Mfg. Co. v. Howard, 219 Ky 106, 292 SW 762.

Massachusetts. Stebbins v. North Adams Trust Co., 243 Mass 69, 136 NE 880.

Missouri. Gillen v. Bayfield, 329 Mo 681, 46 SW2d 571; Jones Store Co. v. Kelly, 225 MoApp 833, 36 SW2d 681; Bishop & Babcock Co. v. Mack (MoApp), 238 SW 512; McConnon v. Kennon (MoApp), 281 SW 450.

It is not an assumption where court uses expression "if you find." Dodge v. Kirkwood (MoApp), 260 SW 1012.

Montana. Where one of the main issues as made by the pleadings is whether a partnership had any existence in fact, the testimony being conflicting on this point, and whether there was a partnership liability, the court oversteps its bounds in assuming the existence of the partnership. Lawrence v. Westlake, 28 Mont 503, 73 P 119.

Ohio. Ross v. Couden, 22 OhApp 330, 154 NE 527.

Texas. McCallon v. Cohen (Tex CivApp), 39 SW 973.

[39] Bonelli v. Conrad, 1 CalApp2d 660, 37 P2d 137.

[40] **Georgia.** Adams v. Slocum, 26 GaApp 799, 107 SE 375 (son as agent for father).

Illinois. It was error to assume that daughter driving car involved in collision was agent of defendant owner. Richardson v. Franklin, 235 IllApp 440.

Kentucky. Cumberland State Bank v. Ison, 218 Ky 412, 291 SW 405.

Maryland. American Fidelity Co. v. State ex rel. Cobb, 135 Md 326, 109 A 99; Lewis v. E. F. Schlichter Co., 137 Md 217, 112 A 282 (agency).

Virginia. Robertson's Exr. v. Atlantic Coast Realty Co., 129 Va 494, 106 SE 521.

[41] Brown v. Leppo, 194 IllApp 243; Sutton v. Kansas City Star Co. (MoApp), 54 SW2d 454.

[42] Lavander v. Chicago City R. Co., 296 Ill 284, 129 NE 757. But see Mayne v. Kansas City R. Co., 287 Mo 235, 229 SW 386.

[43] J. W. Wheeler & Co. v. Fitzpatrick, 135 Ark 117, 205 SW 302.

[44] White v. Payne, 118 SC 381, 110 SE 463.

Where, however, it is clear from the charge as a whole that the reference of the court to the terms of the agreement between the parties was intended merely to apprise the jury of the issues and where the charge submits to the jury the question of the existence of the contract, there is no error.[45]

The performance or nonperformance of a contract is a question of fact to be decided by the jury from the evidence. Thus, in an action to recover for labor performed in boring a well, an instruction is erroneous which assumes that the work has been finished, and the evidence on this point is contradictory.[46] Again, an instruction may be erroneous which assumes a tender in fulfilment of a contract.[47]

In an action to recover a commission for the sale of real estate, where the evidence is conflicting as to whether a definite price for the property had been fixed, an instruction assuming that the price was fixed is a violation of the rule.[48] But facts are not assumed in an instruction that brokers were free to accept employment by purchaser for a resale, after they had completed their contract with the vendor.[49]

(2) *Negligence.* Negligence and contributory negligence are questions for the jury where there are facts and circumstances from which it may or may not be inferred,[50] and it is error to instruct that certain facts constitute negligence where the law does not declare them to be such.[51]

[45] In Thompson v. Thompson, 141 SC 56, 139 SE 182, it was held that the rule was not violated by the court's charge to the jury, "Now, as to a valid contract, what is a valid contract? It must be about a lawful subject and I charge you this is a lawful subject."

Blake v. Austin, 33 TexCivApp 112, 75 SW 571.

[46] Bates v. Harte, 124 Ala 427, 26 S 898, 82 AmSt 186.

In a suit to recover the balance claimed to be due on a building contract, an instruction which directs the jury to find from the evidence whether or not the architect refused to deliver the final certificate is not objectionable as instructing the jury to assume the nondelivery of the certificate as a fact. Fitzgerald v. Benner, 219 Ill 485, 76 NE 709.

[47] Holmes v. Cameron, 267 Pa 90, 110 A 81.

[48] Sample v. Rand, 112 Ia 616, 84 NW 683.

[49] Bales v. Hendrickson (MoApp), 290 SW 638.

[50] **Alabama.** Walter v. Alabama Great Southern R. Co., 142 Ala 474, 39 S 87; Sloss-Sheffield Steel & Iron Co. v. Harris, 199 Ala 261, 74 S 347 (assumption of defect in belt); Payne v. James, 207 Ala 134, 91 S 801 (injuries to fruit shipment); Western R. Co. v. Madison, 16 Ala App 588, 80 S 162.

Arkansas. Lancaster v. Kaler, 135 Ark 617, 204 SW 854 (assumption that locomotive engineer kept proper outlook); St. Louis & S. F. R. Co. v. Black, 142 Ark 41, 218 SW 377; Ft. Smith Rim & Bow Co. v. Qualls, 146 Ark 475, 225 SW 892 (injury to minor servant); Edgar Lbr. Co. v. Denton, 156 Ark 46, 245 SW 177.

California. Collins v. Hodgson, 5 CalApp2d 366, 42 P2d 700.

An instruction that if plaintiff attempted to board a moving car he was guilty of contributory negligence was erroneous as importing

In an action for damages from automobile accident, it is error to assume that at the time when he was struck the plaintiff was at a place where he had a right to be, there being evidence for and against the fact that he had suddenly stepped in front of the automobile.[52] So, it is error to assume that a servant was in the line of his duty at the time an injury was received,[53] or that the instrumentalities with which he worked were defective.[54]

The rule applies in actions against common carriers for personal injuries and an instruction assuming negligence or contributory negligence as established, when in controversy, is in violation of the rule.[55] Thus in a case of injuries to a street railway passenger the rule was violated by an instruction which assumed that plaintiff was acquainted with certain facts and circumstances and knew that certain duties, as involving the question of his own care and caution, grew out of such facts

some degree of negligence by defendant. Hanton v. Pacific Elec. R. Co., 178 Cal 616, 174 P 61.

Georgia. Rome R. & Light Co. v. Foster, 25 GaApp 173, 102 SE 845 (operation of street car); Hudson v. Devlin, 28 GaApp 458, 111 SE 693.

[51] **Florida.** Western Union Tel. Co. v. Michel, 120 Fla 511, 163 S 86.

Georgia. Western & A. R. Co. v. Casteel, 138 Ga 579, 75 SE 609.

Illinois. Alden v. Coultrip, 275 Ill App 306 (rule recognized, but instruction held not to violate it).

Minnesota. Abraham v. Byman, 214 Minn 355, 8 NW2d 231.

Missouri. Mahaney v. Kansas City, Clay County & St. Joseph Auto Transit Co., 329 Mo 793, 46 SW2d 817; Rice v. Jefferson City Bridge & Transit Co. (Mo), 216 SW 746; McCombs v. Ellsberry (Mo), 85 SW2d 135; Alexander v. Hoenshell (Mo App), 66 SW2d 164.

Montana. An instruction that an employer is liable for any negligent acts of the driver of an automobile in his employment as driver did not assume negligence by the driver. Rohan v. Sherman & Reed, 61 Mont 519, 202 P 749.

Oklahoma. Goodrich v. Tulsa, 102 Okl 90, 227 P 91; Oklahoma City v. Wilcoxen, 173 Okl 433, 48 P2d 1039.

Utah. Olsen v. S. H. Kress & Co., 87 Utah 51, 48 P2d 430.

[52] Nelson v. Lott, 81 Utah 265, 17 P2d 272.

[53] Edwards v. Federal Lead Co. (MoApp), 230 SW 127.

[54] Eudy v. Federal Lead Co. (Mo App), 220 SW 504; Cowan v. Hydraulic Press Brick Co. (MoApp), 222 SW 924.

[55] **Alabama.** Montgomery Light & Trac. Co. v. Harris, 197 Ala 236, 72 S 545.

An instruction that the duty of the carrier with reference to calling stations is fulfilled when such station is called in a distinct tone of voice in the car in which passenger is traveling, assumes that the name of the station was properly called. Central of Georgia R. Co. v. Barnitz, 17 AlaApp 201, 84 S 474.

California. Haber v. Pacific Elec. R. Co., 78 CalApp 617, 248 P 741.

Illinois. Brewster v. Rockford Public Service Co., 257 IllApp 182.

Maryland. Baltimore & O. R. Co. v. State ex rel. Hendricks, 104 Md 76, 64 A 304; Washington, B. & A. Elec. R. Co. v. State ex rel. Kolish, 153 Md 119, 137 A 484.

Massachusetts. Callahan v. Boston Elevated R. Co., 286 Mass 223, 190 NE 27.

Minnesota. Wiester v. Kaufer, 188 Minn 341, 247 NW 237.

Mississippi. In Priestly v. Hays, 147 Miss 843, 112 S 788, the instruc-

and circumstances.[56] The rule finds application in injury cases involving railroads outside the passenger or shipper relation.[57]

But an instruction in an action by an employee that "if the jury find from the evidence that the defendant's engine was derailed by reason of the cracked, defective and dangerous condition of said wheel," plaintiff is entitled to recover, has been held not an assumption that the wheel was, as a matter of fact, cracked, dangerous and defective.[58] If the statute makes it negligence to drive an automobile on the wrong side of the street, it is not error for the court so to instruct the jury in an action in which no excuse is offered for so driving.[59] And in an action for personal injuries caused by falling into an unprotected elevator shaft, where a material controverted fact is whether the light at the opening was sufficient, it is no violation of the rule to instruct that the plaintiff was entitled to recover "if the jury find from the evidence that the shipping room near said elevator-opening on said day was dark and insufficiently lighted and that sunlight was partly excluded by the piling up of the furniture therein." The instruction does not assume the inadequacy of the light as established, but puts the question to

tion assumed negligence of the driver of an automobile in being on wrong side of street.

Tennessee. Nashville, C. & St. L. R. Co. v. Newsome, 141 Tenn 8, 206 SW 33 (assumption that alighting place was dangerous).

Texas. Freeman v. Galveston, H. & S. A. R. Co. (TexComApp), 285 SW 607, revg. 273 SW 979, and reh. den. in 287 SW 902.

Washington. Whether the rate of speed at which a car is traveling is negligent is to be determined by a consideration of all the surrounding circumstances and where the facts are in dispute it is properly a question for the jury. Hence an instruction directing the jury to find for the defendant street railway if they find that the speed of the car was within nine miles an hour, which is the limit prescribed by municipal ordinance, is an assumption of a fact. Atherton v. Tacoma R. & Power Co., 30 Wash 395, 71 P 39.

[56] Omaha St. R. Co. v. Cameron, 43 Neb 297, 61 NW 606.

[57] Preston v. Union Pacific R. Co., 292 Mo 442, 239 SW 1080 (injuries to switchman); Perkins v. United R. Co. (MoApp), 243 SW 224; Brookings v. Northern Pacific R. Co., 47 ND 111, 180 NW 972 (animals killed at crossing).

[58] Geary v. Kansas City, O. & S. R. Co., 138 Mo 251, 39 SW 774, 60 AmSt 555.

Where a brewing company furnished its salesman with a horse and buggy to be used in visting patrons where one of the principal issues was whether or not reasonably safe and suitable harness had been provided, a charge was not erroneous which said that "if, upon reviewing the testimony, you find that the plaintiff had equal opportunities—equal means of ascertaining the defect—that the master had, then the plaintiff could not recover and your verdict would be for the defendant." The instruction is not vulnerable to the objection that it assumed the existence of a defect in the harness. Portner Brew. Co. v. Cooper, 120 Ga 20, 47 SE 631.

[59] Winter v. Davis, 217 Ia 424, 251 NW 770.

the jury and leaves the jury to determine the matter.[60] An instruction that an interurban company, sued for injuries to an occupant of a motorcycle at a public crossing, was not required to be on guard against "unusual or extraordinary occurrences or conduct on the part of others" was erroneous as assuming that the passage of a motorcycle was an unusual and extraordinary occurrence that did not require lookout by the motorman.[61] Use by the court in instructions of the words "and this being so," in reference to the plaintiff's claim that an electric wire ran close to the branches of trees, was held to be an assumption of the fact.[62] Where the plaintiff in a negligence damage case was fifteen years old at the time of the accident on which the action is based, it is error for the court to refer to her as a child.[63]

In an action for injury to an automobile, an instruction that if the jury found for the plaintiff to allow for use of the machine was erroneous as assuming damages from loss of use.[64] It is error to assume that an injury will result in a decrease of the earning power of the injured person.[65]

(3) *Wills.* Where undue influence is involved in a suit to contest a will, it is for the jury to pass upon the question as to whether a relationship of close confidence and trust existed between the executor and the testator and the court therefore may, with propriety, refuse to instruct in such a way as to assume the existence of such a relationship.[66] The delivery of a deed is a question of the grantor's intention to surrender control of the instrument, and it is the sole right of the jury to determine whether intention may be inferred from certain acts on the part

[60] West Kentucky Transp. Co. v. Dezern, 259 Ky 470, 82 SW2d 486; Wendler v. People's House Furnishing Co., 165 Mo 527, 65 SW 737; Dohring v. Kansas City (Mo), 81 SW2d 943. See Fowler v. Missouri, K. & T. R. Co. (MoApp), 84 SW2d 194.

[61] Swanlund v. Rockford & I. R. Co., 305 Ill 339, 137 NE 206.

[62] Jackiewicz v. United Illuminating Co., 106 Conn 302, 138 A 147.

[63] Ellington v. Chicago, R. I. & P. R. Co. (MoApp), 45 SW2d 105.

[64] Elliott v. Ticen, 78 IndApp 14, 134 NE 778.

[65] Texas & Pacific Coal Co. v. Ervin (TexCivApp), 212 SW 234.

[66] Appeal of Turner, 72 Conn 305, 44 A 310.

Where considerable evidence is introduced to show a testator's excessive use of intoxicants, as bearing on the question of his mental capacity, the jury's province is not invaded by an instruction that if the testator was sober and in possession of all his mental faculties at the time of the execution of the will, the fact that he was under the influence of liquor on other occasions would not alone be sufficient to invalidate the instrument or that if the habit of intoxication was of such long standing as to cause unsoundness of mind, the same principles as to testamentary capacity would apply as in cases of mental unsoundness produced by different causes. Swygart v. Willard, 166 Ind 25, 76 NE 755.

of the grantor.[67] In a will contest where the issue was the mental capacity of testator, it was held that an instruction assumed mental unsoundness which told the jury that it was a matter of common knowledge that epilepsy was a mental disease.[68]

[67] Walker v. Nix, 25 TexCivApp 596, 64 SW 73.

[68] Platt v. Platt, 290 Mo 686, 236 SW 35.

It is not error to refer to the alleged will as "the will" or "the will she has made." Fagan v. Welsh, 19 OhCirCt (N. S.) 177, 32 OhCir Dec 409.

Illinois. Anderson v. Moore, 108 IllApp 106; Paris v. East St. Louis R. Co., 275 IllApp 241.

What is ordinary care is a question for the jury, to be decided in the light of all the attendant circumstances, and an instruction is erroneous which assumes that the exercise of ordinary care requires a particular course of conduct in a given case. Nelson v. Knetzger, 109 IllApp 296.

The rule was violated by instruction assuming that injured person had done something to aggravate his condition. Todd v. Chicago City R. Co., 197 IllApp 544.

Indiana. Teagarden v. McLaughlin, 86 Ind 476, 44 AmRep 332.

Kentucky. An instruction in a malpractice case that it was defendant's duty to continue attention to case as long as it needed attention, assumed the need of further attention, and disregarded the question of diligence and skill. Bolar v. Browning, 168 Ky 273, 181 SW 1109.

Maryland. Baltimore v. State ex rel. Biggs, 132 Md 113, 103 A 426.

A prayer requesting an instruction that a railway company is not responsible for the negligence of a city's watchman is erroneous where it is an open question whether the watchman was in the city's employ, and the jury should be left to determine such fact. Baltimore Consol. R. Co. v. State ex rel. O'Dea, 91 Md 506, 46 A 1000.

Massachusetts. Noyes v. Whiting (Mass), 194 NE 93.

Mississippi. In an action against an express company for goods alleged to have been lost in transit, an instruction to find for the plaintiff "the value of the property consigned to him that belonged to him and was never delivered" assumes as a fact the very issue to be tried by the jury and should be refused. American Exp. Co. v. Jennings, 86 Miss 329, 38 S 374, 109 AmSt 708.

Missouri. Orris v. Chicago, R. I. & P. R. Co., 279 Mo 1, 214 SW 124 (setting out fire by locomotive); McLaughlin v. Marlatt, 296 Mo 656, 246 SW 548; Klein v. St. Louis Transit Co., 117 MoApp 691, 93 SW 281; Willi v. United Rys. Co., 205 MoApp 272, 224 SW 86 (assumption that suburban car driven at excessive speed); Gaylor v. Weinshienk, 221 MoApp 585, 283 SW 464; Bodenmueller v. Columbia Box Co. (Mo App), 237 SW 879; Boyer v. General Oil Products (MoApp), 78 SW2d 450.

New Jersey. Reed v. Director-General of Railroads, 95 NJL 525, 113 A 146.

New York. Brush v. Long Island R. Co., 10 AppDiv 535, 42 NYS 103.

Ohio Toledo R. & Light Co. v. Mayers, 93 OhSt 304, 112 NE 1014 (injury to occupant of auto driven by another).

Oklahoma. It is improper to charge the jury that certain facts, if proved, would amount to contributory negligence and prevent recovery. Muskogee Elec. Trac. Co. v. Durham, 115 Okl 238, 242 P 762.

Oregon. Robison v. Oregon-Washington R. & Nav. Co., 90 Or 490, 176 P 594 (imputed negligence).

South Carolina. Jones v. Charleston & W. C. R. Co., 61 SC 556, 39 SE 758; Pearson v. Piedmont & N.

§ 24. Assumption of facts—Statement of issues and claims.

Instructions do not assume facts if merely stating the issues made by the pleadings, or the parties' claims, or matters of common knowledge, or abstract legal propositions, or facts in evidence hypothetically.

Instructions are not open to objection on the ground of assuming controverted facts where they merely state the issues made by the pleadings,[69] or the claims of the parties,[70] or mat-

R. Co., 112 SC 220, 99 SE 811.

Texas. St. Louis Southwestern R. Co. v. Gentry (TexCivApp), 74 SW 607; Abilene Gas & Elec. Co. v. Thomas (TexCivApp), 194 SW 1016; Panhandle & S. F. R. Co. v. Wright-Herndon Co. (TexCivApp), 195 SW 216 (assumption that rough handling of freight is negligence); Southern Trac. Co. v. Owens (TexCivApp), 198 SW 150 (assumption of material facts in charge on discovered peril); Texas & Pacific Coal Co. v. Sherbley (TexCivApp), 212 SW 758.

An instruction to the effect that pedestrian could assume that automobile drivers would not negligently injure him was open to objection that it assumed that plaintiff was exercising ordinary care and that defendant was negligent. Magee v. Cavins (TexCivApp), 197 SW 1015.

Utah. Cheney v. Buck, 56 Utah 29, 189 P 81 (injury to bicyclist, assumption that he was on wrong side of roadway).

An instruction that, in determining whether chauffeur was defendants' servant, his act in driving defendants' car might be taken into consideration does not assume existence of facts. Ferguson v. Reynolds, 52 Utah 583, 176 P 267.

Washington. Walters v. Seattle, 97 Wash 657, 167 P 124 (reckless driving of automobile).

An instruction that if jury from any evidence in the case thought that plaintiff was negligent, and that her negligence contributed to the injury, she could not recover does not assume that she was guilty of contributory negligence. MacDermid v. Seattle, 93 Wash 167, 160 P 290.

Wisconsin. Clifford v. Minneapolis, St. P. & S. S. M. R. Co., 105 Wis 618, 81 NW 143.

[69] **California.** Charge was not bad as assuming fact not in evidence which recited: "Where the insured is found dead under such circumstances that death may have been due to suicide or to accident, the presumption is against suicide, and in favor of accident." Wilkinson v. Standard Acc. Ins. Co. of Detroit, Mich., 180 Cal 252, 180 P 607.

Colorado. It cannot be said that there is an assumption of a fact where the court, referring to the grounds relied upon for a recovery, as shown by the pleadings, tells the jury that "plaintiffs, by their reply, give us a history of the transaction and claim." De St. Aubin v. Marshall Field & Co., 27 Colo 414, 62 P 199.

Indiana. Allen v. Powell, 65 Ind App 601, 115 NE 96.

Kentucky. Roseberry v. Louisville R. Co., 168 Ky 277, 181 SW 1117.

Ohio. Plymouth & S. Trac. Co. v. Hart, 2 OhApp 1, 19 OhCirCt (N. S.) 71, 25 OhCirDec 347.

Texas. Missouri, K. & T. R. Co. v. Kyser & Sutherland, 43 TexCiv App 322, 95 SW 747; Ft. Worth & R. G. R. Co. v. Montgomery (Tex CivApp), 141 SW 813.

West Virginia. Wallace v. Prichard, 92 WVa 352, 115 SE 415.

[70] **California.** Jarman v. Rea, 137 Cal 339, 70 P 216.

Minnesota. Dawson v. Northwestern Constr. Co., 137 Minn 352, 163 NW 772.

Missouri. Barada-Ghio Real Estate Co. v. Keleher (Mo), 214 SW 961.

ters of common knowledge,[71] or abstract legal propositions without applying them to the facts,[72] or state facts in evidence hypothetically and without assuming that they have been established.[73]

In all cases it is essential that the instruction should work harm to the complaining party in order to cause a reversal on this ground.[74] Very generally the rule against assumption is considered not violated when the court submits the stated facts as issues for the jury to decide.[75] An instruction in condemna-

New York. Polykranas v. Krausz, 73 AppDiv 583, 77 NYS 46.

Ohio. Delaware v. Metropolitan Constr. Co., 21 OhCirCt (N. S.) 137, 33 OhCirDec 285.

Virginia. Deitz v. Whyte, 131 Va 19, 109 SE 212.

[71] Joliet v. Shufeldt, 144 Ill 403, 32 NE 969, 18 LRA 750, 36 AmSt 453; Harris v. Shebek, 151 Ill 287, 37 NE 1015; Lewis v. Bell, 109 Mich 189, 66 NW 1091.

[72] **Alabama.** Anthony v. Seed, 146 Ala 193, 40 S 577.

Florida. Florida Cent. & P. R. Co. v. Foxworth, 41 Fla 1, 25 S 338, 79 AmSt 149.

Illinois. Illinois Steel Co. v. Hanson, 97 IllApp 469.

Missouri. Wagner v. Wagner (MoApp), 215 SW 784.

[73] **Alabama.** Seaboard Mfg. Co. v. Woodson, 94 Ala 143, 10 S 87.

Arkansas. Wisconsin & Arkansas Lbr. Co. v. Thomas, 143 Ark 106, 219 SW 779.

California. Arundell v. American Oil Fields Co., 31 CalApp 218, 160 P 159.

Colorado. Jackson v. Burnham, 20 Colo 532, 39 P 577.

Indiana. Morgan v. Wattles, 69 Ind 260; Lake Erie & W. R. Co. v. Howarth, 73 IndApp 454, 124 NE 687, 127 NE 804.

Iowa. Christy v. Des Moines City R. Co., 126 Ia 428, 102 NW 194.

Mississippi. Jones v. Edwards, 57 Miss 28.

Missouri. Baker v. J. W. McMurry Contracting Co., 282 Mo 685, 223 SW 45; Grubbs v. Kansas City Public Service Co., 329 Mo 390, 45 SW2d 71; McDonald v. Central Illinois Constr. Co., 196 MoApp 57, 190 SW 633; Liljegren v. United Rys. Co. (MoApp), 227 SW 925. But see Bente v. Finley (MoApp), 83 SW2d 155.

It is for the jury to decide in a will contest case whether the evidence for or against the validity of the will is true, and any assumption by the court in the instructions that any of such testimony is true is erroneous. Hartman v. Hartman, 314 Mo 305, 284 SW 488.

Nebraska. Sioux City & P. R. Co. v. Smith, 22 Neb 775, 36 NW 285.

Texas. El Paso & S. W. R. Co. v. Havens (TexCivApp), 216 SW 444.

[74] **Indiana.** Van Camp Hdw. & Iron Co. v. O'Brien, 28 IndApp 152, 62 NE 464.

Kentucky. Reliance Textile & Dye Works v. Martin, 23 KyL 1625, 65 SW 809.

Missouri. Walker v. Kansas City, 99 Mo 647, 12 SW 894; Bordeaux v. Hartman Furn. & Carpet Co., 115 MoApp 556, 91 SW 1020.

Texas. Payne v. Baker (TexCiv App), 242 SW 343.

[75] **Alabama.** Kay v. Elston, 205 Ala 307, 87 S 525.

Arkansas. Olson v. Swift & Co., 122 Ark 611, 182 SW 903.

California. Gainer v. United Railroads, 58 CalApp 459, 208 P 1013.

Illinois. Raxworthy v. Heisen, 191 IllApp 457; Anderson v. Chicago City R. Co., 207 IllApp 427; Kusturin v. Chicago & A. R. Co., 209 IllApp 55; Finley v. Federal Life Ins. Co., 211 IllApp 66.

Indiana. Pittsburgh, C., C. & St. L. R. Co. v. Smith, 190 Ind 656, 131 NE 516; Spickelmeir v. Hartman,

tion proceedings is erroneous where it assumes that the remaining lands will be benefited.[76]

It is clear that one may not complain of this vice in an instruction given by the court at his request.[77]

§ 25. Assumption of facts—Established, uncontroverted or admitted facts.

The court may, however, assume the existence of facts without invading the province of the jury, (1) where the evidence establishes the facts, (2) or where such facts are not controverted, (3) or are admitted.

(1) Facts established by the evidence may be assumed by the court,[78] as where the jury can draw but one conclusion

72 IndApp 207, 123 NE 232; Cook & Bernheimer Co. v. Hagedorn, 82 Ind App 444, 131 NE 788.

Iowa. Wells v. Chamberlain, 185 Ia 264, 168 NW 238.

Missouri. Morrow v. Franklin, 289 Mo 549, 233 SW 224; Henderson v. Heman Constr. Co., 198 MoApp 423, 199 SW 1045; Roy v. Kansas City, 204 MoApp 332, 224 SW 132; Breen v. United R. Co. (Mo), 204 SW 521; Priebe v. Crandall (MoApp), 187 SW 605; Deming v. Alpine Ice Co. (Mo App), 214 SW 271; Beall v. Kansas City R. Co. (MoApp), 228 SW 834; Jeffries v. Walsh Fire Clay Products Co. (MoApp), 233 SW 259; Pruitt v. Nat. Life & Acc. Co. (MoApp), 237 SW 852; Llywelyn v. Lowe (Mo App), 239 SW 535; Schmitter v. United R. Co. (MoApp), 245 SW 629.

There was no assumption by instruction which first required that the jury find and believe various matters therein stated. Yarde v. Hines, 209 MoApp 547, 238 SW 151.

North Dakota. Watson v. Nelson, 42 ND 102, 172 NW 823.

Ohio. Armstrong v. Travelers Ins. Co., 4 OhApp 46.

Texas. Rio Grande, E. P. & S. F. R. Co. v. Starnes (TexCivApp), 185 SW 366.

Virginia. Norfolk & W. R. Co. v. Parrish, 119 Va 670, 89 SE 923; Mopsikov v. Cook, 122 Va 579, 95 SE 426.

[76] Hatter v. Mobile County, 226 Ala 1, 145 S 151.

[77] Davis v. Brown, 67 Mo 313; Haggard v. German Ins. Co. of Freeport, Ill., 53 MoApp 98; Cole v. Germania Fire Ins. Co., 99 NY 36, 1 NE 38.

[78] **Alabama.** Bessemer Land & Imp. Co. v. Campbell, 121 Ala 50, 25 S 793, 77 AmSt 17; Ferguson v. Shipp, 198 Ala 87, 73 S 414 (place of boundary corner); Southern Exp. Co. v. Roseman, 206 Ala 681, 91 S 612. See also Somerall v. Citizens Bank, 211 Ala 630, 101 S 429.

Arizona. Reid v. Topper, 32 Ariz 381, 259 P 397.

Arkansas. McGee v. Smitherman, 69 Ark 632, 65 SW 461; Miller v. Ft. Smith Light & Trac. Co., 136 Ark 272, 206 SW 329.

California. Burrell v. Southern California Canning Co., 35 CalApp 162, 169 P 405; Timbrell v. Suburban Hosp., Inc., 4 Cal2d 68, 47 P2d 737.

Connecticut. C. I. T. Corp. v. Deering, 119 Conn 347, 176 A 553.

Georgia. Jones v. Wall, 22 GaApp 513, 96 SE 344; Watkins v. Stulb & Vorhauer, 23 GaApp 181, 98 SE 94.

Illinois. Chicago City R. Co. v. Carroll, 206 Ill 318, 68 NE 1087; Vogler v. Chicago & Carterville Coal Co., 196 IllApp 574 (ownership of land damaged by overflow); Monk v. Caseyville R. Co., 202 IllApp 641 (plaintiff had himself testified to the facts); Kusturin v. Chicago & A. R.

from the evidence.[79] It is sometimes stated to be a duty of the trial court to assume the existence of undisputed facts.[80]

Thus where the evidence establishes the possession of a promissory note, an instruction is not improper which tells the

Co., 209 IllApp 55, affd. 287 Ill 306, 122 NE 512; Robeson v. Greyhound Lines, Inc., 257 IllApp 278.

An instruction is erroneous where it assumes facts disproved by the evidence. Smith v. Bellrose, 200 Ill App 368.

Indiana. Roberts v. Kendall, 12 IndApp 269, 38 NE 424; Milhollin v. Adams, 66 IndApp 376, 115 NE 803; Southern Surety Co. v. Kinney, 74 IndApp 205, 127 NE 575; Pursley v. Hisch, 119 IndApp 232, 85 NE2d 270.

Iowa. Dunning v. Burt, 180 Ia 754, 162 NW 23; Read v. Reppert, 194 Ia 620, 190 NW 32 (ownership of automobile causing injury).

Kansas. Wade v. Empire Dist. Elec. Co., 98 Kan 366, 158 P 28 (dangerous electric wires).

Kentucky. Henning v. Stevenson, 118 Ky 318, 80 SW 1135; Louisville & N. R. Co. v. E. J. O'Brien & Co., 168 Ky 403, 182 SW 227, AnnCas 1917D, 922 (unreasonable delay in transportation); Ohio Valley Elec. R. Co. v. Payne, 223 Ky 197, 3 SW2d 223.

Maine. Toole v. Bearce, 91 Me 209, 39 A 558.

Minnesota. Lemon v. De Wolf, 89 Minn 465, 95 NW 316.

Missouri. Gayle v. Missouri Car & Foundry Co., 177 Mo 427, 76 SW 987; Cooley v. Dunham, 196 MoApp 399, 195 SW 1058; Kearse v. Seyb, 200 MoApp 645, 209 SW 635; Cole v. Long, 207 MoApp 528, 227 SW 903; McMillan v. Bausch (Mo), 234 SW 835 (unsafe roof); Neeley v. Snyder (MoApp), 193 SW 610; Stratton v. Nafziger Baking Co. (MoApp), 237 SW 538; Dodge v. Kirkwood (Mo App), 260 SW 1012.

Nebraska. First Nat. Bank v. Sargeant, 65 Neb 594, 91 NW 595, 59 LRA 296; Watkins v. Union Pacific R. Co., 103 Neb 75, 170 NW 358; Thomas v. Otis Elevator Co., 103 Neb 401, 172 NW 53; Morris v. Missouri Pacific R. Co., 107 Neb 788, 187 NW 130.

New York. Crossman v. Lurman, 57 AppDiv 393, 68 NYS 311.

Ohio. Northern Ohio Trac. & L. Co. v. Peterson, 18 OhCirCt (N. S.) 242, 33 OhCirDec 14.

Oklahoma. Vanderslice v. Davis, 119 Okl 87, 248 P 585.

Pennsylvania. Thomas, Roberts, Stevenson Co. v. Philadelphia & R. R. Co., 256 Pa 549, 100 A 998 (identity clearly established); Eline v. Western Maryland R. Co., 262 Pa 33, 104 A 857 (evidence showed fractured skull and instant death in collision. Not error to instruct that death resulted from collision); Wolf Co. v. Western Union Tel. Co., 24 PaSuper 129.

Rhode Island. Providence Ice Co. v. Bowen, 44 RI 173, 114 A 186; McNear, Inc. v. American & British Mfg. Co., 44 RI 190, 115 A 709.

South Carolina. Riser v. Southern R. Co., 67 SC 419, 46 SE 47.

The court may assume that a railroad trestle is an obvious place of danger for a pedestrian. Tyler v. Atlantic Coast Line R. Co., 104 SC 107, 88 SE 541.

Texas. Northern Texas Trac. Co. v. Yates, 39 TexCivApp 114, 88 SW 283; McCauley v. McElroy (TexCiv App), 199 SW 317 (agency relation).

Court may assume negligence in suit for injury to passenger by derailment where derailment not explained by defendant. Galveston, H. & S. A. R. Co. v. Miller (TexCiv App), 191 SW 374.

Washington. Smith v. Spokane, 103 Wash 314, 174 P 2.

[79] Barker v. Southern P. Co., 118 CalApp 748, 5 P2d 970, 6 P2d 982.

[80] Associated Indem. Corp. v. Baker, (TexCivApp), 76 SW2d 153.

jury that possession of a promissory note by the payee at the time of his death is evidence tending to prove that there had been no gift of the note.[81] Where an injury is of such a nature that pain and anguish necessarily follow, an instruction may assume there was such pain and mental anguish.[82] It is only in a case where the testimony of a witness is not only unopposed by direct evidence, but where it is not in conflict with the just and proper inferences to be drawn from other facts proved in the case, that it is proper for the court to treat the evidence as wholly undisputed.[83] So, though the answer denied that the plaintiffs were minors, the court could in its instructions assume the fact of their infancy where it was otherwise undisputed.[84]

(2) If a certain fact is not controverted, its truth may be assumed.[85]

[81] Oelke v. Theis, 70 Neb 465, 97 NW 588.

[82] Dunn v. Northeast Elec. R. Co., 81 MoApp 42.

[83] Schulz v. Schulz, 113 Mich 502, 71 NW 854.

[84] Blomquist v. Jennings, 119 Or 691, 250 P 1101.

[85] **Federal.** Missouri Dist. Tel. Co. v. Morris, 243 F 481.

Alabama. Birmingham R., Light & Power Co. v. Jones, 146 Ala 277, 41 S 146; Southern R. Co. v. Hayes, 198 Ala 601, 73 S 945; Alabama Power Co. v. Hines, 207 Ala 346, 92 S 611; Montgomery v. Ferguson, 207 Ala 430, 93 S 4; Montevallo Min. Co. v. Little, 208 Ala 131, 93 S 873.

California. Timbrell v. Suburban Hosp., Inc., 4 Cal2d 68, 47 P2d 737.

Colorado. Wolfer v. Redding, 48 Colo 58, 108 P 980.

Connecticut. McCaffrey v. Groton & S. St. R. Co., 85 Conn 584, 84 A 284; Ferrigino v. Keasbey, 93 Conn 445, 106 A 445; Brown Bag Filling Mach. Co. v. United Smelting & Aluminum Co., 93 Conn 670, 107 A 619.

Delaware. Truxton v. Fait & Slagle Co., 1 Penn (Del) 483, 42 A 431, 73 AmSt 81.

Georgia. Greer v. Raney, 120 Ga 290, 47 SE 939; Oxford v. Oxford, 136 Ga 589, 71 SE 883; Elrod v. Chamblee, 26 GaApp 703, 106 SE 915.

Illinois. Brennan v. Streator, 256 Ill 468, 100 NE 266; Chicago Union Trac. Co. v. Newmiller, 116 IllApp 625, affd. 215 Ill 383, 74 NE 410.

Indiana. Indianapolis Trac. & Terminal Co. v. Smith, 38 IndApp 160, 77 NE 1140; Union Trac. Co. v. Elmore, 66 IndApp 95, 116 NE 837; Davis Constr. Co. v. Granite Sand & Gravel Co., 90 IndApp 379, 163 NE 240.

Iowa. State v. Wrangler, 151 Ia 555, 132 NW 22.

Kansas. McArthur v. Independent Torpedo Co., 107 Kan 68, 190 P 787.

Kentucky. Otis Elev. Co. v. Wilson, 147 Ky 676, 145 SW 391; Coral Gables v. Barnes, 247 Ky 292, 57 SW 2d 18.

Maryland. But see Martin Fertilizer Co. v. Thomas & Co., 135 Md 633, 109 A 458.

Massachusetts. McGuire v. Lawrence Mfg. Co., 156 Mass 324, 31 NE 3.

Michigan. Garrisi v. Kass, 201 Mich 643, 167 NW 833.

Minnesota. Johnson v. Crookston Lbr. Co., 92 Minn 393, 100 NW 225; Marchio v. Duluth, 133 Minn 470, 158 NW 612 (ownership of property damaged by change of grade).

Missouri. Phelps v. Conqueror Zinc Co., 218 Mo 572, 117 SW 705; Midwest Nat. Bank & Trust Co. v. Davis, 288 Mo 563, 233 SW 406; Argeropoulos v. Kansas City R. Co., 201 MoApp 287, 212 SW

Thus in a suit involving claims to certain timber, the court is within its rights in charging that the detention of the logs was not disputed, where the record discloses no different situation.[86] Where the court, in charging with reference to the question as to whether a highway was maintained in a reasonably safe condition, instructs that "there is no question, under the evidence, but there was a depression or hole, and an accumulation of bark near it, in the highway," there can be no objection if the testimony shows that the court's statement was justified.[87] In an action between landlord and tenant where one of the issues involved continued possession, it was not error for the court to instruct the jury that if the tenant retained the key and remained in possession the tenancy continued.[88] If the evidence of plaintiff in an accident case that the injuries were inflicted by defendant's bus are not disputed, it is not error

369; Koenig v. Kansas City R. Co. (Mo), 243 SW 118; Young v. Tilley (MoApp), 190 SW 95; Montgomery v. Hammond Packing Co. (MoApp), 217 SW 867; Frank Hart Realty Co. v. Ryan (MoApp), 218 SW 412; Jeffries v. Kansas City R. Co. (MoApp), 220 SW 698; Zackwik v. Hanover Fire Ins. Co. (Mo App), 225 SW 135; Curlin v. St. Louis Merchants Bridge Terminal R. Co. (MoApp), 232 SW 215; Patton v. Eveker (MoApp), 232 SW 762; Warren v. Curtis & Co. Mfg. Co. (MoApp), 234 SW 1029; St. Louis House Furnishing Co. v. Stoecker & Price Storage & Auction Co. (Mo App), 238 SW 841; Foy v. United R. Co. (MoApp), 243 SW 185 (existence of speed ordinance not questioned); Heather v. Palmyra (MoApp), 245 SW 390 (date of accident); Wood v. Great American Ins. Co. (MoApp), 279 SW 205; Glassman v. Fainberg (MoApp), 35 SW2d 950; Rowland v. Boston Ins. Co. (MoApp), 55 SW2d 1011.

Nebraska. Fitzgerald v. Union Stockyards Co., 91 Neb 493, 136 NW 838.

New Mexico. Milliken v. Martinez, 22 NM 61, 159 P 952.

Ohio. Pittsburgh, C., C. & St. L. R. Co. v. Dooley, 13 OhCirCt (N. S.) 225, 22 OhCirDec 655; Northern Ohio Trac. & L. Co. v. Peterson, 18 OhCirCt (N. S.) 242, 33 OhCirDec 14; Cleveland, C., C. & St. L. R. Co. v. Hudson, 22 OhCirCt 586, 12 OhCirDec 661.

Oklahoma. Byers v. Ingraham, 51 Okl 440, 151 P 1061; Wichita Falls & N. W. R. Co. v. Woodman, 64 Okl 326, 168 P 209; Landauer v. Sublett, 126 Okl 185, 259 P 234.

Pennsylvania. Loughrey v. Pennsylvania R. Co., 284 Pa 267, 131 A 260.

South Carolina. Jennings v. Edgefield Mfg. Co., 72 SC 411, 52 SE 113; Reardon v. Averbuck, 92 SC 569, 75 SE 959.

Texas. Thornburg v. Moon (Tex CivApp), 180 SW 959; White v. Peters (TexCivApp), 185 SW 659; Townsend v. Pilgrim (TexCivApp), 187 SW 1021; Athens Elec. Light & Power Co. v. Tanner (TexCiv App), 225 SW 421.

Virginia. Carpenter v. Smithey, 118 Va 533, 88 SE 321 (litigation beneficial where suit by attorney for fee).

West Virginia. Ashland Coal & Coke Co. v. Hull Coal & Coke Corp., 67 WVa 503, 68 SE 124.

[86] Johnson v. Moore, 28 Mich 3.

[87] Little v. Iron River, 102 Wis 250, 78 NW 416.

[88] Porter v. Taylor, 107 Conn 68, 139 A 649.

for the court to assume in the instructions that the injuries were inflicted.[89]

So, in a case where the suit for ejection of a newsboy from a train by the conductor and no evidence was offered that the act of the conductor was beyond the scope of his authority, the court was justified in assuming in an instruction that the conductor had such authority.[90] In action based on Federal Employers' Liability Act, the court may in its instructions assume that tracks used by railroad under an arrangement with the owner were a part of its line, such fact being uncontroverted.[91]

(3) The court may assume facts admitted to be true,[92] either by the pleadings,[93] or by the parties in the course of the trial,[94]

[89] Roark Transp. v. Sneed, 188 Ark 928, 68 SW2d 996.

[90] Griffin v. Kansas City R. Co., 199 MoApp 682, 204 SW 826.

[91] Lovett v. Kansas City Terminal R. Co., 316 Mo 1246, 295 SW 89.

[92] **Alabama.** Miller v. Millstead & Hill, 17 AlaApp 6, 81 S 182.

Georgia. Morrison v. Cureton, 139 Ga 299, 77 SE 160.

Indiana. Horka v. Wieczorek, 64 IndApp 387, 115 NE 949.

Kentucky. Burbank v. Jones, 194 Ky 830, 241 SW 358.

Michigan. Burt v. Long, 106 Mich 210, 64 NW 60; Johnston v. Cornelius, 200 Mich 209, 166 NW 983, LRA 1918D, 880 (fact conceded by complaining party on former trial).

Missouri. Brown v. Emerson, 66 MoApp 63; Palmer v. Shaw Transfer Co. (MoApp), 209 SW 882; Byrnes v. Poplar Bluff Printing Co. (Mo), 74 SW2d 20; Hieken v. United R. Co. (MoApp), 227 SW 654; Majors v. Kansas City R. Co. (Mo App), 228 SW 517.

North Carolina. Crampton v. Ivie, 124 NC 591, 32 SE 968.

Ohio. Northern Ohio Trac. & L. Co. v. Peterson, 18 OhCirCt (N. S.) 242, 33 OhCirDec 14; Cleveland, C., C. & St. L. R. Co. v. Hudson, 22 Oh CirCt 586, 12 OhCirDec 661.

South Carolina. Latour v. Southern R. Co., 71 SC 532, 51 SE 265; Reardon v. Averbuck, 92 SC 569, 75 SE 959; Denny v. Doe, 116 SC 307, 108 SE 95.

Texas. New Fenfield Townsite Co. v. King (TexCivApp), 204 SW 788 (question of breach of contract admitted if existence of contract established); Texas & Pacific R. Co. v. Dickey (TexCivApp), 70 SW2d 614.

[93] **California.** Moore v. Pacific Coast Steel Co., 171 Cal 489, 153 P 912.

Kansas. Wiley v. Keokuk, 6 Kan 94.

Kentucky. Orth v. Clutz's Admr., 18 BMon (57 Ky) 223.

Missouri. Brown v. Emerson, 66 MoApp 63; State ex rel. Nat. Newspapers' Assn. v. Ellison (Mo), 200 SW 433.

Ohio. Place v. Elliott, 147 OhSt 499, 72 NE2d 103.

[94] **Alabama.** McCaa v. Thomas, 207 Ala 211, 92 S 414.

Arkansas. Kelley v. Pacific Fruit & Produce Co., 173 Ark 1181, 295 SW 23.

California. People v. Phillips, 70 Cal 61, 11 P 493.

Iowa. Blaul v. Tharp, 83 Ia 665, 49 NW 1044.

Michigan. Burt v. Long, 106 Mich 210, 64 NW 60.

Minnesota. Johnson v. Anderson, 172 Minn 574, 216 NW 237.

Missouri. Taylor v. Scherpe & Koken Architectural Iron Co., 133 Mo 349, 34 SW 581; Chapman v. Brown, 192 MoApp 78, 179 SW 774;

or by their counsel.[95] Where a damage action was predicated on the negligence of a railroad in exceeding the speed prescribed by city ordinance, and the ordinance was introduced over the sole objection that it was unreasonable and discriminatory, the court in its charge to the jury may assume that the ordinance is in force.[96]

Thus where liability has been admitted, the court may instruct that "the liability of the company is not disputed, but the amount of damages, if any, is questioned."[97] So, the court may charge the amount to be recovered by plaintiff should the jury find for plaintiff where the controversy is not over the amount of the recovery but solely over liability.[98] So, where the plaintiff admits that his action does not involve certain property, a charge may be given limiting the jury, in their deliberations, to the property concerned in the litigation.[99] So, the court may assume expectancy of life based on the American Mortality Tables where there is no evidence of expectancy different from that shown by the tables.[1] And so, where the only issue was as to the manner in which injuries were occasioned, the court very properly charged that the injuries were sustained.[2] It seems very clear that the court may assume the existence of facts agreed upon by counsel for both parties.[3] The court may assume the existence of a fact that a party is estopped to deny.[4]

§ 26. Assumption of facts in criminal cases.

The rules as to the assumption of facts in civil cases apply with equal force to instructions in criminal cases.

(1) Instructions in criminal cases must not assume a fact in dispute and which must be found by the jury.[5]

Irwin v. Wilhoit (MoApp), 199 SW 588.

Oklahoma. Sturm v. American Bank & Trust Co. (Okl), 44 P2d 974.

Utah. Cooper v. Denver & R. G. R. Co., 11 Utah 46, 39 P 478.

[95] Illinois Steel Co. v. Muza, 164 Wis 247, 159 NY 908.

[96] Simpson v. St. Louis-San Francisco R. Co., 334 Mo 1126, 70 SW2d 904.

[97] **Illinois.** North Chicago St. R. Co. v. Honsinger, 175 Ill 318, 51 NE 613.

Missouri. See also Rogles v. United R. Co. (Mo), 232 SW 93.

Virginia. Seaboard Air Line R. v. Abernathy, 121 Va 173, 92 SE 913.

[98] Jones v. S. H. Kress & Co., 54 Okl 194, 153 P 655. See also Chambers v. Farnham, 236 F 886.

[99] Lee v. O'Quin, 103 Ga 355, 30 SE 356.

[1] Chicago, R. I. & P. R. Co. v. Johnson, 71 Okl 118, 175 P 494.

[2] Sheffield Co. v. Harris, 183 Ala 357, 61 S 88.

[3] State v. Pritchard, 16 Nev 101.

[4] Continental Ins. Co. v. Norman, 71 Okl 146, 176 P 211.

[5] **Alabama.** Williams v. State, 161 Ala 52, 50 S 59; Underwood v. State, 179 Ala 9, 60 S 842; Thomas v. State, 206 Ala 416, 90 S 295; Pynes v. State, 207 Ala 395, 92 S 663; Parks v. State, 7 AlaApp 9, 60 S 995; Jennings v. State, 15 Ala

The court must not directly or indirectly assume the guilt of accused of the crime charged,[6] or other crimes.[7] A court must not tell the jury in any case that the defendant's testimony

App 116, 72 S 690; Pounds v. State, 15 AlaApp 223, 73 S 127.

There is no error in instructing the jury on what day of the week a certain day of the month fell. Koch v. State, 115 Ala 99, 22 S 471.

Arizona. Lauterio v. State, 23 Ariz 15, 201 P 91.

California. People v. Buster, 53 Cal 612; People v. Matthai, 135 Cal 442, 67 P 694; People v. McGee, 14 CalApp 99, 111 P 264; People v. Wieler, 55 CalApp 687, 204 P 410.

Colorado. McAndrews v. People, 71 Colo 542, 208 P 486, 24 ALR 655 (assumption of aged and weakened condition of assaulted party).

Connecticut. State v. Alderman, 83 Conn 597, 78 A 331.

Florida. Doyle v. State, 39 Fla 155, 22 S 272, 63 AmSt 159; Wallace v. State, 41 Fla 547, 26 S 713; Cook v. State, 46 Fla 20, 35 S 665; Sloan v. State, 70 Fla 216, 70 S 23.

Georgia. Cooley v. State, 152 Ga 469, 110 SE 449; Vincent v. State, 153 Ga 278, 112 SE 120 (assumption that defendant went to deceased's place of business to kill him); Davis v. State, 153 Ga 669, 113 SE 11.

Illinois. People v. Bissett, 246 Ill 516, 92 NE 949; People v. Johnson, 150 IllApp 424.

Iowa. State v. Johnson, 192 Ia 813, 185 NW 574.

Kansas. State v. Moore, 110 Kan 732, 205 P 644; State v. Johnson, 6 KanApp 119, 50 P 907.

Kentucky. Goins v. Commonwealth, 167 Ky 603, 181 SW 184.

Michigan. People v. Schick, 75 Mich 592, 42 NW 1008.

Missouri. State v. Murphy, 292 Mo 275, 237 SW 529; State v. Norman (Mo), 232 SW 452; State v. Johnson (Mo), 234 SW 794 (age of prosecutrix in rape); State v. Bayless, 362 Mo 109, 240 SW2d 114.

Montana. State v. Harrington, 61 Mont 373, 202 P 577 (liquor law violation); State v. Daems, 97 Mont 486, 37 P2d 322.

Nevada. State v. Buralli, 27 Nev 41, 71 P 532.

New Hampshire. State v. Rheaume, 80 NH 319, 116 A 758.

North Carolina. State v. Hand, 170 NC 703, 86 SE 1005.

Ohio. Mead v. State, 26 OhSt 505; Whiting v. State, 48 OhSt 220, 27 NE 96; Fouts v. State, 113 OhSt 450, 149 NE 551; Freeman v. State, 119 OhSt 250, 163 NE 202; Zimmerman v. State, 42 OhApp 407, 182 NE 354; Riegle v. State, 45 OhApp 251, 186 NE 875, 39 OLR 17; State v. Del Bello, 8 OhDec 455.

Pennsylvania. Commonwealth v. Watson, 117 PaSuperCt 594, 178 A 408.

South Carolina. State v. Driggers, 84 SC 526, 66 SE 1042, 137 AmSt 855; State v. Bazen, 89 SC 260, 71 SE 779.

Texas. Williams v. State, 37 Tex Cr 238, 39 SW 644; Ragazine v. State, 47 TexCr 46, 84 SW 832; Ellis v. State, 59 TexCr 630, 130 SW 171; Sheppard v. State, 63 TexCr 569, 140 SW 1090 (accomplice); Stephens v. State, 90 TexCr 245, 234 SW 540.

An instruction that mere weakness of mind is no defense to crime provided accused has sufficient reason to know the quality of the act charged against him, and knew the difference between the right and wrong of it, does not assume that accused was weak-minded. Cox v. State, 60 TexCr 471, 132 SW 125.

Utah. State v. Gordon, 28 Utah 15, 76 P 882.

West Virginia. State v. Dickey, 46 WVa 319, 33 SE 231.

Wisconsin. Cupps v. State, 120 Wis 504, 97 NW 210, 98 NW 546, 102 AmSt 996.

[6] **Federal.** Sturcz v. United States, 57 F2d 90.

California. People v. Howland, 13

is false.[8] The court should not assume that venue has been proved,[9] the existence of the accomplice relation,[10] the age of the prosecutrix in a rape case,[11] or the imminency of peril justifying self-defense.[12] But there is no assumption of facts in instructions which merely state the material averments of the indictment,[13] or the contentions of the parties,[14] or abstract legal propositions.[15] The truth of an accomplice's testimony is held to be assumed by an instruction that upon corroboration it warrants a conviction.[16]

CalApp 363, 109 P 894; People v. Hansen (CalApp), 19 P2d 993.

Kentucky. Caudill v. Commonwealth, 220 Ky 191, 294 SW 1042.

Missouri. State v. Collins, 292 Mo 102, 237 SW 516 (flight of defendant); State v. Warren, 326 Mo 843, 33 SW2d 125; State v. Mazur (MoApp), 77 SW2d 839.

An instruction that a witness is an accomplice assumes that the witness has committed a crime, for until a crime has been committed there can be no accomplice. State v. Potts, 239 Mo 403, 144 SW 495.

Ohio. Fouts v. State, 113 OhSt 450, 149 NE 551; Premack v. State, 11 OhCirCt (N. S.) 364, 20 OhCirDec 828.

Oklahoma. Nichols v. State, 39 OklCr 32, 262 P 1076.

Utah. State v. Hanna, 81 Utah 583, 21 P2d 537.

West Virginia. State v. Newman, 101 WVa 356, 132 SE 728.

[7] **Idaho.** State v. Hines, 43 Idaho 713, 254 P 217.

Montana. State v. Daems, 97 Mont 486, 37 P2d 322.

Oklahoma. Call v. State, 39 OklCr 264, 264 P 643.

Texas. Rice v. State, 49 TexCr 569, 94 SW 1024; Glenn v. State (TexCr), 76 SW 757; Arnold v. State (TexCr), 83 SW 205.

[8] People v. Ohanian, 245 NY 227, 157 NE 94.

[9] People v. Kubulis, 298 Ill 523, 131 NE 595; State v. McCradit, 149 La 825, 90 S 210.

[10] **Alabama.** Moore v. State, 15 AlaApp 152, 72 S 596.

Illinois. People v. Gleitsmann (Ill), 197 NE 557.

Missouri. State v. Martin (Mo), 56 SW2d 137.

Ohio. Crouch v. State, 37 OhApp 366, 174 NE 799.

Texas. Sarli v. State, 80 TexCr 161, 189 SW 149.

[11] State v. Mundy (Mo), 76 SW2d 1088.

[12] Allsup v. State, 15 AlaApp 121, 72 S 599.

[13] **Georgia.** Griggs v. State, 17 GaApp 301, 86 SE 726.

Illinois. People v. Fricano, 302 Ill 287, 134 NE 735.

Nebraska. Knights v. State, 58 Neb 225, 78 NW 508, 76 AmSt 78.

West Virginia. There was no assumption by correct definition of statutory offense. State v. Stafford, 89 WVa 301, 109 SE 326.

[14] **California.** People v. Worden, 113 Cal 569, 45 P 844.

Georgia. Stanford v. State, 153 Ga 219, 112 SE 130; Davis v. State, 153 Ga 669, 113 SE 11; Allen v. State, 27 GaApp 625, 110 SE 627.

Minnesota. State v. Christianson, 131 Minn 276, 154 NW 1095.

New Jersey. State v. Kind, 80 NJL 176, 75 A 438.

North Carolina. State v. Blackwelder, 182 NC 899, 109 SE 644; State v. Kincaid, 183 NC 709, 110 SE 612.

[15] **Georgia.** Brooks v. State, 19 GaApp 3, 90 SE 989 (definition of place of business).

Nevada. State v. Willberg, 45 Nev 183, 200 P 475.

Ohio. Montgomery v. State, 11 Oh 424; Robbins v. State, 8 OhSt 131.

[16] **Arkansas.** But see Copper-

(2) The court may, however, assume as true facts which are undisputed.[17] In a prosecution for murder, where it was uncontroverted that the defendant ran over the deceased with his automobile, an instruction is not erroneous for assuming that the defendant inflicted the fatal injuries though it further told the jury that if the deceased was suffering from a disease and died from the combined effects of the injury and the disease, then the act of the defendant caused death.[18] Neither is there a violation of the rule by the assumption that the crime was committed where the only controversy is as to the defenses interposed by the accused.[19] It is not error for the court to instruct on accomplice testimony in cases where the fact that the witness was an accomplice is not controverted.[20]

smith v. State, 149 Ark 597, 233 SW 777.

Georgia. See Riley v. State, 153 Ga 182, 111 SE 729.

New York. People v. Reilly, 25 Misc 45, 53 NYS 1005.

Texas. Bell v. State, 39 TexCr 677, 47 SW 1010.

[17] **Alabama.** Murphy v. State, 14 AlaApp 78, 71 S 967.

Arkansas. Dollar v. State, 153 Ark 410, 241 SW 1 (sale of intoxicating liquor).

Georgia. McCloud v. State, 166 Ga 436, 143 SE 558 (that accused was in the custody of slain officer at time of killing); Miller v. State, 151 Ga 710, 108 SE 38.

Illinois. People v. Walinsky, 300 Ill 92, 132 NE 757.

Indiana. White v. State, 178 Ind 317, 99 NE 417.

If there is actually no evidence in the case to establish a particular fact, the court may so assume in the instructions. Hines v. State, 197 Ind 575, 150 NE 371.

Iowa. State v. Graves, 192 Ia 623, 185 NW 78; State v. Johnson, 192 Ia 813, 185 NW 574.

Michigan. People v. Hubbard, 92 Mich 322, 52 NW 729; People v. Wilson, 242 Mich 532, 219 NW 641.

Minnesota. State v. Damuth, 135 Minn 76, 160 NW 196.

Missouri. State v. Moore, 101 Mo 316, 14 SW 182; State v. Bobbst, 269 Mo 214, 190 SW 257; State v. Fletcher (Mo), 190 SW 317; State v. Moore (Mo), 80 SW2d 128; State v. Farr (MoApp), 277 SW 354.

Montana. State v. Welch, 22 Mont 92, 55 P 927.

New Jersey. State v. Caruso, 6 NJMisc 112, 140 A 27; State v. Pedagog, 9 NJMisc 300, 153 A 646.

Oregon. State v. Watson, 47 Or 543, 85 P 336.

South Carolina. State v. Nickels, 65 SC 169, 43 SE 521.

Texas. Sawyer v. State, 104 TexCr 522, 286 SW 209; Frazier v. State, 119 TexCr 217, 43 SW2d 597.

[18] State v. Galle, 214 Wis 46, 252 NW 277.

[19] **Arkansas.** McConnell v. Booneville, 123 Ark 561, 186 SW 82.

California. People v. Putman, 129 Cal 258, 61 P 961.

Colorado. Komrs v. People, 31 Colo 212, 73 P 25.

Indiana. Hoover v. State, 161 Ind 348, 68 NE 591.

Kansas. State v. Toliver, 109 Kan 660, 202 P 99, 20 ALR 502.

Mississippi. Dean v. State, 85 Miss 40, 37 S 501.

Missouri. State v. Holloway, 156 Mo 222, 56 SW 734.

Texas. There was no error in assuming that defendant took the property where the only defense was that he took it for the purpose of taking care of it for the prosecutor. Tanner v. State (TexCr), 44 SW 489.

[20] Clines v. Commonwealth, 221 Ky 461, 298 SW 1107.

(3) The court may assume facts which are admittedly true.[21] A fact admitted by counsel for the accused, as to which there is no issue, may be assumed to be true by the court in its instructions.[22]

(4) The court may assume true facts that are incontrovertibly proved.[23] So, the court may tell the jury that a count of the indictment is not to be considered where there is no evidence to sustain such count.[24] The evidence may be such as to justify the statement of the court to the jury that the fatal wound was inflicted by a revolver in the defendant's hand.[25] It was held

[21] **Alabama.** It was not an assumption to refer to the knowledge of defendant of an event as a fact where his testimony as well as the evidence of the state showed such knowledge. Sherrill v. State, 138 Ala 3, 35 S 129.

California. People v. Roderick, 118 CalApp 457, 5 P2d 463; People v. Bernfield, 140 CalApp 613, 35 P2d 585.

Florida. It was not error to assume fact proved by the defendant. Edwards v. State, 62 Fla 40, 56 S 401.

Georgia. Farmer v. State, 49 GaApp 323, 175 SE 401.

Michigan. If there is any evidence as to a particular fact question, the court should not state to the jury that it is admitted. People v. Burlingame, 257 Mich 252, 241 NW 253.

Missouri. State v. Vaughan, 141 Mo 514, 42 SW 1080; State v. Barbata (Mo), 80 SW2d 865.

Nebraska. Morgan v. State, 51 Neb 672, 71 NW 788; Pisar v. State, 56 Neb 455, 76 NW 869.

Nevada. Where both the accused and his counsel admitted the fact of flight, it was not error for the court to assume that there was evidence of flight. State v. Mangana, 33 Nev 511, 112 P 693.

New York. People v. Walker, 198 NY 329, 91 NE 806.

South Carolina. State v. Ayres, 86 SC 426, 68 SE 625.

South Dakota. State v. Sonnenschein, 37 SD 585, 159 NW 101.

Wisconsin. Scheldberger v. State (Wis), 235 NW 419.

[22] Swain v. State, 162 Ga 777, 135 SE 187.

[23] **Alabama.** Pugh v. State, 4 AlaApp 144, 58 S 936.

Arizona. Porris v. State, 30 Ariz 442, 247 P 1101.

Georgia. Roark v. State, 105 Ga 736, 32 SE 125.

Kansas. State v. Mortimer, 20 Kan 93.

Kentucky. Howard v. Commonwealth, 246 Ky 738, 56 SW2d 362.

Minnesota. State v. Fleetwood, 111 Minn 70, 126 NW 485, 827.

Nebraska. Welsh v. State, 60 Neb 101, 82 NW 368.

The court may assume the existence of collateral fact established by uncontroverted evidence and which tends to prove one of the constituent elements of a crime. Welsh v. State, 60 Neb 101, 82 NW 368.

Oklahoma. Bartell v. State, 4 OklCr 135, 111 P 669.

Pennsylvania. Commonwealth v. Brletic, 113 PaSuperCt 508, 173 A 686.

South Dakota. State v. Shepard, 30 SD 219, 138 NW 294.

Texas. Winfield v. State, 44 TexCr 475, 72 SW 182 (accomplice); Dugat v. State, 67 TexCr 46, 148 SW 789.

Wisconsin. Cupps v. State, 120 Wis 504, 97 NW 210, 98 NW 546, 102 AmSt 996.

[24] Isbell v. State, 18 AlaApp 223, 90 S 55.

[25] People v. Arnett, 239 Mich 123, 214 NW 231.

error to submit to a jury the question whether the defendant had understood a conversation in English that had occurred in his presence, where the evidence was undisputed that he did not understand the English language.[26]

In homicide cases, there is no assumption that defendant killed the victim by the giving of correct instructions on the subject of self-defense,[27] or on the question of motive.[28]

§ 27. Weight of contradictory evidence for jury in civil cases.

It is the province of the jury alone to weigh and sift contradictory evidence, and it is prejudicial for the court to determine the weight of such evidence.

Conflicting evidence is for the jury, and the trial judge cannot draw conclusions for them,[29] or give an instruction that the

[26] Kalos v. United States, 9 F2d 268.

[27] **Arkansas.** Cunningham v. State, 149 Ark 336, 232 SW 425.

California. People v. Groves, 140 CalApp 125, 35 P2d 202.

Illinois. People v. Tamborski, 356 Ill 11, 190 NE 90.

Indiana. Lloyd v. State, 206 Ind 359, 189 NE 406.

[28] Jackson v. State, 152 Ga 210, 108 SE 784.

[29] **Alabama.** Alabama Midland R. Co. v. Thompson, 134 Ala 232, 32 S 672; Renfroe v. Collins & Co., 201 Ala 489, 78 S 395; De Bardelaben v. State, 205 Ala 658, 88 S 827; City Nat. Bank v. Nelson, 214 Ala 297, 107 S 849; Roberson v. State, 18 AlaApp 143, 90 S 70.

Arkansas. Twist v. Mullinix, 126 Ark 427, 190 SW 851; Free v. Maxwell, 138 Ark 489, 212 SW 325; Benson v. State, 149 Ark 633, 233 SW 758; Pate v. State, 152 Ark 553, 239 SW 27 (statements by accused after commission of homicide); Milton v. Jeffers, 154 Ark 516, 243 SW 60.

It was improper to tell the jury that their functions as judges of the weight of evidence were "illimitable, final, and unfettered." Texarkana & Ft. S. R. Co. v. Adcock, 149 Ark 110, 231 SW 866.

California. National Bank v. Whitney, 181 Cal 202, 183 P 789, 8 ALR 298; Straten v. Spencer, 52 CalApp 98, 197 P 540; People v. Kasch, 136 CalApp 385, 28 P2d 936; In re Sargavak's Estate, 95 CalApp2d 73, 212 P2d 541.

Colorado. Denver v. Stutzman, 95 Colo 165, 33 P2d 1071.

Connecticut. State v. Schutte, 97 Conn 462, 117 A 508.

District of Columbia. Metropolitan R. Co. v. Martin, 15 AppDC 552.

Georgia. Western & A. R. Co. v. Roberts, 144 Ga 250, 86 SE 933.

In Hirsch v. Plowden, 35 GaApp 763, 134 SE 833, the court expressed the opinion that plaintiff was totally and permanently disabled, that being one of the controverted issues in the case.

Illinois. Lundquist v. Chicago R. Co., 305 Ill 106, 137 NE 92; People v. Angelica, 358 Ill 621, 193 NE 606; Johnson v. Galesburg & K. Elec. R. Co., 193 IllApp 387.

It is improper for the court to discuss in the instructions the relative weight of positive and negative testimony. Hofer v. Chicago, B. & Q. R. Co., 237 IllApp 309.

Iowa. Wildeboer v. Peterson, 187 Ia 1169, 175 NW 349.

Michigan. Baldwin v. Hall, 323 Mich 25, 34 NW2d 539.

Missouri. Berry v. Sedalia, 201 MoApp 436, 212 SW 34 (instruction equivalent to demurrer to evidence); De Witt v. Syfon, 202 MoApp 469,

fact in controversy has[30] or has not been established[31] by the evidence presented.

211 SW 716; Morrill v. Kansas City (MoApp), 179 SW 759.

Where, in a rape case, testimony had been admitted to the effect that the defendant had tried to bribe the sheriff to let him escape, and had made statements tending to corroborate prosecutrix, it presented a question of fact for the jury's determination. State v. Mundy (Mo), 76 SW2d 1088.

Montana. Kansier v. Billings, 56 Mont 250, 184 P 630.

Nebraska. Skow v. Locks (Neb), 91 NW 204.

New Jersey. Hardy v. Delaware, L. & W. R. Co., 97 NJL 358, 118 A 104.

New Mexico. Victor American Fuel Co. v. Melkusch, 24 NM 47, 173 P 198.

New York. First Nat. Bank v. Nat. Surety Co., 243 NY 34, 152 NE 456, 46 ALR 967; Corrigan v. Funk, 109 AppDiv 846, 96 NYS 910; Barth v. Drago, 242 AppDiv 631, 272 NYS 109.

North Carolina. Swain v. Clemmons, 172 NC 277, 90 SE 193; State v. Moore, 192 NC 209, 134 SE 456 (holding it not erroneous for the court to tell the jury that the testimony of certain witnesses in the case was not contradicted).

The rule is violated by an instruction that the location of the distillery on the land of another should be considered as tending to show that defendant was not guilty. State v. Crouse, 182 NC 835, 108 SE 911.

Ohio. State v. Tuttle, 67 OhSt 440, 66 NE 425, 93 AmSt 689; Painesville Utopia Theatre Co. v. Lautermilch, 118 OhSt 167, 160 NE 683; Scaccuto v. State, 118 OhSt 397, 161 NE 211; Sandoffsky v. State, 29 OhApp 419, 163 NE 634; Ohio Exchange for Educational Films Co. v. P. & R. Amusement Co., 45 OhApp 10, 186 NE 746.

Oklahoma. Clarke v. Uihlein, 52 Okl 48, 152 P 589; Smith v. State, 56 OklCr 318, 38 P2d 591.

Oregon. Lawrence v. Portland R., Light & Power Co., 91 Or 559, 179 P 485.

Pennsylvania. Smith v. Jackson Tp., 26 PaSuperCt 234.

South Carolina. Enlee v. Seaboard Air Line R., 110 SC 137, 96 SE 490; Glenn v. Walker, 113 SC 1, 100 SE 706.

Texas. Barnes v. State, 90 TexCr 51, 232 SW 312; Dunn v. State, 92 TexCr 126, 242 SW 1049; Cosgrove v. Smith (TexCivApp), 183 SW 109 (disputed boundary line); San Antonio, U. & G. R. Co. v. Dawson (TexCivApp), 201 SW 247; Rio Grande & E. P. R. Co. v. J. H. Russell & Son (TexCivApp), 212 SW 530; Emerson-Brantingham Imp. Co. v. Roquemore (TexCivApp), 214 SW 679; Land v. Dunn (TexCivApp), 226 SW 801.

It was a charge on the weight of evidence that accused could not be convicted of a higher grade of assault than simple assault. Tucker v. State, 91 TexCr 538, 239 SW 978.

Virginia. Mopsikov v. Cook, 122 Va 579, 95 SE 426; Price v. Commonwealth, 132 Va 582, 110 SE 349.

[30] **Federal.** Ward v. Morrow, 15 F2d 660.

California. People v. Woodcock, 52 CalApp 412, 199 P 565; People v. Marconi, 118 CalApp 683, 5 P2d 974.

Georgia. Florida Cent. & P. R. Co. v. Lucas, 110 Ga 121, 35 SE 283; Murray v. State, 28 GaApp 101, 110 SE 418.

Idaho. Judd v. Oregon Short Line R. Co. (Idaho), 44 P2d 291.

Illinois. Holland v. Peoples Bank & Trust Co., 303 Ill 381, 135 NE 717 (testamentary capacity); People v. Brothers, 347 Ill 530, 180 NE 442.

Iowa. Bremhorst v. Phillips Coal Co., 202 Ia 1251, 211 NW 898.

The courts in absence of statute cannot, as a matter of law, where the evidence is conflicting declare what effect shall be given any particular act or circumstance,[32] or the inferences that may be drawn from a particular state of facts.[33] The court should not give a charge ascribing a certain effect to a particular part of the evidence.[34] Although the evidence may appear to

Michigan. Connor v. McRae, 193 Mich 682, 160 NW 479.

North Carolina. State v. Brinkley, 183 NC 720, 110 SE 783.

Ohio. Interstate S. S. Co. v. Chanfordi, 22 OhCirCt (N. S.) 310, 28 OhCirDec 477.

Texas. Galveston, H. & S. A. R. Co. v. Manns, 37 TexCivApp 356, 84 SW 254; Houston Chronicle Publishing Co. v. Murray (TexCivApp), 185 SW 407 (master and servant relation).

Washington. State v. Hilsinger, 167 Wash 427, 9 P2d 357.

[31] **Alabama.** Montgomery St. R. Co. v. Rice, 142 Ala 674, 38 S 857; Denham v. State, 18 AlaApp 145, 90 S 129; Alabama Great Southern R. Co. v. Bonner (Ala), 39 S 619.

Florida. Sessions v. State, 82 Fla 248, 89 S 553.

Illinois. Erwin v. Johnson, 200 IllApp 644.

Michigan. Morain v. Tesch, 214 Mich 699, 183 NW 899; People v. Toner, 217 Mich 640, 187 NW 386, 23 ALR 433.

North Carolina. Royal v. Dodd, 177 NC 206, 98 SE 599.

Oklahoma. Grayson v. Damme, 59 Okl 214, 158 P 387.

Pennsylvania. Solomon v. Ford, 108 PaSuperCt 43, 164 A 92.

Virginia. Myers v. Commonwealth, 132 Va 746, 111 SE 463.

[32] **Federal.** United States v. Coward, 76 F2d 875.

Alabama. Orr v. State, 225 Ala 642, 144 S 867; Carter v. Ne-Hi Bottling Co., 226 Ala 324, 146 S 821.

California. Zerbe v. United Railroads, 56 CalApp 583, 205 P 887; People v. Vaughan, 131 CalApp 265, 21 P2d 438.

Georgia. Moultrie v. Land, 145 Ga 479, 89 SE 485 (acts not amounting to negligence).

Illinois. People v. Lawson, 328 Ill 602, 160 NE 125.

Indiana. Talge Mahogany Co. v. Burrows, 191 Ind 167, 130 NE 865; Lauer v. Roberts, 99 IndApp 216, 192 NE 101.

North Carolina. Perry v. Norfolk Southern R. Co., 171 NC 38, 87 SE 948; Roanoke R. & Lbr. Co. v. Privette, 178 NC 37, 100 SE 79.

Ohio. MacDiarmid Candy Co. v. Schwartz, 11 OhApp 303; Newland v. State, 29 OhApp 135, 163 NE 56.

Oklahoma. Littlefield Loan & Inv. Co. v. Walkley & Chambers, 65 Okl 246, 166 P 90.

Oregon. Southern Oregon Co. v. Kight, 112 Or 66, 228 P 132, 832.

South Carolina. Gathings v. Great Atlantic & Pacific Tea Co., 168 SC 385, 167 SE 652.

Texas. Perez v. Maverick (TexCiv App), 202 SW 199; Dodson v. Watson (TexCivApp), 225 SW 586.

Utah. Smith v. Cummings, 39 Utah 306, 117 P 38.

[33] **Alabama.** Parnel v. Farmers Bank & Trust Co., 16 AlaApp 292, 77 S 442.

Arkansas. Union Seed & Fertilizer Co. v. St. Louis, I. M. & S. R. Co., 121 Ark 585, 181 SW 898 (inference that fire set out by passing locomotive).

Illinois. Pridmore v. Chicago, R. I. & P. R. Co., 275 Ill 386, 114 NE 176; Crisler v. Chicago City R. Co., 204 IllApp 491.

Michigan. Wood v. Standard Drug Co., 190 Mich 654, 157 NW 403.

Minnesota. Farrell v. G. O. Miller Co., 147 Minn 52, 179 NW 566.

[34] **Alabama.** Tingle v. Worthington, 215 Ala 126, 110 S 143.

the court to be clear, strong and convincing, yet the court may not state that fact to the jury.[35]

Illustrations of this type of error: The court encroaches on the domain of the jury by charging that the failure of a bank was prima facie evidence of insolvency.[36] If the instruction indicates to the jury that the evidence is sufficient to establish any ultimate fact in the prosecution's case, it is erroneous.[37] So instructions are erroneous which impute conclusivness to the verdicts of coroners on questions as to causes of injuries,[38] and responsibility therefor.[39] Where the evidence is in direct conflict upon the principal fact at issue, an instruction is erroneous which tells the jury that "where the testimony of witnesses is irreconcilably conflicting, they should give great weight to the surrounding circumstances in determining which witness is entitled to credit."[40] It is error in an action on a claim against a decedent for the court to charge that the claim should be considered with suspicion and be clearly established.[41]

There is an encroachment on the prerogatives by a charge which places more confidence in the testimony given by the witnesses for one party than in the testimony of the other side and the court announces that the verdict will be set aside unless the jury acts similarly.[42] So, it is an invasion of the province of the jury for the court to instruct in a rape case that the defendant should be found guilty if the jury believed the testimony of the prosecutrix.[43] It is error merely to tell the jury that positive testimony is entitled to more weight than negative testimony.[44] There was error in a charge that "the undisputed

Missouri. Biskup v. Hoffman, 220 MoApp 542, 287 SW 865.

North Carolina. But in State v. Strickland, 192 NC 253, 134 SE 850, an instruction was held without error though it told the jury to convict the defendant if they believed his testimony, it appearing that the evidence was susceptible to no other interpretation.

35 Ray v. Patterson, 170 NC 226, 87 SE 212.

36 State v. Walser, 318 Mo 833, 1 SW2d 147.

37 Walter v. State (Ind), 195 NE 268.

38 Gehrig v. Chicago & A. R. Co., 201 IllApp 287.

39 Devine v. Brunswick-Balke-Collender Co., 270 Ill 504, 110 NE 780, AnnCas 1917B, 887.

40 Skow v. Locks (Neb), 91 NW 204.

41 Varner's Exrs. v. White, 149 Va 177, 140 SE 128.

42 State v. Connelly (NJ), 136 A 603 (where the court told the jury to convict if they believed the witnesses for the prosecution truthful); Corrigan v. Funk, 109 AppDiv 846, 96 NYS 910.

43 Deffenbaugh v. State, 32 Ariz 212, 257 P 27.

44 Zbinden v. DeMoulin Bros. & Co., 245 IllApp 248; State v. Davies, 101 OhSt 487, 129 NE 590; Cleveland, C., C. & St. L. R. Co. v. Richerson, 19 OhCirCt 385, 10 OhCirDec 326; Cincinnati Trac. Co. v. Harrison, 24 OhCirCt (N. S.) 1, 34 OhCir Dec 435.

evidence shows that she [the plaintiff] had a fall from the train when wrecked" and that "there was evidence to show some slight physical bruises which, I think, were not denied," when these points were, in fact, controverted.[45] The rule was violated by an instruction that plaintiff offered evidence "which supported his contention" and that defendant offered evidence "which he says supports his contention."[46] It is improper to charge that a claim of alibi not made in good faith, and an unsuccessful attempt to prove it, should be considered by the jury.[47] It has been held error for the court to tell the jury that they may consider matters of common and general knowledge in addition to the evidence introduced and the instructions of the court.[48]

Whether there is any evidence tending to prove material allegations of the complaint is a question of law for the court, but in passing on propriety of a motion for directed verdict neither trial court nor appellate court can properly consider contradictory evidence.[49] The power of a trial court to order a judgment non obstante veredicto is subject to the same rules as the power to grant a nonsuit or to direct a verdict. In considering such motion the trial court may not weigh all the evidence of both sides or judge credibility of the witnesses as it may do on a motion for new trial, but must accept the evidence tending to support the verdict as true, unless on its face it should be inherently incredible.[50]

But where the evidence is not in conflict, the court may say that it substantially supports the complaint.[51] Where there is, in fact, an absence of proof, the court may instruct that the issue is not sustained by the evidence.[52] Nor is it a charge on the weight of the evidence where the court states what the law is upon certain facts submitted for consideration of the

[45] Florida Cent. & P. R. Co. v. Lucas, 110 Ga 121, 35 SE 283.

[46] Neal v. Yates, 180 NC 266, 104 SE 537.

[47] State v. Blair (WVa), 177 SE 307.

[48] Phoenix Ref. Co. v. Tips (TexCivApp), 66 SW2d 396.

[49] Evans v. Paul F. Beich Co., 337 IllApp 98, 85 NE2d 202.

[50] In re Sargavak's Estate, 95 CalApp2d 73, 212 P2d 541.

[51] **Arkansas.** See also Whittington v. Hooks, 154 Ark 423, 242 SW 817.

Connecticut. Scholfield Gear & Pulley Co. v. Scholfield, 71 Conn 1, 40 A 1046.

Texas. Hegman v. Roberts (TexCivApp), 201 SW 268.

[52] **Alabama.** But see Wheat v. Union Springs Guano Co., 195 Ala 180, 70 S 631.

Missouri. Alexander v. Harrison, 38 Mo 258, 90 AmDec 431.

Ohio. American Chem. Co. v. Smith, 8 OhApp 361, 30 OhCtApp 203.

Virginia. Norfolk Southern R. Co. v. Norfolk Truckers Exch., 118 Va 650, 88 SE 318.

jury.[53] So, the rule is not violated by a charge that fraud must be established by clear proof.[54] It is held not a charge on the weight of evidence to instruct that testimony of an accomplice must be corroborated by more than mere proof that an offense has been committed.[55] An instruction is also held not on the weight of evidence which told the jury that if they found accused guilty of some offense but had a reasonable doubt as to whether it was murder or manslaughter they would apply the doubt in favor of the accused.[56]

It is held under the Oregon law that the court should instruct that if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence is within the power of the party, the evidence offered should be viewed with distrust.[57] The prohibition in the Delaware Constitution against the court's comment or charge on the facts means some expression by the court directly or indirectly conveying to the jury the court's estimation of the truth, falsity, or weight of some of the testimony in the case.[58] A charge to disregard incompetent testimony is not a charge on the facts.[59]

Where a material allegation of the complaint was that smelter smoke had injured crops, which the defendant's answer denied, but the defendant offered no evidence to support the denial, the court properly told the jury that the defendant admitted the fact.[60]

§ 28. Questions of fact and weight of evidence in criminal cases.

In criminal cases the jury are the sole judges of questions of fact and the weight of the evidence.

The rule in criminal cases is substantially the same as the rule

[53] **Arkansas.** Bocquin v. Theurer, 133 Ark 448, 202 SW 845.

Florida. Stone v. State, 71 Fla 514, 71 S 634.

Illinois. Pierce v. Chicago City R. Co., 202 IllApp 69.

New York. Gangi v. Fradus, 227 NY 452, 125 NE 677.

South Carolina. Loveland v. Collins, 109 SC 294, 96 SE 124.

Texas. Paire v. Goff (TexCivApp), 202 SW 813; Etter v. Stampp & Eichelberger (TexCivApp), 204 SW 143; Hines v. Jones (TexCivApp), 225 SW 412.

[54] State Security & Realty Co. v. Badger, 200 Mich 104, 166 NW 950.

[55] Forson v. State, 90 TexCr 271, 234 SW 913.

[56] Littleton v. State, 91 TexCr 205, 239 SW 202.

[57] Stamm v. Wood, 86 Or 174, 168 P 69. But see Bank of Emanuel v. Smith, 32 GaApp 606, 124 SE 114.

[58] State v. Carey (Del), 178 A 877.

[59] Hocking Valley R. Co. v. Helber, 91 OhSt 231, 110 NE 481; Logan v. Cleveland R. Co., 107 OhSt 211, 140 NE 652; True v. Cudd, 106 SC 478, 91 SE 856.

[60] United Verde Copper Co. v. Jordan, 14 F2d 299, affg. 9 F2d 144.

in civil cases regarding questions of fact, that is, the jury alone decide questions of fact and the weight of the evidence.[61]

The matter is for the jury where there is any evidence, however slight, which tends to establish any material fact involved on the trial of a crime,[62] and the case is the same where there

[61] **Federal.** Hoke v. United States, 227 US 308, 57 LEd 523, 33 SupCt 281, 43 LRA (N. S.) 906, AnnCas 1913E, 905; Price v. United States, 276 F 628; Rosenthal v. United States, 45 F2d 1000, 78 ALR 1415.

Alabama. Arden v. State, 6 AlaApp 64, 60 S 538; Cunningham v. State, 14 AlaApp 1, 69 S 982; Wade v. State, 14 AlaApp 130, 72 S 269.

The jury determines the weight of the evidence of an accomplice. Handley v. State, 214 Ala 172, 106 S 692.

The province of the jury is invaded by an instruction that if the jury believes the evidence, it cannot find defendant guilty of first degree murder. James v. State, 14 AlaApp 652, 72 S 299.

California. People v. Dole, 122 Cal 486, 55 P 581, 68 AmSt 50.

Delaware. State v. Dougherty, 4 Boyce (27 Del) 163, 86 A 736.

Georgia. Kelloy v. State, 151 Ga 551, 107 SE 488; Mulligan v. State, 18 GaApp 464, 89 SE 541; Ponder v. State, 18 GaApp 703, 90 SE 365; Latty v. State, 19 GaApp 621, 91 SE 942.

Idaho. State v. Jones, 28 Idaho 428, 154 P 378.

Indiana. Newport v. State, 140 Ind 299, 39 NE 926.

Jury may draw its own conclusions from the evidence, though such conclusions may differ from the theories of accused or the state. Brunaugh v. State, 173 Ind 483, 90 NE 1019.

Kansas. State v. Gaunt, 98 Kan 186, 157 P 447.

Maryland. Deibert v. State, 150 Md 687, 133 A 847.

Michigan. People v. Abernathy, 253 Mich 583, 235 NW 261.

Mississippi. Miller v. State (Miss), 35 S 690.

Missouri. State v. Williams, 191 Mo 205, 90 SW 448; State v. McGee, 336 Mo 1082, 83 SW2d 98.

In State v. Summers (MoApp), 281 SW 123, it was held error for the court to tell the jury that they "will" take certain enumerated things into consideration, instead of informing them that they "may" take such things into consideration.

Ohio. Berry v. State, 31 OhSt 219, 27 AmRep 506; Burns v. State, 75 OhSt 407, 79 NE 929; State v. Robinson, 83 OhSt 136, 93 NE 623, 21 AnnCas 1255; Scaccuto v. State, 118 OhSt 397, 161 NE 211.

Instruction is improper which tells jury "as a matter of law, that you are to be liberal with the state as well as the defense." State v. Norman, 103 OhSt 541, 134 NE 474.

Oklahoma. Blunt v. State, 3 OklCr 449, 106 P 806.

South Carolina. In a homicide prosecution, the following instruction was not ground for reversal: "In other words, after all the dissertations, all that is meant is that the jury must be satisfied in their minds by the testimony of the existence or nonexistence of the facts under consideration." State v. Cooper, 118 SC 300, 110 SE 152.

South Dakota. State v. Coleman, 17 SD 594, 98 NW 175.

Utah. State v. Webb, 18 Utah 441, 56 P 159.

Wyoming. Curran v. State, 12 Wyo 553, 76 P 577.

[62] **Federal.** United States v. Rowe, 56 F2d 747.

Alabama. Morris v. State (Ala), 39 S 608.

California. People v. Miller, 139 CalApp 644, 34 P2d 788.

Illinois. People v. Schneider, 360 Ill 43, 195 NE 430.

Kentucky. Bently v. Commonwealth, 242 Ky 322, 46 SW2d 103; Lee v. Commonwealth, 255 Ky 814,

is conflicting evidence on controverted issues.[63] If the circumstances of a case reasonably justify an inference of the accused's guilt, the jury are not required to believe the evidence of the defendant even though if they did believe it the defendant would be entitled to an acquittal.[64] It is for the jury to say whether the evidence before them is sufficient to establish such matters and contentions as the defense of insanity[65] (but the question

75 SW2d 528; Bond v. Commonwealth, 257 Ky 366, 78 SW2d 1; Ford v. Commonwealth, 259 Ky 492, 82 SW2d 785.

Oklahoma. Wisdom v. State, 56 OklCr 140, 36 P2d 514.

Pennsylvania. Commonwealth v. Hyman, 117 PaSuperCt 585, 178 A 510.

Wisconsin. Newbern v. State (Wis), 260 NW 236.

[63] **Alabama.** Walker v. State, 117 Ala 42, 23 S 149; Hampton v. State, 1 AlaApp 156, 55 S 1018.

California. People v. Haydon, 18 CalApp 543, 123 P 1102, 1114.

Delaware. Where testimony is conflicting, it is the duty of the jury to reconcile it if possible; otherwise to reject that which they deem unworthy of credit, having regard to the character, intelligence, and bias of the witnesses and their opportunities of knowledge. State v. Lee, 1 Boyce (24 Del) 18, 74 A 4.

Illinois. People v. Martishuis, 361 Ill 178, 197 NE 531.

Michigan. People v. Stewart, 163 Mich 1, 127 NW 816.

Missouri. State v. Devorss, 221 Mo 469, 120 SW 75; State v. Davis, 337 Mo 411, 84 SW2d 930.

New York. People v. Ferrara, 199 NY 414, 92 NE 1054.

Oklahoma. Bourns v. State, 57 OklCr 377, 48 P2d 353.

Rhode Island. State v. Buchanan, 32 RI 490, 79 A 1114.

Texas. Owens v. State, 128 TexCr 199, 80 SW2d 316; Womack v. State, 129 TexCr 175, 84 SW2d 1011.

Virginia. Vlastaris v. Commonwealth, 164 Va 647, 178 SE 775.

[64] People v. Bolton, 215 Cal 12, 8 P2d 116.

[65] **Alabama.** Boyle v. State, 229 Ala 212, 154 S 575; Douglass v. State, 21 AlaApp 289, 107 S 791.

California. People v. Hubert, 119 Cal 216, 51 P 329, 63 AmSt 72; People v. Mellody, 87 CalApp 295, 261 P 1114.

Florida. Chesser v. State, 92 Fla 589, 109 S 599.

Kentucky. Prather v. Commonwealth, 215 Ky 714, 287 SW 559; Miller v. Commonwealth, 236 Ky 448, 33 SW2d 590.

Missouri. State v. Holme, 54 Mo 153; State v. Cockriel, 314 Mo 699, 285 SW 440.

Montana. State v. Howard, 30 Mont 518, 77 P 50.

Nebraska. Larson v. State, 92 Neb 24, 137 NW 894.

Nevada. The defense of insanity becomes a matter of evidence, the admissibility of which must first be passed on by the court to determine the form of insanity, and it then becomes a question of law for the court whether the form of insanity attempted to be proved is a legal defense, and if recognized the defense must be submitted to the jury by proper instructions. State v. Casey, 34 Nev 154, 117 P 5.

Ohio. State v. Hauser, 101 OhSt 404, 131 NE 66.

Oklahoma. Adair v. State, 6 OklCr 284, 118 P 416, 44 LRA (N. S.) 119; Litchfield v. State, 8 OklCr 164, 126 P 707, 45 LRA (N. S.) 153; Baker v. State, 9 OklCr 47, 130 P 524; Harris v. State, 53 OklCr 107, 7 P2d 914.

Texas. Kinney v. State, 116 Tex Cr 636, 33 SW2d 463; McCann v. State, 129 TexCr 105, 83 SW2d 967.

Utah. State v. Green, 78 Utah 580, 6 P2d 177.

of mental competency should not be presented to the jury in the absence of testimony tending to show that accused's mental condition influenced him at the time of commission of the crime);[66] a criminal intent;[67] guilty knowledge;[68] the venire;[69] the corpus delecti;[70] an alibi;[71] provocation justifying assault;[72] the identification of the defendant;[73] the result of experi-

Washington. State v. Dulacas, 147 Wash 540, 266 P 185.

Wisconsin. Oborn v. State, 143 Wis 249, 126 NW 737, 31 LRA (N. S.) 966; Tendrup v. State, 193 Wis 482, 214 NW 356.

[66] State v. Brewer, 218 Ia 1287, 254 NW 834.

[67] McNair v. State, 61 Fla 35, 55 S 401.

[68] Bonker v. People, 37 Mich 4.

[69] **Federal.** Price v. United States, 68 F2d 133 (question as to where income tax returns and taxes were due).

Alabama. Williams v. State, 5 AlaApp 112, 59 S 528; Smith v. State, 21 AlaApp 497, 109 S 530.

Arkansas. Spinks v. State, 104 Ark 641, 149 SW 54; Green v. State, 190 Ark 583, 79 SW2d 1006.

California. In re O'Connor, 80 CalApp 647, 252 P 730.

Idaho. State v. Roland, 11 Idaho 490, 83 P 337.

Iowa. State v. Spayde, 110 Ia 726, 80 NW 1058; State v. Caskey, 200 Ia 1397, 206 NW 280.

Kentucky. Risner v. Commonwealth, 220 Ky 77, 294 SW 803.

Louisiana. State v. Kline, 109 La 603, 33 S 618.

Missouri. State v. Burns, 48 Mo 438.

New Jersey. State v. Rose (NJ), 136 A 295.

Ohio. State v. Dickerson, 77 OhSt 34, 82 NE 969, 13 LRA (N. S.) 341, 122 AmSt 479, 11 AnnCas 1181.

Pennsylvania. Commonwealth v. Mull, 316 Pa 424, 175 A 418.

Texas. Teel v. State (TexCr), 70 SW2d 716.

[70] People v. Trine, 164 Mich 1, 129 NW 3; State v. Maranda, 94 OhSt 364, 114 NE 1038.

[71] **Alabama.** Chiles v. State, 26 AlaApp 358, 159 S 700.

California. People v. Arnold, 199 Cal 471, 250 P 168; People v. Madsen, 93 CalApp 711, 270 P 237; People v. Parker, 135 CalApp 761, 27 P2d 921; People v. Clark, 2 CalApp2d 743, 38 P2d 796.

Georgia. Stiles v. State, 113 Ga 700, 39 SE 295; Tipton v. State, 119 Ga 304, 46 SE 436.

Illinois. People v. Gentile, 326 Ill 540, 158 NE 222; People v. Manfucci, 359 Ill 69, 194 NE 248.

Iowa. State v. Sampson, 220 Ia 142, 261 NW 769.

Kentucky. Gray v. Commonwealth, 252 Ky 830, 68 SW2d 430.

Mississippi. Johnson v. State, 171 Miss 321, 157 S 896.

North Carolina. State v. Jeffreys, 192 NC 318, 135 SE 32.

Ohio. Burns v. State, 75 OhSt 407, 79 NE 929.

Pennsylvania. Commonwealth v. Szachewicz, 303 Pa 410, 154 A 483.

Wisconsin. Cobb v. State, 191 Wis 652, 211 NW 785.

[72] Amerson v. State, 18 GaApp 176, 88 SE 998.

[73] **Federal.** Kaplan v. United States, 18 F2d 939.

California. People v. Schoedde, 126 Cal 373, 58 P 859; People v. Hrjak, 85 CalApp 301, 259 P 353.

Colorado. Barr v. People, 30 Colo 522, 71 P 392.

Florida. Pennington v. State, 91 Fla 446, 107 S 331.

Georgia. Gray v. State, 6 GaApp 428, 65 SE 191.

Illinois. People v. Deal (Ill), 197 NE 772.

Iowa. State v. Kelly, 202 Ia 729, 210 NW 903.

Kentucky. Tatum v. Commonwealth, 22 KyL 927, 59 SW 32.

Missouri. State v. Friedman, 313 Mo 88, 280 SW 1023.

ments;[74] the impeachment of a witness;[75] former acquittal;[76] former jeopardy[77] (but if the facts on which a plea of former jeopardy is based are not disputed, it becomes a question for the court to determine[78]); the force and effect of confessions;[79]

New York. People v. Jackson, 182 NY 66, 74 NE 565.

Ohio. Mead v. State, 26 OhSt 505.

Vermont. State v. Orlandi, 106 Vt 165, 170 A 908.

[74] People v. Wagner, 29 CalApp 363, 155 P 649.

[75] **Federal.** Ramos v. United States, 12 F2d 761; Schneider v. United States, 57 F2d 454.

Alabama. James v. State, 14 Ala App 652, 72 S 299.

California. People v. Vejar, 93 CalApp 259, 269 P 671.

Georgia. Huff v. State, 104 Ga 521, 30 SE 808.

Illinois. People v. Lehner, 326 Ill 216, 157 NE 211.

Indiana. Fritch v. State, 199 Ind 89, 155 NE 257; Hammond v. State, 200 Ind 343, 163 NE 262.

Kentucky. McPerkin v. Commonwealth, 236 Ky 528, 33 SW2d 622; Sumner v. Commonwealth, 256 Ky 139, 75 SW2d 790.

Michigan. People v. Hare, 57 Mich 505, 24 NW 843.

Missouri. State v. Sharp, 183 Mo 715, 82 SW 134; State v. Gentry, 329 Mo 282, 44 SW2d 27; State v. Berezuk, 331 Mo 626, 55 SW2d 949; State v. Buckner, 335 Mo 229, 72 SW2d 73.

New York. People v. Tait, 234 AppDiv 433, 255 NYS 455.

Ohio. Sharp v. State, 16 OhSt 218.

Pennsylvania. Commonwealth v. Alessio, 313 Pa 537, 169 A 764.

Texas. Moore v. State, 103 TexCr 566, 281 SW 1080; Black v. State, 109 TexCr 2, 2 SW2d 459.

Virginia. Hendricks v. Commonwealth, 163 Va 1102, 178 SE 8.

Washington. State v. Prouse, 141 Wash 358, 251 P 582.

[76] **Indiana.** Dunn v. State, 70 Ind 47.

Louisiana. State v. Foley, 114 La 412, 38 S 402.

Missouri. State v. Tatman, 228 Mo 470, 128 SW 736.

New Jersey. State v. Rosa, 72 NJL 462, 62 A 695.

[77] **Alabama.** Gladden v. State, 24 AlaApp 188, 132 S 435.

California. In re Perry, 94 Cal App 235, 270 P 996.

Missouri. See State v. Ward (Mo), 85 SW2d 1.

North Carolina. State v. Clemmons, 207 NC 276, 176 SE 760.

North Dakota. State v. Panchuk, 53 ND 669, 207 NW 991.

Ohio. Beamer v. State, 10 OhCir-Ct (N. S.) 131, 19 OhCirDec 578.

Texas. Woodward v. State, 42 TexCr 188, 58 SW 135.

Wisconsin. But see Lanphere v. State, 114 Wis 193, 89 NW 128.

[78] **Iowa.** State v. Smith (Ia), 256 NW 651.

Oklahoma. State v. Brooks, 38 OklCr 302, 260 P 785.

Pennsylvania. Commonwealth v. Bloom, 88 PaSuperCt 93.

[79] **Federal.** Colletti v. United States, 53 F2d 1017.

Alabama. Fowler v. State, 170 Ala 65, 54 S 115.

Florida. Nickels v. State, 90 Fla 659, 106 S 479.

Illinois. People v. Gukouski, 250 Ill 231, 95 NE 153, AnnCas 1912B, 297; People v. Guido, 321 Ill 397, 152 NE 149.

Massachusetts. Commonwealth v. Zelenski, 287 Mass 125, 191 NE 355.

Nebraska. Becker v. State, 91 Neb 352, 136 NW 17.

New Jersey. State v. Compo, 108 NJL 499, 158 A 541, 85 ALR 866; State v. Locicero, 115 NJL 208, 178 A 778, affg. 12 NJMisc 837, 175 A 904.

Ohio. Burdge v. State, 53 OhSt 512, 42 NE 594; State v. Knapp, 70 OhSt 380, 71 NE 705, 1 AnnCas 819; State v. Strong, 12 OhDec 701.

the truth or falsity of admissions by the accused;[80] the commission of the offense within the statute of limitations;[81] and whether the defendant concealed the alleged crime and thus tolled the running of the statute.[82]

It is likewise a question for the jury whether a witness is an accomplice,[83] unless the facts as to the participation of the witness in the crime charged are clear and undisputed;[84] whether such a witness has been corroborated,[85] but if the evidence whether a witness was an accomplice is undisputed, the court

Texas. Wright v. State, 117 Tex Cr 603, 36 SW2d 747.

West Virginia. State v. Richards, 101 WVa 136, 132 SE 375.

[80] **California.** People v. Buckley, 143 Cal 375, 77 P 169; People v. Holmes, 130 CalApp 507, 20 P2d 67.

Colorado. Ausmus v. People, 47 Colo 167, 107 P 204, 19 AnnCas 491.

Ohio. Hoover v. State, 91 OhSt 41, 109 NE 626; Neiswender v. State, 28 OhCtApp 545, 30 OhCirDec 417.

[81] State v. Newton, 39 Wash 491, 81 P 1002. But see Gambling v. State, 22 AlaApp 442, 116 S 507.

[82] State v. Wingett, 136 Kan 436, 16 P2d 486; State v. Taylor, 140 Kan 663, 38 P2d 680.

[83] **Federal.** Hays v. United States, 231 F 106.

California. People v. Compton, 123 Cal 403, 56 P 44; People v. Southwell, 28 CalApp 430, 152 P 939.

Georgia. Hargrove v. State, 125 Ga 270, 54 SE 164.

Illinois. People v. Smith, 342 Ill 600, 174 NE 828.

Jury is to pass upon and determine the credibility of an accomplice. People v. Durand, 321 Ill 526, 152 NE 569.

Kansas. State v. Reidie, 142 Kan 290, 46 P2d 601.

Kentucky. Smith v. Commonwealth, 148 Ky 60, 146 SW 4; Fryman v. Commonwealth, 225 Ky 808, 10 SW2d 302; Fox v. Commonwealth, 248 Ky 466, 58 SW2d 608 (saying, however, that where the facts are undisputed it is for the court to say whether the witness was an accomplice).

Montana. State v. Smith, 75 Mont 22, 241 P 522.

New York. People v. Dunn, 243 NY 381, 153 NE 843; People v. Clougher, 246 NY 106, 158 NE 38; People v. Jackerson, 247 NY 36, 159 NE 715; People v. Warder, 231 AppDiv 215, 247 NYS 60.

North Dakota. State v. Moeller, 24 ND 165, 138 NW 981.

Ohio. Curtis v. State, 113 OhSt 187, 148 NE 834.

Oklahoma. Wells v. State, 34 OklCr 179, 245 P 1007; Vardeman v. State, 54 OklCr 329, 20 P2d 194; Yeargain v. State, 57 OklCr 136, 45 P2d 1113.

If the facts are not controverted, it is a question of law for the court to decide. Evinger v. State, 57 OklCr 63, 45 P2d 552.

Texas. Clay v. State, 40 TexCr 556, 51 SW 212; Minor v. State, 108 TexCr 1, 299 SW 422; Craven v. State, 119 TexCr 606, 45 SW2d 219.

Where the evidence did not in any way connect a witness with the crime charged, he was not an accomplice, so as to require the submission of the question whether he was an accomplice. Tate v. State, 68 TexCr 561, 151 SW 825.

[84] Commonwealth v. Brown, 116 PaSuperCt 1, 175 A 748; Chapman v. State, 127 TexCr 302, 76 SW2d 138.

[85] **Alabama.** Arrington v. State, 24 AlaApp 233, 133 S 592; Smith v. State, 230 Ala 413, 161 S 538; Crumbley v. State, 26 AlaApp 24, 152 S 55; Dodd v. State, 26 AlaApp 367, 160 S 267.

Arizona. Faltin v. State, 17 Ariz 278, 151 P 952.

determines the status of the witness as a matter of law;[86] the weight that should be given to the testimony of experts;[87] whether evidence favorable to accused raises a reasonable doubt of his guilt;[88] and whether reasonable force has been used in retaking property wrongfully taken.[89]

The weight to be given to statements which form a part of the res gestae is for the jury.[90] Where there was testimony in a homicide case on the question of identity that the murderer was pale or white, and photographs of the defendant in evidence showed him tanned, the weight of the evidence was for the jury.[91] It is not proper for the court to go to the extent of telling the jury in a murder trial that it is a well-settled rule of law that if there be two reasonable constructions which can be given to facts proved, one favorable and the other unfavorable to the accused, it is the duty of the jury to give that which is favorable rather than unfavorable.[92] The court invades the province of the jury by telling them that mere evidence of opportunity for sexual intercourse is not sufficient to establish adultery;[93] that the jury could consider the superior strength of the defendant

California. People v. Viets, 79 CalApp 576, 250 P 588.

Georgia. Bowden v. State, 36 GaApp 751, 138 SE 246.

Iowa. State v. Dorsey, 154 Ia 298, 134 NW 946.

Kentucky. Goodin v. Commonwealth, 212 Ky 561, 279 SW 984; Sullivan v. Commonwealth, 255 Ky 666, 75 SW2d 339; Walker v. Commonwealth, 257 Ky 613, 78 SW2d 754.

New York. People v. Barry, 196 NY 507, 89 NE 1107; People v. Kathan, 136 AppDiv 303, 120 NYS 1096.

Ohio. Noland v. State, 19 Oh 131; Sandoffsky v. State, 29 OhApp 419, 163 NE 634.

Oklahoma. McGill v. State, 6 OklCr 512, 120 P 297.

Pennsylvania. Commonwealth v. Bruno, 316 Pa 394, 175 A 518.

South Dakota. State v. Walsh, 25 SD 30, 125 NW 295.

Tennessee. Patmore v. State, 152 Tenn 281, 277 SW 892.

[86] People v. McDermott, 75 Cal App 718, 243 P 485.

[87] **Montana.** State v. Mah Sam Hing, 89 Mont 178, 295 P 1014.

New York. People v. Soper, 243 NY 320, 153 NE 433.

North Carolina. State v. Combs, 200 NC 671, 158 SE 252.

Ohio. Vey v. State, 35 OhApp 324, 172 NE 434, 31 OLR 135; State v. Del Bello, 8 OhDec 455; State v. Rieber, 51 OhBull 208.

Pennsylvania. Commonwealth v. Cavalier, 284 Pa 311, 131 A 229.

Texas. Kellum v. State, 102 Tex Cr 537, 278 SW 434.

[88] People v. Williams, 240 Ill 633, 88 NE 1053; State v. Robinson, 83 OhSt 136, 93 NE 623, 21 AnnCas 1255.

[89] Commonwealth v. Donahue, 148 Mass 529, 20 NE 171, 2 LRA 623, 12 AmSt 591.

[90] Rouse v. State, 135 Ga 227, 69 SE 180; State v. Lasecki, 90 OhSt 10, 106 NE 660, LRA 1915E, 202, AnnCas 1916C, 1182.

[91] People v. Herbert, 361 Ill 64, 196 NE 821.

[92] Mathis v. State, 15 AlaApp 245, 73 S 122. See also Deshazo v. State, 120 Ark 494, 179 SW 1012.

[93] Brown v. State, 22 AlaApp 290, 115 S 68.

in a rape case, and the suddenness of his attack;[94] that shooting of officer shows anarchy and chaos.[95]

§ 29. Comments and expressions of opinion on the evidence—In general.

In most jurisdictions, the exclusive province of the jury as to the facts of the case is infringed by any comments on the facts or expression of opinion by the court as to the weight and effect to be given to the evidence.

Because of the likelihood of unduly influencing the jury in its deliberations, the trial judge in a majority of states cannot comment on the facts or express his opinion on the weight and effect of the evidence.[96] Of course, this rule applies only if the judge determines that the issue is for the jury and not entitled to a peremptory instruction. It has been said that "a court in charging a jury should so evenly balance the scales of justice as not to indicate by a wink, look, shake of the head, or peculiar emphasis, as to his notions as to which way the verdict should

[94] People v. Celmars, 332 Ill 113, 163 NE 421.

[95] Freeman v. State, 119 OhSt 250, 163 NE 202.

[96] **Arizona.** Griswold v. Horne, 19 Ariz 56, 165 P 318, LRA 1918A, 862.

California. McNeil v. Barney, 51 Cal 603; Davis v. Pezel, 131 CalApp 46, 20 P2d 982.

Florida. Supreme Lodge K. P. v. Lipscomb, 50 Fla 406, 39 S 637.

Georgia. Owen v. Palmour, 111 Ga 885, 36 SE 969; Worsham v. Ligon, 144 Ga 707, 87 SE 1025; Bowen v. Smith-Hall Groc. Co., 146 Ga 157, 91 SE 32; Frost v. Smith, 148 Ga 840, 98 SE 471; Atlantic Coast Line R. Co. v. Mead, 18 GaApp 621, 90 SE 87 (intimation that language was insulting); De Ment v. Rogers, 24 GaApp 438, 101 SE 197.

A statement in an instruction that there was a great deal of feeling on the part of the parties was an expression of an opinion on the facts of the case. Skellie v. Skellie, 152 Ga 707, 111 SE 22.

In a case where the jury announced an inability to agree, the court's remark that it was expensive to the county to try the case and that it was necessary that they make a verdict if they could did not intimate an opinion on the facts in favor of plaintiff or otherwise prejudice defendant. Atlanta & W. P. R. Co. v. Reese, 28 GaApp 275, 110 SE 750.

Illinois. Rice & Bullen Malting Co. v. International Bank, 86 IllApp 136, affd. in 185 Ill 422, 56 NE 1062.

Indiana. Reynolds v. Cox, 11 Ind 262.

Maryland. Western Maryland R. Co. v. Shivers, 101 Md 391, 61 A 618.

Massachusetts. Davis v. Jenney, 1 Metc. (42 Mass) 221.

Michigan. Walts v. Walts, 127 Mich 607, 86 NW 1030; McCain v. Smith, 172 Mich 1, 137 NW 616.

Missouri. Jones v. St. Louis-San Francisco R. Co., 287 Mo 64, 228 SW 780; Webb v. Baldwin, 165 MoApp 240, 147 SW 849; Wagner v. Binder (Mo), 187 SW 1128; Markland v. Clover Leaf Casualty Co. (MoApp), 209 SW 602; Hearon v. Himmelberger - Harrison Lbr. Co. (MoApp), 224 SW 67.

This rule was violated by an instruction that evidence by deposition should be given the same weight and

go."[97] While the evidence may be reviewed or summarized, the court should refrain from commenting upon it, and there is such an objectionable comment where the court says there is an entire absence of evidence on an issue of the case, and there is evidence sufficient to raise an inference on the issue.[98]

The rule is not affected by the fact that the expression may have been inadvertent or unintentional.[99] It has been held to be a comment on the weight of the evidence for the court to cross-examine a witness in the presence of the jury.[1] The rule against comment and expression of opinion does not, as a general rule, depend on whether there is a conflict in the evidence.[2]

When the evidence is parol, any opinion as to its weight, effect and sufficiency by the court is an invasion of the province of the jury.[3] Thus the court would overstep the line between law and fact by instructing that the jury cannot return a verdict upon the testimony of one witness alone, as it is the jury's right to weigh such testimony in connection with all the other evidence

credit as if the witnesses were personally present. Anderson v. White, 210 MoApp 275, 235 SW 834.

Montana. Hardesty v. Largey Lbr. Co., 34 Mont 151, 86 P 29; Hawley v. Richardson, 60 Mont 118, 198 P 450.

Nebraska. Kleutsch v. Security Mut. Life Ins. Co., 72 Neb 75, 100 NW 139.

New York. Broderick v. Brooklyn, Q. C. & S. R. Co., 186 AppDiv 546, 174 NYS 571.

North Carolina. Phillips v. Giles, 175 NC 409, 95 SE 772; Sloan v. Cooper Guano Co., 176 NC 690, 96 SE 954; Fox v. Texas Co., 180 NC 543, 105 SE 437.

Ohio. Hastings v. Allen, 14 Oh 58, 45 AmDec 522; Weybright v. Fleming, 40 OhSt 52; Metropolitan Life Ins. Co. v. Howle, 68 OhSt 614, 68 NE 4; Fouts v. State, 113 OhSt 450, 149 NE 551; Zimmerman v. State, 42 OhApp 407, 182 NE 354, 12 OLA 140; Rapp v. Becker, 4 CirCt (N. S.) 139, 16 CirDec 321.

Oklahoma. Bilby v. Owen, 74 Okl 158, 181 P 724; Snouffer v. First Nat. Bank, 86 Okl 190, 207 P 452.

South Carolina. Sandel v. State, 115 SC 168, 104 SE 567, 13 ALR 1268 (instruction as to weight of admissions of state officers); Powers v. Rawls, 119 SC 134, 112 SE 78.

Texas. Smith v. Bryan (TexCiv App), 204 SW 359.

Virginia. Whitelaw's Exr. v. Whitelaw, 83 Va 40, 1 SE 407.

West Virginia. Harman & Crockett v. Maddy Bros., 57 WVa 66, 49 SW 1009.

[97] Metropolitan Life Ins. Co. v. Howle, 68 OhSt 614, 68 NE 4.

[98] **Alabama.** Coghill v. Kennedy, 119 Ala 641, 24 S 459.

North Carolina. State v. Fleming, 202 NC 512, 163 SE 453.

Ohio. Home Tel. Co. v. Meyers, 99 OhSt 338, 124 NE 210; Minnick v. Cockley, 103 OhSt 675, 136 NE 59.

[99] Starling v. Selma Cotton Mills, 171 NC 222, 88 SE 242.

[1] Felker v. Gulf Coast Orchards Co. (TexCivApp), 81 SW2d 1044.

[2] The court invades the province of the jury by telling them that if they believe all the evidence in the case their verdict should be for the plaintiff. Dixon v. Hotel Tutwiler Operating Co., 214 Ala 396, 108 S 26.

Whitelaw's Exr. v. Whitelaw, 83 Va 40, 1 SE 407.

[3] Cook v. Gillespie, 259 Ky 281,

in the case,[4] or by instructing that certain evidence is more satisfactory and reliable than certain other evidence or that one class of testimony is to be believed in preference to another class,[5] or that the evidence is insufficient to sustain the declaration,[6] or that the testimony is not "clear, cogent and convincing."[7] Where the court in charging the jury stated the facts as they were alleged in plaintiff's complaint but failed to include an expression to the effect that "it is alleged," it was held that the instruction was erroneous as it invaded the province of the jury.[8]

An instruction is not open to objection as being on the weight of the evidence where it charges the jury upon the legal effect of admitted or uncontroverted facts,[9] or merely recites the contentions of the parties.[10] Further, as the trial judge, in ruling that evidence is admissible, in effect decides that it has a ten-

82 SW2d 347; Richmond & D. R. Co. v. Noell, 86 Va 19, 9 SE 473.

[4] Dawson v. Falls City Boat Club, 125 Mich 433, 84 NW 618.

[5] Coulter v. B. F. Thompson Lbr. Co., 142 F 706; Belt R. Co. v. Confrey, 111 IllApp 473.

[6] Winkler v. Chesapeake & O. R. Co., 12 WVa 699.

[7] Ray v. Long, 132 NC 891, 44 SE 652.

That certain evidence might be considered a "strong circumstance" against a party is improper. Edwards v. St. Louis & S. F. R. Co., 166 MoApp 428, 149 SW 321.

[8] Wilch v. Western Asphalt Paving Corp., 124 Neb 177, 245 NW 605.

[9] **Alabama.** Newell Contr. Co. v. Glenn, 214 AlaApp 282, 107 S 801; Orr v. Read Phosphate Co., 215 Ala 562, 112 S 145.

Georgia. Peeples v. Rudulph, 153 Ga 17, 111 SE 548; May v. Sorrell, 153 Ga 47, 111 SE 810.

It does not amount to a comment to charge that failure of plaintiff to do correct thing in the face of imminent peril would not preclude recovery for injuries the result of negligence of plaintiff. Gainesville Midland R. Co. v. Vandiver, 144 Ga 852, 88 SE 193.

Indiana. Chicago, I. & L. R. Co. v. Stierwalt, 87 IndApp 478, 153 NE 807.

Missouri. Slayback v. Gerkhardt, 1 MoApp 333; Cantrell v. Knight (MoApp), 72 SW2d 196.

Washington. Thornton v. Eneroth, 180 Wash 250, 39 P2d 379, 48 P2d 1120.

[10] **Alabama.** Johnson Bros. v. Storrs-Schaefer Co., 25 AlaApp 78, 140 S 885.

Arkansas. Love v. Cowger, 130 Ark 445, 197 SW 853.

Georgia. Carswell v. Smith, 145 Ga 588, 89 SE 698; Ford v. Ford, 146 Ga 164, 91 SE 42; Brookman v. Rennolds, 148 Ga 721, 98 SE 543; McArthur v. Ryals, 162 Ga 413, 134 SE 76; American Trust & Banking Co. v. Harris, 18 GaApp 610, 89 SE 1095; Owens v. Fuller, 27 GaApp 368, 108 SE 312.

Indiana. Public Utilities Co. v. Handorf, 185 Ind 254, 112 NE 775.

Maine. Benner v. Benner, 120 Me 468, 115 A 202.

Missouri. Hurlburt v. Bush, 284 Mo 397, 224 SW 323.

North Carolina. Bradley v. Camp Mfg. Co., 177 NC 153, 98 SE 318.

Texas. Wiedner v. Katt (TexCiv App), 279 SW 909.

An instruction that operation of cotton gin was not a nuisance as matter of law was not a comment on weight of testimony. Oliver v. Forney Cotton Oil & Ginning Co. (TexCivApp), 226 SW 1094.

dency to make out a case or defense, there can be no objection to his saying so in his charge.[11] While the court may not instruct as to what any evidential fact proves or does not prove, or the weight to be given it, it is within his power to determine whether there is any evidence tending to establish a fact in the case.[12] He may likewise tell the jury of the relevancy of the evidence to the issues but he may not give an opinion as to the facts proved.[13]

So the trial judge has the right to tell the jury what the claims of the respective parties are, and if, in doing so, he incidentally refers to the testimony, his statement will not necessarily amount to a charge on the weight of the evidence provided he does not indicate to the jury that the evidence establishes or tends to establish the claim of either party.[14] The rule is not violated where the instruction is not intended as a comment on the facts, but merely as a statement of the issues.[15] The court may, likewise, make reference to particular phases of the testimony and apply principles of law thereto,[16] or explain the various matters of fact involved and differentiate between them.[17] Nor does the rule forbid the judge to tell the jury that there was no evidence to sustain a particular fact.[18]

Further, the court may, without violation of the rule, explain to the jury the use of mortality and annuity tables by referring to a particular age which, according to the evidence, is approximately the age of one of the parties.[19] So the court does not

[11] Campau v. Langley, 39 Mich 451, 33 AmRep 414.

[12] **Arkansas.** Miller v. Ft. Smith Light & Trac. Co., 136 Ark 272, 206 SW 329.

California. Habner v. Pacific Elec. R. Co., 78 CalApp 617, 248 P 741.

Indiana. Beckner v. Riverside & Battle Ground Tpk. Co., 65 Ind 468.

[13] Ivey v. Louisville & N. R. Co., 18 GaApp 434, 89 SE 629; Newton v. Texas Co., 180 NC 561, 105 SE 433.

[14] **Missouri.** Neal v. Caldwell, 326 Mo 1146, 34 SW2d 104; First Nat. Bank v. Aquamsi Land Co. (MoApp), 70 SW2d 90; Schrowang v. Von Hoffman Press (MoApp), 75 SW2d 649.

South Carolina. In re Brazman's Will, 172 SC 188, 173 SE 623.

Texas. State v. Blair (TexCiv App), 72 SW2d 927.

Washington. Drumheller v. American Surety Co., 30 Wash 530, 71 P 25.

[15] Commonwealth v. Kretezitis, 111 PaSuperCt 5, 169 A 417; Westbury v. Simmons, 57 SC 467, 35 SE 764.

[16] **California.** People v. Calkins (CalApp), 47 P2d 544.

Kansas. Haines v. Goodlander, 73 Kan 183, 84 P 986.

North Carolina. State v. Steele, 190 NC 506, 130 SE 308 (reference in murder trial to state's contention that wife of deceased saw defendant strike deceased).

Pennsylvania. Commonwealth v. Gittleson, 88 PaSuper 190.

[17] Hopcraft v. Kittredge, 162 Mass 1, 37 NE 768.

[18] Dime Sav. & Trust Co. v. Jacobson, 191 IllApp 275; Jensen v. Schlenz, 89 Wash 268, 154 P 159.

[19] **Georgia.** Central of Georgia

comment on the evidence where he gives the reason for the withdrawal of a cause of action by the plaintiff;[20] or states to the attorneys in the case the reasons for rulings on certain objections;[21] or overrules a motion for a nonsuit and tells the jury that his action was a matter of law and not for the jury;[22] or where he makes casual remarks in reference to the dates of documents introduced in evidence, and, so far as indicated by the evidence, the dates are correct.[23] The rule is not infringed by an instruction restricting the maximum recovery of the plaintiff to the amount stated in the complaint.[24] The court will not ordinarily be held to have expressed an opinion where it charges that issues must be sustained by clear and satisfactory evidence.[25]

A party cannot complain that a court has used in the instructions the same language used by the party's attorney in argument.[26]

§ 30. Comments and expressions of opinion as to preponderance of evidence.

The province of the jury is invaded by instructions which express an opinion as to the preponderance of the evidence in a particular case.

This rule is a particular application of the more general rule that the judge cannot comment on the evidence. The particular rule is violated when the judge in effect, by hint, emphasis, incorrect instruction, or otherwise, expresses his view as to which party's evidence preponderates. That this is an invasion of the province of the jury is supported by the cases.[27]

R. Co. v. Duffy, 116 Ga 346, 42 SE 510.

Michigan. Fishleigh v. Detroit United Ry. Co., 205 Mich 145, 171 NW 549.

South Carolina. But see Case v. Atlanta & C. A. L. R. Co., 107 SC 216, 92 SE 472.

[20] Lownsdale v. Grays Harbor Boom Co., 36 Wash 198, 78 P 904.

[21] Osborne v. Galusha, 143 Wash 127, 254 P 1086.

[22] Moseley v. Carolina, C. & O. R. Co., 106 SC 368, 91 SE 380.

[23] McGhee v. Wells, 57 SC 280, 35 SE 529, 76 AmSt 567.

[24] Bradley v. Camp Mfg. Co., 177 NC 153, 98 SE 318.

[25] Hubbard & Co. v. Goodwin, 175 NC 174, 95 SE 152.

[26] Bowen v. Worthington, 191 NC 468, 132 SE 151.

[27] **Georgia.** Peacock v. Anderson, 20 GaApp 540, 93 SE 171; Union Warehouse Co. v. Roper, 21 GaApp 182, 94 SE 74.

Illinois. An instruction which tells the jury upon what facts and circumstances they shall determine the preponderance of the evidence invades the province of the jury. Witt v. Gallemore, 163 IllApp 649.

Indiana. Pennsylvania Co. v. Hunsley, 23 IndApp 37, 54 NE 1071.

New York. Suse v. Metropolitan Street R. Co., 80 AppDiv 24, 80 NYS 513.

South Carolina. But see Montgomery v. Seaboard Air Line R. Co., 73 SC 503, 53 SE 987.

An instruction that the jury "are at liberty to decide that the preponderance of the evidence is on the side which, in their judgment, is sustained by the more intelligent and better informed, and the more credible and the more disinterested witnesses, whether these are the greater or the smaller number," is in effect telling them that greater weight is to be given to the testimony of the more intelligent and better informed, regardless of other considerations in the case.[28] So, while the jury may take into consideration, along with other facts and circumstances, the intelligence and credibility of the witnesses and their opportunities of seeing and hearing the facts, it is beyond the court's domain to tell the jury they "should" rather than "may" take into consideration such factors.[29] The court may

Texas. Where the court, in defining preponderance, says that "this does not mean that there shall be a greater number of witnesses on one side than on the other," the impression likely to be conveyed to the jury is that they may disregard the number of witnesses as bearing on the question of preponderance, while, as a matter of fact, the jury may consider the number, as well as any other factors or elements entering into the case, in determining weight. Dallas Cotton Mills v. Ashley (TexCivApp), 63 SW 160.

[28] **Colorado.** In Garver v. Garver, 52 Colo 227, 121 P 165, AnnCas 1913D, 674, the defendant requested and the court gave an instruction that "although the preponderance of the evidence is not always determined by the number of witnesses testifying in a case, yet if in a case there are only one or two witnesses who testify to a given state of facts, and six or seven witnesses of equal candor, fairness, intelligence, and truthfulness and equally well corroborated by all the other evidence, and who have no great interest in the result of the suit, testify against such facts, then the preponderance of the evidence is determined by the number of witnesses." The court on appeal, in holding that the instruction was clearly erroneous, said: "It suggests a comparison of the number of witnesses testifying on either side—is a comment on the evidence—and is an erroneous rule. The preponderance of the evidence is never determined by the number of witnesses, but by the greater weight of all the evidence. And the greater weight does not necessarily mean a greater number of witnesses who testify on either side of the issue or issues involved."

Illinois. W. H. Stubbings Co. v. Worlds Columbian Exposition Co., 110 IllApp 210.

Pennsylvania. The weight of evidence is not a question of mathematics, but depends on its effect in inducing belief. It often happens that one witness standing uncorroborated may tell a story so natural and reasonable in its character, and in a manner so sincere and honest, as to command belief, although several witnesses of equal apparent respectability may contradict him. The manner and appearance of the witness, the character of his story and its inherent probability may be such as to lead a jury to believe his testimony, and accept it as the truth of the transaction to which it relates. The question for the jury is not on which side are the witnesses most numerous, but "what testimony do you believe?" Braunschweiger v. Waits, 179 Pa 47, 36 A 155.

[29] **Illinois.** Walters v. Checker Taxi Co., 265 IllApp 329.

inform the jury that preponderance of the evidence means the greater weight of credible testimony.[30] It is a correct statement of the law, however, to inform the jury that if they find from the evidence the plaintiff has, by a preponderance of the evidence, proved the material allegations of his declaration, their verdict will be in his favor and there can be no valid objection, in this connection, to the use of the word "will" rather than "may."[31]

It is error to tell the jury that preponderance of the evidence meant the greater weight of the testimony, where the evidence consisted in part of testimony and in part of exhibits.[32]

Special attention should be made to instructions relating to the number of witnesses testifying for and against an issue of fact. It is error to tell the jury that the probability of truth is on the side of the party having the affirmative of the issue, even though the same instruction charges that the preponderance of the evidence is not necessarily disclosed by the greater number of witnesses.[33] Where an instruction tells the jury that the evidence which convinces them most strongly of its truthfulness is of greater weight and does not assume to instruct as to how to determine the greater weight, whether by a larger or smaller number of witnesses, there can be no good ground for objection.[34] An instruction which may lead the jury to understand that the preponderance of the evidence depends upon the number of witnesses testifying on each side of the case is erroneous.[35] Some states by statute, however, permit the judge to tell the jury that they may consider the number of witnesses, but the statutory rule is not applicable in a case where the numbers on both sides are the same.[36]

§ 31. Comments and expressions of opinion—Cases of contract and tort.

The rule prohibiting the court from commenting on the weight of the evidence or intimating an opinion as to its weight, importance, or effect, applies with equal force to actions of contract, and actions of tort.

Indiana. Pennsylvania Co. v. Hunsley, 23 IndApp 37, 54 NE 1071.

[30] Moll v. Pollack (Mo), 8 SW2d 38.

[31] North Chicago Street R. Co. v. Zeiger, 78 IllApp 463.

[32] John Bright Shoe Stores Co. v. Scully, 24 OhApp 15, 156 NE 155.

[33] Ennes v. Dunham, 266 Mich 616, 254 NW 224.

[34] Fierberg v. Whitcomb, 119 Conn 390, 177 A 135; Indianapolis Street Ry. Co. v. Schomberg (Ind App), 71 NE 237.

[35] Kempf v. Himsel, 121 IndApp 488, 98 NE2d 200; Industrial Comm. v. Jasionowski, 24 OhApp 66, 156 NE 616.

[36] Atlanta Gas-Light Co. v. Cook, 35 GaApp 622, 134 SE 198 (involving Civ. Code 1910, § 5732).

Since tort and contract cases are prevalent, it is advisable to give examples of violations and compliances with the rule prohibiting the judge's comments and expression of opinion on the evidence. It is clear that the prohibitory rule does apply to actions of contract[37] and actions of tort.[38]

(1) **Contracts.** In an action on a note, the point at issue being the genuineness of the instrument, it is for the jury to determine such question and it is erroneous to instruct that evidence of handwriting "is of a character little worthy of credence" and that the jury may refuse to find the note to be genuine, from such evidence alone, where there is no proof as to consideration.[39] Where the grantor of a deed was an infant, the court erred in telling the jury that such grantor ratified the deed after becoming of age, by keeping the amount received for the grant.[40] It was held not an expression of opinion by the court that the verdict should be for the plaintiff to charge that if interest was allowed for breach of contract it should be added to the principal, and the verdict should be for that amount.[41]

In a suit on an insurance policy, however, a requested charge was: "If the agent, though mistaken, insures one person when he should have insured another, the person who should have been insured can not sue in an action at law on a contract of insurance that should have been made without first having the contract reformed and corrected in a court of equity." The court modified the charge by saying, "But I think you will not have any difficulty about going into the court of equity about reformation of the contract." It was held that the modified charge

[37] **Alabama.** Copeland v. Pope, 198 Ala 257, 73 S 490; Jones v. First Nat. Bank, 206 Ala 203, 89 S 437.

California. Rosenberg v. Rogers, 52 CalApp 574, 199 P 50.

Georgia. Venable v. Lippold, 102 Ga 208, 29 SE 181; Roberson v. Weaver, 25 GaApp 726, 104 SE 912.

Maryland. Calvert Bank v. J. Katz & Co., 102 Md 56, 61 A 411.

Massachusetts. Henderson v. Raymond Syndicate, 183 Mass 443, 67 NE 427; Mark v. Stuart-Howland Co., 226 Mass 35, 115 NE 42, 2 ALR 678.

Minnesota. Hughes v. Meehan, 81 Minn 482, 84 NW 331.

Montana. Harrington v. Butte & Boston Min. Co., 33 Mont 330, 83 P 467, 114 AmSt 821.

North Carolina. Knight v. Vincennes Bridge Co., 172 NC 393, 90 SE 412 (effect of release).

Ohio. Klass v. Klass, 27 OhApp 459, 161 SE 406.

Oklahoma. Chicago, R. I. & P. R. Co. v. Cotton, 62 Okl 168, 162 P 763 (release for personal injuries).

South Carolina. Miller v. Southern R. Co., 69 SC 116, 48 SE 99.

West Virginia. Musick v. Home Ins. Co., 105 WVa 341, 142 SE 436.

Wisconsin. Hunkins v. Milwaukee & St. P. R. Co., 30 Wis 559.

[38] **Arkansas.** McDonough v. Williams, 77 Ark 261, 92 SW 783, 8 LRA (N. S.) 452, 7 AnnCas 276.

California. Quint v. Dimond, 147 Cal 707, 82 P 310.

Florida. Holman Live Stock Co. v. Louisville & N. R. Co., 81 Fla 194, 87 S 750.

could not be construed as indicating the court's opinion as to the effect of the testimony.[42]

(2) **Torts.** *Negligence in general.* Where the case is one of tort and involves a question of negligence, it is the right of the jury to determine the question of due care or negligence after a consideration of the whole evidence and the court may not tell the jury what facts would, or would not, constitute negligence,[43] or that render one guilty or not guilty of contribu-

Georgia. Seaboard Air Line R. Co. v. Johnson, 139 Ga 471, 77 SE 632; Decatur v. Hinson, 29 GaApp 131, 113 SE 702.

Illinois. Pittsburgh, C. C. & St. L. R. Co. v. Banfill, 206 Ill 553, 69 NE 499.

Iowa. Kinyon v. Chicago & N. W. R. Co., 118 Ia 349, 92 NW 40, 96 AmSt 382.

Michigan. Butler v. Detroit, Y. & A. A. R. Co., 138 Mich 206, 101 NW 232.

Minnesota. Haeger v. Leuthold, 153 Minn 544, 191 NW 257.

Pennsylvania. Lingle v. Scranton R. Co., 214 Pa 500, 63 A 890.

Tennessee. Louisville & N. R. Co. v. Bohan, 116 Tenn 271, 94 SW 84.

Texas. Collins v. Chipman, 41 TexCivApp 563, 95 SW 666.

[39] Rose v. Vandercar, 21 IllApp 345.

[40] Holbrook v. Montgomery, 165 Ga 514, 141 SE 408.

[41] Atlanta Oil & Fertilizer Co. v. Phosphate Min. Co., 25 GaApp 430, 103 SE 873.

[42] Montgomery v. Delaware Ins. Co., 67 SC 399, 45 SE 934.

[43] **Alabama.** Dye-Washburn Hotel Co. v. Aldridge, 207 Ala 471, 93 S 512; Centennial Ice Co. v. Mitchell, 215 Ala 688, 112 S 239; Iron City Grain Co. v. Birmingham, 217 Ala 119, 115 S 99; Hines v. Beasley, 17 AlaApp 636, 88 S 1.

Arkansas. St. Louis Southwestern R. Co. v. Aydelott, 128 Ark 479, 194 SW 873.

California. Albert v. McKay & Co., 53 CalApp 325, 200 P 83; Vedder v. Bireley, 92 CalApp 52, 267 P 724.

Georgia. Western & A. R. Co. v. Jarrett, 22 GaApp 313, 96 SE 17; Atlanta & W. P. R. Co. v. Miller, 23 GaApp 347, 98 SE 248; Georgia R. & Power Co. v. Shaw, 25 GaApp 146, 102 SE 904; Tennessee A. & G. R. Co. v. Neely, 27 GaApp 491, 108 SE 629; Holloway v. Milledgeville, 35 GaApp 87, 132 SE 106 (holding that court has no right to instruct jury that specified acts of a driver of car constituted negligence); Huckabee v. Grace, 48 Ga App 621, 173 SE 744.

Illinois. Engel v. Frank Parmalee Co., 169 IllApp 410; Lenihan v. Chicago R. Co., 195 IllApp 144; Hanke v. Chicago R. Co., 208 IllApp 293.

Indiana. New York, C. & St. L. R. Co. v. King, 85 IndApp 510, 154 NE 508.

Iowa. Powell v. Alitz, 191 Ia 233, 182 NW 236.

Massachusetts. Sullivan v. Worcester, 232 Mass 111, 121 NE 788.

Missouri. Kennedy v. Phillips, 319 Mo 573, 5 SW2d 33; Fanning v. Hines, 206 MoApp 118, 222 SW 1038; Boland v. St. Louis-San Francisco R. Co. (Mo), 284 SW 141 (holding it error for the trial court to charge that a guest riding in an auto is in duty bound under the law to "look and listen"); Ferguson v. Missouri Pacific R. Co. (MoApp), 186 SW 1134.

It is not the expression of an opinion to state that plaintiff, if the injury resulted from accident and not from negligence of defendants, could not recover. McDonald v. Central Illinois Constr. Co., 196 MoApp 57, 190 SW 633. See

tory negligence.[44] The court is guilty of a comment within the rule where he states that an injured person was entitled to sympathy.[45] The court may not express the opinion that a party had not exercised due care after discovery of the plaintiff's danger,[46] or that it was not contributory negligence to make the wrong choice of means of escape when a party was confronted with sudden peril.[47]

also Bussey v. Don (Mo), 259 SW 791.

North Carolina. Reid v. Carolina, C. & O. R. Co., 180 NC 511, 105 SE 169 (proper equipment of locomotive); Matthews v. Hudson Bros., 184 NC 622, 113 SE 780.

Ohio. Piqua v. Morris, 98 OhSt 42, 120 NE 300, 7 ALR 129; McMurtrie v. Wheeling Trac. Co., 107 OhSt 107, 140 NE 636; Cleveland R. Co. v. Lee, 13 OhApp 255, 32 OhCtApp 135; Keiner v. Wheeling & L. E. R. Co., 34 OhApp 409, 171 NE 253.

Oklahoma. Chicago, R. I. & P. R. Co. v. Dizney, 61 Okl 176, 160 P 880 (leaving open trap door in vestibule of train—no expression of opinion).

Pennsylvania. Atlantic Ref. Co. v. Pennsylvania R. Co., 270 Pa 415, 113 A 570.

Rhode Island. Sears v. A. Bernardo & Sons, 44 RI 106, 115 A 647.

South Carolina. Huggin v. Gaffney, 134 SC 114, 132 SE 163 (holding it error for the trial court to charge that a traveler assumes the risk in going a dangerous way when there is a safe way for him to go).

Texas. Abilene Gas & Elec. Co. v. Thomas (TexCivApp), 194 SW 1016 (failure to turn off electric current); Missouri K. & T. R. Co. v. Luten (TexComApp), 228 SW 159; St. Louis Southwestern R. Co. v. Ristine (TexComApp), 234 SW 1086.

Utah. Montague v. Salt Lake & U. R. Co., 52 Utah 368, 174 P 871.

[44] **Arizona.** Varela v. Reid, 23 Ariz 414, 204 P 1017.

Arkansas. Richardson v. Reap, 173 Ark 96, 291 SW 987 (contributory negligence).

California. Young v. Southern Pacific Co., 182 Cal 369, 190 P 36.

Georgia. In an instruction that if defendants were negligent, and plaintiff could have avoided the accident by ordinary care, plaintiff cannot recover, the use of word "accident" was not open to objection as intimation of opinion that injury was result of accident. Ivey v. Louisville & N. R. Co., 18 GaApp 434, 89 SE 629.

Illinois. Vittum v. Drury, 161 IllApp 603; Thorne v. Southern Illinois R. & Power Co., 206 IllApp 262.

Indiana. Chicago & E. R. Co. v. Hunter, 65 IndApp 158, 113 NE 772 (choice of dangerous route around train blocking crossing).

Mississippi. Gulf & S. I. R. Co. v. Adkinson, 117 Miss 118, 77 S 954 (not improper to characterize negligence of injured person gross where he exercises no care for his own safety).

New Jersey. Rhodehouse v. Director General of Railroads, 95 NJL 355, 111 A 662.

Oklahoma. Sweet v. Henderson, 72 Okl 51, 178 P 666.

Tennessee. Middle Tennessee R. Co. v. McMillan, 134 Tenn 490, 184 SW 20.

Texas. Baker v. Streater (Tex CivApp), 221 SW 1039; Dowdy v. Southern Trac. Co. (TexComApp), 219 SW 1092.

[45] Toledo, C. & O. R. Co. v. Miller, 103 Oh 17, 132 NE 156.

[46] Studstill v. Bergsteiner, 25 Ga App 405, 103 SE 691; Paris Transit Co. v. Fath (TexComApp), 231 SW 1080.

[47] Michigan City v. Werner, 186 Ind 149, 114 NE 636.

Automobiles. It is error to give an instruction that defendant was guilty of negligence per se in driving on the highway with knowledge that his brakes were inadequate.[48] Thus, it is improper for the court to tell the jury that the defendant in an automobile accident case could lawfully go thirty-five miles an hour.[49] It is error to charge that the driver of an automobile is in duty bound to sound his horn only when someone is in the path of his car or is about to pass in front of it.[50] Where the defendant in an automobile collision case denied "all the material allegations of the petition," one of which was that the defendant's driver was negligent, it is error to charge the jury that defendant failed to specifically deny, so as to create the impression that defendant had admitted the truth of this issue.[51]

It is not proper for the court to instruct in a collision case that under the evidence it was negligence for the defendant to fail to see the plaintiff sooner than he did.[52] In an automobile damage action, it is error for the court to instruct the jury to find for the defendant if they believed he operated the automobile as he testified he did.[53] In an action for damages from a motor accident, it is not an invasion of the jury's realm for the court to charge that the motorist when blinded by approaching lights is under a duty to reduce speed.[54]

It is a charge on the weight of the evidence for the court to tell the jury to find for the defendant if they find that the plaintiff's automobile struck the defendant's truck in a designated way.[55] It was held erroneous for the court to instruct the jury that a motorist was guilty of contributory negligence if he permitted his car to collide with a pole.[56]

Public carriers. There is no error in refusing to instruct, as a matter of law, that plaintiff was not negligent in attempting to drive across a track if he judged at the time it could be safely done.[57] It is error to charge the jury in an action against a railroad for damages from fire set by a locomotive, that they should find a verdict for the defendant if the evidence as to how the fire was started was evenly balanced, or if they were unable to

[48] Landry v. Hubert, 101 Vt 111, 141 A 593, 63 ALR 396.

[49] Soda v. Marriott, 118 CalApp 635, 5 P2d 675. See Summers v. Spivey's Admr., 241 Ky 213, 43 SW2d 666.

[50] Gano v. Zidell, 140 Or 11, 10 P2d 365, 12 P2d 1118.

[51] Reese v. Waltz, 14 OhApp 295.

[52] Quillin v. Colquhoun, 42 Idaho 522, 247 P 740.

[53] Weiseltier v. Jacoby, 220 App Div 582, 222 NYS 46.

[54] Hill v. Peres, 136 CalApp 132, 28 P2d 946.

[55] Johnson v. Wofford Oil Co., 42 GaApp 647, 157 SE 349.

[56] Keller v. Pacific Tel. & T. Co., 2 CalApp2d 513, 38 P2d 182.

[57] Rubinovitch v. Boston Elevated R. Co., 192 Mass 119, 77 NE 895.

determine how or by whom the fire was started.[58] So, as it is the duty of a railroad company to stop its trains at a station, the question whether, in a particular case, a train was so stopped is for the jury, and the court is not at liberty to charge as to what distance past the usual stopping place a train may go.[59] The jury should not be told that it is the duty of railroads to blow whistles at railroad crossings when necessary.[60] Where the principal point at issue is whether there was any defect in a locomotive and whether the air brakes were applied, an instruction is highly prejudicial which tells the jury that the evidence introduced tending to show the alleged defective condition of the brake valve could not have been the proximate cause of the accident and was not a valid defense.[61] The court may not express the opinion that an injured person was a passenger,[62] or an employee,[63] or that a properly equipped street car is easily stopped.[64]

Assault and battery. In an action for damages from an assault it is improper for the court to charge the jury to find for the defendant if they believed the plaintiff had been fully compensated.[65]

Malicious prosecution. It is an invasion of the jury's province for the court to tell them that malice may be inferred from named circumstances.[66] In an action for malicious prosecution, it is error for the court to charge the jury that the evidence was insufficient to show that defendant relied upon the advice of counsel as vindication.[67]

False imprisonment. In an action for wrongful arrest, it is error to instruct the jury that they are warranted in finding the arrest was maliciously made if it was wrongful and without probable cause.[68]

[58] Durrett v. Mississippian R. Co., 171 Miss 899, 158 S 776.

[59] Cooper v. Georgia, C. & N. R. Co., 61 SC 345, 39 SE 543.

An instruction as to duty of the employees of a railway on discovering that by mistake they have carried a passenger beyond his destination is not an instruction upon the facts in the case. Laird v. Atlantic Coast Line R. Co., 136 SC 34, 134 SE 220.

[60] Louisville & N. R. Co. v. Galloway, 219 Ky 595, 294 SW 135.

[61] Louisville & N. R. Co. v. Bohan, 116 Tenn 271, 94 SW 84.

[62] Georgia Southern & F. R. Co. v. Overstreet, 17 GaApp 629, 87 SE 909. But see Hellman v. Los Angeles R. Corp., 135 CalApp 627, 27 P2d 946, 28 P2d 384.

[63] Hudson v. St. Louis & Southwestern R. Co. (TexComApp), 295 SW 577, denying reh. of 293 SW 811.

[64] Langford v. San Diego Elec. R. Co., 174 Cal 729, 164 P 398.

[65] Burke v. Middlesworth, 92 IndApp 394, 174 NE 432.

[66] Peterson v. Grayce Oil Co. (TexCivApp), 37 SW2d 367.

[67] Beard v. Wilson, 211 Ia 914, 234 NW 802.

[68] Greaves v. Kansas City Junior Orpheum Co. (MoApp), 80 SW2d 228.

Trespass to chattels. The trial court went beyond proper bounds in charging the jury that if the proof showed the delivery of an automobile to a garage and that it was afterward missing, such facts were prima facie evidence of theft.[69]

Fraud. It was an expression of opinion on the facts to charge that if one buys the property of another and soon thereafter sells it for less than he paid, then this is evidence of fraudulent intent not to pay.[70]

Defamation. It is held that there is no expression of opinion under the rule in an action of slander by a charge that the jury should have no prejudice against that character of action, for it was allowed by law.[71]

Landowners. Where plaintiff was injured by falling down a stairway, and it was in dispute whether the place was light or dark, there was an expression of opinion in a charge that if the place was dark it was the duty of plaintiff to get a light if he was not familiar with the place.[72]

Alienation of affections. There was a comment on the evidence in an alienation of affections suit where the court told the jury that plaintiff's alleged denials of his marriage were entitled to great weight, and that his statements that he was married were entitled to little weight.[73]

Damages. Mortality tables were rendered conclusive evidence by the effect of a court's charge that the plaintiff had an expectancy of twenty-eight years fixed by law from the time of the injury, and the instruction was erroneous.[74] Though the remark be inadvertent, it is error in a personal injury action for the court to say to the jury that the plaintiff would be compelled to bear permanent injury.[75]

§ 32. Comments and expressions of opinion—Criminal cases.

The rule prohibiting comments on the evidence, or expressions of opinion as to its weight, importance, or effect, applies with equal force to instructions given by the court in criminal prosecutions.

Citations are numerous supporting the prohibition as to com-

[69] Export Ins. Co. v. Royster, 177 Ark 899, 8 SW2d 468.

[70] Fountain v. Fuller E. Callaway Co., 144 Ga 550, 87 SE 651.

[71] Lewis v. Williams, 105 SC 165, 89 SE 647.

[72] Bingham v. Marcotte, Cote & Co., 115 Me 459, 99 A 439.

[73] Butterfield v. Ennis, 193 MoApp 638, 186 SW 1173.

[74] Taylor v. J. A. Jones Constr. Co., 193 NC 775, 138 SE 129.

[75] Cogdill v. Boice Hdw. Co., 194 NC 745, 140 SE 732.

ments on the evidence[76] and expressions of opinion as to the weight of the evidence.[77]

In general. There is an invasion of the jury's province by instructions as to the inference to be drawn from testimony

[76] **California.** People v. Briley (CalApp), 48 P2d 734.

Florida. Hampton v. State, 50 Fla 55, 39 S 421.

Idaho. State v. Shuff, 9 Idaho 115, 72 P 664.

Illinois. People v. Kelly, 347 Ill 221, 179 NE 898, 80 ALR 890.

Louisiana. In a prosecution for entering a shop with intent to steal therefrom, an instruction is permissible which defines a shop by referring to a place such as that claimed to have been entered by the defendants. State v. Garon, 161 La 867, 109 S 530.

Massachusetts. It is an improper comment on the evidence, rather than a statement of matters of law, for the court to refer to the defendant's explanation of circumstantial evidence and to discuss the way different men will act when facing death or distress, and a request for such an instruction is properly refused. Commonwealth v. Mercier, 257 Mass 353, 153 NE 834.

Michigan. People v. Jones, 24 Mich 215.

Missouri. State v. Smith, 53 Mo 267; State v. Shelton, 223 Mo 118, 122 SW 732; State v. Rollins, 226 Mo 524, 126 SW 478; State v. Cruts, 288 Mo 107, 231 SW 602 (error in comment on part of testimony); State v. Murphy, 292 Mo 275, 237 SW 529; State v. Johnson (Mo), 234 SW 794 (statutory rape).

Montana. State v. Duncan, 82 Mont 170, 266 P 400.

A charge stating that certain testimony is corroborative of other testimony is a comment on the weight of the evidence. State v. Keerl, 29 Mont 508, 75 P 362, 101 AmSt 579.

Oklahoma. Sherman v. State, 20 OklCr 306, 202 P 521.

Texas. Green v. State, 60 TexCr 530, 132 SW 806.

Washington. State v. Vance, 29 Wash 435, 70 P 34.

It is not a comment on the evidence to charge that the jury in the case of the defendant may consider the great interest he has in the result of their verdict. State v. Carey, 15 Wash 549, 46 P 1050.

[77] **Alabama.** Hall v. State, 134 Ala 90, 32 S 750; Smith v. State, 165 Ala 50, 51 S 610; Culliver v. State, 15 AlaApp 375, 73 S 556.

Arizona. Hurley v. Territory, 13 Ariz 2, 108 P 222.

Arkansas. Crosby v. State, 154 Ark 20, 241 SW 380.

It is not an opinion that accused should be found guilty in instruction on the various degrees of homicide, that if the jury found the defendant not guilty of murder in the first degree they might find him guilty in the second, or lesser degrees. Witham v. State, 149 Ark 324, 232 SW 437.

California. People v. Barthleman, 120 Cal 7, 52 P 112; People v. Converse, 28 CalApp 687, 153 P 734; People v. Andrade, 29 CalApp 1, 154 P 283.

Florida. Blanton v. State, 52 Fla 12, 41 S 789.

The court should exercise utmost care where human life is involved not to let any expression fall capable of being interpreted by the jury as an index of what he thinks of the prisoner, his counsel or his case. Mathis v. State, 45 Fla 46, 34 S 287.

Doyle v. State, 39 Fla 155, 22 S 272, 63 AmSt 159; Green v. State, 43 Fla 556, 30 S 656.

Georgia. Stephenson v. State, 40 Ga 291; Tiget v. State, 110 Ga 244, 34 SE 1023; Dozier v. State, 116 Ga 583, 42 SE 762; Davis v. State, 153 Ga 669, 113 SE 11 (poison found in stomach sufficient to produce death); Dyer v. State, 6 GaApp 390, 65 SE

when it is susceptible of more than one rational conclusion;[78] that certain parts of the evidence did not have much probative

42; Brown v. State, 17 GaApp 300, 86 SE 661; Walton v. State, 17 GaApp 810, 88 SE 590.

It is not an expression of opinion that the law presumes every act which is of itself unlawful to be criminally intended until the contrary appears. Brundage v. State, 7 GaApp 726, 67 SE 1051.

An instruction as to form of verdict and punishment in case of recommendation by jury is not an expression of opinion as to defendant's guilt. Griffin v. State, 18 GaApp 402, 89 SE 625.

Idaho. State v. Marren, 17 Idaho 766, 107 P 993.

Illinois. People v. Williams, 240 Ill 633, 88 NE 1053; People v. McCann, 247 Ill 130, 93 NE 100, 20 AnnCas 496.

Indiana. Sater v. State, 56 Ind 378.

Louisiana. State v. Johnson, 139 La 829, 72 S 370 (how far absence of motive may go toward establishing innocence); State v. Hopkins, 50 LaAnn 1171, 24 S 188.

Michigan. People v. Gastro, 75 Mich 127, 42 NW 937; People v. Durham, 170 Mich 598, 136 NW 431.

Mississippi. Leverett v. State, 112 Miss 394, 73 S 273.

Missouri. State v. Devorss, 221 Mo 469, 120 SW 75; State v. Hall, 228 Mo 456, 128 SW 745; State v. Cannon, 232 Mo 205, 134 SW 513; State v. Reed, 237 Mo 224, 140 SW 909.

Montana. State v. Mahoney, 24 Mont 281, 61 P 647.

Nebraska. Clarence v. State, 86 Neb 210, 125 NW 540.

New Hampshire. State v. Rheaume, 80 NH 319, 116 A 758.

North Carolina. State v. Williams, 172 NC 894, 90 SE 306.

Ohio. Fouts v. State, 113 OhSt 450, 149 NE 551; Zimmerman v. State, 42 OhApp 407, 182 NE 354. But see Sandoffsky v. State, 29 OhApp 419, 163 NE 634.

Oklahoma. Havill v. State, 7 OklCr 22, 121 P 794; Collegenia v. State, 9 OklCr 425, 132 P 375; Nicholson v. State, 13 OklCr 123, 162 P 447.

Oregon. State v. Rader, 62 Or 37, 124 P 195.

Pennsylvania. It is not a suggestion for verdict of guilty for court to charge that it is the duty of jury merely to pass on evidence, regardless of consequences. Commonwealth v. Webb, 252 Pa 187, 97 A 189.

Texas. Best v. State, 58 TexCr 327, 125 SW 909.

A charge that if confessions were so contradictory in themselves that they could not be reconciled, they might be disregarded, was on the weight of evidence, since the fact that they were contradictory would not affect their admissibility, but would only go to their weight as evidence. Goode v. State, 57 TexCr 220, 123 SW 597.

In a prosecution for unlawfully transporting liquor the defendant testified that the liquor was forced upon him and that he then walked a few steps down the road to talk the matter over with a friend, and in view of this testimony it was held error for the trial court to tell the jury that to "transport" meant to carry something "without regard to the distance moved." Holden v. State, 102 TexCr 429, 278 SW 204.

Virginia. Dejarnette v. Commonwealth, 75 Va 867; Corvin v. Commonwealth, 131 Va 649, 108 SE 651, 39 ALR 592 (bigamy).

West Virginia. State v. Allen, 45 WVa 65, 30 SE 209.

[78] **Alabama.** Harrell v. State, 166 Ala 14, 52 S 345; Ford v. State, 22 AlaApp 59, 112 S 182.

Ohio. Crobaugh v. State, 12 OLA 404.

Texas. Cromeans v. State, 59 TexCr 611, 129 SW 1129.

force;[79] as to what other juries in other counties have done in similar cases;[80] that certain evidence has a certain tendency;[81] that certain presumptions arise from stated facts.[82] A charge on the weight of evidence favorable to accused is no more proper than one unfavorable to him.[83] The court may not tell the jury that if from all the evidence there arose two theories, one consistent with defendant's innocence, and the other with his guilt, the jury should adopt the theory of innocence.[84]

An instruction applying the law to the facts does not charge on the weight of the evidence.[85] A statement of a contention of the prosecution is not an intimation of the opinion of the court on what had been proved.[86]

Character and reputation. There is such an invasion by instructions as to the conclusiveness of evidence of previous good or bad character,[87] although a New York court has declared in a case depending upon circumstantial evidence that it was error to refuse to instruct the jury that a reasonable doubt might be created from evidence of good character alone.[88] The court should not charge that evidence of the defendant's good character may

[79] People v. Van Arsdale, 242 AppDiv 545, 275 NYS 680, appeal dismissed in 266 NY 502, 195 NE 173.

[80] State v. Price, 103 SC 277, 88 SE 295.

[81] **Indiana.** It is not error to instruct that there is some evidence tending to prove a certain fact where there is no doubt of such evidence having been given and its weight and significance are left to the jury. White v. State, 153 Ind 689, 54 NE 763.

Michigan. People v. Coughlin, 67 Mich 466, 35 NW 72.

New York. But see People v. Walker, 85 AppDiv 556, 83 NYS 372.

[82] **Alabama.** It was an invasion by instruction that malice from the use of a deadly weapon could not be presumed in the case. Thayer v. State, 138 Ala 39, 35 S 406.

Colorado. But see Newby v. People, 28 Colo 16, 62 P 1035.

An instruction that where such means is used as is likely to produce death the legal presumption is that death was intended invaded province of jury. Nilan v. People, 27 Colo 206, 60 P 485.

Kentucky. Tines v. Commonwealth, 25 KyL 1233, 77 SW 363.

[83] Burns v. State, 65 TexCr 175, 145 SW 356; Carver v. State, 67 TexCr 116, 148 SW 746.

[84] Harvey v. State, 15 AlaApp 311, 73 S 200; White v. State, 18 AlaApp 96, 90 S 63.

[85] **Alabama.** Stevenson v. State, 18 AlaApp 174, 90 S 140.

Georgia. Buckhanon v. State, 151 Ga 827, 108 SE 209; Lumpkin v. State, 152 Ga 229, 109 SE 664 (reasonable doubt); Merritt v. State, 152 Ga 405, 110 SE 160 (reasonable doubt).

[86] Linder v. State, 17 GaApp 310, 86 SE 741.

[87] **Arkansas.** There was an invasion by an instruction that it was more probable that a man of bad character would commit a crime than a man of good character. Long v. State, 76 Ark 493, 89 SW 93, 91 SW 26.

Montana. State v. Jones, 32 Mont 442, 80 P 1095.

Ohio. State v. Hare, 87 OhSt 204, 100 NE 825.

[88] People v. D'Anna, 243 AppDiv 259, 277 NYS 279.

raise a reasonable doubt as to his guilt;[89] that the strongest proof of chastity was that no one heard the reputation of prosecutrix discussed.[90] It is erroneous to give the affirmative charge that previous good character is not a defense.[91] A defendant's character is not put in issue by the fact that the charge of crime has been lodged against him, and it is error for the court so to instruct the jury.[92]

Defendant's declarations and testimony. It is error to charge on the weight and credibility of confessions;[93] the weight of admissions and declarations;[94] that from defendant's failure to deny extrajudicial statement, the inference might be drawn that he admitted making the statement.[95]

Flight. It is error to charge that there is a presumption of guilt from flight,[96] though it is not a comment on the weight of evidence to tell the jury that fear and guilty knowledge may be inferred and that flight is a circumstance from which the inference may arise;[97] or attempt to escape.[98]

[89] **Federal.** Kreiner v. United States, 11 F2d 722; Scheib v. United States, 14 F2d 75.

Mississippi. Dewberry v. State, 168 Miss 366, 151 S 479.

Nevada. Evidence of the defendant's good character is not disparaged by an instruction to convict him regardless of such good character, if the jury believed him guilty beyond a reasonable doubt. State v. Boyle, 49 Nev 386, 248 P 48.

[90] Welch v. State, 110 Miss 147, 69 S 770.

[91] **Federal.** In Nanfito v. United States, 20 F2d 376, it was held incumbent on the court to instruct that evidence of good character should be considered by the jury.

Illinois. People v. Rogers, 324 Ill 224, 154 NE 909.

Pennsylvania. It is error to charge that the mere proof of good character of the accused cannot generate a reasonable doubt. Commonwealth v. Mack, 92 PaSuperCt 165.

[92] Smith v. State, 25 AlaApp 79, 141 S 265.

[93] **Arizona.** Faltin v. State, 17 Ariz 278, 151 P 952.

Arkansas. Owens v. State, 120 Ark 562, 179 SW 1014.

California. People v. Vuyacich, 57 CalApp 233, 206 P 1031.

Georgia. Esa v. State, 19 GaApp 14, 90 SE 732.

Ohio. Blackburn v. State, 23 OhSt 146; Edinger v. State, 12 OhApp 362, 32 OhCtApp 529.

[94] Johnson v. State, 15 AlaApp 298, 73 S 210. See State v. Davis (Mo), 84 SW2d 930.

[95] State v. Long (Mo), 80 SW2d 154.

[96] **California.** See People v. Hall, 220 Cal 166, 30 P2d 23, 996; People v. Murguia (Cal), 48 P2d 958.

Iowa. State v. Harding, 204 Ia 1135, 216 NW 642.

Mississippi. The jury may be told that an inference of fear or guilty knowledge may be drawn from the circumstance of flight. Ransom v. State, 149 Miss 262, 115 S 208.

Oregon. State v. Osborne, 54 Or 289, 103 P 62, 20 AnnCas 627.

An instruction which leaves the fact of flight of defendant to the jury and instructs as to the effect of flight is not invasive. State v. Lem Woon, 57 Or 482, 107 P 974, 112 P 427.

[97] Tatum v. State, 142 Miss 110, 107 S 418.

[98] State v. Orfanakis, 22 NM 107, 159 P 674.

Credibility of witnesses. It is error for the judge to instruct on the weight of corroborating evidence;[99] the probative value of impeaching testimony,[1] such as a charge which tells the jury that a witness who had been convicted of a felony was less likely to tell the truth than one who had not been so convicted,[2] but a charge that the law assumes that a person who has been convicted of crime may not be as worthy of belief as one who has never been so convicted is correct;[3] the weight of the testimony of detectives and police officers;[4] that the testimony of expert witnesses is not conclusive on the jury;[5] that certain witnesses were accomplices, instead of leaving the determination of that matter to the jury.[6]

Motive. It is error to instruct that failure to show a motive for homicide is a circumstance in favor of defendant to be considered by the jury;[7] that accused was the only one who had a motive for burning his store.[8]

[99] **Alabama.** Simmons v. State, 171 Ala 16, 54 S 612; Pearce v. State, 4 AlaApp 32, 58 S 996.

Arkansas. Kent v. State, 64 Ark 247, 41 SW 849.

Georgia. Coley v. State, 110 Ga 271, 34 SE 845.

Kentucky. Craft v. Commonwealth, 81 Ky 250, 50 AmRep 160.

Mississippi. Saucier v. State, 102 Miss 647, 59 S 858, AnnCas 1915A, 1044.

New York. People v. O'Farrell, 175 NY 323, 67 NE 588.

Ohio. Sandoffsky v. State, 29 Oh App 419, 163 NE 634.

Oklahoma. Hill v. Territory, 15 Okl 212, 79 P 757.

[1] **Alabama.** Freeland v. State (AlaApp), 153 S 294.

Arkansas. It would be erroneous to instruct a jury to disregard the bad reputation of a witness. Turner v. State, 171 Ark 1118, 287 SW 400.

California. In People v. Hardwick, 204 CalApp 582, 269 P 427, it was held error for the court to advise the jury that a witness who had been convicted of a crime was less likely to tell the truth than one who had not been so convicted.

Nebraska. Strong v. State, 61 Neb 35, 84 NW 410.

Ohio. State v. Kerlin, 51 OhBull 317.

[2] People v. Hardwick, 204 Cal 582, 269 P 427, 59 ALR 1480.

[3] Boyle v. State, 105 Ind 469, 5 NE 203, 55 AmRep 218; State v. Sandt, 95 NJL 49, 111 A 651; Cincinnati Trac. Co. v. Lied, 9 OhApp 156, 29 OhCtApp 136.

[4] **Alabama.** The court should not say to the jury that an officer who testified would receive a fee if the defendant was convicted, and that the jury should consider such fact. Pruitt v. State, 22 AlaApp 353, 115 S 698.

California. People v. Rudolph, 28 CalApp 683, 153 P 721; People v. Litle, 85 CalApp 402, 259 P 458 (holding an instruction improper which told the jury to receive with caution the testimony of informers).

Washington. It has been held permissible for the court to tell the jury that if investigators bought liquor without unlawful intent, they were not accomplices and their testimony need not be corroborated. State v. Dahl, 139 Wash 644, 247 P 1023.

[5] State v. Warren, 326 Mo 843, 33 SW2d 125.

[6] Crouch v. State, 37 OhApp 366, 174 NE 799.

[7] Ince v. State, 77 Ark 418, 88 SW 818; People v. Glaze, 139 Cal 154, 72 P 965; People v. Wilkins, 158 Cal 530, 111 P 612.

[8] People v. Perlman, 219 AppDiv 196, 219 NYS 184.

Alibi. It is error to instruct that evidence of an alibi is evidence of a suspicious character[9] or should be received with caution,[10] although instructions in disparagement of alibi evidence have been approved in other jurisdictions.[11]

Possession. It is error to charge the conclusions from the recent possession of stolen property;[12] that one is guilty of possessing liquor if he rides in a conveyance knowing it contains liquor.[13]

Insanity and intent. It is error to charge that extravagant acts, nervousness, sleeplessness, and restlessness are symptoms of insanity;[14] that intent was but a mental state of accused and often impossible to prove by direct evidence, but that it was competent to prove it by facts and circumstances;[15] that the jury might consider the fact that defendant was intoxicated.[16]

Miscellaneous. It is error to charge as to the weight and conclusiveness of dying declarations;[17] the weight or value of cir-

[9] **Alabama.** It was error to charge that the failure of the defendant's proof of alibi was a strong circumstance against him. Williams v. State, 21 AlaApp 319, 108 S 84.

Indiana. Line v. State, 51 Ind 172.

Iowa. But see State v. Minella, 177 Ia 283, 158 NW 645.

Louisiana. State v. Molay, 174 La 63, 139 S 759.

Michigan. But see People v. Marcus, 253 Mich 410, 235 NW 202.

New York. People v. Russell, 266 NY 147, 194 NE 65; People v. Robins, 242 AppDiv 516, 275 NYS 940.

Ohio. Radke v. State, 107 OhSt 399, 140 NE 586.

[10] State v. Spadoni, 137 Wash 684, 243 P 854.

[11] State v. Bird, 207 Ia 212, 220 NW 110.

Special warning against an alibi as a defense is not reversible error if the only witnesses in support of such alibi have been convicted of felony. Radke v. State, 107 OhSt 399, 140 NE 586.

[12] **Arkansas.** Crosby v. State, 169 Ark 1058, 277 SW 523.

Georgia. Thomas v. State, 18 Ga App 19, 88 SE 720.

Illinois. People v. Judycki, 302 Ill 143, 134 NE 134.

Missouri. State v. Swarens, 294 Mo 139, 241 SW 934; State v. Wagner (Mo), 237 SW 750.

Ohio. Doe v. State, 14 OhApp 178.

Oregon. State v. Keelen, 103 Or 172, 203 P 306, 204 P 162, 164.

Texas. Stiles v. State, 89 TexCr 603, 232 SW 805.

Virginia. Myers v. Commonwealth, 132 Va 746, 111 SE 463.

[13] Hill v. State, 103 TexCr 531, 281 SW 562.

[14] Porter v. State, 135 Ala 51, 33 S 694. See State v. Douglas, 312 Mo 373, 278 SW 1016.

[15] Frazier v. State, 34 OklCr 375, 246 P 652. (But the instruction was erroneous only when considered in connection with the facts involved.)

[16] People v. Nevarro, 135 CalApp 535, 27 P2d 652.

[17] **Federal.** Freihage v. United States, 56 F2d 127.

Alabama. The fact that the dying declaration introduced as evidence was taken down by an attorney representing the state at the trial would not warrant a charge requiring the jury to scrutinize such declaration carefully for that reason. Parker v. State, 165 Ala 1, 51 S 260.

California. People v. Amaya, 134 Cal 531, 66 P 794.

cumstantial evidence as compared with direct evidence;[18] that the corpus delicti has been established;[19] that the testimony was "exceedingly fallible" which related to the identity of the accused as the one who had purchased poison from which deceased died;[20] that there was not a sufficient lapse of time for "cooling" period;[21] that the defendant is guilty of negligent homicide if he was driving his car, which caused the death of the deceased, at an unlawful rate of speed at the time of the offense.[22]

§ 33. Comments and expressions of opinion—Common-law rule and rule in federal courts.

In both civil and criminal cases, an expression of opinion on a disputed question of fact by the judge in his charge is permitted in the federal courts and in a few state courts.

In the federal courts and a few state courts, the trial judge may comment on the evidence in both civil cases and criminal prosecutions.[23] The expression of the opinion is discretionary

Georgia. An instruction does not deal with the weight of the evidence which tells the jury that dying declarations stand on the same plane as testimony given under oath. Josey v. State, 137 Ga 769, 74 SE 282.

Louisiana. State v. Richardson, 175 La 823, 144 S 587.

Missouri. State v. McCanon, 51 Mo 160; State v. Dipley, 242 Mo 461, 147 SW 111; State v. Gore, 292 Mo 173, 237 SW 993; State v. Custer, 336 Mo 514, 80 SW2d 176. But see State v. Peak, 292 Mo 249, 237 SW 466.

New Mexico. State v. Wright, 36 NM 74, 8 P2d 443.

Ohio. Martin v. State, 17 OhCir Ct 406, 9 OhCirDec 621.

[18] California. People v. Howland, 13 CalApp 363, 109 P 894.

Georgia. But see Samples v. State, 18 GaApp 286, 89 SE 375.

Idaho. State v. Marren, 17 Idaho 766, 107 P 993.

Ohio. Lambert v. State, 105 OhSt 219, 136 NE 921.

[19] State v. Cox, 55 Idaho 694, 46 P2d 1093.

[20] State v. Flory, 203 Ia 918, 210 NW 961 (and a request to so charge was properly refused).

[21] Dickey v. State, 15 AlaApp 135, 72 S 608.

[22] People v. DeWitt, 233 Mich 222, 206 NW 562.

[23] Federal. Quercia v. United States, 289 US 466, 77 LEd 1321, 53 SupCt 698; United States v. Murdock, 290 US 389, 78 LEd 381, 54 SupCt 223; Illinois Cent. R. Co. v. Davidson, 76 F 517; Vanarsdale v. Hax, 107 F 878; Lesser Cotton Co. v. St. Louis, I. M. & S. Ry. Co., 114 F 133; Kerr v. Modern Woodmen of America, 117 F 593; Freese v. Kemplay, 118 F 428; Perkins v. United States, 228 F 408; Griggs v. Nadeau, 250 F 781; McCurley v. Nat. Sav. & Trust Co., 258 F 154; United Mine Workers v. Coronado Coal Co., 258 F 829; Calcutt v. Gerig, 271 F 220, 27 ALR 543; Caudle v. United States, 278 F 710; Dillon v. United States, 279 F 639; Simmons Hdw. Co. v. Southern R. Co., 279 F 929; Hamilton v. Empire Gas & Fuel Co., 297 F 422; Armborst v. Cincinnati Trac. Co., 25 F2d 240.

California. People v. Friend, 50 Cal2d 570, 327 P2d 97.

Connecticut. Appeal of Comstock, 55 Conn 214, 10 A 559; Cook v. M. Steinert & Sons Co., 69 Conn 91, 36 A 1008; State v. Cabaudo, 83 Conn 160, 76 A 42; McLaughlin v. Thomas, 86 Conn 252, 85 A 370; Appeal of Wheeler, 91 Conn 388, 100 A 13;

and the court cannot be required to state it.[24] On the other hand, some courts, perhaps in less careful language, have stated that it is the duty of the judge to so comment.[25]

The federal courts may exercise the power to express opinions on the evidence though the practice is forbidden by the constitution or laws of the state in which the case is tried.[26] A state constitution cannot, any more than a state statute, prohibit the judges of the courts of the United States from charging juries with regard to matters of fact.[27] The court, in these jurisdictions, may not only state what the evidence is, but he may go further in criminal trials and make legitimate comment on it.[28]

In Michigan it was held not reversible error for the court to tell the jury that he would be very reluctant to believe the testimony of the defendant as against that of officers.[29] It has been

Smith v. Hausdorf, 92 Conn 579, 103 A 939; Di Bernardo v. Connecticut Co., 100 Conn 612, 124 A 231; Heslin v. Malone, 116 Conn 471, 165 A 594.

Maryland. Snyder v. Cearfoss, 190 Md 151, 57 A2d 786.

Michigan. Blumeno v. Grand Rapids & I. R. Co., 101 Mich 325, 59 NW 594.

Minnesota. Bonness v. Felsing, 97 Minn 227, 106 NW 909, 114 AmSt 707.

New Jersey. Botta v. Brunner, 42 NJSuper 95, 126 A2d 32; W. A. Manda, Inc. v. Delaware, L. & W. R. Co., 87 NJL 327, 98 A 467; Chrisafides v. Brunswick Motor Co., 90 NJL 313, 100 A 196; Fiorentino v. Farr & Bailey Mfg. Co., 100 NJL 143, 125 A 122; Archer v. Morris (NJ), 137 A 842; State v. Fuersten, 103 NJL 383, 135 A 894; Jones v. Lahn, 1 NJ 358, 63 A2d 804.

Pennsylvania. Bonner v. Herrick, 99 Pa 220; Price v. Little, 257 Pa 312, 101 A 645; Commonwealth v. Lessner, 274 Pa 108, 118 A 24; Dodson Coal Co. v. New Boston Land Co., 276 Pa 452, 119 A 173; Casey v. Siciliano, 310 Pa 238, 165 A 1; Thomas v. Mills, 388 Pa 353, 130 A2d 489; Commonwealth v. Romano, 392 Pa 632, 141 A2d 597.

Rhode Island. McHugh v. Williams & Payton, 43 RI 170, 110 A 607.

Vermont. Missisquoi Bank v. Evarts, 45 Vt 293; Rowell v. Fuller, 59 Vt 688, 10 A 853.

[24] **Federal.** Van Ness v. Pacard, 2 Pet. (27 US) 137, 7 LEd 374; Breese v. United States, 106 F 680.

Connecticut. Temple v. Gilbert, 86 Conn 335, 85 A 380; Appeal of Wheeler, 91 Conn 388, 100 A 13.

Pennsylvania. Philadelphia & T. R. Co. v. Hagan, 47 Pa 244, 86 Am Dec 541.

Rhode Island. Smith v. Rhode Island Co., 39 RI 146, 98 A 1.

Vermont. Stevens v. Talcott, 11 Vt 25; Doon v. Ravey, 49 Vt 293.

[25] Licker v. J. G. Martin Box Co., 127 NJL 136, 21 A2d 595; Jones v. Lahn, 1 NJ 358, 63 A2d 804.

[26] Nudd & Noe v. Burrows, 91 US 426, 23 LEd 286; Indianapolis & St. L. R. Co. v. Horst, 93 US 291, 23 LEd 898; Vicksburg & M. R. Co. v. Putnam, 118 US 545, 30 LEd 257, 7 SupCt 1; St. Louis, I. M. & S. R. Co. v. Vickers, 122 US 360, 30 LEd 1161, 7 SupCt 1216.

[27] St. Louis, I. M. & S. R. Co. v. Vickers, 122 US 360, 30 LEd 1161, 7 SupCt 1216.

[28] Vecchio v. United States, 53 F2d 628.

[29] People v. Wudarski, 253 Mich 83, 234 NW 157.

held permissible for the trial court to say to the jury in a murder trial that under the evidence so far as the court could see the defendant took part in a burglary in which there was a killing constituting first degree murder, and therefore the defendant was guilty of first degree murder.[30] The court may even go so far as to state that the accused's contentions are without merit.[31] And some courts have gone so far as to permit the trial judge to express his opinion upon the guilt or innocence of the accused.[32] The California Supreme Court has surprisingly stated that "It is also settled that a judge may restrict his comments to portions of the evidence or to the credibility of a single witness and need not sum up all the testimony, both favorable and unfavorable." Yet in the same case, that court also states that the judge's comment "should be temperately and fairly made, rather than being argumentative or contentious to a degree amounting to partisan advocacy."[33]

Other courts also state that the judge is not permitted to go so far as to convert his comment into an argument in favor of one side or the other.[34] The court in commenting on the evidence

[30] Commonwealth v. Brue, 284 Pa 294, 131 A 367.

[31] Lewin v. United States, 62 F2d 619.

[32] People v. Friend, 50 Cal2d 570, 327 P2d 97; Commonwealth v. Romano, 392 Pa 632, 141 A2d 597.

In United States v. Notto, 61 F2d 781, it was held that the trial judge may even advise a conviction of the defendant as long as he charges the jury that they are the judges of the evidence.

In Murdock v. United States, 62 F2d 926, it was suggested that it is better practice for the trial judge not to go so far in his comment on the case in a criminal prosecution as to advise a conviction.

[33] People v. Friend, 50 Cal2d 570, 327 P2d 97.

[34] Yoder v. United States, 71 F2d 85.

In the case of Shea v. United States, 251 F 440, the trial court, among other things, charged the jury as follows: "There is little chance for dispute here, in the court's opinion, but that the paraphernalia employed to impress Hoblitzel with the thought that he was in touch with a real 'turf exchange,' so called, where real wagers on the outcome of real horse races might be laid, were but the furniture of this swindle. The large amount of apparent money was but a simulation, the telegraph and telephone instruments were but shams in that neither was a real instrument of communication; the announcements and posting of races were shams; the bookings were tricks. Anyone who devised this scheme produced just such a fraudulent device as the statute condemns." Upon appeal from a conviction it was contended that this charge was erroneous, for the reasons, first, that it instructed the jury that this so called "turf exchange" was a sham and a fraud; and, second, that the charge as a whole was unduly argumentative in favor of the prosecution. The court, however, held that there was no other reasonable inference to be drawn from the evidence, and that "while the charge of the court was argumentative, in the sense that it contained a considerable discussion of the testimony, which was applied to the various elements of the of-

in a criminal case is under the obligation to call attention to evidence that is favorable to the defendant as well as that which points toward his guilt.[35] There should be no one-sided comment on the evidence.[36]

Probably the most oft-repeated limitation on the judge's privilege to comment on the evidence is that he must make it clear to the jury that it is their recollection of the testimony that controls and that they are the final deciders of the issues of fact.[37]

fense charged, we are not impressed that it was unduly so, or that it went beyond the limitations upon the trial judge's right to comment as previously expressed in this paragraph."

See People v. Carlsonakas, 241 AppDiv 232, 272 NYS 35; People v. Thomas, 240 AppDiv 101, 269 NYS 143.

[35] Hunter v. United States, 62 F2d 217.

[36] Young v. Travelers Ins. Co., 68 F2d 83, revg. 2 FSupp 624.

[37] **Federal.** Simmons v. United States, 142 US 148, 35 LEd 968, 12 SupCt 171; Doyle v. Union Pacific R. Co., 147 US 413, 37 LEd 223, 13 SupCt 333; Allis v. United States, 155 US 117, 39 LEd 91, 15 SupCt 36.

In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error. Vicksburg & M. R. Co. v. Putnam, 118 US 545, 30 LEd 257, 7 SupCt 1.

It was not error for the trial court in the charge to express an opinion relative to plaintiff's failure to produce a certain witness, where the jury was given to understand that it was not bound by such opinion. The jury was sufficiently advised in this regard. The comments criticized did not trench upon the province of the jury, or go beyond the limits of reasonable expression of opinion. Young v. Corrigan, 210 F 442.

In Calcutt v. Gerig, 271 F 220, 27 ALR 543, the court said to the jury preliminarily: "Only for the purpose of suggesting to you the method of consideration, I shall call your attention to the facts in evidence, and if I should omit any you will remember them and act upon them, or if I should not correctly repeat the evidence then you will understand that I am mistaken about it, and act upon your own recollection." In this case the court charged the jury several times that the jury, and not the court, were the triers of the facts. In one place in the charge the court said: "You are the exclusive judges of the credibility of the witnesses and the weight of the evidence." And again: "Then it comes to you upon a question of fact, and you must determine the rights of these parties upon the evidence." And again: "There is no evidence, as I recall, but you will remember how that is." It was held that from such expressions the court left the jury free to exercise its own judgment as to the facts.

See McLanahan v. Universal Ins. Co., 1 Pet. (26 US) 170, 7 LEd 98.

California. People v. Friend, 50 Cal2d 570, 327 P2d 97.

Maryland. Snyder v. Cearfoss, 190 Md 151, 57 A2d 786.

More general limitations have been made. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office.[38] While the judge may anaylze and dissect the evidence, he may not distort it or add to it; it is the duty of the federal trial judge in commenting upon the evidence to use great care that his expression of opinion thereon should be given as not to mislead, and especially as not to be one-sided, studiously to avoid deductions and theories unwarranted by the evidence and not to render vain by hostile comment the privilege of the accused to testify in his own behalf. Hence the remarks of a federal trial judge in charging the jury in a criminal case on the fact that defendant while testifying wiped his hands, that such action is almost always an indication of lying, is prejudicial error and is not cured by adding that the opinion so expressed is not binding on the jury and that if they do not agree with it, they should find the defendant not guilty.[39]

Generally, however, the fact that the opinion of the court is erroneous is held not ground for reversal where the jury have been distinctly told that the opinion of the court has no binding force and they are at full liberty to disregard it.[40]

§ 34. Weight of admissions of parties.

The weight to be accorded the admissions of the parties belongs exclusively to the jury.

The word "admissions," as used in this connection, may be defined as concessions or acknowledgments by a party, of the existence or truth of certain facts. They are those statements which would otherwise be hearsay.

It is the exclusive province of the jury to pass on the weight of the admissions of the parties.[41] An admission of a party is simply a part of the evidence and is to be taken by the jury for what it may be worth, as the facts and circumstances may warrant.[42] Hence it is not error to refuse to instruct that "while

New Jersey. Jones v. Lahn, 1 NJ 358, 63 A2d 804; Botta v. Brunner, 42 NJSuper 95, 126 A2d 32.

Pennsylvania. Thomas v. Mills, 388 Pa 353, 130 A2d 489; Bizich v. Sears, Roebuck & Co., 391 Pa 640, 139 A2d 663; Commonwealth v. Romano, 392 Pa 632, 141 A2d 597; Fulforth v. Prudential Ins. Co., 147 Pa SuperCt 516, 24 A2d 749.

[38] Snyder v. Cearfoss, 190 Md 151, 57 A2d 786.

[39] Quercia v. United States, 289 US 466, 77 LEd 1321, 53 SupCt 698.

[40] Oyster v. Longnecker, 16 Pa 269; Knapp v. Griffin, 140 Pa 604, 21 A 449; Commonwealth v. Elliott, 292 Pa 16, 140 A 537.

[41] Rumrill v. Ash, 169 Mass 341, 47 NE 1017; Blume v. Chicago, M. & St. P. R. Co., 133 Minn 348, 158 NW 418, AnnCas 1918D, 297 (court should not disparage effect).

[42] **Arkansas.** Gish v. Scantland, 151 Ark 594, 237 SW 98.

proof of the fact that admissions were made, and of the terms in which they were made, ought to be cautiously scanned, yet when deliberately made and precisely identified, they are usually received as satisfactory" and that "admissions by parties are not to be regarded as an inferior kind of evidence—on the contrary, when satisfactorily proved they constitute a ground of belief on which the mind reposes with strong confidence."[43]

Statements in the nature of admissions, which are also admissible as part of the res gestae, may not be disparaged by the court's instruction.[44] The evidence of the admissions of the nature of res gestae statements should be scanned with care and the jury should be cautioned to give them no more meaning than they are entitled to.[45]

In some of the states, cautionary instructions as to alleged admissions have been approved when limited to testimony of verbal admissions.[46] Where allegations of a petition were stricken

California. Fawkes v. Reynolds, 190 Cal 204, 211 P 449; People v. Wagner, 29 CalApp 363, 155 P 649.

Georgia. Phoenix Ins. Co. v. Gray, 113 Ga 424, 38 SE 992.

Indiana. It is error to caution jury to scrutinize admissions very closely, because they are to be considered by the jury as other evidence properly admitted in the case. Reitemeier v. Linard (IndApp), 150 NE 797.

Washington. Marton v. Pickrell, 112 Wash 117, 191 P 1101, 17 ALR 68. In this case an instruction was given which advised the jury that if the plaintiff had made any admissions indicating that the collision which was the basis of the action was due to his own fault, such admissions must be considered in the light of all the circumstances surrounding him when he made them, and that they would be binding upon him only in case he was then fully advised as to all of the facts, and as to the law applicable thereto. On appeal, this instruction was held correct in submitting the fact-issue as to plaintiff's alleged admissions to the jury; and while it was noticed that the court should not have appended the statements concerning the necessity of plaintiff's being advised as to the law at the time he made the alleged admissions, such did not apparently mislead the jury.

Wyoming. Verbal statements of witnesses are not regarded as admissions. Hoge v. George, 27 Wyo 423, 200 P 96, 18 ALR 469.

[43] Phoenix Ins. Co. v. Gray, 113 Ga 424, 38 SE 992.

[44] Dixon v. Russell, 156 Wis 161, 145 NW 761; John v. Pierce, 172 Wis 44, 178 NW 297.

[45] **Georgia.** Wallace v. Mize, 153 Ga 374, 112 SE 724; Pitts v. Rape, 25 GaApp 722, 104 SE 643.

Iowa. Cawley v. Peoples Gas & Elec. Co., 193 Ia 536, 187 NW 591.

South Dakota. But see Chrestenson v. Harms, 38 SD 360, 161 NW 343.

Washington. Allison v. Bartelt, 121 Wash 418, 209 P 863.

Wisconsin. John v. Pierce, 172 Wis 44, 178 NW 297.

[46] **Georgia.** Raleigh & G. R. Co. v. Allen, 106 Ga 572, 32 SE 622.

Iowa. Martin v. Algona, 40 Ia 390; State v. Jackson, 103 Ia 702, 73 NW 467.

Minnesota. Blume v. Chicago, M. & St. P. R. Co., 133 Minn 348, 158 NW 418, AnnCas 1918D 297.

Oregon. Gleason v. Denson, 65 Or 199, 132 P 530.

South Dakota. Chrestenson v. Harms, 38 SD 360, 161 NW 343.

by an amendment, and at the trial the defendant introduced the allegations so stricken on the claim that they were admissions made by the plaintiff, instructions to receive admissions with caution and to determine what kind of admissions, if any, were made, were approved.[47] And so the court may refuse to instruct that particular admissions may be regarded as strong evidence.[48] The admission is admissible only against the party making it and not against his codefendants and this limitation should be set out in the charge.[49]

The rule that the weight and probative effect of admissions is for the jury has like application in criminal prosecutions.[50] An instruction in a criminal prosecution was proper which told the jury that while each defendant was entitled to what he might have said for himself, if true, the state was entitled to anything he said against himself.[51]

Wisconsin. Haven v. Markstrum, 67 Wis 493, 30 NW 720.

[47] Elliott v. Marshall, 179 Ga 639, 176 SE 770.

[48] Earp v. Edgington, 107 Tenn 23, 64 SW 40.

[49] Holt v. Williams, 210 MoApp 470, 240 SW 864.

[50] **California.** People v. Selby, 198 Cal 426, 245 P 426.

Idaho. State v. Fleming, 17 Idaho 471, 106 P 305.

Illinois. People v. Allen, 279 Ill 150, 116 NE 625; People v. Sovetsky, 323 Ill 133, 153 NE 615, holding that if the statement of the accused admitted in evidence did not constitute a confession of guilt, but merely an admission, it was error to instruct the jury that the defendant could be found guilty if he had truly and voluntarily confessed guilt.

Missouri. It is erroneous to instruct that if the jury find that any statements of the defendant have been proved by the state and not denied by the defendant, they are to be taken as admitted to be true, for such a charge is equivalent to a charge that defendant must specifically deny every statement attributed to him. State v. Hollingsworth, 156 Mo 178, 56 SW 1087.

Montana. In State v. Louie Won, 76 Mont 509, 248 P 201, an instruction was held proper which told the jury that where accusatory statements against the accused are made in his presence and not denied by him, their probative force is not great and they should be received with caution.

Nebraska. In Bourne v. State, 116 Neb 141, 216 NW 173, it was held error to refuse to caution the jury against verbal admissions.

South Carolina. State v. Shorter, 85 SC 170, 67 SE 131.

[51] State v. Wansong, 271 Mo 50, 195 SW 999.

If a confession of the accused introduced in evidence contains exculpatory statements, the Texas court has ruled that it is incumbent upon the court to tell the jury that such statements are to be regarded as true unless disproved by the state. McKinley v. State, 104 TexCr 65, 282 SW 600.

§ 35. Weight of expert testimony.

Expert testimony, when admissible at all, must go to the jury like any other testimony in the case without discrimination by the court as to its weight.

The weight to be given to expert testimony is a question to be determined by the jury, and there is no rule of law which requires them to surrender their own judgment, or to give a controlling influence to the opinion of expert witnesses. The jury is at liberty to exercise an independent judgment. In other words, the testimony of experts is not necessarily controlling on the jury. Although the court determines in the first instance whether a witness is competent to testify as an expert, the jury may consider it along with other testimony and arrive at their independent judgment on the facts even though it would be in conflict with the opinion of the experts.[52]

Whether expert evidence is strong or weak depends upon the skill and character of the witness, his opportunities for acquiring information and all the attendant facts and circumstances of the case. Great or little importance may be attached to it and the jury have the right to determine its value without any influencing instruction.[53] But in some jurisdictions the trial court is per-

[52] **California.** In re Hess' Estate, 183 Cal 589, 192 P 35.

Georgia. Wall v. State, 112 Ga 336, 37 SE 371; Crump v. Knox, 18 GaApp 437, 89 SE 586.

Indiana. Eggers v. Eggers, 57 Ind 461; Indianapolis Trac. & Terminal Co. v. Peeler, 69 IndApp 645, 122 NE 600.

Iowa. Ingwersen v. Carr, 180 Ia 988, 164 NW 217; In re Byrne's Will, 186 Ia 345, 172 NW 655 (insanity of testator).

Kansas. Burns v. Clark, 105 Kan 454, 185 P 27; State v. McAlister, 139 Kan 672, 33 P2d 314.

Mississippi. Coleman v. Adair, 75 Miss 660, 23 S 369. But see Remfry v. Mut. Life Ins. Co. (MoApp), 196 SW 775.

Missouri. Chillicothe Trust Co. v. French, 211 MoApp 214, 241 SW 984.

New York. People v. Soper, 243 NY 320, 153 NE 433.

North Carolina. Hedgepeth v. Coleman, 183 NC 309, 111 SE 517, 24 ALR 232 (typewritten will); State v. Combs, 200 NC 671, 158 SE 252.

Ohio. Ross v. Stewart, 15 OhApp 339, 32 OhCtApp 217; Vey v. State, 35 OhApp 324, 172 NE 434, 31 OLR 135.

Pennsylvania. Commonwealth v. Cavalier, 284 Pa 311, 131 A 229.

South Carolina. State v. Bramlett, 114 SC 389, 103 SE 755.

Texas. The court had the right to admit in evidence the testimony of a witness that a liquid was whisky, which opinion was based on its odor, but the weight of the testimony when given was for the consideration of the jury. Kellum v. State, 102 TexCr 537, 278 SW 434.

Washington. Nelson v. McLellan, 31 Wash 208, 71 P 747, 60 LRA 793, 96 AmSt 902; State v. Owens, 167 Wash 283, 9 P2d 90 (testimony of handwriting expert).

Wisconsin. Carver v. State, 190 Wis 234, 208 NW 874; Anderson v. Eggert, 234 Wis 348, 291 NW 365.

[53] **Mississippi.** Coleman v. Adair, 75 Miss 660, 23 S 369.

mitted to tell the jury that they are to receive and act upon expert testimony with caution or, under some circumstances, with great caution.[54]

It is error for the court to invade their province in this connection to the extent of saying to them that the opinions of the experts were advisory only and not binding on the jury.[55] Consequently, the court acts prejudicially in instructing that the testimony of experts is usually of very little value in determining the sanity or insanity of a party and that their opinions are not so highly regarded now as formerly,[56] or that the testimony of experts is not as good evidence of a fact as the testimony of a credible witness or witnesses who testify to having seen the fact itself occur.[57] Where physicians have testified as to the sterility of the accused in a rape case, it is error for the court to charge the jury that the opinions of the experts are advisory only and that the jury are to use their own judgment in passing on the matters to which the experts testified.[58]

It is error to tell the jury that the testimony of experts is all opinion, and that they are not bound by it.[59] It is therefore error to instruct that "while the opinion of an expert is competent to go to the jury on an issue involving the genuineness of a written instrument, yet such evidence is intrinsically weak and ought

Missouri. Brees v. Chicago, R. I. & P. R. Co. (Mo), 4 SW2d 426.

Washington. State v. Brunn, 144 Wash 341, 258 P 13, for opinion on petition for rehearing, see 145 Wash 435, 260 P 990.

West Virginia. See also Browning v. Hoffman, 90 WVa 568, 111 SE 492.

[54] State v. Miller, 13 OhCirCt 67, 7 OhCirDec 553; Union Trac. Co. v. Anderson, 146 Tenn 476, 242 SW 876, 25 ALR 1496.

In Fisher v. Travelers Ins. Co., 124 Tenn 450, 138 SW 316, AnnCas 1912D, 1246, it was held that a charge instructing the jury that they must receive and consider expert testimony with great caution, that they must make a careful and painstaking investigation of all the facts, with a view of reaching the truth, and must not be misled or confused by expert testimony, because, while such testimony is sometimes the only means or the best way to reach the truth, yet it is largely a field of speculation, beset with pitfalls and uncertainties, and requires patient and intelligent investigation to reach the truth, was erroneous as discriminating too strongly against such class of evidence in warning the jury that they "must not be misled or confused by expert testimony," and also in charging, in respect of all of the expert testimony in the case, that it must be received with "great caution." See United States v. Pendergast, 32 F 198; Persons v. State, 90 Tenn 291, 16 SW 726; Atkins v. State, 119 Tenn 458, 105 SW 353, 13 LRA (N. S.) 1031.

[55] Zeikle v. St. Paul & K. C. S. L. R. Co. (MoApp), 71 SW2d 154.

[56] Eggers v. Eggers, 57 Ind 461.

[57] Nelson v. McLellan, 31 Wash 208, 71 P 747, 60 LRA 793, 96 AmSt 902.

[58] State v. Mundy (Mo), 76 SW2d 1088.

[59] Spencer v. Quincy O. & K. C. R. Co. (Mo), 297 SW 353.

to be received and weighed by the jury with great caution,"[60] or that "it is your own opinion upon the matter, and the conclusions you draw from the facts proven, that should determine your verdict, and not what any other person says or thinks."[61] In a case where experts have testified as to a testator's mental capacity, it is error for the court to say to the jury that the attending physician's testimony was worth more than that of the experts.[62] But it was held that expert testimony was not disparaged by an instruction explaining for what reason the conclusions or opinions of experts are received and pointing out the distinction between the testimony of such witnesses and other witnesses whose testimony is received only as to facts and not as to opinions and conclusions.[63]

The premises on which the hypothetical question is based must be established by a preponderance of the evidence and the jury may be told to disregard the expert testimony where they are satisfied that these premises are untrue.[64]

§ 36. Weight of circumstantial and negative evidence.

The question of the comparative weight (1) of direct and circumstantial evidence, (2) or of positive and negative evidence, is for the jury and the court may not infringe on this prerogative by expressions of opinion on comparative weight.

(1) Circumstantial evidence, in a given case, may be of more or less weight than direct evidence, depending upon the facts in the particular instance, and it is for the jury to determine the comparative value of the two after considering all the facts.[65]

[60] **Federal.** Perkins v. United States, 228 F 408.

Minnesota. State v. Mohrbacher, 173 Minn 567, 218 NW 112.

Mississippi. Coleman v. Adair, 75 Miss 660, 23 S 369.

[61] Ball v. Hardesty, 38 Kan 540, 16 P 808.

[62] Blakely v. Cabelka, 203 Ia 5, 212 NW 348.

[63] Penhansky v. Drake Realty Constr. Co., 109 Neb 120, 190 NW 265.

[64] Hallawell v. Union Oil Co., 36 CalApp 672, 173 P 177; Haas v. Kundtz, 94 Oh 238, 113 NE 826.

[65] **Arkansas.** Cloar v. Consumers Compress Co., 150 Ark 419, 234 SW 272.

The rule was not violated in a will contest by an instruction on undue influence that direct proof is not required, but only evidence of circumstances from which undue influence and fraud may be inferred. Morris v. Collins, 127 Ark 68, 191 SW 963.

Delaware. Director General of Railroads v. Johnston, 1 WWHarr. (31 Del) 397, 114 A 759.

Georgia. Hudson v. Best, 104 Ga 131, 30 SE 688; Armstrong v. Penn, 105 Ga 229, 31 SE 158; Pelham Phosphate Co. v. Daniels, 21 GaApp 547, 94 SE 846.

Illinois. People v. Hart, 323 Ill 61, 153 NE 705.

Kentucky. Whitehead v. Commonwealth, 192 Ky 428, 233 SW 890.

Michigan. Wolf v. Providence Wash. Ins. Co., 333 Mich 333, 53 NW2d 475.

The rule is the same in criminal cases.[66] Accordingly, a charge that "circumstantial evidence is just as good and just as convincing and just as reliable as direct and positive evidence, when properly linked together," is a prejudicial determination of the question by the court.[67] But an instruction has been held unobjectionable which told the jury that circumstantial evidence was just as good as positive evidence.[68] And the statement has been approved that the law does not distinguish between circumstantial and direct evidence.[69] Where the evidence on an issue is wholly circumstantial it is not an invasion to state the fact that the evidence is circumstantial.[70]

(2) It is a trespass upon the rights of the jury to instruct, unqualifiedly, that positive testimony is entitled to greater weight than negative, as the jury may properly attach more importance to either one, as the facts adduced may seem to justify.[71]

South Carolina. State v. Herron, 116 SC 282, 108 SE 93.

Texas. San Antonio & A. P. R. Co. v. McGill (TexCivApp), 202 SW 338; Rounds v. Coleman (TexCivApp), 214 SW 496.

Virginia. Denis v. Commonwealth, 144 Va 559, 131 SE 131. See also § 64, *infra*.

[66] **Arkansas.** McAlister v. State, 99 Ark 604, 139 SW 684.

Kentucky. Brady v. Commonwealth, 74 Ky (11 Bush) 282.

Mississippi. The court should not charge that circumstantial evidence is legal and competent evidence as the jury has no concern with the competency or legality of the evidence submitted by the court. Williams v. State, 95 Miss 671, 49 S 513.

Nebraska. It is not prejudicial for the court to charge that the evidence before the jury is both direct and circumstantial. Davis v. State, 51 Neb 301, 70 NW 984.

Ohio. Lambert v. State, 105 OhSt 219, 136 NE 921; Doe v. State, 14 OhApp 178.

Oklahoma. Cook v. State, 9 Okl Cr 509, 132 P 507.

South Carolina. State v. Aughtrey, 49 SC 285, 26 SE 619, 27 SE 199; State v. Johnson, 66 SC 23, 44 SE 58.

Texas. Limbrick v. State, 117 TexCr 578, 36 SW2d 1026.

A charge that the possession of recently stolen property may be proved by circumstantial evidence is not on the weight of the evidence. Suggs v. State, 65 TexCr 67, 143 SW 186.

Wisconsin. Schwantes v. State, 127 Wis 160, 106 NW 237.

[67] Hudson v. Best, 104 Ga 131, 30 SE 688.

[68] State v. Wright, 140 SC 363, 138 SE 828.

[69] People v. Wysong, 86 CalApp 329, 260 P 825.

[70] Wolf v. State, 198 Ind 261, 151 NE 731; Orris v. Chicago, R. I. & P. R. Co., 279 Mo 1, 214 SW 124.

[71] **Florida.** Sumpter v. State, 45 Fla 106, 33 S 981.

Georgia. Cowart v. State, 120 Ga 510, 48 SE 198.

Missouri. State v. Kansas City, Ft. S. & M. R. Co., 70 MoApp 634; Milligan v. Chicago, B. & Q. R. Co., 79 MoApp 393.

Ohio. State v. Davies, 101 OhSt 487, 129 NE 590; Cleveland, C., C. & St. L. R. Co. v. Richerson, 19 OhCirCt 385, 10 OhCirDec 326; Cincinnati Trac. Co. v. Harrison, 24 Oh CirCt (N. S.) 1, 34 OhCirDec 435. But see Kazdan v. Stein, 118 OhSt 217, 160 NE 704.

Utah. It is erroneous to instruct that "positive testimony of credible witnesses who were in a situation to

Where there is evidence both positive and negative as to the character of the accused, the weight of all the evidence is for the jury.[72] Thus, while it is ordinarily true, in point of fact, that positive testimony is stronger than negative, yet it can not be said, as a matter of law, that positive necessarily overbalances negative testimony. Whether it does so must depend upon the particular circumstances.[73] Consequently, the trial court acts rightly in refusing to instruct that "it is the duty of the jury, in passing upon the weight and effect to be given by them to the evidence in the cause, to give to testimony of a positive or affirmative character greater weight than to that simply of a negative character, provided the witnesses testifying affirmatively to a given fact are not shown to be unworthy of belief by other facts and circumstances in the case."[74] So, courts properly refuse to discriminate in favor of evidence of one character, as the refusal of an instruction that testimony that lights at a railroad crossing were flashing carried more weight than testimony that the lights were out.[75] But testimony that the witness did not hear the bell of an engine will not raise an issue with positive testimony of all the trainmen and disinterested witnesses that the signal was given.[76] In a damage action no error was found in an instruction that the jury was warranted in concluding that no signal was given prior to the accident if they believed the witnesses who testified that they heard no such signal.[77]

Where the witnesses testifying positively and negatively are of equal credibility and have an equal means of information as to a fact in controversy, it cannot be said that the positive testimony should receive greater weight than the negative.[78] And it is error to charge that "the existence of a fact testified to by one positive witness is to be believed rather than such fact did not exist because many witnesses who had the same oppor-

know whether the whistle was blown or the bell rung, to the effect that the whistle was blown and the bell rung, is of a higher character than the negative testimony of witnesses that they did not hear the whistle blown or the bell rung." Haun v. Rio Grande Western R. Co., 22 Utah 346, 62 P 908.

[72] Henry Woo v. United States, 73 F2d 897.

[73] State v. Kansas City, Ft. S. & M. R. Co., 70 MoApp 634.

[74] State v. Kansas City, Ft. S. & M. R. Co., 70 MoApp 634.

[75] Baltimore & O. R. Co. v. Hawke (Del), 143 A 27.

[76] Sutton v. Chicago, St. P., M. & O. R. Co., 98 Wis 157, 73 NW 993; Jordan v. Osborne, 147 Wis 623, 133 NW 32; Linden v. Minneapolis, St. P. & S. S. M. R. Co., 156 Wis 527, 143 NW 167.

[77] Lindsey v. Pacific Elec. R. Co., 111 CalApp 482, 296 P 131.

[78] Milligan v. Chicago, B. & Q. R. Co., 79 MoApp 393.

tunity of observation swore they did not see or know of its having transpired."[79]

§ 37. Credibility of witnesses for jury.

The credibility of witnesses and the probability of their testimony are questions for the jury.

The credibility of witnesses is for the jury and this function may not be infringed by instructions which disparage the testimony of witnesses or which minimize its value.[80] There are occasions when the question of a witness' testimony is taken away from the jury; for example, if the testimony is entirely

[79] Southern R. Co. v. O'Bryan, 115 Ga 659, 42 SE 42.

[80] **Alabama.** Brown v. Mobile Elec. Co., 207 Ala 61, 91 S 802; Southern R. Co. v. Ellis, 6 AlaApp 441, 60 S 407.

Arkansas. Buffalo Zinc & Copper Co. v. McCarty, 125 Ark 582, 189 SW 355.

Connecticut. Sullivan v. Nesbit, 97 Conn 474, 117 A 502.

Georgia. It is reversible error to instruct that where the witnesses agree as to material facts, slight discrepancies as to collateral facts do not authorize their testimony to be discredited. Pace v. Cochran, 144 Ga 261, 86 SE 934.

Illinois. Lundquist v. Chicago R. Co., 305 Ill 106, 137 NE 92.

The jury is not bound to take the testimony of any witness as absolutely true. Brant v. Chicago & A. R. Co., 294 Ill 606, 128 NE 732.

The court should not instruct the jury to disregard the testimony of a witness who has exaggerated the amount of damages sustained. J. F. Humphreys & Co. v. Bloomington, 246 IllApp 334.

Iowa. Connelly v. Greenfield Sav. Bank, 192 Ia 876, 185 NW 887.

Massachusetts. Cahalane v. Proust, 333 Mass 689, 132 NE2d 660.

Michigan. Reed v. McCready, 170 Mich 532, 136 NW 488; Wolf v. Providence Washington Ins. Co. of Providence, R. I., 333 Mich 333, 53 NW2d 475.

New Hampshire. Holman v. Boston & M. R. R., 76 NH 496, 84 A 979.

New York. It is error to charge in a case where no evidence was produced by defendant, and plaintiff's evidence was sufficient to require defendant to sustain his denials by evidence, that the jury might disregard the testimony of any witness, even though uncontradicted. Gnichtel v. Stone, 233 NY 465, 135 NE 852.

The trial court is unwarranted in telling the jury that if false testimony had been given on both sides and it was evenly balanced they should return a verdict for the defendant. Macchia v. Marsigliano, 126 Misc 342, 215 NYS 170.

North Carolina. Taylor v. Meadows, 182 NC 266, 108 SE 755; Modlin v. Garrett & Lawrence, 183 NC 122, 110 SE 778.

North Dakota. Reuter v. Olson, 79 ND 834, 59 NW2d 830.

Ohio. State v. Tuttle, 67 OhSt 440, 66 NE 524, 93 AmSt 689; Tanzi v. N. Y. Central R. Co., 155 OhSt 149, 98 NE2d 39, 24 ALR2d 1151; Cincinnati Trac. Co. v. Lied, 9 OhApp 156, 29 OhCtApp 136; Henderson v. Wertheimer, 12 Oh App 249; Byrnes v. Hewston, 13 Oh App 13, 31 OhCtApp 414; Sandoffsky v. State, 29 OhApp 419, 163 NE 634.

Pennsylvania. Steffenson v. Lehigh Valley Transit Co., 361 Pa 317, 64 A2d 785.

South Dakota. State v. Lutheran, 76 SD 561, 82 NW2d 507.

unworthy of belief and clearly erroneous,[81] or the testimony is incredible as a matter of law.[82]

Erroneous instructions. The rule is violated where the court indicates a lack of confidence in the testimony of a particular witness or intimates that it does not believe him,[83] or where the jury are told that a witness has been impeached,[84] or not impeached,[85] or that the jury are not required to believe incredible testimony,[86] or that they may reject the testimony of a witness if they believe he has been impeached,[87] or that they may give consideration to the fact that a witness is a party to the suit,[88] or that they "should" take into consideration the intelligence of the several witnesses,[89] or that they "should" apply the maxim "falsus in uno, falsus in omnibus,"[90] or that they "must" reject the testimony of a witness who has testified falsely to any material fact,[91] or that if any individual juror believes a witness had testified falsely the jury may reject all or a part of the testimony of such witness,[92] or that they may consider the general reputation of the witness for truth and veracity, chastity and morality as shown by the evidence,[93] or that they should consider the

[81] Romano v. Littleton Const. Co., 95 NH 404, 64 A2d 695.

[82] People v. White, 2 NY2d 220, 159 NYS2d 168, 140 NE2d 258.

[83] Williams v. West Bay City, 119 Mich 395, 78 NW 328; William J. Burns International Detective Agency v. Powers, 176 AppDiv 114, 162 NYS 578.

It is prejudicial error for the court unreasonably to dwell on the proposition that one witness may be contradicted by several and yet be believed. Among other things, the court told the jury in one case: "If five or six men should come on the stand and swear that the moon was made of green cheese, and one should swear that it wasn't, you wouldn't be compelled to believe it. If a dozen men should come upon the stand and swear that the sun rose in the west, instead of the east, you wouldn't be called on to believe it." In the particular case, the testimony of one witness for the plaintiff was contradicted by several for the defendant, and the charge of the court was held erroneous. Lendberg v. Brotherton Iron Min. Co., 75 Mich 84, 42 NW 675.

[84] Huntingburg v. First, 22 Ind App 66, 53 NE 246.

[85] Berliner v. Travelers Ins. Co., 121 Cal 451, 53 P 922; Watkins v. Bowyer, 42 SD 189, 173 NW 745.

[86] Virginia R. & Power Co. v. Hill, 120 Va 397, 91 SE 194.

[87] Kornazsewska v. West Chicago St. R. Co., 76 IllApp 366.

No matter how thoroughly a witness may be impeached, his credibility is for the jury, and it is improper to charge them to disregard his testimony, if reasonably satisfied that he has been successfully impeached. Lay v. Fuller, 178 Ala 375, 59 S 609.

[88] Copeland v. American Cent. Ins. Co., 158 MoApp 338, 138 SW 557.

[89] Pennsylvania Co. v. Hunsley, 23 IndApp 37, 54 NE 1071.

[90] Potter v. Pennsylvania R. Co., 113 NJL 441, 174 A 734. See §§ 71 and 72, *infra*.

[91] Coral Gables v. Blount, 116 Fla 356, 156 S 244, 157 S 925.

[92] Hoge v. Soissons, 48 OhApp 221, 192 NE 860.

[93] Beck v. Metropolitan Life Ins. Co. (MoApp), 207 SW 248.

bias and prejudice of certain named witnesses,[94] or that greater weight is to be attached to the testimony of witnesses whose means of information is superior,[95] or that a party producing a witness vouches for his veracity,[96] or that a single statement made by a witness may be regarded as a mistake, and that full credence may be given to his testimony in other respects,[97] or, while bias or ill will are always factors to be taken into account by the jury, to instruct that but little weight should be given to the veracity of a witness because of his ill will,[98] or to charge that it is the duty of the jury "to believe that witness who has the least inducement to swear falsely and the best means of knowing the facts about which he testifies,"[99] or that the law presumes an unimpeached witness has spoken the truth,[1] or that, where a witness is unimpeached, the jury should not allow remarks of counsel in assailing the witness to influence them;[2] or for the court to say to the jury that the impeachment of a witness is partial.[3]

In a damage action where plaintiff claimed in her unverified complaint and her bill of particulars that she had fractured her leg, but there was no claim in an amended verified complaint or on the trial that she had so fractured her leg, it was error to instruct the jury that the claim first set up in the unverified complaint and bill of particulars was false.[4] It is error to instruct that the quality of the evidence is to be considered as well as the number of witnesses, since the word "quality" may imply better evidence and it is for the jury to say whether the evidence of the greater number or the minority is to be treated as better evidence.[5] In an action on a note it is improper for the jury to be charged that if the testimony of a certain witness is in line with a writing in evidence the witness was truthful.[6]

[94] Scholl v. Sterkel, 46 OhApp 389, 189 NE 15, 40 OLR 9.

[95] Winklebleck v. Winklebleck, 160 Ind 570, 67 NE 451.

[96] Oates v. Glover, 228 Ala 656, 154 S 786; Folsom-Morris Coal Min. Co. v. Dillon, 65 Okl 22, 162 P 696.

[97] Citizens St. R. Co. v. Burke, 98 Tenn 650, 40 SW 1085.

[98] Norwood v. State, 118 Ala 134, 24 S 53.

An instruction that the jury must take into consideration the interest, appearance, bias or prejudice, of witnesses if any shown, is calculated to unduly impress on the jury that the judge has in mind some suspicion regarding the testimony of some witnesses. Tippecanoe Loan & Trust Co. v. Jester, 180 Ind 357, 101 NE 915, LRA 1915E, 721.

[99] Hudson v. Best, 104 Ga 131, 30 SE 688. See also Keen v. Crosby, 25 GaApp 595, 103 SE 850.

[1] Chicago Union Trac. Co. v. O'Brien, 219 Ill 303, 76 NE 341.

[2] Chicago Union Trac. Co. v. O'Brien, 219 Ill 303, 76 NE 341.

[3] Elmendorf v. Ross, 221 AppDiv 376, 222 NYS 737.

[4] Toorock v. Delevan Smelting & Ref. Works, Inc., 242 AppDiv 705, 272 NYS 891.

[5] Gilmore v. Seattle & R. R. Co., 29 Wash 150, 69 P 743.

[6] Dunlap v. Dennison Lbr. Co., 27 OhApp 412, 160 NE 873.

Proper instructions. An instruction is free from objection which merely tells the jury they are at liberty to withhold credence where they believe the witness was in error or has not spoken the truth;[7] or which tells the jury that depositions read in evidence should be given the same weight as if the absent witnesses were present;[8] or which states that the jury need not lay aside their general knowledge which comes from the common experience of mankind;[9] or which informs the jury that the uncontradicted testimony of an unimpeached witness is not to be ignored;[10] or which points out fairly and impartially the intrinsic probability or improbability of testimony, leaving the jury to determine the question of credibility;[11] or which tells the jury that the probative effect of hospital clinical reports is solely for the determination of the jury;[12] or which tells the jury that "a person's reputation for truth is made by what his neighbors generally say of him in this regard—if they generally say he is untruthful, that makes his general reputation for truth bad; on the other hand, if they say nothing whatever about him as to his truthfulness, that is evidence that his general

[7] **Alabama.** Benefit Assn. of Railway Employees v. Armbruster, 224 Ala 302, 140 S 356.

California. Belm v. Patrick, 109 CalApp 599, 293 P 847.

Illinois. Goss Printing Press Co. v. Lempke, 90 IllApp 427; Egan v. Moellenbrock, 322 Ill 426, 153 NE 600 (advising the jury that they may disregard the testimony of a witness who has knowingly sworn falsely).

Iowa. In Jorgensen v. Cocklin (Ia), 260 NW 6, it was held error to charge that the jury could disregard the testimony of the defendant if they believed his reputation for truth and veracity was bad.

Missouri. Howser v. Chicago Great Western R. Co., 319 Mo 1015, 5 SW2d 59; Pappas Pie & Baking Co. v. Stroh Bros. Delivery Co. (MoApp), 67 SW2d 793.

But an instruction to this effect is insufficient if it fails to inform the jury the facts as to which they believe the witness has wilfully testified falsely must have been material facts. Larsen v. Webb, 332 Mo 370, 58 SW2d 967, 90 ALR 67.

Montana. Hageman v. Arnold, 79 Mont 91, 254 P 1070.

An instruction is defective which tells the jury to disregard the testimony of a witness who has wilfully testified falsely in regard to a material matter in the case, unless it is corroborated by other competent testimony. Vande Veegaete v. Vande Veegaete, 75 Mont 52, 243 P 1082.

South Dakota. Cox v. General Motors Acceptance Corp., 59 SD 588, 241 NW 609.

[8] Empire Plow Co. v. Berthold & Jennings Lbr. Co. (MoApp), 237 SW 137; Hershiser v. Chicago, B. & Q. R. Co., 102 Neb 820, 170 NW 177.

[9] **Kansas.** Fisher v. O'Brien, 99 Kan 621, 162 P 317, LRA 1917F, 610.

Nebraska. Nye-Schneider-Fowler Co. v. Chicago & N. W. R. Co., 105 Neb 151, 179 NW 503.

Oregon. Rostad v. Portland R., Light & Power Co., 101 Or 569, 201 P 184.

[10] Schwamb Lbr. Co. v. Schaar, 94 IllApp 544.

[11] McNeile v. Cridland, 6 PaSuper Ct 428.

[12] Wilson v. Detroit United R. Co., 208 Mich 411, 175 NW 172.

reputation for truth is good;"[13] or which points out that the testimony of one credible witness is entitled to more weight than the testimony of many others, if the latter are mistaken or have knowingly testified untruthfully;[14] or which informs the jury that they may dismiss the testimony of any witness or believe that of any witness or eliminate anything which the jury believed itself justified in eliminating.[15] But the court invades the province of the jury when it instructs on the weight to be attached to the testimony of a witness or group of witnesses or a certain class of evidence.[16]

It is not error to tell the jury in a malpractice case that they may disregard the answers of the experts to hypothetical questions if the jury does not believe that all of the facts assumed in the questions have been established by the evidence.[17] It has been held not an invasion of the jury's province to instruct the jury to "weigh the evidence carefully and consider it all together," that they "should not pick out any particular fact in evidence or any particular statement of any witness and give it undue weight," but that if they "believe any witness on either side of this case has wilfully testified falsely on any material matter," then they "have a right to disregard the entire testimony of such witness unless the witness is corroborated by other reliable evidence."[18]

§ 38. Credibility of witnesses—Corroborating or contradictory evidence.

The province of the jury as judges of the credibility of witnesses is invaded by instructions concerning the weight the jury are to give to corroborating or contradictory evidence.

Erroneous instructions. Credibility and weight are not matters susceptible of mathematical demonstration and the jury may place confidence in the testimony of one witness and not in that of another, regardless of the fact that either or both may be

[13] Treschman v. Treschman, 28 IndApp 206, 61 NE 961.

[14] **Illinois.** In Olson v. North, 276 IllApp 457, the practice was frowned upon of telling the jury that the weight of the testimony does not necessarily go with the greater number of witnesses.

North Dakota. McGilvra v. Minneapolis, St. P. & S. S. M. R. Co., 35 ND 275, 159 NW 854.

Oregon. See also State v. Howard, 102 Or 431, 203 P 311.

[15] Rish v. Jackson, 104 SC 163, 88 SE 380. See also Louisiana & A. R. Co. v. Woodson, 127 Ark 323, 192 SW 174.

[16] Jones v. Casler, 139 Ind 382, 38 NE 812, 47 AmSt 274; Gilmore v. Seattle & R. R. Co., 29 Wash 150, 69 P 743.

[17] Wilcox v. Crumpton (Ia), 258 NW 704.

[18] Reese v. Fife (Mo), 279 SW 415; Rio Grande Western R. Co. v. Utah Nursery Co., 25 Utah 187, 70 P 859. See Marden v. Radford (Mo App), 84 SW2d 947.

interested as a party or parties to the action.[19] Thus it is held prejudicial error to instruct that "the testimony of one credible witness is entitled to more weight than the testimony of many others if, as to those other witnesses, the jury have reason to believe and do believe from the evidence and all the facts before them that such other witnesses have knowingly and wilfully testified falsely and untruthfully and are not corroborated by other credible witnesses or by circumstances proved in the case."[20] It is error for the court to tell the jury that they must believe certain witnesses.[21] Where the evidence is conflicting, it is repugnant to the foregoing rule to instruct in such a manner as to determine the question of weight for the jury.[22] It is the right of the jury to disregard testimony which they believe to be untrue, even though they should predicate such belief upon the contradictory testimony of another witness.[23] The jury is not required to believe a witness though he is uncontradicted and not impeached.[24] The court may not instruct that one witness corroborates another.[25] Where there is evidence to show that a particular witness made statements, upon a different occasion, in direct conflict with his testimony upon the trial, the court has

[19] Mercantile Trust Co. v. Paulding Stave Co. (MoApp), 210 SW 438.

The court may, in its discretion, instruct on credibility of witnesses where there is contradictory evidence on a material point. Dawson v. Flinton, 195 MoApp 75, 190 SW 972.

Thus an instruction that "if the jury find that the only evidence as to the payment of these notes is that of the parties—plaintiff and defendant—who swear, oath against oath, each in support of his contention, and there being no corroboration, the verdict must be for the plaintiff" is clearly erroneous as taking from the jury the right to say which witness is to be believed. Thomas v. Law, 25 PaSuperCt 19.

[20] Keller v. Hansen, 14 Bradw. (14 IllApp) 640.

[21] Carpenter v. Versailles (Mo App), 65 SW2d 957.

[22] **Connecticut.** Bradley v. Gorham, 77 Conn 211, 58 A 698, 66 LRA 934.

Georgia. Southern Mut. Ins. Co. v. Hudson, 113 Ga 434, 38 SE 964.

New York. Peterson v. Eighmie, 175 AppDiv 113, 161 NYS 1065.

Wisconsin. F. Dohmen Co. v. Niagara Fire Ins. Co., 96 Wis 38, 71 NW 69; Petrich v. Union, 117 Wis 46, 93 NW 819.

[23] F. Dohmen Co. v. Niagara Fire Ins. Co., 96 Wis 38, 71 NW 69.

The court transcends its domain in instructing that "if there was a conflict between the witnesses in what they have sworn before you, it is your duty to reconcile that conflict if you can do so; but if you can not do so, then you should believe that witness or those witnesses who have the best opportunity of knowing the facts about which they testify and the least inducement to swear falsely." Southern Mut. Ins. Co. v. Hudson, 113 Ga 434, 38 SE 964.

[24] Bradley v. Gorham, 77 Conn 211, 58 A 698, 66 LRA 934.

But see Geuder, Paeschke & Frey Co. v. Milwaukee, 147 Wis 491, 133 NW 835, holding that the uncontroverted, reasonable, positive testimony of one witness who has personal knowledge is controlling.

[25] Lassiter v. Seaboard Air Line Ry. Co., 171 NC 283, 88 SE 335.

no right to instruct that the impeaching evidence must be received with great caution and that the jury should have little regard for it unless convinced that extra weight should be attached to it.[26]

The jury should not be instructed that a witness may be impeached as to an immaterial matter in his testimony in reference to which he has made different and contradictory statements on former occasions.[27] Nor may it be assumed, on the other hand, that a witness has been successfully impeached merely because there is evidence of previous contradictory statements made by him, and therefore an instruction is rightfully refused which tells the jury that if a named witness testified at a former trial upon the cause, with reference to a material matter, at variance with his testimony upon the trial in question, such a situation has a tendency to impeach him and they may reject his evidence completely, unless corroborated.[28]

Proper instructions. It was held that there was no error in an instruction that "the testimony of one credible witness may be entitled to more weight than the testimony of many others, if, as to those other witnesses, you have reason to believe and do believe from the evidence and all the facts before you that such other witnesses have knowingly testified untruthfully and are not corroborated by other credible witnesses or by circumstances proved in the case."[29] And it is a correct statement of the law to instruct that "a person who attaches his name as a witness to a testamentary instrument impliedly certifies that the testator is of sound mind and competent to make a will; and while the law will subsequently permit him to testify to the contrary because the truth, if such it be, should be learned, yet the jury trying the case may consider the fact of such implied contradiction in weighing his testimony." An instruction of this character has been held not to invade the province of the jury in a case where the jury were explicitly told in the charge that they were the judges of the credibility of the witnesses.[30] It is not within the inhibition of the rule to instruct that where there is a chain of corroborating testimony this fact is of material importance as bearing on the question of credibility.[31]

[26] Bradley v. Gorham, 77 Conn 211, 58 A 698, 66 LRA 934. See also Beaulac v. Robie, 93 Vt 275, 107 A 107.

[27] Fleck v. Weipert, 195 IllApp 57. See also Olson v. Des Moines City R. Co., 186 Ia 384, 170 NW 466.

[28] Matthews v. Granger, 96 IllApp 536.

[29] Strickler v. Gitchel, 14 Okl 523, 78 P 94.

[30] Stevens v. Leonard, 154 Ind 67, 56 NE 27, 77 AmSt 446. See also Stark v. Cress, 4 OhApp 92.

[31] Bisewski v. Booth, 100 Wis 383, 76 NW 349.

If the testimony of a given witness to prove an issue for the party having the burden is conflicting and contradictory, one version tending to prove the issue and the other tending to disprove it, with no reasonable excuse or explanation of the contradiction, and no other fact or circumstance in the case tending to show which version of the witness' testimony is true, no case is made by the witness' testimony, as one contradictory statement cancels the other; and the jury should not be permitted to speculate or guess which of the contradictory statements should be accepted.[32]

§ 39. Credibility of witnesses—Demeanor and character of witnesses.

The jury's province is invaded by an instruction which comments upon the demeanor or character of a witness.

It is an infringement of the jury's prerogatives for the court to comment upon the demeanor or course of action or character of witnesses.[33] It is the jury's province to weigh the evidence of a witness by giving consideration to his manner and testimony on the stand,[34] and to determine credibility without being prejudiced by expressions of opinion from the court intimating that

[32] Flack v. First Nat. Bank, 148 Tex 495, 226 SW2d 628.

[33] **Federal.** The rule is different in the federal courts. Thus in a prosecution for transporting women in interstate commerce for purpose of prostitution, where the jury may have found that the women, who testified for the prosecution, were accomplices, and accused requested proper instructions concerning accomplice testimony, the court charged concerning the witnesses: "You have noticed their manner of testifying, and you have heard more or less about what kind of people they are. All these things you should keep in mind when you are weighing the testimony of any witness, in order to determine what credibility it is entitled to." It was held that this amounted to nothing more than the general admonition, which it was proper for the court to give in all cases, and fell far short of the requirements of the situation. Freed v. United States, 266 F 1012.

California. People v. Wallace, 89 Cal 158, 26 P 650.

Illinois. Purdy v. People, 140 Ill 46, 29 NE 700; DeLong v. Giles, 11 IllApp 33.

An instruction was erroneous as not confining the jury to the evidence in the case to determine the credibility of witnesses which told them that credibility was determined from the manner of the witnesses, the reasonableness or otherwise of their testimony, and their means of knowing, if shown by the evidence and all other circumstances tending to aid them in weighing the testimony. Fowler v. Cade, 214 IllApp 153.

Missouri. Kirchner v. Collins, 152 Mo 394, 53 SW 1081.

North Carolina. Crutchfield v. Richmond & D. R. Co., 76 NC 320.

West Virginia. See also State v. Owens, 96 WVa 308, 122 SE 909.

[34] **Arkansas.** Martin v. Vaught, 128 Ark 293, 194 SW 10.

Illinois. People v. Lalor, 290 Ill 234, 124 NE 866.

Missouri. Kirchner v. Collins, 152 Mo 394, 53 SW 1081; Esstman v. United R. Co. (Mo), 232 SW 725.

the testimony of particular witnesses is inconsistent with their conduct,[35] or that certain witnesses are entitled to a higher degree of belief because they are sworn officers of the law.[36] It is not a fair comment by the court on the credibility of witnesses to intimate or suggest that such witnesses are entitled to less credibility if they are private detectives in the pay of one of the parties.[37]

But the fact that a defendant conveyed its witnesses gratuitously to the place of trial and defrayed their hotel expenses is a circumstance tending to show bias and is proper matter for the consideration of the jury,[38] and it is error to instruct as a matter of law that the fact that this was done has nothing to do with the issues in the case.[39] And where the method of procuring admissions, in an action on a policy of insurance, tends to show that undue influence was exercised by persons of skill and experience in such matters, the admissions so brought out should be closely scrutinized and it is correct for the court so to charge.[40]

There was no error in a case where the court pointed to the extreme youth of a witness who was a boy eight years old as a circumstance affecting credibility, together with the conduct of the child's mother in talking over his probable testimony on the day preceding the trial, without directing the jury how to find the facts, but leaving the question of weight to the jury.[41]

It has been held that the court may comment on character to the extent of saying that one of the witnesses is a well-known and capable member of the bar,[42] or a minister of the gospel.[43] So, the court may charge that the credibility of a witness is not to be tested by his color or race.[44] It is held not an infringement of the prerogatives of the jury for the court to direct the jury to weigh with caution the evidence of a weak-minded witness.[45]

§ 40. Credibility of witnesses—Interested witnesses.

The effect of interest, bias, or prejudice of a party on his credibility is wholly for the jury to consider, and an instruction which discredits the testimony of a witness on the ground of his interest in the cause of action deprives the jury of their right, to that extent, to be the sole judges of the credibility of witnesses.

[35] Renaud v. Bay City, 124 Mich 29, 82 NW 617.

[36] Durst v. Ernst, 45 Misc 627, 91 NYS 13.

[37] DeLong v. Giles, 11 IllApp 33.

[38] Alabama Great Southern R. Co. v. Johnston, 128 Ala 283, 29 S 771; Moore v. Nashville, C. & St. L. Ry., 137 Ala 495, 34 S 617.

[39] Moore v. Nashville, C. & St. L. Ry., 137 Ala 495, 34 S 617.

[40] Fidelity Mut. Life Assn. v. Jeffords, 107 F 402, 53 LRA 193.

[41] Banks v. Connecticut R. & Lighting Co., 79 Conn 116, 64 A 14.

[42] Holmes v. Montauk Steamboat Co., Ltd., 93 F 731.

[43] Sneed v. Creath, 8 (NC) 309.

[44] McDaniel v. Monroe, 63 SC 307, 41 SE 456.

[45] Lowe v. Herald Co., 6 Utah 175, 21 P 991.

It is always competent for the jury to believe or disbelieve a witness, wholly irrespective of any interest he may or may not have in the litigation, and this right would be taken from them should the court tell them to give less weight to the testimony of an interested than of a disinterested witness.[46] The

[46] **Federal.** It is proper to instruct that the jury must weigh the testimony of each witness, considering the interest that any witness might have in the outcome of the case, as bearing upon the subject of damages, even if plaintiff's contention that negligence was conclusively established was correct. Robertson v. Washington Ry. & Elec. Co., 51 AppDC 311, 279 F 180.

Alabama. Louisville & N. R. Co. v. Watson, 90 Ala 68, 8 S 249.

California. It is not erroneous to instruct that each of the parties is interested in the case. Konig v. Lyon, 49 CalApp 113, 192 P 875.

Georgia. It has been held that the court takes from the jury the right to take into consideration the interest of witnesses in the outcome of the action by instructing that it is the duty of the jury not to impute perjury to any witness, but to reconcile all the testimony, if possible, or to decide from the evidence which witnesses the jury would believe. Summers Buggy Co. v. Estes, 34 GaApp 407, 130 SE 350.

Illinois. Pienta v. Chicago City R. Co., 284 Ill 246, 120 NE 1; Douglass v. Fullerton, 7 IllApp 102; Margolis v. Chicago City R. Co., 197 IllApp 316; Fairfowl v. Price, 221 IllApp 447.

Indiana. Nelson v. Vorce, 55 Ind 455; Duvall v. Kenton, 127 Ind 178, 26 NE 688.

An instruction that the weight of the testimony of a witness depends upon his disinterestedness in the result of the suit and his freedom from bias, though close to the line, has been held not to warrant a reversal where there was nothing to show that it was more prejudicial to one party than the other. Hess v. Lowrey, 122 Ind 225, 23 NE 156, 7 LRA 90, 17 AmSt 355.

Iowa. Bonnell v. Smith, 53 Ia 281, 5 NW 128.

Michigan. Vinton v. Plainfield Tp., 208 Mich 179, 175 NW 403.

The jury may be told that they may consider the interest, bias, or prejudice of the witnesses in reaching the verdict. Foley v. Detroit & M. R. Co., 193 Mich 233, 159 NW 506.

Mississippi. Samuel B. Allen & Co. v. Lyles, 35 Miss 513.

Missouri. Kansas City, N. & Ft. S. R. Co. v. Dawley, 50 MoApp 480.

Nebraska. Omaha Belt Ry. Co. v. McDermott, 25 Neb 714, 41 NW 648.

New York. Duygan v. Third Ave. R. Co., 6 Misc 66, 26 NYS 79; Stevens v. Rosenwasser, 162 NYS 989.

New York. In People v. Viscio, 241 AppDiv 499, 272 NYS 213, a case in which the defendant was on trial for arson, the judge in his charge instructed the jury that defendant and his son, who had testified for him, were interested witnesses. In discussing that subject the judge said: "The defendant has testified here. Naturally, Gentlemen, he is interested in the outcome of the trial. It is your duty to place such credibility upon the testimony of this defendant's witnesses, the testimony of his son, as you may deem that credibility deserves. Take into consideration that he is interested and his son is interested, are interested witnesses in the outcome of this lawsuit. In believing and testing their testimony, place a keener test to the weight of their testimony than you would of some witness who is not at all interested in the outcome of this trial." On appeal from a conviction, the appellate court said as to this charge: "The court seriously erred in the statement just quoted. A disinter-

rule is the same as to relatives of interested witnesses.[47] While the jury may disbelieve the testimony of a party litigant, they may not wholly ignore it without first weighing and considering it in the light of the other evidence and of the attending circumstances.[48] The court was right where it declined to instruct that "in weighing the evidence the jury are to remember that the plaintiff is the most interested party in the controversy; they are to receive his evidence, therefore, with caution as being that of a partial witness; and they are empowered to reject any evidence which is uncorroborated, even though it be uncontradicted."[49] Even where an instruction on the question of interest is otherwise unobjectionable, the jury should be told that they "may," rather than that they "should," take into consideration the interest of a witness in the result of the suit.[50] It is equally a violation of the rule for the court to instruct the jury that the facts testified to by an interested party have been

ested witness is not necessarily entitled to any more credit than an interested witness. The whole subject of the interest of the witness and its effect upon his testimony is for the jury. In this instance the error was highly prejudicial because the defense rested entirely upon the story of the defendant and his son." See also People v. Gerdvine, 210 NY 184, 104 NE 129.

Ohio. Scholl v. Sterkel, 46 OhApp 389, 189 NE 15; Rose v. State, 13 OhCirCt 342, 7 OhCirDec 226.

Oklahoma. Thrasher v. St. Louis & S. F. Ry. Co., 86 Okl 88, 206 P 212 (employees of railroad).

Pennsylvania. Park v. Beaver Valley Trac. Co., 262 Pa 561, 106 A 106.

In Pennsylvania, a common law state, sanction is given to careful instructions on the testimony dealing with the number of witnesses on each side, their respective interests, opportunities for observation, and other matters affecting the weight of evidence, in personal injuries, in view of natural sympathy. Windle v. Davis, 275 Pa 23, 118 A 503.

Texas. Willis v. Whitsitt, 67 Tex 673, 4 SW 253; Briggs v. Briggs (TexCivApp), 227 SW 511.

[47] **Indiana.** Nelson v. Vorce, 55 Ind 455; Unruh v. State, 105 Ind 117, 4 NE 453.

New York. People v. Viscio, 241 AppDiv 499, 272 NYS 213.

Pennsylvania. It was not ground for reversal that the court charged that the plaintiff's wife and daughter, as witnesses, were morally interested in the suit. Lipshutz v. Lipshutz, 274 Pa 217, 117 A 796.

[48] Hence, where there is no charge or requested charge as to the jury's province in sifting the evidence and determining questions of credibility, an instruction that the jury "may disregard entirely the plaintiff's testimony, inasmuch as he is an interested witness" is rightfully refused. Irwin v. Metropolitan St. Ry. Co., 25 Misc 187, 54 NYS 195.

[49] Coloritype Co. v. Williams, 78 F 450.

[50] **Alabama.** Miller v. State, 21 AlaApp 283, 107 S 721.

Georgia. The proper instruction as to interest is that it "may" and not that it "does" affect credibility of the witness. Davis v. Central R. R., 60 Ga 329.

Indiana. Lynch v. Bates, 139 Ind 206, 38 NE 806.

North Dakota. State v. Greiner, 53 ND 558, 207 NW 226.

Oregon. State v. Quartier, 118 Or 637, 247 P 783.

established though the testimony of such witness was not contradicted.[51]

Where, however, an instruction as to interest as affecting credibility is general and not limited in its operation to any particular witness or witnesses, it is within the court's province to give it.[52] The court may, with propriety, instruct that, in deliberating upon the evidence, the interest of the witnesses may be considered by the jury, where at the same time the jury are admonished that no unfair inference is raised by the fact of the witnesses' employment by one of the parties to the action.[53]

§ 41. Credibility of witnesses in criminal cases.

The jury in criminal cases are the exclusive judges of the credibility of the witnesses appearing before them and this prerogative may not be usurped by the court in his instructions.

The judge at any time during a criminal trial is not permitted to cast doubt upon a witness' testimony or to impeach his credibility. It makes no difference in what manner or when the opinion of the judge is conveyed to the jury. It may be directly or indirectly, by comment, by arraying the evidence unequally in the charge, by imbalancing the contentions of the parties, by the choice of language in stating the contentions, or by the general tone and tenor of the trial. All are forbidden.[54]

[51] Turner v. Grobe, 24 TexCivApp 554, 59 SW 583.

[52] Lynch v. Bates, 139 Ind 206, 38 NE 806; Kavanaugh v. Wausau, 120 Wis 611, 98 NW 550.

An instruction that, in passing upon the credibility of plaintiff's testimony, the jury may properly consider his interest in the result of the trial, the temptation under the circumstances to color his testimony favorably to himself, and everything bearing on the subject, and give such evidence such weight only as, in their judgment, it was entitled to, and that a like test should be applied to evidence of each of the witnesses who testified in the case, has been held a correct statement of a legal principle and not to infringe upon the province of the jury. Kavanaugh v. Wausau, 120 Wis 611, 98 NW 550.

[53] Lovely v. Grand Rapids & I. R. Co., 137 Mich 653, 100 NW 894. See also Brown v. Forrester & Nace Box Co. (Mo), 243 SW 330.

[54] **Alabama.** Kennedy v. State, 147 Ala 687, 40 S 658; Turner v. State, 160 Ala 40, 49 S 828; McCoy v. State, 170 Ala 10, 54 S 428; Pearce v. State, 4 AlaApp 32, 58 S 996; Snead v. State, 7 AlaApp 118, 61 S 473.

Arkansas. James v. State, 94 Ark 514, 127 SW 733, Marshall v. State, 101 Ark 155, 141 SW 755; Benson v. State, 103 Ark 87, 145 SW 883; Smith v. State, 172 Ark 156, 287 SW 1026.

Colorado. Curl v. People, 53 Colo 578, 127 P 951, AnnCas 1914B 171; Brasher v. People, 81 Colo 113, 253 P 827.

Florida. Wolf v. State, 72 Fla 572, 73 S 740.

Georgia. Waycaster v. State, 136 Ga 95, 70 SE 883; Union v. State, 7 GaApp 27, 66 SE 24.

Erroneous Instructions. It has been held error for the court to fail to charge that the jury are the judges as to the facts, the credibility of the witnesses and the weight of their testimony.[55] Under this rule it is for the jury to pass upon the credibility of such witnesses as the accused.[56]

Idaho. State v. Marren, 17 Idaho 766, 107 P 993.

Illinois. Hauser v. People, 210 Ill 253, 71 NE 416; People v. Jacobs, 243 Ill 580, 90 NE 1092; People v. McCann, 247 Ill 130, 93 NE 100, 20 AnnCas 496.

Indiana. Cotner v. State, 173 Ind 168, 89 NE 847.

Iowa. State v. Todd, 110 Ia 631, 82 NW 322; State v. Brown, 152 Ia 427, 132 NW 862.

Kentucky. Hale v. Commonwealth, 151 Ky 639, 152 SW 773.

Louisiana. State v. Bazile, 50 LaAnn 21, 23 S 8.

Michigan. People v. Breen, 192 Mich 39, 158 NW 142.

Missouri. State v. McKenzie, 177 Mo 699, 76 SW 1015; State v. Hall, 228 Mo 456, 128 SW 745; State v. Bayless, 362 Mo 109, 240 SW2d 114.

Montana. State v. Jones, 32 Mont 442, 80 P 1095; State v. Morrison, 46 Mont 84, 125 P 649.

Nebraska. Howell v. State, 61 Neb 391, 85 NW 289; Parker v. State, 67 Neb 555, 93 NW 1037; Bunge v. State, 87 Neb 557, 127 NW 899.

New Jersey. A charge that contradictory testimony of witnesses must be considered by the jury as affecting their credibility invades the province of the jury. State v. Rosa, 72 NJL 462, 62 A 695.

North Carolina. State v. Simpson, 233 NC 438, 64 SE2d 568.

Ohio. State v. Tuttle, 67 OhSt 440, 66 NE 524, 93 AmSt 689; Sandoffsky v. State, 29 OhApp 419, 163 NE 634.

Oklahoma. Havill v. State, 7 Okl Cr 22, 121 P 794; Wainscott v. State, 8 OklCr 590, 129 P 655; Munson v. State, 13 OklCr 569, 165 P 1162.

Texas. Edgar v. State, 59 TexCr 491, 129 SW 141; Crowell v. State, 66 TexCr 537, 148 SW 570; Hamilton v. State, 68 TexCr 419, 153 SW 331.

Virginia. McCue v. Commonwealth, 103 Va 870, 49 SE 623.

West Virginia. State v. Sutfin, 22 WVa 771.

[55] Garrison v. State, 129 TexCr 32, 84 SW2d 477.

[56] **Federal.** It has been held error for the trial court to tell the jury that the decision of the case depends upon whether the accused told the truth on the witness stand. Grillo v. United States, 26 F2d 461.

Alabama. Stevens v. State, 138 Ala 71, 35 S 122.

It is an invasion where the court instructs that, in weighing the testimony of the accused, the jury must consider his interest in the case; but an instruction that they may do so does not have this effect. Tucker v. State, 167 Ala 1, 52 S 464.

It is an invasion in an instruction that the jury in weighing the testimony of the accused must consider the fact that he is the accused and interested in the result. Pugh v. State, 4 AlaApp 144, 58 S 936.

Where the court had charged that there was testimony in the case impeaching the veracity of the accused, the latter was entitled to have the court tell the jury that his testimony could not be capriciously disregarded or rejected. Ware v. State, 21 AlaApp 407, 108 S 645.

Arizona. Erickson v. State, 14 Ariz 253, 127 P 754.

Arkansas. Douglass v. State, 91 Ark 492, 121 SW 923.

California. It is an invasion by instruction that the defendant has offered himself as a witness in his own behalf and that the jury are not permitted to disregard or reject his testimony simply on the ground that he is the accused and on trial

Also under this rule, it is for the jury and not the court to pass upon the credibility of witnesses who may be considered as accomplices,[57] children when called to testify,[58] detectives,[59]

on a criminal charge. People v. Winters, 125 Cal 325, 57 P 1067.

Georgia. It is proper to instruct that the jury has the right to believe the statement of the defendant in preference to the sworn testimony in the case. Clark v. State, 35 GaApp 388, 133 SE 273.

Illinois. Carle v. People, 200 Ill 494, 66 NE 32, 93 AmSt 208.

Massachusetts. Commonwealth v. Barber, 261 Mass 281, 158 NE 840.

In Commonwealth v. Stewart, 255 Mass 9, 151 NE 74, 44 ALR 579, it was held proper for the court to tell the jury that they must differentiate between the statement of the accused not under oath and the sworn testimony before them.

Nevada. State v. Blaha, 39 Nev 115, 154 P 78.

New Jersey. See also State v. Sandore, 100 NJL 187, 124 A 528.

New York. People v. McDonald, 159 NY 309, 54 NE 46; People v. Biddison, 136 AppDiv 525, 121 NYS 129.

It is error to tell the jury that in weighing the testimony of the defendant and his son, the main reliance of the defense being upon such testimony, they should place a keener test upon it than they would upon the testimony of disinterested witnesses. People v. Viscio, 241 AppDiv 499, 272 NYS 213.

North Carolina. State v. Wilcox, 206 NC 691, 175 SE 122.

It was not erroneous to tell the jury to scrutinize testimony with care to determine to what extent his testimony was biased by his interest. State v. Burton, 172 NC 939, 90 SE 561.

It was error for the court to instruct the jury that they should scrutinize the testimony of the defendant carefully before accepting it as true and that the defendant testifying in his own behalf is under the temptation to testify to whatever he thinks will be necessary to clear himself, and that the law presumes that he is under such a temptation. State v. Wilcox, 206 NC 694, 175 SE 121.

North Dakota. The fact that defendant gave no testimony would not render erroneous the giving of the usual instruction as to credibility of witnesses. State v. Ramsey, 31 ND 626, 154 NW 731.

Oklahoma. Wainscott v. State, 8 OklCr 590, 129 P 655; Doud v. State, 12 OklCr 273, 154 P 1008; Dismore v. State (OklCr), 44 P2d 894.

South Carolina. State v. Cannon, 49 SC 550, 27 SE 526.

Texas. Tilmyer v. State, 58 Tex Cr 562, 126 SW 870, 137 AmSt 982.

It is an invasion of the province of the jury for the court to instruct that the only object of evidence of prior conviction of the defendant of crime is its effect on his credibility as a witness. Patrick v. State, 106 TexCr 205, 291 SW 901.

[57] **Federal.** Hoback v. United States, 296 F 5; Greenberg v. United States, 297 F 45.

Alabama. The province of the jury as to the credibility of witnesses is invaded by an instruction that the jury must view the testimony of the wife of an accomplice with caution and give every consideration to the fact that she is the wife of an accomplice. Crittenden v. State, 134 Ala 145, 32 S 273.

California. Where the evidence is uncontradicted that shows a witness to be an accomplice, there is no jury question concerning it involved. People v. McDeermott, 75 CalApp 718, 243 P 485.

Colorado. Tollifson v. People, 49 Colo 219, 112 P 794.

Delaware. State v. Ryan, 1 Boyce (24 Del) 223, 75 A 869.

Iowa. It is not error for the court to fail to define an accomplice where an instruction has properly

police officers,[60] experts,[61] convicts,[62] prostitutes,[63] impeached witnesses,[64] eye-witnesses to homicide,[65] interested witnesses

told the jury that the witness is confessedly an accomplice. State v. Gill, 202 Ia 242, 210 NW 120.

Kentucky. Where an accomplice testifies, the court must instruct as to the necessity of corroboration under Carroll's Cr. Code 1932, § 241. Mullins v. Commonwealth, 216 Ky 149, 287 SW 542.

Michigan. People v. Schweitzer, 23 Mich 301; Hamilton v. People, 29 Mich 173; People v. Dumas, 161 Mich 45, 125 NW 766; People v. Delano, 318 Mich 557, 28 NW2d 909.

Missouri. State v. Daugherty, 302 Mo 638, 259 SW 787.

Oklahoma. Where evidence is conflicting as whether a witness is an accomplice, the court may instruct on law of accomplices. Wiley v. State, 17 OklCr 643, 191 P 1057.

Texas. Simms v. State, 98 TexCr 352, 265 SW 897.

West Virginia. State v. Hammond, 96 WVa 96, 122 SE 363.

[58] **California.** People v. Sonoqui (Cal), 31 P2d 783; People v. Agullana (CalApp), 40 P2d 848.

Idaho. State v. Parris (Idaho), 44 P2d 1118.

Illinois. People v. Lewis, 252 Ill 281, 96 NE 1005.

Missouri. It is an improper comment on the credibility of a witness to charge the jury to consider her age, her moral state of mind, and the fact that she does not realize the sanctity of an oath. State v. Burlison, 315 Mo 232, 285 SW 712.

[59] **Alabama.** Harris v. Tuscaloosa, 21 AlaApp 316, 108 S 79.

Illinois. People v. Dressen, 158 IllApp 139.

Michigan. People v. Plummer, 189 Mich 415, 155 NW 533.

Missouri. State v. Kennett, 151 MoApp 637, 132 SW 286; State v. Kimmell, 156 MoApp 461, 137 SW 329.

Oregon. State v. Emmons, 63 Or 535, 127 P 791.

It is not proper to instruct the jury that they should consider the testimony of those employed to secure evidence in a case with greater care than the testimony of other witnesses. State v. Quartier, 118 Or 637, 247 P 783.

[60] Robinson v. Commonwealth, 118 Va 785, 87 SE 553.

[61] **Alabama.** White v. State, 133 Ala 122, 32 S 139; Parrish v. State, 139 Ala 16, 36 S 1012.

California. People v. Wilkins, 158 Cal 530, 111 P 612; People v. Driggs, 14 CalApp 507, 112 P 577.

District of Columbia. Shaffer v. United States, 24 AppDC 417.

Georgia. Rouse v. State, 135 Ga 227, 69 SE 180.

North Carolina. State v. Wilcox, 132 NC 1120, 44 SE 625.

Oklahoma. Miller v. State, 9 Okl Cr 255, 131 P 717, LRA 1915A, 1088.

[62] Johnson v. State, 152 Ark 218, 238 SW 23.

[63] State v. Rankin, 150 Ia 701, 130 NW 732. But see Freed v. United States, 266 F 1012.

[64] **Federal.** Van Dam v. United States, 23 F2d 235.

Alabama. Rambo v. State, 134 Ala 71, 32 S 650; Autrey v. State, 15 AlaApp 574, 74 S 397; Freeland v. State, 26 AlaApp 74, 153 S 294.

District of Columbia. Lyles v. United States, 20 AppDC 559.

Georgia. Getters v. State, 35 Ga App 497, 134 SE 121.

Indiana. But see Smith v. State, 142 Ind 288, 41 NE 595.

Kentucky. Shorter v. Commonwealth, 248 Ky 37, 58 SW2d 224; Sumner v. Commonwealth, 256 Ky 139, 75 SW2d 790.

Massachusetts. Commonwealth v. Sacco, 255 Mass 369, 151 NE 839.

New Jersey. State v. Harris, 10 NJMisc 236, 158 A 848.

Oklahoma. It was an invasion to instruct that the jury was bound to accept and act upon the testimony of an impeached witness, if corroborated. Rea v. State, 3 Okl Cr 269, 105 P 381.

generally,[66] and the weight to be attached to evidence establishing the fact that a bloodhound trailed the defendant.[67]

It is error for the court to tell the jury that character witnesses were interested witnesses because of their friendship for the one for whose character they vouched, and to expatiate upon the duty of the jury to consider whether this interest would lead the character witnesses far afield in their desire and effort to assist the party for whom they testify.[68] Where a statement was admitted in a homicide case as a dying declaration, it was error for the court to charge that "a declaration made under those circumstances is fully as solemn as one given under oath."[69] The court is not authorized to convey to the jury in his instructions the idea that a witness in the case may be impeached on an immaterial matter.[70]

Tennessee. Crittendon v. State, 157 Tenn 403, 8 SW2d 371.

Texas. Roberson v. State, 103 TexCr 307, 280 SW 586.

Vermont. State v. Bissel, 106 Vt 80, 170 A 102.

Washington. State v. Gaul, 88 Wash 295, 152 P 1029.

West Virginia. The province of the jury is invaded by an instruction that the jury, if they were of the opinion that any witness had wilfully and corruptly testified to what was false, were at liberty to reject all of his testimony that was not corroborated by other testimony as the jury have a right to believe any portion of the testimony whether corroborated or not. State v. Musgrave, 43 WVa 672, 28 SE 813.

Wisconsin. Haley v. State, 207 Wis 193, 240 NW 829.

[65] Gray v. Commonwealth, 252 Ky 830, 68 SW2d 430.

[66] **Alabama.** Bowlin v. State, 24 AlaApp 192, 132 S 600. But see Thornton v. State, 18 AlaApp 225, 90 S 66 (instruction not a charge on the evidence).

Illinois. In People v. Sepich, 237 IllApp 178, an instruction was held too broad which informed the jury that they could consider the financial or other interest of a witness for the state in arriving at the guilt or innocence of the defendant; People v. Cash, 326 Ill 104, 157 NE 76.

Mississippi. Hughey v. State (Miss), 106 S 361.

New York. The province of the jury is invaded by a charge that in estimating the value of the testimony of a certain witness the jury should consider that he had a strong motive to testify in that he had civil suits pending against the defendant in which he and the defendant would probably be witnesses. People v. Noblett, 96 AppDiv 293, 89 NYS 181.

North Carolina. State v. Smith, 170 NC 742, 87 SE 98.

North Dakota. State v. Wisnewski, 13 ND 649, 102 NW 883, 3 AnnCas 907 (witness entitled to reward on conviction).

Oregon. State v. Pomeroy, 30 Or 16, 46 P 797 (wife and daughter of accused).

Texas. Harrell v. State, 37 TexCr 612, 40 SW 799.

[67] State v. Dooms, 280 Mo 84, 217 SW 43.

[68] People v. Marino, 243 AppDiv 533, 275 NYS 962.

[69] People v. Block, 243 AppDiv 551, 275 NYS 873. See People v. Ludkowitz, 266 NY 233, 194 NE 688.

[70] People v. Solomen, 261 IllApp 585.

The appearance and demeanor of the witness on the stand is for the jury to consider in giving weight to his testimony.[71] The court should not single out the testimony of any particular witness for comment, either favorable or unfavorable.[72] The court is without authority to point out to the jury certain discrepancies in the testimony of the witnesses for one party and at the same time to omit any references to grave contradictions in that of the opposing set of witnesses.[73]

Proper instructions. It is permissible for the court to say to the jury that they may consider the interest of any witness who has testified.[74] In the federal courts it has been held permissible for the court to charge the jury to give to the testimony of special investigators as much credit as other witnesses.[75] The court may with propriety tell the jury that if they believe any witness before them has wilfully testified falsely as to a material matter in the case, they may disregard the whole of his testimony unless it is supported by other credible evidence.[76]

Testimony of the accused. When the accused in a criminal case testifies as a witness he is entitled to an instruction upon the hypothesis raised by his testimony, however improbable or unreasonable his testimony may seem.[77] It is improper for the court to single out the testimony of the accused and tell the jury that the law presumes that he will testify to whatever he may think necessary to clear himself, and that the jury, in determining the weight to give to his testimony, should consider the temptation he labors under.[78] The jury ought not to be told in a criminal case that they are not bound to believe the defendant, and in considering his testimony they may think of his interest in

[71] **Alabama.** Roberson v. State, 24 AlaApp 244, 133 S 744.

California. An instruction that "you should carefully scrutinize all the testimony in this case and in doing so consider all the circumstances under which each witness has testified, his degree of intelligence, his manner on the witness stand" although an invasion of the province of the jury is not prejudicial for it merely tells the jury what they would do without being told. People v. Newcomer, 118 Cal 263, 50 P 405.

Illinois. People v. Fox, 269 Ill 300, 110 NE 26.

New Jersey. State v. Runyon, 94 NJL 265, 109 A 925.

New York. People v. Scanlon, 132 AppDiv 528, 117 NYS 57.

Washington. State v. Neaudeau, 137 Wash 297, 242 P 36.

[72] Koss v. State (Wis), 258 NW 860.

[73] People v. Robins, 242 AppDiv 516, 275 NYS 940.

[74] State v. Simmons, 332 Mo 247, 58 SW2d 302.

[75] Louviers v. United States, 62 F2d 163.

[76] State v. Farnsworth, 51 Idaho 768, 10 P2d 295; Wells v. State, 52 OklCr 445, 6 P2d 841.

See § 72, *infra.*

[77] Huffman v. People, 96 Colo 80, 39 P2d 788.

[78] State v. Carden, 207 NC 517, 177 SE 647.

the result of the trial.[79] Nor should the court charge that there is a presumption of the truth of a statement of the defendant against his own interest.[80] The court should not charge the jury that they should not disregard the testimony of the accused because of the charge of crime made against him.[81] It is an invasion of the jury's province to tell them that in determining the weight to be accorded to the accused's testimony they may take into consideration the testimony of all the other witnesses and also such facts and circumstances as are in proof in the case.[82]

§ 42. Cautionary instructions.

The giving of cautionary instructions in both criminal and civil cases is generally within the judicial discretion of the trial judge and the giving of such instructions will not be ground for reversal unless the privilege has been grossly abused to the injury of a party.

Cautionary instructions have been declared to be warnings to the jury to apply the law to the facts and to deal with each other candidly in order to arrive at a just verdict.[83] The giving of a cautionary instruction is largely within the discretion of the trial court.[84] But just as with any discretionary power, it may be

[79] People v. Rogers, 324 Ill 224, 154 NE 909.

[80] State v. Foyte, 43 Idaho 459, 252 P 673.

[81] People v. Harris, 128 CalApp 44, 16 P2d 688.

[82] **Alabama.** McCormick v. State, 21 AlaApp 654, 111 S 647.

Illinois. In People v. Toohey, 319 Ill 113, 149 NE 795, it was held error to instruct that the jury in considering the defendant's credibility as a witness might take into account his demeanor on the witness stand and during the trial.

Michigan. People v. Wudarski, 253 Mich 83, 234 NW 157.

Oklahoma. Rhea v. United States, 6 Okl 249, 50 P 992.

Texas. But see Salamy v. State, 117 TexCr 465, 37 SW2d 1028.

[83] Stockton v. State, 174 Ark 472, 295 SW 397.

[84] **Arkansas.** Aydelotte v. State, 170 Ark 1192, 281 SW 369.

California. In People v. Stevens, 78 CalApp 395, 248 P 696, it was held permissible for the trial court to tell the jury that unless the jury did its duty the laws might as well be stricken from the statute books. But see People v. Harshaw, 128 CalApp 212, 16 P2d 1025.

Illinois. Comorouski v. Spring Valley Coal Co., 203 IllApp 617.

Iowa. Siesseger v. Puth, 211 Ia 775, 234 NW 540.

Maryland. The judgment of the lower court was set aside because of failure of the trial judge to give a cautionary instruction. Schapiro v. Meyers, 160 Md 208, 153 A 27.

Minnesota. State v. Jenkins, 171 Minn 173, 213 NW 923.

Missouri. Hely v. Hinerman, 208 MoApp 691, 236 SW 698; Wolfson v. Cohen (Mo), 55 SW2d 677; Fuenfgeld v. Holt (MoApp), 70 SW2d 143.

In State v. Bartley (Mo), 84 SW2d 637, it was held proper for the court to refuse to tell the jury that an alleged declaration of the defendant should be received with great caution.

abused and if a party is prejudiced thereby, it is ground for reversal.[85] For example, too many cautionary admonitions favorable to one party may constitute reversible error.[86]

Matters not in evidence. The failure to give a cautionary instruction may be error. The trial justice must instruct the jury that, except as to matters of common knowledge, they must base their verdict solely upon the evidence produced at the trial.[87] Yet in some courts this kind of cautionary instruction is not mandatory. The court may instruct that the jury should base their verdict on the evidence and not be influenced by matters outside the case,[88] such, for example, as the color of the litigants,[89] or that one of the parties is a corporation,[90] or that the defendant is a member of the same lodge as a juror.[91] It is proper to tell the jury that they should confine themselves to the evidence in forming their conclusions,[92] and not to indulge in

Nebraska. Dinsmore v. State, 61 Neb 418, 85 NW 445; Johnson v. Nathan, 161 Neb 399, 73 NW2d 398.

Ohio. Bandy v. State, 13 OhApp 461, 32 OhCtApp 360; Cleveland & S. W. Trac. Co. v. Ward, 6 OhCirCt (N. S.) 385, 17 OhCirDec 761; Empire Coal Min. Co. v. George M. Jones Co., 15 OhCirCt (N. S.) 369, 31 OhCirDec 95; Geer v. State, 16 OhCirCt (N.S.) 151, 31 OhCirDec 455; Findlay Bros. Co. v. Eiser, 17 OhCirCt (N. S.) 406, 32 OhCirDec 206; Akron St. R. Co. v. Dussel, 33 OhBull 98.

Oregon. Childers v. Brown, 81 Or 1, 158 P 166, AnnCas 1918D, 170; Barnhart v. North Pacific Lbr. Co., 82 Or 657, 162 P 843; Arthur v. Parish, 150 Or 582, 47 P2d 682.

Pennsylvania. Commonwealth v. Crow, 303 Pa 91, 154 A 283.

Texas. Ford Motor Co. v. Whitt (TexCivApp), 81 SW2d 1032.

Wisconsin. Strabel v. State, 192 Wis 452, 211 NW 773.

[85] **Arkansas.** Rayburn v. State, 69 Ark 177, 63 SW 356.

Iowa. State v. Derry, 202 Ia 352, 209 NW 514; Clarke v. Hubbell, — Ia —, 86 NW2d 905.

Kansas. It was not error in a criminal case for the trial court to charge the jury that it was shown by the evidence that the prosecution was being aided by the Ku Klux Klan, and that it was laudable for that organization to aid in the enforcement of the law, but that the jury should not be influenced by the organization's action. State v. Stockton, 119 Kan 868, 241 P 688.

[86] Clarke v. Hubbell, — Ia —, 86 NW2d 905.

[87] W. C. Viall Dairy, Inc. v. Providence Journal Co., 79 RI 416, 89 A2d 839.

[88] Foskey v. State, 119 Ga 72, 45 SE 967; Wimberly v. State, 12 Ga App 540, 77 SE 879; State v. Tedder, 83 SC 437, 65 SE 449.

[89] McLaurin v. Williams, 175 NC 291, 95 SE 559; Wilson v. Singer Sewing Mach. Co., 184 NC 40, 113 SE 508.

[90] **Iowa.** Snakenberg v. Minneapolis & St. L. R. Co., 194 Ia 215, 188 NW 935.

Missouri. Burow v. St. Louis Public Service Co. (MoApp), 79 SW2d 478 (said to be within the discretion of the court).

Washington. Shanks v. Oregon-Washington R. & Nav. Co., 98 Wash 509, 167 P 1074.

[91] People v. Harris, 80 CalApp 328, 251 P 823.

[92] **Illinois.** Smith v. Bellrose, 200 IllApp 368.

Oklahoma. Potter v. Womach, 63 Okl 107, 162 P 801.

speculation,[93] so they may be told that they are not to give damages simply because the charge set out rules for measure of damages.[94] It has been held proper for the court to caution the jury to avoid discussion of personal experiences when they deliberate upon the evidence.[95] A very proper instruction is the one cautioning the jury against participation in discussion of the case before its submission.[96]

In a murder trial, where newspapers had carried statements to the effect that the crime had been solved, it was held proper for the court to tell the jury to disregard these statements.[97]

Sympathy and prejudice. In criminal cases the court may caution the jury against sympathy for accused or his relatives or against the influence of public prejudice against the crime or the one charged therewith.[98] The matter of instructions on the subject of sympathy in civil actions is entirely within the discretion of the court,[99] but courts are generally not inclined to give such instructions on the theory that jurors are fair-minded men governed by their oaths and their reason.[1] Where the circumstances of a civil case render it advisable, the court may caution the jury against being influenced by sympathy or sentiment.[2] A like instruction may be proper in a criminal case.[3]

Oregon. State v. Hamilton, 80 Or 562, 157 P 796.

South Carolina. State v. Cooler, 112 SC 95, 98 SE 845.

[93] **Indiana.** See Gross v. State, 186 Ind 581, 117 NE 562, 1 ALR 1151.

Missouri. Holmes v. Protected Home Circle, 199 MoApp 528, 204 SW 202; Garner v. New Jersey Fidelity & Plate Glass Ins. Co. (Mo App), 200 SW 448.

Oregon. Duncan Lbr. Co. v. Willapa Lbr. Co., 93 Or 386, 182 P 172, 183 P 476.

[94] Grover v. Morrison, 47 CalApp 521, 190 P 1078.

[95] Taylor v. General Exch. Ins. Corp. (TexCivApp), 67 SW2d 1061.

[96] Walker v. State, 82 Fla 465, 90 S 376; Gunn v. State, 90 TexCr 209, 234 SW 399.

[97] Hall v. State, 199 Ind 592, 159 NE 420.

[98] **California.** People v. Woodcock, 52 CalApp 412, 199 P 565.

Illinois. People v. Duzan, 272 Ill 478, 112 NE 315.

Oregon. State v. Trapp, 56 Or 588, 109 P 1094; State v. Howard, 102 Or 431, 203 P 311.

[99] **California.** People v. Bojorquez, 35 CalApp 350, 169 P 922.

Missouri. Aronovitz v. Arky (Mo), 219 SW 620; Oliver v. Morgan (Mo), 73 SW2d 993.

Oregon. Nordin v. Lovegren Lbr. Co., 80 Or 140, 156 P 587.

Virginia. Powhatan Lime Co. v. Whetzel's Admx., 118 Va 161, 86 SE 898.

[1] **Iowa.** Mitchell v. Mystic Coal Co., 189 Ia 1018, 179 NW 428.

Michigan. Robbins v. Magoon & Kimball Co., 193 Mich 200, 159 NW 323.

Virginia. P. Lorillard Co. v. Clay, 127 Va 734, 104 SE 384.

[2] **Florida.** Doyle v. State, 39 Fla 155, 22 S 272, 63 AmSt 159; Cook v. State, 46 Fla 20, 35 S 665.

Iowa. Welton v. Iowa State Highway Comm., 211 Ia 625, 233 NW 876.

Missouri. Waeckerley v. Colonial Baking Co., 228 MoApp 1185, 67 SW2d 779.

Where during the trial the defendant by sudden outbursts called the witnesses "dirty liars" and vile names, he was not entitled to have the court tell the jury that these incidents should not cause the jury to be prejudiced against him.[4]

Urging agreement. Urging a jury to come to an agreement in a criminal case may be such as to constitute an invasion of their province by the court.[5] An argumentative, involved, cautionary instruction, entreating that some of the jurors change their minds and reach a verdict, is erroneous.[6] They should not be told that a failure to perform their duty, whereby a crime goes unpunished, cannot be corrected by a new trial.[7] The court should not tell the jury that the people have a right to a proper execution of the laws, and that unless the jurors do their duty the laws may as well be stricken from the statute books.[8] The court may tell the jury that questions of mercy are not for the jury, but for the executive in the exercise of the pardoning power.[9] It is proper practice for the court to omit any statement to the jury as to what will be the consequences of their verdict.[10]

Miscellaneous. The court should not single out a particular witness and direct cautionary instructions against his testimony. Such a course would tend to convey to the minds of the jurors the impression that the particular witness was not believed by the court.[11] It is held not improper for the court to tell the jury that his action in the sustaining or overruling of evidence is not to be regarded as indicating sympathy or any opinion as to the weight or credit of evidence.[12]

If in a particular jurisdiction fewer than the total number of jurors may return a verdict, the court should so instruct the

Nebraska. See also Koenigstein v. State, 101 Neb 229, 162 NW 879.

New Mexico. The court should not refuse an instruction in rape case cautioning the jury of the nature of the case and the ease with which an accusation may be lodged and the difficulty of defending the same. State v. Clevenger, 27 NM 466, 202 P 687.

Washington. Curtis v. Perry, 171 Wash 542, 18 P2d 840.

[3] Kirchman v. State, 122 Neb 624, 241 NW 100.

[4] People v. Egan, 91 CalApp 44, 266 P 581.

[5] Sharp v. State, 115 Neb 737, 214 NW 643.

[6] Stockton v. State, 174 Ark 472, 295 SW 397.

[7] State v. Crofford, 121 Ia 395, 96 NW 889.

[8] People v. Harshaw, 128 CalApp 212, 16 P2d 1025. But see People v. Stevens, 78 CalApp 395, 248 P 696.

[9] **Alabama.** See Avery v. State, 124 Ala 20, 27 S 505.

Michigan. People v. Williams, 218 Mich 436, 188 NW 403.

Nebraska. Dinsmore v. State, 61 Neb 418, 85 NW 445.

[10] Goldstein v. United States, 73 F2d 804.

[11] People v. Longland, 52 CalApp 499, 199 P 546.

[12] People v. Davis, 300 Ill 226, 133 NE 320.

jury.[13] The jury may be warned not to agree upon a verdict by lot.[14]

§ 43. Cautioning individual jurors.

The trial court is authorized to caution individual jurors only to the extent that such instruction does not amount to coercion or improper influence upon the juror to cause him to agree to a verdict to which he would otherwise not consent.

Each juror's independence. It is not error for the court to direct the attention of the jury to their individual responsibility and their independence in arriving at their verdict.[15] It is within the trial court's discretion to caution the jury against yielding a conscientious conviction.[16] An instruction has been approved which, being addressed to the individual jurors, told them that they should not give up their own opinions simply because other jurors held different views.[17] On this last point, apparently, states disagree: A requested charge should be refused when its effect is to admonish individual jurors that if they hold a reasonable doubt as to the defendant's guilt they should not vote to convict merely because the majority believe otherwise, or merely for the sake of reaching a verdict.[18] It is permissible to charge that no juror should give up his own convictions if they remained after full and free consultation with the other jurors.[19]

Other juror's influence. It has been held error for the court to decline to tell the jury that jurors should not be influenced by a majority.[20] A federal court has declared it proper for the court to tell the jury that each juror should consider the opinions of the other jurors.[21] If instructions have been given fairly covering the issues and theories of the case, the court is not required to give a requested instruction that each juror is entitled to make up his mind without regard to the opinions of the other jurors.[22] It has been held improper to charge the jury to acquit the defendant in a criminal case unless each juror believed him guilty beyond a reasonable doubt.[23]

[13] Louisville Cemetery Assn. v. Downs, 241 Ky 773, 45 SW2d 5.

[14] Texas & Pacific R. Co. v. Dickey (TexCivApp), 70 SW2d 614.

[15] Foust v. State, 200 Ind 76, 161 NE 371.

[16] State v. Rudman, 327 Mo 260, 37 SW2d 409.

[17] Emery v. Monongahela West Penn Public Service Co., 111 WVa 699, 163 SE 620.

[18] State v. Eldredge, 45 Wyo 488, 21 P2d 545.

[19] Blevins v. State, 169 Miss 868, 154 S 269.

[20] People v. Scott, 84 CalApp 642, 258 P 638.

[21] Calcara v. United States, 53 F2d 767.

[22] Beers v. California State Life Ins. Co., 87 CalApp 440, 262 P 380.

[23] **Alabama.** Hudson v. State, 217 Ala 479, 116 S 800.

§ 44. Recommendations of mercy in criminal cases.

The jury should be instructed that they have the power of recommending mercy if there is statutory authority and such recommendation is binding on the court. However, failure to so charge is error only if the accused has requested such charge.

The power of the jury to recommend mercy rests wholly upon statutory provision. Without a statute, there is no such power, and if such recommendation be made, the court is not required to consider it in fixing punishment.[24] If the charge of the court to the jury is such as to induce the jury to mistakenly believe that they can recommend mercy, and that such recommendation will be given effect, a conviction will be considered wrongfully obtained and will be vacated on appeal.[25]

If there is statutory authority for the jury to recommend a convicted person to the mercy of the court, and the provision makes such recommendation binding on the court, the jury should be instructed that they have the power to so recommend as a part of their verdict.[26] In order, however, to constitute

Indiana. Cole v. State, 203 Ind 616, 173 NE 597.

Kansas. State v. McClure, 125 Kan 608, 265 P 1099 (converse).

New Jersey. See State v. Baline, 104 NJL 325, 140 A 566.

Pennsylvania. See Commonwealth v. Pulemena, 113 PaSuper 430, 173 A 462.

[24] **Arkansas.** Criglow v. State, 183 Ark 407, 36 SW2d 400.

California. People v. Lee, 17 Cal 76; People v. Holmes, 118 Cal 444, 50 P 675; People v. Bowman, 24 CalApp 781, 142 P 495; People v. Cornell, 29 CalApp 430, 155 P 1026; People v. Caiazza, 61 CalApp 505, 215 P 80; People v. Mitchell, 61 Cal App 569, 215 P 117; People v. Parker, 119 CalApp 246, 6 P2d 82; People v. Keylon, 122 CalApp 408, 10 P2d 86.

Indiana. Callender v. State, 193 Ind 91, 138 NE 817 (recommendation when not authorized does not, however, invalidate the verdict).

Iowa. State v. Sampson, 220 Ia 142, 261 NW 769.

Kansas. State v. Cotton, 134 Kan 1, 4 P2d 367.

Louisiana. State v. Harville, 170 La 991, 129 S 612; State v. Doucet, 177 La 63, 147 S 500, 87 ALR 1356.

Mississippi. Allen v. State, 166 Miss 551, 148 S 634.

Nevada. State v. Vasquez, 16 Nev 42.

Oklahoma. Teel v. State, 53 Okl Cr 200, 11 P2d 197.

South Carolina. State v. Jones, 74 SC 456, 54 SE 1017.

Washington. State v. Lindberg, 125 Wash 51, 215 P 41.

West Virginia. See State v. McCoy, 95 WVa 274, 120 SE 597.

[25] **Iowa.** State v. Kernan, 154 Ia 672, 135 NW 362, 40 LRA (N. S.) 239.

Louisiana. See State v. Titus, 152 La 1011, 95 S 106. See also State v. Bradley, 6 LaAnn 554.

New Jersey. See State v. Martin, 92 NJL 436, 106 A 385, 17 ALR 1090 (under statute since amended).

South Dakota. State v. Kiefer, 16 SD 180, 91 NW 1117, 1 AnnCas 268.

[26] **United States.** Winston v. United States, 172 US 303, 43 LEd 456, 19 SupCt 212.

California. People v. Rogers, 163 Cal 476, 126 P 143.

Florida. Keech v. State, 15 Fla 591; Denham v. State, 22 Fla 664;

error from a failure to charge the jury as to its power to recommend mercy, it is necessary that the defendant request such charge.[27]

In some of the states where the jury are authorized to recommend mercy, it is solely a question left to their discretion as to whether they will do so,[28] and likewise within the discretion of the court to determine what quantum of punishment shall be meted out to the defendant.[29]

Milton v. State, 40 Fla 251, 24 S 60; Cook v. State, 46 Fla 20, 35 S 665; Webster v. State, 47 Fla 108, 36 S 584.

Georgia. Cyrus v. State, 102 Ga 616, 29 SE 917.

New Jersey. State v. Martin, 92 NJL 436, 106 A 385, 17 ALR 1090.

Ohio. Howell v. State, 102 OhSt 411, 131 NE 706, 17 ALR 1108; Rehfeld v. State, 102 OhSt 431, 131 NE 712; Mason v. State, 5 OhCirCt (N. S.) 647, 17 OhCirDec 526.

South Carolina. State v. Bethune, 86 SC 143, 67 SE 466. See State v. Adams, 68 SC 421, 47 SE 676.

Utah. It is reversible error for the court to fail so to instruct. State v. Zuro Yamashita, 61 Utah 170, 211 P 360.

[27] **Florida.** Under a statute permitting the jury to add to their verdict a recommendation of mercy, and that when such recommendation was made in a murder case, the punishment should be life imprisonment instead of death, the court said: "We know of no rule requiring the court to instruct the jury in regard to the punishment to be inflicted upon criminals. It would be very proper for the court to instruct the jury as to the existence of this law, in all capital cases, and it would undoubtedly be the duty of the court to do so if it were specially requested. In this case we find no exception taken on account of the omission, nor any evidence that the court was so requested." Keech v. State, 15 Fla 591. See Groover v. State, 82 Fla 427, 90 S 473, 26 ALR 373.

Ohio. In Mason v. State, 5 Oh CirCt (N. S.) 647, 17 OhCirDec 526, the court said: "While we think that the jury could not intelligently recommend the prisoners to mercy without knowing the effect of such recommendation, and that it is the duty of the court to so instruct, yet, there being no request in this case, it was not error for which the judgment could be reversed."

South Carolina. In State v. Dodson, 16 SC 453, the court said: "There are few instances—we doubt if there are any—in which such recommendation has not been respected by the proper authority, and yet we have never heard it suggested before that the omission of a judge to inform the jury that they had such a power would constitute such an error of law as could be corrected by this court; and we can see no reason why it should be so regarded now, especially when, as in this case, there was no request so to instruct the jury." See State v. Collins, 125 SC 267, 118 SE 423.

[28] **Delaware.** State v. Jaroslowski, 7 Boyce (30 Del) 108, 103 A 657; State v. Thomas, 1 W. W. Harr. (31 Del) 102, 111 A 538.

New Mexico. See Territory v. Griego, 8 NM 133, 42 P 81.

Tennessee. Ray v. State, 108 Tenn 282, 67 SW 553.

Utah. State v. Romeo, 42 Utah 46, 128 P 530. See State v. Woods, 62 Utah 397, 220 P 215.

[29] **Delaware.** State v. Lapista, 7 Boyce (30 Del) 260, 105 A 676.

Georgia. See Yaughan v. State, 26 GaApp 639, 107 SE 389.

Idaho. State v. Farnsworth, 51 Idaho 768, 10 P2d 295.

North Dakota. State v. Stern, 64 ND 593, 254 NW 765.

If the jury are given the power by statute to recommend in a murder case that the accused be sentenced to imprisonment for life instead of death, a failure of the trial court to instruct the jury that they have such power has been held error by the United States Supreme Court, even though the statute expressly left it to the discretion of the trial court to say which punishment should be inflicted.[30]

There are jurisdictions where the view prevails that even though the statute places within the discretion of the jury the matter of recommending mercy, the jury are nevertheless limited in the exercise of such discretion by a requirement that their recommendation shall be warranted by the evidence, and the court should so instruct the jury.[31]

Tennessee. Greer v. State, 3 Baxt. (62 Tenn) 321.

Utah. State v. Thorne, 39 Utah 208, 117 P 58.

[30] Johnson v. State, 100 Ga 78, 25 SE 940; Moore v. State, 150 Ga 679, 104 SE 907; Braxley v. State, 17 GaApp 196, 86 SE 425; Winder v. State, 18 GaApp 67, 88 SE 1003.

In Calton v. Utah, 130 US 83, 32 LEd 870, 9 SupCt 435, the jury were not told by the trial judge of their right under the statute to recommend imprisonment for life in the penitentiary at hard labor in lieu of the punishment by death otherwise fixed by the statute. The Supreme Court said: "If their attention had been called to that statute, it may be that they would have made such a recommendation, and thereby enabled the court to reduce the punishment to imprisonment for life. We are of opinion that the court erred in not directing the attention of the jury to this matter. The statute evidently proceeds upon the ground that there may be cases of murder in the first degree, the punishment for which by imprisonment for life at hard labor will suffice to meet the ends of public justice. Its object could only have been met through a recommendation by the jury that the lesser punishment be inflicted, and it is not to be presumed that they were aware of their right to make such a recommendation. The failure of the court to instruct them upon this point prevented it from imposing the punishment of imprisonment for life, even if, in its judgment, the circumstances of the case rendered such a course proper."

[31] **California.** People v. Bawden, 90 Cal 195, 27 P 204; People v. Rogers, 163 Cal 476, 126 P 143. See People v. Caiazza, 61 CalApp 505, 215 P 80; People v. Mitchell, 61 Cal App 569, 215 P 117.

Delaware. State v. Thomas, 1 W. W. Harr. (31 Del) 102, 111 A 538; State v. Galvano, 4 W. W. Harr. (34 Del) 409, 154 A 461; State v. Carey, 6 W. W. Harr. (36 Del) 521, 178 A 877.

Georgia. Valentine v. State, 77 Ga 470; Harvey v. State, 20 GaApp 300, 115 SE 31.

Louisiana. In State v. Melvin, 11 LaAnn 535, wherein was involved such a statute empowering the jury to recommend mercy, the instruction of the court went very far in limiting the discretion of the jury, by suggestions that they should not exercise the pardoning power. For that reason the Supreme Court reversed the conviction, but held: "The qualification of the verdict in capital cases should be left where the law has left it, to the sound discretion of the jury, upon the facts of the case, guided by a sense of their solemn responsibility—which is, to do their whole duty to the state as well as to the accused."

But in other states the rule obtains that when the statute places it within the power of the jury, at their discretion, to recommend the defendant to mercy, it means that their discretion in the matter is not to be controlled or influenced by the court by a charge that such recommendation must be based upon the evidence or warranted by the evidence, or that the recommendation must be limited to some other cause.[32] The Supreme Court

Ohio. Shelton v. State, 102 OhSt 376, 131 NE 704; Rehfeld v. State, 102 OhSt 431, 131 NE 712. See Ashbrook v. State, 49 OhApp 298, 197 NE 214.

In Howell v. State, 102 OhSt 411, 131 NE 706, 17 ALR 1108, the court said: "It may be true, and some courts so hold, that the function of a court, in permitting the jury to make a recommendation respecting mercy, is best fulfilled by simply giving the terms of the statute to the jury and informing them that the making or withholding of the recommendation is a matter entirely within their discretion. In such case, of course, it would be presumed that the jury would fulfil their duty from a consideration of the case as presented to them as sworn jurors. But in arriving at a determination with reference to this recommendation, they should be guided by the evidence, or lack of evidence as the case may be, as disclosed upon the trial. It would be a travesty upon justice were the jury permitted to ignore the evidence and rest their conviction upon their conscientious scruples against imposing capital punishment, or take into consideration facts which may have come to their knowledge while they were not acting as jurors. That was not the purpose of the law."

South Carolina. State v. Bates, 87 SC 431, 69 SE 1075.

In State v. Bethune, 86 SC 143, 67 SE 466, the court said: "When shall the jury recommend a party mercy? The legislature gave the right, and the legislature did not limit the power; they said wherever the jury sees proper, under all the circumstances of the case, if they see any mercy in the circumstances; if the circumstances of the case satisfy the jury that the elements in the case reduce it from that bold and awful murder which merits death, then the jury may recommend the party to mercy."

Tennessee. Lewis v. State, 3 Head (40 Tenn) 127.

It was said in Clark v. State, 8 Baxt. (67 Tenn) 591: "The jury in the case returned a verdict of 'Guilty of murder in the first degree with mitigating circumstances.' The verdict would authorize the court, in a proper case, to commute the death penalty to imprisonment for life in the state penitentiary. The court in this case declined to commute. This court has several times held that the circuit judges are not bound by such a finding, if there be in fact no circumstances in the case to mitigate the guilt of the defendant. On the other hand, it is the sworn duty of the circuit judges to see to it, in every case of atrocious guilt like this, that the law be administered. We are at a loss to see upon what the jury has based its conclusion that there were mitigating circumstances in this case."

[32] **Florida.** Garner v. State, 28 Fla 113, 9 S 835, 29 AmSt 232; Lovett v. State, 30 Fla 142, 11 S 550, 17 LRA 705.

Georgia. Cohen v. State, 116 Ga 573, 42 SE 781; Williams v. State, 119 Ga 425, 46 SE 626; Thomas v. State, 129 Ga 419, 59 SE 246.

New Jersey. State v. Martin, 92 NJL 436, 106 A 385, 17 ALR 1090 (as a result of this decision the legislature of New Jersey amended the pertinent statute by authorizing

of the United States has adopted the view that statutes authorizing jury recommendations of mercy were intended to place the matter wholly within the discretion of the jury, without limitation or circumscription, leaving them free to exercise their discretion with or without evidentiary basis in the case.[33]

The charge of the court with respect to the power of the jury to recommend mercy should not be couched in such terms, or given at such a time, as will result in influencing, or tend to result in influencing, the jury to reach and return a compromise verdict.[34] Such a charge has been regarded as an inducement

the jury to recommend mercy expressly "upon and after consideration of all the evidence"); State v. Carrigan, 93 NJL 268, 108 A 315, aff'd in 94 NJL 566, 111 A 927.

Oklahoma. In Vickers v. United States, 1 OklCr 452, 98 P 467, the court said: "It is the duty of the trial court to instruct the jury that if they shall find a verdict of guilty of rape, they may qualify their verdict by the words, 'without capital punishment,' no matter what the evidence may be."

Utah. State v. Thorne, 39 Utah 208, 117 P 58.

In State v. Mewhinney, 43 Utah 135, 134 P 632, LRA 1916D, 590, AnnCas 1916C, 537, an instruction was not condemned under this view which told the jury that "in considering this question, you are not restricted by any rule of law or public policy, but are entitled to decide the question from such considerations as may appeal to you as reasonably and conscientiously entitled to be weighed in determining the giving or withholding of such recommendation."

[33] The case of Winston v. United States, 172 US 303, 43 LEd 456, 19 SupCt 212, has received varied interpretations among the state courts in its holding as to the point under discussion. There an act of congress provided that in a case where the accused was found guilty of the crime of murder or rape, the jury might qualify their verdict by adding thereto "without capital punishment"; and that whenever the jury should return such a verdict, the person convicted should be sentenced to imprisonment at hard labor for life. The conviction was reversed because the trial court limited the discretion of the jury to recommend the less extreme sentences to cases where the jury were of the opinion that there were palliating or mitigating circumstances, the court saying that "the authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of the opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment." This case was distinguished in Johnson v. United States, 225 US 405, 56 LEd 1142, 32 SupCt 748. See Sinclair v. District of Columbia, 192 US 16, 48 LEd 322, 24 SupCt 212.

[34] See Echols v. State, 109 Ga 508, 34 SE 1038.

In Hackett v. People, 8 Colo 390, 8 P 574, the jury after unsuccessfully attempting for some time to reach an agreement, returned to court and asked if they could indorse on the verdict a recommendation of mercy. The court thereupon gave them an additional written instruction, telling them that they could make such an indorsement on their verdict if they so desired. In a short time they returned with an agreed verdict, to which had been added the recommendation of mercy. In holding the

held out by the court to expedite and assure the concurrence of the jury in a verdict of guilty, and an extraneous influence prohibiting the free exercise of the jury's prerogatives.[35]

§ 45. Coercing jury to reach agreement.

A trial judge has no authority, either by threats, intimidation, undue urging, or inapt suggestion, to affect the fair, conscientious, and impartial deliberations of the jury, or to influence the conclusions they are to reach.

Coercion by the trial judge of the jury to reach an agreement is forbidden. The fact-finding body of the mixed tribunal should be as unhampered in the performance of their proper functions as the judge is in his.[36]

action of the trial court to be fatal error, it was said on appeal: "Thus it appears that some of the jurors were opposed to conviction for the grade of crime finally found in their verdict, and that they only consented thereto upon condition that the recommendation for mercy be incorporated. They must have been led to suppose from the court's answer to their question, that this might have weight in mitigating the severity of the sentence to be pronounced. Any other explanation of the proceedings would be absurd; and it must be assumed that without such belief the verdict, as returned, would not have been agreed upon."

[35] In Territory v. Griego, 8 NM 133, 42 P 81, it appeared that after the jury had been unsuccessfully deliberating for fifty-four hours, the court advised them by an additional instruction that "While the law fixes the punishment in the case, or, rather, while the court assesses the punishment, the law authorizes you, in case you find the defendant guilty, to recommend him to the mercy of the court; and that recommendation made by the jury will be considered by the court in fixing the punishment." In half an hour after such charge had been given, the jury returned with a verdict of guilty, with recommendation of mercy. In setting aside the conviction, the appellate court said:

"We think these recitals from the record render it quite apparent that the sudden agreement of the jury, after being out and unable to agree for fifty-four hours, was influenced quite powerfully by the judge's instructions that a recommendation of mercy would receive his consideration in fixing punishment. It seems within the range of reasonable probability that, with a knowledge that nothing but the death penalty would be the consequence of their verdict, no agreement could have been secured from the jury. The gravity of the punishment may well have caused jurors to hang to a doubt of guilt rather than hang a man whose guilt they doubted. Coming, as it did, without request, after the jury had been deliberating and unable to agree for fifty-four hours, it was an indication, quite pointed, of the judge's opinion. * * * The judge had no right to hold out any promises to the jury, much less one which he could not lawfully fulfil." For further consideration of the statute involved in this case, see State v. Carabajal, 26 NM 384, 193 P 406, 17 ALR 1098.

[36] **Federal.** Chicago & E. I. Ry. Co. v. Sellars, 5 F2d 31.

Alabama. Phoenix Ins. Co. v. Moog, 81 Ala 335, 1 S 108.

Arkansas. St. Louis, I. M. & S. R. Co. v. Devaney, 98 Ark 83, 135 SW 802.

The trial judge may advise an unagreed jury of the importance of their reaching a verdict, if they can do so without surrendering their conscientious convictions. But he cannot go beyond that and say anything to the prejudice of either party. There is no prescribed language that he must use in this connection. What he may with propriety say must in a large measure be left to his good judgment. But as the exclusive right to agree or not to agree rests with the jury, the judge must not by threat or entreaty attempt to coerce a verdict or to exert his authority to force an agreement; nor must he under any circumstances or in any manner indicate the character of verdict that the jury should return.[37]

Indiana. Terre Haute & I. R. Co. v. Jackson, 81 Ind 19.

Iowa. Mt. Hamill State Sav. Bank v. Hughes, 196 Ia 861, 195 NW 589.

Kansas. Alcorn v. Cudahy Packing Co., 125 Kan 493, 264 P 741; Shouse v. Consolidated Flour Mills Co., 128 Kan 174, 277 P 54, 64 ALR 606.

Minnesota. Mar v. Shew Fan Qui, 108 Minn 441, 122 NW 321, 133 AmSt 460.

Missouri. State v. Eatherly, 185 Mo 178, 83 SW 1081, 105 AmSt 567.

In State v. Alexander, 66 Mo 148, the court said: "The jury are the triers of the facts, and the court has no more right to interfere with them while considering their verdict, except in open court, to discharge them from time to time, or in the presence of the accused and his counsel, to instruct them as to the law in the case, than the jury have to invade the province of the court."

New York. McCarthy v. Odell, 202 AppDiv 784, 195 NYS 80.

North Carolina. Trantham v. Elk Furn. Co., 194 NC 615, 140 SE 300.

Ohio. Zimmerman v. State, 42 Oh App 407, 182 NE 354.

Pennsylvania. Di Santo v. Alper, 99 PaSuperCt 46.

Rhode Island. Petrarca v. McLaughlin, 75 RI 1, 62 A2d 877.

Tennessee. Chesapeake, O. & S. W. R. Co. v. Barlow, 86 Tenn 537, 8 SW 147.

Texas. Sunshine Oil Corp. v. Randals (TexCivApp), 226 SW 1090.

[37] **Colorado.** Hutchins v. Haffner, 63 Colo 365, 167 P 966, LRA 1918A, 1008.

Connecticut. Wheeler v. Thomas, 67 Conn 577, 35 A 499.

Georgia. Henderson v. Reynolds, 84 Ga 159, 10 SE 734, 7 LRA 327 (where the court had threatened to keep the jury together without food until they reached a verdict).

Iowa. State v. Smith, 99 Ia 26, 68 NW 428, 61 AmSt 219; Shuck v. Conway (Ia), 186 NW 858.

Kentucky. Sandefur v. Commonwealth, 143 Ky 655, 137 SW 504.

Maine. Cowan v. Umbagog Pulp Co., 91 Me 26, 39 A 340.

Michigan. Baker v. Mohl, 191 Mich 516, 158 NW 187; Holtquist v. O'Connell, 196 Mich 484, 163 NW 53.

Minnesota. Converse v. Adleman, 153 Minn 306, 190 NW 340.

Mississippi. Maury v. State, 68 Miss 605, 9 S 445, 24 AmSt 291.

Missouri. In State v. Nelson, 181 Mo 340, 80 SW 947, 103 AmSt 602, the court admonished the jury that it was the third trial of the case, that it was to the interest of society, and of the defendant, and of everybody, that a verdict be reached, and the judge insisted that an effort be made to make a verdict, and in conclusion he advised them to "get together and make a verdict." The action of the trial court was held reversible error.

New York. People v. Sheldon, 156 NY 268, 50 NE 840, 41 LRA 644, 66 AmSt 564; Nalli v. Peters, 213 AppDiv 735, 211 NYS 411.

While there must be nothing in the conduct of the trial judge toward the jury savoring of undue pressure or coercion to reach a verdict, when the jury return into court and announce their failure to agree, the court may impress upon them the importance of agreeing, urge them to listen to argument and sacrifice the pride of personal opinion, and he may send them back for further deliberation until such time as it becomes apparent that hope of an agreement is futile.[38]

Pennsylvania. Girard Trust Co. v. Page, 282 Pa 174, 127 A 458.

South Carolina. Terry v. Richardson, 123 SC 319, 116 SE 273.

South Dakota. In State v. Place, 20 SD 489, 107 NW 829, 11 AnnCas 1129, after the case was submitted, the jury retired to deliberate at 9 o'clock P. M., and after remaining out all night and all the next forenoon, they were brought into court and the court inquired, "What seems to be the matter?" to which the foreman replied, "We are shy on evidence." The court stated that he could not help them out on evidence, but if it were matter of law he could give them further instructions. "But," he said, "you will have to agree in this case, for I will keep you together until you do agree." Defendant's counsel thereupon excepted to the remarks of the court to the jury that he would keep them together until they did agree. The court replied in substance. "You may have an exception, but I will keep this jury together until they do agree upon a verdict." All of this occurred in the presence of the jury who thereupon retired and soon returned into court with a verdict convicting the defendant. In setting aside the conviction, the appellate court remarked: "In this enlightened age no one will contend that a verdict should stand which does not, at least presumptively, express the free and deliberate judgment of those who rendered it."

Texas. Fleck v. Missouri K. & T. Ry. Co. (TexCivApp), 191 SW 386.

[38] **Alabama.** Louisville & N. R. Co. v. Johnson, 204 Ala 150, 85 S 372.

Arkansas. Johnson v. State, 60 Ark 45, 28 SW 792.

Georgia. Gambo v. Dugas & Son, 145 Ga 614, 89 SE 679.

Illinois. Brown v. Walker, 32 Ill App 199.

Indiana. Churchill v. Woodruff, 66 IndApp 241, 118 NE 136.

Iowa. Delmonica Hotel Co. v. Smith, 112 Ia 659, 84 NW 906.

Kansas. State v. Garrett, 57 Kan 132, 45 P 93.

Louisiana. State v. Dodoussat, 47 LaAnn 977, 17 S 685.

Minnesota. Watson v. Minneapolis St. Ry. Co., 53 Minn 551, 55 NW 742.

New York. Reversible error was held to have occurred where the court said to the jury: "Juries are selected, not to disagree, but to agree, and all this time has been wasted unless the jury comes to an agreement. It is not likely that we will have in this county a jury as competent and as impartial to try this case as you are." McCarthy v. Odell, 202 AppDiv 784, 195 NYS 80.

Ohio. Liska v. State, 115 OhSt 283, 152 NE 667; Bandy v. State, 13 OhApp 461, 32 OhCtApp 360; Andrews v. State, 15 OhCirCt (N. S.) 241, 23 OhCirDec 564, 57 OhBull 505; Akron St. R. Co. v. Dussel, 33 OhBull 98.

Pennsylvania. Knickerbocker Ice Co. v. Pennsylvania R. Co., 253 Pa 54, 97 A 1051.

Texas. The court may charge the jury to try further to reconcile their differences and agree upon a verdict; that he does not wish to coerce them, but that it is in the interest of society that they shall, if they can, agree upon a verdict. Dow v. State, 31 TexCr 278, 20 SW 583.

The court is not authorized to tell the jury, at any stage of the trial, that they must agree. The statement of a trial judge to a disagreeing jury that they must arrive at a verdict, or language from which such peremptory order is logically inferred, is plain coercion and an invasion by the court of the province of the jury.[39] The trial court should not direct such remarks or admonitions to the jury as will tend unduly to hasten them in arriving at a verdict.[40] A trial judge's authority over the jury does not extend to the coercing of a minority to agree with the majority merely in order to arrive at a verdict. The individual jurors are entitled to their own honest opinions as to the evidence in the case and the weight they will give it, and it is error for the trial court to undertake to sway them from their convictions. If the words of the court are so indiscreet as to constitute threats, intimidation, or disparagement of one or more jurors, there is no doubt of their coercive and improper character.[41]

[39] **Kentucky.** In Randolph v. Lampkin, 90 Ky 551, 14 SW 538, 10 LRA 87, the court told the jury that they must decide the case, and added, "It is no credit to a man merely because he has an opinion to stubbornly stick to it."

Louisiana. State v. Ladd, 10 La Ann 271.

Massachusetts. See Prince v. Lowell Elec. Light Corp., 201 Mass 276, 87 NE 558.

Missouri. Fairgrieve v. Moberly, 29 MoApp 141.

In Brooks v. Barth, 98 MoApp 89, 71 SW 1098, the judge stated, among other prejudicial things, that he had no use for jurors who failed to agree.

New York. In Katsidras v. Weber, 199 NYS 30, the court said to the jury, "You will have to render a decision in this case if I have to keep you locked up all night."

Texas. Missouri, K. & T. Ry. Co. v. Barber (TexComApp), 209 SW 394.

[40] In McCombs v. Foster, 64 MoApp 613, after the jury in the case had been deliberating quite a long time the court had them brought in and informed them that he was obliged to leave town on an early train on account of a family affliction, and that they could stay until next morning if they did not sooner agree; later during the evening he sent for them several times to inquire if they had reached an agreement, and a few minutes before his train was due to leave he sent the sheriff to tell the jury that he was about to leave and for them to report the prospect of a verdict; shortly thereafter a verdict was brought in which, upon appeal, was set aside as having been coerced. See Terry v. State, 50 TexCr 438, 97 SW 1043.

[41] **Federal.** Chicago & E. I. Ry. Co. v. Sellars, 5 F2d 31.

Arkansas. Southern Ins. Co. v. White, 58 Ark 277, 24 SW 425.

California. Mahoney v. San Francisco & S. M. Ry. Co., 110 Cal 471, 42 P 968, 43 P 518.

Illinois. In Lively v. Sexton, 35 IllApp 417, it appeared that the jury stood eleven to one when the court sent for them and said: "Gentlemen, you will retire and further consider this case and I will say that if there is a mistrial in this case I shall inquire into it, and if I find that any juror has stubbornly refused to do his duty or wilfully tried to bring about a disagreement so as to interfere with

It is not condemnatory conduct, however, for the trial court to give a fair explanation of the duties of a disagreeing jury, nor to say to them that a minority should weigh the opinions of the majority and doubt the correctness of their own.[42] But it is not permissible for the court to threaten

the administration of justice, I will send him to jail for contempt of court." The judgment and verdict were set aside on appeal.

Kansas. In Shouse v. Consolidated Flour Mills Co., 128 Kan 174, 277 P 54, 64 ALR 606, the trial court, on two separate occasions, admonished the jury with respect to agreeing, on the first of which the judge said: "It isn't the duty of any one juror to take an obstreperous or obstinate stand when there are reasonable grounds for minds to differ, and so hang the jury." On the second occasion he said: "I feel like you should endeavor to accommodate your views or differences to others to come to an understanding or agreement if it can humanly be done." These remarks were held on appeal to have been improper.

Michigan. People v. Engle, 118 Mich 287, 76 NW 502.

Minnesota. Gibson v. Minneapolis, St. P. & S. S. M. Ry. Co., 55 Minn 177, 56 NW 686, 43 AmSt 482.

Missouri. In McPeak v. Missouri Pacific Ry. Co., 128 Mo 617, 30 SW 170, the trial judge said: "Verdicts are often reached in cases after further consideration, by trying it a little longer. I don't want to put you gentlemen to any discomfort unnecessarily; yet I think you ought to look it over, and experience shows that it frequently takes some little time for jurors to get their minds together. I trust and presume that every juror is acting rationally in this matter, and that nobody is acting from a dogmatic spirit, merely for the purpose of asserting his opinion."

New York. In Twiss v. Lehigh Valley R. Co., 61 AppDiv 286, 70 NYS 241, the court discoursed to a disagreeing jury as follows: "I certainly hope that there are no stubborn men on this jury. There ought not to be * * *. It is the only case for a jury to be tried at this term and in my judgment there should not be a failure of this character * * *. If I were a juror, and quite a large proportion of my fellows were against me, and I was standing out, and I thought that they were honest and fair, the first thing I would do would be to get before a large looking-glass and look at myself and see if I could not find out what was the matter with me."

Oregon. State v. Ivanhoe, 35 Or 450, 57 P 317.

[42] **United States.** Allen v. United States, 164 US 492, 41 LEd 528, 17 SupCt 154.

Federal. Lehigh Valley R. Co. v. Allied Mach. Co., 271 F 900.

Alabama. State v. Blackwell, 9 Ala 79.

Georgia. Ball v. State, 9 GaApp 162, 70 SE 888.

Illinois. Madison Coal Co. v. Beam, 63 IllApp 178.

Iowa. In State v. Richardson, 137 Ia 591, 155 NW 220, the trial judge said: "Every juror should listen to the arguments of other jurors with a disposition to be convinced by them, and if any of the jury differ in their views of the evidence from a larger number of their fellow jurors, such difference of opinion should induce the minority to doubt the correctness of their own judgments, and cause them to scrutinize the evidence more closely and to re-examine the grounds of their opinion. Your duty is to decide the issues of fact which have been submitted to you, if you can conscientiously do so. And, in con-

to keep the jury together several days with only one meal a day if they do not reach an agreement,[43] or to tell them that their meals will be furnished them at their own expense,[44] or to threaten to take the jury to another county where the judge is going to hold a term of court,[45] or to state to the jury: "Don't you undertake to fool me by coming in here and saying that you have agreed to a mistrial. I should dislike to send such a good-looking body of men to jail, and that is what I would have to do."[46] The trial judge is without legal authority either expressly or impliedly to suggest that the jury compromise in order to arrive at an agreement. A compromise verdict is necessarily the result of the sacrifice by one or more jurors of their conscientious opinions in the case for the sake of agreeing upon a verdict. If the compromise is the result of improper directions or coercion by the trial court, the verdict will be vacated on appeal.[47]

ferring together, you should bear in mind that the jury room is no place for pride of opinion, nor for espousing and maintaining in a spirit of controversy either side of a cause." But see Mt. Hamill State Sav. Bank v. Hughes, 196 Ia 861, 195 NW 589.

Michigan. People v. Coulon, 151 Mich 200, 114 NW 1013.

Nebraska. Gebhardt v. State, 80 Neb 363, 114 NW 290.

New Hampshire. Whitman v. Morey, 63 NH 448, 2 A 899.

North Carolina. Osborne v. Wilkes, 108 NC 651, 13 SE 285.

North Dakota. Lathrop v. Fargo-Moorhead St. R. Co., 23 ND 246, 136 NW 88.

Pennsylvania. Darlington v. Allegheny City, 189 Pa 202, 42 A 112.

Washington. State v. Baker, 67 Wash 595, 122 P 335.

[43] Fairbanks, Morse & Co. v. Weeber, 15 ColoApp 268, 62 P 368; Hancock v. Elam, 3 Baxt. (62 Tenn) 33.

[44] Henderson v. Reynolds, 84 Ga 159, 10 SE 734, 7 LRA 327.

[45] Spearman v. Wilson, 44 Ga 473.

[46] Fairey v. Haynes, 107 SC 115, 91 SE 976.

[47] **Arkansas.** O'Neal v. Richardson, 78 Ark 132, 92 SW 1117.

Georgia. Alabama Great Southern R. Co. v. Daffron, 136 Ga 555, 71 SE 799, AnnCas 1912D, 438.

Massachusetts. Highland Foundry Co. v. New York, N. H. & H. R. Co., 199 Mass 403, 85 NE 437.

Michigan. Goodsell v. Seeley, 46 Mich 623, 10 NW 44, 41 AmRep 183.

Missouri. Edens v. Hannibal & St. J. R. Co., 72 Mo 212; State v. Nelson, 181 Mo 340, 80 SW 947, 103 AmSt 602.

Texas. In Gulf, C. & S. F. R. Co. v. Johnson, 99 Tex 337, 90 SW 164, the court said: "The fundamental objection to such instructions is that the law, in our opinion, prescribes no rule for the court to lay down, except that the jury are to find in accordance with the truth as their judgments, honestly applied to the evidence, lead them to believe it to be, or, as their oath expresses it, 'that they will a true verdict render according to the law * * * and the evidence.' What prepossessions or inclinations of mind a juror may surrender consistently with an intelligent and conscientious discharge of this duty is for him alone to determine, for the reason that it is his judgment the law seeks to obtain, and he should be left to form it uninfluenced by advice from the court."

An instruction that stresses the expense of a retrial has a tendency to coerce the jury, and is reversible error, notwithstanding a failure to make timely objection to the instruction.[48]

Where the jury shortly after retiring declared that they could not reach a verdict, the trial judge did not coerce the jury when he told them: "You have been out only an hour or a little better which is not a long time. We are here to do justice between the parties. If the very simple question of fact at issue is not decided by you, it would have to be submitted to another jury. The court does not intend to take a disagreement [at this time]."[49]

An instruction which tells a jury that it is their fault if they fail to agree and which tells the minority that their conscientious conviction might be only a mistake in judgment, together with the fact that the jury returned with a verdict in a very short time, is sufficient to convince a reviewing court that the instruction was prejudicially erroneous.[50]

§ 46. Private communications of the judge with the jury during their deliberations.

No communication whatever ought to take place between the trial judge and the jury after the cause has been submitted to them by the instructions of the court, unless in open court and, where practicable, in the presence of the attorneys in the case.

The public interest requires that litigating parties should have nothing to complain of or suspect in the administration of justice; and in order to prevent all jealousies and suspicions as to the fairness of verdicts of juries it is necessary to consider the judge as having no control over the case except in open court in the presence of the parties and their counsel.[51] The courts

[48] In re Stern, 11 NJ 584, 95 A2d 593.

[49] Smith v. Campbell, 82 RI 204, 107 A2d 338.

[50] Janssen v. Carolina Lbr. Co., 137 WVa 561, 73 SE2d 12.

[51] **Alabama.** In Continental Casualty Co. v. Ogburn, 186 Ala 398, 64 S 619, the conduct of the judge was held improper but not reversible error, because it did not appear that the defendant had been prejudiced.

Georgia. Groce v. State, 147 Ga 672, 95 SE 234.

Illinois. Crabtree v. Hagenbaugh, 23 Ill 349, 76 AmDec 694; Chicago & A. R. Co. v. Robbins, 159 Ill 598, 43 NE 332; Mound City v. Mason, 262 Ill 392, 104 NE 685.

Indiana. Deming v. State, 235 Ind 282, 133 NE2d 51. In Coolman v. State, 163 Ind 503, 72 NE 568, it appeared that the jury sent a communication to the judge to the effect that they could not agree upon a verdict, and the judge sent back word to them through the bailiff that he could not accept their disagreement, and the appellate court said that such communication was grossly improper.

Kentucky. Goode v. Campbell, 14 Bush (77 Ky) 75.

agree upon this general rule; but a division of opinion here begins, having to do with the effect of the conduct of the trial judge in improperly communicating with the jury after the case has been submitted to them. On one side the view is enforced that when such improper conduct is shown to the appellate court a reversal will be ordered without regard to the question as to the effect it may have had on the rights of the complaining party, it not being necessary to demonstrate that he was prejudiced.[52] For

Massachusetts. Read v. Cambridge, 124 Mass 567, 77 NE 516, 26 AmRep 690.

However in Whitney v. Commonwealth, 190 Mass 531, 77 NE 516, the improper conduct of the judge was held not reversible error because it did not appear that the defendant was prejudiced thereby.

Missouri. State v. Beedle (Mo), 180 SW 888.

New York. Watertown Bank & Loan Co. v. Mix, 51 NY 558.

Ohio. Kirk v. State, 14 Oh 511; Campbell v. Beckett, 8 OhSt 210; Jones v. State, 26 OhSt 208; Kriegers Cleaners & Dyers, Inc. v. Benner, 123 OhSt 482, 175 NE 857; Hrovat v. Cleveland Ry. Co., 125 OhSt 67, 180 NE 549, 84 ALR 215; Martin v. State, 12 OLA 173.

South Carolina. State v. Ashley, 121 SC 15, 113 SE 305 (where the judge held a telephone conversation with the foreman of the jury relative to the case while the jury were deliberating).

Texas. Quigley v. Gulf, C. & S. F. R. Co. (TexCivApp), 142 SW 633.

Vermont. State v. Patterson, 45 Vt 308, 12 AmRep 200.

Washington. State v. Shutzler, 82 Wash 365, 144 P 284.

Wisconsin. Smith v. State, 51 Wis 615, 8 NW 410, 37 AmRep 845; McBean v. State, 83 Wis 206, 53 NW 497; Barnard v. State, 88 Wis 656, 60 NW 1058.

[52] **Indiana.** See Danes v. Pearson, 6 IndApp 465, 33 NE 976.

Mississippi. Lewis v. State, 109 Miss 586, 68 S 785.

Missouri. Berst v. Moxom, 163 MoApp 123, 145 SW 857.

New York. People v. Moore, 50 Hun 356, 3 NYS 159, 18 NY 1031, 20 NY 1; People v. Linzey, 79 Hun 23, 29 NYS 560; Jenss v. Harrod, 100 Misc 624, 166 NYS 958.

North Dakota. In State v. Murphy, 17 ND 48, 115 NW 84, 16 AnnCas 1133, 17 LRA (N. S.) 609, the court said: "The state urgently insists that no prejudice could have resulted from what was done or said in the case, but we shall not consider that question. However, the fact that the foreman said that he thought they could not agree when the judge first spoke to them, and that they did agree in five or ten minutes thereafter, would be a stubborn fact for consideration if we entered upon an inquiry as to the effect upon the jury of the words spoken to them and the visit to the room. We think that any communication in this way as to the case should be prohibited and held prejudicial. It is against the policy of the law to indulge in secret communications or conferences with the jury or with jurors in reference to the merits or law of the case. To determine in each case whether prejudice resulted would be difficult, if not impossible, and justice will be better subserved by avoiding such communications entirely. The authorities are practically unanimous in condemning such communications and in holding them prejudicial as a matter of law."

Texas. Dempster Mill Mfg. Co. v. Humphries (TexCivApp), 189 SW 1110.

Washington. In State v. Wroth, 15 Wash 621, 47 P 106, the court said: "In the discharge of his official duty the place for the judge is

the attainment of the best administration of justice, the law requiring that all proceedings of courts be open and public, and in the presence of the parties or their representatives, must be strictly enforced; and, in case of any infringement of this policy, parties are not to be put to the burden of showing that it in fact injured them, even though it be manifest that no improper motives prompted the acts complained of.[53]

Other courts are of opinion that the one complaining of improper conduct or communication of the trial judge with the jury during that body's deliberations must show that his rights have been adversely affected thereby before reversible error will be predicated thereon.[54]

on the bench. As to him, the law has closed the portals of the jury room, and he may not enter. The appellant was not obliged to follow the judge to the jury room in order to protect his legal rights, or to see that the jury was not influenced by the presence of the judge; and the state can not be permitted to show what occurred between the judge and the jury at a place where the judge had no right to be, and in regard to which no official record could be made."

Wisconsin. Meier v. Morgan, 82 Wis 289, 52 NW 174, 33 AmSt 39; Hurst v. Webster Mfg. Co., 128 Wis 342, 107 NW 666; Du Cate v. Brighton, 133 Wis 628, 114 NW 103.

[53] In Havenor v. State, 125 Wis 444, 104 NW 116, 4 AnnCas 1052, after the jury had retired for deliberation as to their verdict, they sent a communication to the judge through the bailiff, requesting him to come before them for the purpose of answering some inquiries concerning the case. The judge responded by stepping into the doorway of the jury room, and one of the jurors propounded some questions to him. In reply the judge told them that he could not answer their questions, but that the instructions given them fully covered the subject of their inquiry, and that some of the matters inquired about by them were excluded from their consideration by the instructions given. The court also offered to read part of the instructions, or to submit to them the charge given. This conduct of the judge was held reversible error.

[54] **Colorado.** In Moffitt v. People, 59 Colo 406, 149 P 104, the court said: "Unquestionably such conduct on the part of the trial judge was improper and merits severe criticism, and, had it appeared that the rights of the defendants were in the least prejudiced, we would unhesitatingly reverse the case on that ground. But, inasmuch as there is no claim that their rights were in any manner prejudicially affected, and it clearly appears from the record that they were not, we can not reverse the case on this assignment."

Iowa. State v. Olds, 106 Ia 110, 76 NW 644.

Massachusetts. Whitney v. Commonwealth, 190 Mass 531, 77 NE 516.

New York. See People v. Pickert, 26 Misc 112, 56 NYS 1090.

South Carolina. State v. Nash, 51 SC 319, 28 SE 946.

Texas. Denison v. State, 49 TexCr 426, 93 SW 731. See Priest v. State (Tex), 34 SW 611.

Virginia. See Philips v. Commonwealth, 19 Gratt (Va) 485.

CHAPTER 3

SUBJECT-MATTER

Section

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§ 50. Pertinency of instructions to issues and evidence.

It is the duty of the trial court, either on its own initiative or because requested, to give instructions which are warranted by the law and the evidence.

(1) *Civil Cases.* In general, the trial judge must give requested instructions embodying the applicable law and supported by the evidence if not covered by other instructions.[1]

[1] **Federal.** De Soto Motor Corp. v. Stewart, 62 F2d 914.

Alabama. The charge should not throw on the jury the duty to figure out the issues for themselves. Louisville & N. R. Co. v. Laney, 14 AlaApp 287, 69 S 993.

California. Tasker v. Cochrane, 94 CalApp 361, 271 P 503.

Colorado. Marsh v. Cramer, 16 Colo 331, 27 P 169.

Connecticut. Laukaitis v. Klikna, 104 Conn 355, 132 A 913; Lovell v. Bridgeport, 116 Conn 565, 165 A 795.

District of Columbia. It is error for the court to put before the jury any consideration, outside the evidence, that may influence them and lead to a verdict not otherwise possible of attainment. Miller v. United States, 37 AppDC 138.

This duty does not arise where the law, so far as applicable to the facts, is clearly stated in other instructions.[2]

Idaho. Investors Mtg. Secur. Co. v. Strauss & Co., 50 Idaho 562, 298 P 678.

Illinois. Hill v. Ward, 2 Gilm. (7 Ill) 285; Johnson v. Hull, 199 IllApp 258; Anderson v. Decatur Ry. & Light Co., 200 IllApp 646.

The court should not instruct on the derangement of a testator's mind as affecting his capacity to make a will, where such is not an issue made by the pleadings. Miller v. Ahrbecker, 320 Ill 577, 151 NE 526.

The jury should be instructed on the degree of care required. Margolis v. Chicago City R. Co., 197 IllApp 316.

It was proper to refuse an instruction as to what was not the law as to a matter not material to the questions in controversy. Comorouski v. Spring Valley Coal Co., 203 IllApp 617.

Indiana. Conaway v. Shelton, 3 Ind 334; Pittsburgh, C., C. & St. L. R. Co. v. Cottman, 52 IndApp 661, 101 NE 22; Chicago, I. & L. R. Co. v. American Trust Co., 85 IndApp 193, 153 NE 419.

Kansas. St. Louis & S. F. R. Co. v. Boyce, 5 KanApp 678, 48 P 949.

Kentucky. Louisville & N. R. Co. v. Campbell, 237 Ky 182, 35 SW2d 26.

Massachusetts. Lincoln v. Finkelstein, 255 Mass 486, 152 NE 332.

Missouri. Coombes v. Knowlson, 193 MoApp 554, 182 SW 1040; Little Bros. Co. v. G. Mathes Iron & Metal Co. (MoApp), 223 SW 952.

In Kessler v. West Missouri Power Co., 221 MoApp 644, 283 SW 705, it was said that the instructions must be within the purview of both the pleadings and the evidence and not broader than either.

Nebraska. First Nat. Bank v. Carson, 30 Neb 104, 46 NW 276; Crosby v. Ritchey, 56 Neb 336, 76 NW 895.

New York. Trulock v. Kings County Iron Foundry, 216 AppDiv 439, 215 NYS 587; Trbovich v. Burke, 234 AppDiv 384, 255 NYS 100.

Ohio. Cleveland, C., C. & St. L. Ry. Co. v. Potter, 113 OhSt 591, 150 NE 44; Beck v. Beagle, 28 OhApp 508, 162 NE 810.

Oklahoma. Fisk v. Ellis, 133 Okl 43, 271 P 158; Williams v. Otis, 155 Okl 173, 8 P2d 728.

Tennessee. Kendrick v. Cisco, 13 Lea (81 Tenn) 247.

Texas. Pecos & N. T. Ry. Co. v. Chatten (TexCivApp), 185 SW 911; Scott v. Northern Texas Trac. Co. (TexCivApp), 190 SW 209; Southern Trac. Co. v. Jones (TexCivApp), 209 SW 457.

Under the Texas Code it is immaterial whether the instructions are embodied in a general charge or in one specially presented to and adopted by the court. Steiner v. Anderson (TexCivApp), 130 SW 261.

Vermont. Vaughan v. Porter, 16 Vt 266; Rowell v. Vershire, 62 Vt 405, 19 A 990, 8 LRA 708.

Washington. In an action for the wrongful removal by a city of a lateral support in regarding a street, it was held error to instruct that private property could not be taken for public use without just compensation. Hamm v. Seattle, 140 Wash 427, 249 P 778.

[2] **Federal.** Taylor v. Continental Supply Co., 16 F2d 578; Ocean Acc. & Guarantee Corp., Ltd. v. Turner, 55 F2d 654.

Alabama. Scott v. Louisville & N. R. Co., 217 Ala 255, 115 S 171.

California. Higgins v. Williams, 114 Cal 176, 45 P 1041; Rystrom v. Sutter Butte Canal Co., 72 CalApp 518, 249 P 53; Dennis v. Orange, 110 CalApp 16, 293 P 865; De Nardi v. Palanca, 120 CalApp 371, 8 P2d 220.

Georgia. In an action to set aside a conveyance from husband to wife on the ground of fraudulent design to defeat creditors, though a charge was given basing the right to have the conveyance set aside on knowl-

As to whether the instructions must be confined to issues raised by both the pleadings *and* the evidence, the courts are not in agreement. In some states, the instructions are confined within the issues as made by the pleadings, regardless of what the evidence may be;[3] while in others the rule is stated that whatever may be shown by the pleadings, it is still necessary that a proposed instruction have support in the evidence, or it is not proper for the court to give it.[4] Some

edge by the "party taking" of the fraudulent intent of the grantor, it was held error not to give the defendant's requested instruction that the conveyance could not be annulled if the wife had no knowledge of the fraudulent intent of the husband to defeat his creditors. Rowe v. Cole, 176 Ga 592, 168 SE 882.

Indiana. Funk v. Bonham, 204 Ind 170, 183 NE 312; Chesapeake & O. R. Co. v. Fultz, 91 IndApp 639, 161 NE 835.

Iowa. In re Butterbrodt's Estate, 201 Ia 871, 208 NW 297.

Kentucky. Clore v. Argue, 213 Ky 664, 281 SW 1005; Coleman v. Nelson, 224 Ky 460, 6 SW2d 454; Summers v. Spivey's Admr., 241 Ky 213, 43 SW2d 666; McGraw v. Ayers, 248 Ky 166, 58 SW2d 378.

Massachusetts. Freese v. Spaulding, 255 Mass 243, 151 NE 91; Buckley v. Frankel, 262 Mass 13, 159 NE 459.

Missouri. Reith v. Tober (Mo), 8 SW2d 607; Heath v. Missouri Candy Co. (MoApp), 286 SW 157.

New Jersey. Napier Hat Mfg. Co. v. Essex County Park Comm. (NJL), 164 A 484.

North Dakota. Motley v. Standard Oil Co., 61 ND 660, 240 NW 206.

Ohio. Bartson v. Craig, 121 OhSt 371, 169 NE 291; Romeo v. State, 39 OhApp 309, 177 NE 483, 34 OLR 150.

Oklahoma. Marland Ref. Co. v. Snider, 125 Okl 260, 257 P 797; Sheean v. Walden, 130 Okl 51, 265 P 141.

Oregon. Hill v. Wood, 142 Or 143, 19 P2d 89.

Texas. Joyce v. Texas Power & Light Co. (TexCivApp), 298 SW 627; Galveston, H. & S. A. Ry. Co. v. Mallott (TexCivApp), 6 SW2d 432.

Vermont. In re Moxley's Will, 103 Vt 100, 152 A 713.

Washington. Ekeberg v. Tacoma, 142 Wash 240, 252 P 915; Hirst v. Standard Oil Co., 145 Wash 597, 261 P 405; Comfort v. Penner, 166 Wash 177, 6 P2d 604.

[3] **Arizona.** Lutfy v. Lockhart, 37 Ariz 488, 295 P 975.

Missouri. Krelitz v. Calcaterra (Mo), 33 SW2d 909.

West Virginia. Johnson v. Hawkins, 110 WVa 199, 157 SE 412.

[4] **Federal.** Lynch v. United States, 73 F2d 316.

Arkansas. It is the duty to refuse instructions on matters not in issue. Nat. Fruit Products Co. v. Garrett, 121 Ark 570, 181 SW 926.

Colorado. Reeves v. Currier, 60 Colo 594, 155 P 320.

Connecticut. Brown v. Page, 98 Conn 141, 119 A 44.

It is a familiar principle of law that it is the duty of the trial court to give the jury such instructions as are correct in law, adapted to the issues, and sufficient for its guidance in the determination of the issues upon the evidence and upon the ultimate facts as they may reasonably be found to be established by the evidence. Warner v. McLay, 92 Conn 427, 103 A 113.

Florida. Seaboard Air Line R. Co. v. Kay, 73 Fla 554, 74 S 523.

Georgia. King v. Luck Illustrating Co., 21 GaApp 698, 94 SE 890.

It is not enough to recite contentions of the pleadings. Newton v. Seaboard Airline Ry. Co., 17 GaApp 624, 87 SE 908.

state the rule as the duty of a judge to instruct the jury upon every point pertinent to the pleadings and supported by the evidence.[5] Finally, a few courts state that it is error to instruct on a matter as to which there is no issue made by the pleadings or by the evidence.[6] It is undoubtedly true that a court often states the rule broadly without realizing that it may make a difference.

Illinois. Lichtenstein v. L. Fish Furn. Co., 272 Ill 191, 111 NE 729, AnnCas 1918A, 1087; Fritz v. F. W. Hochspeier Co., 287 Ill 574, 123 NE 51; People v. True, 314 Ill 89, 145 NE 198.

Iowa. Flanders v. Monroe, 172 Ia 347, 154 NW 586; Garvey v. Boody-Holland & New, 176 Ia 273, 155 NW 1027; Conner v. Henry, 201 Ia 253, 207 NW 119.

Kentucky. Bell v. North, 4 Litt. (14 Ky) 133.

Maine. Arthur E. Guth Piano Co. v. Adams, 114 Me 390, 96 A 722; Smith v. Tilton, 116 Me 311, 101 A 722.

Maryland. Fast v. Austin, 135 Md 1, 107 A 540.

Massachusetts. Poorva v. Weisberg, 286 Mass 526, 190 NE 804.

Michigan. In re Keene's Estate, 189 Mich 97, 155 NW 514, AnnCas 1918E, 367.

Missouri. Gately Outfitting Co. v. Vinson (MoApp), 182 SW 133.

Nebraska. Kimball v. Lanning, 102 Neb 63, 165 NW 890.

North Carolina. Langley v. Misenheimer, 177 NC 538, 99 SE 367.

Ohio. Acklin Stamping Co. v. Kutz, 98 OhSt 61, 120 NE 229, 14 ALR 812.

Oklahoma. Holmboe v. Neale, 69 Okl 183, 171 P 334.

It is not error to instruct as to nature of pleadings. Shawnee-Tecumseh Trac. Co. v. Newcome, 59 Okl 271, 158 P 1193.

Pennsylvania. Pennsylvania R. Co. v. Zebe, 33 Pa 318.

Texas. Southern Trac. Co. v. Dillon (TexCivApp), 199 SW 698; Gulf Pipe Line Co. v. Hurst (TexCivApp), 230 SW 1024.

Virginia. Lynchburg Tel. Co. v. Booker, 103 Va 594, 50 SE 148; Carpenter v. Smithey, 118 Va 533, 88 SE 321.

Washington. Hoffman v. Watkins, 89 Wash 661, 155 P 159.

[5] **Alabama.** Britling Cafeteria Co. v. Irwin, 229 Ala 687, 159 S 228.

California. Martin v. Pacific Gas & Elec. Co. (CalApp), 255 P 284; Smith v. Hale, 3 CalApp2d 277, 39 P2d 445.

Connecticut. Ennis v. Clancy, 106 Conn 511, 138 A 432.

Illinois. Clark v. Public Service Co., 278 IllApp 426 (instruction should not be abstract).

Kentucky. Prestonsburg v. Mellon, 220 Ky 808, 295 SW 1064; Suter's Admr. v. Kentucky Power & Light Co., 256 Ky 356, 76 SW2d 29.

Missouri. Allen v. Missouri Pacific R. Co. (Mo), 294 SW 80; Bennett v. National Union Fire Ins. Co. (MoApp), 80 SW2d 914.

Texas. Texas General Utilities Co. v. Nixon (TexCivApp), 81 SW2d 250.

Washington. Kane v. Lindsey, 143 Wash 61, 254 P 461.

Wisconsin. Madison Trust Co. v. Helleckson, 216 Wis 443, 257 NW 691, 96 ALR 992.

[6] Sisters of St. Joseph v. Edwards (Ariz), 44 P2d 155; Osenbaugh v. Virgin & Morse Lbr. Co. (Okl), 46 P2d 952.

One court has stated that a charge is tested by the claims of proof advanced by the parties and not by the evidence. Lopes v. Connecticut Light & Power Co., 145 Conn 313, 192 A2d 135.

Whether requested by a party or not, it is the duty of the trial judge to instruct the jury on each issue presented by the pleadings and evidence.[7] However, there is no duty to instruct upon matters which are not really issues because admitted or conceded, or about which no question is made.[8] Nor is the court required to instruct as to issues of fact involving common experience or understanding of the average man.[9]

Each party is entitled to have the court present his theory of the issues to the jury by proper instructions.[10] Instructions requested by a plaintiff, if they correctly enunciate the law and apply to the facts concerning which evidence was submitted, are not to be refused merely because they do not correspond with the theories of the defendant.[11] The defendant is entitled to an affirmative charge as to every defense raised by the pleadings and the evidence.[12] But where instructions have been given covering the issues and theories of the parties, it is not incumbent upon the court to give further instructions that are the antithesis of those given.[13]

Abstract instructions. The court should not give an instruction that would allow the jury to formulate their verdict from abstract notions of what is right between man and man.[14] Abstract propositions should in no event be submitted to the

[7] **Michigan.** Jorgensen v. Howland, 325 Mich 440, 38 NW2d 906.

Nebraska. McKain v. Platte Valley Public Power & Irr. Dist., 151 Neb 497, 37 NW2d 923; Thurnow v. Schaeffer, 151 Neb 651, 38 NW2d 732.

Oklahoma. Vogel v. Rushing (Okl), 212 P2d 665.

[8] **Indiana.** Southern R. Co. v. Weidenbrenner, 61 IndApp 314, 109 NE 926.

Massachusetts. Altavilla v. Old Colony St. R. Co., 222 Mass 322, 110 NE 970.

Missouri. Edwards v. Schreiber, 168 MoApp 197, 153 SW 69.

Ohio. Schlickling v. Post Publishing Co., 115 OhSt 589, 155 NE 143.

Oregon. Vale v. Campbell, 123 Or 632, 263 P 400.

Washington. See also Burlie v. Stephens, 113 Wash 182, 193 P 684.

In Galanena v. Ragan, 182 Wash 659, 47 P2d 1021, the court said that if there was a variance between the pleading and the proof the court should submit the issue of facts, which position, however, was not to be taken for all it imported.

[9] **Illinois.** See also Catt v. Robins, 305 Ill 76, 137 NE 101 (impairment of mental faculties by excessive and habitual use of intoxicants).

Iowa. Bailey v. LeMars, 189 Ia 751, 179 NW 73.

Texas. Kansas City, M. & O. Ry. Co. v. Starr (TexCivApp), 194 SW 637.

[10] Clinchfield Coal Corp. v. Compton, 148 Va 437, 139 SE 308, 55 ALR 1376.

[11] Lowe v. Huckins, 356 Ill 360, 190 NE 683.

[12] Southland Life Ins. Co. v. Dunn (TexCivApp), 71 SW2d 1103.

[13] Best v. Atchison, T. & S. F. R. Co. (MoApp), 76 SW2d 442; Hill v. Wilson, 123 Or 193, 261 P 422.

[14] Pierson v. Smith, 211 Mich 292, 178 NW 659.

jury where their effect reasonably will be to confuse or mislead the jury.[15]

Illustrations. The court is without authority to instruct so that the jury may allow damages not claimed in the pleadings.[16] An allegation in the pleading that defendant "failed to exercise due care in avoiding colliding with plaintiff" is too general to warrant its submission to jury as a charge of negligence.[17] If contributory negligence has not been pleaded, it is proper for the court to give no instruction as to such defense.[18] Where only a part of the statements of an article claimed to be libelous were relied upon in the pleadings, it was error for the court to require the defendant to prove the truth of every statement in the article as a justification.[19] It is improper to instruct as to the statute of frauds in an action where the complaint discloses a contract not within the statute and the answer did not set up the statute as a defense.[20] A request that the court instruct as to whether the proper parties were joined in a suit is rightly refused, as this question is one for determination as part of the procedure and not within the legitimate scope and purpose of instructions.[21]

(2) *Criminal Cases.* Abstract instructions should not be submitted to the jury where their effect may confuse or mislead the jury.[22]

[15] **Colorado.** Denver v. Stutzman, 95 Colo 165, 33 P2d 1071.

Iowa. Deweese v. Iowa Transit Lines, 218 Ia 1327, 256 NW 428.

Ohio. Hurlbut v. Jones, 84 OhSt 457, 95 NE 1150.

[16] Warfield Natural Gas Co. v. Hall, 254 Ky 805, 72 SW2d 417; Nash v. Searcy, 256 Ky 234, 75 SW2d 1052; Tiedke Bros. Co. v. Williams, 13 OhCirCt (N. S.) 58, 23 OhCirDec 175; Cincinnati Trac. Co. v. Wooley, 4 ONP (N. S.) 122, 6 ONP (N. S.) 444, 17 OhDec 19; Bader v. Columbus, B. L. & N. Trac. Co., 5 ONP (N. S.) 495, 17 OhDec 143.

[17] Sparks v. Long, 234 Ia 21, 11 NW2d 716.

[18] Nance v. Lansdell (MoApp), 73 SW2d 346.

Contra, Cincinnati Trac. Co. v. Young, 115 OhSt 160, 152 NE 666.

[19] Louisville Times Co. v. Lyttle, 257 Ky 132, 77 SW2d 432.

[20] Magee v. Winn, 52 Idaho 553, 16 P2d 1062.

[21] Worcester City Missionary Soc. v. Memorial Church, 186 Mass 531, 72 NE 71.

[22] **Federal.** Roberts v. United States, 126 F 897.

Alabama. Wingard v. State, 26 AlaApp 383, 161 S 107.

Arizona. Woodson v. State, 30 Ariz 448, 247 P 1103.

Colorado. If there is sufficient direct evidence to sustain a conviction of the accused, it is not error to decline to instruct on circumstantial evidence. Gavin v. People, 79 Colo 189, 244 P 912.

Georgia. Since there is no practical distinction between principals in the first and second degrees, there is no error in the failure to charge on the law in reference to the conviction of a principal in the second degree. Brown v. State, 26 GaApp 189, 105 SE 723.

A requested charge in a criminal case which correctly states the law should not be given if no point has arisen in the case to which it can be applied.[23] No instruction should be given in criminal trials that is not pertinent to the issues.[24] And if the defendant's theory and testimony are so completely disproved by the physical facts that it would be utterly unreasonable to attach any credence to them, the court need not charge upon such theory and evidence.[25] It is error for the charge to permit conviction for aiding and abetting a murder when the indictment named no other person than the defendant as participating in the crime in any capacity.[26] It is the judge's duty accurately to state the law applicable to the case so that the jury may have clear and intelligent notions of what they are to decide,[27] and this duty is especially imperative where the evidence on material questions is sharply conflicting and the question of liability close.[28] Where the defense in a liquor

Idaho. State v. Cox, 55 Idaho 694, 46 P2d 1093.

Illinois. People v. Parks, 321 Ill 143, 151 NE 563.

It is error to instruct in a rape case that a conviction could be returned on circumstantial evidence where all the evidence in the case was direct. People v. Braidman, 323 Ill 37, 153 NE 702.

Indiana. Parker v. State, 136 Ind 284, 35 NE 1105; Campbell v. State, 197 Ind 112, 149 NE 903.

Kentucky. Heilman v. Commonwealth, 84 Ky 457, 1 SW 731, 4 Am St 207; Anderson v. Commonwealth, 211 Ky 726, 277 SW 1008.

Louisiana. It is improper to give an instruction embodying only an abstract legal proposition, even though the statement of the law be correct. State v. Harris, 166 La 759, 117 S 820.

Missouri. State v. Harris, 232 Mo 317, 134 SW 535; State v. Starr, 244 Mo 161, 148 SW 862.

New Mexico. The court should instruct that part of those jointly indicted may be convicted and the others acquitted. State v. Ward, 30 NM 111, 228 P 180.

Ohio. Sydell v. State, 17 OhApp 418.

Texas. Teel v. State, 104 TexCr 368, 283 SW 834; Hanners v. State, 104 TexCr 442, 284 SW 554.

Virginia. Ellison v. Commonwealth, 130 Va 748, 107 SE 697 (should instruct on aiding and abetting).

Washington. If intoxication is not denied, it is not necessary for the court to define the term in its charge. Tenino v. Hyde, 138 Wash 251, 244 P 550.

West Virginia. State v. Manns, 48 WVa 480, 37 SE 613.

[23] State v. Capaci, 179 La 462, 154 S 419.

[24] **California.** People v. Allen, 138 CalApp 652, 33 P2d 77.

Kentucky. Payne v. Commonwealth, 255 Ky 533, 75 SW2d 14.

Oklahoma. Sullivan v. State, 56 OklCr 250, 37 P2d 655.

[25] Williams v. State, 56 OklCr 147, 35 P2d 282.

[26] Pelfry v. Commonwealth, 255 Ky 442, 74 SW2d 913.

[27] **California.** People v. Speraic, 87 CalApp 724, 262 P 795.

Iowa. Owen v. Owen, 22 Ia 270; Blades v. Des Moines City R. Co., 146 Ia 580, 123 NW 1057.

Kansas. State v. Gaunt, 98 Kan 186, 157 P 447.

[28] People v. Gray, 251 Ill 431, 96 NE 268; Chicago & E. I. R. Co. v. Garner, 83 IllApp 118; People v. Johnson, 150 IllApp 424; Gorey v. Illinois Cent. R. Co., 153 IllApp 17; Bartholomew v. Illinois Valley R.

prosecution was entrapment, the accused is entitled to an instruction as to such defense;[29] and, in general, the defendant in a criminal case is entitled to affirmative instructions as to any defensive theory raised by the evidence.[30]

If the defense in a criminal case is fully covered by the court's instructions as to the prosecution's theory, the negative of which is easily understood, it is not necessary for the court to accede to the defendant's request for an affirmative charge as to such defense.[31]

§ 51. Recapitulation of testimony.

The extent to which a trial judge recapitulates the testimony is a matter entirely within his discretion.

Although the court must state the questions presented to the jury and the applicable law, recapitulating the testimony presented during the trial is a matter of discretion. This rule applies to both civil and criminal cases.[32] The cases on the appellate level are concerned with whether or not the trial judge has abused that discretion either by refusing to recapitulate the evidence or by recapitulating in an improper manner.

Co., 154 IllApp 512; Witt v. Gallemore, 163 IllApp 649; Kirschner v. Kirschner, 169 Okl 129, 36 P2d 297; Skaggs v. Gypsy Oil Co., 169 Okl 209, 36 P2d 865.

[29] Driskill v. United States, 24 F2d 525. But see French v. State, 149 Miss 684, 115 S 705.

[30] **Idaho.** State v. White, 46 Idaho 124, 266 P 415.

Illinois. People v. Egan, 331 Ill 489, 163 NE 357.

Oklahoma. Scott v. State, 40 Okl Cr 296, 268 P 312.

Texas. Patterson v. State, 109 TexCr 521, 5 SW2d 993.

[31] Duvall v. Commonwealth, 225 Ky 827, 10 SW2d 279.

[32] **Federal.** Bu-Vi-Bar Petroleum Corp. v. Krow, 47 F2d 1065.

Connecticut. Murphy v. Connecticut Co., 84 Conn 711, 81 A 961.

Maine. Virgie v. Stetson, 73 Me 452.

Massachusetts. Doherty v. Phoenix Ins. Co., 224 Mass 310, 112 NE 940; McIntire v. Leland, 229 Mass 348, 118 NE 665; Sawyer v. Worcester Consol. Street R. Co., 231 Mass 215, 120 NE 404.

Michigan. Bauman v. Pere Marquette Boom Co., 66 Mich 544, 33 NW 538.

New Hampshire. Rollins v. Varney, 22 NH 99.

New Jersey. Drummond v. Hughes, 91 NJL 563, 104 A 137; Van Sciver v. Public Service R. Co., 96 NJL 13, 114 A 146.

New York. Smith v. Gray, 19 AppDiv 262, 46 NYS 180; People v. Sisto, 174 AppDiv 532, 161 NYS 108.

North Carolina. State v. Smith, 183 NC 725, 110 SE 654.

Unless there be some reason why the judge should remark particularly on the testimony of a witness, he may, with propriety, decline to comply with a request to do so. Findly v. Ray, 50 NC 125.

Where the facts in a criminal case are not complicated, it may be a sufficient summing up of the case for the court merely to read the notes of the evidence and charge the law in general terms. State v. Beard, 124 NC 811, 32 SE 804.

Ohio. Morgan v. State, 48 OhSt 371, 27 NE 710; Fugman v. Trostler, 24 OhCirCt (N. S.) 521, 34 OhCir Dec 746.

Where there is only one question of fact in a case and the question is clearly stated to the jury, it is unnecessary, ordinarily, for the court to recapitulate the evidence and comment on corroborating circumstances, unless requested to do so.[33] In jurisdictions, as in Georgia, where the defendant is permitted to make a statement, and does so, but introduces no other evidence, the court, while stating the facts relied upon by the state, is not required to state the facts relied upon by the defendant.[34] If there is no evidence of a particular point, it is unnecessary for the court to inform the jury of that fact.[35]

If the judge undertakes to restate the evidence, the restatement must be accurate, and any material misstatement will be ground for exceptions by the injured party.[36] If the judge recapitulates the evidence on one side, he should, in fairness, recapitulate it on the other side also.[37] The evidence should be stated in a way not to mislead and confuse the jury.[38] It may not be demanded of the judge that he shall single out some particular portion of the evidence for special comment and remark.[39]

Oregon. De War v. First Nat. Bank, 88 Or 541, 171 P 1106 (no duty); State v. Newlin, 92 Or 589, 182 P 133.

Pennsylvania. Commonwealth v. McCl skey, 273 Pa 456, 117 A 192; Gentile v. McLaughlin, 107 PaSuper Ct 489, 164 A 71.

It is sufficient for the court in its charge to give the jury a general review of the evidence which fairly and adequately presents the respective contentions of the state and of defendant with only enough reference to the items of evidence to assist the jury in recalling it as a substantial whole and to appreciate its bearing. Commonwealth v. Kaiser, 184 Pa 493, 39 A 299.

Texas. Undisputed facts may not be submitted as issuable. Pullman Co. v. Custer (TexCivApp), 140 SW 847.

Washington. State v. Hankins, 93 Wash 124, 160 P 307.

Wisconsin. The mere refusal to state certain facts to the jury, though undisputed, is not ground for reversal. Brickley v. Walker, 68 Wis 563, 32 NW 773.

The court may properly mention the evidence bearing on a controversy, speaking of it correctly and in case of conflict, without suggesting the effect thereof. Holway v. Sanborn, 145 Wis 151, 130 NW 95.

[33] Lauer v. Yetzer, 3 PaSuperCt 461.

[34] Ray v. State, 38 GaApp 202, 143 SE 603.

[35] Central of Georgia R. Co. v. Bagley, 173 Ala 611, 55 S 894; Louisville & N. R. Co. v. Moorer, 195 Ala 344, 70 S 277; Birmingham Ry., Light & Power Co. v. Milbrat, 201 Ala 368, 78 S 224; Southern R. Co. v. Hobson, 4 AlaApp 408, 58 S 751; Neale v. McKinstry, 7 Mo 128.

[36] New Jerusalem Church v. Crocker, 7 OhCirCt 327, 4 OhCirDec 619; Scott v. McGroarty, 48 RI 79, 135 A 481.

[37] **Federal.** United Commercial Travelers v. Tripp, 63 F2d 37.

Alabama. Lamar v. King, 168 Ala 285, 53 S 279.

Iowa. See also Hanson v. Anamosa, 177 Ia 101, 158 NW 591.

[38] State v. Overson, 55 Utah 230, 185 P 364; Jones' Admr. v. Richmond, 118 Va 612, 88 SE 82.

[39] **Federal.** See Stilson v. United States, 250 US 583, 63 LEd 1154, 40 SupCt 28.

In some jurisdictions, for example, North Carolina, the judge is required to state in a full and correct manner the evidence in the case, but he need state only so much as is necessary in order to aid the jury in reaching a conclusion upon the issues. It is therefore unnecessary to recapitulate the testimony a second time.[40]

§ 52. Theories of case in civil actions.

Each party to a cause of action is entitled to have his theory submitted to the jury where supported by the evidence and the pleading.

A party is entitled to have the jury instructed with reference to his theory of the case, when the pleadings present the theory as an issue and it is supported by competent evidence.[41] If the

Massachusetts. Dahill v. Booker, 140 Mass 308, 5 NE 496, 54 AmRep 465.

Pennsylvania. Commonwealth v. Durlin, 75 PaSuperCt 260; Commonwealth v. Wilson, 76 PaSuperCt 147.

[40] Aston v. Craigmiles, 70 NC 316. See also Ball-Thrash Co. v. McCormack, 172 NC 677, 90 SE 916.

[41] **Federal.** Fernald v. Boston & M. R. R., 62 F2d 782.

Alabama. Birmingham Ry., Light & Power Co. v. Camp, 161 Ala 456, 49 S 846; Lamar v. King, 168 Ala 285, 53 S 279; Dwight Mfg. Co. v. Word, 200 Ala 221, 75 S 979; Mobile Light & R. Co. v. Logan, 213 Ala 672, 106 S 147.

Arizona. Morenci Southern R. Co. v. Monsour, 21 Ariz 148, 185 P 938.

Arkansas. Cain v. Songer, 176 Ark 551, 3 SW2d 315.

California. Miner v. Dabney-Johnson Oil Corp., 219 Cal 580, 28 P2d 23; Tognazzini v. Freeman, 18 CalApp 468, 123 P 540; Carey v. Pacific Gas & Elec. Co., 75 CalApp 129, 242 P 97; Cassinelli v. Bennen, 110 CalApp 722, 294 P 748; Cole v. Ridings, 95 CalApp2d 136, 212 P2d 597.

Colorado. Rocky Mountain Fuel Co. v. Bakarich, 66 Colo 275, 180 P 754; Davies v. Everett, 72 Colo 104, 209 P 799.

Connecticut. Murphy v. Connecticut Co., 84 Conn 711, 81 A 961; Bjorkman v. Newington, 113 Conn 181, 154 A 346.

Florida. Southern Utilities Co. v. Matthews, 84 Fla 30, 93 S 188.

Georgia. Savannah Elec. Co. v. Johnson, 12 GaApp 154, 76 SE 1059; Rushin v. Massey, 25 GaApp 82, 102 SE 456; Salios v. Swift, 25 GaApp 96, 102 SE 869.

The instruction on the theory should be given though the undisputed evidence may show that for some other reason the plaintiff is not entitled to recover on that particular contention. Hines v. McCook, 25 GaApp 395, 103 SE 690.

Idaho. Jones v. Caldwell, 20 Idaho 5, 116 P 110, 48 LRA (N. S.) 119.

Illinois. Bernier v. Illinois Cent. R. Co., 296 Ill 464, 129 NE 747; Casey v. Grand Trunk Western R. Co., 165 IllApp 108; Ridinger v. Toledo, P. & W. R. Co., 168 IllApp 284; Lurie v. Rock Falls, 237 IllApp 334; Pittman v. Duggan, 336 IllApp 502, 84 NE2d 701; Abbs v. Rob Roy Country Club, 337 IllApp 591, 86 NE2d 412.

Indiana. Southern Indiana Ry. Co. v. Peyton, 157 Ind 690, 61 NE 722; New York, C. & St. L. R. Co. v. First Trust & Sav. Bank, 198 Ind 376, 153 NE 761; Lavengood v. Lavengood, 225 Ind 206, 73 NE2d

685; Baltimore & O. R. Co. v. Peck, 53 IndApp 281, 101 NE 674.

Iowa. Clement v. Drybread, 108 Ia 701, 78 NW 235; Burris v. Titzell, 189 Ia 1322, 177 NW 557, 179 NW 851 (malpractice); Eves v. Littig Constr. Co., 202 Ia 1338, 212 NW 154.

Kansas. Eames v. Clark, 104 Kan 65, 177 P 540 (care to be exercised by persons of tender years).

Kentucky. Winter, Jr. & Co. v. Forrest, 145 Ky 581, 140 SW 1005; Stearns Coal & Lbr. Co. v. Williams, 171 Ky 46, 186 SW 931; Louisville & N. R. Co. v. McCoy, 177 Ky 415, 197 SW 801; Chicago, M. & G. R. Co. v. Stahr, 184 Ky 529, 212 SW 115; Penn Furn. Co. v. Ratliff, 194 Ky 162, 238 SW 393; Comer v. Yancey, 251 Ky 461, 65 SW2d 459.

Maryland. Lion v. Baltimore City Passenger Ry. Co., 90 Md 266, 44 A 1045, 47 LRA 127; Howard County Comrs. v. Pindell, 119 Md 69, 85 A 1041.

Michigan. Cooper v. Mulder, 74 Mich 374, 41 NW 1084; Wendt v. Richmond, 164 Mich 173, 129 NW 38.

Minnesota. Robertson v. Burton, 88 Minn 151, 92 NW 538.

Missouri. Thornton v. Mersereau, 168 MoApp 1, 151 SW 212; Barr v. Missouri Pacific R. Co. (Mo), 37 SW2d 927; Pevesdorf v. Union Elec. Light & Power Co., 333 Mo 1155, 64 SW2d 939; Sullivan v. Chauvenet (MoApp), 186 SW 1090; Low v. Paddock (MoApp), 220 SW 969; Donner v. Whitecotton (MoApp), 245 SW 203 (no evidence); Culver v. Minden Coal Co. (MoApp), 286 SW 745.

Montana. Parties are entitled to instructions on all issues. Best v. Beaudry, 62 Mont 485, 205 P 239.

Nebraska. Colgrove v. Pickett, 75 Neb 440, 106 NY 453; Hauber v. Leibold, 76 Neb 706, 107 NW 1042; Mentz v. Omaha & C. B. St. R. Co., 103 Neb 216, 170 NW 889, 173 NW 478; Dawson County Irr. Co. v. Dawson County, 103 Neb 692, 173 NW 696, 176 NW 78; Schmidbauer v. Omaha & C. B. St. R. Co., 104 Neb 250, 177 NW 336; Beauchamp v. Leypoldt, 108 Neb 510, 188 NW 179, 27 ALR 65; Swengil v. Martin, 125 Neb 745, 252 NW 207; Landrum v. Roddy, 143 Neb 934, 12 NW2d 82, 149 ALR 1041.

New Jersey. Yates v. Madigan, 112 NJL 443, 171 A 679.

New York. Marion v. B. G. Coon Constr. Co., 216 NY 178, 110 NE 444.

North Carolina. Roberson v. Stokes, 181 NC 59, 106 SE 151; Yellow Cab Co. v. Sanders, 223 NC 626, 27 SE2d 631.

Ohio. Fruit Dispatch Co. v. F. Lisey & Co., 4 OhApp 300, 22 Oh CirCt (N. S.) 7, 28; Knox County Farm Bureau v. Wagner, 24 OhApp 466, 155 NE 804; Henkel v. Robinson, 27 OhApp 341, 161 NE 342; St. Paul Fire & Marine Ins. Co. v. Baltimore & O. R. Co., 129 OhSt 401, 195 NE 861.

Oklahoma. St. Louis & S. F. R. Co. v. Posten, 31 Okl 821, 124 P 2; Menten v. Richards, 54 Okl 418, 153 P 1177; Smith v. Maher, 84 Okl 49, 202 P 321, 23 ALR 270; Kimmell v. Goehler, 99 Okl 273, 226 P 576.

Oregon. Del Vol v. Citizens Bank, 92 Or 606, 179 P 282, 181 P 985; Collins v. United Brokers Co., 99 Or 556, 194 P 458; Anderson v. Wallowa Nat. Bank, 100 Or 679, 198 P 560.

Pennsylvania. Weissburg v. Peoples State Bank, 284 Pa 260, 131 A 181.

South Carolina. Powers v. Rawls, 119 SC 134, 112 SE 78; Planters Fertilizer & Phosphate Co. v. Bradberry, 134 SC 541, 133 SE 436.

Texas. Pullman Co. v. Moise (TexCivApp), 187 SW 249; Magnolia Petroleum Co. v. Ray (TexCiv App), 187 SW 1085; Southern Kansas Ry. Co. v. Wallace (Tex ComApp), 206 SW 505; Greer v. Thaman (TexComApp), 55 SW2d 519, revg. 38 SW2d 378.

Utah. Martineau v. Hanson, 47 Utah 549, 155 P 432; Pratt v. Utah Light & Trac. Co., 57 Utah 7, 169 P 868.

court instructs the jury to find for one of the parties if the jury find certain facts, the court should instruct as to the effect of finding the converse of those facts.[42] A party has a right not only to tender his own theory of the case, but also, without waiver of his own theory, to tender instructions to meet the theory of the opposite party.[43] Where the testimony sustains the theory of both parties it is not enough to give the theory of one of the parties, but the court should also give the theory of the other party.[44] The affirmative charge on a theory should be given though a general charge may have been given to the same effect.[45] Ordinarily, the theories of both parties may be covered in a single instruction.[46] The "theory" may be referred to as the "claim" of the party.[47]

Illustrations: Where there are two theories as to a tortious death, each being supported by evidence, the court should clearly draw the attention of the jury to the law applicable to each theory.[48] Under the Nebraska guest statute, the de-

Virginia. Miller & Co. v. Lyons, 113 Va 275, 74 SE 194; Norfolk & W. R. Co. v. Parrish, 119 Va 670, 89 SE 923; Baylor v. Hoover, 123 Va 659, 97 SE 309.

Washington. West v. Shaw, 61 Wash 227, 112 P 243.

West Virginia. Jones v. Riverside Bridge Co., 70 WVa 374, 73 SE 942; Slater v. United Fuel Gas Co., 126 WVa 127, 27 SE2d 436.

Wyoming. Murphy v. W. & W. Live Stock Co., 26 Wyo 455, 187 P 187, 189 P 857.

[42] **Kentucky.** Cincinnati, N. O. & T. P. R. Co. v. Francis, 187 Ky 703, 220 SW 739.

Missouri. Harper v. Wilson (Mo App), 191 SW 1024; Boles v. Dunham (MoApp), 208 SW 480.

New Hampshire. Bjork v. United States Bobbin & Shuttle Co., 79 NH 402, 111 A 284, 533.

Texas. Baker v. Williams (Tex CivApp), 198 SW 808.

[43] **Illinois.** Ziehme v. Metz, 157 IllApp 543.

Iowa. Morrow v. Scoville, 206 Ia 1134, 221 NW 802.

Missouri. Harting v. East St. Louis Ry. Co. (Mo), 84 SW2d 914.

[44] **Connecticut.** Bullard v. DeCordova, 119 Conn 262, 175 A 673.

Missouri. Smith v. Southern, 210 MoApp 288, 236 SW 413; Koury v. Home Ins. Co. (MoApp), 57 SW2d 750.

Nevada. Crosman v. Southern Pacific Co., 42 Nev 92, 173 P 223.

North Carolina. Hood System Industrial Bank v. Dixie Oil Co., 205 NC 778, 172 SE 360.

Oklahoma. Campbell v. Thomas-Godfrey Land & Loan Co., 81 Okl 201, 197 P 452.

Oregon. West v. McDonald, 64 Or 203, 127 P 784, 128 P 818.

Texas. Hart-Parr Co. v. Paine (TexCivApp), 199 SW 822; Kansas City, M. & O. Ry. Co. v. Weatherby (TexCivApp), 203 SW 793; Haverbekken v. Johnson (TexCivApp), 228 SW 256; McElroy v. Dobbs (TexCiv App), 229 SW 674; Wichita Valley Ry. Co. v. Williams (TexCivApp), 6 SW2d 439.

[45] Kansas City, M. & O. Ry. Co. v. Swift (TexCivApp), 204 SW 135; Kuehn v. Neugebauer (TexCivApp), 204 SW 369; Sherrill v. Union Lbr. Co. (TexCivApp), 207 SW 149.

[46] Toone v. J. O'Neil Constr. Co., 40 Utah 265, 121 P 10.

[47] Di Maio v. Yolen Bottling Works, 93 Conn 597, 107 A 497.

[48] Cerrillos Coal R. Co. v. Deserant, 9 NM 49, 49 P 807.

fendant is entitled to have the jury instructed on the defense of assumption of risk where the issue is raised by the pleadings and evidence.[49]

The court should submit all the issues and not merely those supported by a preponderance of the evidence.[50] This does not, however, require the submission of every disputed evidentiary fact, but only the essential facts warranting a recovery without omission of essential ultimate facts which would defeat such recovery or vice versa.[51] A party is entitled to have the whole case submitted either for a general verdict or for such special findings as will dispose of the issues.[52] So where a plaintiff

[49] Landrum v. Roddy, 143 Neb 934, 12 NW2d 82, 149 ALR 1041.

[50] **Illinois.** Krieger v. Aurora, E. & C. R. Co., 242 Ill 544, 90 NE 266.

Iowa. Hutchinson Purity Ice Cream Co. v. Des Moines City R. Co., 172 Ia 527, 154 NW 890.

Massachusetts. Maxwell v. Massachusetts Title Ins. Co., 206 Mass 197, 92 NE 42.

Oklahoma. St. Louis & S. F. R. Co. v. Whitefield, 70 Okl 26, 172 P 637; First State Bank v. Carr, 72 Okl 262, 180 P 856; Klein v. Muhlhausen, 83 Okl 21, 200 P 436.

Oregon. Van Orsdol v. Hutchcroft, 83 Or 567, 163 P 978.

Pennsylvania. Volk v. Beatty, 40 PaSuperCt 628.

Texas. Barnes v. Dallas Consol. Elec. Street R. Co., 103 Tex 387, 128 SW 367; Parks v. Sullivan (TexCiv App), 152 SW 704.

The court should charge on the issues involved, though the case is submitted on special issues. Texas Baptist University v. Patton (Tex CivApp), 145 SW 1063.

Washington. Where instructions covering the same point are requested by both sides, if the court adopts those requested by one side, the other should be rejected. Melius v. Chicago, M. & P. S. R. Co., 71 Wash 64, 127 P 575.

West Virginia. Williams v. Schehl, 84 WVa 499, 100 SE 280.

[51] **Missouri.** Acme Harvesting Mach. Co. v. Gasperson, 168 MoApp 558, 153 SW 1069.

New Mexico. Putney v. Schmidt, 16 NM 400, 120 P 720.

Pennsylvania. Wally v. Clark, 263 Pa 322, 106 A 542.

Tennessee. Crisman v. McMurray, 107 Tenn 469, 64 SW 711.

Vermont. Ryder v. Vermont Last Block Co., 91 Vt 158, 99 A 733.

Virginia. Norfolk & W. R. Co. v. Allen, 118 Va 428, 87 SE 558.

[52] **Federal.** Commercial Standard Ins. Co. v. Garrett, 70 F2d 969.

California. Jordan v. Great Western Motorways (CalApp), 294 P 9.

Florida. American Fruit Growers v. Woodley, 116 Fla 779, 156 S 689 (omitting element of apparent authority in case where agency was an issue).

Georgia. Henderson v. Murray, 42 GaApp 489, 156 SE 470.

Illinois. Green v. Ross, 257 Ill App 344.

Indiana. Burroughs v. Southern Colonization Co., 96 IndApp 93, 173 NE 716.

Kentucky. Myers v. Franklin, 236 Ky 758, 34 SW2d 234.

Missouri. Porter v. Equitable Life Assur. Soc. (MoApp), 71 SW2d 766; Hunt v. Dean (MoApp), 72 SW2d 831 (ignoring element of breach of contract and the plaintiff's knowledge of such breach).

New York. McAdam v. Wholesale Dry Cleaning & Dyeing Works, 232 AppDiv 30, 248 NYS 613.

Ohio. Ruman v. Smith, 48 OhApp 188, 192 NE 808 (defense of contributory negligence ignored).

Oklahoma. National Life & Acc. Ins. Co. v. Roberson, 169 Okl 136, 36 P2d 479.

claims under two separate deeds of conveyance, it is error for the court to confine the jury, in their deliberations, to the claim arising from only one of such deeds,[53] and where there are two distinct defenses supported by the evidence, the court should fairly instruct as to both.[54]

In submitting the issues, both the affirmative and the negative must be presented.[55] Thus where the court is asked to instruct that unless they find and believe from the evidence that the plaintiff complied with all the requirements upon his part under the contract offered in evidence, their finding should be for the defendant, there is no good reason for refusing it where the affirmative of the proposition was given in one of plaintiff's instructions.[56]

Where the case is submitted on special issues, it is not necessary to affirmatively submit the theory of each party.[57]

§ 53. Theories of case in criminal prosecution.

The rule in civil cases requiring the court to instruct on all theories of the case having support in the evidence to any extent has a like application in criminal prosecutions.

(1) In general. The accused is entitled to have the jury instructed on the whole law of the case.[57a] It is error for a trial

Tennessee. Kroger Groc. & Baking Co. v. Addington, 18 TennApp 191, 74 SW2d 650.

Texas. South Plains Coaches, Inc. v. Behringer (TexCivApp), 32 SW2d 959.

Vermont. Coolidge v. Ayers, 76 Vt 405, 57 A 970.

Virginia. Chesapeake Ferry Co. v. Hudgins, 155 Va 874, 156 SE 429.

[53] Sackett v. Stone, 115 Ga 466, 41 SE 564.

[54] **Alabama.** Knight Iron & Metal Co. v. Orr, 202 Ala 677, 81 S 633.

Kentucky. Langhan v. Louisville, 186 Ky 438, 216 SW 1082.

Mississippi. Crow v. Burgin (Miss), 38 S 625.

Missouri. See Ganahl v. United Rys. Co., 197 MoApp 495, 197 SW 159.

[55] **California.** Buckley v. Silverberg, 113 Cal 673, 45 P 804.

Michigan. Miller v. Miller, 97 Mich 151, 56 NW 348.

Missouri. Womach v. St. Joseph, 168 Mo 236, 67 SW 588; Marshall v. Brown (MoApp), 230 SW 347.

North Carolina. Raleigh Real Estate Co. v. Moser, 175 NC 255, 95 SE 498.

Oklahoma. Crouch & Son v. Huber, 87 Okl 83, 209 P 764.

Texas. Wichita Falls Trac. Co. v. Adams, 107 Tex 612, 183 SW 155; Missouri, K. & T. Ry. Co. v. Renfro (TexCivApp), 83 SW 21; Shaller v. Johnson-McQuiddy Cattle Co. (TexCivApp), 189 SW 553; Galveston, H. & S. A. Ry. Co. v. Wilson (TexCivApp), 214 SW 773.

Virginia. Virginia Ry. & Power Co. v. McDemmick, 117 Va 862, 86 SE 744.

West Virginia. Angrist v. Burk, 77 WVa 192, 87 SE 74.

[56] Bruce v. Wolfe, 102 MoApp 384, 76 SW 723.

[57] Jackson v. Graham (TexCiv App), 205 SW 755.

[57a] **Federal.** Calderon v. United States, 279 F 556.

Alabama. Sanford v. State, 143 Ala 78, 39 S 370; Davis v. State, 214 Ala 273, 107 S 737; Burns v. State, 229 Ala 68, 155 S 561; Bell v. State, 2 AlaApp 150, 56 S 842.

California. People v. Rallo, 119 CalApp 393, 6 P2d 516.

Georgia. Where the accused in his statement presents a theory which, if true, entitles him to either an acquittal or conviction of a lower offense than the one charged, it is error to refuse a written request applicable to such theory. Dozier v. State, 12 GaApp 722, 78 SE 203.

Illinois. People v. Grant, 313 Ill 69, 144 NE 813.

Iowa. State v. Brooks, 192 Ia 1107, 186 NW 46.

Kentucky. Gordon v. Commonwealth, 136 Ky 508, 124 SW 806; Tucker v. Commonwealth, 145 Ky 84, 140 SW 73; Curtis v. Commonwealth, 169 Ky 727, 184 SW 1105; Huddleston v. Commonwealth, 171 Ky 187, 188 SW 332; Hunter v. Commonwealth, 171 Ky 438, 188 SW 472; Vaughn v. Commonwealth, 204 Ky 229, 263 SW 752; Gibson v. Commonwealth, 204 Ky 748, 265 SW 339; Agee v. Commonwealth, 9 KyL 272, 5 SW 47.

Michigan. People v. Cummins, 47 Mich 334, 11 NW 184, 186; People v. Parsons, 105 Mich 177, 63 NW 69; People v. Germaine, 234 Mich 623, 208 NW 705.

Missouri. State v. McBroom, 238 Mo 495, 141 SW 1120; State v. Stallings, 326 Mo 1037, 33 SW2d 914; State v. Bartley, 337 Mo 229, 84 SW2d 637; State v. Widner (Mo App), 184 SW 909.

The defendant is entitled to an instruction that unless certain facts are shown he should be acquitted where on the converse of this the state asks for his conviction. State v. Rutherford, 152 Mo 124, 53 SW 417.

New Mexico. Territory v. Baca, 11 NM 559, 71 P 460; State v. Martinez, 30 NM 178, 230 P 379.

New York. People v. Murch, 263 NY 285, 189 NE 220; People v. Viscio, 241 AppDiv 499, 272 NYS 213.

North Carolina. State v. Grainger, 157 NC 628, 73 SE 149.

North Dakota. State v. Tough, 12 ND 425, 96 NW 1025.

Ohio. Miller v. State, 125 OhSt 415, 181 NE 890.

Oklahoma. Reed v. State, 3 Okl Cr 16, 103 P 1070, 24 LRA (N. S.) 268; Jessie v. State, 28 OklCr 309, 230 P 519; Moore v. State, 35 OklCr 257, 250 P 538.

The defendant is entitled to a clear instruction applicable to his testimony, based on the hypothesis that it is true, when such testimony affects a material issue in the case. Payton v. State, 4 OklCr 316, 111 P 666.

Oregon. State v. Patterson, 117 Or 153, 241 P 977.

Pennsylvania. Commonwealth v. Principatti, 260 Pa 587, 104 A 53.

Tennessee. Ford v. State, 101 Tenn 454, 47 SW 703; Cooper v. State, 123 Tenn 37, 138 SW 826.

Texas. Reed v. State, 9 TexApp 317; Berry v. State, 58 TexCr 291, 125 SW 580; Moore v. State, 59 TexCr 361, 128 SW 1115; Kelley v. State, 79 TexCr 402, 185 SW 874; McPeak v. State, 80 TexCr 50, 187 SW 754; Berry v. State, 80 TexCr 87, 188 SW 997; James v. State, 86 TexCr 107, 215 SW 459; McCormick v. State, 86 TexCr 366, 216 SW 871 (whether state's witness was an accomplice); Duncan v. State, 90 Tex Cr 479, 236 SW 468; White v. State, 102 TexCr 456, 278 SW 203; Latta v. State, 124 TexCr 618, 64 SW2d 968; Stokes v. State, 126 TexCr 377, 71 SW2d 882.

The state is entitled to the same extent as the accused. Smith v. State, 79 TexCr 468, 185 SW 576.

Virginia. Nelson v. Commonwealth, 143 Va 579, 130 SE 389.

Where there is evidence in support of two opposing theories as to the cause and motives of an alleged defense and a court charges as to the theory of the state, it is error to refuse an instruction covering the theory of the accused. Jackson v. Commonwealth, 96 Va 107, 30 SE 452.

Washington. State v. Gohn, 161 Wash 177, 296 P 826.

court to fail to give equal stress to the contentions of the state and the defendant. This does not necessarily mean that the statements of the opposing parties be of equal length. But there is a lack of equal stress when the state's contentions are given at great length and in detail, while, on the other hand, the defendant's contentions are given in very brief, general terms, as though he had offered no evidence at all.[58] The charge should set forth the converse of the instructions given for the state on the principal fact.[59] The court may instruct upon all theories of the defense, though they may necessarily conflict,[60] but he need not tell the jury that the defenses are inconsistent.[61]

The instruction should be given though the evidence in support of the theory is slight,[62] and is produced by the party opposed to the party requesting the instruction.[63] The instruction should cover contentions made and argued before the jury,[64] and the theory must be presented pertinently, plainly, and affirmatively.[65]

(2) Illustrations. *Insanity.* If insanity be set up as a defense, and there is evidence submitted in support of it, the

[58] State v. Kluckhohn, 243 NC 306, 90 SE2d 768.

[59] **Arkansas.** Stockton v. State, 174 Ark 472, 295 SW 397. But see Ring v. State, 154 Ark 250, 242 SW 561.

Kentucky. Tyree v. Commonwealth, 253 Ky 823, 70 SW2d 930.

Missouri. State v. Cantrell, 290 Mo 232, 234 SW 800; State v. Santino (Mo), 186 SW 976; State v. Johnson (Mo), 234 SW 794; State v. Majors (Mo), 237 SW 486.

Texas. Kilpatrick v. State, 80 TexCr 391, 189 SW 267; Cammack v. State, 102 TexCr 579, 278 SW 1105; Edwards v. State, 125 TexCr 427, 68 SW2d 1049.

[60] Stevens & Elkins v. Lewis, Wilson, Hicks Co., 168 Ky 648, 182 SW 840; Carver v. State, 36 TexCr 552, 38 SW 183.

[61] Yarbrough v. State, 13 OklCr 140, 162 P 678.

[62] **Louisiana.** State v. Robichaux, 165 La 497, 115 S 728.

Missouri. State v. Lambert, 318 Mo 705, 300 SW 707.

Texas. Ladwig v. State, 40 TexCr 585, 51 SW 390; Burkhalter v. State, 79 TexCr 336, 184 SW 221; Crispi v. State, 90 TexCr 621, 237 SW 263.

West Virginia. State v. Manns, 48 WVa 480, 37 SE 613.

[63] **Kentucky.** It is immaterial which side the evidence comes from in support of the defense. Vick v. Commonwealth, 236 Ky 436, 33 SW2d 297.

Oklahoma. Heath v. State, 49 OklCr 250, 293 P 1111.

Texas. Stapleton v. State, 56 TexCr 422, 120 SW 866.

See Spears v. State, 103 TexCr 474, 281 SW 555 (where a requested charge directing acquittal was based solely on consideration of the state's case, ignoring the evidence adduced on defendant's side).

[64] **Federal.** Kearns v. United States, 27 F2d 854.

California. People v. Doble (Cal App), 265 P 184.

Georgia. Autrey v. State, 24 GaApp 414, 100 SE 782.

[65] Smith v. State, 89 TexCr 606, 232 SW 811; Franklin v. State, 106 TexCr 285, 292 SW 222; Dodd v. State, 117 TexCr 495, 35 SW2d 168.

court commits error in refusing to charge the jury with respect to this defense.[66]

Principal and accomplice. Where the indictment charges that the defendant alone committed the offense, it is error to instruct the jury that conviction is authorized if the accused aided and abetted the commission of the crime.[67] Where the defendant is charged as a principal, the instruction should point out plainly what acts or conduct constitute the defendant a principal.[68] Where accomplice's testimony is used, it is the right of the accused to have the jury told of the necessity of corroboration of such testimony.[69]

Motive and intent. Where the evidence shows facts tending to show absence of motive, the jury may be told that absence of motive is a circumstance in favor of accused.[70] Although motive is not a necessary element of murder, where the identity of the killer is not shown by direct evidence, it is the court's duty to instruct the jury to consider the evidence on motive, in determining the guilt or innocence of the accused. But if there is direct evidence of murder, and guilt or innocence depends upon the credibility of witnesses, the court need not charge upon

[66] **Illinois.** People v. Moor, 355 Ill 393, 189 NE 318.

Pennsylvania. Commonwealth v. Williams, 309 Pa 529, 164 A 532.

Virginia. Wessels v. Commonwealth, 164 Va 664, 180 SE 419.

[67] Tillman v. Commonwealth, 259 Ky 73, 82 SW2d 222; State v. Doty, 94 OhSt 258, 113 NE 811.

[68] Ellison v. Commonwealth, 130 Va 748, 107 SE 697.

An instruction is sufficient which tells the jury that one who is present at the time and place an offense is actually committed, and, knowing the unlawful intent and purpose of the person committing the offense, either participates in the commission or encourages the person engaged in it knowing his unlawful purpose and intent, by words, signs, deeds, or acts, is a principal, and alike guilty with the one committing the offense. Monday v. State, 90 TexCr 8, 232 SW 831.

[69] **Federal.** Davis v. United States, 24 F2d 814; Nash v. U. S., 54 F2d 1006.

California. People v. Swoape, 75 CalApp 404, 242 P 1067.

Kentucky. Baker v. Commonwealth, 212 Ky 50, 278 SW 163.

Montana. State v. Smith, 75 Mont 22, 241 P 522.

Ohio. State v. Lehr, 97 OhSt 280, 119 NE 730; State v. Reichert, 111 OhSt 698, 146 NE 386.

Texas. Davidson v. State, 84 Tex Cr 433, 208 SW 664; Ice v. State, 84 TexCr 509, 208 SW 343; Childress v. State, 85 TexCr 22, 210 SW 193; Cone v. State, 86 TexCr 291, 216 SW 190; Hornbuckle v. State, 86 TexCr 352, 216 SW 880; Scales v. State, 86 TexCr 433, 217 SW 149; Newton v. State, 86 TexCr 508, 217 SW 939; Clark v. State, 86 TexCr 585, 218 SW 366; Stovall v. State, 104 TexCr 210, 283 SW 850; Turner v. State, 117 TexCr 434, 37 SW2d 747.

Utah. State v. McCurtain, 52 Utah 63, 172 P 481.

[70] State v. Johnson, 139 La 829, 72 S 370.

motive.[71] It is not error to fail to charge on motive which is not made an issue in the case.[72]

Intent need not be charged where the statute makes the commission of the act an offense.[73] As the converse of instructions given for the state in a murder prosecution where the defense was that the shooting was an accident, and intent was the main issue in the case, it was held error to refuse a requested instruction of the defendant that his defense was that the shooting was accidental and that the prosecution carried the burden of proving beyond reasonable doubt that it was intentional.[74] In a liquor prosecution for transporting, the defendant's contention that he did not know the liquor was in his car should be submitted to the jury as a proper instruction.[75]

Identification. A defense based largely on lack of identification of the accused, where he was identified by only one of four eye-witnesses, is sufficient to entitle the defendant to an instruction thereon.[76]

Alibi. Where the defense was alibi in a prosecution for robbing a bank, it was error to refuse an instruction that the jury should acquit if one other than defendant entered the bank and committed the robbery, even though the defendant knew of the intended robbery; the theory of the prosecution being that the defendant himself entered the bank and committed the robbery, and an instruction having been given pursuant to the state's theory.[77]

Offense charged. An instruction on an offense different from that for which the defendant is on trial is error.[78]

§ 54. Definition of terms in civil cases.

Where technical terms, or terms which have acquired a peculiar significance in the law, are employed in instructions, the court should point out their meaning to the jury, unless the meaning is already clear.

Where words and expressions are used in a legal or technical sense differing from the common acceptance of the term, an in-

[71] State v. Lancaster, 167 OhSt 391, 149 NE2d 157.

[72] Commonwealth v. Gates, 392 Pa 557, 141 A2d 219.

[73] State v. Conley, 280 Mo 21, 217 SW 29; State v. Dehn, 126 Wis 168, 105 NW 795; State ex rel. Conlin v. Wausau, 137 Wis 311, 118 NW 810; State v. Welch, 145 Wis 86, 129 NW 656, 32 LRA (N. S.) 746.

[74] State v. Markel, 336 Mo 129, 77 SW2d 112.

[75] Carr v. State, 122 TexCr 392, 56 SW2d 183.

[76] People v. LeMar, 358 Ill 58, 192 NE 703.

[77] State v. Ledbetter, 332 Mo 225, 58 SW2d 453.

[78] State v. Barbour, 142 Kan 200, 46 P2d 841.

struction defining their meaning is proper and in some cases essential, for it is not to be expected that the untrained minds of jurors will grasp the meaning of legal terms without explanation.[79] Thus an instruction that the plaintiff is required to establish all the material allegations of his petition is open to objection as leaving the jury to decide for themselves what is meant by the word "material."[80] So in an action against a city for damage to lots in consequence of a faulty sewer, it is error to submit to

[79] **Federal.** Buckeye Cotton Oil Co. v. Sloan, 163 CCA 44, 250 F 712 (ratification of slander).

Alabama. A requested charge explanatory of charges given at the request of the other party should not be refused. Sloss-Sheffield Steel & Iron Co. v. Milbra, 173 Ala 658, 55 S 890.

California. Young v. Southern Pac. Co., 182 Cal 369, 190 P 36 ("proper warning" at railroad crossing); Burrell v. Southern California Canning Co., 35 CalApp 162, 169 P 405 (perfectly constructed mechanically).

District of Columbia. Thomas v. Presbrey, 5 AppDC 217.

Georgia. The word "approved" used in an instruction on the degree of skill required of a surgeon, a statement that such skill includes an ability to perform an operation in an "approved" way, should be defined. Pace v. Cochran, 144 Ga 261, 86 SE 934.

An elaborate definition of circumstantial evidence is not demanded. Pope v. Seaboard Air Line Ry., 21 GaApp 251, 94 SE 311.

Illinois. Momence Stone Co. v. Turrell, 205 Ill 515, 68 NE 1078; Sparr v. Southern Pac. Co., 220 IllApp 180 (in good merchantable shipping condition).

Iowa. Overhouser v. American Cereal Co., 128 Ia 580, 105 NW 113.

Kentucky. Kroger Groc. & Baking Co. v. Hamlin, 193 Ky 116, 235 SW 4.

Michigan. Barkow v. Donovan Wire & Iron Co., 190 Mich 563, 157 NW 55.

Missouri. Roberts v. Piedmont, 166 MoApp 1, 148 SW 119 (great degree of care); Foy v. United Rys. Co., 205 MoApp 521, 226 SW 325; Trepp v. State Nat. Bank, 315 Mo 883, 289 SW 540; Anderson v. American Sash & Door Co. (MoApp), 182 SW 819; Strother v. Metropolitan Street Ry. Co. (MoApp), 183 SW 657; Mullenix v. Briant (MoApp), 198 SW 90 (statutory offense of common-law assault and battery); Kepley v. Park Circuit & Realty Co. (MoApp), 200 SW 750 (wrongful and without justifiable cause); Scheidel Western X-Ray Co. v. Bacon (MoApp), 201 SW 916; Nicholson v. Missouri Pacific R. Co. (MoApp), 297 SW 996 (sufficient warning).

Prompt and proper treatment by physician should be defined. Dunnagan v. Briggs, 170 MoApp 691, 154 SW 428.

Ohio. Perrysburg & T. Transp. Co. v. Gilchrist, 2 OhCirCt (N. S.) 505, 14 OhCirDec 165 (dwelling-house and residence).

Texas. Texas & N. O. R. Co. v. Harrington (TexCivApp), 209 SW 685 ("crossing" and "view of crossing" in action for crossing injury); Peters v. Graham (TexCivApp), 234 SW 566; Robertson v. Holden (Tex ComApp), 1 SW2d 570, revg. (Tex CivApp), 297 SW 327.

Washington. Hub Clothing Co. v. Seattle, 117 Wash 251, 201 P 6 (reasonable inspection).

Wisconsin. Yerkes v. Northern Pacific Ry. Co., 112 Wis 184, 88 NW 33, 88 AmSt 961; Mahoney v. Kennedy, 188 Wis 30, 205 NW 407; Ulrich v. Schwarz, 199 Wis 24, 225 NW 195, 63 ALR 886; Bump v. Voights, 212 Wis 256, 249 NW 508.

[80] Williams v. Iowa Cent. Ry. Co., 121 Ia 270, 96 NW 774.

the jury the question of plaintiff's ownership of the land without showing what constitutes ownership or title.[81] The court should give an instruction defining "negligence" and "ordinary care" as those terms are used in the charge.[82]

The following terms should be defined by the judge when used in the charge: "independent contractor,"[83] "unavoidable accident,"[84] "last clear chance,"[84a] "undue influence,"[85] "more than ordinarily dangerous as night-time crossing,"[86] "permanently disabled,"[87] "contributory negligence,"[88] "apparent authority,"[89] "negative testimony,"[90] "new and independent cause,"[91] "safety,"[92] "exemplary damages,"[93] "timely," where the charge declared an engineer's duty to give timely warning,[94] "preponderance of evidence," used in instruction in connection with burden of proof,[95] "acting within scope of their authority,"[96] "authorized agent,"[97] "community property."[98]

[81] McArthur v. Dayton, 19 KyL 882, 42 SW 343.

[82] **Alabama.** Brilliant Coal Co. v. Barton, 203 Ala 38, 81 S 828.

Kentucky. Chesapeake & O. Ry. Co. v. Warnock, 150 Ky 74, 150 SW 29; South Covington & C. Street Ry. Co. v. Nelson, 28 KyL 287, 89 SW 200. But see Western Union Tel. Co. v. Brasher, 136 Ky 485, 124 SW 788.

Missouri. Raybourn v. Phillips, 160 MoApp 534, 140 SW 977; Malone v. St. Louis-San Francisco Ry. Co., 202 MoApp 489, 213 SW 864.

Ohio. Breuer v. Frank, 3 ONP (N.S.) 581, 16 OhDec 231.

Texas. Cleburne Elec. & Gas Co. v. McCoy (TexCivApp), 149 SW 534.

"Contributory negligence" need not be defined where that term is not used in the charge. Baker v. Sparks (TexCivApp), 234 SW 1109.

[83] Overhouser v. American Cereal Co., 128 Ia 580, 105 NW 113.

[84] Leland v. Empire Engineering Co., 135 Md 208, 108 A 570; Knabb v. Scherer, 45 OhApp 535, 187 NE 574, 39 OLR 234.

[84a] Rooney v. Levinson, 95 Conn 466, 111 A 794.

[85] Gwinn v. Hobbs, 72 IndApp 439, 118 NE 155.

[86] Missouri, K. & T. R. Co. v. Long (TexComApp), 299 SW 854, revg. 293 SW 184.

[87] Commonwealth Life Ins. Co. v. Ovesen, 257 Ky 622, 78 SW2d 745.

[88] Miller v. Pettigrew (TexCiv App), 10 SW2d 168.

[89] Emerson - Brantingham Implement Co. v. Roquemore (TexCiv App), 214 SW 679.

[90] Suick v. Krom, 171 Wis 254, 177 NW 20.

[91] Greer v. Thaman (TexCom App), 55 SW2d 519.

[92] Withey v. Hammond Lbr. Co., 140 CalApp 587, 35 P2d 1080.

[93] **Michigan.** Hink v. Sherman, 164 Mich 352, 129 NW 732.

Mississippi. But see St. Louis & S. F. R. Co. v. Moore, 101 Miss 768, 58 S 471, 39 LRA (N. S.) 978, AnnCas 1914B, 597.

Missouri. Distler v. Missouri Pacific R. Co., 163 MoApp 674, 147 SW 518.

[94] Ward v. Missouri Pacific Ry. Co., 311 Mo 92, 277 SW 908.

[95] Head v. M. E. Leming Lbr. Co. (Mo), 281 SW 441.

In attempting to define "preponderance of the evidence," an instruction that mentions what is not "reasonable doubt" or "clear and convincing evidence" is error, since it would certainly confuse and mislead a jury. Pickering v. Cirell, 163 OhSt 1, 125 NE2d 185.

[96] Humphreys v. St. Louis-San Francisco Ry. Co. (MoApp), 286 SW 738.

It is better practice to use plain English rather than classical language in charging the jury. Latin phrases when used should be explained. But it is not error, where a charge, although using an untranslated Latin phrase [*quantum meruit*], plainly informs the jury of the issues and explains the applicable law in ordinary parlance.[99]

But where ordinary words and terms are used in the sense in which they are commonly understood, it is unnecessary to define or explain them.[1] The courts have placed in this category such words and expressions as "diligent inquiry,"[2] "direct and proximate result,"[3] "proximate cause,"[4] "burden of proof,"[5] "preponderance of evidence,"[6] "misrepresentation,"[7] "execute,"

[97] Bender Motor Co. v. Rowan (TexCivApp), 33 SW2d 263.

[98] Hutson v. Bassett (TexCiv App), 35 SW2d 231.

[99] City of Summerville v. Sellers, 94 GaApp 152, 94 SE2d 69.

[1] **Georgia.** Jackson v. Georgia R. & Banking Co., 7 GaApp 644, 67 SE 898.

Missouri. Cottrill v. Krum, 100 Mo 397, 13 SW 753, 18 AmSt 549; Clonts v. Laclede Gas Light Co., 160 MoApp 456, 140 SW 970.

Ohio. Ross v. Stewart, 15 OhApp 339, 32 OhCApp 217 (prima facie); Watkins v. Linver, 48 OhApp 268, 193 NE 77, 1 OhO 283 (sole negligence); Platers Supply Co. v. General Supply Co., 1 OLA 612 (merchantable).

Texas. Johnson v. W. H. Goolsby Lbr. Co. (TexCivApp), 121 SW 883; Stanton v. Boyd (TexCivApp), 299 SW 321.

Utah. Geary v. Cain, 69 Utah 340, 255 P 416.

[2] Cottrill v. Krum, 100 Mo 397, 13 SW 753, 18 AmSt 549.

[3] Rand v. Butte Elec. R. Co., 40 Mont 398, 107 P 87.

[4] **Federal.** Jasper County Lbr. Co. v. McNeill, 76 F2d 207. But see Delaware & Hudson Co. v. Ketz, 147 CCA 101, 233 F 31.

Illinois. Kleet v. Southern Illinois Coal & Coke Co., 197 IllApp 243; Bagaini v. Donk Bros. Coal & Coke Co., 199 IllApp 76.

Kentucky. Louisville v. Arrowsmith, 145 Ky 498, 140 SW 1022.

Missouri. Turnbow v. Dunham, 272 Mo 53, 197 SW 103; Wolters v. Chicago & A. R. Co. (MoApp), 193 SW 877; Mitchell v. Violette (Mo App), 203 SW 218.

Texas. Wichita Falls, R. & F. W. R. Co. v. Mendoza (TexCivApp), 240 SW 570 (should be given on request).

[5] Holmes v. Protected Home Circle, 199 MoApp 528, 204 SW 202; Miller v. Firemens Ins. Co., 206 MoApp 475, 229 SW 261; Thompson v. Business Mens Acc. Assn. (Mo App), 231 SW 1049; Stine Oil & Gas Co. v. English (TexCivApp), 185 SW 1009.

[6] **California.** Franklin v. Visalia Elec. R. Co., 21 CalApp 270, 131 P 776.

Colorado. Brunton v. Stapleton, 65 Colo 576, 179 P 815.

Delaware. Wilmington City Ry. Co. v. Truman, 7 Penn. (23 Del) 197, 72 A 983.

Georgia. Day v. Bank of Sparks, 26 GaApp 718, 107 SE 272.

Illinois. Chicago City R. Co. v. Kastrzewa, 141 IllApp 10.

Missouri. Tucker v. Carter (Mo App), 211 SW 138.

Montana. Rand v. Butte Elec. Ry. Co., 40 Mont 398, 107 P 87.

Oklahoma. Cushing v. Bay, 82 Okl 140, 198 P 877.

Texas. Galveston, H. & S. A. R. Co. v. Blumberg (TexCivApp), 227 SW 734; American Fidelity & Casualty Co., Inc. v. Williams (TexCiv App), 34 SW2d 396.

as applied to contracts,[8] "proper control," as applied to automobile,[9] "gross" and "slight," in reference to negligence,[10] "U turn" in automobile collision case,[11] "common laborer,"[12] "consideration,"[13] "reasonable proximity thereto,"[14] "scope of employment,"[15] "agency,"[16] "partnership,"[17] "bona fide controversy,"[18] "tender,"[19] "unreasonable, highly dangerous, and negligent speed,"[20] "intersection,"[21] "dangerous,"[22] "merchantable title,"[23] "paramount right of way over intersection,"[24] "frequently,"[25] "intrinsic value,"[26] "acquiescence,"[27] "passenger,"[28] "imminent peril,"[29] "inevitable accident,"[30] "efficient and procuring cause,"[31] "society, assistance, and domestic services,"[32] "bred,"[33] "habitual drunkard,"[34] "jimmies, willies, delirium tremens,"[35] "deliver" or "delivery,"[36] "market value,"[37] "proper

[7] Zackwik v. Hanover Fire Ins. Co. (MoApp), 225 SW 135; Hester v. Shuster (TexCivApp), 234 SW 713.

[8] W. T. Rawleigh Co. v. Snider, 207 Ind 686, 194 NE 356.

[9] Cassinelli v. Bennen, 110 CalApp 722, 294 P2d 748; Hiteshue v. Robinson, 170 Wash 272, 16 P2d 610.

[10] Monasmith v. Cosden Oil Co., 124 Neb 327, 246 NW 623.

[11] Szuch v. Ni Sun Lines, 332 Mo 469, 58 SW2d 471.

[12] Boettger v. Scherpe & Koken Architectural Iron Co., 136 Mo 531, 38 SW 298.

[13] **Indiana.** First Nat. Bank v. Garner, 187 Ind 391, 118 NE 813, 119 NE 711.

Iowa. Babb v. Herring Motor Co., 193 Ia 794, 186 NW 672.

Kentucky. Farmers Bank v. Birk, 179 Ky 761, 201 SW 315.

[14] Oliver v. Forney Cotton Oil & Ginning Co. (TexCivApp), 226 SW 1094.

[15] Stevenson v. A. B. C. Fireproof Warehouse Co. (MoApp), 6 SW2d 676.

[16] Western Union Tel. Co. v. Ford, 10 GaApp 606, 74 SE 70.

[17] Brown v. Cassidy-Southwestern Comm. Co. (TexCivApp), 225 SW 833.

[18] Bay Lbr. Co. v. Snelling (Tex CivApp), 205 SW 763.

[19] Shockley v. Booker (MoApp), 204 SW 569.

[20] Hoagland v. Kansas City Rys. Co. (MoApp), 209 SW 569.

[21] Dauber v. Josephson, 209 Mo App 531, 237 SW 149.

[22] Gilbert v. Hilliard (MoApp), 222 SW 1027.

[23] Sims v. Spelman, 209 MoApp 186, 232 SW 1071; Platers Supply Co. v. General Supply Co., 1 OLA 612.

[24] Malone v. Kansas City Rys. Co. (MoApp), 232 SW 782.

[25] Rigley v. Prior, 290 Mo 10, 233 SW 828 (sounding of bell or whistle of locomotive).

[26] Morrow v. Franklin, 289 Mo 549, 233 SW 224.

[27] West Side Oil Co. v. McDorman (TexCivApp), 244 SW 167.

[28] Looff v. Kansas City Rys. Co. (Mo), 246 SW 578; Beckner v. Kansas City Rys. Co. (MoApp), 232 SW 745.

[29] Bryant v. Kansas City Rys. Co., 286 Mo 342, 228 SW 472.

[30] Van Tresse v. Kansas City Public Service Co., 222 MoApp 671, 4 SW2d 1095.

[31] Lumsden v. Jones (TexCiv App), 227 SW 358.

[32] Baldwin v. Kansas City Rys. Co. (MoApp), 231 SW 280.

[32] Lester v. Hugley (MoApp), 230 SW 355 (bred to registered bull).

[34] Runkle v. Southern Pacific Milling Co., 184 Cal 714, 195 P 398, 16 ALR 275.

[35] Cavannaugh v. North American Union (MoApp), 2 SW2d 172.

insulation,"[38] "fact,"[39] "business portions of the city,"[40] "substantially,"[41] "substantial performance,"[42] "high and immoderate rate of speed,"[43] "express consent" and "implied consent,"[44] "reputation,"[45] "suffer or permit,"[46] "efficient and procuring cause,"[47] "bona fide holder,"[48] "intoxicated,"[49] "ingress" and "egress"[50] "proper inspection,"[51] "permanent," as referring to disability under insurance policy,[52] "under the influence of liquor,"[53] "reasonable time,"[54] "actual value,"[55] "man of ordinary prudence," "reasonable man,"[56] "fast" with regard to speed of motor vehicle.[57]

It has been held unnecessary to explain what is meant by "adverse" possession of realty, as the word in itself imports a "hostile and distinct" possession.[58] Further, in an action for an illegal arrest and imprisonment, an instruction telling the jury that if they believed the defendant "unlawfully and oppressively arrested the plaintiff in the night-time and confined him in the city jail," then they should find for the plaintiff, was held not objectionable where other instructions informed the

[36] Jameson v. Flournoy, 76 Okl 227, 184 P 910. But see Archambeau v. Edmunson, 87 Or 476, 171 P 186.

[37] Quanah, A. & P. R. Co. v. Stearns (TexCivApp), 206 SW 857.

[38] Fidelity & Casualty Co. v. Cedar Valley Elec. Co., 187 Ia 1014, 174 NW 709.

[39] In re Nutt's Estate, 181 Cal 522, 185 P 393 (suppression of facts).

[40] Varley v. Columbia Taxicab Co. (Mo), 240 SW 218.

[41] Carrollton Monument Co. v. Geary, 210 MoApp 45, 240 SW 506; Moore v. McCutchen (MoApp), 190 SW 350; Westchester Fire Ins. Co. v. Dickey (TexCivApp), 246 SW 730.

[42] Weed v. Idaho Copper Co., 51 Idaho 737, 10 P2d 613.

[43] El Paso Elec. Co. v. Portillo (TexCivApp), 45 SW2d 404.

[44] McQuillen v. Meyers, 213 Ia 1366, 241 NW 442.

[45] Pitman v. Drown, 176 Ky 263, 195 SW 815.

[46] Kentucky Utilities Co. v. McCarty's Admr., 170 Ky 543, 186 SW 150 (employment of child).

[47] Ramsey v. Gibson (TexCiv App), 185 SW 1025.

[48] King v. Heilig, 203 IllApp 117.

[49] Mutual Life Ins. Co. v. Johnson, 64 Okl 222, 166 P 1074.

[50] Wegner v. Kelly, 182 Ia 259, 165 NW 449.

[51] Brogan v. Union Trac. Co., 76 WVa 698, 86 SE 753 (car by motorman).

[52] Porter v. Equitable Life Assur. Soc. (MoApp), 71 SW2d 766.

[53] New York Cent. R. Co. v. De Leury, 100 IndApp 140, 192 NE 125.

[54] Bettoki v. Northwestern Coal & Min. Co. (MoApp), 180 SW 1021; Kurth v. Morgan (MoApp), 277 SW 50.

[55] Interstate Forwarding Co. v. McCabe (TexCivApp), 285 SW 920.

[56] Kelley v. Hodge Transp. System, 197 Cal 598, 242 P 76.

[57] Branch v. Mashkin Freight Lines, Inc., 134 Conn 278, 57 A2d 136.

[58] **Kentucky.** But see Louisville Cooperage Co. v. Collins, 212 Ky 819, 280 SW 137.

Michigan. Miller v. Beck, 68 Mich 76, 35 NW 899.

Texas. But see Bowles v. Watson (TexCivApp), 245 SW 120.

jury when an arrest without warrant might be made and pointed out what was meant by an oppressive arrest.[59]

There is obvious lack of agreement among the courts in distinguishing common terms from technical terms. Aside from this, one is compelled to remark that some courts are surely mistaken in declaring that terms such as "consideration" and "proximate cause" are commonly understood. Professors of Contracts and Torts hesitate to define the terms, but it seems it is unnecessary to define or explain these terms to jury laymen. Perhaps the judges, realizing the difficulty, hesitate to attempt, and throw the problem into the laps of the jurors.

§ 55. Definition of terms in criminal cases.

The rule as to the definition of terms in instructions is the same in criminal prosecutions as in civil cases (see § 54).

The court in the trial of a criminal case is required to define technical words and expressions, but not words and expressions which are of ordinary understanding and self-explanatory.[60]

Among other things it has been held the duty of the court to define such terms as "corpus delicti,"[61] "wilful,"[62] "successfully impeached,"[63] "accomplice,"[64] "accessory before the fact,"[65]

[59] White v. Madison, 16 Okl 212, 83 P 798.

[60] **Georgia.** Roberts v. State, 114 Ga 450, 40 SE 297.

Idaho. State v. Marks, 45 Idaho 92, 260 P 697.

Iowa. State v. McKinnon, 158 Ia 619, 138 NW 523.

Missouri. State v. McGuire, 193 Mo 215, 91 SW 939.

A "conspiracy" is a combination of two or more persons by concerted action to accomplish criminal purpose. A "common design" is a community of intention between two or more persons to do an unlawful act. State v. Hill, 273 Mo 329, 201 SW 58.

It is not necessary to define the word "robbery," where there was a general charge of murder, though the killing in question was incident to a robbery or an attempt to rob. State v. Peak, 292 Mo 249, 237 SW 466.

North Carolina. State v. Clark, 134 NC 698, 47 SE 36.

Texas. Compere v. State, 107 Tex Cr 95, 295 SW 614.

Vermont. The practice of the court of reading to the jury in its charge definitions of a word given in dictionaries is not to be commended. State v. Rivers, 84 Vt 154, 78 A 786.

Washington. The word "sabotage" is of somewhat recent coinage, having a common and well-understood meaning, and the court may define its meaning as commonly understood, without testimony as to its meaning. State v. McLennen, 116 Wash 612, 200 P 319.

West Virginia. State v. McDonie, 89 WVa 185, 109 SE 710.

[61] People v. Frey, 165 Cal 140, 131 P 127.

[62] Windon v. State, 56 TexCr 198, 119 SW 309.

[63] People v. Blevins, 251 Ill 381, 96 NE 214, AnnCas 1912C, 451.

[64] Spencer v. State, 128 Ark 452, 194 SW 863.

[65] Williams v. State, 128 Miss 271, 90 S 886.

An instruction should be requested distinguishing between accessories before and after the fact. Commonwealth v. Gray, 72 PaSuperCt 287.

"implied malice,"[66] "proper identification,"[67] "wilfully" and "deliberately,"[68] "aiding" and "abetting,"[69] "prima facie evidence,"[70] "knowingly,"[71] "inciting,"[72] "provoking a difficulty,"[73] "constructive possession,"[74] "solvent,"[75] "res gestae,"[76] "heat of passion,"[77] "unlawful attack,"[78] "robbery,"[79] and "self-defense."[80]

It has been held unnecessary to define "preponderance of the evidence,"[81] "corroborate,"[82] "improper conduct,"[83] "assault,"[84] "reckless," when used in charge in a prosecution for murder,[85] "anger,"[86] "attempt,"[87] "overt,"[88] "prostitution,"[89] "drunkeness,"[90] "credibility,"[91] "prima facie,"[92] "fraudulently,"[93] "penetration,"[94] "premises,"[95] "theft,"[96] "lucid interval,"[97]

[66] Connell v. State, 46 TexCr 259, 81 SW 746.

[67] Commonwealth v. Ronello, 251 Pa 329, 96 A 826.

[68] State v. Garrett, 276 Mo 302, 207 SW 784; Holt v. State, 48 TexCr 559, 89 SW 838; Howard v. State, 86 TexCr 288, 216 SW 168 (obstruction of road); Stephens v. State, 90 TexCr 245, 234 SW 540.

[69] State v. Enanno, 96 Conn 420, 114 A 386. But see People v. Wong Hing, 176 Cal 699, 169 P 357.

[70] People v. Lawson, 351 Ill 457, 184 NE 606; Nelson v. State, 14 OklCr 153, 168 P 460.

[71] People v. Stewart, 68 CalApp 621, 230 P 221.

[72] Ellison v. Commonwealth, 130 Va 748, 107 SE 697.

[73] Vann v. State, 45 TexCr 434, 77 SW 813, 108 AmSt 961.

[74] People v. Csontos, 275 Ill 402, 114 NE 123.

[75] People v. Roth, 137 CalApp 592, 31 P2d 813.

[76] People v. Thomas, 135 CalApp 654, 27 P2d 765.

[77] State v. Skaggs, 159 Mo 581, 60 SW 1048. But see State v. Gore, 292 Mo 173, 237 SW 993.

[78] Lewellen v. State, 104 TexCr 550, 286 SW 224.

[79] Napier v. Commonwealth, 236 Ky 147, 32 SW2d 743.

[80] People v. Doody, 343 Ill 194, 175 NE 436.

[81] State v. Felker, 27 Mont 451, 71 P 668.

[82] State v. Affronti, 292 Mo 53, 238 SW 106; State v. Tedder, 294 Mo 390, 242 SW 889; Buckley v. State, 78 TexCr 378, 181 SW 729; Still v. State (TexCr), 50 SW 355.

[83] State v. Barrington, 198 Mo 23, 95 SW 235.

[84] State v. Lewis, 52 Mont 495, 159 P 415. See also Simpson v. State, 87 TexCr 277, 220 SW 777.

[85] Pelfrey v. Commonwealth, 247 Ky 484, 57 SW2d 474.

[86] Robinson v. State (TexCr), 63 SW 869.

[87] West v. People, 60 Colo 488, 156 P 137; State v. Bersch, 276 Mo 397, 207 SW 809.

[88] State v. Enanno, 96 Conn 420, 114 A 386.

[89] Tores v. State (TexCr), 63 SW 880.

[90] **Arkansas.** Simmons v. State, 149 Ark 348, 232 SW 597.
Missouri. State v. Bobbst, 269 Mo 214, 190 SW 257.
Texas. Wood v. State, 120 TexCr 144, 70 SW2d 436.

[91] Barber v. State, 64 TexCr 96, 142 SW 577.

[92] Balfe v. People, 66 Colo 94, 179 P 137.

[93] Sebree v. Commonwealth, 190 Ky 164, 227 SW 152.

[94] State v. Pettit, 33 Idaho 326, 193 P 1015 (prosecution for statutory rape).

[95] Traylor v. State, 91 TexCr 262, 239 SW 982.

[96] Bloch v. United States, 261 F 321; Pearce v. State, 33 OklCr 273, 243 P 761 (to steal).

[97] Montgomery v. State, 68 TexCr 78, 151 SW 813.

"felonious,"[98] "sale,"[99] "concealment,"[1] "transport,"[2] "operate," and "intoxicated condition," in prosecution for operating an automobile while intoxicated,[3] "money,"[4] "self-defense,"[5] "proximate cause,"[6] "wilful, wanton, or wantonness,"[7] "wilful, deliberate, and premeditated," in murder prosecution,[8] "charred," in arson prosecution,[9] and "accidental," where there was an issue as to accidental killing.[10]

It is the duty of the court, in plain and concise language, to define the offense accurately and tell the jury the essential facts necessary to a conviction, rather than to refer them to the indictment to determine what they must find in order to convict.[11] The court may describe the offense in the language of the statute,[12] though a charge will ordinarily suffice which gives the substance of the statute.[13] It is not necessary to give

[98] Iowa. State v. Penney, 113 Ia 691, 84 NW 509.

Kentucky. Metcalfe v. Commonwealth, 27 KyL 704, 86 SW 534.

Missouri. State v. Brown, 104 Mo 365, 16 SW 406; State v. Rowland, 174 Mo 373, 74 SW 622.

[99] Young v. State, 92 TexCr 277, 243 SW 472; Nelson v. State, 117 TexCr 253, 35 SW2d 443. But see State v. Brown (MoApp), 193 SW 902 (should instruct what would constitute sale of intoxicating liquor).

[1] State v. McDonald, 107 Kan 568, 193 P 179.

[2] Crowley v. State, 92 TexCr 103, 242 SW 472 (intoxicating liquor).

[3] State v. Johnson (Mo), 55 SW2d 967.

[4] Guyon v. State, 89 TexCr 287, 230 SW 408.

[5] State v. Bailey, 190 Mo 257, 88 SW 733. But see Chappell v. State, 15 AlaApp 227, 73 S 134.

[6] People v. Halbert, 78 CalApp 598, 248 P 969.

[7] People v. Halbert, 78 CalApp 598, 248 P 969.

[8] Commonwealth v. Robinson, 305 Pa 302, 157 A 689.

[9] State v. Witham (Mo), 281 SW 32.

[10] Jackson v. State, 103 TexCr 252, 280 SW 808.

[11] Illinois. Christie v. People, 206 Ill 337, 69 NE 33.

Missouri. State v. Brown, 104 Mo 365, 16 SW 406; State v. Scott, 109 Mo 226, 19 SW 89

New Mexico. Territory v. Baca, 11 NM 559, 71 P 460.

[12] Arkansas. There was no prejudice in an instruction defining an accessory after the fact to employ, in addition to the language of the statute, the words "shelters, receives, relieves, comforts, or assists the felon," as employed in the common-law definition. Higgins v. State, 136 Ark 284, 206 SW 440.

California. People v. Fortch, 13 CalApp 770, 110 P 823; People v. Bernal, 40 CalApp 358, 180 P 825; People v. Owens, 57 CalApp 84, 206 P 473; People v. Anderson, 58 Cal App 267, 208 P 324.

Colorado. Militello v. People, 95 Colo 519, 37 P2d 527.

Iowa. State v. Banoch, 193 Ia 851, 186 NW 436.

Montana. An instruction should follow the language of the statute and state that accessories are those who "advise and encourage" instead of "advise or encourage" the commission of crime. State v. Geddes, 22 Mont 68, 55 P 919.

Nebraska. Alt v. State, 88 Neb 259, 129 NW 432, 35 LRA (N. S.) 1212.

Oklahoma. Smith v. State, 40 OklCr 152, 267 P 682.

Texas. See Stafford v. State, 103 TexCr 304, 280 SW 811.

[13] California. People v. Plum, 88 CalApp 575, 263 P 862, 265 P 322; People v. Hill, 2 CalApp2d 141, 37 P2d 849.

the jury definitions or synonyms of common English words when used in a statute in their ordinary sense.[14] The failure to give the statutory definition of "neglected child" or "dependent child" was an error of omission and not commission, and does not constitute reversible error, in the absence of a request calling the court's attention to the omission.[15]

§ 56. Limitation of purpose of evidence.

Where evidence is admitted for a limited purpose, the court should instruct that the evidence is to be considered for such purpose only and its scope and effect should be explained to the jury.

The rule as stated is well supported by the cases.[16] However, if the limited purpose of the evidence is explained to the jury at

Idaho. State v. Sheehan, 33 Idaho 103, 190 P 71.

Kansas. State v. Ireland, 72 Kan 265, 83 P 1036.

Michigan. People v. Burk, 238 Mich 485, 213 NW 717.

Missouri. State v. Miller, 93 Mo 263, 6 SW 57.

Pennsylvania. Commonwealth v. Habecker, 113 PaSuperCt 335, 173 A 831.

Texas. Adkins v. State, 41 TexCr 577, 56 SW 63.

[14] State v. Rombolo, 91 NJL 560, 103 A 203.

[15] State v. Griffin, 93 OhApp 299, 106 NE2d 668.

[16] **Federal.** Aetna Life Ins. Co. v. Kelley, 70 F2d 589, 93 ALR 471.

Alabama. Birmingham Trust & Sav. Co. v. Currey, 175 Ala 373, 57 S 962, AnnCas 1914D, 81.

An instruction should limit effect of evidence offered by one defendant so as not to make it binding on another defendant. Childers v. Holmes, 207 Ala 382, 92 S 615.

California. Bourne v. Bourne, 43 CalApp 516, 185 P 489; Baldarachi v. Leach, 44 CalApp 603, 186 P 1060.

Connecticut. Barlow Bros. Co. v. Parsons, 73 Conn 696, 49 A 205.

District of Columbia. Simmons v. Brooks, 63 AppDC 293, 72 F2d 86.

Illinois. Chaney v. Baker, 304 Ill 362, 136 NE 804; Chicago City Ry. Co. v. Schuler, 111 IllApp 470; Lowe v. Alton Baking & Catering Co., 158 IllApp 458.

Indiana. Pittsburgh, C., C. & St. L. R. Co. v. Parish, 28 IndApp 189, 62 NE 514, 91 AmSt 120.

Iowa. Kircher v. Larchwood, 120 Ia 578, 95 NW 184; Miller v. Miller, 154 Ia 344, 134 NW 1058.

Kansas. Hammon v. Midland Valley R. Co., 111 Kan 58, 206 P 330; May v. Kansas Power & Light Co., 134 Kan 470, 7 P2d 108.

Kentucky. Louisville Gas Co. v. Kentucky Heating Co., 142 Ky 253, 134 SW 205; South Covington & C. Street Ry. Co. v. Finan's Admx., 153 Ky 340, 155 SW 742.

Michigan. Dalton v. Dregge, 99 Mich 250, 58 NW 57; Dolson v. Central Business Mens Assn., 235 Mich 80, 209 NW 95.

Missouri. State v. Chick, 282 Mo 51, 221 SW 10; McMorrow v. Dowell, 116 MoApp 289, 90 SW 728; Downing v. St. Louis-San Francisco Ry. Co., 220 MoApp 260, 285 SW 791; Citizens Trust Co. v. Tindle (Mo App), 194 SW 1066.

Nebraska. Cleland v. Anderson, 66 Neb 252, 92 NW 306, 96 NW 212, 98 NW 1075, 5 LRA (N. S.) 136.

Ohio. Knight v. State, 54 OhSt 365, 43 NE 995; Barnett v. State, 104 OhSt 298, 135 NE 647, 27 ALR 351; Toledo v. Meinert, 15 OhCirCt

the time of its admission, it is not necessary for the court to later give a limiting instruction.[17]

If evidence is pertinent to some issues but not to others, the court should instruct the jury as to what issue the evidence is referable.[18] Similarly with testimony incompetent for one purpose, but competent for another.[19]

Evidence admitted solely to impeach testimony requires an instruction that such evidence is to be considered for that purpose and no other.[20] So, in an accident case where evidence of

(N. S.) 545, 31 OhCirDec 118; Lake Shore Elec. Ry. Co. v. Mills, 16 Oh CirCt (N. S.) 62, 31 OhCirDec 146.

Vermont. State v. Bolton, 92 Vt 157, 102 A 489.

West Virginia. Welch v. King, 82 WVa 258, 95 SE 844.

[17] Esty v. Walker, 222 MoApp 619, 3 SW2d 744.

[18] Southern Ry. Co. v. Hooper, 16 TennApp 112, 65 SW2d 847.

[19] **Alabama.** Johnson v. Day, 230 Ala 165, 160 S 340.

California. The restricting charge should be requested. People v. Rubalcado, 56 CalApp 440, 205 P 709.

Kansas. Minor v. Atchison, T. & S. F. Ry. Co., 97 Kan 260, 155 P 35.

Kentucky. In a damage action arising from an automobile accident where a physician employed by the defendant's liability insurer testified for the defendant, it was permissible for the cross-examination of the witness to go into his employment by the insurer, but the court properly limited the effect of such cross-examination to the question of credibility of the witness. Carter v. Ward, 251 Ky 774, 65 SW2d 996.

Massachusetts. Ferris v. Ray Taxi Service Co., 259 Mass 401, 156 NE 538.

Missouri. Courter v. G. W. Chase & Son Merc. Co., 222 MoApp 43, 299 SW 622.

Nebraska. Nichols v. Owens Motor Co., 121 Neb 105, 236 NW 169.

Ohio. Clyne v. State, 123 OhSt 234, 174 NE 767.

Tennessee. In an action involving injury by which a boy's eye was shot out by another boy using an air rifle, it was proper for the court to charge the jury at some length that they should not consider as bearing on the reputation of the boy who did the shooting a long line of inquiries respecting specific acts of misconduct on his part, directed at him by the attorney for the plaintiff. Highsaw v. Creech, 17 TennApp 573, 69 SW2d 249.

Texas. Grice v. Herrick Hdw. Co. (TexCivApp), 219 SW 502.

West Virginia. Goodwin v. Tony Pocahontas Coal Co., 88 WVa 49, 106 SE 76.

[20] **Federal.** Woody v. Utah Power & Light Co., 54 F2d 220.

Alabama. Thomas Furnace Co. v. Carroll, 204 Ala 263, 85 S 455.

California. People v. White, 50 Cal2d 428, 325 P2d 985 (not error, in absence of request, for judge to fail to instruct on limiting rebuttal impeachment testimony).

Connecticut. Barlow Bros. Co. v. Parsons, 73 Conn 696, 49 A 205.

Georgia. Griggs v. State, 17 Ga App 301, 86 SE 726.

Illinois. People v. Brewer, 355 Ill 348, 189 NE 321.

Iowa. Law v. Hemmingsen, — Ia —, 89 NW2d 386.

Kentucky. Georgetown Water, Gas, Elec. & Power Co. v. Neale, 137 Ky 197, 125 SW 293; Watson v. Kentucky & I. Bridge & R. Co., 137 Ky 619, 126 SW 146, 129 SW 341.

Missouri. Buckry-Ellis v. Missouri Pacific Ry. Co., 158 MoApp 499, 138 SW 912.

New Hampshire. Connecticut River Power Co. v. Dickinson, 75 NH 353, 74 A 585.

the speed of buses, similar to the one involved in the collision was admitted, the court should have told the jury that the evidence is limited to the question of the credibility of witnesses.[21]

If there are two or more defendants, evidence against one may be admissible, but the other defendants are entitled to an instruction that the effect of such evidence must be limited to the codefendant against whom it is competent.[22] For example, where the owner of an automobile and one who was driver when an accident occurred are sued together, testimony admissible only against the driver should be limited by the court's instructions and the jury told not to consider it as against the owner.[23]

Other illustrations in civil cases: The court should tell the jury that a view of the premises is not evidence, but to help the jury to understand the evidence.[24] And where a statute makes a tax deed prima facie evidence of the regularity of the proceedings from the time the property was appraised by the assessor to the date of the deed, the presumption in favor of the instrument may be overcome by competent evidence and the court should therefore point out to the jury the purpose for which the deed is introduced in evidence and the effect of its introduction.[25] In a libel action evidence of other publications than those upon which the action is based may be admitted, but only for the purpose of determining malice, and the instructions to the jury should limit the evidence to that purpose.[26] So in an action against a city for personal injuries sustained by reason of a defective highway, evidence that a party of men and women had been drinking and were on their way to a roadhouse, "where they expected to get more liquor and have a high time," is competent for the purpose of showing a want of due care on their part, but the purpose and effect of the introduction of such testimony should be limited, under proper instructions from the court, to the question of due care.[27] So, in a breach of promise case the court should tell the jury that evidence of defendant's reputation for wealth in the community was received to show the condition of life denied plaintiff by the breach and

New Jersey. Moloney v. Public Service Ry. Co., 92 NJL 539, 106 A 376.

Texas. Ice v. State, 84 TexCr 509, 208 SW 343; James v. State, 86 TexCr 598, 219 SW 202.

[21] Consolidated Coach Corp. v. Hopkins' Admr., 238 Ky 136, 37 SW2d 1.

[22] Stroud v. Payne, 124 Neb 612, 247 NW 595.

[23] In re Thompson's Estate, 211 Ia 935, 234 NW 841.

[24] Murray v. Vandalia R. Co., 202 IllApp 362.

[25] Ropes v. Minshew, 51 Fla 299, 41 S 538.

[26] Peck v. Coos Bay Times Publishing Co., 122 Or 408, 259 P 307.

[27] Guertin v. Hudson, 71 NH 505, 53 A 736.

not to prove the ability of defendant to pay damages.[28] So also, in an action to recover for an alleged nuisance, where evidence otherwise inadmissible is admitted with the view of showing the unhealthy condition of certain premises, it is proper practice to inform the jury that the testimony is to be considered by them for this purpose alone.[29]

A deposition should receive the same fair and impartial consideration as testimony in open court,[30] but the court should instruct that a deposition may not be considered against a party not notified that it was to be taken.[31] Where the court has stated the issues made by the pleadings, he should go further and tell the jury that the pleadings are not evidence.[32]

The rule is the same as to the indictment in a criminal case. The indictment is a mere formal charge and not any evidence of guilt, but the failure to charge to this effect is not ordinarily reversible error.[33] The charge in a criminal case should make clear that the admission of evidence of other offenses is not to show guilt of the accused of the offense charged, but for other purposes, such as motive,[34] guilty knowledge,[35] credibility,[36] intent,[37] or corroboration.[38] Testimony of a police officer, since deceased, at a preliminary examination should be limited to those defendants present at the preliminary examination.[39]

The right to have the jury limited as to the purpose of evidence may be waived by failure to request the instruction.[40]

[28] Fellers v. Howe, 106 Neb 495, 184 NW 122.

[29] Cohen v. Bellenot (Va), 32 SE 455.

[30] Hershiser v. Chicago, B. & Q. R. Co., 102 Neb 820, 170 NW 177.

[31] Millspaugh v. Missouri Pacific Ry. Co., 138 MoApp 31, 119 SW 993.

[32] Western & A. R. Co. v. Meigs, 74 Ga 857. See also Curtis v. State, 28 GaApp 219, 110 SE 907.

[33] State v. Baker, 136 Mo 74, 37 SW 810; State v. Darrah, 152 Mo 522, 54 SW 226; State v. Hollingsworth, 156 Mo 178, 56 SW 1087.

[34] **Arizona.** Judd v. State, 41 Ariz 176, 16 P2d 720.

Georgia. Manning v. State, 153 Ga 184, 111 SE 658.

Texas. See also McClain v. State, 89 TexCr 48, 229 SW 550.

[35] **Federal.** MacDonald v. United States, 264 F 733.

Arkansas. Norris v. State, 170 Ark 484, 280 SW 398.

Texas. Fry v. State, 86 TexCr 73, 215 SW 560.

[36] Gielow v. State, 198 Ind 248, 153 NE 409; Smith v. State, 198 Ind 614, 154 NE 370; State v. Brownlow, 89 Wash 582, 154 P 1099.

[37] People v. Mullaly, 77 CalApp 60, 245 P 811; State v. Derry, 202 Ia 352, 209 NW 514; State v. Ingram, 219 Ia 501, 258 NW 186.

[38] State v. Harris, 51 Mont 496, 154 P 198.

[39] Bianchi v. State, 169 Wis 75, 171 NW 639.

[40] Anderson v. Commonwealth, 205 Ky 369, 265 SW 824.

§ 57. Lower grade of offense.

An instruction on a lower grade of offense than that charged in the indictment, but necessarily included therein, is proper where the evidence justifies the giving of such an instruction.

If the evidence tends to support a lesser offense than that charged in the indictment, it is the duty of the court to charge the jury with reference to such lesser offense.[41] But such instruction should not be given where the evidence shows that the accused is guilty of the greater offense or not guilty at all.[42]

[41] **Alabama.** Null v. State, 16 AlaApp 542, 79 S 678.

Arizona. Stokes v. Territory, 14 Ariz 242, 127 P 742.

Arkansas. Pickett v. State, 91 Ark 570, 121 SW 732.

California. In People v. Dukes, 2 CalApp2d 698, 38 P2d 805, it was held error for the court to tell the jury in a prosecution for conspiracy to commit robbery, to fix the degree of the crime in the event they found the accused guilty.

Georgia. Moore v. State, 151 Ga 648, 108 SE 47.

Illinois. People v. Beil, 322 Ill 434, 153 NE 639.

Indiana. Koehler v. State, 188 Ind 387, 123 NE 111.

Iowa. State v. Desmond, 109 Ia 72, 80 NW 214; State v. Asbury, 172 Ia 606, 154 NW 915, AnnCas 1918A, 856; State v. Ellington, 200 Ia 636, 204 NW 307.

Kentucky. McCandless v. Commonwealth, 170 Ky 301, 185 SW 1100.

Louisiana. State v. Foster, 149 La 521, 89 S 680.

Minnesota. State v. Brinkman, 145 Minn 18, 175 NW 1006.

Missouri. State v. Musick, 101 Mo 260, 14 SW 212; State v. Buckner, 335 Mo 229, 72 SW2d 73.

Nebraska. Wozniak v. State, 103 Neb 749, 174 NW 298; Fulton v. State, 163 Neb 759, 81 NW2d 177.

New York. People v. Hassan, 196 AppDiv 89, 187 NYS 115.

North Carolina. State v. Lutterloh, 188 NC 412, 124 SE 752; State v. Hardee, 192 NC 533, 135 SE 345.

Ohio. Windle v. State, 102 OhSt 439, 132 NE 22; State v. Fleming, — OhSt —, 142 NE2d 546.

Oklahoma. Nail v. State, 18 Okl Cr 40, 192 P 592.

Texas. Jones v. State, 86 TexCr 371, 216 SW 884.

Utah. State v. Cerar, 60 Utah 208, 207 P 597; State v. Hyams, 64 Utah 285, 230 P 349.

Washington. State v. McPhail, 39 Wash 199, 81 P 683; State v. Gottstein, 111 Wash 600, 191 P 766; State v. Donofrio, 141 Wash 132, 250 P 951.

Wisconsin. Kilkelly v. State, 43 Wis 604; Fertig v. State, 100 Wis 301, 75 NW 960; Hempton v. State, 111 Wis 127, 86 NW 596.

[42] **Federal.** Davis v. United States, 165 US 373, 41 LEd 750, 17 SupCt 360; Perkins v. United States, 142 CCA 638, 228 F 408.

Alabama. Clarke v. State, 117 Ala 1, 23 S 671, 67 AmSt 157; Braham v. State, 143 Ala 28, 38 S 919; Pinkerton v. State, 146 Ala 684, 40 S 224; Thomas v. State, 150 Ala 31, 43 S 371; Fowler v. State, 155 Ala 21, 45 S 913, Houston v. State, 208 Ala 660, 95 S 145; Williams v. State, 208 Ala 620, 95 S 31; Durden v. State, 18 AlaApp 498, 93 S 342.

Arkansas. Kinslow v. State, 85 Ark 514, 109 SW 524; Thompson v. State, 88 Ark 447, 114 SW 1184; Guerin v. State, 155 Ark 50, 243 SW 968.

California. People v. Lee Gam, 69 Cal 552, 11 P 183; People v. Rogers, 163 Cal 476, 126 P 143; Peo-

ple v. Lapara, 181 Cal 66, 183 P 545; People v. Ong Git, 23 CalApp 148, 137 P 283; People v. Dad, 51 CalApp 182, 196 P 506; People v. Moon, 7 CalApp2d 96, 45 P2d 384.

Colorado. Johnson v. People, 33 Colo 224, 80 P 133, 108 AmSt 85; Mitsunaga v. People, 54 Colo 102, 129 P 241.

Connecticut. State v. Cianflone, 98 Conn 454, 120 A 347.

Florida. Starke v. State, 49 Fla 41, 37 S 850.

Georgia. Washington v. State, 36 Ga 222; Jackson v. State, 91 Ga 271, 18 SE 298, 44 AmSt 22; Allen v. State, 133 Ga 260, 65 SE 431; Clyde v. State, 138 Ga 767, 76 SE 49; Devereaux v. State, 140 Ga 225, 78 SE 849; Griggs v. State, 148 Ga 211, 96 SE 262; Stevens v. State, 149 Ga 24, 98 SE 604; Felder v. State, 149 Ga 538, 101 SE 179; Rowland v. State, 150 Ga 733, 105 SE 301; Farmer v. State, 154 Ga 486, 114 SE 639; Lawhorn v. State, 155 Ga 373, 116 SE 822; Brooks v. State, 24 GaApp 274, 100 SE 655; Brewington v. State, 24 GaApp 594, 101 SE 753.

Illinois. Dacey v. People, 116 Ill 555, 6 NE 165; People v. Tokoly, 313 Ill 177, 144 NE 808.

Iowa. State v. Burns, 124 Ia 207, 99 NW 721; State v. Dean, 148 Ia 566, 126 NW 962; State v. Brown, 152 Ia 427, 132 NW 862; State v. Dimmitt, 184 Ia 870, 169 NW 137; State v. Flory, 203 Ia 918, 210 NW 961; State v. Marshall, 206 Ia 373, 220 NW 106; State v. Stennett, 220 Ia 388, 260 NW 732.

Kansas. State v. Kornstett, 62 Kan 221, 61 P 805; State v. Allen, 98 Kan 778, 160 P 795, reh. in 99 Kan 187, 160 P 795.

Kentucky. Warner v. Commonwealth, 27 KyL 219, 84 SW 742; Jolly v. Commonwealth, 110 Ky 190, 22 KyL 1622, 61 SW 49, 96 AmSt 429; McElwaine v. Commonwealth, 154 Ky 242, 157 SW 6; Wallace v. Commonwealth, 167 Ky 277, 180 SW 381; Frasure v. Commonwealth, 169 Ky 620, 185 SW 146; Harris v. Commonwealth, 183 Ky 542, 209 SW 509; Hensley v. Commonwealth, 197 Ky 563, 247 SW 742; Meredith v. Commonwealth, 218 Ky 571, 291 SW 745. See also Foster v. Commonwealth, 33 KyL 975, 112 SW 563.

Louisiana. State v. Ramkissoonsinghjiki, 163 La 750, 112 S 708. See State v. Thomas, 50 LaAnn 148, 23 S 250.

Michigan. People v. Beverly, 108 Mich 509, 66 NW 379; People v. Utter, 217 Mich 74, 185 NW 830.

Minnesota. State v. Nelson, 91 Minn 143, 97 NW 652; State v. Morris, 149 Minn 41, 182 NW 721; State v. Coon, 170 Minn 343, 212 NW 588.

Mississippi. Jones v. State, 129 Miss 457, 92 S 586.

Missouri. State v. Wilson, 88 Mo 13; State v. Bulling, 105 Mo 204, 15 SW 367, 16 SW 830; State v. Fairlamb, 121 Mo 137, 25 SW 895; State v. Pollard, 139 Mo 220, 40 SW 949; State v. Hyland, 144 Mo 302, 46 SW 195; State v. Baker, 146 Mo 379, 48 SW 475; State v. Bronstine, 147 Mo 520, 49 SW 512; State v. Garrison, 147 Mo 548, 49 SW 508; State v. Lewis, 181 Mo 235, 79 SW 671; State v. Henderson, 186 Mo 473, 85 SW 576; State v. Sassaman, 214 Mo 695, 114 SW 590; State v. Sartino, 216 Mo 408, 115 SW 1015; State v. Myers, 221 Mo 598, 121 SW 131; State v. McKenzie, 228 Mo 385, 128 SW 948; State v. Butler, 247 Mo 685, 153 SW 1042; State v. Lewis, 273 Mo 518, 201 SW 80; State v. Liolios, 285 Mo 1, 225 SW 941; State v. Murphy, 292 Mo 275, 237 SW 529; State v. Weber (Mo), 188 SW 122; State v. Stenzel (Mo), 220 SW 882; State v. Hayes (Mo), 247 SW 165.

Montana. State v. McGowan, 36 Mont 422, 93 P 552; State v. Fisher, 54 Mont 211, 169 P 282.

Nebraska. Johnke v. State, 68 Neb 154, 94 NW 158, 104 NW 154; Williams v. State, 103 Neb 710, 174 NW 302; Braunie v. State, 105 Neb 355, 180 NW 567, 12 ALR 658.

The court is not relieved of the duty of instructing on the lesser degree because of a belief that the evidence relating to it is weak and inconclusive.[43] The rule is the same in cases where the evidence is wholly circumstantial as where the evidence is direct.[44]

Illustrations: The weight of authority is that where there is no evidence indicating guilt of a lower degree than murder in the first degree, error cannot be based on the court's giving of an instruction to find him guilty of the higher degree or to acquit him.[45] Where the offense charged consists of several de-

New Jersey. State v. Moynihan, 93 NJL 253, 106 A 817.

New Mexico. State v. Granado, 17 NM 542, 131 P 497; State v. Luttrell, 28 NM 393, 212 P 739.

New York. People v. Schleiman, 197 NY 383, 90 NE 950, 27 LRA (N. S.) 1075, 18 AnnCas 588; People v. Chapman, 224 NY 463, 121 NE 381; People v. Van Norman, 231 NY 454, 132 NE 147; People v. Smith, 187 NYS 836.

North Carolina. State v. Price, 158 NC 641, 74 SE 587.

North Dakota. State v. Sanders, 14 ND 203, 103 NW 419.

Ohio. Dresback v. State, 38 OhSt 365; State v. Schaeffer, 96 OhSt 215, 117 NE 220, LRA 1918B, 945, AnnCas 1918E, 1137.

Oklahoma. Hopkins v. State, 4 OklCr 194; 108 P 420, 111 P 947; Fritz v. State, 8 OklCr 342, 128 P 170. Williams v. State, 12 OklCr 39, 151 P 900.

In a prosecution for homicide the court is not required to charge on involuntary manslaughter if the evidence clearly indicates an intentional killing. Collins v. State, 22 OklCr 203, 210 P 285, 30 ALR 811.

Texas. Hudson v. State, 40 Tex 12; Henning v. State, 24 TexApp 315, 6 SW 137; McCoy v. State, 27 TexApp 415, 11 SW 454; Maxwell v. State, 31 TexCr 119, 19 SW 914; Smith v. State, 40 TexCr 391, 50 SW 938; Turner v. State, 48 TexCr 585, 89 SW 975; Washington v. State, 50 TexCr 356, 96 SW 1084; Shelton v. State, 54 TexCr 588, 114 SW 122; King v. State, 57 TexCr 363, 123 SW 135; Treadway v. State, 65 TexCr 208, 144 SW 655; Foster v. State, 68 TexCr 38, 150 SW 936; Thompson v. State, 77 TexCr 140, 177 SW 503; Steel v. State, 82 TexCr 483, 200 SW 381; Cundff v. State, 86 TexCr 476, 218 SW 771; Pickens v. State, 86 TexCr 657, 218 SW 755; Walker v. State, 89 TexCr 76, 229 SW 527; Calloway v. State, 92 TexCr 506, 244 SW 549.

Where the defense is insanity, there is no ground for the submission to the jury of the question of irresistible impulse. McCann v. State, 129 TexCr 105, 83 SW2d 967.

Utah. State v. Thorne, 41 Utah 414, 126 P 286, AnnCas 1915D, 90.

Washington. State v. Gottstein, 111 Wash 600, 191 P 766.

Wisconsin. Pleimling v. State, 46 Wis 516, 1 NW 278; Cornell v. State, 104 Wis 527, 80 NW 745.

Under this general rule the doctrine is established and enforced by most of the courts that it is not error to refuse or fail to charge on manslaughter where the evidence showed the defendant guilty of murder or not guilty at all. Dietz v. State, 149 Wis 462, 136 NW 166, AnnCas 1913C, 732; Krueger v. State, 171 Wis 566, 177 NW 917.

[43] State v. Cunningham, 120 Kan 430, 243 P 1006.

[44] State v. Trujillo, 27 NM 594, 203 P 846.

[45] **United States.** Sparf v. United States, 156 US 51, 39 LEd 343, 15 SupCt 273.

Alabama. Jackson v. State, 226 Ala 72, 145 S 656.

grees, the court should instruct on the law of an attempt to commit the crime charged where there is evidence on that issue.[46] If in the trial on an indictment for murder, it is possible under the evidence to acquit the defendant of murder in the first degree, of murder in the second degree, and of manslaughter because the evidence fails to establish an essential element of such offenses, it is competent for the jury, where the evidence warrants it, to find the defendant guilty of assault and battery only, and under such circumstances it is error to the prejudice of the defendant to refuse a request to charge on the lesser offense of assault and battery.[47] In a prosecution under an indictment charging armed robbery, the trial court is warranted in charging on the lesser offense of assault with intent to commit robbery, where there is substantial evidence of such offense.[48] An indictment charging, in separate counts, shooting with intent to kill and shooting with intent to wound includes the lesser offenses of assault and battery and assault, and where upon the trial, the evidence tends to support such lesser offense or offenses, it is the duty of the court to charge the jury with reference to such lesser offense or offenses.[49] Where a defendant is indicted and tried for "purposely and wilfully" killing an officer, and defendant's testimony tends to prove that such killing, although unintentional, was caused by the defendant while resisting arrest, the court should change the degree of manslaughter.[50] Where one is indicted and tried for murder in the attempted perpetration of robbery, under statute, no instruction of any lesser

California. People v. King, 27 Cal 507, 87 AmDec 95.

Colorado. Sevilla v. People, 65 Colo 437, 177 P 135.

Georgia. Dotson v. State, 129 Ga 727, 59 SE 774.

Michigan. People v. Repke, 103 Mich 459, 61 NW 861; People v. Nunn, 120 Mich 530, 79 NW 800.

Minnesota. State v. Hanley, 34 Minn 430, 26 NW 397.

New Jersey. State v. Moynihan, 93 NJL 253, 106 A 817; State v. Fiore, 93 NJL 362, 108 A 363, affd. in 94 NJL 477, 110 A 909.

North Carolina. State v. McKinney, 111 NC 683, 16 SE 235; State v. Spivey, 151 NC 676, 65 SE 995; State v. Spencer, 176 NC 709, 97 SE 155.

Ohio. Bandy v. State, 102 OhSt 384, 131 NE 499, 21 ALR 594 (where the court refused to charge on the lower degrees).

Texas. Darlington v. State, 40 TexCr 333, 50 SW 375.

Washington. State v. McPhail, 39 Wash 199, 81 P 683.

Wisconsin. Cupps v. State, 120 Wis 504, 97 NW 210, 98 NW 546, 102 AmSt 996.

[46] **Georgia.** Bailey v. State, 153 Ga 413, 112 SE 453 (rape).

Kansas. State v. Franklin, 69 Kan 798, 77 P 588.

Michigan. People v. Allie, 216 Mich 133, 184 NW 423 (robbery).

[47] State v. Cochrane, 151 OhSt 128, 38 OhO 575, 84 NE2d 742.

[48] State v. Curtis, 149 OhSt 153, 36 OhO 500, 78 NE2d 46.

[49] Windle v. State, 102 OhSt 439, 132 NE 22.

[50] Freeman v. State, 119 OhSt 250, 163 NE 202.

grade of homicide than murder in the first degree is requisite or proper when evidence to support the same is lacking.[51]

Reasonable doubt and lesser offenses. The weight of authority supports the view that the court should tell the jury that in case they have a reasonable doubt from the evidence between two degrees, they should convict of the lower only, and that it is not sufficient for the court to charge generally that the guilt of the defendant must be proved beyond a reasonable doubt.[52] This rule has been applied as between murder and manslaughter,[53] and between degrees of crime in a rape prosecution.[54]

Suppose an instruction on a lower offense is given but there is no evidence as to guilt of the lower offense? If the accused is convicted of the higher offense, is he entitled to a new trial? Defendant cannot complain because it was error in his favor, and he is held to be not prejudiced by the instruction.[55]

Suppose an instruction on a lower offense which is not supported by the evidence, the instruction not requested by the defendant who is convicted of the lower offense? Is he entitled to a new trial? The result on appeal has been made to depend upon whether or not the instruction given was prejudicial to the defendant under the evidence in the case.[56] So, if the evidence warrants conviction of the higher degree and does not warrant a verdict of not guilty, or if there is some evidence which, if believed, warrants an acquittal, it is not reversible error in behalf

[51] Malone v. State, 130 OhSt 443, 5 OhO 59, 200 NE 473.

[52] **Georgia.** Bailey v. State, 153 Ga 413, 112 SE 453; Sills v. State, 36 GaApp 103, 135 SE 758. But see Ramsey v. State, 92 Ga 53, 17 SE 613.

Indiana. Coolman v. State, 163 Ind 503, 72 NE 568.

Iowa. State v. Asbury, 172 Ia 606, 154 NW 915, AnnCas 1918A, 856.

Kentucky. Shelton v. Commonwealth, 145 Ky 543, 140 SW 670; Hall v. Commonwealth, 219 Ky 446, 293 SW 961.

Texas. Richardson v. State, 91 TexCr 318, 239 SW 218, 20 ALR 1249, and extended note at page 1258; Sparks v. State, 108 TexCr 367, 300 SW 938.

[53] O'Neil v. State, 55 OklCr 388, 31 P2d 886; Miller v. State, 139 Wis 57, 119 NW 850.

[54] State v. Ingram, 219 Ia 501, 258 NW 186.

[55] **Georgia.** Darby v. State, 79 Ga 63, 3 SE 663.

Missouri. State v. Fitzgerald, 130 Mo 407, 32 SW 1113; State v. Kindred, 148 Mo 270, 49 SW 845.

Montana. State v. Vanella, 40 Mont 326, 106 P 364, 20 AnnCas 398.

Texas. Wheatly v. State (TexCr), 39 SW 672.

Washington. State v. Quinn, 56 Wash 295, 105 P 818.

[56] **Georgia.** Pugh v. State, 114 Ga 16, 39 SE 875; McBeth v. State, 122 Ga 737, 50 SE 931; James v. State, 123 Ga 548, 51 SE 577.

Mississippi. Parker v. State, 102 Miss 113, 58 S 978; Walker v. State, 123 Miss 517, 86 S 337.

New Mexico. State v. Pruett, 27 NM 576, 203 P 840, 21 ALR 579.

Washington. State v. Underwood, 35 Wash 558, 77 P 863.

of one convicted of the lower degree that the court submitted such degree, though there was no evidence supporting it.[57] Where statutes exist expressly permitting a conviction on a lower grade, even without supporting evidence, the giving of an instruction of the lower degree is not reversible error.[58]

In Pennsylvania, the court has no authority to tell the jury what the verdict must be, and under this rule it has no power to instruct in a murder case that the verdict must be either second degree murder or an acquittal.[59] But in Wisconsin, in a case where it appeared that upon the undisputed evidence, the defendant was guilty of a criminal homicide, it was held proper to instruct the jury that it was their duty to determine the degree of murder or manslaughter of which defendant was guilty, and while they had the power to acquit, acquittal would be contrary to the undisputed evidence and the law.[60]

§ 58. Insanity of accused.

The question of the insanity of the accused at the time of the commission of the crime should be submitted where there is testimony tending to show that the accused was mentally incapable of committing the crime.

The instruction should be given even though testimony as to insanity is slight compared with the contrary testimony.[61]

[57] **Arkansas.** Rogers v. State, 136 Ark 161, 206 SW 152.

California. People v. Huntington, 138 Cal 261, 70 P 284; People v. Tugwell, 32 CalApp 520, 163 P 508.

Colorado. Murphy v. People, 9 Colo 434, 13 P 528.

Georgia. Berry v. State, 122 Ga 429, 50 SE 345; Bryant v. State, 19 GaApp 144, 91 SE 215; McCrackin v. State, 24 GaApp 195, 99 SE 435.

Idaho. State v. Alcorn, 7 Idaho 599, 64 P 1014, 97 AmSt 252; State v. Phinney, 13 Idaho 307, 89 P 634, 12 LRA (N. S.) 935, 12 AnnCas 1079.

Illinois. People v. Schultz, 267 Ill 147, 107 NE 833.

Iowa. State v. Bertoch (Ia), 79 NW 378.

Kentucky. Higgins v. Commonwealth, 142 Ky 647, 134 SW 1135.

New Mexico. See State v. Pruett, 27 NM 576, 203 P 840, 21 ALR 579 (where the submitting of the lower degree was held error in the case).

Ohio. Dresback v. State, 38 OhSt 365.

Oklahoma. Lytton v. State, 12 OklCr 204, 153 P 620; Lovejoy v. State, 18 OklCr 335, 194 P 1087; Wilmoth v. State, 20 OklCr 453, 203 P 1055, 21 ALR 590.

Virginia. Burton v. Commonwealth, 108 Va 892, 62 SE 376.

Washington. State v. Howard, 33 Wash 250, 74 P 382; State v. Underwood, 35 Wash 558, 77 P 863.

[58] Morrison v. State, 42 Fla 149, 28 S 97; Clemmons v. State, 43 Fla 200, 30 S 699; State v. West, 202 Mo 128, 100 SW 478; State v. Bobbitt, 215 Mo 10, 114 SW 511; State v. Sebastian, 215 Mo 58, 114 SW 522; State v. Whitsett, 232 Mo 511, 134 SW 555.

[59] Commonwealth v. Green, 292 Pa 579, 141 A 624.

[60] Schmidt v. State, 159 Wis 15, 149 NW 388, AnnCas 1916E, 107.

[61] **Alabama.** In Marlow v. State, 21 AlaApp 623, 111 S 49, it was held that the court should have in-

Nor should the court disparage the defense.[62] For instance, the court should not tell the jury that they were not to take evidence of mental irresponsibility as an excuse to commit crime, but that they should take it into consideration with the other evidence in the case to determine whether defendant had the capacity to distinguish between right and wrong.[63] The Supreme Court of Colorado, addressing itself to this subject, has said: "Care should be observed to state the rule governing accountability to the law, rather than to attempt to define insanity or any of the various recognized forms of disease of the mind, and the law requires that the instructions to this end be couched in plain and comprehensive terms, consistent with approved scientific determinations."[64]

A proper statement of the law on insanity has been held contained in an instruction which advised the jury that the term "insanity" in the law means such abnormal condition of mind, from any cause, as renders the afflicted one incapable of distinguishing between right and wrong in the given instance and so rendering him unconscious of the punishable character of his act.

structed the jury to consider whether the accused was weak-minded, as bearing upon the credibility of his statement.

Georgia. Patterson v. State, 124 Ga 408, 52 SE 534.

Kansas. State v. Newman, 57 Kan 705, 47 P 881.

North Dakota. State v. Shahane, 56 ND 642, 219 NW 132.

Ohio. Blackburn v. State, 23 Oh St 146.

Texas. There is no necessity for instruction on emotional insanity where the evidence does not raise that issue. Hurst v. State, 40 TexCr 378, 46 SW 635, 50 SW 719.

[62] **California.** People v. Young, 140 CalApp 456, 35 P2d 354 (where the court's charge was held not to be in disparagement).

There was no prejudicial error in the instruction in a prosecution for assault with a deadly weapon that the defense of insanity should be received with caution and applied with equal force where the defense was that the defendant was unconscious of his act. People v. Nihell, 144 Cal 200, 77 P 916.

Montana. An instruction disparages defense of insanity which says that the defense is one which may be, and sometimes is, resorted to in cases where the proof of the act is so complete that any other means of avoiding conviction and escaping punishment seems hopeless. State v. Crowe, 39 Mont 174, 102 P 579, 18 AnnCas 643.

Nevada. State v. Behiter, 55 Nev 236, 29 P2d 1000 (recognizing the rule, but holding that the defense was not disparaged by the instruction given).

Ohio. Sharkey v. State, 4 OhCirCt 101, 2 OhCirDec 443.

South Carolina. It is not disparagement for the court to remark that he could not recall during his experience another case in which temporary insanity was relied upon as a defense. State v. Stalvey, 146 SC 275, 143 SE 817.

[63] State v. Saffron, 143 Wash 34, 254 P 463.

[64] Oldham v. People, 61 Colo 413, 158 P 148.

The law does not recognize a form of insanity in which there exists capacity to distinguish between right and wrong and consciousness of the wrongful nature of the act, without power to abstain from it.[65] An instruction has been approved wherein the jury were advised that in establishing the defense of insanity it was only necessary that the jury be reasonably satisfied that the defendant was insane and unable to distinguish between the right and wrong.[66] It is proper to reject a request to charge that the defendant would be excused for robbery if he was temporarily insane from the drinking of whisky and if his mind was too weak to resist the desire to drink.[67]

The court should not explain to the jury what it will be the court's duty to do in the event the jury determines the defendant was insane at the time the crime was committed or at the time of the trial.[68]

The burden of proof of the defense of insanity rests on the accused,[69] and the fact must be proved to the reasonable satisfaction of the jury.[70] Where defendant has been adjudged insane by a court, there is a presumption of the continuance of the condition and the court should charge that the burden is on the state to show that the insane condition has terminated and that accused was sane at the time the crime was committed.[71]

[65] Duthey v. State, 131 Wis 178, 111 NW 222, 10 LRA (N. S.) 1032; Oborn v. State, 143 Wis 249, 126 NW 737, 31 LRA (N. S.) 966.

An instruction on the test of accountability was not erroneous which informed the jury that if at the time of committing the crime the defendant had a sufficient degree of reason to discern between moral good and evil, then he was responsible for his acts, but that if he was unable to distinguish between right and wrong he should be acquitted. Bothwell v. State, 71 Neb 747, 99 NW 669.

[66] State v. Douglas, 312 Mo 373, 278 SW 1016.

[67] Bryant v. State, 122 TexCr 385, 55 SW2d 1037.

[68] People v. Moor, 355 Ill 393, 189 NE 318.

[69] **United States.** Matheson v. United States, 227 US 540, 57 LEd 631, 33 SupCt 355.

California. People v. Wells, 145 Cal 138, 78 P 470; People v. Rogers, 113 CalApp 1, 297 P 643.

Idaho. State v. Shuff, 9 Idaho 115, 72 P 664.

Nebraska. Snider v. State, 56 Neb 309, 76 NW 574.

[70] Minder v. State, 113 Ga 772, 39 SE 284; State v. Duestrow, 137 Mo 44, 38 SW 554, 39 SW 266.

An instruction on insanity was proper which told the jury that every man is presumed to be sane till the contrary is proved, and where mental imbecility is interposed as a defense, the defendant must prove it to their reasonable satisfaction, and that it must be proved that at the time of committing the act the defendant labored under such mental defects as not to know the nature of the act he was doing, or if he did know it that he did not know that he was doing wrong. State v. Palmer, 161 Mo 152, 61 SW 651.

Contra, Revoir v. State, 82 Wis 295, 52 NW 84; Butler v. State, 102 Wis 364, 78 NW 590.

See also § 62, *infra*.

[71] Morse v. State, 68 TexCr 351, 152 SW 927.

Where an adjudication of insanity was outstanding against the accused at the time he committed the offense charged, and that is made a defense in his trial, it is the duty of the court to charge the jury that the prosecution must prove beyond a reasonable doubt that the defendant was sane at the time the crime was committed.[72] A judgment declaring a person insane is entitled to full faith and credit in another state by virtue of the provisions of the federal constitution. And if the person so declared insane be afterward prosecuted in another state for crime, and prove the foreign judgment declaring him insane, he is entitled to have the jury instructed as to the full faith and credit to be given such judgment.[73]

§ 59. Reasonable doubt.

The defendant in a criminal case is entitled to an instruction that the jury must acquit unless they are convinced of his guilt beyond a reasonable doubt.

Whether or not the term "reasonable doubt" must be defined, it is clear that the trial judge must charge that the jury must acquit unless they are convinced of defendant's guilt beyond a reasonable doubt. The doctrine applies to every material issue in the case;[74] but it does not require that every fact or circumstance be proved beyond a reasonable doubt, for the rule is satisfied if the jury are told that they may not convict unless they believe beyond a reasonable doubt that the defendant is guilty.[75] The court should not instruct that proof beyond a reasonable doubt is not required as to each link in the chain of evidence.[76] Reasonable doubt will acquit where it relates to the presence of the accused at the time and place where the crime is charged to have been committed.[77]

In a prosecution for theft of cattle, it is error to charge that if the jury believed the defendant stole the cattle, he was guilty of grand larceny.[78] Similarly, it is error for the court to omit the charge as to reasonable doubt in telling the jury that a defendant could be convicted as an aider and abettor if the jury

[72] Glover v. State, 125 TexCr 605, 69 SW2d 136.

[73] State v. Neu, 180 La 545, 157 S 105.

[74] Watson v. State, 28 OklCr 244, 230 P 521; Hathcock v. State, 97 TexCr 550, 263 SW 587.

[75] State v. Wilson, 41 Idaho 616, 243 P 359.

In State v. Trudell, 49 SD 532, 207 NW 465, it was held that where the evidence depended upon for conviction was circumstantial, the jury should be told that every circumstance must be proved beyond a reasonable doubt.

[76] People v. Rogers, 324 Ill 224, 154 NE 909.

[77] State v. Hassan, 149 Ia 518, 128 NW 960; State v. Adair, 160 Mo 391, 61 SW 187.

[78] Tanner v. State, 26 AlaApp 277, 158 S 196.

believed he was present at the time the crime was committed and wilfully aided and assisted the perpetrator of the crime.[79] It is insufficient to say to the jury that unless "you believe defendant has been proven guilty, you will find him not guilty," for such leaves out the requirement as to reasonable doubt.[80] It is proper to instruct that the question is not who committed the offense if defendant did not, but is whether the state had shown defendant's guilt beyond a reasonable doubt.[81]

It is essential in all cases of acquittal on the ground of reasonable doubt that the doubt be entertained by all the jurors.[82] One distinct enunciation of the principle is sufficient and it is unnecessary to repeat it in other instructions.[83]

Defendant should not be required to establish the elements of his defense beyond a reasonable doubt.[84]

Jurors' bases for reasonable doubt. The doubt must spring from the whole case and arise from the evidence or the want of evidence or from a conflict in the evidence.[85] It must be a substantial or fair doubt and not one which is based merely

[79] Benge v. Commonwealth, 258 Ky 600, 80 SW2d 569.

[80] Delong v. Commonwealth, 214 Ky 216, 282 SW 1089.

[81] Mitchell v. State, 147 Ga 468, 94 SE 570.

[82] **Alabama.** Littleton v. State, 128 Ala 31, 29 S 390; Davis v. State, 131 Ala 10, 31 S 569; Yeats v. State, 142 Ala 58, 38 S 760; Whatley v. State, 144 Ala 68, 39 S 1014; Outler v. State, 147 Ala 39, 41 S 460; Russell v. State, 201 Ala 572, 78 S 916.

Arkansas. Biddle v. State, 131 Ark 537, 199 SW 913.

Florida. Cook v. State, 46 Fla 20, 35 S 665; Hall v. State, 78 Fla 420, 83 S 513, 8 ALR 1034.

Illinois. People v. Lardner, 296 Ill 190, 129 NE 697.

Indiana. Rains v. State, 137 Ind 83, 36 NE 532.

Oklahoma. Hodge v. Territory, 12 Okl 108, 69 P 1077.

South Dakota. State v. Sonnenschein, 37 SD 585, 159 NW 101.

Washington. State v. Cushing, 17 Wash 544, 50 P 512.

West Virginia. State v. McCausland, 82 WVa 525, 90 SE 938.

[83] **Florida.** Davis v. State, 46 Fla 137, 35 S 76.

Georgia. Watts v. State, 9 GaApp 500, 71 SE 766.

Illinois. People v. Snyder, 279 Ill 435, 117 NE 119; People v. Lowhone, 296 Ill 391, 129 NE 781. See also People v. Wallace, 279 Ill 139, 116 NE 700.

[84] **Georgia.** Dedge v. State, 153 Ga 176, 111 SE 547; Stanford v. State, 153 Ga 219, 112 SE 130.

Idaho. State v. Rogers, 30 Idaho 259, 163 P 912.

New Jersey. State v. Sandt, 95 NJ 49, 111 A 651.

North Carolina. State v. Simmerson, 191 NC 614, 132 SE 596.

Texas. Long v. State, 104 TexCr 298, 283 SW 810.

It was error to charge that the jury must believe beyond reasonable doubt that liquor was for medicinal purposes. Lewis v. State, 103 TexCr 64, 279 SW 828.

[85] **Alabama.** Tribble v. State, 145 Ala 23, 40 S 938; Pippin v. State, 197 Ala 613, 73 S 340; Pinson v. State, 201 Ala 522, 78 S 876; Suttles v. State, 15 AlaApp 582, 74 S 400; Adkins v. State, 16 AlaApp 181, 76 S 465; McNeal v. State, 18 AlaApp 311, 92 S 95.

It is error to refuse a charge to acquit if the jury upon consid-

ering all the testimony have a reasonable doubt about the guilt of the defendant arising out of any part of the evidence. Walker v. State, 117 Ala 42, 23 S 149.

It was proper to refuse to charge that the jury were to consider all the evidence in the light of their experience as fair-minded men and on such fair and reasonable consideration to doubt the guilt of the defendant meant to acquit him. Thayer v. State, 138 Ala 39, 35 S 406.

A charge should state of what jury should be in doubt. Smith v. State, 16 AlaApp 153, 75 S 829.

It is not error to instruct that if the jury believed from the evidence beyond a reasonable doubt that defendant was guilty they must convict, although they believed it possible that he was not guilty. Cain v. State, 17 AlaApp 530, 86 S 166.

It was error to charge that "if there is one single fact proven to the satisfaction of the jury which is inconsistent with the defendant's guilt, this is sufficient to raise a reasonable doubt, and the jury should acquit." Cowan v. State, 15 AlaApp 87, 72 S 578.

Arkansas. Bruce v. State, 71 Ark 475, 75 SW 1080; Zinn v. State, 135 Ark 342, 205 SW 704.

California. People v. Madison, 3 Cal2d 668, 46 P2d 159.

Florida. Hall v. State, 78 Fla 420, 83 S 513, 8 ALR 1034.

Georgia. Lucas v. State, 146 Ga 315, 91 SE 72; Benton v. State, 9 GaApp 291, 71 SE 8; Alexander v. State, 82 GaApp 488, 123 SE 923.

There was no error in an instruction that a reasonable doubt is such a doubt as would arise in the mind of an honest juror seeking to do his duty, seeking the truth of the transaction, seeking to do justice between the state and the accused, and not such a doubt as would arise in the mind of a dishonest juror or one who would go into the jury box for the purpose of discharging defendant. Evans v. State, 27 Ga App 316, 108 SE 129.

Idaho. State v. Nolan, 31 Idaho 71, 160 P 295.

Illinois. Henry v. People, 198 Ill 162, 65 NE 120; People v. Gray, 251 Ill 431, 96 NE 268; People v. Zurek, 277 Ill 621, 115 NE 644; People v. Sawhill, 299 Ill 393, 132 NE 477; People v. Shaw, 300 Ill 451, 133 NE 208; People v. Hanson, 359 Ill 266, 194 NE 520.

Indiana. Morgan v. State, 190 Ind 411, 130 NE 528 (defendant entitled to instruction on subject).

Iowa. State v. James, 198 Ia 976, 200 NW 577; State v. Grattin, 218 Ia 889, 256 NW 273.

Kentucky. Berry v. Commonwealth, 149 Ky 398, 149 SW 824; West v. Commonwealth, 194 Ky 536, 240 SW 52.

Michigan. People v. Powers, 203 Mich 40, 168 NW 938.

Mississippi. Howell v. State, 98 Miss 439, 53 S 954.

Missouri. State v. Garth, 164 Mo 553, 65 SW 275; State v. Arnett (Mo), 210 SW 82.

Nebraska. Ferguson v. State, 52 Neb 432, 72 NW 590, 66 AmSt 512; McIntosh v. State, 105 Neb 328, 180 NW 573, 12 ALR 798.

New Jersey. State v. Comtarino, 91 NJL 103, 102 A 872 (satisfied as reasonable men not erroneous); State v. Fisher, 94 NJL 12, 110 A 124.

New York. People v. Billick, 193 AppDiv 914, 183 NYS 685.

Pennsylvania. Commonwealth v. Knox, 262 Pa 428, 105 A 634.

Texas. Perrin v. State, 45 TexCr 560, 78 SW 930; James v. State, 86 TexCr 107, 215 SW 459; Lewis v. State, 89 TexCr 345, 231 SW 113.

Washington. State v. Pettviel, 99 Wash 434, 169 P 977; State v. Herwitz, 109 Wash 153, 186 P 290.

upon whim, caprice, or imagination;[86] it must not arise from the argument of counsel,[87] or from sympathy or compassion.[88]

[86] **Federal.** Singer v. United States, 278 F 415.

Alabama. McGrew v. State, 21 AlaApp 266, 107 S 328 ("possibility" of innocence not the criterion).

It is proper to charge: "It is not a mere doubt that authorizes an acquittal. The doubt which authorizes an acquittal must be a reasonable doubt." Lodge v. State, 122 Ala 107, 26 S 200, 82 AmSt 23.

Arkansas. Kelley v. State, 133 Ark 261, 202 SW 49.

California. People v. T. Wah Hing, 47 CalApp 327, 190 P 662.

A charge on reasonable doubt is not objectionable which states that "the doubt must be supported by reason, and not by mere conjecture and idle supposition, irrespective of evidence." People v. Ross, 115 Cal 233, 46 P 1059.

Florida. It is improper to base right to acquittal on probabilities. Graham v. State, 72 Fla 510, 73 S 594.

Georgia. Chancey v. State, 145 Ga 12, 88 SE 205; Lampkin v. State, 145 Ga 40, 88 SE 563; Lumpkin v. State, 152 Ga 229, 109 SE 664; Merritt v. State, 152 Ga 405, 110 SE 160; Stanford v. State, 153 Ga 219, 112 SE 130; Wall v. State, 153 Ga 309, 112 SE 142; Newsome v. State, 25 GaApp 191, 102 SE 876; Hall v. State, 25 GaApp 762, 105 SE 249.

Idaho. State v. Anthony, 6 Idaho 383, 55 P 884.

Iowa. State v. Powers, 180 Ia 693, 163 NW 402.

Michigan. People v. Swartz, 118 Mich 292, 76 NW 491; People v. Barrette, 233 Mich 615, 208 NW 27.

Minnesota. State v. Keehn, 135 Minn 211, 160 NW 666.

Missouri. State v. Temple, 194 Mo 237, 92 SW 869, 5 AnnCas 954; State v. Maupin, 196 Mo 164, 93 SW 379; State v. Lewis, 273 Mo 518, 201 SW 80; State v. Judge, 315 Mo 156, 285 SW 718.

Montana. State v. Lewis, 52 Mont 495, 159 P 415.

Nebraska. Hodge v. State, 101 Neb 419, 163 NW 321.

New York. An instruction was held not erroneous which said that "A . . . reasonable doubt is not a mere whim, but it is such a doubt as reasonable men may entertain, after a careful and honest review and consideration of the evidence in the case. It is a doubt founded in reason and coming from reason or a doubt coming from reason, . . . and which survives reason." People v. Barker, 153 NY 111, 47 NE 31.

Ohio. Beck v. State, 129 OhSt 582, 196 NE 423, 2 OhO 566; Micella v. State, 38 OhApp 1, 175 NE 705, 34 OLR 296.

Pennsylvania. Commonwealth v. De Palma, 268 Pa 25, 110 A 756; Commonwealth v. Fogel, 75 Pa SuperCt 446 (not a mere fleeting hesitancy or momentary state of irresolution).

South Carolina. State v. Glover, 91 SC 562, 75 SE 218.

Utah. State v. Neel, 23 Utah 541, 65 P 494.

Wisconsin. It is proper to instruct that "beyond a reasonable doubt" does not mean beyond a mere doubt or possibility of innocence; that if guilt be established by evidence beyond any doubt founded in reason and common sense as applied thereto a conviction should follow though the jury may believe there is doubt on the question not rising, however, to the certainty of a reasonable doubt or though they yet believed in the possibility of innocence. Emery v. State, 101 Wis 627, 78 NW 145.

[87] **Alabama.** Walker v. State, 139 Ala 56, 35 S 1011.

California. People v. Ammerman, 118 Cal 23, 50 P 15.

West Virginia. State v. Long, 88 WVa 669, 108 SE 279.

[88] Commonwealth v. Green, 292 Pa 579, 141 A 624.

Definitions of "reasonable doubt." The defining instruction should be free from argumentativeness. An example of an argumentative instruction is one which tells the jury that "a reasonable doubt is such a doubt as leaves your mind in view of all the evidence in a state of reasonable uncertainty as to the guilt of the defendant."[89]

The doubt intended is a reasonable doubt and not necessarily a strong or weak doubt,[90] although it is appropriate for the court to tell the jury that it must be a substantial doubt arising from the evidence in the case.[91] It is not the mere possibility of doubt.[92] If one has a doubt which would cause an ordinarily prudent man to pause and hesitate to act in the most important affairs of life, he has a reasonable doubt.[93]

The jury should not be instructed that they should doubt as a jury only when they doubt as men.[94] It is not essential that the doubt should be one for which a reason can be given by the jurors.[95] It ought, however, to be such a doubt as a man of reasonable intelligence could give some good reason for entertaining if he were called on to do so.[96] It should be a substantial

[89] Pinson v. State, 201 Ala 522, 78 S 876; Butler v. State, 16 AlaApp 234, 77 S 72; Cain v. State, 16 Ala App 303, 77 S 453; Bowling v. State, 18 AlaApp 231, 90 S 33.

[90] People v. Lardner, 296 Ill 190, 129 NE 697.

[91] State v. Smith, 332 Mo 44, 56 SW2d 39.

[92] State v. Garzio, 113 NJL 349, 175 A 98.

[93] Miller v. State, 139 Wis 57, 119 NW 850.

[94] **California.** But see People v. Clark, 183 Cal 677, 192 P 521.

Colorado. Highley v. People, 65 Colo 497, 177 P 975.

Illinois. People v. Kingcannon, 276 Ill 251, 114 NE 508.

West Virginia. State v. Worley, 82 WVa 350, 96 SE 56; State v. McCausland, 82 WVa 525, 96 SE 938; State v. Young, 82 WVa 714, 97 SE 134; State v. Price, 83 WVa 71, 97 SE 582, 5 ALR 1247; State v. Ringer, 84 WVa 546, 100 SE 413.

[95] **Alabama.** Roberts v. State, 122 Ala 47, 25 S 238; Smith v. State, 142 Ala 14, 39 S 329; Dees v. State, 18 AlaApp 133, 89 S 95. See Whitfield v. State, 22 AlaApp 556, 117 S 761.

Arkansas. Darden v. State, 73 Ark 315, 84 SW 507.

Indiana. Scheerer v. State, 197 Ind 155, 149 NE 892.

It is not proper to tell the jury that a reasonable doubt required the evidence to convince them with that degree of certainty which they would be willing to act upon in the more weighty matters relating to their own affairs. Beneks v. State, 208 Ind 317, 196 NE 73.

Iowa. State v. Cohen, 108 Ia 208, 78 NW 857, 75 AmSt 213.

Mississippi. Klyce v. State, 78 Miss 450, 28 S 827.

Nebraska. Blue v. State, 86 Neb 189, 125 NW 136.

New Jersey. State v. Parks, 96 NJL 360, 115 A 305.

Utah. But see State v. Overson, 55 Utah 230, 185 P 364.

Washington. State v. Dunn, 159 Wash 608, 294 P 217 (where such a definition was approved).

[96] **Illinois.** People v. Grove, 284 Ill 429, 120 NE 277.

doubt, and not a mere possibility that the defendant is innocent.[97] It is not required that the state should prove guilt to a mathematical certainty,[98] or a moral certainty,[99] or by evidence equivalent to "absolute and positive proof,"[1] or that produces an "undoubting" and satisfactory conviction of guilt.[2] It has been held correct to explain to the jury that "reasonable doubt" is a condition of not being able to feel conviction of the truth of the charge against the accused to a moral certainty.[3] It has been held that for the court to charge that the jury must believe the evidence of defendant's guilt "to a moral certainty" is equivalent to the expression "beyond a reasonable doubt."[4] The court is not required to state to the jury that

New York. People v. Lagroppo, 90 AppDiv 219, 18 NYCr 75, 86 NYS 116.

South Carolina. State v. Bramlett, 114 SC 389, 103 SE 755.

A reasonable doubt is one for which a reason can be given; a substantial doubt based on the evidence, or want of evidence in the case, and not a bare possibility of defendant's innocence; such a doubt as would cause a reasonably prudent man to pause before acting in the highest affairs of life. State v. Raice, 24 SD 111, 123 NW 708.

[97] State v. Cook (Mo), 44 SW2d 90.

[98] Hicks v. State, 123 Ala 15, 26 S 337; Keith v. State, 15 AlaApp 129, 72 S 602.

That it was erroneous to charge that the jury must believe defendant guilty beyond all reasonable supposition was properly refused; supposition having no legitimate sphere in judicial administration. Dawson v. State, 196 Ala 593, 71 S 722.

Davis v. State, 114 Ga 104, 39 SE 906; Bonner v. State, 152 Ga 214, 109 SE 291; Connell v. State, 153 Ga 151, 111 SE 545; Griggs v. State, 17 GaApp 301, 86 SE 726; Ponder v. State, 18 GaApp 727, 90 SE 376.

A reasonable doubt is such a doubt as an upright man might entertain in an honest investigation after the truth. Lochamy v. State, 152 Ga 235, 109 SE 497.

[99] **Alabama.** Talbert v. State, 121 Ala 33, 25 S 690; Keith v. State, 15 AlaApp 129, 72 S 602; Minor v. State, 15 AlaApp 556, 74 S 98; McMillan v. State, 16 AlaApp 148, 75 S 824.

It is error to tell the jury "You must find defendant not guilty unless the evidence is such as to exclude to a marked certainty every supposition but that of his guilt." Cain v. State, 16 AlaApp 303, 77 S 453.

Arkansas. Wolf v. State, 130 Ark 591, 197 SW 582.

Georgia. Loyd v. State, 26 GaApp 259, 106 SE 601. See also Connell v. State, 153 Ga 151, 111 SE 545.

Minnesota. But see State v. Couplin, 146 Minn 189, 178 NW 486.

Missouri. State v. Johnson (Mo), 234 SW 794.

[1] **Federal.** Crane v. United States, 170 CCA 456, 259 F 480.

New York. People v. Benham, 160 NY 402, 14 NYCr 188, 55 NE 11.

Ohio. The state is required only to prove the accused guilty beyond a reasonable doubt, and not beyond all reasonable doubt. Colletti v. State, 12 OhApp 104, 31 OCA 81.

[2] State v. Paxton, 126 Mo 500, 29 SW 705.

[3] State v. Rubenstein, 104 NJL 291, 140 A 287.

[4] Gray v. State, 56 OklCr 208, 38 P2d 967.

the facts and circumstances proved in the case must be "absolutely incompatible" with any other hypothesis than defendant's guilt.[5] An instruction that the commission of the offense must be shown to the satisfaction of the jury has been held erroneous as requiring too high a degree of proof.[6] So, the jury should not be told to acquit unless the evidence excluded every reasonable supposition except that of guilt.[7] A fixed abiding conviction of guilt will suffice.[8] The court cannot charge the jury to convict the defendant on evidence indicative of guilt.[9] It has been held proper to say to the jury that the evidence must satisfy the mind, conscience, and judgment to a moral certainty and beyond a reasonable doubt.[10]

In some jurisdictions, the trial judge is required to read the definition of "reasonable doubt" as given in a statute,[11] but the precise statutory language is not necessary, where the court charges the jury substantially in accordance with the statutory definition.[12] The term, in many jurisdictions, is regarded as self-explanatory,[13] and the practice of attempting to define the term is not approved;[14] these attempts sometimes confuse the

[5] People v. Hanson, 359 Ill 266, 194 NE 520.

[6] McCormack v. State, 133 Ala 202, 32 S 268; Thayer v. State, 138 Ala 39, 35 S 406; Best v. State, 155 Ind 46, 57 NE 534.

[7] Prince v. State, 215 Ala 276, 110 S 407.

[8] **Alabama.** Frazier v. State, 17 AlaApp 486, 86 S 173.

Oklahoma. Thompson v. State, 16 OklCr 716, 184 P 467.

Virginia. Smith v. Commonwealth, 155 Va 1111, 156 SE 577.

[9] Post v. State, 197 Ind 193, 150 NE 99.

[10] People v. Arnold, 199 Cal 471, 250 P 168.

[11] Pickering v. Cirell, 163 OhSt 1, 56 OhO 1, 125 NE2d 185.

[12] **Kentucky.** Renaker v. Commonwealth, 172 Ky 714, 189 SW 928; Frierson v. Commonwealth, 175 Ky 684, 194 SW 914; Commonwealth v. Stites, 190 Ky 402, 227 SW 574; Keith v. Commonwealth, 195 Ky 635, 243 SW 293; Nickells v. Commonwealth, 241 Ky 159, 43 SW2d 697.

Ohio. Beck v. State, 129 OhSt 582, 2 OhO 566, 196 NE 423.

Oklahoma. Reeves v. Territory, 2 OklCr 351, 101 P 1039.

Pennsylvania. Commonwealth v. Berney, 262 Pa 176, 105 A 54.

South Carolina. It has been held correct to charge that a reasonable doubt is a strong doubt based on the testimony. State v. Summer, 55 SC 32, 32 SE 771, 74 AmSt 707.

[13] **Georgia.** Snell v. State, 179 Ga 52, 175 SE 14; Buchanan v. State, 11 GaApp 756, 76 SE 73; Ponder v. State, 18 GaApp 703, 90 SE 365.

Illinois. People v. Malmenato, 14 Ill2d 52, 150 NE2d 806.

North Carolina. State v. Wilcox, 132 NC 1120, 44 SE 625.

Oklahoma. Choate v. State, 19 OklCr 169, 197 P 1060.

Pennsylvania. Commonwealth v. Berney, 262 Pa 176, 105 A 54 (desirable to explain meaning of term).

In Pennsylvania it is necessary for the court, in capital cases, to define the meaning of the words "reasonable doubt." Commonwealth v. Varano, 258 Pa 442, 102 A 131.

South Carolina. State v. Aughtry, 49 SC 285, 26 SE 619, 27 SE 199.

jury.[15] It has even been held erroneous for the court to attempt to elaborate upon the meaning of the term.[16]

§ 60. Good character as generating reasonable doubt of guilt.

In a criminal prosecution, the accused is entitled to a charge as to the effect of his good character on reasonable doubt of guilt.

Rarely, if ever, is the character of the accused an operative element of his guilt. Rather, character evidence is introduced for the purpose of inferentially proving that he is innocent because of the generally accepted proposition that one of good character is less likely to commit a crime than one of bad character. To put it in another way, the purpose of character evidence is to help create a reasonable doubt of the defendant's guilt.

Hence, it has become appropriate for courts to charge that good character, if proved, is a fact to be considered by the jury together with all the other evidence in reaching the ultimate conclusion of guilt or innocence, and if the evidence raises a reasonable doubt as to guilt, the verdict should be not guilty.[17] But if upon the whole evidence, including that of good character,

Texas. Holmes v. State, 68 TexCr 17, 150 SW 926.

Vermont. State v. Costa, 78 Vt 198, 62 A 38.

Virginia. McCoy v. Commonwealth, 133 Va 731, 112 SE 704.

[14] **Federal.** Nanfito v. United States, 20 F2d 376 (where, however, it was held that a definition must be given).

California. People v. Bickerstaff, 46 CalApp 764, 190 P 656.

Georgia. Solomon v. State, 44 GaApp 755, 162 SE 863.

Illinois. People v. Leggio, 329 Ill 514, 161 NE 60; People v. Buzan, 351 Ill 610, 184 NE 890; People v. Kennedy, 356 Ill 151, 190 NE 296; People v. Cary, 245 IllApp 100. See People v. Guertin, 342 Ill 99, 173 NE 824.

The giving of stock instructions on subject is not commended. People v. Casino, 295 Ill 204, 129 NE 145, 34 ALR 1102.

Kentucky. Crump v. Commonwealth, 215 Ky 827, 287 SW 23; Swopshire v. Commonwealth, 246 Ky 593, 55 SW2d 356.

Oklahoma. Thompson v. State, 16 OklCr 716, 184 P 467; Mayfield v. State, 17 OklCr 503, 190 P 276; Tolbert v. State, 34 OklCr 110, 245 P 659.

[15] State v. Andrews, — RI —, 134 A2d 425.

[16] People v. Cary, 245 IllApp 100.

[17] **Federal.** White v. United States, 164 US 100, 41 LEd 365, 17 SupCt 38.

Evidence of the good character of the defendant may be considered in connection with other evidence to create a reasonable doubt of his guilt; and a charge that it can be considered only when the other evidence raises such a doubt is erroneous. Edgington v. United States, 164 US 361, 41 LEd 467, 17 SupCt 72.

Rowe v. United States, 38 CCA 496, 97 F 779; Snitkin v. United States, 265 F 489; Linde v. United States, 13 F2d 59; Scheib v. United States, 14 F2d 75; Mansfield v. United States, 76 F2d 224.

Alabama. Cobb v. State, 115 Ala 18, 22 S 506; Carwile v. State, 148 Ala 576, 39 S 220.

Arkansas. Rhea v. State, 104 Ark 162, 147 SW 463; Teague v. State, 171 Ark 1189, 287 SW 578.

California. People v. Bowman, 81 Cal 566, 22 P 917. See People v. Lathrop, 49 CalApp 63, 192 P 722.

Florida. Olds v. State, 44 Fla 452, 33 S 296.

Georgia. Nelms v. State, 123 Ga 575, 51 SE 588; Jones v. State, 130 Ga 274, 60 SE 840; Hill v. State, 18 GaApp 259, 89 SE 351; Thomas v. State, 25 GaApp 558, 103 SE 859; Rutland v. State, 28 GaApp 145, 110 SE 634; Peek v. State, 34 GaApp 797, 131 SE 915. But see Taylor v. State, 17 GaApp 787, 88 SE 696; Sheffield v. State, 26 GaApp 72, 105 SE 376.

Idaho. See State v. McGreevey, 17 Idaho 453, 105 P 1047.

Illinois. Spalding v. People, 172 Ill 40, 49 NE 993; People v. Bartz, 342 Ill 56, 173 NE 779.

Indiana. Eacock v. State, 169 Ind 488, 82 NE 1039. See Wilkoff v. State, 206 Ind 142, 185 NE 642.

Iowa. See State v. Johnson, 211 Ia 874, 234 NW 263.

Louisiana. See State v. Nicholls, 50 LaAnn 699, 23 S 980.

Massachusetts. Commonwealth v. Leonard, 140 Mass 473, 4 NE 96, 54 AmRep 485.

Michigan. People v. Parker, 166 Mich 587, 131 NW 1120. See People v. Best, 218 Mich 141, 187 NW 393.

Minnesota. State v. Dolliver, 150 Minn 155, 184 NW 848.

Mississippi. Hammond v. State, 74 Miss 214, 21 S 149; Dewberry v. State, 168 Miss 366, 151 S 479.

Missouri. State v. Lasson, 292 Mo 155, 238 SW 101.

Nebraska. Lillie v. State, 72 Neb 228, 100 NW 316. See McDougal v. State, 105 Neb 553, 181 NW 519.

New Jersey. Baker v. State, 53 NJL 45, 20 A 858; State v. Lang, 87 NJL 508, 94 A 631, 10 ALR 4. See State v. Duelks, 97 NJL 43, 116 A 865.

New York. Remsen v. People, 43 NY 6. See People v. Trimarchi, 231 NY 263, 131 NE 910; People v. Colantone, 243 NY 134, 152 NE 700.

In People v. Viscio, 241 AppDiv 499, 272 NYS 213, the court said: "Defendant introduced evidence of his good character. The trial judge made no reference to this subject in his charge. He utterly ignored this evidence so vital to defendant. He should have explained to the jury the effect of good character upon the question of reasonable doubt. When evidence of good character raises a reasonable doubt as to the guilt of a person accused of crime, he is entitled to an acquittal although without such evidence no doubt as to his guilt would exist. . . . Evidence of good character is a matter of substance, not of form, in criminal cases, and must be considered by the jury as bearing upon the issue of guilt, even when the evidence against the defendant may be very convincing."

See to the contrary People v. D'Anna, 243 AppDiv 259, 277 NYS 279. See also People v. Jackson, 182 NY 66, 74 NE 565.

An instruction that evidence of good character must be considered and if in the judgment of the jury it does raise a doubt against positive evidence, the jury have a right to entertain such doubt and the defendant must have the benefit of it, has been held to correctly state the rule in regard to such evidence. People v. Hughson, 154 NY 153, 47 NE 1092.

Evidence of good character will raise a reasonable doubt when believed by the jury. People v. Trimarchi, 231 NY 263, 131 NE 910.

Ohio. Stewart v. State, 22 OhSt 477; State v. Hare, 87 OhSt 204, 100 NE 825.

Oklahoma. Cannon v. Territory, 1 OklCr 600, 99 P 622. See Jollifee v. State, 21 OklCr 278, 207 P 454.

the jury are satisfied beyond a reasonable doubt of the defendant's guilt, it is their duty to convict.[18] The charge must be made without any disparagement by the court.[19]

Not every defendant in a criminal case is entitled to an instruction on good character. The instruction on good character is required only where substantial evidence of good character is adduced. No such instruction is required merely by the answer of defendant to the question on direct examination as to arrest

Pennsylvania. Commonwealth v. Ronello, 251 Pa 329, 96 A 826.

Utah. State v. Brown, 39 Utah 140, 115 P 994, AnnCas 1913E, 1; State v. Harris, 58 Utah 331, 199 P 145.

Washington. State v. Cushing, 17 Wash 544, 50 P 512; State v. Humphreys, 118 Wash 472, 203 P 965.

Wisconsin. Jackson v. State, 81 Wis 127, 51 NW 89.

An instruction was erroneous which told the jury that the office of evidence respecting good reputation was not to raise a doubt of guilt but to aid in solving it. Schutz v. State, 125 Wis 452, 104 NW 90.

For approved instructions see Niezorawski v. State, 131 Wis 166, 111 NW 250.

[18] **Federal.** Hughes v. United States, 145 CCA 238, 231 F 50.

Alabama. Kilgore v. State, 74 Ala 1; Hussey v. State, 87 Ala 121, 6 S 420; Pate v. State, 94 Ala 14, 10 S 665.

Arkansas. Edmonds v. State, 34 Ark 720.

California. People v. Smith, 59 Cal 601; People v. Mitchell, 129 Cal 584, 62 P 187. See People v. Hahn, 58 CalApp 704, 209 P 268.

Georgia. Hathcock v. State, 88 Ga 91, 13 SE 959; Brazil v. State, 117 Ga 32, 43 SE 460; Johnson v. State, 21 GaApp 497, 94 SE 630.

Illinois. Hirschman v. People, 101 Ill 568; People v. Anderson, 239 Ill 168, 87 NE 917.

Indiana. Rollins v. State, 62 Ind 46; Walker v. State, 136 Ind 663, 36 NE 356; Rains v. State, 152 Ind 69, 52 NE 450; Dorsey v. State, 179 Ind 531, 100 NE 369.

Michigan. People v. Mead, 50 Mich 228, 15 NW 95.

Missouri. State v. McMurphy, 52 Mo 251; State v. Wertz, 191 Mo 569, 90 SW 838; State v. Wilson, 230 Mo 647, 132 SW 238.

New York. People v. Brooks, 131 NY 321, 30 NE 189; People v. Conrow, 200 NY 356, 93 NE 943.

Ohio. Stewart v. State, 22 OhSt 477.

Oklahoma. Coleman v. State, 6 OklCr 252, 118 P 594.

Pennsylvania. Commonwealth v. Eckerd, 174 Pa 137, 34 A 305.

Washington. State v. Stentz, 33 Wash 444, 74 P 588.

Wisconsin. Cupps v. State, 120 Wis 504, 97 NW 210, 98 NW 546, 102 AmSt 996; Dunn v. State, 125 Wis 181, 102 NW 935; Hedger v. State, 144 Wis 279, 128 NW 80.

[19] **Federal.** Hughes v. United States, 145 CCA 238, 231 F 50; Perara v. United States, 235 F 515, 149 CCA 61, 10 ALR 1.

Connecticut. Proof of good character may be considered in a doubtful case and may raise a doubt based on the improbability of guilt of one of generally good character. State v. McGuire, 84 Conn 470, 80 A 761, 38 LRA (N. S.) 1045.

Georgia. Nelms v. State, 123 Ga 575, 51 SE 588; Brundage v. State, 7 GaApp 726, 67 SE 1051.

Kansas. State v. Hall, 111 Kan 458, 207 P 773.

Louisiana. Evidence in support of good reputation to the effect that witness had never heard it discussed, questioned, or talked about is admissible. State v. Emory, 151 La 152, 91 S 659.

or conviction of an offense.[20] It is not error to fail to call attention to defendant's reputation for truth and veracity where his reputation in this respect has not been attacked and evidence introduced by him on this point, if objected to, might have been rejected.[21] If the only character evidence offered by the defendant was as to his reputation for truth and veracity, the court is not required to charge on good character.[22] On the other hand, the defendant is entitled to the instruction. though his witnesses on that subject were contradicted.[23]

It is not required, before a good character instruction must be given, that the rest of the evidence in the case leaves the guilt of the defendant in doubt.[24] Nor should the jury be told not to consider character evidence if from the rest of the evi-

Michigan. People v. Best, 218 Mich 141, 187 NW 393.

It was error to refuse an instruction that accused was presumed to be of good character. People v. Woods, 206 Mich 11, 172 NW 384.

Proof of good character is of no avail where there is positive evidence of guilt. People v. Covelesky, 217 Mich 90, 185 NW 770.

Minnesota. State v. Friedson, 170 Minn 72, 211 NW 958.

Mississippi. Powers v. State, 74 Miss 777, 21 S 657.

Missouri. State v. Martin, 230 Mo 680, 132 SW 595; State v. Baird, 288 Mo 62, 231 SW 625, 15 ALR 1035.

Nebraska. Latimer v. State, 55 Neb 609, 76 NW 207, 70 AmSt 403.

New Jersey. State v. Duelks, 97 NJL 43, 116 A 865.

New York. People v. Billick, 193 AppDiv 914, 183 NYS 685.

Ohio. Harrington v. State, 19 OhSt 264; Stewart v. State, 22 OhSt 477; Burns v. State, 75 OhSt 407, 79 NE 929; State v. Hare, 87 OhSt 204, 100 NE 825.

Oklahoma. Gray v. State, 56 Okl Cr 208, 38 P2d 967.

Pennsylvania. Commonwealth v. Tenbroeck, 265 Pa 251, 108 A 635.

It may be error in the particular case for the court to tell the jury that the defendant's character is not in issue. Commonwealth v. Wood, 118 PaSuperCt 269, 179 A 756 (prosecution for conspiracy to cheat and defraud).

South Carolina. State v. Hill, 129 SC 166, 123 SE 817.

Utah. State v. Cerar, 60 Utah 208, 207 P 597.

Wisconsin. Niezorawski v. State, 131 Wis 166, 111 NW 250; McGillis v. State, 177 Wis 522, 188 NW 597 (where jury satisfied of guilt from all evidence including evidence of good character).

[20] State v. Millard (Mo), 242 SW 923.

[21] **Alabama.** In a prosecution for murder it was proper to refuse an instruction that if the jury believed the character of the defendant for peace and quietude good they should consider it in favor of his innocence even though they believed his character for veracity bad. Terry v. State, 120 Ala 286, 25 S 176.

Kansas. See also State v. Gaunt, 98 Kan 186, 157 P 447.

Michigan. People v. Smith, 122 Mich 284, 81 NW 107.

[22] State v. Steely, 327 Mo 16, 33 SW2d 938.

[23] People v. Duzan, 272 Ill 478, 112 NE 315.

[24] **United States.** Edgington v. United States, 164 US 361, 41 LEd 467, 17 SupCt 72.

Federal. Rowe v. United States, 38 CCA 496, 97 F 779; Hughes v. United States, 145 CCA 238, 231 F 50.

dence they believe defendant guilty.[25] On the other hand, the jury should not be charged to acquit defendant if there is a reasonable doubt of his guilt "independent of evidence of good character."[26]

Where the rest of the evidence does not raise a reasonable doubt of guilt, the jury may be charged that the evidence of good character itself may offset the other evidence, but that the jury must still consider all the evidence; they should not be told that good character evidence, if believed, by itself, without consideration of the rest of the evidence, is sufficient to raise a reasonable doubt.[27]

California. People v. Ashe, 44 Cal 288; People v. Shepardson, 49 Cal 629.

Georgia. Shropshire v. State, 81 Ga 589, 8 SE 450; McCullough v. State, 11 GaApp 612, 76 SE 393.

Illinois. The jury must not be told that evidence of good character is conclusive in favor of the accused in all doubtful cases. People v. Buckman, 204 IllApp 53 affd. in 279 Ill 348, 116 NE 835.

Iowa. State v. Northrup, 48 Ia 583, 30 AmRep 408.

Louisiana. State v. Simon, 131 La 520, 59 S 975.

Massachusetts. Commonwealth v. Leonard, 140 Mass 473, 4 NE 96, 54 AmRep 485.

Michigan. People v. Jassino, 100 Mich 536, 59 NW 230; People v. Laird, 102 Mich 135, 60 NW 457; People v. Humphrey, 194 Mich 10, 160 NW 445.

Minnesota. State v. Sauer, 38 Minn 438, 38 NW 355.

Missouri. State v. Howell, 100 Mo 628, 14 SW 4.

Montana. Territory v. Burgess, 8 Mont 57, 19 P 558, 1 LRA 808.

Nebraska. Johnson v. State, 34 Neb 257, 51 NW 835.

New York. People v. Weiss, 129 AppDiv 671, 23 NYCr 140, 114 NYS 236; People v. Blatt, 136 AppDiv 717, 24 NYCr 418, 121 NYS 507.

Pennsylvania. Commonwealth v. House, 223 Pa 487, 72 A 804.

Tennessee. Keith v. State, 127 Tenn 40, 152 SW 1029.

Texas. Lee v. State, 2 TexApp 338.

Wisconsin. Schutz v. State, 125 Wis 452, 104 NW 90.

[25] **Georgia.** Thornton v. State, 107 Ga 683, 33 SE 673.

Kansas. State v. Keefe, 54 Kan 197, 38 P 302; State v. Douglass (Kan), 24 P 1118.

Michigan. People v. Garbutt, 17 Mich 9, 97 AmDec 162.

Missouri. State v. Alexander, 66 Mo 148.

Ohio. Donaldson v. State, 10 OhCirCt 613, 5 OhCirDec 98.

Pennsylvania. Commonwealth v. Ronello, 251 Pa 329, 96 A 826.

Wisconsin. Jackson v. State, 81 Wis 127, 51 NW 89.

[26] Holland v. State, 131 Ind 568, 31 NE 359. See also Kistler v. State, 54 Ind 400.

[27] **Federal.** Searway v. United States, 197 CCA 635, 184 F 716; Linn v. United States, 163 CCA 470, 251 F 476.

Alabama. Bryant v. State, 116 Ala 445, 23 S 40; Watts v. State, 177 Ala 24, 59 S 270. See Pate v. State, 94 Ala 14, 10 S 665; Clark v. State, 20 AlaApp 92, 101 S 63.

California. People v. Bell, 49 Cal 485; People v. Silva, 20 CalApp 120, 128 P 348.

Florida. Langford v. State, 33 Fla 233, 14 S 815; Mitchell v. State, 43 Fla 188, 30 S 803.

Georgia. Howell v. State, 124 Ga 698, 52 SE 649.

In Taylor v. State, 13 GaApp 715,

§ 61. Burden of proof in civil cases.

Although it is proper for the court to inform the jury upon whom the burden of proof rests, in the absence of a request, it is generally not error to give the instruction.

There are many cases supporting the propriety of the court in informing the jury upon whom the burden of proof rests to sustain the issues of the case.[28] But generally, there is no error in the omission to give the instruction, in the absence of request.[29] There is no necessity for the instruction on burden

79 SE 924, the court on appeal said that the trial court should have told the jury that good character, alone and of itself, may create a reasonable doubt.

Illinois. Spalding v. People, 172 Ill 40, 49 NE 993.

Iowa. State v. House, 108 Ia 68, 78 NW 859; State v. Dunn (Ia), 160 NW 302. See State v. Fortune, 196 Ia 884, 194 NW 65.

Kansas. State v. Pipes, 65 Kan 543, 70 P 363. See State v. Hall, 111 Kan 458, 207 P 773.

Louisiana. State v. Riculfi, 35 LaAnn 770; State v. Spooner, 41 La Ann 780, 6 S 879; State v. Simon, 131 La 520, 59 S 975.

Michigan. People v. McArron, 121 Mich 1, 79 NW 944.

Nebraska. Sweet v. State, 75 Neb 263, 106 NW 31.

New York. People v. Hughson, 154 NW 153, 47 NE 1092; People v. Gilbert, 199 NY 10, 92 NE 85, 20 Ann Cas 769; People v. Dippold, 30 AppDiv 62, 13 NYCr 230, 51 NYS 859. See also People v. Fisher, 136 AppDiv 57, 24 NYCr 176, 120 NYS 659.

Ohio. Burns v. State, 75 OhSt 407, 79 NE 929.

Pennsylvania. Commonwealth v. Cate, 220 Pa 138, 69 A 322, 17 LRA (N. S.) 795, 123 AmSt 683; Commonwealth v. Webb, 252 Pa 187, 97 A 189; Becker v. Commonwealth (Pa), 9 A 510.

Washington. State v. Cushing, 17 Wash 544, 50 P 512.

Wisconsin. Niezorawski v. State, 131 Wis 166, 111 NW 250.

[28] **Alabama.** Robinson v. Smith, 207 Ala 378, 92 S 546.

Arkansas. Arkadelphia Milling Co. v. Green, 142 Ark 565, 219 SW 319.

Connecticut. Coogan v. Lynch, 88 Conn 114, 89 A 906.

Illinois. Teter v. Spooner, 305 Ill 198, 137 NE 129; McMahon v. Scott, 132 IllApp 582.

Iowa. Young v. Jacobsen Bros. (Ia), 258 NW 104.

Maryland. Meyer v. Frenkil, 116 Md 411, 82 A 208, Ann Cas 1913C, 875.

Ohio. Travelers Ins. Co. v. Gath, 118 OhSt 257, 160 NE 710.

Oklahoma. Burt Corp. v. Crutchfield, 153 Okl 2, 6 P2d 1055.

Texas. Chittim v. Martinez, 94 Tex 141, 58 SW 948; Boswell v. Pannell, 107 Tex 433, 180 SW 593; Smith v. Smith (TexCivApp), 200 SW 540; Emerson-Brantingham Implement Co. v. Roquemore (TexCiv App), 214 SW 679; Goree v. Uvalde Nat. Bank (TexCivApp), 218 SW 620.

The trial judge should instruct on burden of proof on special issues. Levy v. Jarrett (TexCivApp), 198 SW 333.

Wisconsin. Illinois Steel Co. v. Paczocha, 139 Wis 23, 119 NW 550.

[29] **California.** Wyatt v. Pacific Elec. R. Co., 156 Cal 170, 103 P 892.

Georgia. Southern Ry. Co. v. Wright, 6 GaApp 172, 64 SE 703.

Illinois. Drury v. Connell, 177 Ill 43, 52 NE 368.

Iowa. Reizenstein v. Clark, 104 Ia 287, 73 NW 588.

of proof where only one of the parties offers any evidence.[30] Failure to charge on burden of proof on the question of damages is not error where the general tenor of the charge that plaintiff has the burden of proving all of the material allegations of the complaint is sufficient to apply such rule to the proof of damages.[31] In a replevin case, where the property sought to be recovered is claimed by defendant to have been sold to him by plaintiff, it is error for the court to fail to charge that the burden was on the defendant to prove the sale, to the extent, at least, of meeting the prima facie case of the plaintiff, as the question of who had the burden of proof on such issue was an essential part of the case.[32]

The allocation between the parties of this burden of persuasion is not uniform, but broadly speaking, the plaintiff has the burden of persuasion to establish the allegations of his complaint,[33] not admitted by defendant.[34] The defendant has the burden to establish the affirmative defenses.[35] Accordingly, the burden of proof is on defendant to prove assumption of risk and contributory negligence (in most states),[36] or set-off,[37] or loss

Ohio. Cleveland Rolling-Mill Co. v. Corrigan, 46 OhSt 283, 20 NE 466, 3 LRA 385, 15 AmSt 596.

South Dakota. Frye v. Ferguson, 6 SD 392, 61 NW 161.

Tennessee. Shelby County v. Fisher, 137 Tenn 507, 194 SW 576.

Texas. Davis v. Hill (TexCiv App), 291 SW 681, affd. in 298 SW 526; Gulf States Utilities Co. v. Moore (TexCivApp), 73 SW2d 941.

Wisconsin. Coppins v. Jefferson, 126 Wis 578, 105 NW 1078.

[30] Utica Hydraulic Cement Co. v. Chicago, R. I. & P. R. Co., 193 IllApp 390; Cohen v. Chicago, 197 IllApp 377. See also Hamel v. Southern R. Co., 113 Miss 344, 74 S 276.

[31] Bysczynski v. McCarthy Freight System, 129 Conn 118, 26 A2d 853.

[32] Wortheim v. Brace, 116 Vt 9, 68 A2d 719.

[33] **Alabama.** Southern Exp. Co. v. Roseman, 206 Ala 681, 91 S 612.

Indiana. Public Utilities Co. v. Iverson, 187 Ind 672, 121 NE 33.

Ohio. Travelers Ins. Co. v. Gath, 118 OhSt 257, 160 NE 710.

Washington. Wright v. J. F. Duthie & Co., 118 Wash 564, 204 P 191.

[34] Laam v. Green, 106 Or 311, 211 P 791.

[35] **Georgia.** Fisher v. Shands, 24 GaApp 743, 102 SE 190.

Illinois. Zink v. National Council, Knights & Ladies of Security, 109 IllApp 376.

New York. Nordlinger v. Handelmaatschappy Transmarina, Inc., 192 NYS 789.

[36] **California.** Ellis v. Central California Trac. Co., 37 CalApp 390, 174 P 407.

Missouri. Wagner v. Gilsonite Constr. Co. (Mo), 220 SW 890; Pohlman v. Wayland (MoApp), 226 SW 92.

New Hampshire. Crugley v. Grand Trunk Ry. Co., 79 NH 276, 108 A 293.

Ohio. Smith v. Lopa, 123 OhSt 213, 174 NE 735.

Texas. Barnhart v. Kansas City, M. & O. Ry. Co., 107 Tex 638, 184 SW 176.

[37] Nutt v. Vennum, 202 IllApp 507.

from "act of God,"[38] or modification,[39] or rescission of contract sued upon.[40] The burden is upon a fiduciary to prove fair dealing with the subject of his trust.[41]

In most civil cases, the burden is sustained by a preponderance of all the evidence,[42] however slight.[43] In some claims or issues, the measure or standard of persuasion is higher. For example, to establish a right to recover on account of fraud or on any wrong-doing which also constitutes a crime, the proof must be by "clear and satisfactory evidence."[44] But where the court imposes upon a litigant a greater burden of proof than the law requires, prejudice will be presumed.[45]

The courts do not agree, however, on the meaning of "preponderance" of evidence. The matter is correctly presented to

[38] Payne v. Orton, 150 Ark 307, 234 SW 469.

[39] Kossoff v. Alt, 200 AppDiv 552, 193 NYS 431.

[40] Curran v. Junk, 200 IllApp 208.

[41] Sadler's Estate v. Sadler's Estate, 201 Mich 281, 167 NW 861.

[42] **Arizona.** Red Rover Copper Co. v. Hillis, 21 Ariz 87, 185 P 641.

Arkansas. Johnson v. Missouri Pacific Ry. Co., 149 Ark 418, 233 SW 699.

California. Fidelity & Casualty Co. v. Paraffine Paint Co., 188 Cal 184, 204 P 1076; Lawrence v. Goodwill, 44 CalApp 440, 186 P 781.

Connecticut. Sullivan v. Nesbit, 97 Conn 474, 117 A 502.

Georgia. Parker v. Georgia Pacific Ry. Co., 83 Ga 539, 10 SE 233; Robertson v. Rigsby, 148 Ga 81, 95 SE 973.

Illinois. Beacon Falls Rubber Co. v. Gravenhorst, 194 IllApp 205; Smiley v. Barnes, 196 IllApp 530; Waiswila v. Illinois Cent. Ry. Co., 220 IllApp 113.

Indiana. Holmes v. Buell, 85 Ind App 467, 153 NE 432; DeHart v. Johnson County, 143 Ind 363, 41 NE 825.

Iowa. Jamison v. Jamison, 113 Ia 720, 84 NW 705.

Missouri. Anderson v. Voeltz, (MoApp), 206 SW 584.

Oregon. Mt. Emily Timber Co. v. Oregon-Washington Ry. & Nav. Co., 82 Or 185, 161 P 398.

South Carolina. Dial v. Gardner, 104 SC 456, 89 SE 396; Sloan v. J. G. White Engineering Co., 105 SC 226, 89 SE 564.

Texas. Moore v. Coleman (Tex Civ App), 195 SW 212; Rachofsky v. Rachofsky (TexCivApp), 203 SW 1134; Carl v. Settegast (TexCiv App), 211 SW 506; Texas Power & Light Co. v. Bristow (TexCivApp), 213 SW 702.

Utah. Contributory negligence is determined by all the evidence and not by that of defendant's witnesses alone. Dimmick v. Utah Fuel Co., 49 Utah 430, 164 P 872.

Wisconsin. Sullivan v. Minneapolis, St. P. & S. S. M. Ry. Co., 167 Wis 518, 167 NW 311.

[43] Glascock v. Gerold, 199 IllApp 134; Meers v. Daley, 203 IllApp 515; Comorouski v. Spring Valley Coal Co., 203 IllApp 617; Vivian Collieries Co. v. Cahall, 184 Ind 473, 110 NE 672.

[44] Poertner v. Poertner, 66 Wis 644, 29 NW 386; Klipstein v. Raschein, 117 Wis 248, 94 NW 63; Burnham v. Burnham, 119 Wis 509; 97 NW 176, 100 AmSt 895; Neacy v. Board of Suprs. of Milwaukee County, 144 Wis 210, 128 NW 1063; Maahs v. Schultz, 207 Wis 624, 242 NW 195.

[45] Cleveland Ry. Co. v. Goldman, 122 OhSt 73, 170 NE 641.

the jury by a charge that the evidence preponderates for a proposition when that favorable to it outweighs that which is against it.[46] To entitle one on whom rests the burden of proof to a finding in his favor, the evidence sustaining his contention must have greater convincing power than the opposing evidence and must satisfy the minds of the jury to a reasonable certainty of the truth of his contention.[47]

The standard is too high when it is required that the sustaining evidence shall be beyond a reasonable doubt,[48] or that there shall be a "clear" preponderance of the evidence,[49] or that the jury shall be "convinced,"[50] or that the party must establish his contention "clearly and to the satisfaction of the jury,"[51] or to a "reasonable and moral certainty,"[52] or that the evidence must be "clear, cogent and convincing,"[53] or "positive and unequivocal,"[54] or that the plaintiff must "prove" the allegations of his complaint,[55] or "prove to reasonable certainty every material allegation of his complaint,"[56] or that the evidence must

[46] Travelers Ins. Co. v. Gath, 118 OhSt 257, 160 NE 710.

[47] Anderson v. Chicago Brass Co., 127 Wis 273, 106 NW 1077; Eichman v. Buchheit, 128 Wis 385, 107 NW 325, 8 AnnCas 435.

[48] **Alabama.** Lawson v. Norris, 215 Ala 666, 112 S 129.

California. Galloway v. United Railroads of San Francisco, 51 Cal App 575, 197 P 663.

Illinois. Garrett v. Anglo-American Provision Co., 205 IllApp 411.

Missouri. Brooks v. Roberts, 281 Mo 551, 220 SW 11; Collins v. Beckmann (Mo), 79 SW2d 1052. But see Morley v. Prendiville, 316 Mo 1094, 295 SW 563.

Reversible error occurred where the court told the jury in a damage action that their verdict must be for the defendant if there remained any doubt as to plaintiff's proof of the charge of negligence. Aly v. Terminal R. Assn., 336 Mo 340, 78 SW2d 851.

Utah. Whatcott v. Continental Casualty Co., 85 Utah 406, 39 P2d 733.

[49] **Illinois.** Teter v. Spooner, 305 Ill 198, 137 NE 129.

Mississippi. Choate v. Pierce, 126 Miss 209, 88 S 627.

Oklahoma. But see St. Louis & S. F. R. Co. v. Bruner, 56 Okl 682, 156 P 649.

Oregon. Kelley v. Joslin, 123 Or 253, 261 P 413.

Pennsylvania. Suravitz v. Prudential Ins. Co., 261 Pa 390, 104 A 754.

Texas. Wyatt v. Chambers (Tex CivApp), 182 SW 16.

[50] **Illinois.** Newman v. Newman, 208 IllApp 97; Fowler v. Cade, 214 IllApp 153.

Ohio. Merrick v. Ditzler, 91 Oh St 256, 110 NE 493.

Washington. Sheller v. Seattle Title Trust Co., 120 Wash 140, 206 P 847.

[51] Myerl v. Gutzeit, 50 OhApp 83, 3 OhO 448, 197 NE 503; Carl v. Settegast (TexComApp), 237 SW 238.

[52] Whatley v. Long, 147 Ga 323, 93 SE 887.

[53] Dovich v. Chief Consol. Min. Co., 53 Utah 522, 174 P 627. But see Smith & Co. v. Kimble, 38 SD 511, 162 NW 162.

[54] Molyneux v. Twin Falls Canal Co., 54 Idaho 619, 35 P2d 651, 94 ALR 1264.

[55] Southern Exp. Co. v. Roseman, 206 Ala 681, 91 S 612.

[56] American Lbr. & Export Co. v. Love, 17 AlaApp 251, 84 S 559.

"satisfy" the jury,[57] or that the proof of a fact must be by "full and satisfactory evidence."[58]

The jury should not be told that the preponderance must be clear, satisfactory, and convincing.[59] It has been held incorrect for the court to define preponderance of evidence as that degree of proof which leads the minds of the jury to a conclusion and convinces their understanding.[60] It is reversible error in a negligence case to charge that the jury must find for the defendant if after considering the evidence there remained in their minds a doubt of the truth of the charge of negligence against the defendant.[61]

Preponderance of evidence does not mean greater number of witnesses,[62] yet that fact may be considered by the jury.[63] But under the circumstances of particular cases it may be error for

[57] **Alabama.** Wetzel v. Birmingham Southern Ry. Co., 204 Ala 619, 87 S 96; Nabers v. Long, 207 Ala 270, 92 S 444; Bierley v. Shelby Iron Co., 208 Ala 25, 93 S 829.

California. Lawrence v. Goodwill, 44 CalApp 440, 186 P 781.

Georgia. Pope v. Peeples, 24 Ga App 467, 101 SE 303.

Illinois. Dombrowski v. Metropolitan Life Ins. Co., 192 IllApp 16.

Missouri. Yorger v. Weindel (Mo App), 245 SW 578. But see Jackson v. Malden (City of) (MoApp), 72 SW2d 850.

Nebraska. Hyndshaw v. Mills, 108 Neb 205, 187 NW 780.

Ohio. Buttermiller v. Schmid, 4 OhApp 100, 25 OhCirCt (N. S.) 201, 26 OhCirDec 50.

[58] Carleton-Ferguson Dry Goods Co. v. McFarland (TexCivApp), 230 SW 208.

[59] Purvis v. Hornor, 185 Ark 323, 47 SW2d 48.

[60] Aarons v. Levy Bros. & Adler Rochester, Inc., 44 OhApp 488, 38 OLR 25, 185 NE 62.

[61] Dempsey v. Horton (Mo), 84 SW2d 621; Grimes v. Red Line Service, Inc., 337 Mo 743, 85 SW2d 767.

[62] **California.** Hanton v. Pacific Elec. Ry. Co., 178 Cal 616, 174 P 61.

Connecticut. Fierberg v. Whitcomb, 119 Conn 390, 177 A 135.

Georgia. Tallulah Falls Ry. Co. v. Taylor, 20 GaApp 786, 93 SE 533; Hinson v. Hooks, 27 GaApp 430, 108 SE 822.

Illinois. Coonan v. Straka, 204 IllApp 17.

Indiana. Barnes v. Phillips, 184 Ind 415, 111 NE 419; Davis v. Babb, 190 Ind 173, 125 NE 403; Lafayette Tel. Co. v. Cunningham, 63 IndApp 136, 114 NE 227; Cleveland, C., C. & St. L. Ry. Co. v. Vettel, 81 IndApp 625, 133 NE 605.

Michigan. Gardner v. Russell, 211 Mich 647, 179 NW 41.

Missouri. Zackwik v. Hanover Fire Ins. Co. (MoApp), 225 SW 135.

North Dakota. Shellberg v. Kuhn, 35 ND 448, 160 NW 504.

[63] **Georgia.** See Atlanta Gas-Light Co. v. Cook, 35 GaApp 622, 134 SE 198.

Illinois. Noone v. Olehy, 297 Ill 160, 130 NE 476; Osberg v. Cudahy Packing Co., 198 IllApp 551; Parker v. Chicago Ry. Co., 200 IllApp 9; Gordon v. Stadelman, 202 IllApp 255; Powell v. Alton & S. R. Co., 203 IllApp 60; Rynearson v. McCartney, 203 IllApp 555; Horstman v. Chicago Ry. Co., 211 IllApp 144; Neville v. Chicago & A. R. Co., 210 IllApp 168; Franz v. St. Louis, S. & P. R. R. Co., 219 IllApp 558; Ogren v. Sundell, 220 IllApp 584.

Missouri. Hite v. St. Joseph & G. I. Ry. Co. (Mo), 225 SW 916.

the trial court so to instruct the jury.[64] Such an instruction is improper if coupled with another untenable direction that "the probability of truth is with the party having the affirmative of the issue."[65] A court may instruct the jury that if it finds that any of the witnesses testifying for or against a controverted fact are equal in testimonial value as determined by all tests of truth or falsity—including credibility, fairness, candor, intelligence, opportunity for observation, corroboration by other testimony, and freedom from interest in the suit—then it may consider any numerical preponderance of such witnesses testifying on one side as to such fact.[66]

Of course where the evidence is evenly balanced there can be no preponderance; and in such a case the one carrying the burden of proof must lose, and an instruction to that effect is proper.[67] An instruction has been declared confusing and misleading which charged in a negligence action that plaintiff could not recover if he failed to prove negligence of defendant by a preponderance of the evidence, or if the jury could not say where the preponderance of the evidence lay.[68]

§ 62. Burden of proof and presumption of innocence in criminal cases.

In criminal cases, the court must instruct that the burden rests on the state to prove every essential element of the offense charged in the indictment.

The degree of persuasive proof necessary in criminal cases is guilt beyond a reasonable doubt. It is obvious that this burden of persuasion rests on the state, and the judge must so instruct the jury.[69] It is also clear that this burden never at any time shifts to the accused.[70]

[64] See Chicago v. Van Schaack Bros. Chem. Works, 330 Ill 264, 161 NE 486.

[65] Ennes v. Dunham, 266 Mich 616, 254 NW 224.

[66] Rice v. Cleveland, 144 OhSt 299, 29 OhO 447, 58 NE2d 768.

[67] **Alabama.** Wilson Bros. v. Mobile & O. R. Co., 208 Ala 581, 94 S 721.

Georgia. McWilliams v. McWilliams, 166 Ga 792, 144 SE 286.

Missouri. Stofer v. Dunham (Mo App), 208 SW 641.

New York. Drena v. Travelers Ins. Co., 192 AppDiv 703, 183 NYS 439.

[68] Mitchell v. Dyer (Mo), 57 SW2d 1082.

[69] **Federal.** Caughman v. United States, 169 CCA 450, 258 F 434; Guignard v. United States, 170 CCA 61, 258 F 607.

Alabama. Haithcock v. State, 21 AlaApp 367, 108 S 401.

Florida. Padgett v. State, 40 Fla 451, 24 S 145; Alvarez v. State, 41 Fla 532, 27 S 40.

Georgia. Merritt v. State, 152 Ga 405, 110 SE 160; Nixon v. State, 14 GaApp 261, 80 SE 513.

Illinois. People v. Schultz-Knighten, 277 Ill 238, 115 NE 140.

Iowa. State v. Comer, 198 Ia

It is placing the burden of proof upon the defendant in a criminal case for the court to charge the jury to acquit the defendant if he has caused the jury to entertain a reasonable doubt as to the charges against him.[71] The burden of establishing that the injury resulted from some cause other than the act of the defendant cannot legitimately be placed upon the defendant in a criminal case; the converse being the rule, that the burden of establishing that the particular injury resulted from the act of the accused is upon the prosecution.[72] Where a prosecution for theft in the federal court involved the stealing of automobiles moving in interstate commerce, it was error for the court in its charge to the jury to omit to state that the burden of proof was upon the government to show that at the time of the alleged theft the cars were moving in interstate commerce.[73] In Pennsylvania it has been held error for the court to tell the jury that the evidence of the commonwealth made a prima facie case against the defendant or the court would have taken the case from the jury, the implication being that the burden shifted to the defendant to prove innocence.[74]

Presumption of innocence. This is really another way of saying that the state must convince the jury of the accused's guilt beyond a reasonable doubt. Even though an instruction on reasonable doubt has been given, courts still require an in-

740, 200 NW 185; State v. Brady (Ia), 91 NW 801.

Nebraska. Chamberlain v. State, 80 Neb 812, 115 NW 555.

Ohio. Morehead v. State, 34 OhSt 212.

Oklahoma. Beal v. State, 12 Okl Cr 157, 152 P 808; Adair v. State, 15 OklCr 619, 180 P 253.

Pennsylvania. Commonwealth v. Greene, 227 Pa 86, 75 A 1024, 136 AmSt 867.

South Carolina. State v. Hampton, 106 SC 275, 91 SE 314.

Texas. The burden is on state first to prove theft by particular person before finding another guilty as accomplice. Cone v. State, 86 TexCr 291, 216 SW 190.

Washington. State v. Hatfield, 65 Wash 550, 118 P 735, AnnCas 1913B, 895.

Wyoming. Meldrum v. State, 23 Wyo 12, 146 P 596.

[70] **Colorado.** Cook v. People, 60 Colo 263, 153 P 214.

Kentucky. Williams v. Commonwealth, 258 Ky 830, 81 SW2d 891.

Michigan. People v. McWhorter, 93 Mich 641, 53 NW 780.

Mississippi. Cumberland v. State, 110 Miss 521, 70 S 695.

New Jersey. State v. Kaplan, 115 NJL 374, 180 A 423.

North Carolina. State v. Kirkland, 178 NC 810, 101 SE 560.

Oklahoma. Carter v. State, 12 OklCr 164, 152 P 1132; Findley v. State, 13 OklCr 128, 162 P 680.

Texas. Hawkins v. State, 77 Tex Cr 520, 179 SW 448; Crippen v. State, 80 TexCr 293, 189 SW 496; Stafford v. State, 125 TexCr 174, 67 SW2d 285.

[71] State v. Headley, 113 NJL 335, 174 A 572.

[72] Feldman v. Commonwealth, 258 Ky 277, 79 SW2d 960.

[73] McAdams v. United States, 74 F2d 37.

[74] Commonwealth v. Wood, 118 PaSuperCt 269, 179 A 756.

struction on the presumption of innocence,[75] or that he is not called upon to prove his innocence,[76] and that the presumption continues throughout the trial until overcome by legal and competent evidence.[77] An instruction deprives the defendant

[75] **Alabama.** Matthews v. State, 18 AlaApp 222, 90 S 52.

It is error to refuse to charge that the presumption of innocence attends the accused in the trial until overcome by facts proving his guilt beyond a reasonable doubt. Haithcock v. State, 21 AlaApp 367, 108 S 401.

Georgia. Gardner v. State, 17 Ga App 410, 87 SE 150.

Illinois. People v. Israel, 269 Ill 284, 109 NE 969.

Ohio. State v. Knapp, 70 OhSt 380, 71 NE 705, 1 AnnCas 819.

South Carolina. State v. Johnson, 159 SC 165, 156 SE 353.

Texas. Dugan v. State, 86 TexCr 130, 216 SW 161; Roberts v. State, 91 TexCr 433, 239 SW 960.

Virginia. Campbell v. Commonwealth, 162 Va 818, 174 SE 856.

[76] **Federal.** Dodson v. United States, 23 F2d 401.

The court should instruct that the indictment returned against the accused is not evidence of guilt. Cooper v. United States, 9 F2d 216.

California. People v. Riccardi, 50 CalApp 427, 195 P 448.

Massachusetts. Commonwealth v. McDonald, 264 Mass 324, 162 NE 401.

Texas. McNair v. State, 14 Tex App 78.

[77] **Federal.** Holt v. United States, 218 US 245, 54 LEd 1021, 31 SupCt 2, 20 AnnCas 1138.

Alabama. Bryant v. State, 116 Ala 445, 23 S 40; Rogers v. State, 117 Ala 192, 23 S 82; Diamond v. State, 15 AlaApp 33, 72 S 558.

California. The presumption extends only to the crime charged and hence an instruction is erroneous which speaks of presumption of innocence of "any" crime. People v. Southwell, 28 CalApp 430, 152 P 939.

Florida. Long v. State, 42 Fla 509, 28 S 775.

Georgia. Hodge v. State, 116 Ga 852, 43 SE 255; Waters v. State, 150 Ga 623, 104 SE 626; Bass v. State, 152 Ga 415, 110 SE 237; Richardson v. State, 8 GaApp 26, 68 SE 518; Webb v. State, 11 GaApp 850, 75 SE 815, 76 SE 990; Hayes v. State, 18 GaApp 68, 88 SE 752; Ponder v. State, 18 GaApp 703, 90 SE 365; Finch v. State, 24 GaApp 339, 100 SE 793; Summerlin v. State, 25 GaApp 568, 103 SE 832; Varner v. State, 27 GaApp 291, 108 SE 80.

Illinois. People v. Patrick, 277 Ill 210, 115 NE 390; People v. Collins, 332 Ill 222, 163 NE 694.

Indiana. Snell v. State, 50 Ind 516.

Iowa. State v. Meyer, 180 Ia 210, 163 NW 244.

Massachusetts. But see Commonwealth v. DeFrancesco, 248 Mass 9, 142 NE 749, 34 ALR 937.

Michigan. People v. Yund, 163 Mich 504, 128 NW 742; People v. McClintic, 193 Mich 589, 160 NW 461, LRA 1917C, 52.

Missouri. State v. Baker, 136 Mo 74, 37 SW 810; State v. Dooms, 280 Mo 84, 217 SW 43; State v. Martin (Mo), 195 SW 731; State v. Jones (Mo), 225 SW 898.

It is not reversible error to refuse an instruction on the presumption of innocence when the court has fully instructed on the doctrine of reasonable doubt. State v. Maupin, 196 Mo 164, 93 SW 379.

It is proper to instruct that the presumption of innocence protects the defendant until it is overcome by clear, satisfactory, and abiding evidence proving his guilt beyond a reasonable doubt. State v. Newland (Mo), 285 SW 400.

Montana. State v. Harrison, 23 Mont 79, 57 P 647.

of the presumption of innocence which tells the jury that a presumption of guilt arises from the defendant's escape or flight.[78]

Although not a true presumption in the sense of some kind of inference from a fact based on probability, a few courts have declared that it is error for the trial court to omit an instruction that the presumption of innocence is itself evidence to be weighed with respect to all material questions affecting the guilt of the defendant.[79] Other courts recognizing the true function of the presumption of innocence as means of clarification, deny that the presumption is evidence that runs with the defendant throughout the trial.[80]

Self-defense and justification. Although these arguments advanced by the accused may be termed "affirmative defenses," he does not have the burden of proving them beyond a reasonable doubt. It is clear in many states that he does not have the burden of persuasion, as distinguished from the burden of producing evidence, to any degree. It is not error to charge that the accused is not required to establish the plea of self-defense by the preponderance of the evidence.[81] It is error to tell the jury that a defendant cannot avail himself of self-defense unless he convinces the jury that a defense was necessary.[82] It is error for the court to charge that the burden is upon the defendant to prove that he believed or had good cause to believe that it was necessary for him to inflict the injury, before the accused could avail himself of the plea of self-de-

New Mexico. State v. Kelly, 27 NM 412, 202 P 524, 21 ALR 156.

Ohio. State v. Knapp, 70 OhSt 380, 71 NE 705, 1 AnnCas 819.

South Carolina. State v. Bramlett, 114 SC 389, 103 SE 755.

Texas. Flournoy v. State, 57 Tex Cr 88, 122 SW 26; McDowell v. State, 69 TexCr 545, 155 SW 521.

Washington. State v. Mayo, 42 Wash 540, 85 P 251, 7 AnnCas 881; State v. Tyree, 143 Wash 313, 255 P 382.

Wisconsin. Cobb v. State, 191 Wis 652, 211 NW 785.

It has been held that it is not accurate to instruct that the presumption of innocence "prevails" throughout the trial. It is more proper to say that the presumption "attends" the accused and must prevail unless overcome by evidence that establishes guilt beyond a reasonable doubt. Emery v. State, 101 Wis 627, 78 NW 145.

[78] State v. Moberg, 316 Mo 647, 291 SW 118.

See also § 66, *infra*.

[79] State v. Coomer, 105 Vt 175, 163 A 585, 94 ALR 1038. See Connell v. State, 153 Ga 151, 111 SE 545; Proctor v. State, 49 GaApp 497, 176 SE 96; Kellar v. State, 192 Ind 38, 134 NE 881.

[80] Commonwealth v. Devlin, 335 Mass 555, 141 NE2d 269.

[81] State v. Vargo, 116 OhSt 495, 156 NE 600. But see State v. Vancak, 90 OhSt 211, 107 NE 511.

[82] People v. Asbury, 257 Mich 297, 241 NW 144.

[83] Flick v. State, 207 Ind 473, 193 NE 603.

fense.[83] An instruction is erroneous which places upon the defendant the burden of proving an affirmative defense.[84]

But where the commission of the offense is clearly established and does not disclose mitigating circumstances, then the duty of showing mitigating or justifying circumstances is very generally held to devolve on the defendant.[85] Where there is a statutory provision that when homicide is proved the burden devolves upon the accused to establish circumstances in mitigation, justification, or excuse, it is proper for the court so to instruct the jury.[86]

Defense of insanity. To avoid waste of time and effort, the state is not required initially to prove the accused's sanity, there being a presumption of sanity, although the court should not charge that the presumption of sanity has evidentiary value.[87] In this respect, the defense of insanity is similar to an affirmative defense. Since the issue of sanity will usually not be raised without the defendant first producing evidence of his insanity, the important question is not whether he has satisfied the burden of producing evidence, but whether he has the burden of persuasion and to what degree. On this question, the courts are not in agreement.

Some courts have held that it is error to instruct that the burden of proving a defense of insanity is upon the defendant.[88] This would mean that the state must prove the defendant's sanity beyond a reasonable doubt. Other courts do place the burden of persuasion on the defendant, but to a different degree. An instruction placing on accused a greater burden as to defense of insanity than proof by a preponderance of the evidence is erroneous.[89] In Georgia, the degree of persuasion is the "reasonable satisfaction" of the jury.[90]

[84] **Iowa.** State v. Gude, 201 Ia 4, 206 NW 584.

Kentucky. Jones v. Commonwealth, 213 Ky 356, 281 SW 164.

Pennsylvania. Commonwealth v. Baker, 285 Pa 77, 131 A 655.

Texas. Dent v. State, 103 TexCr 657, 281 SW 1066.

[85] **Arkansas.** Johnson v. State, 120 Ark 193, 179 SW 361.

California. See also People v. Andrade, 29 CalApp 1, 154 P 283.

Georgia. Griggs v. State, 17 Ga App 301, 86 SE 726; Elrod v. State, 27 GaApp 265, 108 SE 67.

Montana. State v. Davis, 60 Mont 426, 199 P 421; State v. Bess, 60 Mont 558, 199 P 426.

North Carolina. State v. Gaddy, 166 NC 341, 81 SE 608.

Pennsylvania. Commonwealth v. Calhoun, 238 Pa 474, 86 A 472.

[86] Rosser v. State, 45 Ariz 264, 42 P2d 613.

[87] State v. Green, 78 Utah 580, 6 P2d 177.

[88] Birchfield v. State, 217 Ala 225, 115 S 297; People v. Saylor, 319 Ill 205, 149 NE 767.

[89] State v. Austin, 71 OhSt 317, 73 NE 218, 104 AmSt 778; State v. Hauser, 101 OhSt 404, 131 NE 66.

See § 58, *supra.*

[90] Walker v. State, 208 Ga 99, 65 SE2d 403.

Criminal intent. If there be evidence in a prosecution for theft of an automobile that the taking was open, with no attempt thereafter of concealment, the court should instruct that from such facts there would arise a presumption against criminal intent.[91]

Alibi. An instruction is erroneous which places upon the defendant the burden of proving a defense of alibi.[92]

Motive. The jury are not merely to be told that the failure to show a motive affords a substantial presumption that the defendant is not guilty.[93]

§ 63. Circumstantial evidence in civil cases.

Where a party relies upon circumstantial evidence to support a contention, the jury should be instructed to take this evidence into consideration in determining the issue.

Instructions should cover the entire case and embrace all the testimony, whether direct or circumstantial,[94] and where a litigant relies on circumstantial evidence, in whole or in large part, he has the right to have the jury instructed that they may consider it.[95] Where, however, some circumstantial evidence is introduced, but the case is not based thereon, there is no error in refusing to give an instruction respecting it.[96]

It has been held proper for the court to charge that facts cannot be said to be established by circumstantial evidence alone.[97]

[91] Hickman v. State, 25 AlaApp 279, 145 S 167.

[92] **Alabama.** Seale v. State, 21 AlaApp 351, 108 S 271.

Ohio. Walters v. State, 39 OhSt 215; State v. Norman, 103 OhSt 541, 134 NE 474.

Oregon. State v. Milosevich, 119 Or 404, 249 P 625.

South Carolina. State v. Hester, 137 SC 145, 134 SE 885.

Texas. Caldwell v. State, 117 Tex Cr 145, 35 SW2d 165 (alibi).

Wisconsin. Fraccaro v. State, 189 Wis 428, 207 NW 687.

See also § 72, *infra.*

[93] State v. Fox, 52 Idaho 474, 16 P2d 663.

[94] **Georgia.** Louisville & N. R. Co. v. Pounds, 50 GaApp 611, 179 SE 235.

Texas. Parr v. Gardner (TexCiv App), 293 SW 859.

Wisconsin. United States Exp. Co. v. Jenkins, 64 Wis 542, 25 NW 549.

[95] **Maryland.** State v. Hammond's Exrs., 6 Gill & J. (Md) 157.

Missouri. Culbertson v. Hill, 87 Mo 553.

Texas. Jones v. Hess (TexCiv App), 48 SW 46; West v. Cashin (TexCivApp), 83 SW2d 1001.

Wisconsin. United States Exp. Co. v. Jenkins, 64 Wis 542, 25 NW 549.

[96] Roberts v. Port Blakely Mill Co., 30 Wash 25, 70 P 111.

In Notarfrancesco v. Smith, 105 Conn 49, 134 A 151, it was held not error to reject a request to charge in an accident case that due care of deceased might be proved by circumstantial evidence.

[97] Ferber v. Great Northern Ry. Co., 205 Ia 291, 217 NW 880.

§ 64. Circumstantial evidence in criminal cases.

As far as competency is concerned, no distinction is made in criminal cases between direct and circumstantial evidence. But the courts are divided as to whether the trial court must of its motion charge on circumstantial evidence, where the prosecution relies wholly on such evidence for a conviction.

The mere fact that evidence is circumstantial does not affect its admissibility in criminal cases.[98] In its weight and effect, it is not to be distinguished from direct evidence.[99] Yet it has been held permissible for the court to advise the jury to scan circumstantial evidence very cautiously.[1] It is not error if the trial court tells the jury that few violators would be convicted if the state had to depend upon direct proof in every criminal case.[2]

In some situations, a request for an instruction on circumstantial evidence is properly denied. Obviously, the instruction should not be given where the evidence of guilt is direct and positive,[3] or the defendant admits the commission of the offense

[98] **Arkansas.** Kellogg v. State, 153 Ark 193, 240 SW 20; Hixson v. State, 158 Ark 642, 239 SW 1057.

California. People v. Stennett, 51 CalApp 370, 197 P 372.

Where evidence is circumstantial, it is proper to instruct that the evidence must not only be consistent with the hypothesis of guilt but inconsistent with every other rational hypothesis. People v. Muhly, 15 CalApp 416, 114 P 1017.

Georgia. Where the defendant relies on circumstantial evidence it is error to charge that the proved facts must not only be consistent with innocence but inconsistent with guilt. Sikes v. State, 120 Ga 494, 48 SE 153.

Nebraska. Cunningham v. State, 56 Neb 691, 77 NW 60.

South Carolina. An instruction that the circumstances relied on must be proved to the entire satisfaction of the jury should also state that the circumstances must be inconsistent with any other reasonable hypothesis than the guilt of the accused. State v. Hudson, 66 SC 394, 44 SE 968, 97 AmSt 768.

Virginia. Longley v. Commonwealth, 99 Va 807, 37 SE 339.

[99] State v. Letz, 294 Mo 333, 242 SW 681; People v. Garkus, 358 Ill 106, 192 NE 653; Martin v. Commonwealth, 223 Ky 762, 4 SW2d 419; Bond v. Commonwealth, 257 Ky 366, 78 SW2d 1.

In People v. Watts, 198 Cal 776, 247 P 884, it was held error to charge that nothing in the nature of circumstantial evidence made it any less reliable than other evidence.

[1] Peoples v. Commonwealth, 147 Va 692, 137 SE 603.

[2] Crawford v. State, 21 AlaApp 437, 109 S 181.

[3] **Alabama.** McCoy v. State, 170 Ala 10, 54 S 428; Latner v. State, 20 AlaApp 180, 101 S 522.

California. People v. Holden, 13 CalApp 354, 109 P 495.

Georgia. Moore v. State, 97 Ga 759, 25 SE 362; Cole v. State, 178 Ga 674, 173 SE 655; Harper v. State, 12 GaApp 651, 77 SE 915; Horton v. State, 21 GaApp 120, 93 SE 1012.

Illinois. People v. Paddock, 300 Ill 590, 133 NE 240.

Kansas. State v. Loar, 116 Kan 485, 227 P 359.

Missouri. State v. Mills, 272 Mo 526, 199 SW 131; State v. Dowell, 331 Mo 1060, 55 SW2d 975; State v. Shepard, 334 Mo 423, 67 SW2d 91.

charged.[4] It is not necessary to charge on circumstantial evidence where only the venue is disputed and not the fact of the offense.[5]

If circumstantial evidence is competent and admitted in a case, is the trial court required to instruct on circumstantial evidence, that is, even though there has been no request? On this question, the courts are in general agreement where some evidence is direct and some circumstantial. In this situation, a request is necessary.[6] A refinement of this rule may be that

North Dakota. State v. Foster, 14 ND 561, 105 NW 938.

Ohio. Carano v. State, 3 OhCirCt (N. S.) 629, 14 OhCirDec 93.

Oklahoma. Price v. State, 9 Okl Cr 359, 131 P 1102; Carroll v. State, 54 OklCr 196, 16 P2d 891.

Oregon. State v. Holbrook, 98 Or 43, 188 P 947, 192 P 640, 193 P 434.

Texas. Yancy v. State, 48 TexCr 166, 87 SW 693; Sellers v. State, 61 TexCr 140, 134 SW 348; Willcox v. State, 68 TexCr 138, 150 SW 898 (eye-witnesses); Borrer v. State, 83 TexCr 198, 204 SW 1003; Hinton v. State, 122 TexCr 438, 55 SW2d 837; Bybee v. State, 122 TexCr 593, 57 SW2d 129; Jones v. State (Tex Cr), 77 SW 802 (facts testified to by eye-witnesses); Hoffman v. State, 126 TexCr 114, 70 SW2d 182.

Where the evidence in a trial for murder was circumstantial and there was no question that the murder was committed, a charge was sufficient that the facts proved must be consistent with each other as to the guilt of the accused and taken together must be of a conclusive nature, producing a reasonable and moral certainty that the defendant "and no other person" committed the offense charged. Crow v. State, 37 TexCr 295, 39 SW 574.

Where evidence was direct, there was no necessity for instruction on circumstantial evidence, though intent was proved by circumstances. Williams v. State, 58 TexCr 82, 124 SW 954.

[4] **Federal.** Ossendorf v. United States, 272 F 257.

Alabama. Dennis v. State, 118 Ala 72, 23 S 1002.

Georgia. Griner v. State, 121 Ga 614, 49 SE 700; Harris v. State, 152 Ga 193, 108 SE 777; Brantley v. State, 154 Ga 80, 113 SE 200.

Oklahoma. Hollingsworth v. State, 50 OklCr 164, 297 P 301.

South Dakota. State v. Harbour, 27 SD 42, 129 NW 565.

Tennessee. Moon v. State, 146 Tenn 319, 242 SW 39.

Texas. Whitehead v. State, 49 TexCr 123, 90 SW 876; Worsham v. State, 56 TexCr 253, 120 SW 439, 18 AnnCas 134; Ellington v. State, 63 TexCr 420, 140 SW 1102; Fitzgerald v. State, 87 TexCr 34, 219 SW 199; Berdell v. State, 87 TexCr 310, 220 SW 1101; Tillman v. State, 88 TexCr 10, 225 SW 165; Miller v. State, 88 TexCr 157, 225 SW 262; Escobedo v. State, 88 TexCr 277, 225 SW 377 (automobile theft); Roberts v. State, 91 TexCr 433, 239 SW 960; Ruiz v. State, 92 TexCr 73, 242 SW 231; Bailey v. State, 97 TexCr 312, 260 SW 1057 (admission must be unequivocal); DeLaney v. State, 98 TexCr 98, 263 SW 1065.

Utah. State v. Overson, 30 Utah 22, 83 P 557, 8 AnnCas 794.

[5] Steadham v. State, 40 TexCr 43, 48 SW 177.

[6] **Federal.** Bedell v. United States, 78 F2d 358.

Alabama. Overby v. State, 24 AlaApp 254, 133 S 915.

Georgia. Chamblee v. State, 50 GaApp 251, 177 SE 824; Morris v. State, 51 GaApp 145, 179 SE 822.

Minnesota. State v. Bailey, 235 Minn 204, 50 NW2d 272.

Oklahoma. Aday v. State, 28 OklCr 201, 230 P 280.

no instruction is necessary where the circumstantial evidence is merely corroborative of the direct evidence.[7] But where the evidence is both direct and circumstantial, it would seem the better practice to define each class of evidence and explain the difference between them.[8]

Where the prosecution's case is based *wholly* on circumstantial evidence, the courts are divided as to whether the trial court must instruct on circumstantial evidence, whether requested or not. It therefore becomes important in some jurisdictions to determine whether the case is based wholly on circumstantial evidence.

The evidence is wholly circumstantial where the main fact is shown by inference from other facts in evidence.[9] Thus, in a prosecution for cattle theft, the evidence was wholly circumstantial where it was shown that the defendant had been in possession of the cattle which he kept in a third person's pasture, although there was no direct testimony that he took the cattle from the owner.[10] But it is a case of direct evidence where an officer testifies that the defendant admitted guilt of the offense charged.[11]

Assuming the only evidence is circumstantial, some courts require the trial court on its own motion to instruct the jury on circumstantial evidence.[12] Other courts require a request

Wyoming. State v. Wilson, 32 Wyo 37, 228 P 803.

[7] State v. Shives, 100 Kan 588, 165 P 272; Tyler v. State, 78 TexCr 279, 180 SW 687.

[8] **Federal.** In McLendon v. United States, 13 F2d 777, it is said that where the evidence is circumstantial, or where it is both direct and circumstantial, the court should charge that the accused should be acquitted if the evidence was as consistent with innocence as with guilt. See also Hendrey v. United States, 147 CCA 75, 233 F 5.

California. People v. Bailey, 82 CalApp 700, 256 P 281.

Georgia. Joiner v. State, 105 Ga 646, 31 SE 556.

Illinois. People v. Harrison, 359 Ill 295, 194 NE 518.

Pennsylvania. See Commonwealth v. Appel, 115 PaSuperCt 496, 176 A 44.

[9] Sanders v. State, 127 TexCr 55, 75 SW2d 116.

[10] Brown v. State, 126 TexCr 449, 72 SW2d 269.

See also: State v. Swarens, 294 Mo 139, 241 SW 934; Coleman v. State, 82 TexCr 332, 199 SW 473; Grant v. State, 87 TexCr 19, 218 SW 1062; Skirlock v. State, 103 TexCr 539, 104 TexCr 420, 284 SW 545.

[11] Christy v. State, 126 TexCr 330, 71 SW2d 270.

In People v. Guido, 321 Ill 397, 152 NE 149, it was held where the evidence tending to connect the accused with the commission of the offense consisted of circumstances together with his alleged confession, it was proper to charge as to circumstantial evidence.

[12] **Alabama.** It is error in an instruction to state that circumstantial evidence must be so strong as to lead with "unerring certainty" to conclusion of guilt; the test is beyond reasonable doubt. Lawson v. State, 16 AlaApp 174, 76 S 411.

Arkansas. Cunningham v. State, 149 Ark 336, 232 SW 425.

California. People v. Stennett, 51 CalApp 370, 197 P 372; People v. Allen, 138 CalApp 652, 33 P2d 77.

But see the California case in note 13, *infra.*

Georgia. Hamilton v. State, 96 Ga 301, 22 SE 528; Day v. State, 133 Ga 434, 66 SE 250; Yaughan v. State, 148 Ga 517, 97 SE 540; Gravett v. State, 150 Ga 74, 102 SE 426; Callaway v. State, 151 Ga 342, 106 SE 577; Harris v. State, 152 Ga 193, 108 SE 777; Warren v. State, 153 Ga 354, 112 SE 283; Brantley v. State, 154 Ga 80, 113 SE 200; Brown v. State, 178 Ga 772, 174 SE 536; Reece v. State, 208 Ga 165, 66 SE2d 133; Benton v. State, 9 GaApp 422, 71 SE 498; Mitchell v. State, 18 GaApp 501, 89 SE 602; Harris v. State, 18 GaApp 710, 90 SE 370; Bush v. State, 23 GaApp 126, 97 SE 554; Reynolds v. State, 23 GaApp 369, 98 SE 246; Davis v. State, 24 GaApp 35, 100 SE 50; Griffin v. State, 24 GaApp 656, 101 SE 767; Johnson v. State, 27 GaApp 191, 107 SE 780; Dewitt v. State, 27 GaApp 644, 109 SE 681; Coney v. State, 31 GaApp 569, 121 SE 132; Hester v. State, 32 GaApp 81, 122 SE 721; Butler v. State, 47 GaApp 56, 169 SE 760.

But see the Georgia cases in note 13, *infra.*

Illinois. People v. Matthews, 359 Ill 171, 194 NE 220.

Indiana. Robinson v. State, 188 Ind 467, 124 NE 489.

But see the Indiana case in note 13, *infra.*

Iowa. See Wells v. Chamberlain, 185 Ia 264, 168 NW 238; State v. Glendening, 205 Ia 1043, 218 NW 939.

But see the Iowa cases in note 13, *infra.*

Kansas. State v. Pack, 106 Kan 188, 186 P 742; State v. Ward, 107 Kan 498, 192 P 836.

Kentucky. Duroff v. Commonwealth, 192 Ky 31, 232 SW 47; Wolf v. Commonwealth, 214 Ky 544, 283 SW 385.

Missouri. State v. Donnelly, 130 Mo 642, 32 SW 1124; State v. Swarens, 294 Mo 139, 241 SW 934; State v. Johnson (Mo), 252 SW 623; State v. Miller, 292 Mo 124, 237 SW 498; State v. Sandoe, 316 Mo 55, 289 SW 890; State v. Fitzgerald (Mo), 201 SW 86.

But see Missouri cases in note 13, *infra.*

Montana. State v. Francis, 58 Mont 659, 194 P 304.

New Mexico. State v. McKnight, 21 NM 14, 153 P 76.

New York. People v. Trimarchi, 231 NY 263, 131 NE 910; People v. D'Anna, 243 AppDiv 259, 277 NYS 279.

Ohio. Lambert v. State, 105 OhSt 219, 136 NE 921; Carter v. State, 4 OhApp 193, 22 OhCirCt (N. S.) 154.

But see Ohio case in note 13, *infra.*

Oklahoma. Pierson v. State, 13 OklCr 382, 164 P 1005; Criswell v. State, 26 OklCr 444, 224 P 373; Chapman v. State, 28 OklCr 208, 230 P 283; Breedlove v. State, 49 OklCr 428, 295 P 239.

But see Oklahoma cases in note 13, *infra.*

Pennsylvania. Commonwealth v. Braunfelt, 72 PaSuperCt 25.

Tennessee. Barnards v. State, 88 Tenn 183, 12 SW 431; Webb v. State, 140 Tenn 205, 203 SW 955, 15 ALR 1034; Moon v. State, 146 Tenn 319, 242 SW 39.

Texas. Boswell v. State, 59 Tex Cr 161, 127 SW 820; Jones v. State, 59 TexCr 559, 129 SW 1118; Bickham v. State, 126 TexCr 511, 72 SW2d 1095; Allen v. State, 127 TexCr 181, 75 SW2d 101; Carrell v. State, 79 TexCr 231, 184 SW 190; Bloch v. State, 81 TexCr 1, 193 SW 303; Renfro v. State, 82 TexCr 197, 198 SW 957; Love v. State, 82 TexCr 411, 199 SW 623; Anderson v. State, 85 TexCr 411, 213 SW 639; Miller v. State, 88 TexCr 69, 225 SW 379, 12 ALR 597; Miller v. State, 88 TexCr 77, 225 SW 382; Moore v. State, 89 TexCr 87, 229 SW 508; Atwood v. State, 90 TexCr 112, 234 SW 85; Rundell v. State, 90 TexCr

for such a charge.[13] In the former jurisdictions, the trial court is required to instruct on such evidence, even though the de-

410, 235 SW 908; Marinkovich v. State, 96 TexCr 59, 255 SW 734; Garner v. State (TexCr), 70 SW 213; Inness v. State, 106 TexCr 524, 293 SW 821; Duke v. State, 117 TexCr 381, 36 SW2d 732; Barber v. State, 127 TexCr 532, 78 SW2d 183; Ryan v. State, 128 TexCr 482, 82 SW2d 668.

But see Texas case in note 13, *infra*.

Utah. People v. Scott, 10 Utah 217, 37 P 335. See State v. Brown, 39 Utah 140, 115 P 994, AnnCas 1913E, 1.

But see Utah case in note 13, *infra*.

Wisconsin. A charge used by trial judges in Wisconsin is as follows: "All the evidence produced by the state is circumstantial. There is no direct or positive evidence that the defendant committed the crime charged. And to warrant a conviction on circumstantial evidence each fact necessary to the conclusion . . . [of guilt] must be proven by competent evidence beyond a reasonable doubt, and all the facts . . . [so proven] must be consistent with each other and with the main fact sought to be proved, and the circumstances, taken together, must be of a conclusive nature, . . . and producing, in effect, a reasonable and moral certainty that the accused, and no other person, committed the offense charged. The mere union of a limited number of independent circumstances, each of an imperfect and inconclusive character, will not justify a conviction. They must be such as to generate and justify full belief according to the standard rule of certainty. It is not sufficient that they coincide with and render probable the guilt of the accused. . . [The facts so proven] must be absolutely incompatible with innocence, and incapable of explanation upon any other reasonable hypothesis than that of guilt."

See Colbert v. State, 125 Wis 423, 104 NW 61.

Wyoming. Gardner v. State, 27 Wyo 316, 196 P 750, 15 ALR 1040, State v. Wilson, 32 Wyo 37, 228 P 803.

[13] **Federal.** Hughes v. United States, 145 CCA 238, 231 F 50; Herman v. United States, 48 F2d 479.

California. People v. Balkwell, 143 Cal 259, 76 P 1017.

But see the California cases in note 12, *supra*.

Colorado. Reagan v. People, 49 Colo 316, 112 P 785.

Florida. Ford v. State, 80 Fla 781, 86 S 715; McCall v. State, 116 Fla 179, 156 S 325.

Georgia. Jones v. State, 105 Ga 649, 31 SE 574; Middleton v. State, 7 GaApp 1, 66 SE 22; Lepinsky v. State, 7 GaApp 285, 66 SE 965; Harvey v. State, 8 GaApp 660, 70 SE 141; Teague v. State, 48 GaApp 225, 172 SE 571.

But see the Georgia cases in note 12, *supra*.

Indiana. See Bohan v. State, 194 Ind 227, 141 NE 323.

But see the Indiana case in note 12, *supra*.

Iowa. State v. Bartlett, 128 Ia 518, 105 NW 59; State v. Hayward, 153 Ia 265, 133 NW 667.

But see the Iowa cases in note 12, *supra*.

Kansas. State v. Woods, 105 Kan 554, 185 P 21; State v. Davis, 106 Kan 527, 188 P 231.

Louisiana. State v. Holbrook, 153 La 1025, 97 S 27.

Michigan. People v. Dellabonda, 265 Mich 486, 251 NW 594.

Mississippi. Warren v. State, 166 Miss 284, 146 S 449.

Missouri. State v. Hubbard, 223 Mo 80, 122 SW 694; State v. Singleton (Mo), 77 SW2d 80.

But see Missouri cases in note 12, *supra*.

fendant requests his own instruction which is erroneous; in such a case, it is as if no request had been made, and the duty of the court arises from the general principle.[14]

§ 65. Positive and negative testimony.

The court may charge the law as to the comparative value of positive and negative testimony where both kinds of testimony are before the jury.

Negative testimony relates to the denial of the existence of a fact, while affirmative testimony relates to the existence of a fact. Most courts are permitted to instruct the jury on the relative quality of the two kinds of testimony.[15] Common examples of these types of testimony occur as to whether warning signals were given at a railroad crossing or whether there were any lights and barriers around a street defect.

The rule in most states is that it is proper to instruct the jury that the positive testimony is of more probative value than the negative. But the charge should not be given without qualifications that the witnesses are equally credible or that they had equal opportunities for observation. To put it in another way, all other things being equal, if they ever are,

Nebraska. Nunnenkamp v. State, 129 Neb 264, 261 NW 418.

Ohio. Carter v. State, 4 OhApp 193, 22 OhCirCt (N. S.) 154.

But see Ohio cases in note 12, *supra.*

Oklahoma. Hagerty v. State, 22 OklCr 136, 210 P 300; Little v. State, 34 OklCr 270, 245 P 1062; Ayers v. State, 53 OklCr 89, 7 P2d 918.

But see Oklahoma cases in note 12, *supra.*

South Carolina. State v. Bunyon, 137 SC 391, 135 SE 361.

South Dakota. State v. Colvin, 24 SD 567, 124 NW 749; State v. Millard, 30 SD 169, 138 NW 366.

Texas. Arismendis v. State, 41 TexCr 374, 54 SW 599; Williams v. State, 58 TexCr 82, 124 SW 954; Bonner v. State, 58 TexCr 195, 125 SW 22; Russell v. State, 108 TexCr 308, 300 SW 74; Scott v. State (Tex App), 12 SW 504; Borger v. State, 126 TexCr 5, 70 SW2d 195; Dobbins v. State, 127 TexCr 380, 76 SW2d 1057.

But see Texas cases in note 12, *supra.*

Utah. State v. Romeo, 42 Utah 46, 128 P 530.

But see Utah cases in note 12, *supra.*

[14] People v. Scott, 10 Utah 217, 37 P 335; Gardner v. State, 27 Wyo 316, 196 P 750, 15 ALR 1040.

[15] **Georgia.** Heywood v. State, 12 GaApp 643, 77 SE 1130; Chewning v. State, 18 GaApp 11, 88 SE 904; Williams v. State, 23 GaApp 542, 99 SE 43.

Illinois. See Hofer v. Chicago, B. & Q. R. Co., 237 IllApp 309.

Kansas. But see Smith v. Bush, 102 Kan 150, 169 P 217.

Ohio. Toledo Consol. Street Ry. Co. v. Rohner, 9 OhCirCt 702, 6 Oh CirDec 706.

Wisconsin. Wickham v. Chicago & N. W. Ry. Co., 95 Wis 23, 69 NW 982; Ryan v. Philippi, 108 Wis 254, 83 NW 1103; Alft v. Clintonville, 126 Wis 334, 105 NW 561; Ives v. Wisconsin Cent. Ry. Co., 128 Wis 357, 107 NW 452; Canning v. Chicago & M. Elec. Ry. Co., 163 Wis 448, 157 NW 532.

positive testimony is better than negative.[16] Some states go so far as to hold that it is proper to instruct that the positive testimony of a small number of witnesses will outweigh the negative testimony of a greater number of witnesses.[17]

Psychologically, there may be some basis for the conclusion that positive testimony is better than negative testimony. The stimuli causing a person to believe he observed an event are less than the stimuli causing a person to believe than an event did not occur. Hence, as between the two kinds of testimony, the probability of error is less with the one testifying affirmatively. This takes into account the possibility that the one testifying affirmatively may have been stimulated by recurring past experiences to testify that on this occasion the same thing did happen. There are other refinements.

The fact that all testimony may be said to be positive does not solve the problem. If the question is whether a train gave an audible signal, the witness testifying that it did not could be said to be testifying positively, i.e., to the non-existence of the signal. This seems to be a matter of mere form. The question is still whether or not a signal was given, whether a phenomenon did or did not occur.

Yet, if there are so many refinements as to the margin of error psychologically and if juries are to decide facts on the weight of the evidence and the credibility of witnesses, the reasonable solution is to forbid an instruction on the relative weight of positive and negative testimony. If a judge is not to comment on the weight of the evidence or to instruct the jury what to believe, the relative quality of negative and posi-

[16] **Illinois.** Zbinden v. De Moulin Bros. & Co., 245 IllApp 248.

Kansas. See State v. Henson, 105 Kan 581, 185 P 1059.

Ohio. State v. Davies, 101 OhSt 487, 129 NE 590; Cleveland, C., C. & St. L. Ry. Co. v. Richerson, 19 OhCirCt 385, 10 OhCirDec 326; Cincinnati Trac. Co. v. Harrison, 24 Oh CirCt (N. S.) 1, 34 OhCirDec 435.

Pennsylvania. Costack v. Pennsylvania Ry. Co., 376 Pa 341, 102 A2d 127.

Contra: **Georgia.** Minor v. State, 120 Ga 490, 48 SE 198.

The rule relating to the distinction between positive and negative evidences should not be given when there are two witnesses having equal facilities for seeing or hearing the thing about which they testified and directly contradicting each other, one of them directly testifying that it occurred and the other that it did not. Skinner v. State, 108 Ga 747, 32 SE 844.

Virginia. Virginian Ry. Co. v. Bacon, 156 Va 337, 157 SE 789; Virginian Ry. Co. v. Haley, 156 Va 350, 157 SE 776.

[17] Draper v. Baker, 61 Wis 450, 21 NW 527; Hinton v. Cream City R. Co., 65 Wis 323, 27 NW 147; Hildman v. Phillips, 106 Wis 611, 82 NW 566; Hill v. Gates County, 112 Wis 482, 88 NW 463; Dixon v. Russell, 156 Wis 161, 145 NW 761.

Contra: Kansier v. Billings, 56 Mont 250, 184 P 630 (comment on weight of evidence).

tive testimony, being inseparable from credibility and weight, should be left for the jury to decide.

§ 66. Inferences from flight.

In criminal cases where there is evidence of flight by the accused after the commission of a crime, the court is permitted to tell the jury that flight may be considered by them as a circumstance bearing on the guilt of the accused with all the other evidence in the case.

It is proper to instruct the jury that if the fact of flight is believed, it may be considered with other evidence in determining the guilt of the accused.[18] A person may flee from the scene of a crime, or he may flee after he discovers that he has been accused of the crime, or he may flee to avoid arrest by the police. In any event, an instruction on flight is not proper unless the evidence supports a fair inference that de-

[18] **Federal.** Allen v. United States, 164 US 492, 41 LEd 528, 17 SupCt 154; Campbell v. United States, 136 CCA 602, 221 F 186; Rowan v. United States, 277 F 777, 25 ALR 876.

Alabama. Gardner v. State, 17 AlaApp 589, 87 S 885.

California. People v. Easton, 148 Cal 50, 82 P 840; People v. Hall, 220 Cal 166, 30 P2d 23, 996; People v. Madison, 3 Cal2d 668, 46 P2d 159; People v. Grant, 105 CalApp2d 347, 233 P2d 660 (DistCtofApp, 2ndDist, Division 2, Cal).

Colorado. Dockerty v. People, 96 Colo 338, 44 P2d 1013.

Florida. Blackwell v. State, 79 Fla 709, 86 S 224, 15 ALR 465.

Georgia. It is an expression of opinion to tell the jury that "flight unexplained is a circumstance pointing to defendant's guilt." Kettles v. State, 145 Ga 6, 88 SE 197.

Illinois. People v. Armstrong, 299 Ill 349, 132 NE 547; People v. Marchiando, 358 Ill 286, 193 NE 127.

Indiana. Collins v. State, 192 Ind 86, 131 NE 390.

Kansas. State v. Thomas, 58 Kan 805, 51 P 228.

Kentucky. Garman v. Commonwealth, 183 Ky 455, 209 SW 528.

Louisiana. State v. Anderson, 121 La 366, 46 S 357.

Massachusetts. Commonwealth v. Cline, 213 Mass 225, 100 NE 358.

Michigan. People v. Simon, 243 Mich 489, 220 NW 678.

Mississippi. Ransom v. State, 149 Miss 262, 115 S 208.

Missouri. State v. Gibbs (Mo), 186 SW 986; State v. Likens (Mo), 231 SW 578; State v. Duncan, 336 Mo 600, 80 SW2d 147.

Montana. An instruction is erroneous which assumes the commission of the crime. State v. Bonning, 60 Mont 362, 199 P 274, 25 ALR 879.

New Mexico. Territory v. Lucero, 16 NM 652, 120 P 304, 39 LRA (N. S.) 58.

Ohio. Allison v. State, 12 OhApp 217, 32 OhCirApp 124; Edinger v. State, 12 OhApp 362, 32 OhCirApp 529; Grillo v. State, 9 OhCirCt 394, 6 OhCirDec 90; Zeltner v. State, 13 OhCirCt 417, 22 OhCirDec 102; Malotte v. State, 12 OLA 659.

Oregon. State v. Ching Lem, 91 Or 611, 176 P 590.

Texas. Kelley v. State, 80 TexCr 249, 190 SW 173.

Utah. State v. Fairclough, 86 Utah 326, 44 P2d 692.

Virginia. Jenkins v. Commonwealth, 132 Va 692, 111 SE 101, 25 ALR 882.

Washington. State v. Leroy, 61 Wash 405, 112 P 635.

fendant did flee or attempted to flee.[19] The mere fact that the accused was arrested in another state does not justify the giving of an instruction on the inference which may be drawn from flight.[20]

Even if there is strong evidence of flight, it is not, in most courts, a presumption of guilt, i.e., the jury must not be told that they must infer guilt from flight unexplained.[21] Apparently, in a few states it is proper to instruct that a presumption of guilt does arise from the fact of flight unexplained.[22] How this presumption relates to the presumption of innocence or the state's burden of showing guilt beyond a reasonable doubt is explained by one court that this presumption of guilt from flight is never alone sufficient to show guilt beyond a reasonable doubt.[23] In these states, the jury must also be told that the presumption from flight is rebuttable.[24]

If flight may be evidence of guilt, does it follow that surrendering is evidence of innocence? Clearly not. The court is not required to charge that the fact that the defendant gave himself up tends to lessen incriminating circumstances.[25] Nor should the court instruct that the fact that accused made no effort to escape should be considered as evidence of his innocence.[26]

§ 67. Confessions in criminal cases.

The court should instruct that confessions should be scanned with caution since they must be voluntary and corroborated by other evidence.

[19] People v. Goodwin, 202 Cal 527, 261 P 1009.

[20] State v. Evans, 138 Mo 116, 39 SW 462, 60 AmSt 549.

[21] Hickory v. United States, 160 US 408, 40 LEd 474, 16 SupCt 327; Alberty v. United States, 162 US 499, 40 LEd 1051, 16 SupCt 864.

[22] **Iowa.** Variation of the rule where flight occurred after the defendant was accused of the crime and to avoid being arrested for its commission. State v. Heatherton, 60 Ia 175, 14 NW 230; State v. Van Winkle, 80 Ia 15, 45 NW 388; State v. Sorenson, 157 Ia 534, 138 NW 411.

Missouri. See State v. Griffin, 87 Mo 608; State v. Walker, 98 Mo 95, 9 SW 646, 11 SW 1133.

And see comment with respect to the Missouri court's position on the question in State v. Kyles, 247 Mo 640, 153 SW 1047.

New Jersey. State v. Harrington, 87 NJL 713, 94 A 623.

[23] State v. Walker, 98 Mo 95, 9 SW 646, 11 SW 1133.

[24] See cases in note 23, *supra*, and State v. Sparks (Mo), 195 SW 1031; State v. Weissengoff, 89 WVa 279, 109 SE 707 (technical flight).

[25] **Alabama.** Cobb v. State, 115 Ala 18, 22 S 506.

Florida. Thomas v. State, 47 Fla 99, 36 S 161.

Mississippi. Banks v. State (Miss), 145 S 104.

Missouri. State v. Knowles, 185 Mo 141, 83 SW 1083.

[26] Reed v. State, 66 Neb 184, 92 NW 321.

The general rule is supported by the decisions.[27] A voluntary confession is one made without physical coercion or induced by fear of injury or hope of benefit. The trial judge, as a preliminary question, determines whether a confession has been made with that degree of freedom to justify its admission in evidence. In case of doubt and of a conflict in the evidence, he should submit the question to the jury, under proper instructions; if it clearly appears that the confession was induced by force, threats, or promises, the confession should not be admitted. If the question is submitted to the jury, they should be instructed to disregard the confession if they find that it was not voluntarily made.[28] So, if there is no evidence tending to prove that the confession was not voluntarily made, it is not error to refuse to instruct that the con-

[27] **Federal.** Fitter v. United States, 169 CCA 507, 258 F 567 (confessions of accomplices).

Arkansas. Pearrow v. State, 146 Ark 201, 225 SW 308.

California. People v. Tibbs, 143 Cal 100, 76 P 904 (should be viewed with caution).

Georgia. Denson v. State, 150 Ga 618, 104 SE 780 (rape); Bowden v. State, 151 Ga 336, 106 SE 575; Bradley v. State, 151 Ga 422, 107 SE 254; Davis v. State, 7 GaApp 680, 67 SE 839; Leverett v. State, 23 GaApp 141, 98 SE 115; Walker v. State, 26 GaApp 70, 105 SE 717; Plummer v. State, 27 GaApp 185, 108 SE 128.

A jury was sufficiently cautioned not to consider the confession of one defendant as against the others by a charge that a confession by any one or more of the defendants "would only apply to the one making it and would not inculpate any other one of them so far as that particular confession is concerned." Nobles v. State, 98 Ga 73, 26 SE 64, 38 LRA 577.

Iowa. State v. Jackson, 103 Ia 702, 73 NW 467 (viewed with caution).

Michigan. People v. Jackzo, 206 Mich 183, 172 NW 557; People v. Biossat, 206 Mich 334, 172 NW 933.

Missouri. State v. McNeal (Mo), 237 SW 738.

Oregon. State v. Howard, 102 Or 431, 203 P 311.

Texas. Anderson v. State, 87 Tex Cr 230, 220 SW 775.

[28] **Federal.** Shaw v. United States, 103 CCA 494, 180 F 348; United States v. Lydecker, 275 F 976.

Arkansas. Shuffin v. State, 122 Ark 606, 184 SW 454; Henry v. State, 151 Ark 620, 237 SW 454.

California. See People v. Britton (CalApp), 48 P2d 707.

It is error to instruct that the fact that confession was obtained by police officers "presents an important item" in considering its voluntary character. People v. Hadley, 175 Cal 118, 165 P 442.

Iowa. State v. Bennett, 143 Ia 214, 121 NW 1021; State v. Crisman, 244 Ia 590, 57 NW2d 207.

Maine. State v. Priest, 117 Me 223, 103 A 359.

Massachusetts. Commonwealth v. Makarewicz, 333 Mass 575, 132 NE2d 294.

Michigan. People v. Marthinson, 235 Mich 393, 209 NW 99.

Missouri. State v. Brooks, 220 Mo 74, 119 SW 353.

Nebraska. Heddendorf v. State, 85 Neb 747, 124 NW 150; Ringer v. State, 114 Neb 404, 207 NW 928.

Pennsylvania. Commonwealth v. Williams, 309 Pa 529, 164 A 532.

South Carolina. State v. Danelly, 116 SC 113, 107 SE 149, 14 ALR 1420.

fession, to be admissible, must have been voluntary.[29] Where the objections to a purported confession were that it was obtained by third-degree methods, it was improper for the court to tell the jury that the nicety of details of procuring a confession must be governed by circumstances and that circumstances create conditions that justify the methods of officers by which confessions are obtained.[30] And in those jurisdictions denying the trial judge the right to comment upon the evidence, it is error for him to give an instruction suggesting his belief of the truth of a confession.[31]

The main rule does not apply in strictness to incriminatory statements not amounting to a confession.[32] It has been held, however, that a charge on confessions was proper where there was evidence that accused while under arrest expressed a desire out of court to begin to serve his sentence.[33]

It is unnecessary to charge that there must be evidence in corroboration of a confession, if the corpus delicti is otherwise sufficiently established,[34] or if the commission of the offense is proved beyond a reasonable doubt by evidence independent of the confession.[35] Presumably, in this last rule, the appellate court

Texas. Bozeman v. State, 85 Tex Cr 653, 215 SW 319; Lucas v. State, 88 TexCr 166, 225 SW 257; Grace v. State, 90 TexCr 329, 234 SW 541; Bridges v. State, 102 TexCr 462, 277 SW 1096; Williams v. State, 123 TexCr 199, 58 SW2d 125.

The accused is not entitled to a charge on the competency of a confession elicited from the state's witnesses on cross-examination and without objection by the state. Luna v. State (TexCr), 47 SW 656.

Washington. Where confession of defendant was admitted as evidence and there was no evidence that the confession was not voluntary, a charge that the jury could take the whole of the confession as true or any portion of it like any other evidence in the case was proper. State v. Barker, 56 Wash 510, 106 P 133.

Wisconsin. Tarasinski v. State, 146 Wis 508, 131 NW 889; Lang v. State, 178 Wis 114, 189 NW 558, 24 ALR 690; Farino v. State, 203 Wis 374, 234 NW 366; Pollack v. State, 215 Wis 200, 253 NW 560, 254 NW 471.

A sworn statement made to a district attorney while under arrest is not voluntary. Flamme v. State, 171 Wis 501, 177 NW 596. See also Bianchi v. State, 169 Wis 75, 171 NW 639.

[29] Raarup v. United States, 23 F2d 547.

[30] Commonwealth v. Brown, 309 Pa 515, 164 A 726, 86 ALR 892.

[31] People v. Schraeberg, 347 Ill 392, 179 NE 829.

[32] Buckhanon v. State, 151 Ga 827, 108 SE 209; Waller v. State, 164 Ga 128, 138 SE 67; Bridges v. State, 9 GaApp 235, 70 SE 968; Phillips v. State, 27 GaApp 1, 107 SE 343; McCoy v. State, 32 GaApp 80, 122 SE 650; State v. Johnson (MoApp), 236 SW 365.

[33] Abrams v. State, 121 Ga 170, 48 SE 965.

[34] Abdon v. Commonwealth, 237 Ky 21, 34 SW2d 742; Herron v. Commonwealth, 247 Ky 220, 56 SW2d 974; Crowley v. State, 92 TexCr 103, 242 SW 472.

[35] Commonwealth v. Stites, 190 Ky 402, 227 SW 574; Dunbar v. Commonwealth, 192 Ky 263, 232 SW 655.

will determine if the commission of the crime has been proved beyond a reasonable doubt. It is erroneous to charge that the corpus delicti need not be proved beyond a reasonable doubt by evidence independent of an alleged confession, but this instruction is not prejudicial if the corpus delicti is not questioned.[36]

No instructions on confessions are necessary where the accused admits commission of the offense but claims there was justification.[37] If the prosecution introduces an alleged confession containing exculpatory matter, the jury must be charged to take the confession as true and that the exculpatory part must be accepted unless disproved by the prosecution.[38]

§ 68. Credibility of witnesses—Interest of witnesses—Falsus in uno, falsus in omnibus.

The court should lay down general rules of law for determining (1) the credibility of witnesses; (2) and this imposes the duty of pointing out that, where a witness has wilfully testified falsely upon one material point, his entire evidence may be rejected; (3) of directing attention to contradictions; (4) and of explaining the effect of a witness' interest in the suit.

(1) The court should announce general rules of law for the guidance of the jury in determining the credibility of witnesses.[39] While it is the province of the jury to determine the ultimate credit to be given a witness and while the trial judge should avoid giving an instruction which implies a fixed opinion of his own as to the weight to be attached to particular testimony, general principles as to credibility may be laid down which will be of assistance to the jury in arriving at a correct determination of the issues.[40] The court has the right to refer to the testimony of a particular witness if it be done in such a manner as neither to commend nor discredit.[41] The court may charge that, in determining weight and credibility, the jury should take into consideration the character of the witness.[42] The court is au-

[36] People v. Moor, 355 Ill 393, 189 NE 318.

[37] Harris v. State, 152 Ga 193, 108 SE 777.

[38] Robidoux v. State, 116 TexCr 432, 34 SW2d 863; Roberts v. State, 117 TexCr 418, 35 SW2d 175; Yarbrough v. State, 125 TexCr 304, 67 SW2d 612. See Hargrove v. United States, 67 F2d 820, 90 ALR 1276.

[39] Heddle v. City Elec. Ry. Co., 112 Mich 547, 70 NW 1096.

[40] Heddle v. City Elec. Ry. Co., 112 Mich 547, 70 NW 1096.

[41] Reek v. Reek, 184 Minn 532, 239 NW 599.

[42] **Arizona.** The court may instruct the jury to consider the fact that witnesses who testified in liquor prosecution were detectives and bought liquor to entrap defendant. Baumgartner v. State, 20 Ariz 157, 178 P 30.

Missouri. Harrison v. Lakenan, 189 Mo 581, 88 SW 53.

Pennsylvania. An instruction was held not erroneous wherein the jury were told that while the criminal

thorized to say to the jury that they may believe or disbelieve all or any part of the testimony of the witnesses.[43] So where the jury are instructed that if the reputation of a certain witness for truth and veracity is bad, such fact may be considered, there can be no valid objection provided the instruction is predicated upon the evidence in the case.[44] If there is evidence in a case on which to base it, there should be an instruction that unless the testimony of a successfully impeached witness is corroborated by other credible evidence the jury should disregard it.[45] But, while the jury have the undoubted right to observe a witness upon the stand and to take into account his appearance and demeanor, as affecting credibility, the court should refrain from instructing them that it is their duty to do so.[46] The court may charge the jury in their consideration of conflicting testimony, to take note of the reasonableness or unreasonableness of the statements, the interest of the witnesses, if any, and all the circumstances in evidence.[47]

(2) Where a witness has knowingly and wilfully testified falsely concerning a matter material to the issue, the court should instruct that the jury may disregard his entire testimony,[48] except where corroborated by other credible testi-

records of the plaintiffs affected their credibility as witnesses, it did not deprive them of the right to contract, that being one of the ingredients of the case. Weiss v. London Guarantee & Acc. Co., Ltd., 285 Pa 251, 132 A 120.

[43] Union Bus Station v. Etosh, 48 OhApp 161, 1 OhO 151, 192 NE 743.

[44] LaFevre v. DuBrule, 71 IllApp 263.

An instruction that a witness might be impeached by proving statements made by him on some former occasion contrary to those made by him on the witness stand may be given. Egan v. Moellenbrook, 322 Ill 426, 153 NE 600.

[45] Welton v. Iowa State Highway Comm., 211 Ia 625, 233 NW 876.

[46] Heenan v. Howard, 81 IllApp 629.

[47] Cole v. F. Mayer Boot & Shoe Co., 221 MoApp 1250, 300 SW 321.

[48] **Alabama.** Steele-Smith Dry Goods Co. v. Blythe, 208 Ala 288, 94 S 281; Tennessee Coal, Iron & Ry. Co. v. Wilhite, 211 Ala 195, 100 S 135; Aycock v. Schwartzchild & Sulzsberger Co., 4 AlaApp 610, 58 S 811; Taylor v. State, 17 AlaApp 28, 81 S 364.

Arkansas. Hughes v. Bartholomew, 164 Ark 152, 261 SW 284.

California. Spear v. United Railroads of San Francisco, 16 CalApp 637, 117 P 956; Belm v. Patrick, 109 CalApp 599, 293 P 847.

Connecticut. Craney v. Donovan, 92 Conn 236, 102 A 640, LRA 1918C, 96.

Georgia. Molho v. Johnson, 25 GaApp 719, 104 SE 577.

Missouri. Hartpence v. Rogers, 143 Mo 623, 45 SW 650; Cohen v. St. Louis Merchants, Bridge Terminal Ry. Co., 193 MoApp 69, 181 SW 1080; Poague v. Mallory, 208 MoApp 395, 235 SW 491 (must be wilful and with knowledge); Myers v. Independence (Mo), 189 SW 816.

The giving or refusing of an instruction that the jury may disregard the entire testimony of witnesses whom they believe to have wilfully testified falsely rests largely in the discretion of the trial court, and where the evidence is

mony.[49] Where the testimony of a witness is of such a character that it may fairly induce the belief that he has wilfully testified falsely on a material matter, the jury should be told of their right to reject the entire evidence of the witness and it is error to refuse the instruction.[50] But before an instruction of this kind may be given the court must determine whether the facts and circumstances in evidence afford a sufficient basis for the application of the rule.[51] An instruction upon this basis is faulty if it fails to inform the jury that the facts as to which they believe the witness has wilfully testified falsely must have been material.[52]

(3) Where the evidence is contradictory, the court should direct attention to this fact as bearing on credibility.[53] Thus where the testimony of a witness stands alone, with no corroborating circumstance in support of it, and is contradicted by the testimony of several other witnesses, the jury's attention should be directed to the situation and credibility of the witness.[54] So where the testimony of a witness is in direct contradiction to that given by him on a former trial on the same point, an instruction should not be refused which tells the jury that if they believe the evidence as so given in the former action, then they must discredit the contradictory statements made in the

sharply conflicting, the giving of such an instruction is not improper. Sampson v. St. Louis & S. F. R. Co., 156 MoApp 419, 138 SW 98.

Ohio. Dye v. Scott, 35 OhSt 194, 35 AmRep 604; Edinger v. State, 12 OhApp 362, 32 OhCirApp 529.

South Dakota. State v. Goodnow, 41 SD 391, 170 NW 661.

[49] **Georgia.** Payne v. Reese, 28 GaApp 180, 110 SE 740.

Idaho. Baird v. Gibberd, 32 Idaho 796, 189 P 56.

Illinois. Stewart v. Clark, 194 IllApp 2; Sherburne v. McGuire, 197 IllApp 486; Osberg v. Cudahy Packing Co., 198 IllApp 551; Monk v. Caseyville R. Co., 202 IllApp 641; Marshall v. Illinois Cent. R. Co., 207 IllApp 619.

Indiana. Selz, Schwab & Co. v. Gullion, 187 Ind 328, 119 NE 209.

Missouri. Bryant v. Kansas City Rys. Co., 286 Mo 342, 228 SW 472; Guidewell v. Patterson, 207 MoApp 437, 229 SW 225; Kansas City v. Boruff, 295 Mo 28, 243 SW 167; Heidemann v. Kleine (MoApp), 210 SW 913.

West Virginia. See Siever v. Coffman, 80 WVa 420, 92 SE 669.

[50] Peckham v. Lindell Glass Co., 7 MoApp 563.

[51] Wyatt v. Central Coal & Coke Co. (MoApp), 209 SW 585; Milton v. Holtzman (MoApp), 216 SW 828 (instruction discretionary with trial court); Pumorlo v. Merrill, 125 Wis 102, 103 NW 464.

[52] Larsen v. Webb, 332 Mo 370, 58 SW2d 967, 90 ALR 67.

[53] Where a written statement by plaintiff's chief witness is introduced contradicting his testimony, the duty of the court is limited to calling the attention of the jury to the discrepancy, and cautioning them as to their duty in passing on his credibility. Danko v. Pittsburgh Rys. Co., 230 Pa 295, 79 A 511.

[54] Fineburg v. Second & Third Streets Passenger Ry. Co., 182 Pa 97, 37 A 925.

later suit.[55] But the court need not instruct on the matter of credibility where statements are not necessarily in conflict, as where a plaintiff testifies that a railway switch was defective, and, on cross-examination, says he made only a casual observation of it.[56]

(4) The court should, if requested, point out the effect of a witness' interest in the suit, as bearing on the question of his credibility.[57] The law recognizes tests and methods to be applied to testimony in enabling the jury to determine credibility and one of such tests is that they have the right to consider the interest of a witness and his manner of testifying.[58] And the common law rule that the testimony of an interested party is to be weighed in the light of such interest is not abrogated by a federal statute providing that no witness shall be excluded because he is a party to or interested in the issue tried. The jury's attention should be called to the party's interest and it is then for the jury to say to what extent, if at all, the credibility of the witness is affected.[59] For it is not only proper, but it is the duty of the jury to consider a party's interest, as well as every other fact and circumstance which may reasonably bear upon weight and credibility.[60] Hence an instruction is correct which informs the jury that in passing upon the testimony of any witness they "have a right to take into consideration the interest any such witness may have in the result of this trial and the manner of testifying." And it is not sufficient to tell the jury that, in determining credibility, they may use their common experience and common sense.[61] However open the practice may be

[55] O'Leary v. Buffalo Union Furnace Co., 100 AppDiv 136, 91 NYS 579.

[56] Logan v. Metropolitan Street Ry. Co., 183 Mo 582, 82 SW 126.

[57] **Alabama.** It is not improper to charge in an action for injuries that the jury might consider friendship as bearing on the credibility of witnesses, together with the contradictory statements made by plaintiff, if any, as bearing on the weight to be given his evidence. Birmingham Ry., Light & Power Co. v. Glenn, 179 Ala 263, 60 S 111.

Massachusetts. Commonwealth v. Harris, 232 Mass 588, 122 NE 749.

Missouri. State v. Garrett, 276 Mo 302, 207 SW 784.

Montana. Murray v. Butte, 51 Mont 258, 151 P 1051.

Nebraska. Morfeld v. Weidner, 99 Neb 49, 154 NW 860.

New York. An employee is an interested witness when his master is sued for the negligent act of the employee. Harris v. Fifth Ave. Coach Co., 132 NYS 743.

Wisconsin. Vogel v. Herzfeld-Phillipson Co., 148 Wis 573, 134 NW 141.

[58] Lancashire Ins. Co. v. Stanley, 70 Ark 1, 62 SW 66.

[59] Denver City Tramway Co. v. Norton, 73 CCA 1, 141 F 599.

[60] Kavanaugh v. Wausau, 120 Wis 611, 98 NW 550.

[61] Lancashire Ins. Co. v. Stanley, 70 Ark 1, 62 SW 66. See also Chicago & G. T. Ry. Co. v. Spurney, 69 IllApp 549.

to criticism, yet the court should not instruct that it is the ethical duty of an attorney to retire from the trial of a case in which he appears as a witness.[62]

§ 69. Credibility of witnesses in criminal cases—Interest of witnesses—Falsus in uno, falsus in omnibus.

The court in criminal prosecutions should set forth in its instructions rules of law for the guidance of the jury in determining the credibility to be given to the testimony of the witnesses.

Besides guidance rules on credibility generally,[63] such rules should be given as to the accused,[64] the complaining witness,[65] interested witnesses generally,[66] impeached witnesses,[67] ac-

[62] Fletcher v. Ketcham, 160 Ia 364, 141 NW 916.

[63] **California.** People v. Bernal, 40 CalApp 358, 180 P 825.

Georgia. Grant v. State, 122 Ga 740, 50 SE 946.

In Gibson v. State, 42 GaApp 285, 155 SE 922, it was held proper for the trial court to say to the jury that witnesses are presumed to tell the truth unless they are impeached or discredited in some manner.

Illinois. The court may tell the jury that they have a right to consider whether the testimony of the accused has been corroborated or contradicted by other credible evidence. People v. Stockton, 355 Ill 405, 189 NE 281.

Iowa. State v. Hatters, 184 Ia 878, 169 NW 113.

Missouri. State v. Parmenter, 278 Mo 532, 213 SW 439.

New Mexico. State v. Moss, 24 NM 59, 172 P 199.

Ohio. Edinger v. State, 12 OhApp 362, 32 OhCtApp 529.

West Virginia. State v. Parsons, 90 WVa 307, 110 SE 698.

[64] **Federal.** Caminetti v. United States, 242 US 470, 61 LEd 442, 37 SupCt 192, LRA 1917F 502, AnnCas 1917B, 1168.

Alabama. Weaver v. State, 1 Ala App 48, 55 S 956.

Georgia. Buchanan v. State, 35 GaApp 383, 133 SE 311.

North Dakota. State v. Tough, 12 ND 425, 96 NW 1025.

Oregon. State v. Porter, 32 Or 135, 49 P 964.

Tennessee. Cooper v. State, 123 Tenn 37, 138 SW 826.

[65] **California.** People v. Fraysier, 36 CalApp 579, 172 P 1126 (rape); People v. Williams, 52 CalApp 609, 199 P 56. But see People v. Anthony, 185 Cal 152, 96 P 47.

Georgia. Walker v. State, 151 Ga 341, 106 SE 547.

Missouri. State v. Finley, 278 Mo 474, 213 SW 463.

Utah. State v. Scott, 55 Utah 553, 188 P 860 (rape).

Wisconsin. Abaly v. State, 163 Wis 609, 158 NW 308.

[66] **Alabama.** Weaver v. State, 1 AlaApp 48, 55 S 956.

Illinois. People v. Lalor, 290 Ill 234, 124 NE 866.

Louisiana. State v. Elby, 145 La 1019, 83 S 227.

Nebraska. Chezem v. State, 56 Neb 496, 76 NW 1056.

Virginia. Horton v. Commonwealth, 99 Va 848, 38 SE 184.

[67] Walker v. State, 137 Ga 398, 73 SE 368; Landers v. State, 149 Ga 482, 100 SE 569; Hawkins v. State, 20 GaApp 179, 92 SE 958; Reeves v. State, 22 GaApp 628, 97 SE 115; Williams v. State, 25 GaApp 193, 102 SE 875; Barnes v. State, 25 GaApp 555, 103 SE 857; Lundy v. State, 28 GaApp 70, 110 SE 330; Smith v. State, 14 OklCr 348, 171 P 341.

complices,[68] co-conspirators,[69] detectives,[70] experts,[71] convicts and ex-convicts,[72] and witnesses whose testimony is wilfully and knowingly false in part.[73]

The jury are the sole judges of the credibility of witnesses and the weight that should be given to their testimony and it is

[68] **Federal.** Aliens unlawfully brought into the United States are not accomplices of those who bring them in violation of law, and when they testify against defendant charged with such smuggling, the court is not required to charge as to accomplice testimony. Emmanuel v. United States, 24 F2d 905.

Alabama. Dodd v. State, 24 Ala App 36, 160 S 267.

Georgia. Suddeth v. State, 112 Ga 407, 37 SE 747; Melton v. State, 116 Ga 582, 42 SE 708.

Kentucky. Walker v. Commonwealth, 257 Ky 613, 78 SW2d 754.

Unless one is an accessory before the act, or an aider or abettor, he does not become an accomplice merely because he is an eyewitness to a homicide. Marcum v. Commonwealth, 223 Ky 831, 4 SW2d 728.

Missouri. State v. Meysenburg, 171 Mo 1, 71 SW 229.

Pennsylvania. Commonwealth v. Bruno, 316 Pa 394, 175 A 518.

Texas. Wilson v. State, 41 TexCr 115, 51 SW 916; Collier v. State, 108 TexCr 171, 300 SW 54; West v. State, 117 TexCr 340, 37 SW2d 160.

An instruction is sufficient which defines "accomplices" as all persons who participate in an offense as principals and "principals" as all persons acting together in the commission of an offense. Hilton v. State, 41 TexCr 190, 53 SW 113.

In the absence of other connecting evidence, a witness who was merely riding in car with one later accused of unlawfully transporting liquor was not an accomplice. McNeill v. State, 110 TexCr 499, 7 SW2d 559, 9 SW2d 333.

[69] Grace v. State, 49 GaApp 306, 175 SE 384; Gelosi v. State, 215 Wis 649, 255 NW 893.

[70] **Federal.** Rossi v. United States, 9 F2d 362 (instruction held too broad as to the weight of the testimony of detectives).

In Latses v. United States, 45 F2d 949, it was held not error for the court to fail to instruct that the testimony of federal prohibition agents should be received with caution in a prosecution under the prohibition laws.

Alabama. Layton v. State, 22 AlaApp 523, 117 S 610.

Kansas. State v. Shew, 8 KanApp 679, 57 P 137.

Washington. See State v. Norman, 161 Wash 525, 297 P 216 (an instruction held proper as to the testimony of special investigators employed by the federal government).

[71] **California.** People v. Lytle, 34 CalApp 360, 167 P 552.

Massachusetts. Commonwealth v. Soaris, 275 Mass 291, 175 NE 491.

The court cannot charge as a matter of law that opinion evidence must be received with caution, and that where there is an honest difference of opinion among qualified experts the jury ought not to convict. Commonwealth v. Howard, 205 Mass 128, 91 NE 397.

Missouri. State v. Mundy (Mo), 76 SW2d 1088.

[72] **Iowa.** State v. Gilliland, 187 Ia 794, 174 NW 496.

Nebraska. Under a Nebraska statute a prior conviction of a felony may be proved for the purpose of affecting the credibility of a witness and the court may properly instruct the jury as to the purpose of such evidence. Keating v. State, 67 Neb 560, 93 NW 980.

New Jersey. State v. Sandt, 95 NJL 49, 111 A 651.

[73] **Hawaii.** Territory v. Buick, 27 Hawaii 28.

Louisiana. State v. Allen, 11 La 154, 35 S 495.

proper so to charge the jury.[74] But this does not forbid instructions as to the tests to be applied to the testimony by the jury. The court may charge that the jury may give consideration to the appearance and demeanor of the witnesses, their manner of testifying, their apparent candor and fairness, their bias or prejudice, their apparent intelligence, their interest in the result, and all other surrounding circumstances.[75] The court should not tell the jury to regard and determine the credibility of the witnesses "as reasonable men," as there is no guide thus given for the jury to follow.[76]

The court should instruct that the accused is a competent witness in his own behalf and that his testimony is entitled to whatever weight the jury may give it.[77] The court should not

Nebraska. Joseph v. State, 128 Neb 824, 260 NW 803.

South Dakota. State v. Weston, 47 SD 328, 198 NW 826.

[74] **Alabama.** Brown v. State, 142 Ala 287, 38 S 268.

Indiana. McIntosh v. State, 151 Ind 251, 51 NE 354.

Iowa. An instruction is proper to reject the evidence of witnesses if their testimony is not believed. State v. Minor, 106 Ia 642, 77 NW 330.

Missouri. State v. Maupin, 196 Mo 164, 93 SW 379.

Ohio. Edinger v. State, 12 OhApp 362, 32 OhCtApp 529.

West Virginia. State v. Lutz, 85 WVa 330, 101 SE 434; State v. Long, 88 WVa 669, 108 SE 279.

It is not error to instruct the jury that they are the sole judges of the credibility of the witnesses and they have the right to believe or not any witness who has testified where the instruction is modified so as to tell them that they cannot arbitrarily disregard the testimony of a witness unless they believe it to be untrue. State v. Legg, 59 WVa 315, 53 SE 545, 3 LRA (N. S.) 1152.

The court may not charge that the jury may arbitrarily believe or disbelieve any witness. State v. Weissengoff, 89 WVa 279, 109 SE 707.

[75] **Alabama.** Roberson v. State, 24 AlaApp 244, 133 S 744.

California. People v. Bernal, 40 CalApp 358, 180 P 825.

Florida. Tucker v. State, 64 Fla 518, 59 S 941.

Georgia. Best v. State, 26 GaApp 671, 107 SE 266.

Illinois. People v. Snyder, 279 Ill 435, 117 NE 119; People v. Lalor, 290 Ill 234, 124 NE 866.

Oregon. State v. Fronhofer, 134 Or 378, 293 P 921.

Washington. State v. Hoshor, 26 Wash 643, 67 P 386.

[76] People v. McGeoghegan, 325 Ill 337, 156 NE 378.

[77] **California.** People v. Bernal, 40 CalApp 358, 180 P 825.

Florida. Prevatt v. State, 82 Fla 284, 89 S 807.

Illinois. People v. Duzan, 272 Ill 478, 112 NE 315; People v. Lalor, 290 Ill 234, 123 NE 866 (corroboration by credible evidence essential).

Mississippi. McVay v. State (Miss), 26 S 947.

Missouri. State v. Fredericks, 136 Mo 51, 37 SW 832; State v. Martin, 230 Mo 680, 132 SW 595; State v. Kocian (Mo), 208 SW 44.

An accused is not entitled to an instruction on his evidence where it was simulated and at variance with the physical facts and the testimony of all the witnesses. State v. Pollard, 139 Mo 220, 40 SW 949.

Oklahoma. Shears v. State, 20 OklCr 193, 201 P 816.

disparage the testimony of the accused,[78] but attention may be directed, however, to his interest in the result of the case.[79] It is improper, however, for the court to direct the jury that they "must," rather than that they "may," weigh the accused's testimony in the light of his interest in the outcome of the trial.[80] It has been held proper for the trial court to tell the jury that the testimony of the accused is to be considered in the same manner as that of any other witness in the case.[81]

In Georgia the accused is given the right to make a statement in his own defense not under oath, and this is to be given what weight and credit the jury may deem it entitled to. The jury may believe this statement in preference to the sworn testimony or disregard it entirely. The instruction on this

[78] **Federal.** McCallum v. United States, 159 CCA 245, 247 F 27.

Arkansas. The practice of giving a separate charge on credibility of accused is not commended. Davis v. State, 150 Ark 500, 234 SW 482.

Florida. Blanton v. State, 52 Fla 12, 41 S 789.

Georgia. It is improper to use language calculated to impress the jury that they ought to be cautious in giving credit to what was testified to by accused. Alexander v. State, 114 Ga 266, 40 SE 231.

Illinois. People v. Arnold, 248 Ill 169, 93 NE 786; People v. Munday, 280 Ill 32, 117 NE 286; People v. Fitzgerald, 297 Ill 264, 130 NE 720.

Massachusetts. Commonwealth v. Howard, 205 Mass 128, 91 NE 397.

Michigan. People v. Miller, 217 Mich 635, 187 NW 366.

Minnesota. State v. Dallas, 145 Minn 92, 176 NW 491.

Missouri. State v. Willner (Mo), 199 SW 126.

New York. People v. Viscio, 241 AppDiv 499, 272 NYS 213.

Oklahoma. Bridges v. United States, 3 OklCr 64, 104 P 370; Manning v. State, 5 OklCr 532, 115 P 612 (defendant's testimony singled).

South Carolina. It has been held not erroneous for the court to say to the jury that they may, but need not necessarily, infer the guilt of the accused if they find that he had uttered false exculpatory statements. State v. Pittman, 137 SC 75, 134 SE 514.

[79] **Federal.** Foster v. United States, 167 CCA 423, 256 F 207; Schulze v. United States, 170 CCA 257, 259 F 189; Belvin v. United States, 171 CCA 281, 260 F 455; United States v. Freedman, 268 F 655.

Alabama. Bell v. State, 170 Ala 16, 54 S 116; Scruggs v. State, 224 Ala 328, 140 S 405.

Arkansas. Simmons v. State, 124 Ark 566, 187 SW 646.

Illinois. People v. Maciejewski, 294 Ill 390, 128 NE 489.

Iowa. State v. Bird, 207 Ia 212, 220 NW 110.

Michigan. People v. Hahn, 214 Mich 419, 183 NW 43.

Missouri. State v. Boyer, 232 Mo 267, 134 SW 542.

Nebraska. Darwin v. State, 107 Neb 177, 185 NW 312.

New Jersey. State v. Randall, 95 NJL 452, 113 A 231.

North Carolina. State v. Lovelace, 178 NC 762, 101 SE 380; State v. Deal, 207 NC 448, 177 SE 332.

Tennessee. Cooper v. State, 123 Tenn 37, 138 SW 826.

Washington. In State v. Snyder, 146 Wash 391, 263 P 180, such an instruction was held unnecessary and error.

[80] Kyle v. State, 21 AlaApp 256, 107 S 222.

[81] People v. Jonicek, 342 Ill 414, 174 NE 520.

subject is sufficient if substantially in the language of the statute. The charge should not disparage the statement.[82] It is not error for the court to inform the jury in the instructions that when the accused makes such a statement he incurs no penalty for failure to speak the truth.[83]

On the question of the credibility of witnesses the court may direct the jury to consider their relationship to the accused,[84] and the fact that they are paid detectives, if that is a fact shown by the evidence.[85] It has been held that the general rule requiring cautionary instructions as to the testimony of detectives and informers does not apply to public officials acting in their official capacities.[86] An instruction has been approved which informed the jury that if the bad reputation of a witness for truth and veracity had been established by the evidence, they were entitled to disregard all of his testimony unless it was corroborated by other credible evidence.[87]

An instruction on the effect of impeachment may be given only where evidence tending to impeach witnesses in some of the modes prescribed by law has been introduced.[88]

[82] Chancey v. State, 145 Ga 12, 88 SE 205; Lucas v. State, 146 Ga 315, 91 SE 72; Mitchell v. State, 147 Ga 468, 94 SE 570; Wilder v. State, 148 Ga 270, 96 SE 325; Grant v. State, 152 Ga 252, 109 SE 502; Merritt v. State, 152 Ga 405, 110 SE 160; Bass v. State, 152 Ga 415, 110 SE 237; Stanford v. State, 153 Ga 219, 112 SE 130; Hill v. State, 17 GaApp 294, 86 SE 657; Black v. State, 17 GaApp 294, 86 SE 659; Linder v. State, 17 GaApp 310, 86 SE 741; Allen v. State, 18 GaApp 1, 88 SE 100; Dunn v. State, 18 Ga App 95, 89 SE 170; Harris v. State, 19 GaApp 741, 92 SE 224; McLane v. State, 20 GaApp 825, 93 SE 558; Welch v. State, 26 GaApp 201, 105 SE 647; Causey v. State, 26 GaApp 632, 107 SE 68; Miller v. State, 26 GaApp 642, 107 SE 64; Harrison v. State, 28 GaApp 554, 112 SE 293; Stokes v. State, 28 GaApp 555, 112 SE 293; Norman v. State, 28 GaApp 561, 112 SE 293; Hulin v. State, 28 GaApp 562, 112 SE 294.

[83] Henderson v. State, 50 GaApp 16, 176 SE 811.

[84] **Indiana.** Keesier v. State, 154 Ind 242, 56 NE 232.

Missouri. State v. Napper, 141 Mo 401, 42 SW 957.

Nebraska. Van Buren v. State, 63 Neb 453, 88 NW 671.

North Carolina. State v. Apple, 121 NC 584, 28 SE 469.

[85] **California.** People v. Vuyacich, 57 CalApp 233, 206 P 1031.

District of Columbia. Post-office inspectors are not paid detectives in the sense of the principle that the jury should scrutinize the testimony of such detectives. Lorenz v. United States, 24 AppDC 337.

Georgia. See also McWhorter v. State, 22 GaApp 251, 95 SE 1013.

Minnesota. State v. Overman, 152 Minn 431, 189 NW 444.

Missouri. State v. Fullerton, 90 MoApp 411.

Nebraska. Sandage v. State, 61 Neb 240, 85 NW 35, 87 AmSt 457.

North Carolina. State v. Boynton, 155 NC 456, 71 SE 341.

[86] Allen v. State, 120 Neb 889, 235 NW 85.

[87] State v. Roblin, 160 Wash 529, 295 P 745.

[88] **Alabama.** Bennett v. State, 160 Ala 25, 49 S 296 (instruction on contradictory statements); Leath-

The jury should be instructed that the evidence of an accomplice must be received with great caution unless corroborated by the evidence of others,[89] and that one accomplice cannot

erwood v. State, 17 AlaApp 498, 85 S 875.

It is proper to charge that if any witness has been impeached his entire testimony may be disregarded unless corroborated by other testimony not so impeached. Churchwell v. State, 117 Ala 124, 23 S 72.

Georgia. Freeman v. State, 112 Ga 48, 37 SE 172; Riley v. State, 153 Ga 182, 111 SE 729.

The credibility of a witness is for the jury and it is not error to instruct that a witness may be believed though impeached for general bad character. Ector v. State, 120 Ga 543, 48 SE 315.

Kentucky. Delph v. Commonwealth, 255 Ky 259, 72 SW2d 1027.

[89] **Federal.** Nee v. United States, 267 F 84; United States v. Freedman, 268 F 655; Freedman v. United States, 274 F 603; Lett v. United States, 15 F2d 686.

Arkansas. Griffin v. State, 141 Ark 43, 216 SW 34.

California. The testimony of an accomplice is corroborated "if it tends to connect the defendants with the commission of the offense, though of itself, standing alone, it would be entitled to but little weight." People v. Blunkall, 31 Cal App 778, 161 P 997.

Florida. Peterson v. State, 95 Fla 925, 117 S 227.

Georgia. Almand v. State, 149 Ga 182, 99 SE 795; Callaway v. State, 151 Ga 342, 106 SE 577; Langston v. State, 153 Ga 127, 111 SE 561.

Illinois. People v. Sapp, 282 Ill 51, 118 NE 416.

Kentucky. Nicoll v. Commonwealth, 169 Ky 491, 184 SW 386; Jack v. Commonwealth, 220 Ky 640, 295 SW 983; Williams v. Commonwealth, 257 Ky 175, 77 SW2d 609; Smith v. Commonwealth, 257 Ky 669, 79 SW2d 20; Commonwealth v. Compton, 259 Ky 565, 82 SW2d 813.

Louisiana. State v. Hughes, 141 La 578, 75 S 416.

Massachusetts. Commonwealth v. Leventhal, 236 Mass 516, 128 NE 864.

Minnesota. State v. Price, 135 Minn 159, 160 NW 677; State v. Dunn, 140 Minn 308, 168 NW 2; State v. Smith, 144 Minn 348, 175 NW 689.

A witness is not necessarily an accomplice because he is under indictment for same offense as defendant. State v. Price, 135 Minn 159, 160 NW 677.

Missouri. State v. Black, 143 Mo 166, 44 SW 340.

Nebraska. Dyson v. State, 107 Neb 774, 186 NW 984.

New Jersey. State v. Schuck, 96 NJL 154, 114 A 562.

New Mexico. See State v. Foster, 38 NM 540, 37 P2d 541, 95 ALR 1247.

Oklahoma. Souther v. State, 12 OklCr 195, 153 P 293; McKinney v. State, 20 OklCr 134, 201 P 673; Hewett v. State, 38 OklCr 105, 259 P 144.

Corroboration must connect defendant with commission of the offense. Moore v. State, 14 OklCr 292, 170 P 519.

Texas. Crenshaw v. State, 48 TexCr 77, 85 SW 1147; Bagley v. State, 77 TexCr 539, 179 SW 1167; Self v. State, 80 TexCr 76, 188 SW 978 (seduction); Hollingsworth v. State, 80 TexCr 299, 189 SW 488; Stiles v. State, 89 TexCr 603, 232 SW 805; Newton v. State, 91 TexCr 335, 238 SW 649.

Refusal of such instruction is proper where witness is not shown to be an accomplice. Plachy v. State, 91 TexCr 405, 239 SW 979.

Utah. State v. Elmer, 49 Utah 6, 161 P 167.

Vermont. State v. Montifoire, 95 Vt 508, 116 A 77.

corroborate another.[90] In the federal courts the cautionary instruction with respect to the character of testimony of an accomplice is a matter within the discretion of the trial court, and the charge may be omitted if the proof of guilt seems plain and clear.[91] This is the better practice but it is believed that there is no absolute rule of law that would prevent conviction on the uncorroborated testimony of the accomplice if believed by the jury.[92] The question of the sufficiency of the corroboration is for the jury.[93] It is error to tell the jury that a showing of circumstances sufficient to convince the jury that an accomplice has told the truth is sufficient to corroborate the accomplice's testimony.[94] Whether the witness is an accomplice is a question of law for the court to decide.[95]

On the separate trial of one defendant the court may instruct that the jury are not concerned with the guilt or innocence of codefendants not on trial.[96] So, where certain ones charged with conspiracy had confessed after their arrest, the court, in the trial of the defendants, should have instructed that the fact of the confessions of the others was not evidence against the defendants on trial.[97]

The rule is a rule of practice and not a rule of law and failure to comply with it is not error. State v. Hier, 78 Vt 488, 63 A 877.

Washington. State v. Simpson, 119 Wash 653, 206 P 561.

Wyoming. The question of whether a witness was an accomplice is properly submitted to the jury by an instruction leaving to the jury to determine whether any witness was an accomplice and defining an accomplice. Clay v. State, 15 Wyo 42, 86 P 17, 544.

[90] Lightfoot v. State, 128 TexCr 281, 80 SW2d 984.

[91] United States v. Becker, 62 F2d 1007.

[92] **Federal.** McGinniss v. United States, 167 CCA 651, 256 F 621; Reeder v. United States, 262 F 36; Freed v. United States, 49 AppDC 392, 266 F 1012.

Refusal of such instruction is proper where accomplice though called by the government testified in favor of defendant. Bosselman v. United States, 152 CCA 132, 239 F 82.

California. See People v. Haack, 86 CalApp 390, 260 P 913.

Massachusetts. Commonwealth v. Leventhal, 236 Mass 516, 128 NE 864.

Missouri. State v. Glazebrook (Mo), 242 SW 928.

New Jersey. State v. Bove, 98 NJL 350, 116 A 766.

South Carolina. State v. Johnson, 119 SC 55, 110 SE 460.

Texas. Chandler v. State, 89 Tex Cr 599, 232 SW 337.

[93] Read v. State, 195 Ala 671, 71 S 96; Sealey v. State, 120 TexCr 260, 47 SW2d 295.

[94] Wilson v. State, 117 TexCr 63, 36 SW2d 733.

[95] Jolliffee v. State, 21 OklCr 278, 207 P 454.

[96] Bates v. State, 18 GaApp 718, 90 SE 481. See also Dedge v. State, 153 Ga 176, 111 SE 547; Sizemore v. Commonwealth, 195 Ky 621, 242 SW 842.

[97] Graham v. United States, 15 F2d 740.

Instructions that if the jury believe a witness has wilfully sworn falsely to any material fact they are at liberty to disregard his entire testimony except as corroborated by other credible evidence or by facts proved on the trial are also proper.[98] If a court gives a falsus in uno, falsus in omnibus instruction, other instructions should be given defining the material issues, so as not to throw the burden on the jury of deciding what are and what are not material issues of fact.[99] It has been held error to give such an instruction from which the element "wilfully and knowingly" has been omitted,[1] although another such instruction has been approved in which the word "knowingly" was omitted and the word "wilfully" used.[2] The giving of this form of in-

[98] **Federal.** Shea v. United States, 171 CCA 533, 260 F 807; Henry v. United States, 50 AppDC 366, 273 F 330, cert. den. in 257 US 640, 66 LEd 411, 42 SupCt 51.

Alabama. Reynolds v. State, 196 Ala 586, 72 S 20; Ellis v. State, 15 AlaApp 99, 72 S 578; Taylor v. State, 17 AlaApp 28, 81 S 364; Montgomery v. State, 17 AlaApp 469, 86 S 132 (essential that false testimony should have been wilfully given).

Arizona. Babb v. State, 18 Ariz 505, 163 P 259, AnnCas 1918B, 925.

Arkansas. Johnson v. State, 152 Ark 218, 238 SW 23.

California. People v. Brown, 28 CalApp 261, 152 P 58; People v. Groenig, 57 CalApp 495, 207 P 502.

Colorado. Clarke v. People, 64 Colo 164, 171 P 69.

Connecticut. State v. Enanno, 96 Conn 420, 114 A 386.

Georgia. Stanford v. State, 153 Ga 219, 112 SE 130; Mitchell v. State, 18 GaApp 501, 89 SE 602; Snead v. State, 25 GaApp 772, 105 SE 249.

Idaho. State v. Waln, 14 Idaho 1, 80 P 221; State v. Monteith, 53 Idaho 30, 20 P2d 1023.

Illinois. People v. Binger, 289 Ill 582, 124 NE 583.

Michigan. People v. Breen, 192 Mich 39, 158 NW 142.

Mississippi. Boykin v. State, 86 Miss 481, 38 S 725; State v. Wofford, 99 Miss 759, 56 S 162; Hinton v. State, 129 Miss 226, 91 S 897.

Missouri. State v. Barnes, 274 Mo 625, 204 SW 267; State v. Jordan, 285 Mo 62, 225 SW 905 (error in omission of word "wilfully"); State v. Lamont (Mo), 180 SW 861; State v. Hutchison (Mo), 186 SW 1000; State v. Weiss (Mo), 219 SW 368; State v. Wicker (Mo), 222 SW 1014; State v. Miller (Mo), 234 SW 813.

Nebraska. Titterington v. State, 75 Neb 153, 106 NW 421; Christiancy v. State, 106 Neb 822, 184 NW 948.

Nevada. State v. Burns, 27 Nev 289, 74 P 983.

New Jersey. State v. Samuels, 92 NJL 131, 104 A 322; State v. Hendershot, 9 NJMisc 103, 153 A 99.

Oklahoma. Davis v. State, 18 Okl Cr 453, 196 P 146.

Oregon. State v. Merlo, 92 Or 678, 173 P 317, revd. 92 Or 678, 182 P 153.

Pennsylvania. Commonwealth v. Loomis, 267 Pa 438, 110 A 257; Commonwealth v. Parente, 184 Pa SuperCt 125, 133 A2d 561.

West Virginia. State v. Ringer, 84 WVa 546, 100 SE 413; State v. Green, 101 WVa 703, 133 SE 379.

[99] People v. Skelly, 409 Ill 613, 100 NE2d 915.

[1] Bridges v. State, 55 OklCr 188, 27 P2d 868.

[2] Davenport v. Burbank, 193 Ia 1230, 188 NW 786.

struction is generally held to be within the discretion of the court.[3]

§ 70. Failure of party to testify in his own behalf or call material witness.

The practice of courts is not uniform as to whether it is proper to instruct that an unfavorable inference is raised by the failure of a party to testify in his own behalf or to call a material witness.

In many jurisdictions the court does not have authority to instruct that the failure of a party to testify in his own behalf or to call a material witness would give the jury a right to assume that the testimony, if given, would be detrimental to the party so failing.[4] Other jurisdictions permit the practice.[5]

[3] **Idaho.** State v. Boyles, 34 Idaho 283, 200 P 125.

Missouri. State v. Barnes, 274 Mo 625, 204 SW 267.

Virginia. Jarrell v. Commonwealth, 132 Va 551, 110 SE 430.

[4] **Alabama.** Carter v. Chambers, 79 Ala 223; Bates v. Morris, 101 Ala 282, 13 S 138.

An instruction that failure of state to offer second dying declaration raised presumption that it was less favorable to prosecution than first declaration was properly refused. Defense could have required its production. Husch v. State, 211 Ala 274, 100 S 321.

Arkansas. Worthington v. Curd & Co., 15 Ark 491.

California. Sesler v. Montgomery, 78 Cal 486, 21 P 185, 3 LRA 653, 12 AmSt 76.

Indiana. Mortimer v. Daub, 52 IndApp 30, 98 NE 845.

Iowa. Miller v. Dayton, 57 Ia 423, 10 NW 814.

Michigan. Cross v. Lake Shore & M. S. Ry. Co., 69 Mich 363, 37 NW 361, 13 AmSt 399; Hitchcock v. Davis, 87 Mich 629, 49 NW 912; Norris v. Home City Lodge No. 536, I.O.O.F., 203 Mich 90, 168 NW 935. But see Michigan cases in note 5, *infra*.

Missouri. Hartman v. Hartman, 314 Mo 305, 284 SW 488; Lamport v. Aetna Life Ins. Co. (Mo), 199 SW 1020.

Nebraska. Westing v. Chicago, B. & Q. R. Co., 87 Neb 655, 127 NW 1076; Neal v. State, 104 Neb 56, 175 NW 669.

New York. Hayden v. New York Rys. Co., 233 NY 34, 134 NE 826; Blauner v. Reeveland, 203 AppDiv 101, 196 NYS 457; Lans v. Stern (AppDiv), 197 NYS 147. But see New York cases in note 5, *infra*.

North Carolina. Bank of Statesville v. L. Pinkers & Co., 83 NC 377; Ellison v. Rix, 85 NC 77; Cox v. Norfolk & C. R. Co., 126 NC 103, 35 SE 237.

Texas. Claiborne v. Tanner's Heirs, 18 Tex 68.

[5] **Federal.** Plunkett v. Levengston, 169 CCA 609, 258 F 889.

Georgia. Moye v. Reddick, 20 GaApp 649, 93 SE 256.

Maine. Union Bank v. Stone, 50 Me 595, 79 AmDec 631.

Massachusetts. Robinson v. Doe, 224 Mass 319, 112 NE 1007.

Michigan. Griggs v. Saginaw & F. Ry. Co., 196 Mich 258, 162 NW 960; Anderson v. Kendrick, 199 Mich 240, 165 NW 732. But see Michigan cases in note 4, *supra*.

New York. Brooks v. Steen, 6 Hun (NY) 516; Goodstein v. Brooklyn Heights R. Co., 69 AppDiv 617, 74 NYS 1017; Ripley v. Second Ave. R. Co., 8 Misc 449, 59 NYS 37, 28 NYS 683; Paverman v. Joline, 120 NYS 64. But see New York cases in note 4, *supra*.

In still other jurisdictions, the matter is declared to rest within the sound discretion of the trial court.[6]

Jurisdictions not permitting practice. The right of a party to testify in his own behalf is a personal privilege,[7] and there seems no reason why he should be compelled to establish his case by his own testimony if it can be established by the evidence of other competent and disinterested witnesses.[8] This does not prevent counsel from commenting on the failure to introduce such testimony.[9]

The Supreme Court of Connecticut said: "The circumstance that a particular person, who is equally within the control of both parties, is not called as a witness, is too often made the subject of comment before the jury. Such a fact lays no ground for any presumption against either party. If the witness would aid either party, such party would probably produce him. As he is not produced, the jury have no right to presume anything in respect to his knowledge of any facts in the case, because they are to try the case upon the facts shown in the evidence, and upon them alone, without attempting to guess at what might be shown if particular persons were produced by the parties."[10] But, in a later Connecticut case,[11] a trial judge using these very words in a charge to the jury was reversed on the ground that an unfavorable inference can properly be drawn. Yet, the Court completely ignored the earlier case. This leaves the question open whether no instruction at all should be given or whether an instruction, upon request, pointing out the unfavorable inference, should be granted. The same ambiguity is present in those states forbidding an instruction on the unfavorable inference. Is it acceptable conduct if the trial judge simply remains silent on this point, or must he grant a requested instruction that no unfavorable inference is to be drawn? The doubt is eliminated, at least where there is a controlling statute: the court should not refuse to instruct in accordance with statute that no unfavorable presumption is to be drawn from

Ohio. Zane Dev. Syndicate v. Kurtz, 3 OLA 41; Akron Taxicab Co. v. Dawson, 12 OLA 316.

Pennsylvania. Steininger v. Hoch's Exr., 42 Pa 432; Frick v. Barbour, 64 Pa 120; Collins v. Leafey, 124 Pa 203, 16 A 765; Hoffman v. Gemehl, 266 Pa 498, 109 A 755.

Rhode Island. Paolino v. Appleton (RI), 131 A 200.

[6] Zuber v. Northern Pacific Ry. Co., 246 Minn 157, 74 NW2d 641; Delaware & Hudson Co. v. Nahas, 14 F2d 56.

[7] Moore v. Wright, 90 Ill 470.

[8] Westing v. Chicago, B. & Q. R. Co., 87 Neb 655, 127 NW 1076.

[9] Akalitis v. Philadelphia & Reading Coal & Iron Co., 152 CCA 287, 239 F 299; Cross v. Lake Shore & M. S. Ry. Co., 69 Mich 363, 37 NW 361, 13 AmSt 399.

In Wisconsin comment is by statute forbidden.

[10] Scovill v. Baldwin, 27 Conn 316.

[11] Ezzo v. Geremiah, 107 Conn 670, 142 A 461.

the failure of a wife to testify in a suit to cancel a deed from husband to wife as having been made in fraud of creditors.[12]

Jurisdictions permitting practice. It is proper for the court to submit to the jury's consideration the failure of the plaintiff in an automobile collision case to call as witnesses the persons who treated those injured in the accident.[13] The authority to give an instruction on the unfavorable inference to be drawn from a failure of a party to testify or call a witness is not unlimited. The instruction should not be given unless it clearly appears that the party could have produced the evidence.[14] It would seem clear that an instruction as to inferences from failure to introduce evidence to rebut a charge should not be given where the reason for this failure was that the party relied on the improbability of the evidence introduced in support of the claim.[15] In any event attention should not be called to the fact of failure of a party to produce documents to sustain his contention where such documents are not in his possession but in the possession of third persons.[16] Nor should the court comment on the failure to call a witness who has no other or better knowledge of the matter in dispute than those who are produced and testify.[17] Refusal of the court to comment on the failure of a party to call a witness who had testified at a previous trial of the case has been held justified on the ground that his testimony would have been merely cumulative.[18]

The rule has no application to a case where the defendant merely fails to introduce any evidence.[19]

§ 71. Failure of defendant in criminal case to testify or call witness or produce evidence.

The court in a criminal prosecution may charge that the jury should not consider the failure of the defendant to testify as a circumstance against him.

[12] Cotton States Fertilizer Co. v. Childs, 179 Ga 23, 174 SE 708.

[13] Heck v. Henne, 238 Mich 198, 213 NW 112.

[14] **Indiana.** Bump v. McGrannahan, 61 IndApp 136, 111 NE 640.

New York. Metallurgical Secur. Co. v. Mechanics & Metals Nat. Bank, 171 AppDiv 321, 157 NYS 321 (witness in insane asylum).

Pennsylvania. See Adams v. Derian, 115 PaSuperCt 357, 175 A 762.

[15] Smith v. Chicago City R. Co., 165 IllApp 190.

[16] Harrison v. Kiser, 79 Ga 588, 4 SE 320; Wilson Groc. Co. v. National Surety Co., 218 IllApp 584.

[17] **Minnesota.** Jankowski v. Clausen, 167 Minn 437, 209 NW 317.

Mississippi. See Hobson v. McLeod, 165 Miss 853, 147 S 778.

New York. Fitzpatrick v. Woodruff, 47 NYSuperCt 436.

[18] DenBleyker v. Public Service Co-ordinated Transport, 11 NJMisc 101, 164 A 695.

[19] Hubbard v. Cleveland, Columbus & Cincinnati Highway, Inc., 81 OhApp 445, 37 OhO 279, 76 NE2d 721 [motion to certify overruled 1-21-48].

In criminal cases in most states, in contrast to the rule in civil cases, the trial court is permitted to instruct the jury that the failure of the defendant to testify is not an unfavorable inference.[20] In some states the court is not required on its

[20] **Federal.** Robilio v. United States, 170 CCA 169, 259 F 101; United States v. Brookman, 1 F2d 528.

Alabama. Thomas v. State, 139 Ala 80, 36 S 734.

Arkansas. Martin v. State, 151 Ark 365, 236 SW 274.

Connecticut. State v. Williams, 90 Conn 126, 96 A 370.

Florida. Fogler v. State, 96 Fla 68, 117 S 694.

Georgia. Stephens v. State, 21 GaApp 151, 94 SE 69.

Idaho. State v. Levy, 9 Idaho 483, 75 P 227.

Illinois. People v. Michael, 280 Ill 11, 117 NE 193.

Iowa. State v. Bower, 191 Ia 713, 183 NW 322.

Kansas. State v. Goff, 62 Kan 104, 61 P 683; State v. Olsen, 88 Kan 136, 127 P 625.

Louisiana. State v. Johnson, 50 LaAnn 138, 23 S 199.

Massachusetts. Commonwealth v. Brown, 167 Mass 144, 45 NE 1.

The court should instruct on unwarranted argument of prosecuting attorney respecting failure of accused to testify. Commonwealth v. Richmond, 207 Mass 240, 93 NE 816, 20 AnnCas 1269.

Michigan. People v. Provost, 144 Mich 17, 107 NW 716, 8 AnnCas 277; People v. Murnane, 213 Mich 205, 182 NW 62; People v. Ferrise, 219 Mich 471, 189 NW 56; People v. De Bolt, 269 Mich 39, 256 NW 615.

The court should not call attention to the fact that accused had not testified when the prosecution relied on the testimony of eye-witnesses. People v. Peterson, 166 Mich 10, 131 NW 153.

People v. Thrine, 218 Mich 687, 188 NW 405 (not necessary to refer to matter).

Minnesota. State v. Richman, 143 Minn 314, 173 NW 718.

Mississippi. Funches v. State, 125 Miss 140, 87 S 487; Haynes v. State (Miss), 27 S 601.

Missouri. Moberly (City of) v. Kervin (MoApp), 234 SW 514 (application of rule to violation of ordinances).

Montana. State v. Fuller, 34 Mont 12, 85 P 369, 8 LRA (N. S.) 762.

Nebraska. Neal v. State, 104 Neb 56, 175 NW 669.

New Mexico. State v. Graves, 21 NM 556, 157 P 160.

North Carolina. State v. Turner, 171 NC 803, 88 SE 523.

North Dakota. State v. Currie, 13 ND 655, 102 NW 875, 69 LRA 405, 112 AmSt 687.

Ohio. Tate v. State, 76 OhSt 537, 81 NE 973, 10 AnnCas 949; Sullivan v. State, 9 OhCirCt 652, 4 Oh CirDec 451.

The court can, under the amendment of Ohio Const. Art. I, § 10 on September 3, 1912, instruct the jury that they may take into consideration the failure of the accused to testify. State v. Morrow, 90 OhSt 202, 107 NE 515; State v. Fleming, 127 OhSt 8, 186 NE 613.

Oklahoma. Holmes v. State, 13 OklCr 113, 162 P 446; McLaughlin v. State, 14 OklCr 192, 169 P 657; Dunn v. State, 15 OklCr 245, 176 P 86; Conley v. State, 15 OklCr 531, 179 P 480; Russell v. State, 17 Okl Cr 164, 194 P 242.

South Dakota. State v. Wells, 53 SD 446, 221 NW 56.

Texas. Guinn v. State, 39 TexCr 257, 45 SW 694; Lounder v. State, 46 TexCr 121, 79 SW 552; Kinkead v. State, 61 TexCr 651, 135 SW 573; Eubank v. State, 104 TexCr 628, 286 SW 234.

Vermont. State v. Bolton, 92 Vt 157, 102 A 489; State v. Rossi, 92 Vt 187, 102 A 1030.

Washington. State v. Comer, 176 87 Wash 613, 152 P 335.

own motion to instruct on this question,[21] while in others this instruction is mandatory.[22] Even though this instruction is permitted, the language used by the judge must not amount to a comment by the court on the defendant's failure to testify; if it is a comment, it is reversible error in those jurisdictions adhering to the general rule forbidding comment or opinion by the trial judge.[23] It is improper and reversible error for the court to tell the jury that the rule does not relieve the defendant from the duty of satisfactorily accounting for his recent possession of stolen property.[24]

It is not an adverse comment for the judge to merely tell the jury that the defendant failed to testify,[25] or that he has the right to introduce evidence,[26] or that the state's evidence was uncontradicted.[27]

If a judge *on his motion* instructs that there is no unfavorable inference from the failure of the defendant to testify, is this prejudicial error against the defendant? Probably the reason the defendant would object is that by giving this instruction, the fact of defendant's failure to testify would be called to the attention of the jury, the danger then being that they would draw, on their own, an unfavorable inference. At any rate, the courts have ruled that it is not error because such an instruction is favorable to the defendant.[28]

Some courts make a distinction between the defendant failing to testify and the failure of the defendant to call a witness. Of these courts, some permit the judge to tell the jury they could infer from failure to call an available witness that the testimony of the witness would be adverse to the defendant.[29]

[21] **Connecticut.** State v. Heno, 119 Conn 29, 174 A 181, 94 ALR 696.

Oregon. State v. Magers, 36 Or 38, 58 P 892.

Washington. State v. Comer, 176 Wash 257, 28 P2d 1027.

[22] **Federal.** See Hersh v. United States, 68 F2d 799.

Arkansas. Cox v. State, 173 Ark 1115, 295 SW 29.

Illinois. See People v. Winn, 324 Ill 428, 155 NE 337.

New York. People v. Ferguson, 245 AppDiv 837, 280 NYS 922 (failure of the accused to call a witness).

West Virginia. State v. McClung, 104 WVa 330, 140 SE 55, 56 ALR 257.

[23] Mason v. State, 53 OklCr 76, 7 P2d 492.

[24] State v. Rock, 162 La 299, 110 S 482.

[25] Commonwealth v. Chickerella, 251 Pa 160, 96 A 129.

[26] Smith v. State, 127 TexCr 59, 75 SW2d 99.

[27] Shea v. United States, 163 CCA 451, 251 F 440; Sidebotham v. United States, 165 CCA 159, 253 F 417; McCormick v. United States, 9 F2d 237.

[28] Kahn v. United States, 20 F2d 782 (held not prejudicial); State v. Simpson, 78 ND 571, 50 NW2d 661.

[29] Commonwealth v. Fusci, 117 PaSuperCt 379, 177 A 596.

In some situations, it would be error for the court to refuse defendant's request that failure to call a witness should not raise an adverse inference; for example, where the wife of the defendant is incompetent to testify, it has been held error for the court to decline a request to inform the jury of her incompetency.[30]

§ 72. Alibi in criminal cases.

Where the issue of alibi is raised by the evidence, the jury should be instructed to acquit if there is any reasonable doubt as to the presence of the accused at the time and place where the crime was committed.

There are many cases supporting the rule as stated.[31] The instruction or alibi need not be repeated;[32] and it may be submitted together with all the evidence instead of being treated as an independent issue.[33]

The instruction should be requested where not given by the court on his own motion.[34]

[30] People v. Casey, 350 Ill 522, 183 NE 616.

[31] **Florida.** Jordan v. State, 50 Fla 94, 39 S 155; Clark v. State, 88 Fla 186, 101 S 352.

Georgia. Montford v. State, 144 Ga 582, 87 SE 797.

Indiana. Jacoby v. State, 203 Ind 321, 180 NE 179.

Kansas. State v. Moore, 110 Kan 732, 205 P 644.

Missouri. State v. Davis, 186 Mo 533, 85 SW 354; State v. Shelton, 223 Mo 118, 122 SW 732; State v. Brown, 247 Mo 715, 153 SW 1027.

Montana. State v. Spotted Hawk, 22 Mont 33, 55 P 1026.

Ohio. Walters v. State, 39 OhSt 215; Burns v. State, 75 OhSt 407, 79 NE 929; State v. Norman, 103 OhSt 541, 134 NE 474; Radke v. State, 107 OhSt 399, 140 NE 586; Sabo v. State, 119 OhSt 231, 163 NE 28; Stevens v. State, 26 OhApp 53, 159 NE 834; McGoon v. State, 39 OhApp 212, 177 NE 238.

Oklahoma. Beck v. State, 50 Okl Cr 325, 297 P 820.

Pennsylvania. An alibi was sufficiently explained by a charge that the defendant disclaimed all knowledge of the alleged offense and that he had endeavored to satisfy the jury by evidence that on that particular day he was elsewhere. Commonwealth v. Durlin, 75 PaSuperCt 260.

Texas. Joy v. State, 41 TexCr 46, 51 SW 933; Stripling v. State, 47 TexCr 117, 80 SW 376; McAninch v. State, 77 TexCr 649, 179 SW 719; Burkhalter v. State, 79 TexCr 336, 184 SW 221; James v. State, 86 TexCr 107, 215 SW 459; Hill v. State, 103 TexCr 580, 281 SW 1071; Harris v. State, 119 TexCr 71, 44 SW2d 708; Rountree v. State (Tex Cr), 55 SW 827.

Wisconsin. Abaly v. State, 163 Wis 609, 158 NW 308.

[32] Cook v. People, 177 Ill 146, 52 NE 273. But see Edmonds v. Commonwealth, 204 Ky 495, 264 SW 1100.

[33] **California.** People v. Dowell, 204 Cal 109, 266 P 807; People v. Derwin, 78 CalApp 781, 248 P 1029.

Georgia. Holland v. State, 17 GaApp 311, 86 SE 739.

Vermont. State v. Powers, 72 Vt 168, 47 A 830.

[34] **Alabama.** The court properly refused instruction which did not set out the elements constituting an

If there be evidence of alibi in the record, and the evidence purporting to identify the accused as the guilty party is vague and uncertain, it is error to refuse to instruct as to weighing alibi evidence.[35] But the charge is not required where all the evidence is against the theory of defendant's presence elsewhere.[36]

Where the evidence in a prosecution such as that for arson makes it possible for the accused to have been a participant in the crime though not present at the scene, the court is not required to give an instruction on alibi.[37]

The court is not excused from giving a proper charge as to the defense of alibi merely because the judge deems the evidence thereon weak or inconclusive.[38] The court should not disparage the defense,[39] though he may advise the jury to scan the evidence on the subject with care and attention.[40] It has been held not erroneous for the court to tell the jury that the

alibi, and referred that question of law to the jury. Collins v. State, 14 AlaApp 54, 70 S 995.

Georgia. Barrett v. State, 32 GaApp 30, 122 SE 645.

Iowa. State v. Lightfoot, 107 Ia 344, 78 NW 41.

Montana. State v. Bess, 60 Mont 558, 199 P 426.

[35] People v. Parker, 135 CalApp 761, 27 P2d 921.

[36] Mathis v. State, 153 Ga 105, 111 SE 567; Weeks v. State, 28 GaApp 712, 112 SE 906; Hughes v. State, 78 TexCr 154, 180 SW 259; Woods v. State, 80 TexCr 73, 188 SW 980; May v. State, 129 TexCr 2, 83 SW2d 338.

[37] People v. Ferlin, 203 Cal 587, 265 P 230; State v. Lawrence (Mo), 71 SW2d 740.

[38] Fay v. United States, 22 F2d 740, affg. 19 F2d 620.

[39] **California.** People v. Passafiume, 59 CalApp 283, 210 P 544.

Illinois. See People v. Heinen, 300 Ill 498, 133 NE 232.

Iowa. State v. Wrenn, 194 Ia 552, 188 NW 697.

Louisiana. State v. Molay, 174 La 63, 139 S 759.

Michigan. It is not disparagement for the court to charge that the jury should scrutinize carefully the evidence relating to alibi as being a defense easy to prove and hard to disprove. People v. Trzil, 235 Mich 469, 209 NW 564.

Minnesota. State v. Duddy, 152 Minn 179, 188 NW 261.

Missouri. State v. Crowell, 149 Mo 391, 50 SW 893, 73 AmSt 402.

Nebraska. It was error for the court to advise the jury that the defense of alibi was one "easily fabricated, that it has occasionally been successfully fabricated, and that the temptation to resort to it as a spurious defense is very great, especially in cases of importance." Henry v. State, 51 Neb 149, 70 NW 924, 66 AmSt 450.

New York. People v. Russell, 266 NY 147, 194 NE 65; People v. Robins, 242 AppDiv 516, 275 NYS 940.

Ohio. Radke v. State, 107 OhSt 399, 140 NE 586.

Oregon. State v. Milosevich, 119 Or 404, 249 P 625.

Pennsylvania. Commonwealth v. White, 271 Pa 584, 115 A 870.

Washington. It is error to tell the jury to consider the defense of alibi "with great caution." State v. Lloyd, 138 Wash 8, 244 P 130.

See comprehensive note in 14 ALR 1426, collecting the cases upon the subject under the title "Instructions disparaging defense of alibi."

[40] **Federal.** Fielder v. United States, 142 CCA 356, 227 F 832.

defense of alibi is easy to prove and hard to disprove, and that they ought to scan the evidence of it cautiously.[41]

Proof of the alibi must cover the whole time of the commission of the crime.[42] And if the requested instruction on alibi is based on evidence that covers the presence of the defendant and accounts for his whereabouts during only a portion of the time within which the crime could have been committed, it should be refused.[43]

It is only necessary that the evidence of the alibi should raise a reasonable doubt in the mind of the jury. It is not required that the alibi should be conclusively established.[44] The evidence of alibi is sufficient if it raises a reasonable doubt, and therefor it is error for the instructions to require the proof to cover so much of the transaction in question as would have rendered it impossible for the defendant to have committed the act.[45]

A general instruction informing the jury that the prosecution must prove all the material elements of the offense beyond a reasonable doubt will obviate the necessity for an alibi instruction where the evidence of alibi is not offered until rebuttal and

California. People v. Wing, 31 CalApp 785, 161 P 759; People v. Ross, 89 CalApp 132, 264 P 314. But see People v. Barr, 55 CalApp 321, 203 P 827.

Iowa. State v. Worthen, 124 Ia 408, 100 NW 330; State v. Leete, 187 Ia 305, 174 NW 253; State v. Cartwright, 188 Ia 579, 174 NW 586; State v. Banoch, 193 Ia 851, 186 NW 436.

Minnesota. State v. Duddy, 152 Minn 179, 188 NW 261.

Pennsylvania. Commonwealth v. White, 271 Pa 584, 115 A 870.

Vermont. It is not improper to charge that defendant must prove an alibi by a fair balance of the evidence; that if the jury were satisfied beyond any question that an alibi was a fabricated defense it was evidence, though not conclusive, of guilt, and that if the jury were not satisfied with the alibi they could not throw it out of the case but must consider it with other evidence. State v. Hier, 78 Vt 488, 63 A 877.

[41] People v. Marcus, 253 Mich 410, 235 NW 202.

[42] McDaniel v. United States, 24 F2d 303; People v. Shaw, 300 Ill 451, 133 NE 208; People v. Pargone, 327 Ill 463, 158 NE 716; People v. Terracco, 346 Ill 423, 179 NE 114; People v. Wynekoop, 359 Ill 124, 194 NE 276.

[43] State v. McLane (Mo), 55 SW2d 956.

[44] **Federal.** McCool v. United States, 263 F 55.

Alabama. Doby v. State, 15 Ala App 591, 74 S 724.

Arkansas. Morris v. State, 145 Ark 241, 224 SW 724.

California. People v. De Angelo, 122 CalApp 360, 9 P2d 850.

Idaho. State v. Ward, 31 Idaho 419, 173 P 497.

Illinois. People v. Heinen, 300 Ill 498, 133 NE 232; People v. Todd, 301 Ill 85, 133 NE 645.

Iowa. State v. Wrenn, 194 Ia 552, 188 NW 697. But see State v. O'Brien, 188 Ia 165, 175 NW 769.

[45] Stevens v. State, 26 OhApp 53, 159 NE 834.

then only to overcome the evidence which tended to identify the defendant as the criminal.[46]

There is authority that the court may charge that the failure to prove the alibi may be considered by the jury on the question of the guilt of the defendant.[47]

§ 73. Instruction to disregard testimony erroneously received.

Whenever inadmissible evidence is received, the court should instruct the jury to disregard it.

Obviously, admissible evidence that has been received cannot, without the commission of error, be excluded by the court.[48]

On the other hand, whenever inadmissible evidence is received, the court should instruct the jury to disregard it.[49] This

[46] Witt v. State, 205 Ind 499, 185 NE 645.

[47] Threet v. State, 18 AlaApp 342, 91 S 890.

[48] Campanale v. Metropolitan Life Ins. Co., 290 Mass 149, 194 NE 831, 97 ALR 1282; United Power Co. v. Matheny, 81 OhSt 204, 90 NE 154, 28 LRA (N. S.) 761; Manley v. Coleman, 19 OhApp 284, 22 OLR 242; Cincinnati Gas & Elec. Co. v. Coffelder, 11 OhCirCt (N. S.) 289, 21 OhCirDec 26; Toledo v. Meinert, 15 OhCirCt (N. S.) 545, 31 OhCirDec 118; Walsh v. Walsh, 18 OhCirCt (N. S.) 91, 32 OhCirDec 617.

[49] **United States.** The court may charge the jury to disregard all evidence they find to be false. Allen v. United States, 164 US 492, 41 LEd 528, 17 SupCt 154.

Alabama. Foxworth v. Brown, 120 Ala 59, 24 S 1. See also Age-Herald Publishing Co. v. Waterman, 202 Ala 665, 81 S 621.

California. People v. Delaney, 52 CalApp 765, 199 P 896.

Florida. The practice is not to be commended. Edington v. State, 81 Fla 634, 88 S 468.

Kansas. State v. Roupetz, 73 Kan 663, 85 P 778.

Kentucky. Where evidence is ordered rejected after it has gone to the jury, the court in admonishing as to the exclusion of such evidence should specify it in detail and should name the witnesses from whom it has been elicited in order to identify it. Bess v. Commonwealth, 116 Ky 927, 25 KyLRep 839, 77 SW 349.

New York. Charles W. Schreiber Travel Bureau v. Standard Surety & Casualty Co., 240 AppDiv 279, 269 NYS 804.

North Carolina. State v. Sullivan, 193 NC 754, 138 SE 136.

The court should charge disregard of evidence solely against one defendant as to whom court grants nonsuit. State v. Slagle, 182 NC 894, 109 SE 844.

Ohio. Error in admitting evidence was held cured by instruction excluding such evidence from the consideration of the jury. Mills v. State, 104 OhSt 202, 135 NE 527. See also Mimms v. State, 16 OhSt 221; Klein v. Thompson, 19 OhSt 569; Hocking Valley Ry. Co. v. Helber, 91 OhSt 231, 110 NE 481; Logan v. Cleveland Ry. Co., 107 OhSt 211, 140 NE 652; McGuire v. State, 3 OhCirCt 551, 2 OhCirDec 318; Cincinnati & H. Tpk. Co. v. Hester, 12 OhCirCt 350, 5 OhCirDec 690; Cincinnati, H. & D. Ry. Co. v. Criss, 15 OhCirCt 398, 7 OhCirDec 632; Lake Shore & M. S. Ry. Co. v. Litz, 18 OhCirCt 646, 6 OhCirDec 285; Hoppe v. Parmalee, 20 OhCirCt 303, 11 OhCirDec 24; Pritchard v. State, 1 OLA 459.

Error in admitting evidence was held not cured by court's general charge excluding such evidence from consideration. John Bright Shoe

rule is distinct from the rule that it is improper to give an instruction based on evidence that is not in the record.

If incompetent evidence has been admitted against a party without his objection, or under a waiver of objection, the court is under no duty to give a requested charge to the jury to disregard such evidence.[50] But the jury should be told to ignore testimony which has been admitted with the understanding that it is to be followed by other evidence making it competent and such additional evidence is not forthcoming,[51] or testimony which has been "admitted" improperly,[52] or inadvertently introduced,[53] or which is not material to the issue involved in the case.[54]

Illustrations: Where evidence of several transactions was received, and the evidence as to all but one was incompetent, the

Stores Co. v. Scully, 24 OhApp 15, 156 NE 155. See also Metzger v. Rogers, 11 OLA 659.

Failure of court to give requested instruction excluding from consideration of jury evidence erroneously admitted was held reversible error. Ashtabula Rapid Transit Co. v. Stephenson, 12 OhCirDec 631. See also John Bright Shoe Stores Co. v. Scully, 24 OhApp 15, 156 NE 155; Cleveland Elec. Ry. Co. v. Stanton, 16 OhCirCt (N. S.) 397, 31 OhCir Dec 571; Wagner v. Trott, 7 OLA 491.

Pennsylvania. Wadsworth v. Manufacturers' Water Co., 256 Pa 106, 100 A 577, AnnCas 1917E, 1099.

Texas. Occident Fire Ins. Co. v. Linn (TexCivApp), 179 SW 523.

[50] Frank v. Far Store, 18 OhApp 275; Trustees of Cincinnati Southern Ry. Co. v. McWilliams, 18 Oh App 225; Circleville v. Sohn, 20 Oh CirCt 368, 11 OhCirDec 193; Halsey v. Humble Oil & Ref. Co. (TexCiv App), 66 SW2d 1082.

[51] Patton & Shaver v. Elk River Nav. Co., 13 WVa 259.

[52] **Alabama.** Where a complaint claims items of damages not recoverable for the injury alleged, special instructions may be asked excluding evidence as to such items. Marsicano v. Phillips, 6 AlaApp 229, 60 S 553.

California. Martin v. Pacific Gas & Elec. Co. (CalApp), 255 P 284.

Georgia. Wyatt v. State, 18 Ga App 29, 88 SE 718.

Illinois. Bedell v. Janney, 4 Gilm. (9 Ill) 193; Pittman v. Gaty, 5 Gilm. (10 Ill) 186.

Indiana. Gallivan v. Stickler, 187 Ind 201, 118 NE 679.

Kentucky. Chesapeake & O. Ry. Co. v. Stein, 142 Ky 515, 134 SW 1169.

Missouri. Gutzweiler's Admr. v. Lackmann, 39 Mo 91.

Oklahoma. Creek Coal Min. Co. v. Paprotta, 73 Okl 119, 175 P 235.

Washington. Bentley v. Western Union Tel. Co., 98 Wash 431, 167 P 1127, LRA 1918B, 965.

[53] Price v. Weed, 9 NM 397, 54 P 231; Hall v. Earnest, 36 Barb. (NY) 585.

[54] **Illinois.** Forest Preserve Dist. v. Hahn, 341 Ill 599, 173 NE 763.

Indiana. Utter v. Vance, 7 Blackf. (Ind) 514.

Iowa. Dilly v. Paynsville Land Co., 173 Ia 536, 155 NW 971.

Maine. Harlow v. Perry, 114 Me 460, 96 A 775, AnnCas 1918C, 37.

Massachusetts. Matthews v. New York Cent. & H. R. R. Co., 231 Mass 10, 120 NE 185.

Missouri. White v. Gray, 32 Mo 447.

Pennsylvania. Devling v. Williamson, 9 Watts (Pa) 311.

jury was not properly advised by a charge which told them that the state relied on one of the transactions and that the jury would disregard the other transactions.[55] Where, in an action for damages for automobile collision, there was testimony that an automobile hit a truck, but the falsity of the testimony was disclosed by the admission in evidence of photographs showing that the truck ran into the side of the automobile, it was held proper for the court to tell the jury to disregard the testimony thus shown to be false.[56] Where the action is on a written contract, and the court has improperly admitted parol evidence, it is error to give an instruction based on such parol evidence.[57]

Where, however, the court has ruled that certain evidence is inadmissible, there is no necessity for an instruction to disregard it.[58] The error in refusing to direct the jury to disregard improper evidence is not fatal where it is apparent that the jury did disregard it.[59] It is not necessary to give this instruction as to evidence withdrawn or stricken.[60]

The jury should be instructed to disregard statements by counsel, not sworn as witnesses, as to their personal knowledge of witnesses made to discredit them,[61] also to disregard colloquies between court and counsel.[62] Where the adverse remarks of the court were calculated to destroy a defense, it is held that the error is such that it cannot be cured by the admonition to disregard such comments.[63]

§ 74. Argument of counsel.

Although counsel may fairly maintain their cause by emphasizing those features of the evidence which in their judgment

[55] Ward v. State, 117 TexCr 330, 35 SW2d 733.

[56] Young v. Gill, 103 PaSuperCt 467, 157 A 348.

[57] Kraft-Phenix Cheese Corp. v. H. B. Smith Mach. Co., 267 IllApp 539.

[58] **California.** Gorman v. Sacramento County, 92 CalApp 656, 268 P 1083.

Georgia. Strachan Shipping Co. v. Hazlip-Hood Cotton Co., 35 GaApp 94, 132 SE 454.

Indiana. Grand Rapids & I. R. Co. v. Horn, 41 Ind 479.

Iowa. Sutton v. Moreland, 214 Ia 337, 242 NW 75.

North Dakota. State v. Tracy, 21 ND 205, 129 NW 1033.

[59] Frizelle v. Kaw Valley Paint & Oil Co., 24 MoApp 529.

[60] **Alabama.** Russell v. Bush, 196 Ala 309, 71 S 397.

California. People v. Nakis, 184 Cal 105, 193 P 92.

Indiana. Central Indiana Ry. Co. v. Clark, 63 IndApp 49, 112 NE 892.

Wisconsin. Advance - Rumely Thresher Co. v. Born, 189 Wis 309, 206 NW 904.

[61] Van Alstine v. Kaniecki, 109 Mich 318, 67 NW 502.

[62] Reutner, Klaus & Co. v. Nelson Chesman & Co. (MoApp), 9 SW2d 655.

[63] People v. Pitisci, 29 CalApp 727, 157 P 502.

sustain their contentions, it is proper for the court to instruct the jury that the jury determines the facts.

Although counsel are entitled to portray their roles as advocates,[64] their enthusiasm is not unbridled. The court may properly tell the jury to disregard any statements of counsel concerning the evidence not borne out by the evidence.[65] The court should even without request tell the jury to disregard improper arguments having a tendency to cause prejudice.[66] Where, for example, the counsel for the defendant states that the prosecuting officer will receive the fine assessed, the court properly told the jury that it was not their concern who received the fine.[67]

Where plaintiff's counsel in his opening argument stated that defendant's counsel would be compensated for their services, but that he would be compensated only if plaintiff recovered, it was proper and necessary for the court to promptly instruct the jury to disregard these remarks.[68]

The jury may be cautioned to keep in mind the interest or zeal of attorneys in the causes of their clients in weighing their arguments.[69] Where a prosecuting attorney in his opening and

[64] **Georgia.** McKie v. State, 165 Ga 210, 140 SE 625; Washington v. State, 25 GaApp 422, 103 SE 854.

Minnesota. State v. Price, 135 Minn 159, 160 NW 677.

Ohio. Herman v. Teplitz, 113 Oh St 164, 148 NE 641; East Ohio Gas Co. v. Van Orman, 41 OhApp 56, 179 NE 147; Steen v. Friend, 20 OhCirCt 459, 11 OhCirDec 235.

[65] **Illinois.** Szczech v. Chicago City R. Co., 157 IllApp 150.

Michigan. Hayes v. Coleman, 338 Mich 371, 61 NW2d 634.

Minnesota. Meagher v. Fogarty, 129 Minn 417, 152 NW 833.

New Mexico. Remarks of counsel are not evidence. State v. Moss, 24 NM 59, 172 P 199.

Washington. Tacoma v. Wetherby, 57 Wash 295, 106 P 903; State v. Lance, 94 Wash 484, 162 P 574; State v. Neaudeau, 137 Wash 297, 242 P 36.

Wisconsin. Mullen v. Reinig, 72 Wis 388, 39 NW 861.

[66] **Arkansas.** Briggs v. Jones, 132 Ark 455, 201 SW 118.

Illinois. Illinois Cent. R. Co. v. Borders, 61 IllApp 55.

Indiana. Jackson v. State, 116 Ind 464, 19 NE 330.

Iowa. State v. McCartney, 65 Ia 522, 22 NW 658. See also State v. Powers, 180 Ia 693, 163 NW 402 (punishment to be inflicted not a question for jury).

Kansas. State v. Francis, 64 Kan 664, 68 P 66.

Massachusetts. Taft v. Fiske, 140 Mass 250, 5 NE 621, 54 AmRep 459.

Missouri. Drumm-Flato Comm. Co. v. Gerlach Bank, 107 MoApp 426, 81 SW 503.

Rhode Island. It was held proper for the judge to tell the jury not to pay attention to observation of counsel that witnesses had been seen to enter the office of opposing counsel. Brown v. Rhode Island Co. (RI), 102 A 965.

Texas. Cooksie v. State, 26 Tex App 72, 9 SW 58.

Washington. Farnandis v. Great Northern Ry. Co., 41 Wash 486, 84 P 18, 5 LRA (N. S.) 1086, 111 Am St 1027.

[67] Brooks v. State, 19 GaApp 3, 90 SE 989.

[68] Golamb v. Layton, 154 OhSt 305, 43 OhO 194, 95 NE2d 681.

[69] **Federal.** Kennedy v. United States, 275 F 182; Laurie v. United States, 278 F 934.

closing arguments uses violent language, makes inflammatory remarks, and states his own opinion, it is reversible error for the court to refuse to give instructions directing the jury to disregard the improper argument.[70]

It is held reversible error for the court not to tell the jury that counsel has misconstrued an instruction, for that would amount to the giving of an erroneous instruction.[71] In an accident case it was held proper for the court to admonish the jury to disregard the statement of defense counsel that the law prohibited the using of brighter lights on the street car that struck plaintiff's automobile.[72] If counsel has read the law to the jury, the trial court may properly tell the jury to disregard such law and apply the law as given by the court.[73] In a jurisdiction, however, in which the jury is the judge of the law as well as of the facts in a criminal case, it is error for the court to tell the jury not to consider excerpts from the reported decisions of the Supreme Court which have been read by counsel to the jury.[74]

The jury should not be told to disregard the arguments of counsel.[75] It has been held proper for the court to tell the jury that they must consider all claims of the attorneys.[76] It was reversible error for the judge to say to the jury: "The court charges you that it is upon the testimony, and the testimony alone, that you are to make up your verdict; you are not to be concerned with the argument of counsel, or anything outside

Minnesota. Welle & Hiltner v. Pfau, 151 Minn 279, 186 NW 578; State v. Mulroy, 152 Minn 423, 189 NW 441.

Oregon. Arnett v. Scherer, 142 Or 494, 20 P2d 803.

[70] People v. Provo, 409 Ill 63, 97 NE2d 802.

[71] Briggs v. Jones, 132 Ark 455, 201 SW 118.

Statement by the court to the jury that a case contended to be authoritative by counsel was good law, but not applicable to the present case, was not erroneous. Sears, Roebuck & Co. v. Rouse Banking Co., 191 NC 500, 132 SE 468.

[72] Ostermann v. Milwaukee Elec. Ry. & Light Co., 204 Wis 123, 235 NW 406.

[73] Baucum v. Harper, 176 Ga 296, 168 SE 27; State v. Barnett, 110 NJL 26, 163 A 892.

[74] Leinberger v. State, 204 Ind 311, 183 NE 798.

[75] **Georgia.** Swearengen v. State, 18 GaApp 763, 90 SE 653.

Kansas. State v. Bowser, 124 Kan 556, 261 P 846.

Minnesota. State v. Madden, 137 Minn 249, 163 NW 507.

Missouri. See State v. Farrell, 320 Mo 319, 6 SW2d 857.

South Carolina. State v. Adams, 159 SC 179, 156 SE 445.

Texas. Where counsel had demanded of the jury that some of them "hang" the jury forever under stated conditions, the court was justified in directing the jury to disregard such statements. Indemnity Ins. Co. v. Williams (TexCivApp), 69 SW2d 519.

Utah. People v. Hite, 8 Utah 461, 33 P 254.

[76] State v. Thomas, 105 Conn 757, 136 A 475.

of the testimony brought to you from the witness stand."[77] It has likewise been held error for the court to say to the jury not to be misled or let their attention be distracted from the evidence by arguments about it.[78] Where the court told the jury that they should differentiate between testimony and argument, and said further that "This is no place to have a dissertation on punishment," and further that, as to argument of the counsel for the accused, "You turn as deaf an ear to any harangue of that kind as you do to anything said about evidence that has not been offered," the instruction was indefensible as to each of the features indicated.[79] It is within the scope of proper argument of counsel to impugn the motives and assail the credibility of opposing witnesses, where the remarks are based upon evidence or reasonable inferences therefrom.[80]

In many cases, misconduct of counsel can be overcome by the court's instruction to disregard counsel's remarks. But if improper argument of counsel is of such prejudicial character that the prejudice cannot be cured by instructions to the jury, then a new trial should be granted.[81]

§ 75. Manner of arriving at verdict.

The court cannot coerce a verdict, but this does not prevent an admonition that the members of the jury should listen to each other and make an effort to agree on a verdict.

Clearly, an instruction which merely tells the jury that they should consult with each other and make an effort to reach agreement is not erroneous.[82] It is commendable practice for

[77] Messer v. State, 120 Fla 95, 162 S 146.

[78] In Commonwealth v. Wood, 118 PaSuperCt 269, 179 A 756, the court said: "'. . . the evidence is what you are to be guided by, not by anything counsel say about it.' . . ."

[79] Commonwealth v. Brown, 309 Pa 515, 164 A 726.

[80] Stevens v. Kasten, 342 IllApp 421, 96 NE2d 817.

[81] Book v. Erskine & Sons, Inc., 154 OhSt 391, 43 OhO 334, 96 NE2d 289, 32 ALR2d 1.

[82] **Federal.** Boston & Maine R. v. Stewart, 165 CCA 424, 254 F 14; Willis v. United States, 278 F 611.

Arkansas. Reed v. Rogers, 134 Ark 528, 204 SW 973.

Idaho. State v. Boyles, 34 Idaho 283, 200 P 125.

Ohio. Bandy v. State, 13 OhApp 461, 32 OhCtApp 360; Geer v. State, 16 OhCirCt (N. S.) 151, 31 OhCir Dec 455; Findlay Bros. Co. v. Eiser, 17 OhCirCt (N. S.) 406, 32 OhCir Dec 206 (counterclaim); Akron Street R. Co. v. Dussel, 52 OhSt 649, 44 NE 1148, 33 OhBull 98; Boughner v. State, 7 OLA 508.

A charge to the jury which directs them to use their sense of fairness, fair play, and good conscience, and not to be influenced by anything but a desire to do what is right and fair between the parties is misleading when no reference is made to the law and facts in the case. Fugman v. Trostler, 24 Oh CirCt (N. S.) 521, 34 OhCirDec 746.

South Carolina. Nelson v. Atlantic, Gulf & Pacific Co., 107 SC 1, 92 SE 194.

the court to caution the jury against quotient verdicts,[83] compromise verdicts,[84] and verdicts by lot.[85]

But the court should not require the juror to yield an honest conviction after consultation and deliberation.[86] Yet an instruction suggests disagreement which tells the jury that no juror should consent to a verdict which did not meet with the approval of his own judgment.[87]

It is prejudicial error for the court to instruct that "if a majority are for the defendant, the minority ought to doubt the correctness of their judgment."[88] But the same court held that the following instruction was proper: "If a majority are for the defendant, the minority ought to seriously ask themselves whether they may not be reasonable and ought to doubt the correctness of their judgment."[89]

Palpably erroneous is an instruction that the reasonable doubt of one juror would call for the acquittal of the accused. This would result only in a hung jury preventing conviction.[90] It was clearly erroneous in a criminal case for the court to tell the jury that if they couldn't agree upon a verdict to return a verdict of guilty with a certificate that they could not agree.[91] It is proper upon request in a criminal case, for the court to charge the jury as to the unanimity of their verdict, if the language

Utah. State v. Shaw, 59 Utah 536, 205 P 339.

Washington. J. L. Mott Iron Works v. Metropolitan Bank, 90 Wash 655, 156 P 864.

Wyoming. Harris v. State, 23 Wyo 487, 153 P 881.

[83] Benjamin v. Helena Light & Ry. Co., 79 Mont 144, 255 P 20, 52 ALR 33; Forrest v. Turlay, 125 Or 251, 266 P 229.

[84] Ginsberg v. Myers, 215 Mich 148, 183 NW 749; Cartee v. State, 162 Miss 263, 139 S 618.

[85] Porter v. Davis, 118 SC 153, 110 SE 121; Smith v. State, 89 TexCr 219, 230 SW 160; Newbill v. State, 108 TexCr 473, 1 SW2d 626; Texas & Pacific Ry. Co. v. Dickey (TexCivApp), 70 SW2d 614.

[86] California. People v. Wilt, 173 Cal 477, 160 P 561.

Indiana. Hinshaw v. State, 188 Ind 447, 124 NE 458.

West Virginia. State v. McKinney, 88 WVa 400, 106 SE 894.

[87] Alabama. Hopkins v. State, 26 AlaApp 213, 155 S 891.

Illinois. Gehrig v. Chicago & A. R. Co., 201 IllApp 287.

Pennsylvania. Commonwealth v. Pulemena, 113 PaSuperCt 430, 173 A 462.

[88] J. F. McGehee & Co. v. Fuller, 169 Ark 920, 277 SW 39.

[89] Midland Valley R. Co. v. Barkley, 172 Ark 898, 291 SW 431.

[90] Alabama. Smith v. State, 197 Ala 193, 72 S 316; Whittle v. State, 205 Ala 639, 89 S 43; Johnson v. State, 215 Ala 643, 112 S 234; Strother v. State, 15 AlaApp 106, 72 S 566; Miller v. State, 16 AlaApp 3, 74 S 840; Baader v. State, 16 AlaApp 144, 75 S 820; Butler v. State, 16 AlaApp 234, 77 S 72; Wood v. State, 17 AlaApp 654, 88 S 28; Brown v. State, 18 AlaApp 284, 92 S 16. See also Morrison v. Clark, 196 Ala 670, 72 S 305.

Florida. Roberts v. State, 90 Fla 779, 107 S 242.

Virginia. Peoples v. Commonwealth, 147 Va 692, 137 SE 603.

[91] Lemon v. State, 166 Miss 548, 146 S 637.

is not such as to constitute in reality an invitation to the jurors to disagree.[92]

§ 76. Form of verdict.

Although it is proper for the court to distribute blank verdict forms to the jury, it is generally held that in the absence of a request, it is not prejudicially erroneous to fail to distribute the form.

It is proper for the court to submit blank forms of verdict for the jury to fill out in accordance with their findings.[93] But it is generally held not ground for reversal to fail to submit the form in the absence of request to do so.[94]

Most of the cases deciding rules of instructions on the form of verdicts are criminal cases. In criminal cases, the forms of verdict should cover every kind of verdict that the jury could return under the evidence.[95] For example, in a prosecution for rape, there should be a form submitted for assault with intent

[92] State v. Joseph, 100 WVa 213, 130 SE 451.

[93] **Alabama.** Howell v. Smith, 206 Ala 646, 91 S 496.

Arkansas. Wofford v. De Queen Real Estate Co., 141 Ark 310, 216 SW 710; Ellis v. State, 144 Ark 504, 222 SW 1058.

Georgia. Turner v. State, 20 Ga App 165, 92 SE 975; Loyd v. State, 26 GaApp 259, 106 SE 601.

Illinois. Douvia v. Ottawa, 200 IllApp 131.

Iowa. State v. Butler, 186 Ia 1247, 173 NW 239 (four forms).

Kentucky. Lewis v. Commonwealth, 237 Ky 786, 36 SW2d 639.

Ohio. Mimms v. State, 16 OhSt 221; Rheinheimer v. Aetna Life Ins. Co., 77 OhSt 360, 83 NE 491, 15 LRA (N. S.) 245; Ross v. State, 22 OhApp 304, 153 NE 865; Bethel v. Taxicabs of Cincinnati, 30 ONP (N. S.) 425; Balser v. Roland, 5 OLA 324.

Vermont. State v. Montifoire, 95 Vt 508, 116 A 77.

[94] **Illinois.** Triggs v. McIntyre, 115 IllApp 257.

Missouri. McCrary v. Missouri, K. & T. R. Co., 99 MoApp 518, 74 SW 2.

New Mexico. Territory v. McFarlane, 7 NM 421, 37 P 1111.

[95] **California.** People v. Pratt, 67 CalApp 606, 228 P 47.

It is not error to fail to submit form for petit larceny where grand larceny is charged. People v. Rivera, 57 CalApp 447, 206 P 897.

Georgia. It is not error to fail to give form for acquittal required where defendant charged with seduction admitted guilt of fornication. Swords v. State, 27 GaApp 597, 109 SE 512.

Illinois. People v. Doras, 290 Ill 188, 125 NE 2.

Indiana. Cronin v. State, 189 Ind 568, 128 NE 606.

A verdict, however informal, is good if the court understands it. It is to have a reasonable intendment, and is to receive a reasonable construction, and is not to be invalidated except from necessity. Callender v. State, 193 Ind 91, 138 NE 817.

Iowa. State v. Miller, 175 Ia 210, 157 NW 131.

Ohio. Failure to submit form for acquittal was not error where there was evidence of defendant's confession and his own testimony showing unlawful homicide. Ross v. State, 22 OhApp 304, 153 NE 865.

Texas. Oats v. State, 51 TexCr

to commit rape where there is evidence of the lesser offense.[96] Where homicide is charged in the indictment and there is evidence under which the crime may be reduced to manslaughter, a form for that crime should be submitted.[97]

If the indictment contains more than one count, each charging separate offenses, the jury should be instructed to state in their verdict upon which count they render it.[98] But if the court has given one instruction as to second degree murder, and afterward instructs on first degree murder and manslaughter, it is unnecessary for the court to repeat the instruction relative to second degree murder.[99] A verdict of guilty of murder in the first degree should not be set aside for failure of the trial court to submit to the jury, with other forms of verdict, a form of not guilty, where, in argument to the jury, counsel for the accused, for the purpose of the record, had entered a plea of guilty, and stated to the jury that the only question submitted was that of recommending mercy, and where the uncontradicted evidence established guilt.[1] Where the court submitted forms embracing all the hypotheses of the case, the objection was untenable that the court said to the jury that the verdict "will" be in one of the designated forms, rather than that it "may" be.[2]

Where the jury has nothing to do with the fixing of the punishment, they should not be reminded of the penalty or punishment on conviction.[3] In jurisdictions where the jury fix the punishment, the verdict so submitted should provide therefor[4]

449, 103 SW 859; Cupp v. State, 127 TexCr 10, 74 SW2d 701.

West Virginia. State v. Parsons, 90 WVa 307, 110 SE 698.

[96] Cronin v. State, 189 Ind 568, 128 NE 606. See also Wade v. State, 27 GaApp 650, 109 SE 511.

[97] People v. Doras, 290 Ill 188, 125 NE 2. See Riley v. State, 127 TexCr 267, 75 SW2d 880.

[98] **Indiana.** Wrench v. State, 198 Ind 61, 152 NE 274.

New Jersey. State v. Dunlap, 103 NJL 209, 136 A 510.

Texas. Kennedy v. State, 102 Tex Cr 374, 277 SW 1084.

[99] Commonwealth v. Vasbinder, 292 Pa 206, 141 A 476.

[1] State v. Wells, 134 OhSt 404, 13 OhO 12, 17 NE2d 658.

[2] Blalock v. State, 148 Miss 1, 113 S 627.

[3] **Alabama.** Hogg v. State, 18 AlaApp 179, 89 S 859.

Idaho. State v. Altwatter, 29 Idaho 107, 157 P 256.

Iowa. State v. O'Meara, 190 Ia 613, 177 NW 563.

Kansas. State v. Bell, 107 Kan 707, 193 P 373.

Mississippi. Abney v. State, 123 Miss 546, 86 S 341.

Ohio. Capassa v. State, 1 OLA 505.

Except in prosecutions for first degree murder or burglary of an inhabited dwelling, the court should charge the jury that in the determination of guilt they must not consider the punishment provided by statute, and counsel need not call the court's attention to the omission to so charge. Moon v. State, 34 OLR 352.

[4] **Illinois.** People v. Robertson, 210 IllApp 234.

Kentucky. See also Goins v. Com-

and give a form for assessing maximum and minimum punishment.[5]

Other jurisdictions allow the jury to recommend punishment or suggest the exercise of mercy to the court in fixing the punishment. The jury should be acquainted with rights in these particulars.[6] In New Jersey the court may inform the jury, with or without request, as to the power of supervision of court of pardons over defendant if they find him guilty of murder with recommendation of imprisonment for life.[7]

Where acquittal is on the ground of insanity, the jury should be instructed to state that fact in their verdict.[8]

Under the parole act of Illinois the jury should, on a verdict of guilty, find the age of the accused.[9]

In civil law cases, it would seem proper to instruct the jury to indicate by their verdict whether the damages awarded by them are only actual damages, or both actual and exemplary damages.[10] The defendant should raise the question of the inconsistency of a verdict at the time the verdict is returned so as to give the trial judge an opportunity to correct any error in respect thereto, and the denial of a motion for new trial on account of such inconsistency, is not abuse of discretion.[11]

monwealth, 167 Ky 603, 181 SW 184.

New Jersey. State v. Carrigan, 93 NJL 268, 108 A 315.

Oklahoma. Rambo v. State, 13 OklCr 119, 162 P 449.

[5] Thompson v. State, 151 Ga 328, 106 SE 278; Yaughan v. State, 26 GaApp 639, 107 SE 389.

[6] **Georgia.** Moore v. State, 150 Ga 679, 104 SE 907; Winder v. State, 18 GaApp 67, 88 SE 1003; Yaughan v. State, 26 GaApp 639, 107 SE 389; Varner v. State, 27 GaApp 291, 108 SE 80.

New Jersey. State v. Martin, 92 NJL 436, 106 A 385, 17 ALR 1090; State v. Carrigan, 94 NJL 566, 111 A 927.

Ohio. Howell v. State, 102 OhSt 411, 131 NE 706, 17 ALR 1108; Rehfeld v. State, 102 OhSt 431, 131 NE 712.

Oregon. State v. Howard, 102 Or 431, 203 P 311.

[7] State v. Rombolo, 89 NJL 565, 99 A 434.

[8] Thomson v. State, 78 Fla 400, 83 S 291.

[9] People v. Flynn, 302 Ill 549, 135 NE 101.

[10] Richardson v. Atlantic Coast Line R. Co., 111 SC 359, 98 SE 132.

[11] Feaver v. Railway Express Agency, 324 Mass 165, 85 NE2d 322.

CHAPTER 4

FORM AND ARRANGEMENT

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110. Appeals to sympathy or prejudice.
111. Special verdicts, interrogatories, and findings—Preparation, form, and submission.
112. Special verdicts—Instructions concerning.

§ 90. Form and arrangement in general.

Great importance is not attached to the form of instructions provided they are germane to the issues and are correct statements of the law.

The criterion by which an instruction is to be tested is that the instruction convey to the jury, in language understandable by ordinary men, the applicable law to the end that the jury arrive at a just verdict.[1] Hence, great importance is not attached to the mere form of the instructions, so long as the instructions are pertinent to the issues and are correct statements of the law.[2]

[1] Reivitz v. Chicago Rapid Transit Co., 327 Ill 207, 158 NE 380; State v. Allister, 317 Mo 348, 295 SW 754; Osborne v. Montgomery, 203 Wis 223, 234 NW 372.

[2] **Federal.** Smith v. Bank of Glade Spring, 12 F2d 535.

California. Ritchey v. Watson, 204 Cal 387, 268 P 345.

Florida. Hutchins & Co. v. Sherman, 82 Fla 167, 89 S 430.

Georgia. The fact that nicety of verbal criticism might suggest the use of a particular word more appropriate under the circumstances than the special word or phrase employed by the judge in his charge is not ground for new trial where

There is no fixed rule as to the order of the instructions. This matter is largely discretionary with the court.[3]

Similarly, there seems to be no fixed rule as to the separation of the charge into individual instructions. If there is a rule, it would seem to be again whether the questioned instruction is misleading to ordinary men.

In an oral charge, the jury would not know when one instruction ended and another began, unless the judge told them so or numbered the instructions. A single instruction is a statement of the issue of fact and the applicable law to that issue. There may be only one proposition of law applicable or there may be more than one.[4] Yet where a charge is complete, accurate and pertinent in itself, it is not erroneous because it fails to include an instruction which would be appropriate.[5]

comparing the complaint with the context, it is apparent that the sense in which the inappropriate word was used is unmistakable, and the instruction, as it must have been understood by the jury, is pertinent and correct. Orr v. Planters' Phosphate & Fertilizer Co., 8 GaApp 59, 68 SE 779.

Illinois. People v. Cash, 326 Ill 104, 157 NE 76.

Kentucky. Whitaker v. Commonwealth, 188 Ky 95, 221 SW 215, 10 ALR 145.

Minnesota. Flick v. Ellis-Hall Co., 138 Minn 364, 165 NW 135.

An instruction is not necessarily required to be given merely because it is taken from a decision of an appellate court. Carter v. Duluth Yellow Cab Co., 170 Minn 250, 212 NW 413.

North Carolina. Deaver v. Deaver, 137 NC 240, 49 SE 113.

Ohio. Behm v. Cincinnati, D. & T. Trac. Co., 86 OhSt 209, 99 NE 383.

Texas. Facts, if any, constituting contributory negligence should be grouped. Texas & N. O. R. Co. v. Harrington (TexCivApp), 209 SW 685.

West Virginia. McClintic v. Ocheltree, 4 WVa 249.

[3] **Indiana.** Pittsburgh, C., C. & St. L. R. Co. v. Cioffi, 81 IndApp 424, 143 NE 523.

Ohio. Beck v. Beagle, 28 OhApp 508, 162 NE 810.

Washington. Hutchins v. School Dist. No. 81, 114 Wash 548, 195 P 1020.

[4] **Arkansas.** Missouri Pacific R. Co. v. Kennedy, 153 Ark 77, 239 SW 376, 35 ALR 753.

Indiana. Gemmill v. Brown, 25 IndApp 6, 56 NE 691.

Kentucky. If an instruction groups several propositions together, but guides the jury so as to show under what circumstances a plaintiff may recover, it is not open to exception. Louisville & N. R. Co. v. Veach, 20 KyL 403, 46 SW 493.

[5] **California.** Smith v. Pacific Greyhound Corp., 139 CalApp 696, 35 P2d 169.

Georgia. Jones v. Lanham, 147 Ga 241, 93 SE 399 (brevity not defect where contentions are definitely and completely stated); Johnson v. State, 150 Ga 67, 102 SE 439; Lumpkin v. State, 152 Ga 229, 109 SE 664; Grant v. State, 152 Ga 252, 109 SE 502; Smith v. Duhart, 152 Ga 554, 110 SE 301; Peeples v. Rudulph, 153 Ga 17, 111 SE 548; Elliott v. Gary, 153 Ga 665, 112 SE 900; Conklin v. State, 21 GaApp 399, 94 SE 600; Crone v. State, 22 GaApp 636, 97 SE 83; Easterling v. State, 23 GaApp 92, 97 SE 553; Ray v. State, 23 GaApp 124, 97 SE 555; Gunn v. State, 23 GaApp 545, 99 SE 62;

Although the judge is not required to cover all the issues of fact in a single instruction,[6] this would be required in the hypothetical type of instruction. Even in other types of instructions, some courts have declared that it is ordinarily unnecessary for instructions bearing on different issues to be

Gardner v. State, 25 GaApp 11, 102 SE 376; Troup v. State, 26 GaApp 623, 107 SE 75; Neal v. State, 26 GaApp 647, 106 SE 913; Hawks v. Moore, 27 GaApp 555, 109 SE 807; Smith v. State, 27 GaApp 654, 110 SE 423; Savannah & A. Ry. v. Rowell, 28 GaApp 191, 110 SE 513; Ray v. Warren, 28 GaApp 663, 112 SE 831.

Kentucky. Held v. Commonwealth, 183 Ky 209, 208 SW 772.

Massachusetts. Commonwealth v. Mara, 257 Mass 198, 153 NE 793.

West Virginia. State v. White, 81 WVa 516, 94 SE 972.

[6] **Arkansas.** George v. State, 148 Ark 638, 231 SW 9; Winn v. Jackson, 158 Ark 644, 245 SW 812.

California. Hall v. Steele, 193 Cal 602, 226 P 854.

Where the court, in a damage case, undertakes to embody the whole law of the case in a single continuous instruction wherein the doctrine of last clear chance and the question of concurrent and contemporaneous negligence of the injured person are commingled, the result is confusing and misleading, and the instruction is erroneous. Carrillo v. Helms Bakeries, 6 CalApp 2d 299, 44 P2d 604.

Colorado. The entire law on any one proposition so far as practicable should be embodied in one instruction. Rocky Mountain Motor Co. v. Walker, 71 Colo 53, 203 P 1095.

Georgia. Vickers v. Robinson, 157 Ga 731, 122 SE 405.

The court should charge separately on voluntary manslaughter and justifiable homicide. Deal v. State, 145 Ga 33, 88 SE 573.

Idaho. Kelly v. Troy Laundry Co., 46 Idaho 214, 267 P 222.

Illinois. People v. Haensel, 293 Ill 33, 127 NE 181; Gustafson v. Peterson, 203 IllApp 242.

Indiana. Marmon Motor Car Co. v. Schafer, 93 IndApp 588, 178 NE 863; Terre Haute, I. & E. Trac. Co. v. Wallace, 95 IndApp 395, 180 NE 485; H. E. McGonigal, Inc. v. Etherington, 118 IndApp 622, 79 NE2d 777.

Iowa. State v. Reynolds, 201 Ia 10, 206 NW 635; State v. Reed, 205 Ia 858, 216 NW 759.

Kentucky. Graham's Admr. v. Illinois Cent. R. Co., 185 Ky 370, 215 SW 60; Fullenwider v. Brawner, 224 Ky 274, 6 SW2d 264.

It is better practice to include in one instruction the facts constituting negligence and in another facts constituting contributory negligence. Louisville Ry. Co. v. Osborne, 171 Ky 348, 188 SW 419.

Missouri. Foster v. Kansas City Rys. Co. (Mo), 235 SW 1070; Fenton v. Hart (MoApp), 73 SW2d 1034.

Montana. Allen v. Bear Creek Coal Co., 43 Mont 269, 115 P 673.

Nebraska. In re Lyell's Estate, 116 Neb 827, 219 NW 189.

Ohio. Curlis v. Brown, 9 OhApp 19, 31 OhCtApp 364; Cincinnati Interurban Co. v. Haines, 8 OhCirCt (N. S.) 77, 18 OhCirDec 443; Scott v. Emswiler, 26 OhCirCt (N. S.) 502, 28 OhCirDec 40.

Oklahoma. Chitwood v. Palmer, 101 Okl 300, 225 P 969; Tulsa v. Lloyd, 129 Okl 27, 263 P 152; Sharum v. Sharum, 121 Okl 53, 247 P 97.

Texas. Ritz v. First Nat. Bank (TexCivApp), 234 SW 425; Pearson v. Texas & N. O. Ry. Co. (TexCiv App), 238 SW 1108.

It is not error to submit the different items of damage for personal injury conjunctively in the main charge. Melton v. Manning (Tex CivApp), 216 SW 488.

classified and arranged or set out in separate and distinct paragraphs.[7]

§ 91. Written and oral instructions.

Constitutions, statutes, or court rules determine whether instructions must be in writing. As to the writing requirement, some jurisdictions draw a distinction between requested instructions and general charges, while others distinguish between criminal and civil cases.

At one extreme, a state constitution or statute may require that all instructions be in writing, and that there can be no waiver. At the other extreme, the rule may be that instructions are to be given orally, at the court's discretion, even though both parties have requested a writing.[8] But most provisions seem to require instructions to be in writing,[9] unless waived.[10] The

Washington. O'Connell v. Home Oil Co., 180 Wash 461, 40 P2d 991.

[7] **Iowa.** Meyer v. Boepple Button Co., 112 Ia 51, 83 NW 809. But where several items of negligence are charged against the defendant, they should be set forth in separate instructions, and it is error to group them. Leete v. Hayes, 211 Ia 379, 233 NW 481.

New York. People v. Radcliffe, 232 NY 249, 133 NE 577.

South Carolina. State v. Blanden, 177 SC 1, 180 SE 681.

Contra: **Ohio.** Jones v. Peoples Bank Co., 95 OhSt 253, 116 NE 34.

[8] In Maryland, there is no rule positively requiring instructions to be written, although the courts declare it to be the better practice to reduce them to writing. Winslow v. Atz, 168 Md 230, 177 A 272.

In North Dakota, it is not error where oral instructions are read to the jury, for the trial court, sua sponte, to submit to the jury the identical instructions in writing. State v. Simpson, 78 ND 571, 50 NW2d 661.

[9] **Federal.** It is in the discretion of the federal court to give partly written and partly oral instructions. Warren Bros. Co. v. Wright, 152 CCA 121, 239 F 71.

Alabama. Richardson v. State, 16 AlaApp 81, 75 S 629.

California. People v. Payne, 8 Cal 341.

Florida. McKinney v. State, 74 Fla 25, 76 S 333 (on capital charge must be wholly in writing).

Georgia. It is not sufficient to direct official stenographer to transcribe oral charge. Brindle v. State, 17 GaApp 741, 88 SE 460.

Illinois. People v. Grandstaff, 324 Ill 70, 154 NE 448; People v. Kelly, 347 Ill 221, 179 NE 898, 80 ALR 890; Jarnecke v. Chicago Consol. Trac. Co., 150 IllApp 248; Hughes v. Eldorado Coal & Min. Co., 197 Ill App 259.

The right is statutory and not constitutional in Illinois. People v. Rettich, 332 Ill 49, 163 NE 367. See Welch v. Chicago, 236 IllApp 520, affd. in 323 Ill 498, 154 NE 226.

Indiana. Lindley v. State, 198 Ind 360, 153 NE 772.

Under a statute requiring a court to give general written instructions it is improper to read to the jury the statute on which the action is based. It should be incorporated in the instructions. Chicago & E. R. Co. v. Murphy, 54 IndApp 531, 101 NE 829.

Iowa. Alley, Greene & Pipe Co. v. Thornton Greenery Co., 201 Ia 621, 207 NW 767.

same would be true where the requirement is set forth in court rules.[11] Waiver may be express or by silence, that is, acquiescence in the court's oral charge.

Some jurisdictions have statutes requiring instructions to be in writing if so requested by either party or both.[12]

Louisiana. State v. Rini, 151 La 163, 91 S 664.

Missouri. Belk v. Stewart, 160 MoApp 706, 142 SW 485; Fenton v. Hart (MoApp), 73 SW2d 1034.

Oklahoma. The right is statutory in criminal cases. Howard v. State, 39 OklCr 336, 265 P 149.

Tennessee. Munson v. State, 141 Tenn 522, 213 SW 916.

Texas. Bloxom v. State, 86 TexCr 562, 218 SW 1068; Howard v. State, 90 TexCr 270, 234 SW 895; Connally v. State, 90 TexCr 284, 234 SW 886; Riley v. State, 92 TexCr 237, 243 SW 467; Roberts v. State, 98 TexCr 202, 265 SW 385.

[10] **California.** People v. King, 77 CalApp 434, 246 P 822.

Illinois. Cutter v. People, 184 Ill 395, 56 NE 412.

Kentucky. Chesapeake & O. Ry. Co. v. Commonwealth, 184 Ky 1, 210 SW 793; Whitaker v. Commonwealth, 188 Ky 95, 221 SW 215, 10 ALR 145; Miller v. Noell, 193 Ky 659, 237 SW 373; Gipson v. Commonwealth, 251 Ky 793, 66 SW2d 16.

In Kentucky, the defendant in a criminal case is entitled to instructions in writing by virtue of the code, but this right may be waived, and it is waived either by agreeing to the giving of oral instructions, or by failing to object thereto. Spence v. Commonwealth, 181 Ky 206, 204 SW 80. See also Lyttle v. Commonwealth, 195 Ky 729, 243 SW 1037; Thompson v. Commonwealth, 197 Ky 188, 246 SW 435.

Nevada. State v. Clarke, 48 Nev 134, 228 P 582 (parties may consent to oral instructions).

North Dakota. The giving of oral instructions is authorized only where the parties voluntarily assent thereto, and the consent should be entered on the minutes at such time, and in such manner as not to operate to the prejudice of the right of either party. Forszen v. Hurd, 20 ND 42, 126 NW 224.

Oklahoma. Elms v. State, 53 Okl Cr 268, 10 P2d 728.

The right to have instructions reduced to writing was held waived by failure to make proper request therefor. Ferrero v. State, 64 Okl 44, 166 P 101.

Texas. Pecht v. State, 80 TexCr 452, 192 SW 243; Anthony v. State, 90 TexCr 351, 235 SW 578 (waiver in Texas in misdemeanor cases); Riley v. State, 92 TexCr 237, 243 SW 467: Dalton v. Dalton (TexCiv App), 143 SW 241.

Washington. In Washington the parties may stipulate that the instructions may be made partly oral and partly written. Wheeler v. Hotel Stevens Co., 71 Wash 142, 127 P 840, AnnCas 1914C, 576.

The statutory requirement that instructions shall be in writing may be waived by the accused in a felony case. State v. Andrews, 71 Wash 181, 127 P 1102.

[11] Heyl v. Waggoner, 58 SD 420, 236 NW 375; State v. Linden, 171 Wash 92, 17 P2d 635.

[12] **Alabama.** Where there is no request the general charge may be given orally and taken down by reporter. Blackmon v. State, 201 Ala 53, 77 S 347.

Arkansas. Arnold v. State, 71 Ark 367, 74 SW 513. See also Reed v. Rogers, 134 Ark 528, 204 SW 973; Trimble v. State, 150 Ark 536, 234 SW 626; Tarkington v. State, 154 Ark 365, 242 SW 830.

Georgia. Under the Georgia code the trial judge on request of counsel must reduce his charge to writing and read it to the jury and as soon as the charge has been delivered give it to the clerk to be filed, and

If a writing is required, what kind of writing will satisfy the requirement? In Wisconsin, the statute permits a writing before delivery or that the instructions be taken down by the court reporter, transcribed and filed.[13] In other jurisdictions, the taking in shorthand of a charge delivered orally is not ordinarily sufficient,[14] though they afterward be reduced to writing from the stenographer's notes.[15]

It is not required that the instruction shall be written in ink; and instructions written with a lead pencil[16] or a typewriter will suffice,[17] or the instructions may be printed or hectographed.[18]

In Ohio, where a party is entitled to a written special charge, earlier decisions declared that the trial judge cannot orally qualify, modify, or explain the written charge.[19] But later decisions limit this prohibition to the general charge only.[20] Also, it is error for the trial judge to read part of general charge written for the case being tried and part of the manuscript of another judge's charge.[21]

a failure to do so is reversible error unless the evidence demanded the verdict. Forrester v. Cocke, 6 GaApp 829, 65 SE 1063.

Request must be made before argument begins. Ashley-Price Lbr. Co. v. Henry, 23 GaApp 93, 98 SE 185.

Indiana. Lett v. Eastern Moline Plow Co., 46 IndApp 56, 91 NE 978.

Ohio. Blackburn v. State, 23 Oh St 146; Maranda v. State, 17 OhApp 479; Umbenhauer v. State, 4 OhCir Ct 378, 2 OhCirDec 606; Pittsburgh & L. E. Ry. Co. v. Bishop, 13 Oh CirCt 380, 7 OhCirDec 73.

Oklahoma. Lilly v. Hanson, 171 Okl 604, 43 P2d 405.

Pennsylvania. Oral charge is not erroneous in absence of request. Sgier v. Philadelphia & R. Ry. Co., 260 Pa 343, 103 A 730.

Texas. In Texas it is necessary to request a written charge in a misdemeanor case. Odom v. State, 82 TexCr 580, 200 SW 833.

[13] Penberthy v. Lee, 51 Wis 261, 8 NW 116.

[14] **Arkansas.** Burnett v. State, 72 Ark 398, 81 SW 382.

Indiana. Lesueur v. State, 176 Ind 448, 95 NE 239.

Montana. State v. Fisher, 23 Mont 540, 59 P 919.

Washington. But see State v. Mayo, 42 Wash 540, 85 P 251, 7 AnnCas 881.

[15] Lindley v. State, 198 Ind 360, 153 NE 772.

[16] Harvey v. Tama Co., 53 Ia 228, 5 NW 130.

[17] Kinyon v. Chicago & N. W. Ry. Co., 118 Ia 349, 92 NW 40, 96 AmSt 382.

[18] State v. Burlison, 315 Mo 232, 285 SW 712.

[19] Pendleton St. R. Co. v. Stallmann, 22 OhSt 1; Powers v. Hazelton & L. R. Co., 33 OhSt 429; Householder v. Granby, 40 OhSt 430; Caldwell v. Brown, 9 OhCirCt 691, 6 OhCirDec 694; Rupp v. Shaffer, 21 OhCirCt 643, 12 OhCirDec 154; Diehl v. Cincinnati Trac. Co., 29 OhCtApp 369, 35 OhCirDec 581; Cincinnati v. Lochner, 8 ONP 436, 10 OhDec 596, 11 OhDec 119.

Oral explanation is not reversible error unless prejudicial. Johnson v. Cincinnati, 20 OhCirCt 657, 11 OhCirDec 318.

[20] Cincinnati St. Ry. Co. v. Adams, 33 OhApp 311, 169 NE 480; Pratt v. Byers, 41 OhApp 112, 179 NE 747.

[21] Ohio & M. R. Co. v. Sauer, 25 OhBull 172.

If the requirement applies to instructions, it sometimes becomes a question of whether the judge's oral statements were really instructions. During the voir dire examination of jurors, the court's remarks are not considered instructions.[22] The requirement does not apply to directions to the jury as to their duties in relation to the answering of special interrogatories.[23] Merely informing the jury that a motion had been sustained to withdraw a certain issue in a will contest action is not an instruction.[24]

It is not a violation of the statute for the court orally to tell the jury at the time certain evidence is admitted that it is for the purpose of impeachment.[25] Nor is there a violation where the court orally calls the jury's attention, after instructions have been given and arguments made, to the different forms of blanks handed them for verdict.[26] It is not a violation of the requirement for the court to remark in passing upon an objection to the argument of counsel that he might ask the jury to disregard whatever was said in argument that was not supported in the evidence.[27]

The requirement of writing applies in strictness to the charge proper and does not obtain as to the admonition of the court as to the conduct of the jury,[28] or to statements of the court that there is a lack of evidence on a particular point,[29] or that evidence was admitted only for a stated purpose,[30] or to disregard items stricken from the pleadings,[31] or evidence withdrawn from the jury,[32] or as to number of jurors required to make a verdict in a state where less than entire body may do so,[33] or as to the form of the verdict,[34] or that the jury have nothing to do with

[22] State v. Greenlee, 33 NM 449, 269 P 331; Chase Bag Co. v. Longoria (TexCivApp), 45 SW2d 242.

[23] Lett v. Eastern Moline Plow Co., 46 IndApp 56, 91 NE 978.

[24] Huntington v. Hamilton, 118 IndApp 88, 69 NE2d 134, 73 NE2d 352.

[25] People v. Winchester, 352 Ill 237, 185 NE 580.

[26] Keeney v. Angell, 92 Colo 213, 19 P2d 215.

[27] Schluraff v. Shore Line Motor Coach Co., 269 IllApp 569.

[28] State v. Lewis, 52 Mont 495, 159 P 415.

[29] State v. Crofton, 271 Mo 507, 197 SW 136.

[30] **Florida.** Barton v. State, 72 Fla 408, 73 S 230 (shorthand notes of evidence read to jury not evidence).

Illinois. Jent v. Old Ben Coal Corp., 222 IllApp 380.

Kentucky. Rose v. Commonwealth, 181 Ky 337, 205 SW 326; Anderson v. Commonwealth, 205 Ky 369, 265 SW 824.

Nebraska. Grammer v. State, 103 Neb 325, 172 NW 41, reh. den. 103 Neb 325, 174 NW 507.

Washington. State v. Thompson, 113 Wash 696, 195 P 553.

[31] Western Coal & Min. Co. v. Norvell, 212 IllApp 218.

[32] State v. Brennan, 185 Ia 73, 169 NW 744.

[33] Cravens v. Merritt, 178 Ky 727, 199 SW 785.

[34] **Illinois.** Aurora Trust & Sav.

the punishment,[35] or as to the remarks of the court in sending the jury back for further deliberations,[36] or as to answers of judge to questions as to the punishment attending certain verdicts.[37]

In jurisdictions where oral charges are permitted, the remedy for a misleading charge is to ask a written explanatory charge.[38]

The oral instruction should not be given in the absence of parties or counsel.[39]

§ 92. Marking and signing instructions.

Instructions must be marked or signed as required by the statute or procedure of the jurisdiction.

A statute requiring instructions given by the court to be signed by the judge and filed as part of the record is mandatory.[40] The inadvertence of the judge to sign instructions cannot be remedied by a nunc pro tunc entry, and the charge therefore is not part of the record on appeal.[41]

In order to avoid confusion, it is the better practice to number the written instructions given.[42] On the other hand, a defendant in a criminal case is not prejudiced by the fact that the court numbered the instructions, if the charge was otherwise a connected and continuous narrative in accordance with the statute.[43]

In jurisdictions requiring the instructions offered by the party to be marked "given" or "refused," the effect of the failure of the court to mark the instruction either way, is the same as if they had been formally marked refused.[44] The marking "given" or "refused" should be so made as not to mislead the jury. There is a case of this character where the court

Bank v. Fidler, 200 IllApp 233; People v. Shapiro, 207 IllApp 130.

Indiana. Faulkenberg v. State, 197 Ind 491, 151 NE 382.

Montana. State v. Schaffer, 59 Mont 463, 197 P 986.

Wisconsin. High v. Johnson, 28 Wis 72; State v. Glass, 50 Wis 218, 6 NW 500, 36 AmRep 845.

[35] State v. Jensen, 114 Wash 401, 195 P 238.

[36] Bush v. People, 68 Colo 75, 187 P 528.

[37] State v. Skinner, 101 WVa 632, 133 SE 371.

[38] Birmingham Ry., Light & Power Co. v. Demmins, 3 AlaApp 359, 57 S 404.

[39] Varn v. Gonzales (TexCivApp), 193 SW 1132.

[40] **Indiana.** Hadley v. Atkinson, 84 Ind 64.

Maryland. Bracey v. McGary, 134 Md 267, 106 A 622.

Texas. Payne v. State, 83 TexCr 287, 202 SW 958. But see McDonald v. Axtell (TexCivApp), 218 SW 563.

[41] Bottorff v. Bottorff, 45 IndApp 692, 91 NE 617.

[42] Hendrix v. State, 21 AlaApp 517, 110 S 167.

[43] People v. Wynekoop, 359 Ill 124, 194 NE 276.

[44] Calef v. Thomas, 81 Ill 478.

marked one form of verdict "give" and failed to mark the other form. This was held prejudicial as amounting to a direction to the jury to adopt the verdict bearing the notation.[45]

In jurisdictions which require requested instructions to be signed by counsel, the requirement is generally held to be mandatory and the court may refuse an instruction not so signed.[46]

The courts do not seem to be in agreement on whether the court should inform the jury which party requested an instruction. An argument against revealing the requester is that the jury may believe that it does not have the sanction of the trial judge as a statement of the law that they are bound to follow.[47] In other jurisdictions, although the practice of informing the jury which party requested an instruction is undesirable and improper, it is not reversible error to do so.[48]

§ 93. Reading instructions to the jury.

Written instructions should be read to the jury by the judge in open court and then delivered to them to be taken to the jury room.

The instructions should be read to the jury in open court,[49] by the judge.[50] The reading may, however, be waived by the parties[51] or they may be read by counsel upon agreement of the parties.[52] But the practice of reading instructions by counsel "is one which should not be resorted to except by consent of counsel or by reason of some exigency" which must be shown.[53]

[45] People v. Marks, 251 Ill 475, 96 NE 231.

An instruction as to the forms of verdict all on one sheet was held not erroneous because the court wrote the word "given" in the margin opposite the paragraph containing the form to be used in case the accused was found guilty. People v. Donaldson, 255 Ill 19, 99 NE 62, AnnCas 1913D, 90.

[46] **Colorado.** Mason v. Sieglitz, 22 Colo 320, 44 P 588.

Indiana. Board of County Comrs. v. Legg, 110 Ind 479, 11 NE 612.

Texas. St. Louis Southwestern R. Co. v. Cleland, 50 TexCivApp 499, 110 SW 122.

[47] Johnson v. Roberson, 88 GaApp 548, 77 SE2d 232.

[48] Hudson v. City of Cleveland, — OhApp —, 142 NE2d 535.

[49] Reading the charges is calculated to impress the jury that instructions prepared by counsel and given are entitled to equal consideration with the general charge of the court and to enable them more thoroughly to comprehend the principles of law applicable to the different aspects of the case, by having their attention thus specially directed to the instructions. Alabama Great Southern R. Co. v. Arnold, 80 Ala 600, 2 S 337.

Reading charge before argument is not mandatory. Robison v. State, 77 TexCr 556, 179 SW 1157.

[50] O'Dell v. Goff, 153 Mich 643, 117 NW 59; Veneman v. McCurtain, 33 Neb 643, 50 NW 955.

[51] Talty v. Lusk, 4 Ia 469.

[52] Leaptrot v. Robertson, 44 Ga 46; O'Dell v. Goff, 153 Mich 643, 117 NW 59.

[53] O'Dell v. Goff, 153 Mich 643, 117 NW 59.

In Louisiana the court is not required to serve a copy of the instructions requested by the state upon the defendant's attorney prior to the argument.[54]

Where the court is requested to give written instructions and to send the written instructions to the jury, the written instructions given must be sent to the jury;[55] but where the law does not require the court, without request, to give the charge in writing, and the court, without request therefor, gives his charge in writing, the court may refuse to send his written charge to the jury.[56]

§ 94. Clearness of expression.

The language of an instruction should be (1) clear, (2) and should embody a definite and concise statement of the cause of action and the issues involved, but (3) a charge is legally sufficient if, as delivered, it is correct in substance and presents the issues fairly to the jury.

(1) The instructions should be plain, simple, concise, direct, unambiguous and consistent,[57] and more especially so where

[54] State v. Capaci, 179 La 462, 154 S 419.

[55] Alabama Great Southern R. Co. v. Arnold, 80 Ala 600, 2 S 337; Cone v. Bright, 68 OhSt 543, 68 NE 3; Harris v. Mansfield Ry., Light & Power Co., 4 OhApp 108, 21 OhCir Ct (N. S.) 209, 26 OhCirDec 17; Caldwell v. Brown, 9 OhCirCt 691, 6 OhCirDec 694; Foy v. Toledo Consol. St. Ry. Co., 10 OhCirCt 151, 6 OhCirDec 396.

Ohio statute requiring the written charge to be sent to the jury does not control the trial of cases in federal courts in Ohio. Western Union Tel. Co. v. Burgess, 181 US 620, 45 LEd 1031, 21 SupCt 924, 12 OFD 668.

[56] Kauffman Brew. Co. v. Betz, 8 OhCirCt (N. S.) 64, 18 OhCirDec 484; Pittsburgh & L. E. Ry. Co. v. Bishop, 13 OhCirCt 380, 7 OhCirDec 73; Sherman v. Tucker, 16 OhCir Dec (N. S.) 190, 31 OhCirDec 492.

[57] **Alabama.** Bailey v. State, 168 Ala 4, 53 S 296, 390 (incomplete sentence); Marbury Lbr. Co. v. Heinege, 204 Ala 241, 85 S 453 (elliptical); Nashville Broom & Supply Co. v. Alabama Broom & Mattress Co., 211 Ala 192, 100 S 132; Fuller v. State, 16 AlaApp 163, 75 S 879 (elliptical instruction); Warsham v. State, 17 AlaApp 181, 84 S 885 (elliptical in omitting negative); Fuller v. Stevens (Ala), 39 S 623.

Instructions were properly refused which failed to contain any proposition of law. Knight v. State, 160 Ala 58, 49 S 764.

Arkansas. Jonesboro, L. C. & E. R. Co. v. Kirksey, 134 Ark 605, 135 Ark 617, 204 SW 208; Winn v. Jackson, 158 Ark 644, 245 SW 812.

California. Fitts v. Southern Pacific Co., 149 Cal 310, 86 P 710, 117 AmSt 130; People v. Bickerstaff, 46 CalApp 764, 190 P 656; Hall v. Steele, 193 Cal 602, 226 P 854.

Instructions should state rules of law in general terms. Tower v. Humboldt Transit Co., 176 Cal 602, 169 P 227.

Colorado. Rocky Mountain Motor Co. v. Walker, 71 Colo 53, 203 P 1095.

Georgia. Evitt v. Evitt, 160 Ga 497, 128 SE 661; Whitehead v. Malcolm, 161 Ga 55, 129 SE 769.

Idaho. The court should state propositions of law concisely and in-

the case is close upon the evidence.[58] A charge is open to criticism which covers several distinct questions in a fragmentary

telligibly so that the jury may understand their meaning without indulging in finely drawn out theories as to what law is applicable to the facts. State v. Marren, 17 Idaho 766, 107 P 993.

Illinois. People v. Levato, 330 Ill 498, 161 NE 731; Chicago City Ry. Co. v. Sandusky, 99 IllApp 164, affd. in 198 Ill 400, 64 NE 990; Dodge v. Bruce, 208 IllApp 570.

Iowa. Dunning v. Burt, 180 Ia 754, 162 NW 23 (general terms); Jensen v. Magnolia (Inc. Town of), 219 Ia 209, 257 NW 584.

Indiana. Washington Hotel Realty Co. v. Bedford Stone & Constr. Co., 195 Ind 128, 143 NE 156.

Kansas. Piehler v. Kansas City Pub. Service Co., — Kan —, 226 SW2d 681.

Kentucky. Louisville & N. R. Co. v. Moore, 150 Ky 692, 150 SW 849.

Maine. Bedell v. Androscoggin & K. Ry. Co., 133 Maine 268, 177 A 237.

Maryland. Weihenmayer v. Bitner, 88 Md 325, 42 A 245, 45 LRA 446.

Michigan. Aikin v. Weckerly, 19 Mich 482.

Minnesota. Gaffney v. St. Paul City Ry. Co., 81 Minn 459, 84 NW 304.

Missouri. Hegberg v. St. Louis & S. F. R. Co., 164 MoApp 514, 147 SW 192; Smith v. Williams (Mo), 221 SW 360; Sturgis v. Kansas City Rys. Co. (MoApp), 228 SW 861; Gillette v. Laederich (MoApp), 242 SW 112; Lokey v. Rudy-Patrick Seed Co. (MoApp), 285 SW 1028.

Montana. Fowlie v. Cruse, 52 Mont 222, 157 P 958; Lingquist v. Seibold, 62 Mont 162, 199 P 709; State v. Keays, 97 Mont 404, 34 P2d 855.

Ohio. Mansfield Public Utility & Service Co. v. Grogg, 103 Oh 301, 133 NE 481; State v. Norman, 103 Oh 541, 134 NE 474.

Oklahoma. Hanson v. Kent & Purdy Paint Co., 36 Okl 583, 129 P 7; Gransden v. State, 12 OklCr 417, 158 P 157.

Oregon. Rogers v. Wills, 92 Or 16, 179 P 676; Collins v. United Brokers Co., 99 Or 556, 194 P 458.

Pennsylvania. Randolph v. Campbell. 360 Pa 453, 62 A2d 60.

South Carolina. Ramer v. Hughes, 131 SC 488, 127 SE 565.

South Dakota. Wiggins v. Pay's Art Store, 47 SD 443, 199 NW 122.

Texas. Allen v. Texas Trac. Co. (TexCivApp), 149 SW 195; Ft. Worth & D. C. Ry. Co. v. Atterberry (TexCivApp), 190 SW 1133.

The use of "etc." is condemned as rendering an instruction indefinite. Dallas Consol. Elec. Street Ry. Co. v. Chambers, 55 TexCivApp 331, 118 SW 851.

Virginia. Sutherland v. Gent, 121 Va 643, 93 SE 646.

Washington. Patterson v. Wenatchee Canning Co., 53 Wash 155, 101 P 721.

West Virginia. Parkersburg Industrial Co. v. Schultz, 43 WVa 470, 27 SE 255; Blevins v. Bailey, 102 WVa 415, 135 SE 395; Slaven v. Baltimore & O. R. Co., 114 WVa 315, 171 SE 818.

Wisconsin. Duthie v. Washburn, 87 Wis 231, 58 NW 380.

[58] **California.** People v. Cascino, 137 CalApp 73, 29 P2d 895.

Georgia. Methvin Min. & Inv. Co. v. Matthews, 147 Ga 321, 93 SE 894.

Illinois. Lavander v. Chicago City Ry. Co., 296 Ill 284, 129 NE 757; Winn v. Walker, 145 IllApp 333; Wilcke v. Henrotin, 146 IllApp 481, affd. in 241 Ill 169, 89 NE 329; Ruddell v. Baltimore & O. R. Co., 152 IllApp 218; Show v. Alton, Granite & St. L. Trac. Co., 152 Ill App 552; Gibbons v. Southern Illinois Ry. & Power Co., 199 IllApp 154; Bieber v. Aetna Ins. Co., 201 IllApp 3; Zamiar v. Peoples Gas

manner.[59] The practice of giving "eclectic" instructions by means of selections from requests of both parties, together with general instructions from the court, is condemned as having a tendency to obscure rather than to clarify the issues.[60] The nice selection of words is not material in instructions, the criterion being whether they correctly state the law in a manner to make their meaning clear.[61]

The model instruction is a simple, impartial, clear, concise statement of the law applicable to the evidence in the case then on trial.[62] Thus where the court says, "I charge you that, after hearing the evidence, it is for you to say whether the charges are reasonable or not," the language is not plain, as it may be understood by the jury to refer to the court's charges, whereas another meaning was in fact intended, and the instruction, therefore, is subject to criticism.[63] So where an instruction makes use of the expression "in a case like this," the jury may infer that it means the case at bar, when it was in fact intended to refer to a class of cases to which the plaintiff's action belonged.[64]

An instruction may contain a reference to some other paper before the jury.[65] So also where an instruction makes reference

Light & Coke Co., 204 IllApp 290; Carlin v. Chicago Rys. Co., 205 IllApp 303; Reinick v. Smetana, 205 IllApp 321; Edwall v. Chicago, R. I. & P. R. Co., 208 IllApp 489; Neville v. Chicago & A. R. Co., 210 IllApp 168.

Kentucky. Louisville & N. R. Co. v. Stephens, 188 Ky 17, 220 SW 746.

Oklahoma. Farris v. Hodges, 59 Okl 87, 158 P 909.

[59] Schaidler v. Chicago & NW Ry. Co., 102 Wis 564, 78 NW 732.

The instructions should apply to distinctive facts in the case. Virginia R. & Power Co. v. Burr, 145 Va 338, 133 SE 776.

[60] Marquette, H. & O. R. Co. v. Marcott, 41 Mich 433, 2 NW 795.

[61] Callegari v. Maurer, 4 Cal App2d 178, 40 P2d 883; Oliver v. Nelson, 128 Neb 160, 258 NW 69.

[62] **Colorado.** Huffman v. People, 96 Colo 80, 39 P2d 788.

Massachusetts. Holbrook v. Seagrave, 228 Mass 26, 116 NE 889 (criticism of instruction for inclusion of three or more independent subjects).

Rhode Island. Bourre v. Texas Co., 51 RI 254, 154 A 82.

Virginia. Gottlieb v. Commonwealth, 126 Va 807, 101 SE 872.

Washington. Instructions should be so prepared and presented as to state the law of the case to the jury as succinctly and directly as possible. This is best done by a few simple and direct statements covering and applying to the issues, rather than by lengthy dissertations or numerous instructions. Mathias v. Eichelberger, 182 Wash 185, 45 P2d 619.

West Virginia. See Norfolk & W. Ry. Co. v. Henderson, 132 Va 297, 111 SE 277.

[63] Fuller v. Stevens (Ala), 39 S 623. See State v. Shamblin, 105 WVa 520, 143 SE 230.

[64] Fitts v. Southern Pacific Co., 149 Cal 310, 86 P 710, 117 AmSt 130.

[65] State v. Male, 112 WVa 56, 163 SE 713.

to another instruction, it should do so in a distinct and definite manner so as to leave no doubt as to which one was intended.[66]

Where there is more than one plaintiff in an action, it is not necessarily misleading to make use of the word "plaintiff" in an instruction.[67] The rule is the same with the use of the singular in referring to defendants.[68]

Mere verbiage or prolixity without more does not ordinarily render an instruction erroneous.[69]

Latin terms should be avoided for the presumption is that jurors do not understand them.[70] The use of the words "prima facie" in a charge to the jury has been condemned as likely to cause confusion and misunderstanding.[71]

It is misleading and confusing to use the meaningless term "and/or" in a charge to the jury.[72]

The word "may" is used interchangeably with "shall" or "will,"[73] and likewise the words "proof" and "evidence."[74] The

[66] Drumm-Flato Comm. Co. v. Gerlack Bank, 92 MoApp 326.

[67] Ross P. Beckstrom Co. v. Armstrong Paint & Varnish Works, 220 IllApp 598; Citizens Gas & Oil Min. Co. v. Whipple, 32 IndApp 203, 69 NE 557.

[68] State v. Walker, 207 MoApp 623, 227 SW 831.

[69] **Arkansas.** Fourche River Valley & I. T. Ry. Co. v. Tippett, 101 Ark 376, 142 SW 520.

Indiana. Washington Hotel Realty Co. v. Bedford Stone & Constr. Co., 195 Ind 128, 143 NE 156.

Iowa. Renner v. Thornburg, 111 Ia 515, 82 NW 950.

Kansas. Park View Hosp. Co. v. Randolph Lodge, No. 216, I. O. O. F., 99 Kan 488, 162 P 302.

Kentucky. Pugh v. Eberlein, 190 Ky 386, 227 SW 467.

Massachusetts. The court may use illustrations. Draper v. Cotting, 231 Mass 51, 120 NE 365.

Missouri. Choka v. St. Joseph Ry., Light, Heat & Power Co., 303 Mo 132, 260 SW 67; Johnson v. American Car & Foundry Co. (Mo), 259 SW 442.

New Jersey. It is discretionary with the judge whether to elaborate upon instructions that fairly cover the issues. Runyon v. Monarch Acc. Ins. Co., 108 NJL 489, 158 A 530.

New York. But see People v. Kresel, 243 AppDiv 137, 277 NYS 168, for an extreme case of prolixity held prejudicial.

Ohio. Andy v. State, 2 OhApp 103, 19 OhCirCt (N. S.) 93, 26 Oh CirDec 146.

Wisconsin. Belongy v. Kewaunee, G. B. & W. Ry. Co., 184 Wis 374, 199 NW 384.

[70] Indianapolis Trac. & Terminal Co. v. Thornburg, 74 IndApp 642, 125 NE 57; Dunn v. Land (TexCiv App), 193 SW 698 (desideration).

[71] McAdams v. United States, 74 F2d 37.

[72] **Alabama.** Snow v. Allen, 227 Ala 615, 151 S 468.

Illinois. Preble v. Architectural Iron Workers Union, 260 IllApp 435.

Iowa. Holmes v. Gross, — Ia —, 93 NW2d 714.

[73] **Illinois.** Posch v. Chicago Ry. Co., 221 IllApp 241. But see People v. Munday, 280 Ill 32, 117 NE 286.

Kentucky. See also Mayer v. Louisville Ry. Co., 192 Ky 371, 233 SW 785.

Missouri. Pennington v. Kansas City Rys. Co., 284 Mo 1, 223 SW 428.

New Mexico. State v. Starr, 24 NM 180, 173 P 674.

[74] Walker v. State, 138 Ark 517, 212 SW 319.

expression "I suggest" is held the equivalent of "I instruct."[75]

(2) An instruction should embody a concise and perspicuous statement of the cause of action and the issues.[76] Instructions therefore should show the jury just what the issues are,[77] taking care not to misstate them,[78] and to submit only such issues as are formed by the pleadings.[79] In so doing, the court may state the facts hypothetically, instructing that the verdict should be of a certain designated character if the facts are found to be true.[80] And it is not improper to give a history of the litigation leading up to the case at bar, predicating it upon the pleadings and the uncontradicted evidence, and making mention of it only so far as may be necessary in order to enable the jury to understand the issues.[81] The giving of an indefinite charge would not be error if any indefiniteness is completely removed by special charges given at the same time and, later, by the general charge.[82] But an instruction is inadequate which tells the jury that under certain named circumstances the plaintiff cannot recover, where such circumstances constitute only a portion of the issues.[83] The instruction should not ordinarily join conjunctively two or more grounds of action or defense, for the effect thereof is to require a finding of the existence of all of such grounds and not any one of them.[84]

(3) If the charge, as delivered by the court, is substantially correct and presents the issues fairly to the jury, it will be sufficient.[85] It is not necessary that instructions should be drawn with such technical accuracy as to be free from hyper-

[75] Hodges v. State, 16 OklCr 183, 182 P 260.

[76] Paxton v. Woodward, 31 Mont 195, 78 P 215, 107 AmSt 416, 3 Ann Cas 546.

The court properly refused an instruction consisting of a string of words, without punctuation, intelligible or unintelligible, according as one may happen to read it, requiring division into two distinct sentences to make it intelligible. Bailey v. State, 168 Ala 4, 53 S 296, 390.

[77] **Georgia.** The court should state explicitly which allegations in the declaration were admitted, and which denied by the plea. Southern Ry. Co. v. Ray, 28 GaApp 792, 113 SE 590.

Maryland. Weinbeck v. Dahms, 134 Md 464, 107 A 12.

Oklahoma. Lusk v. Haley, 75 Okl 206, 181 P 727.

Oregon. Doerstler v. First Nat. Bank, 82 Or 92, 161 P 386.

Pennsylvania. McCord v. Whitacre, 8 PaSuperCt 277.

[78] Chicago, B. & Q. R. Co. v. Clinebell, 5 Neb (Unof.) 603, 99 NW 839.

[79] Chicago, B. & Q. R. Co. v. Clinebell, 5 (Unof.) 603, 99 NW 839.

[80] Jones v. Hathaway, 77 Ind 14.

[81] Conley v. Redwine, 109 Ga 640, 35 SE 92, 77 AmSt 398.

[82] Mink v. Cincinnati Street Ry. Co., 99 OhApp 123, 131 NE2d 606.

[83] Caven v. Bodwell Granite Co., 99 Me 278, 59 A 285.

[84] Tuepker v. Sovereign Camp, W. O. W. (MoApp), 226 SW 1002. See also Lackey v. United Rys. Co., 288 Mo 120, 231 SW 956.

[85] **California.** But in Hart v. Farris, 218 Cal 69, 21 P2d 432, an instruction was disapproved which

critical objections, provided the jury can correctly understand therefrom the rules of law applicable to the case.[86] Thus where an instruction is correct, although it might be extended so as to include other matters, the fact that it does not embrace such other matters will not create error. If an additional instruction is desired, it should be requested.[87] Where a charge as a whole

used the word "approximate" instead of "proximate."

Illinois. Fessenden v. Doane, 188 Ill 228, 58 NE 974.

Indiana. Colee v. State, 75 Ind 511; Wilson v. Trafalgar & B. C. Gravel Road Co., 93 Ind 287.

Though a particular form of instruction may have received the approval of appellate courts, there is no rule compelling trial courts to follow such form, and they may use any language they see fit in their charges that will correctly express the controlling legal principles. Beneks v. State, 208 Ind 317, 196 NE 73.

Pennsylvania. Carman v. Central R. Co., 195 Pa 440, 46 A 71.

Rhode Island. Tanguay v. Warwick Chem. Co., 54 RI 445, 173 A 540.

[86] **Alabama.** The use of the word "result" instead of "cause" in referring to proximate cause does not render an instruction erroneous, since if the injury must be the proximate result of negligence then the negligence was the proximate cause of the injury. Sloss-Sheffield Steel & Iron Co. v. Stewart, 172 Ala 516, 55 S 785.

California. Use of article "a" for "the" harmless. Freiburg v. Israel, 45 CalApp 138, 187 P 130.

Georgia. Moore v. McAfee, 151 Ga 270, 106 SE 274 ("if" in instruction equivalent to "where").

Illinois. It is not necessary to repeat the words "by the preponderance of the evidence" in every instruction. Cary v. Niblo, 155 Ill App 338.

Indiana. It is not error to refer to a witness as a "claim agent" where he testified that he was a law agent having the duties of a claim agent. Southern Ry. Co. v. Hazlewood, 45 IndApp 478, 88 NE 636, 90 NE 18.

Kentucky. Mere inaptness of statement is not fatal if the instructions are substantially correct. St. Louis, I. M. & S. R. Co. v. McWhirter, 145 Ky 427, 140 SW 672.

Maryland. Weant v. Southern Trust & Deposit Co., 112 Md 463, 77 A 289 (mere verbal inaccuracy not fatal); Street v. Hodgson, 139 Md 137, 115 A 27.

Missouri. Torreyson v. United Ry. Co., 144 MoApp 626, 129 SW 409; Roberts v. Kansas City Rys. Co., 204 MoApp 586, 228 SW 902 ("nondelegable" criticised as technical but use harmless); Sparks v. Harvey (MoApp), 214 SW 249; Brown v. St. Louis & S. F. Ry. Co. (MoApp), 227 SW 1069 (use of "neglect" for "negligence" harmless); Taul v. Askew Saddlery Co. (MoApp), 229 SW 420.

The length of an instruction will not justify a reversal unless it contains objectionable features which constitute reversible error. State v. Steele, 226 Mo 583, 126 SW 406.

Pennsylvania. Commonwealth v. Robinson, 305 Pa 302, 157 A 689.

South Carolina. Joyner v. Atlantic Coast Line R. Co., 91 SC 104, 74 SE 825.

South Dakota. Smith & Co. v. Kimble, 38 SD 511, 162 NW 162.

Utah. Musgrave v. Studebaker Bros. Co., 48 Utah 410, 160 P 117.

Virginia. E. I. Du Pont De Nemours & Co. v. Snead's Admr., 124 Va 177, 97 SE 812.

Washington. Hutchins v. School Dist. No. 81, 114 Wash 548, 195 P 1020.

[87] Wilson v. Trafalgar & B. C. Gravel Road Co., 93 Ind 287.

An instruction correct as far as it goes is not erroneous merely be-

apprises jury of the matters in issue and no request to charge is made, the charge is not objectionable because isolated paragraphs thereof are not as clear as they could be.[88] And where a charge covers the entire declaration, without discrimination, no demurrer having been interposed as to any count, and the proof corresponding substantially to the allegations, it is not objectionable.[89] But an instruction will be faulty which tells the jury that, in order that a tax deed may be valid, it must be shown that the "requirements of the law have been complied with," and "all conditions precedent" observed, and no information is given as to what such requirements and conditions precedent are.[90]

§ 95. Repetition of instructions in civil cases.

Although the practice of repeating instructions should be avoided, it is not necessarily erroneous.

The occurrence of repetitious instructions may arise in two ways. The judge may grant a requested instruction which is repetitious or the judge may be repetitious in his own general charge.

At first glance, it would appear that repeating an instruction would be a desirable practice. Rules of law are difficult to comprehend to the ordinary man; therefore, repetition should aid comprehension. But the danger of tautology is that it may place undue stress on the repeated matter and thus tend to mislead or confuse the jury. As a general rule then, where the subject matter is fully covered in other instructions, the court should not repeat it, and should refuse a requested instruction that is repetitious.[91] Where, for example, the court, in the commence-

cause it is not more complete. Bissot v. State, 53 Ind 408.

[88] Pembor v. Marcus, 307 Mich 279, 11 NW2d 889.

[89] Fowler v. Gilbert, 38 Mich 292.

[90] Wood v. Chapman, 24 Colo 134, 49 P 136.

[91] **Arkansas.** Furlow v. United Oil Mills, 104 Ark 489, 149 SW 69, 45 LRA (N. S.) 372; Patterson v. Risher, 143 Ark 376, 221 SW 468.

California. Mernin v. Cory, 145 Cal 573, 79 P 174; Weaver v. Carter, 28 Cal App 241, 152 P 323; Nelson v. Colbeck, 94 CalApp2d 792, 211 P2d 878.

Colorado. Alley v. Tovey, 78 Colo 532, 242 P 999; Colorado Springs Rapid Transit Co. v. Albrecht, 22 ColoApp 201, 123 P 957.

Connecticut. Stedman v. O'Neil, 82 Conn 199, 72 A 923, 22 LRA (N. S.) 1229 (burden of proof); Yanez v. DeRosa, 118 Conn 471, 172 A 926.

Illinois. Thompson v. Hughes, 286 Ill 128, 121 NE 387; Chicago City Ry. Co. v. Roach, 76 IllApp 496; Dwyer v. Chicago City Ry. Co., 153 IllApp 463; Kopf v. Yordy, 208 IllApp 580; Holler v. Chicago City Ry. Co., 209 IllApp 140.

Indiana. Baum v. Palmer, 165 Ind 513, 76 NE 108; Modern Woodmen v. Kincheloe, 175 Ind 563, 94 NE 228, AnnCas 1913C, 1259; Kempf v.

ment of a charge, outlines the material averments of the complaint, together with the admissions and denials of the answer, and instructs that a preponderance of the evidence is necessary for the establishment of such averments, it is sufficient afterward to refer generally to such averments, instead of specifically restating them.[92] If an instruction directs the jury that they

Himsel, 121 IndApp 488, 98 NE2d 200.

Iowa. Lillie v. Brotherhood of Railway Trainmen, 114 Ia 252, 86 NW 279; Clarke v. Hubbell, 249 Ia 306, 86 NW2d 905.

Kentucky. Proctor Coal Co. v. Beaver's Admr., 151 Ky 839, 152 SW 965; Trosper Coal Co. v. Crawford, 152 Ky 214, 153 SW 211.

Maryland. Goodman v. Saperstein, 115 Md 678, 81 A 695.

Missouri. Perrette v. Kansas City, 162 Mo 238, 62 SW 448.

Nebraska. Pecha v. Kastl, 64 Neb 380, 89 NW 1047.

New Hampshire. Osgood v. Maxwell, 78 NH 35, 95 A 954.

North Carolina. Gordon v. Seaboard Air Line Ry. Co., 132 NC 565, 44 SE 25.

Ohio. Lloyd v. Moore, 38 OhSt 97; Cincinnati Trac. Co. v. Nellis, 81 OhSt 535, 91 NE 1125; American Steel Packing Co. v. Conkle, 86 OhSt 117, 99 NE 89; Cleveland Ry. Co. v. Halterman, 22 OhApp 234, 153 NE 922, 5 OLA 312; Interstate Motor Freight Corp. v. Beecher, 37 OhApp 23, 174 NE 27; Astrup Co. v. Rehburg, 42 OhApp 126, 181 NE 551, 36 OLR 405; National Life & Acc. Ins. Co. v. Kelly, 42 OhApp 255, 182 NE 46.

Texas. Sizemore v. St. Louis & S. F. Ry. Co. (TexCivApp), 130 SW 1024 (contributory negligence); Continental Oil & Cotton Co. v. Thompson (TexCivApp), 136 SW 1178 (measure of damages); State v. Haley (TexCivApp), 142 SW 1003 (burden of proof); Maibaum v. Bee Candy Mfg. Co. (TexCivApp), 145 SW 313 (burden of proof).

Where a party asks more than one charge on the same subject and the court selects and gives one of them, he can not complain of the refusal of the others. Greenville v. Branch (TexCivApp), 152 SW 478.

Utah. Smith v. Columbus Buggy Co., 40 Utah 580, 123 P 580.

Virginia. Greever v. Bank of Graham, 99 Va 547, 39 SE 159; E. I. Du Pont De Nemours & Co. v. Snead's Admr., 124 Va 177, 97 SE 812.

Where there are two phases of a defense and the jury are fully advised thereon in one instruction, it is unnecessary, in a subsequent instruction, to repeat what has been previously said as to either phase. Greever v. Bank of Graham, 99 Va 547, 39 SE 159.

Washington. Stanhope v. Strang, 140 Wash 693, 250 P 351.

West Virginia. Browning v. Hoffman, 90 WVa 568, 111 SE 492; Robertson v. Hobson, 114 WVa 236, 171 SE 745.

[92] **North Carolina.** Where a correct charge as to the burden of proof has been given in one instruction, it is not necessary to repeat it in succeeding ones. Pennell v. Brookshire, 193 NC 73, 136 SE 257.

Oregon. Where, in an action for malpractice, the court instructs that the degree of skill required of a specialist in surgery is such as is possessed by the average members of the profession practicing as specialists in similar localities, due regard being paid to the advanced state of medical science at the time, there is no necessity for repeating this statement in another instruction. Beadle v. Paine, 46 Or 424, 80 P 903.

Utah. Scott v. Provo City, 14 Utah 31, 45 P 1005.

must determine the issues from the evidence on the question, it is not necessary to further instruct that they must determine each separate issue according to the evidence.[93] Where the court instructed the jury upon their first separation that they must not discuss the case, it was not error to refuse to give a like instruction at the end of each session of the court.[94]

But the mere fact of repetition does not generally amount to reversible error. Prejudice must be shown to have resulted.[95]

Prejudice shown: Overemphasis was held to have occurred from the action of the court in giving seven instructions for the defendant in a damage action, each of them closing with the statement that plaintiff cannot recover, or that defendant is not guilty.[96] Repetition should not occur over and over as to the burden of proof being upon the plaintiff to establish his case by a preponderance of the evidence.[97] It is misleading and prejudicial to constantly and needlessly repeat the charge "then you should find the defendant not guilty," or words of similar import, and also to repeat many times instructions relative to degree of care required of decedent in action for wrongful death.[98] Where

[93] Vandalia Coal Co. v. Yemm, 175 Ind 524, 92 NE 49, 94 NE 881.

[94] Massachusetts Bonding & Ins. Co. v. Worthy (TexCivApp), 9 SW2d 388.

[95] **Arkansas.** Huffman v. Sudbury, 128 Ark 559, 194 SW 510.

Colorado. Liutz v. Denver City Tramway Co., 54 Colo 371, 131 P 258.

Georgia. Wilson v. Barnard, 10 GaApp 98, 72 SE 943.

Illinois. McMahon v. Chicago City Ry. Co., 143 IllApp 608; Roman v. Silbertrust, 159 IllApp 485; Eggmann v. Nutter, 169 IllApp 116; Lecklieder v. Chicago City Ry. Co., 172 IllApp 557.

Indiana. Davis v. Babb, 190 Ind 173, 125 NE 403; Chicago, I. & L. Ry. Co. v. Stierwalt, 87 IndApp 478, 153 NE 807; Sowers v. Indiana Service Corp., 98 IndApp 261, 188 NE 865.

Iowa. Livingstone v. Dole, 184 Ia 1340, 167 NW 639; Arnold v. Ft. Dodge, D. M. & S. R. Co., 186 Ia 538, 173 NW 252; McSpadden v. Axmear, 191 Ia 547, 181 NW 4.

Massachusetts. Maher v. Steuer, 170 Mass 454, 49 NE 741.

Michigan. Gardner v. Russell, 211 Mich 647, 179 NW 41; McLaughlin v. Curry, 242 Mich 228, 218 NW 698; Hayes v. Coleman, 338 Mich 371, 61 NW2d 634.

Minnesota. Jacobsen v. Minneapolis, 115 Minn 397, 132 NW 341.

Missouri. Schultz v. Schultz, 316 Mo 728, 293 SW 105; Rath v. Knight (Mo), 55 SW2d 682.

Nebraska. Denise v. Omaha, 49 Neb 750, 69 NW 119.

Ohio. Smart v. Nova Caesarea Lodge, No. 2, 27 OhCirCt 273; Smart v. Nova Caesarea Lodge, 6 OhCirCt (N. S.) 15, 17 OhCirDec 273.

South Carolina. Keys v. Winnsboro Granite Co., 72 SC 97, 51 SE 549.

Texas. Von Boeckmann v. Loepp (TexCivApp), 73 SW 849; Pettithory v. Clarke (TexCivApp), 139 SW 989.

Wisconsin. Klipstein v. Raschein, 117 Wis 248, 94 NW 63.

[96] Daubach v. Drake Hotel Co., 243 IllApp 298.

[97] Oliver v. Morgan (Mo), 73 SW2d 993.

[98] Gulich v. Ewing, 318 IllApp 506, 48 NE2d 537, in which nine instructions requested by defendant

issues in negligence action were simple, the giving of nineteen instructions for the defendant motorist, which, in seven different instances told the jury in some form that plaintiff, pedestrian, was required to be free of contributory negligence, which in seven instances told the jury that plaintiff must prove her case by a preponderance of the evidence, and which in fourteen instances stated that the jury "must find the defendant not guilty," or that "the plaintiff cannot recover," etc., was reversible error.[99]

In an action for wrongful death it has been held improper for the court to repeat to the jury an instruction relative to the maximum amount recoverable by the plaintiff.[1] Repetition of four (requested) instructions in practically identical language on subject of damages in personal injury action was held to constitute error.[2]

Prejudice not shown: It has been held not an erroneous repetition for the court to charge abstractly upon defendant's theory of defense and then give a special charge presenting the rule of law in connection with the concrete facts.[3]

And where the court instructs the jury that they may find punitive damages under certain circumstances, but omits one feature, namely, that such damages may be awarded where gross negligence is shown, it is no objection that attention is called to this omitted feature and the jury again instructed as to punitive damages, with reference thereto.[4]

Repetition is not confusing where it amounts to no more than the qualification to numerous instructions necessary to make their meaning clear.[5]

One way to avoid deciding whether repetitious instructions resulted in prejudice is simply to find that there was no repetition. A converse statement is not always regarded as a repetition.[6] Repetition has been held not involved in a charge, one paragraph of which declared the law applicable to the case, another submitted the facts for recovery applicable to the declaration, and another stated the negative hypothesis thereof in defendant's favor.[7]

which concluded with words of similar import as those stated were given.

[99] Baker v. Thompson, 337 IllApp 327, 85 NE2d 924.

[1] Streeter v. Humrichouse, 261 IllApp 556.

[2] O'Hara v. Central Illinois Light Co., 319 IllApp 336, 49 NE2d 274.

[3] Jones v. Missouri, K. & T. Ry. Co. (TexCivApp), 157 SW 213.

[4] Nashville St. R. v. O'Bryan, 104 Tenn 28, 55 SW 300.

[5] Stanton v. Hample, 272 F 424.

[6] Continental Casualty Co. v. Deeg, 59 TexCivApp 35, 125 SW 353.

[7] Beaumont, S. L. & W. R. Co. v. Olmstead, 56 TexCivApp 96, 120 SW 596.

§ 96. Repetition of instructions in criminal cases.

The general rule in civil cases is also applicable to criminal cases: Although the practice of repeating instructions should be avoided, it is not necessarily erroneous.

In criminal cases, instructions are also considered together and it is not necessary to repeat instructions as to the crime or some particular phase of it or to reiterate all the qualifying circumstances.[8] But repetition is not reversible error unless it is of such a nature as to mislead the jury.[9]

[8] **Alabama.** Thrasher v. State, 168 Ala 130, 53 S 256; McMickens v. State, 18 AlaApp 36, 88 S 342.

Arkansas. Dean v. State, 139 Ark 433, 214 SW 38; Jones v. State, 165 Ark 250, 263 SW 961; Robertson v. State, 165 Ark 614, 264 SW 822.

Where the jury is instructed that in murder the killing must have been done with malice aforethought and premeditation, it is not necessary to repeat those elements of the crime in each paragraph of the charge. Brewer v. State, 72 Ark 145, 78 SW 773.

California. People v. Stevens, 15 CalApp 294, 114 P 800; People v. White, 20 CalApp 156, 128 P 417; People v. Fuski, 49 CalApp 4, 192 P 552; People v. Musumeci, 51 CalApp 454, 197 P 129.

Connecticut. State v. Kritchman, 84 Conn 152, 79 A 75; State v. Weiner, 84 Conn 411, 80 A 198.

Georgia. Hall v. State, 7 GaApp 186, 66 SE 486; Watts v. State, 9 GaApp 500, 71 SE 766; Hill v. State, 18 GaApp 259, 89 SE 351.

In giving the jury the form of a verdict the court need not repeat the instruction that the verdict should be based on the jury's opinion of the evidence. Brundage v. State, 7 GaApp 726, 67 SE 1051.

Illinois. People v. Blumenberg, 271 Ill 180, 110 NE 788; People v. Robertson, 284 Ill 620, 120 NE 539; People v. Dear, 286 Ill 142, 121 NE 615; People v. Burns, 300 Ill 361, 133 NE 263; Sullivan v. People, 108 IllApp 328.

Indiana. Kennedy v. State, 107 Ind 144, 6 NE 305, 57 AmRep 99; Thrawley v. State, 153 Ind 375, 55 NE 95; Fehlman v. State, 199 Ind 746, 161 NE 8.

Iowa. State v. Walker, 192 Ia 823, 185 NW 619.

Kansas. State v. Buffington, 71 Kan 804, 81 P 465, 4 LRA (N. S.) 154.

Kentucky. Gillis v. Commonwealth, 202 Ky 821, 261 SW 591.

Mississippi. Fisher v. State, 150 Miss 206, 116 S 746.

Missouri. State v. Darrah, 152 Mo 522, 54 SW 226; State v. Chick, 282 Mo 51, 221 SW 10; State v. Miller, 292 Mo 124, 237 SW 498.

New Mexico. State v. Chaves, 27 NM 504, 202 P 694; State v. Ulibarri, 28 NM 107, 206 P 510.

Pennsylvania. Commonwealth v. State Loan Corp., 116 PaSuperCt 365, 176 A 516.

Texas. Lee v. State, 44 TexCr 460, 72 SW 195; Comegys v. State, 62 TexCr 231, 137 SW 349; McBride v. State, 81 TexCr 200, 194 SW 825 (not error to give more than one of three requested charges on same issue); Cauthern v. State (TexCr), 65 SW 96.

Where the law as to insanity has been fully charged the court is not bound to qualify paragraphs dealing with murder in the first and second degrees by referring to the charge on insanity. Montgomery v. State, 68 TexCr 78, 151 SW 813.

West Virginia. State v. Prater, 52 WVa 132, 43 SE 230; State v. Dodds, 54 WVa 289, 46 SE 228; State v. Legg, 59 WVa 315, 53 SE 545, 3 LRA (N. S.) 1152; State v. Vineyard, 85 WVa 293, 101 SE 440.

[9] **Arkansas.** Trimble v. State, 150 Ark 536, 234 SW 626.

Where words once have been properly defined, they need not be again defined in each instruction in which they are used.[10] Likewise, the court should avoid the repetition of definitions of offenses.[11] But it is not prejudicial for a court to give four instructions concerning malice and its different characteristics, even if they could properly have been embraced within one.[12]

Because repeated instructions on reasonable doubt may lead the jury to believe that the court is in doubt as to the guilt of the accused,[13] one charge on reasonable doubt is generally sufficient.[14]

California. In People v. Mesa, 121 CalApp 345, 8 P2d 920, the court gave two instructions on the matter of flight, the defendant having claimed self-defense.

Illinois. People v. Cotton, 250 Ill 338, 95 NE 283; People v. Lewis, 252 Ill 281, 96 NE 1005; People v. Sobzcak, 286 Ill 157, 121 NE 592; People v. Kuhn, 291 Ill 154, 125 NE 882; People v. Flynn, 302 Ill 549, 135 NE 101 (reasonable doubt); People v. Nowicki, 330 Ill 381, 161 NE 747 (three short instructions on reasonable doubt).

Missouri. State v. Murray (Mo), 193 SW 830.

Nebraska. Robinson v. State, 71 Neb 142, 98 NW 694.

West Virginia. State v. Snider, 81 WVa 522, 94 SE 981; State v. Lutz, 88 WVa 502, 107 SE 187.

[10] Plymel v. State, 164 Ga 677, 139 SE 349; State v. Dipley, 242 Mo 461, 147 SW 111.

[11] **California.** People v. Martin, 44 CalApp 45, 185 P 1003.

Colorado. Castner v. People, 67 Colo 327, 184 P 387.

Georgia. See also Loyd v. State, 150 Ga 803, 105 SE 465.

[12] People v. Rooney, 355 Ill 613, 190 NE 85.

[13] State v. Ferrell, 246 Mo 322, 152 SW 33.

[14] **Federal.** Burgner v. United States, 272 F 116; Winter v. United States, 13 F2d 53; Eierman v. United States, 46 F2d 46.

Alabama. McMickens v. State, 18 AlaApp 36, 88 S 342.

California. People v. Waysman, 1 CalApp 246, 81 P 1087.

Florida. Sylvester v. State, 46 Fla 166, 35 S 142.

Georgia. Montford v. State, 144 Ga 582, 87 SE 797; Bryant v. State, 153 Ga 534, 113 SE 4; Davis v. State, 153 Ga 669, 113 SE 11; Thomas v. State, 18 GaApp 21, 88 SE 718; Thomas v. State, 19 GaApp 104, 91 SE 247.

Illinois. People v. Sawhill, 299 Ill 393, 132 NE 477; People v. Shaw, 300 Ill 451, 133 NE 208.

Iowa. State v. Crouch, 130 Ia 478, 107 NW 173; State v. Ball, 220 Ia 595, 262 NW 115.

Kansas. State v. McDonald, 107 Kan 568, 193 P 179; State v. Stewardson, 121 Kan 514, 247 P 429; State v. Sweetin, 134 Kan 663, 8 P2d 397; State v. Fox, 10 KanApp 578, 62 P 727; State v. Ryno, 68 Kan 348, 74 P 1114, 64 LRA 303.

Kentucky. Richmond v. Commonwealth, 255 Ky 758, 75 SW2d 500.

Missouri. State v. Robinson, 236 Mo 712, 139 SW 140; State v. Lawson, 239 Mo 591, 145 SW 92; State v. Washington, 242 Mo 401, 146 SW 1164; State v. Buckner, 335 Mo 229, 72 SW2d 73; State v. Davis (Mo), 34 SW2d 133; State v. Bundy (Mo), 44 SW2d 121.

Nebraska. Dunn v. State, 58 Neb 807, 79 NW 719.

New Jersey. Brown v. State, 62 NJL 666, 42 A 811.

New Mexico. State v. Roybal, 33 NM 187, 262 P 929; State v. Burrus, 38 NM 462, 35 P2d 285.

North Carolina. State v. Killian, 173 NC 792, 92 SE 499.

North Dakota. State v. Currie, 8 ND 545, 80 NW 475.

Yet in some situations, it is held error not to repeat an instruction. If a charge is given on an affirmative defense, the court should include an instruction as to reasonable doubt.[15] Although an instruction on presumption of innocence is another way of instructing the jury that the burden of proof of guilt beyond a reasonable doubt is upon the state, some courts require that both instructions be given.[16] Instructions on manslaughter, aggravated assault, and assault and battery are erroneous unless each is coupled with a charge on reasonable doubt.[17] Where the charge is conspiracy murder, the court should give an instruction as to reasonable doubt upon the whole case, even if instructions have been given as to reasonable doubt on murder and manslaughter.[18]

§ 97. Limitation on number of instructions.

Instructions greatly disproportionate to the issues involved tend to confuse the jury and it is not an abuse of the judge's discretion to place a reasonable limit on the number of instructions he will consider in behalf of either party.

It would seem that the rule as to repeating instructions and the rule that an instruction must be supported by the pleadings and evidence would, if applied, limit the number of instructions without any other rule operating. Nevertheless, it is possible for elaboration and over-completeness to result in a large number of instructions. Hence, the discretion lodged in the judge to limit the number of instructions granted to each party.[19]

Oklahoma. Cole v. State, 18 Okl Cr 430, 195 P 901; McCarty v. State, 21 OklCr 365, 207 P 1069; Needham v. State, 55 OklCr 430, 32 P2d 92.

Texas. Walker v. State, 88 TexCr 389, 227 SW 308; Byrd v. State, 90 TexCr 418, 235 SW 891; Fulton v. State, 102 TexCr 146, 277 SW 651; Armstrong v. State, 120 TexCr 526, 46 SW2d 987; Johnson v. State (TexCr), 67 SW 412.

Virginia. Smith v. Commonwealth, 155 Va 1111, 156 SE 577.

[15] Hathcock v. State, 103 TexCr 518, 281 SW 859; Shannon v. State, 117 TexCr 429, 36 SW2d 521.

[16] People v. Bickerstaff, 46 CalApp 764, 190 P 656; State v. Chick, 282 Mo 51, 221 SW 10.

[17] Hanners v. State, 104 TexCr 442, 284 SW 554.

[18] Lindon v. Commonwealth, 257 Ky 746, 79 SW2d 202.

[19] **California.** In re Keithley's Estate, 134 Cal 9, 66 P 5.

Illinois. Canon v. Grigsby, 116 Ill 151, 5 NE 362, 56 AmRep 769; Chicago & A. R. Co. v. Kelly, 25 IllApp 17; Casey v. J. W. Reedy Elev. Mfg. Co., 166 IllApp 595; Thompson v. Sprague, 197 IllApp 197; Chatelle v. Illinois Cent. R. Co., 210 IllApp 475. But see Kravitz v. Chicago City Ry. Co., 210 IllApp 287 (court may not arbitrarily fix number); Bartz v. Chicago City Ry. Co., 116 IllApp 554.

Indiana. Emry v. Beaver, 192 Ind 471, 137 NE 55 (45 instructions covering 27 pages of printed brief).

Iowa. See McCaleb v. Smith, 22 Ia 242.

Kentucky. See Graham's Admr. v. Illinois Cent. R. Co., 185 Ky 370, 215 SW 60.

The practice of loading down a case with a great number of instructions is especially to be condemned where the issues involved are few and simple.[20] It is a tactical mistake for defense attorneys in personal injury cases to request a multitude of involved and confusing instructions in the hope that an error will be made. This not only reduces the effectiveness of the instructions as an aid to the jury, but also lessens the likelihood of a reviewing court reversing the decision of the jury because of alleged faulty instructions.[21] It is a commendable practice to limit the number of instructions, whenever this course can be taken with due regard to the rights of the parties.[22]

A surplusage of instruction was shown in a case involving a plaintiff, a city, and a gas company, in which there were ten for the plaintiff, twenty for the city, and thirteen for the gas company.[23] In a trial on an indictment for murder, fifty-two instructions, twenty-three for the state and twenty-nine for the defendant, is an unreasonable number of instructions.[24]

The giving of a large number of instructions is likely to impress the jury with the belief that the court is instructing strongly in favor of a party at whose instance they are given.[25] For example, six instructions[26] or fourteen[27] on contributory negligence are manifestly too many, resulting in overemphasis on defendant's theory.

Missouri. Blanton v. Dold, 109 Mo 64, 18 SW 1149. See Naylor v. Chinn, 82 MoApp 160.

Oregon. Collins v. United Brokers Co., 99 Or 556, 194 P 458.

Virginia. Norfolk & W. R. Co. v. Henderson, 132 Va 297, 111 SE 277.

[20] Schluraff v. Shore Line Motor Coach Co., 269 IllApp 569; Whitely v. Bartlett, 270 IllApp 602; Desberger v. Harrington, 28 MoApp 632; Hannibal v. Richards, 35 MoApp 15 (12 instructions on a single issue); McAllister v. Barnes, 35 MoApp 668 (11 instructions, issues few and simple); Doan v. St. Louis, K. & N. W. Ry. Co., 43 MoApp 450 (23 instructions excessive).

The court should give as few instructions as possible provided they cover every feature of the case. State v. Tomasitz, 144 Mo 86, 45 SW 1106.

[21] Borst v. Langsdale, 8 IllApp2d 88, 130 NE2d 520.

[22] Craddock Lbr. Co. v. Jenkins, 124 Va 167, 97 SE 817; American Steel Packing Co. v. Conkle, 86 OhSt 117, 99 NE 89. See also Stewart v. Southwest Missouri R. Co. (Mo App), 224 SW 104.

[23] Welch v. Chicago, 323 Ill 498, 154 NE 226, affg. 236 IllApp 520.

[24] People v. Miller, 403 Ill 561, 87 NE2d 649.

[25] Bartholomew v. Illinois Valley R. Co., 154 IllApp 512.

[26] In Daubach v. Drake Hotel Co., 243 IllApp 298, trial court was adjudged too favorable to the defendant in giving seven instructions for the plaintiff and twenty-one for the defendant.

[27] Ulve v. City of Raymond, 51 Wash2d 224, 317 P2d 908.

§ 98. Reference to pleadings for issues.

The courts are not in agreement on whether the judge may allow the jury to determine the issues by reference to the pleadings. Some courts forbid the practice, others permit it, while still others will reverse if prejudice is shown to have resulted.

Some states require the judge to inform the jury what issues have been raised by the pleadings and not leave the jury to determine the questions by reference to the pleadings.[28] But

[28] **Alabama.** Lewy Art Co. v. Agricola, 169 Ala 60, 53 S 145; Woodward Iron Co. v. Williams, 207 Ala 600, 93 S 523.

An instruction should hypothesize the facts relied on as a defense and not require the jury to examine the pleas to determine what is meant by the instructions. Birmingham Ry., Light & Power Co. v. Fox, 174 Ala 657, 56 S 1013.

Colorado. Ft. Lyon Canal Co. v. Bennett, 61 Colo 111, 156 P 604.

Florida. Seaboard Air Line Ry. Co. v. Kay, 73 Fla 554, 74 S 523.

Illinois. Schlauder v. Chicago & Southern Trac. Co., 253 Ill 154, 97 NE 233; Lerette v. Director General of Railroads, 306 Ill 348, 137 NE 811; Rosinski v. Burton, 163 IllApp 162; Latham v. Cleveland, C., C. & St. L. R. Co., 164 IllApp 559; Randall Dairy Co. v. Pevely Dairy Co., 274 IllApp 474.

It is held by the courts of Illinois that it is the function of the court to define the issues without referring the jury to the pleadings to ascertain what they are; but an instruction referring the jury to the complaint for determination of the charges of negligence does not necessarily require reversal where other given instructions effectively define the issues to the jury. Hann v. Brooks, 331 IllApp 535, 73 NE2d 624.

Iowa. Heineman v. Young (Ia), 197 NW 1001; Miller v. Mutual Fire & Tornado Assn., 219 Ia 689, 259 NW 572.

Mississippi. Gurley v. Tucker, 170 Miss 565, 155 S 189.

An instruction authorizing a recovery if the plaintiff was injured "in the manner set out in the declaration" is improper as tending to mislead. Southern Ry. Co. v. Ganong, 99 Miss 540, 55 S 355.

Missouri. Wilks v. St. Louis & S. F. R. Co., 159 MoApp 711, 141 SW 910; Sinnamon v. Moore, 161 MoApp 168, 142 SW 494; Birch Tree State Bank v. Dowler, 163 MoApp 65, 145 SW 843; Bean v. Lucht, 165 MoApp 173, 145 SW 1171; Byrne v. News Corp., 195 MoApp 265, 190 SW 933; Baker v. Lyell, 210 MoApp 230, 242 SW 703; State ex rel. Macke v. Randolph (MoApp), 186 SW 590; Pollard v. Carlisle (Mo App), 218 SW 921; Ritchie v. State Board of Agri. (MoApp), 297 SW 435; Phillips v. Thompson, 225 Mo App 859, 35 SW2d 382.

Nebraska. Larson v. Chicago & N. W. R. Co., 89 Neb 247, 131 NW 201.

North Dakota. Forszen v. Hurd, 20 ND 42, 126 NW 224.

Ohio. Parmlee v. Adolph, 28 Oh St 10; Baltimore & O. Ry. Co. v. Lockwood, 72 OhSt 586, 74 NE 1071; Cincinnati Trac. Co. v. Forrest, 73 OhSt 1, 75 NE 818; Cincinnati Trac. Co. v. Stephens, 75 OhSt 171, 79 NE 235; Jones v. Peoples Bank, 95 OhSt 253, 116 NE 34; Ohio Collieries Co. v. Cocke, 107 OhSt 238, 140 NE 356; Telinde v. Ohio Trac. Co., 109 OhSt 125, 141 NE 673; Curlis v. Brown, 9 OhApp 19, 31 OhCtApp 364; Souder v. Hassenfeldt, 48 OhApp 377, 194 NE 47, 1 OhO 554; Ruskamp v. Cincinnati Trac. Co., 23 ONP (N. S.) 553; Gill v. Baker, 34 OLR 21; Cleveland Ry.

this practice is permitted in some jurisdictions,[29] and in others is not considered erroneous where the pleadings state a cause of action and no prejudice is shown to have resulted.[30]

Reference to the pleadings may be made either by reading the pleadings or simply telling the jury to read them. In some jurisdictions, merely reading the pleadings without making known to the jury the issues in the case is error.[31] In other states, substantially copying pleadings into the instructions is erroneous only if prejudice is shown, but the practice is not commended.[32] For example, it is reversible error to copy into the

Co. v. Bezoska, 1 OLA 315; Industrial Comm. v. Fritz, 12 OLA 723; Kinney v. Schmidt, 13 OLA 582.

Oklahoma. Klein v. Muhlhausen, 83 Okl 21, 200 P 436.

Texas. Southern Badge Co. v. Smith (TexCivApp), 141 SW 185; Hines v. Hodges (TexCivApp), 238 SW 349; Payne v. Kindel (TexCiv App), 239 SW 1011; Farmers & Mechanics Nat. Bank v. Marshall (Tex CivApp), 4 SW2d 165.

Virginia. Jones v. Richmond, 118 Va 612, 88 SE 82; Southern Ry. Co. v. May, 147 Va 542, 137 SE 493; Curtis & Shumway, Inc. v. Williams (Va), 86 SE 848.

West Virginia. Mott v. Davis, 90 WVa 613, 111 SE 603.

[29] **Georgia.** Jones v. McElroy, 134 Ga 857, 68 SE 729, 137 AmSt 276; Woodward v. Fuller, 145 Ga 252, 88 SE 974; Almand v. Thomas, 148 Ga 369, 96 SE 962; Upshaw Bros. v. Stephens, 26 GaApp 284, 106 SE 125; Port Wentworth Terminal Corp. v. Leavitt, 28 GaApp 82, 110 SE 686.

Texas. A charge which states the issues in substantial conformity to the pleadings and refers the jury to the petition for a full statement of the cause of action is sufficient. Missouri, K. & T. Ry. Co. v. Gilbert, 61 TexCivApp 478, 131 SW 1145.

Virginia. An instruction properly stating the law applicable to the facts which plaintiff has pleaded and proved need not state to which count of the declaration it is applicable, in the absence of a circumstance rendering it necessary. Adamson's Admr. v. Norfolk & P. Trac. Co., 111 Va 556, 69 SE 1055.

[30] **Illinois.** Waschow v. Kelly Coal Co., 245 Ill 516, 92 NE 303; McFarlane v. Chicago City Ry. Co., 288 Ill 476, 123 NE 638; Sandor v. Verhovey Aid Assn., 199 IllApp 199; Thorne v. Southern Illinois Ry. & Power Co., 206 IllApp 372; Peters v. Howard, 206 IllApp 610.

Unless the complaint contains all the elements necessary for a recovery, the court should not instruct that if the plaintiff has made out his case as set out in the complaint by a preponderance of the evidence they should find for the plaintiff. Cromer v. Borders Coal Co., 246 Ill 451, 92 NE 926.

An instruction will not cause a reversal merely because it refers to a count of a declaration which does not state a cause of action if there is another count contained in such declaration which does state a cause of action and will support a recovery. Ruch v. Aurora, E. & C. R. Co., 150 IllApp 329.

[31] Henkel v. Robinson, 27 OhApp 341, 161 NE 342.

[32] **Federal.** Nupen v. Pearce, 149 CCA 43, 235 F 497.

California. Earl v. San Francisco Bridge Co., 31 CalApp 339, 160 P 570.

Colorado. Union Gold Min. Co. v. Crawford, 29 Colo 511, 69 P 600.

Georgia. Georgia Ry. & Power Co. v. Jenkins, 28 GaApp 632, 112 SE 734.

Illinois. Reivitz v. Chicago Rapid Transit Co., 327 Ill 207, 158 NE 380.

instructions the pleadings almost verbatim, where the petition and answer contained much surplusage, and the jury would likely be caused to speculate upon material matters.[33]

On the other hand, it is not error to incorporate a short, concise statement of a party's position as found in the pleadings,[34] nor is paraphrasing pleaded specifications of negligence improper.[35]

Indiana. Cincinnati, I. & W. Ry. Co. v. Little, 190 Ind 662, 131 NE 762; Angola Ry. & Power Co. v. Butz, 52 IndApp 420, 98 NE 818; Indianapolis v. Moss, 74 IndApp 129, 128 NE 857; Fidelity & Casualty Co. v. Blount Plow Works, 78 Ind App 529, 136 NE 559.

Where the complaint states a good cause of action and its sufficiency is not questioned, an instruction is not open to objection which sets out the allegations of the complaint in detail and states that the answer is a general denial and that these form the issues, and that under the issues thus formed the plaintiff, in order to recover, must prove by a fair preponderance of the evidence all of the material elements of the complaint. New v. Jackson, 50 Ind App 120, 95 NE 328.

Iowa. McDonald v. Bice, 113 Ia 44, 84 NW 985; Canfield v. Chicago, R. I. & P. Ry. Co., 142 Ia 658, 121 NW 186; Black v. Miller, 158 Ia 293, 138 NW 535; Sutton v. Greiner, 177 Ia 532, 159 NW 268; Hoegh v. See, 215 Ia 733, 246 NW 787; Christensen v. Farmers Sav. Bank, 218 Ia 892, 255 NW 520; 256 NW 687; Young v. Jacobsen Bros. (Ia), 258 NW 104 (declaring the practice to be improper).

See Dunnegan & Briggs v. Chicago, R. I. & P. R. Co., 202 Ia 787, 211 NW 364; Wilson v. Else, 204 Ia 857, 216 NW 33.

Kansas. Kansas City, Ft. S. & M. Ry. Co. v. Dalton, 66 Kan 799, 72 P 209.

Minnesota. Savino v. Griffin Wheel Co., 118 Minn 290, 136 NW 876.

Missouri. Brunk v. Hamilton-Brown Shoe Co., 334 Mo 517, 66 SW2d 903; Harlan v. Wabash Ry. Co., 335 Mo 414, 73 SW2d 749; Becker v. Thompson, 336 Mo 27, 76 SW2d 357.

Nebraska. Tobler v. Union Stock Yards Co., 85 Neb 413, 123 NW 461; Forrest v. Koehn, 99 Neb 441, 156 NW 1046; Plath v. Brunken, 102 Neb 467, 167 NW 567; Spieler v. Lincoln Trac. Co., 103 Neb 339, 171 NW 896; Fellers v. Howe, 106 Neb 495, 184 NW 122; O'Brien v. Sullivan, 107 Neb 512, 186 NW 532; Sohl v. Sohl, 114 Neb 353, 207 NW 669; Scott v. New England Mut. Life Ins. Co., 128 Neb 867, 260 NW 377; Nama v. Shada, 150 Neb 362, 34 NW2d 650; Simcho v. Omaha & Council Bluffs Street Ry. Co., 150 Neb 634, 35 NW2d 501.

New Jersey. Portley v. Hudson & M. R. Co., 113 NJL 13, 172 A 384.

North Dakota. Reuter v. Olson, 79 ND 834, 59 NW2d 830.

Ohio. Uncapher v. Baltimore & O. R. Co., 127 OhSt 351, 188 NE 553.

South Dakota. Farm Mtg. & Loan Co. v. Martin, 51 SD 424, 214 NW 816.

Tennessee. Nashville, C. & St. L. Ry. Co. v. Anderson, 134 Tenn 666, 185 SW 677, LRA 1918C, 1115, Ann Cas 1917D, 902.

Utah. Davis v. Heiner, 54 Utah 428, 181 P 587.

Washington. Robinson v. Ebert, 180 Wash 387, 39 P2d 992.

[33] Veith v. Cassidy, 201 Ia 376, 207 NW 328.

[34] Taylor v. Weber County, 4 Utah2d 328, 293 P2d 925.

[35] Clarke v. Hubbell, 249 Ia 306, 86 NW2d 905.

The court should state the admissions in the pleadings and not refer the jury to the pleadings to determine what things are admitted.[36]

Instructions which summarize the allegations of the complaint have been sustained,[37] and it is not prejudicial error to merely refer to the declaration if instructions give a correct statement of the necessary facts which the jury must believe before awarding plaintiff a verdict.[38]

It has been held no violation of the principle to refer to a pleading to identify a thing about which an issue is raised.[39] It is not a reference to the pleading to tell the jury that a certain issue was raised by the answer of the defendant.[40]

§ 99. Reference to indictment or information.

Although the courts are not in agreement, the better rule seems to be that it is the duty of the court to state the issues and not refer the jury to the indictment or information to determine what they are.

There are courts that seem to state an absolute prohibition of referring the jury to the indictment or information to determine the issues.[41] Again, reference may be made either by copying the indictment or information into the judge's charge, or simply referring the jury to these documents. Courts have declared that it is not good practice to copy the information or indictment into the instructions.[42]

Most courts seem to follow the rule of deprecating the practice of referring to the information or indictment, but continue to rule that it is not reversible error unless there is prejudice to the defendant.[43]

Where the substance of the indictment is set out in the charge there is held to be no error in a general reference in a subsequent instruction to matters "as charged in the indict-

[36] **California.** Piluso v. Spencer, 36 CalApp 416, 172 P 412.

Minnesota. See Hork v. Minneapolis Street Ry. Co., 193 Minn 366, 258 NW 576.

North Dakota. Branthover v. Monarch Elev. Co., 33 ND 454, 156 NW 927.

[37] Donnelly v. Pennsylvania R. Co., 342 IllApp 556, 97 NE2d 846.

[38] Jessup v. Reynolds, 208 Miss 50, 43 S2d 753.

[39] Notarfrancesco v. Smith, 105 Conn 49, 134 A 151; Ekstan v. Herrington (MoApp), 204 SW 409.

[40] Patton v. Eveker (MoApp), 232 SW 762.

[41] **Alabama.** Lane v. State, 14 AlaApp 40, 70 S 982.

Missouri. State v. Constitino (Mo), 181 SW 1155; State v. Bater (Mo), 232 SW 1012.

New Mexico. State v. McKnight, 21 NM 14, 153 P 76.

[42] Kirchman v. State, 122 Neb 624, 241 NW 100.

[43] Frank v. State, 150 Neb 745, 35 NW2d 816.

ment."[44] It was held no error for the court after defining a deadly weapon to refer to the indictment for the manner of its use.[45] If an instruction in a criminal case sets forth the facts necessary for a conviction, it is not defective for including the expression, "as charged in the first count of the information."[46] Where the indictment charged the theft of lint cotton, it was held not error for the court to refer to the subject of the theft as "one bale of cotton described in the indictment."[47] It is not improper to quote in an instruction the charging part of an information on which the accused has been tried and to state that a plea of not guilty to the charge put in issue all matters alleged.[48]

§ 100. Reference to other instructions.

Instructions are considered as a series and it is not improper to refer in one instruction to another instruction in the charge.

The rule as stated is applicable to both criminal and civil cases.[49]

Criminal cases. Thus, in a homicide case one instruction could properly refer to another for a definition of the term "wilfully."[50] And where the court instructed the jury to acquit the defendant if the killing with which he was charged was done under the circumstances set forth in another instruction referred to which embodied the matter of defense, the instruction was not erroneous as ignoring the accused's defense.[51] Where the court in referring to the presumption of the defendant's in-

[44] State v. Langford, 293 Mo 436, 240 SW 167.

[45] State v. Langford, 293 Mo 436, 240 SW 167.

[46] State v. Moon, 221 MoApp 592, 283 SW 468.

[47] Lindsey v. State, 108 TexCr 187, 299 SW 399.

[48] State v. Ramos, 159 Wash 599, 294 P 223.

[49] **Alabama.** Barney Coal Co. v. Hyche, 197 Ala 228, 72 S 433.

California. People v. Roth, 137 CalApp 592, 31 P2d 813.

Connecticut. Di Maio v. Yolen Bottling Works, 93 Conn 597, 107 A 497.

Illinois. People v. Laures, 289 Ill 490, 124 NE 585; Teal v. Teal, 324 Ill 207, 155 NE 28; Oetgen v. Lowe, 204 IllApp 608.

Iowa. O'Leary v. German American Ins. Co., 100 Ia 390, 69 NW 686; State v. Berry, 193 Ia 191, 182 NW 781.

Massachusetts. Radovsky v. New York, N. H. & H. R. Co., 258 Mass 26, 154 NE 334.

Missouri. Drumm-Flato Comm. Co. v. Gerlack Bank, 92 MoApp 326; State v. Farrar (Mo), 285 SW 1000; Burns v. Polar Wave Ice & Fuel Co. (MoApp), 187 SW 145; Samples v. Kansas City Rys. Co. (MoApp), 232 SW 1049.

Montana. State v. Colbert, 58 Mont 584, 194 P 145.

Tennessee. McElya v. Hill, 105 Tenn 319, 59 SW 1025.

Texas. Johnson v. State, 128 Tex Cr 12, 78 SW2d 965; Payne v. Bannon (TexCivApp), 238 SW 701.

[50] State v. Young, 314 Mo 612, 286 SW 29.

[51] Dalton v. Commonwealth, 216 Ky 317, 287 SW 898.

nocence in a criminal prosecution concluded one of his statements with the words, "under rules which I will give you in charge," such reference was held not to invalidate the instruction.[52] It is not prejudicial error for the trial court to refer to a subsequent charge on the matter of provoking the difficulty, while charging on the law of self-defense.[53]

Civil cases. If an instruction being given clearly defined contributory negligence, it was not error for the court to follow the definition with the expression "as used in these instructions," although it was nowhere else used in the instructions.[54] In a divorce action where condonation was one of the issues, it was held proper to refer to certain acts of extreme cruelty "as defined in these instructions."[55] There are limitations to the practice. The reference to other instructions, in order to escape condemnation, must not result in misleading or confusing the jury. If it has that effect, it will result in reversible error.[56] Where any of the instructions referred to are bad, then the instruction predicated upon it is also bad.[57]

§ 101. Reading from statutes or ordinances.

Where the case is based upon an unambiguous statute or ordinance, it is proper to quote the statute or ordinance in the judge's instructions.

The practice is permitted either in civil cases[58] or criminal

[52] King v. State, 166 Ga 10, 142 SE 160.

[53] Lewis v. State, 108 TexCr 258, 1 SW2d 298.

[54] Chester v. Chicago, B. & Q. R. Co., 247 IllApp 505.

[55] Teal v. Teal, 324 Ill 207, 155 NE 28.

[56] Gale v. Wilber, 163 Va 211, 175 SE 739.

[57] **Indiana.** McBeth-Evans Glass Co. v. Brunson, 70 IndApp 513, 122 NE 439.

Missouri. Cunningham v. Kansas City Public Service Co., 229 MoApp 174, 77 SW2d 161.

Virginia. See also Smyth Bros.-McCleary-McClellan Co. v. Beresford, 128 Va 137, 104 SE 371.

[58] **Federal.** Maryland Casualty Co. v. Cook-O'Brien Constr. Co., 69 F2d 462; Pryor v. Strawn, 73 F2d 595.

Alabama. Wise v. Schneider, 205 Ala 537, 88 S 662 (auto driving).

Arkansas. Van Valkinburgh v. State, 102 Ark 16, 142 SW 843; Pennewell v. State, 105 Ark 32, 150 SW 114; Louisiana & A. Ry. Co. v. Woodson, 127 Ark 323, 192 SW 174; Kansas City Southern Ry. Co. v. Whitley, 139 Ark 255, 213 SW 369.

California. People v. Bernard, 21 CalApp 56, 130 P 1063; People v. Lima, 36 CalApp 553, 172 P 762; Garrison v. Pearlstein, 68 CalApp 334, 229 P 351; Queirolo v. Pacific Gas & Elec. Co., 114 CalApp 610, 300 P 487; Withrow v. Becker, 6 CalApp2d 723, 45 P2d 235; Cowan v. Market Street Ry. Co., 8 Cal App2d 642, 47 P2d 752.

Florida. Florida Ry. Co. v. Dorsey, 59 Fla 260, 52 S 963.

Georgia. Pitts v. State, 114 Ga 35, 39 SE 873; Dunn v. Bray, 145 Ga 195, 88 SE 931; Holland v. Bell, 148 Ga 277, 96 SE 419; Howell v. State, 17 GaApp 802, 88 SE 592 (mobs); McNulty v. State, 21 GaApp

prosecutions.[59] Of course, if the instruction is required to be in writing, orally quoting the statute would be error.[60]

783, 95 SE 304 (cheating and defrauding); Shields v. Carter, 22 Ga App 507, 96 SE 330 (meaning of preponderance of evidence); Miller v. State, 26 GaApp 642, 107 SE 64; Hamrick v. Stewart, 29 GaApp 220, 114 SE 723 (liability for torts of wife, child or servant); Lilly v. Citizens Bank & Trust Co., 44 Ga App 653, 162 SE 639.

It is not error to give a section of the code in its exact language, although it has been construed somewhat differently from the popular acception of the terms employed, if it is thereafter fully explained in accordance with such construction. Western Union Tel. Co. v. Harris, 6 GaApp 260, 64 SE 1123.

Illinois. Greene v. L. Fish Furn. Co., 272 Ill 148, 111 NE 725; People v. Crawford, 278 Ill 134, 115 NE 901 (obtaining money by confidence game); Deming v. Chicago, 321 Ill 341, 151 NE 886; Minnis v. Friend, 360 Ill 328, 196 NE 191; Wells v. Baltimore & O. S. W. R. Co., 153 IllApp 23; Vetrovec v. Meyers, 158 IllApp 391; Adams v. Jurich, 160 IllApp 522; Eaton v. Marion County Coal Co., 173 IllApp 444, affd. in 257 Ill 567, 101 NE 58; Wagner v. Chicago, R. I. & P. R. Co., 200 Ill App 305 (federal employers' liability act); McCormick v. Decker, 204 Ill App 554; Warren v. Jackson, 204 IllApp 576; Sells v. Grand Trunk Western R. Co., 206 IllApp 45; Bohm v. Dalton, 206 IllApp 374 (speed of motor vehicles); Corlett v. Illinois Cent. R. Co., 241 IllApp 124; Sweat v. Aircraft & Diesel Equip. Corp., 335 IllApp 177, 81 NE2d 8 (following Deming v. Chicago, 321 Ill 341, 151 NE 886).

Indiana. Vandalia Coal Co. v. Moore, 69 IndApp 311, 121 NE 685.

Iowa. Haines v. M. S. Welker & Co., 182 Ia 431, 165 NW 1027; Kime v. Owens, 191 Ia 323, 182 NW 398 (right of way at intersections).

Massachusetts. Commonwealth v. Burns, 167 Mass 374, 45 NE 755.

Minnesota. Allen v. Johnson, 144 Minn 333, 175 NW 545 (duty of drivers at crossing intersections).

Missouri. Kippenbrock v. Wabash R. Co., 270 Mo 479, 194 SW 50; State v. Powell, 66 MoApp 598.

Montana. State v. Cassill, 71 Mont 274, 229 P 716.

Nebraska. Lord v. Roberts, 102 Neb 49, 165 NW 892.

New Jersey. Chiapparine v. Public Service Ry. Co., 91 NJL 581, 103 A 180 (duty of motorman to sound bell on approach to crossing); Felix v. Adelman, 113 NJL 445, 174 A 565; Bradley v. Shreve, 6 NJMisc 729, 142 A 642.

New York. People v. Scanlon, 132 AppDiv 528, 23 NYCr 426, 117 NYS 57.

North Dakota. Huus v. Ringo, 76 ND 763, 39 NW2d 505.

Ohio. Bruce v. Cook, 34 OhApp 563, 171 NE 424; Toledo Consol. Street Ry. Co. v. Mammet, 13 OhCir Ct 591, 60 OhCirDec 244; Toledo v. Nitz, 3 OhCirCt (N. S.) 532, 13 OhCirDec 350; Holliday v. Jones, 53 OLA 167, 84 NE2d 602.

Oklahoma. Devonian Oil Co. v. Smith, 124 Okl 71, 254 P 14.

In the case of Manglesdorf Seed Co. v. Busby, 118 Okl 255, 247 P 410, it was held reversible error to instruct in the language of a part of the statute.

South Carolina. Keel v. Seaboard Air Line Ry., 108 SC 390, 95 SE 64; State v. Brown, 113 SC 513, 101 SE 847; State v. Blackstone, 113 SC 528, 101 SE 845.

Texas. Gentry v. State, 61 TexCr 619, 136 SW 50; Walker v. State, 78 TexCr 237, 181 SW 191 (law of mistake in larceny).

[59] **Alabama.** Frazer v. State, 159 Ala 1, 49 S 245.

Arkansas. Mitchell v. State, 73 Ark 291, 83 SW 1050.

California. People v. Trinidad,

In civil cases, it has been held proper to quote a statute setting the standards of care in mining operations,[61] statutes setting speed limits,[62] a statute defining punitive damages.[63] Quoting statutes in civil cases has most frequently arisen in charges to the jury in negligence cases involving automobile or train accidents. In most cases, it is not deemed improper for the court to read or quote the pertinent statute.[64] In some cases, mere quotation is insufficient. An instruction on alleged negligence in violation of a statute should tell the jury what conduct amounts to such violation and not merely quote the statute, and where there is evidence of a legal excuse for the violation of a statute, it is the court's duty to instruct on the fact of such evidence.[65]

In criminal cases, the court may define the offense charged against the defendant in the language of the statute.[66] The court

198 Cal 728, 247 P 907; People v. Costa, 137 CalApp 617, 31 P2d 248; People v. Bill, 140 CalApp 389, 35 P2d 645; People v. Barnes, 111 Cal App 605, 295 P 1045 (reasonable doubt and presumption of innocence).

Georgia. Smith v. State, 43 Ga App 215, 158 SE 339 (defining seduction).

Idaho. State v. Jurko, 42 Idaho 319, 245 P 685.

Illinois. People v. Ficke, 343 Ill 367, 175 NE 543 (definition of accessories and explanation of statute relative to conviction with or without conviction of principal); People v. Nevin, 343 Ill 597, 175 NE 797 (defining larceny); People v. Ripplinger, 243 IllApp 467.

Indiana. Sanford v. State, 198 Ind 198, 152 NE 814.

Kentucky. In Horton v. Commonwealth, 254 Ky 443, 71 SW2d 984, it is held that the language of the statute should be literally followed in instructing as to reasonable doubt, but that slight variations will not be fatal.

It is not absolutely required that an instruction on the trial of a defendant for a statutory offense should follow the language of the statute providing the meaning and substance of the statute is given. Watson v. Commonwealth, 15 KyL 360, 23 SW 666.

Texas. Williams v. State, 117 TexCr 459, 34 SW2d 886.

Wisconsin. State v. Galle, 214 Wis 46, 252 NW 277.

[60] Smurr v. State, 88 Ind 504.

[61] Sommer v. Carbon Hill Coal Co., 46 CCA 255, 107 F 230.

So where an action is brought under a state mining act for a wrongful death, being based upon the defendant's alleged failure to provide suitable props, caps and timber, an instruction referring thereto and making use of the language of the statute is rightly given. Consolidated Coal Co. v. Dombroski, 106 IllApp 641.

[62] Lustik v. Walters, 169 Minn 313, 211 NW 311; Kerzie v. Rodine, 216 Minn 44, 11 NW2d 771; City Transportation Corp. v. Seckler, 32 TennApp 661, 225 SW2d 288.

[63] McNatt v. McRae, 117 Ga 898, 45 SE 248.

[64] Interstate Public Service Co. v. Ford, 96 IndApp 639, 185 NE 525; Pesola v. Tremayne, 108 Pa Super 535, 165 A 661.

[65] Sanford v. Nesbit, 234 Ia 14, 11 NW2d 695.

[66] **California.** People v. Marino, 5 CalApp2d 550, 42 P2d 713.

Mississippi. Brown v. State, 173 Miss 542, 158 S 339.

may read the statutory definition of reasonable doubt,[67] or presumption of innocence,[68] or instruct on aggravated assault,[69] or in a liquor prosecution charge in the language of the pertinent statute.[70] The court may use the statutory language in defining an accessory.[71] An instruction on flight may be given in the words of a statutory provision.[72]

There are limitations on the practice of quoting statutes and ordinances. It is not an assurance of the correctness of an instruction merely that it is in the language of the statute.[73]

The court should explain terms in the statute, the meanings of which are ambiguous and material to the issue.[74] Where the highest court in the state has placed a modified construction on a statute, the instruction should be framed accordingly.[75] It is proper to define the word "drug" in the language of the statute in a prosecution for practicing medicine without a license.[76] Where it is a question of fact in a case as to whether the plaintiff may be called a fellow-servant, it is error to read the statute bearing on the subject, if the statute is susceptible to more than one interpretation.[77] In a prosecution for seduction, it is unnecessary to define the term further, where there is no evidence of unchastity of the prosecutrix.[78] If the statute defines conspiracy, it is unnecessary for the court to define the term in its own words.[79]

A court may err in quoting too much of the statute. It is error to incorporate in the instructions a section of the statutes, where the section contains subjects not in issue nor proper to be presented to the jury.[80] But this practice would not be erroneous,

Wisconsin. Koss v. State, 217 Wis 325, 258 NW 860.

[67] Fleming v. Commonwealth, 217 Ky 485, 290 SW 339; Clemens v. Commonwealth, 224 Ky 370, 6 SW2d 483.

[68] People v. Madison, 3 Cal2d 668, 46 P2d 159.

[69] Wolter v. State, 105 TexCr 363, 288 SW 233.

[70] People v. Daugherty, 324 Ill 160, 154 NE 907.

[71] People v. Nowicki, 330 Ill 381, 161 NE 747.

[72] People v. Blake, 129 CalApp 196, 18 P2d 399.

[73] Wolf v. Mallinckrodt Chem. Works, 336 Mo 746, 81 SW2d 323.

[74] Western Coal & Min. Co. v. Greeson, 284 F 510; Lamke v. Harty Bros. Trucking Co., 96 Conn 505, 114 A 533; Wolfe v. Baskin, 137 OhSt 284, 28 NE2d 629; Kohn v. B. F. Goodrich Co., 139 OhSt 141, 38 NE2d 592.

[75] Waterbury v. Chicago, M. & St. P. R. Co., 207 IllApp 375.

[76] State v. Verbon, 167 Wash 140, 8 P2d 1083.

[77] **Arkansas.** Kansas City, Ft. S. & M. Ry. Co. v. Becker, 63 Ark 477, 39 SW 358. See also Arkansas Shortleaf Lbr. Co. v. Wilkinson, 149 Ark 270, 232 SW 8.

Georgia. Clay v. Brown, 38 GaApp 157, 142 SE 911.

Utah. Dimmick v. Utah Fuel Co., 49 Utah 430, 164 P 872.

[78] Maples v. Commonwealth, 242 Ky 212, 45 SW2d 1060.

[79] State v. Harris, 10 NJMisc 236, 158 A 848.

[80] **California.** Moss v. Stubbs, 111 CalApp 359, 295 P 572, 296 P 86.

provided the instruction properly limited the application of the statutes to matters in issue.[81]

A court may err in not quoting enough of the applicable statute. But this error may not be prejudicial if there is no evidence on the portion of the statute omitted,[82] or if the judge cures the error by fully charging as to the applicable portions of the statute.[83]

There may be a question whether the quoting of an applicable statute is mandatory or merely permissible conduct. At least one court has clearly declared that the court can substitute language of its own choosing equivalent to the terms of the statute.[84] At any rate, the court cannot refer the jury to the statutes, for this would require the jury to take the statutes to their room and there find the particular statute and interpret it.[85]

Minor errors are not prejudicial. If a charge states the law correctly, a reference to the wrong section of the code is immaterial.[86] Referring to a statement of law as a code provision instead of an ordinance is not misleading.[87]

§ 102. Quotations from decisions.

The court may incorporate in the charge a quotation from an opinion of a higher court which lays down a correct rule of law applicable to the facts in the case at bar.

Although the practice of incorporating in the charge a quotation from an opinion of a higher court is permitted, it is not recommended.[88] A trial judge may quote from the regular

Georgia. Central of Georgia Ry. Co. v. De Loach, 18 GaApp 362, 89 SE 433; Ellis v. State, 21 GaApp 499, 94 SE 629.

Illinois. People v. Moshiek, 323 Ill 11, 153 NE 720.

Indiana. Gross v. State, 186 Ind 581, 117 NE 562, 1 ALR 1151.

Nebraska. Henkel v. Boudreau, 88 Neb 784, 130 NW 753.

[81] Wesley v. Waterloo (City of), 232 Ia 1299, 8 NW2d 430.

[82] Texas Employers' Ins. Assn. v. Brumbaugh (TexCivApp), 224 SW 2d 761.

[83] Greenwalt v. Yuhas, 83 OhApp 426, 84 NE2d 221.

[84] Morris v. Fitzwater, 187 Or 191, 210 P2d 104.

[85] Butler v. Gill, 34 Okl 814, 127 P 439.

[86] Chesrown v. Bevier, 101 OhSt 282, 128 NE 94.

[87] Reed v. Hensel, 26 OhApp 79, 159 NE 843.

[88] California. People v. Adams, 76 CalApp 188, 244 P 114; Long v. Barbieri, 120 CalApp 207, 7 P2d 1082 (saying that it is a dangerous practice to quote indiscriminately the statements of opinions of appellate courts).

Georgia. Hogan v. Hogan, 196 Ga 822, 28 SE2d 74; Central of Georgia Ry. Co. v. Hartley, 25 Ga App 110, 103 SE 259; Georgia Ry. & Power Co. v. Shaw, 25 GaApp 146, 102 SE 904; Wilborn v. Barnes, 28 GaApp 254, 110 SE 738.

Iowa. Liddle v. Salter, 180 Ia 840, 163 NW 447.

part of the opinion or he may use an instruction that has been approved by a higher court. In any event, the mere fact of quotation does not assure approval or disapproval.

The danger of reusing an instruction or quoting an opinion is that the language may not be applicable to the facts of the case at bar.[89] The language of the appellate tribunal frequently is argumentative and where this is the case, the quotation is inappropriate for an instruction.[90]

A quotation from an opinion of a higher court or a previously approved instruction would be proper if applicable to the facts in the case at bar.[91] Accordingly, an exception will not lie to the action of the trial court in reading an extract from an opinion where the law is correctly stated and the opinion illustrates one phase of the case at bar.[92] So the trial court in a

New York. People v. Rutigliano, 261 NY 103, 184 NE 689.

Ohio. Marietta & C. R. Co. v. Picksley, 24 OhSt 654; Deckant v. Cleveland, 88 OhApp 469, 97 NE2d 84, revd. 155 OhSt 498, 99 NE2d 609, but on another point.

Virginia. Abernathy v. Emporia Mfg. Co., 122 Va 406, 95 SE 418.

[89] **Colorado.** See Denver Tramway Corp. v. Kuttner, 95 Colo 312, 35 P2d 852 (where the instruction was condemned because built up from detached portions of the argument found in a reported opinion).

Georgia. Jones v. F. S. Royster Guano Co., 6 GaApp 506, 65 SE 361.

New York. See also People v. Stern, 201 AppDiv 687, 195 NYS 348.

[90] **Alabama.** Harper v. State, 16 AlaApp 153, 75 S 829.

California. Discussions in Supreme Court decisions should not be incorporated in the instructions. Davis v. Hearst, 160 Cal 143, 116 P 530.

Georgia. Atlanta & W. P. R. Co. v. Hudson, 123 Ga 108, 51 SE 29; Porter v. State, 180 Ga 147, 178 SE 151.

[91] **Alabama.** In a prosecution for homicide it is not error in Alabama for the court to state facts in a former case showing that no particular time is required for premeditation or deliberation. McGuffin v. State, 178 Ala 40, 59 S 635.

Connecticut. But see Radwick v. Goldstein, 90 Conn 701, 98 A 583.

Iowa. Muller v. DeVries, 193 Ia 1337, 188 NW 885.

Massachusetts. Post v. Leland, 184 Mass 601, 69 NE 361.

The court may read from an opinion by way of illustration. Rothwell v. New York, N. H. & H. R. Co., 223 Mass 550, 112 NE 231.

Michigan. People v. Niles, 44 Mich 606, 7 NW 192; Power v. Harlow, 57 Mich 107, 23 NW 606.

Missouri. Courts ought to adhere to charges that have received the approval of the Supreme Court and not attempt definitions which add nothing to the meaning of well understood terms. State v. Nerzinger, 220 Mo 36, 119 SW 379.

Rhode Island. McCoart v. Rhode Island Co. (RI), 108 A 585.

[92] **Indiana.** It has been held not to constitute error where the trial judge, in giving a definition of a term peculiar to the law, quotes from the Supreme Court of the state or from a recognized text writer. Bronnenburg v. Charman, 80 Ind 475.

Massachusetts. Post v. Leland, 184 Mass 601, 69 NE 361.

South Carolina. Sumter Trust Co. v. Holman, 134 SC 412, 132 SE 811; State v. McMillan, 144 SC 121, 142 SE 236.

criminal case may make part of its charge extracts from the opinion of a higher court on the question of premeditation, deliberation, and criminal intent, where they correctly state well-recognized principles and define with accuracy the rules applicable to those questions in the case at bar.[93]

It is error for the court to read to the jury the full report of a decided case.[94]

While the court may use a reported case for purposes of illustration in his instructions, he is not permitted to state the facts of the reported case as part of his illustration.[95]

It is improper practice to cite authorities on the margin of an instruction, at least where written instructions are given to the jury.[96]

§ 103. Misleading instructions.

The purpose of an instruction is to aid and enlighten the jury, and this object is defeated by instructions which confuse the jury.

It is obvious that if instructions are to serve their purpose of enlightening the jury, confusing instructions should not be given.[97] Instructions should be so unequivocal that a jury can

[93] People v. Breen, 181 NY 493, 74 NE 483. See also State v. Chiles, 58 SC 47, 36 SE 496.

[94] "We think it was not proper for the court to read to the jury the full report of the case * * *. It is no more correct for the court than for counsel to read law reports to a jury. There are in all reports discussions which may include references to facts real or supposed, and law questions in or out of the record, which cannot be taken literally and just as they stand as guides to a jury in some other case, and with different facts. Between this case and that there are very serious differences as to the alleged cause and manner of the accident, and the supposed duty and negligence, that need not be dwelt upon, because the citations would have been improper in the way resorted to in any case. Precedents are for the use of courts, who are supposed competent to extract their principles, and not for juries, who cannot be expected to discriminate in their use. It is the office of a trial court to formulate the legal rules to guide the jury in the case before them with as little extraneous combination as possible." Lendberg v. Brotherton Iron Min. Co., 75 Mich 84, 42 NW 675.

[95] State v. Hester, 137 SC 145, 134 SE 885.

[96] **Federal.** Notary v. United States, 16 F2d 434, 49 ALR 1446.

Idaho. State v. Sage, 22 Idaho 489, 126 P 403, AnnCas 1914B, 251.

Illinois. The Illinois court has held it erroneous to make reference to Supreme Court decisions on margin of written instructions. People v. Bradley, 324 Ill 294, 155 NE 301. See also Springer v. Orr, 82 IllApp 558.

[97] **Federal.** Pulaski Min. Co. v. Hagan, 116 CCA 352, 196 F 724.

Alabama. Sullivan v. State, 117 Ala 214, 23 S 678; Birmingham Paint & Roofing Co. v. Gillespie, 163 Ala 408, 50 S 1032; Southern Ry. Co. v. Smith, 173 Ala 697, 55 S 913; Burton v. State, 194 Ala 2, 69 S 913; Mobile County v. Linch, 198 Ala 57, 73 S 423; Alabama Great Southern R. Co. v. Flinn, 199

Ala 177, 74 S 246; Shipp v. Ferguson, 202 Ala 9, 79 S 307; Herring v. Louisville & N. R. Co., 203 Ala 136, 82 S 166; Western Union Tel. Co. v. Hawkins, 14 AlaApp 295, 70 S 12; McAdoo v. Booker, 17 AlaApp 623, 88 S 196.

Arkansas. Nordin v. State, 143 Ark 364, 220 SW 473.

California. Estrella Vineyard Co. v. Butler, 125 Cal 232, 57 P 980; People v. Cox, 29 CalApp 419, 155 P 1010; People v. Hartwell, 39 Cal App 24, 177 P 885; Bibby v. Pacific Elec. Ry. Co., 58 CalApp 658, 209 P 387.

Florida. Jacksonville Elec. Co. v. Adams, 50 Fla 429, 39 S 183, 7 Ann Cas 241; Holman Live Stock Co. v. Louisville & N. R. Co., 81 Fla 194, 87 S 750.

Georgia. Goodson v. State, 162 Ga 178, 132 SE 899; Malsby & Co. v. Widincamp, 24 GaApp 737, 102 SE 178.

Illinois. Brown v. Illinois Terminal Co., 319 Ill 326, 150 NE 242, affg. 237 IllApp 145; People v. Wynekoop, 359 Ill 124, 194 NE 276; Illinois Cent. R. Co. v. Becker, 119 IllApp 221; Alexander v. Donk Bros. Coal & Coke Co., 149 IllApp 378; Farley v. Wabash R. Co., 153 IllApp 493; Smith v. Kewanee Light & Power Co., 196 IllApp 118; Douvia v. Ottawa, 200 IllApp 131.

Indiana. Heed v. Gummere, 192 Ind 227, 136 NE 5; Shilling v. Braniff, 25 IndApp 676, 58 NE 855.

An instruction was held misleading in use of terms as "slight care," "great care," "highest degree of care," or other like expressions, as indicating the quantum of care the law exacts under special conditions and circumstances. Union Trac. Co. v. Berry, 188 Ind 514, 121 NE 655, reh. den. 124 NE 737, 32 ALR 1171.

Kansas. State v. Ingram, 16 Kan 14; Irvin v. Missouri Pacific R. Co., 81 Kan 649, 106 P 1063, 26 LRA (N. S.) 739.

Maryland. Gambrill v. Schooley, 95 Md 260, 52 A 500, 63 LRA 427; Rosman v. Travelers Ins. Co., 127 Md 689, 96 A 875, AnnCas 1918C, 1047; Levine v. Chambers, 141 Md 336, 118 A 798.

Massachusetts. Dixon v. New England R., 179 Mass 242, 60 NE 581.

Michigan. Schoenberg v. Voigt, 36 Mich 310.

Minnesota. Fransen v. Falk Paper Co., 135 Minn 284, 160 NW 789.

Missouri. Price v. Breckenridge, 92 Mo 378, 5 SW 20; Martin v. Wiglesworth (MoApp), 193 SW 906; Markland v. Brotherhood of American Yeomen (MoApp), 210 SW 774; Robertson v. Kochtitzky (MoApp), 217 SW 543.

Montana. State v. Postal Tel. Cable Co., 53 Mont 104, 161 P 953.

Nebraska. Faulkner v. Gilbert, 61 Neb 602, 85 NW 843, 62 Neb 126, 86 NW 1074.

North Carolina. Bragaw v. Supreme Lodge, 124 NC 154, 32 SE 544.

Ohio. French v. Millard, 2 OhSt 44; Washington Mut. Ins. Co. v. Merchants & Mfrs. Mut. Ins. Co., 5 OhSt 450; White v. Thomas, 12 OhSt 312, 80 AmDec 347; Hadley v. Clinton County Importing Co., 13 OhSt 502, 82 AmDec 454; Little Miami R. Co. v. Wetmore, 19 OhSt 110, 2 AmRep 373; Oliver v. Sterling, 20 OhSt 391; Callahan v. State, 21 OhSt 306; Marietta & C. R. Co. v. Picksley, 24 OhSt 654; Steel v. Kurtz, 28 OhSt 191; Aetna Ins. Co. v. Reed, 33 OhSt 283; Himelright v. Johnson, 40 OhSt 40; Mahoning & Shenango Ry. & Light Co. v. Leedy, 104 OhSt 487, 136 NE 198.

Oklahoma. Friedman v. Weisz, 8 Okl 392, 58 P 613; Barker v. Creek Coal & Min. Co., 80 Okl 86, 194 P 195.

Oregon. Porter Constr. Co. v. Berry, 136 Or 80, 298 P 179.

Texas. Galveston, H. & S. A. R. Co. v. Eaten (TexCivApp), 44 SW 562.

Virginia. Ragland & Co. v. Butler, 18 Gratt. (Va) 323.

West Virginia. State v. Cain, 20 WVa 679; State v. Sutfin, 22 WVa

experience no doubt as to their significance.[98] But where the instruction is not misleading to an intelligent jury, it is not material that it is not expressed in the most precise and elegant English.[99]

Whether an instruction is misleading depends upon how and in what sense, under the evidence and the circumstances of the trial, ordinary men would understand it.[1]

This rule is violated by an instruction which is involved,[2] or which is so verbose as to cause the jury to lose the train of

771; Ward v. Brown, 53 WVa 227, 44 SE 488; State v. Davis, 58 WVa 94, 51 SE 230; Walker v. Strosnider, 67 WVa 39, 67 SE 1087, 21 AnnCas 1; Angrist v. Burk, 77 WVa 192, 87 SE 74; Chambers v. Spruce Lighting Co., 81 WVa 714, 95 SE 192; Wilson v. Elkins, 86 WVa 379, 103 SE 118; State v. Murphy, 89 WVa 413, 109 SE 771.

Wisconsin. Sullivan v. Collins, 107 Wis 291, 83 NW 310; Martin v. Ebert, 245 Wis 341, 13 NW2d 907, 152 ALR 1142.

[98] State v. Green, 45 Nev 297, 202 P 368. See also People v. Paddock, 300 Ill 590, 133 NE 240.

[99] **Indiana.** Hauss v. Niblack, 80 Ind 407.

Montana. Tiggerman v. Butte, 44 Mont 138, 119 P 477.

Washington. It is not demanded that the instruction be expressed in the most simple and direct language but it is enough if the court gives such instructions as are readily understood and are not likely to mislead the ordinary mind. Carson v. Old Nat. Bank, 37 Wash 279, 79 P 927.

[1] **Florida.** Georgia Southern & F. Ry. Co. v. Hamilton Lbr. Co., 63 Fla 150, 58 S 838.

Illinois. Young v. Fairfield, 173 IllApp 311.

Missouri. The test of the correctness of instructions lies not in the indulgence of that close analysis which the lawyer in the seclusion of his office and with the aid of his books and the trial or appellate courts, with the benefit of briefs and arguments of learned counsel before them, give to the instructions, but as to how those instructions will naturally be understood by the average men who compose our juries, on whose judgment on the facts the courts must act. When instructions are so involved as to cloud the real issue and require careful, critical examination on the part of the trial and of the appellate courts to determine exactly what they mean or to determine what inference can be drawn from them, the very object of instructing a jury is defeated. Knapp v. Hanley, 153 MoApp 169, 132 SW 747.

[2] **Alabama.** Ragland v. State, 125 Ala 12, 27 S 983; Simmons v. State, 145 Ala 61, 40 S 660; Turner v. State, 160 Ala 40, 49 S 828; Penry v. Dozier, 161 Ala 292, 49 S 909; Phillips v. State, 162 Ala 14, 50 S 194; Birmingham Ry., Light & Power Co. v. Milbrat, 201 Ala 368, 78 S 224; Martin v. State, 2 AlaApp 175, 56 S 64; Faulk v. State, 4 Ala App 177, 59 S 225; Southern Ry. Co. v. Hobson, 4 AlaApp 408, 58 S 751; Evans v. State, 17 AlaApp 155, 82 S 645.

California. People v. Doble (Cal App), 257 P 81.

Florida. Bass v. State, 58 Fla 1, 50 S 531.

Illinois. People v. King, 276 Ill 138, 114 NE 601; Bourland v. Louisville & N. R. Co., 199 IllApp 126; Pickens v. Kankakee, 200 IllApp 547; Duncan v. Kammeier, 206 IllApp 207.

Maryland. Gordon v. Opalecky, 152 Md 536, 137 A 299.

Minnesota. Pearson v. United States Fidelity & Guaranty Co., 138 Minn 240, 164 NW 919.

thought;[3] or where it states conflicting or inconsistent propositions;[4] or when there is inaccuracy in the statement of facts;[5] or where it refers to a contingency, but omits to say what the contingency is;[6] or where it combines in one instruction several unrelated propositions;[7] or where the instruction is susceptible of the construction that contributory negligence can be established only by the evidence of the defendant;[8] or where it gives several definitions of the offense for which accused is being tried;[9] or where the charge contains numerous and complicated instructions on reasonable doubt;[10] or where it places upon one party the burden of proving a fact admitted by his opponent;[11] or places the burden of proof on the wrong party;[12] or the

Oklahoma. Friedman v. Weisz, 8 Okl 392, 58 P 613; Adair v. State, 15 OklCr 619, 180 P 253.

Texas. Barbee v. State, 58 TexCr 129, 124 SW 961.

Virginia. More than one correct proposition of law may be set out in same instruction where no confusion is likely to result. Abernathy v. Emporia Mfg. Co., 122 Va 406, 95 SE 418.

West Virginia. State v. Greer, 22 WVa 800.

Wisconsin. An instruction is erroneous where so worded as to be difficult to understand and to admit reasonably of a construction that would mislead the jury on a material point. Buel v. State, 104 Wis 132, 80 NW 78.

[3] **Illinois.** Scott v. Parlin & Orendorff Co., 146 IllApp 92, affd. in 245 Ill 460, 92 NE 318.

Missouri. Williams v. Ransom, 234 Mo 55, 136 SW 349; Stid v. Missouri Pac. Ry. Co., 236 Mo 382, 139 SW 172.

Rhode Island. Demara v. Rhode Island Co. (RI), 103 A 708.

Virginia. Reid v. Medley's Admr., 118 Va 462, 87 SE 616.

[4] **Colorado.** Trimble v. Collins, 64 Colo 464, 172 P 421.

Illinois. Hostettler v. Mushrush, 194 IllApp 58.

Indiana. Bump v. McGrannahan, 61 IndApp 136, 111 NE 640.

Kentucky. American Book Co. v. Archer, 170 Ky 744, 186 SW 672.

Missouri. Ware v. Flory, 199 Mo App 60, 201 SW 593 (definition of domicile as permanent home).

Nebraska. Bryant v. Modern Woodmen, 86 Neb 372, 125 NW 621, 27 LRA (N. S.) 326, 21 AnnCas 365.

North Carolina. Tillotson v. Fulp, 172 NC 499, 90 SE 500.

Ohio. Aetna Ins. Co. v. Reed, 33 OhSt 283; Montanari v. Haworth, 108 OhSt 8, 140 NE 319.

Oklahoma. Petroleum Iron Works Co. v. Bullington, 61 Okl 311, 161 P 538.

West Virginia. Bartley v. Western Maryland Ry. Co., 81 WVa 795, 95 SE 443.

[5] Inlet Swamp Drainage Dist. v. Gehant, 286 Ill 558, 122 NE 127.

[6] Gambrill v. Schooley, 95 Md 260, 52 A 500, 63 LRA 427.

[7] Beam Motor Car Co. v. Loewer, 131 Md 552, 102 A 908.

[8] Lyon v. Phillips (TexCivApp), 196 SW 995.

[9] People v. Monahan, 59 Cal 389.

[10] People v. Scott, 284 Ill 465, 120 NE 553.

[11] **Florida.** Seaboard Air Line Ry. Co. v. Hess, 73 Fla 494, 74 S 500.

Missouri. Sexton v. Lockwood (MoApp), 207 SW 856.

Ohio. Price v. Taylor, 12 OLA 621.

Texas. Dodson v. Watson (Tex CivApp), 225 SW 586.

[12] McNutt v. Kauffman, 26 OhSt 127; Cincinnati Trac. Co. v. Forrest, 73 OhSt 1, 75 NE 818; Cincinnati Trac. Co. v. Stephens, 75 OhSt 171,

instruction contains several independent conditions or propositions, any one of which, if true, would have compelled a verdict for the defendant, whereas only one is covered by the predicated statement of facts;[13] or where the court uses the facts of another case as an illustration;[14] or if it is susceptible of two constructions.[15] In an action on an insurance policy, a charge is misleading which tells the jury to find a verdict for the plaintiff for the amount of the policy with interest, twenty-five per cent damages, and attorney fees, or to find for the defendant without setting forth the basis for either verdict.[16]

An inadvertent statement, or mere slip of the judge's tongue, is not always prejudicial error. It may be harmless in view of its context and the thoroughness of the whole charge on the issues of the case.[17] The inadvertent use of the word "defendant" for "plaintiff" or vice versa is not generally held to render an instruction misleading if the case of inadvertence is plain.[18]

Adopting a charge prepared for a particular case to guide a jury in dissimilar cases is unsafe and often calculated to mislead.[19]

It is possible for an instruction to be abstractly correct and yet be susceptible of a misleading interpretation. Hence, if under such circumstances it is not modified in such a manner as to be clear, it should be refused.[20]

It has been judicially declared that the instructions should be short, concise, and directly to the point.[21] The length of an instruction may render it objectionable but this is not a fatal

79 NE 235; List & Son Co. v. Chase, 80 OhSt 42, 88 NE 120, 17 AnnCas 61; Newman Mfg. Co. v. Fisler, 81 OhSt 499, 91 NE 1135; Dykeman v. Johnson, 83 OhSt 126, 93 NE 626, 8 OLR 448; Montanari v. Haworth, 108 OhSt 8, 140 NE 319.

[13] Jacksonville Elec. Co. v. Adams, 50 Fla 429, 39 S 183, 7 AnnCas 241.

[14] State v. Tapp, 105 SC 55, 89 SE 394.

[15] Carpenter v. Connecticut General Life Ins. Co., 68 F2d 69; Hammond v. Thacker Coal & Coke Co., 105 WVa 423, 143 SE 91.

[16] Scottish Union & Nat. Ins. Co. v. Fortesque, 37 GaApp 366, 140 SE 893.

[17] City of Summerville v. Sellers, 94 GaApp 152, 94 SE2d 69.

[18] Benton v. Harley, 21 GaApp 168, 94 SE 46; Magowan v. Kentucky Utilities Co., 179 Ky 114, 200 SW 367; Turner v. Commonwealth, 185 Ky 382, 215 SW 76; W. J. Williams, Inc. v. Cummings (TexCiv App), 65 SW2d 379.

[19] Harrington v. State, 19 OhSt 264.

[20] **Alabama.** Torian v. Ashford, 216 Ala 85, 112 S 418.

California. People v. Arnold, 20 CalApp 35, 127 P 1060.

Illinois. Weltz v. Connell, 196 IllApp 211; Edwall v. Chicago, R. I. & P. R. Co., 208 IllApp 489.

Iowa. Gray v. Chicago, R. I. & P. Ry. Co., 160 Ia 1, 139 NW 934.

Kansas. State v. Ingram, 16 Kan 14.

New York. Hills v. Interborough Rapid Transit Co., 176 AppDiv 754, 163 NYS 1010.

[21] Duthie v. Washburn, 87 Wis

defect where it is clearly written and not difficult to follow.[22] But on the other hand, an instruction should be refused if its length, together with verbosity and uncertainty of meaning, render it likely to mislead the jury.[23] Instructions can be so prolix as to constitute prejudicial error because of confusion to the jury and the practical impossibility of their being able to grasp the import of the charge. This occurred in a criminal case where the instructions were so extended that eight hours were consumed in their delivery, and on appeal they constituted one hundred sixty-three pages of the printed record.[24]

§ 104. Contradictory instructions.

Instructions are misleading if the court gives contradictory instructions on a material issue.

The theory is that instructions when read together must be harmonious.[25] For the effect of contradictory instructions must always be to confuse,[26] and it cannot be known which instruc-

231, 58 NW 380; Hoffman v. Regling, 217 Wis 66, 258 NW 347.

[22] **Illinois.** People v. Gormach, 302 Ill 332, 134 NE 756, 29 ALR 1120.

Iowa. See Livingstone v. Dole, 184 Ia 1340, 167 NW 639.

Missouri. Wolfe v. Payne, 294 Mo 170, 241 SW 915; Roy v. Kansas City, 204 MoApp 332, 224 SW 132; Weddle v. Tarkio Elec. & Water Co. (MoApp), 230 SW 386.

An instruction was considered too long where it covered five pages of the record and covered a phase of the case which was of a simple nature. Burton v. Maupin (MoApp), 281 SW 83.

Ohio. Instruction held not reversible error because too long. Schroeder v. Cleveland Elec. Ry. Co., 24 OhCirCt (N. S.) 585, 35 OhCir Dec 19; Boswell v. N. O. Trac. & L. Co., 1 OLA 314.

Instruction held reversible error because too long. American Steel Packing Co. v. Conkle, 86 OhSt 117, 99 NE 89.

Instruction held not reversible error because too short. Lenart v. Cochran, 2 OLA 537.

[23] Leahy v. Monk, 162 Okl 256, 19 P2d 1077.

[24] People v. Kresel, 243 AppDiv 137, 277 NYS 168.

[25] **Arkansas.** Wells v. State, 102 Ark 627, 145 SW 531.

California. Starr v. Los Angeles Ry. Corp., 187 Cal 270, 201 P 599; Torvend v. Patterson, 136 CalApp 120, 28 P2d 413; Maggini v. West Coast Life Ins. Co., 136 CalApp 472, 29 P2d 263.

Illinois. Doty v. O'Neill, 272 Ill App 212.

Michigan. Fink v. Superior Lamp & Shade Co., 238 Mich 390, 213 NW 453.

Mississippi. Columbus & G. Ry. Co. v. Phillips, 160 Miss 390, 133 S 123.

Missouri. Nagy v. St. Louis Car Co. (Mo), 37 SW2d 513; Finn v. Indemnity Co. (MoApp), 297 SW 175; Tunget v. Cook (MoApp), 84 SW2d 970.

New Mexico. Hall v. Britt, 35 NM 371, 297 P 987.

Ohio. Swisher v. Kimbrough, 25 OhApp 233, 157 NE 823.

Oklahoma. Younger v. Blanchard Hdw. Co., 120 Okl 279, 251 P 56.

Rhode Island. Souza v. United Elec. Rys. Co., 51 RI 124, 152 A 419.

[26] **Federal.** Mideastern Contracting Corp. v. O'Toole, 55 F2d 909.

tion the jury followed.[27] Hence, if the instructions conflict upon a material point, they are erroneous.[28]

Arkansas. Rector v. Robins, 74 Ark 437, 86 SW 667; Arkansas Shortleaf Lbr. Co. v. Wilkinson, 149 Ark 270, 232 SW 8.

Indiana. Fowler v. Wallace, 131 Ind 347, 31 NE 53.

Michigan. Luck v. Gregory, 257 Mich 562, 241 NW 862.

Minnesota. Naylor v. McDonald, 185 Minn 518, 241 NW 674.

Missouri. Wilson v. Chattin, 335 Mo 375, 72 SW2d 1001; Dawes v. Starrett, 336 Mo 897, 82 SW2d 43; Mutual Life v. McKinnis (MoApp), 47 SW2d 564.

New Jersey. State v. Albertalli (NJ), 112 A 724.

New York. Weissbard v. Klein, 242 AppDiv 640, 272 NYS 247.

North Carolina. Supervisor & Comrs. v. Jennings, 181 NC 393, 107 SE 312.

Ohio. Reserve Trucking Co. v. Fairchild, 128 OhSt 519, 191 NE 745.

Oklahoma. Enghlin v. Pittsburgh County Ry. Co., 169 Okl 106, 36 P2d 32, 94 ALR 1180.

Oregon. McCabe v. Kelleher, 90 Or 45, 175 P 608.

Texas. Buie v. State, 128 TexCr 657, 83 SW2d 996.

Washington. Baker v. Rosaia, 165 Wash 532, 5 P2d 1019.

Wisconsin. Bleiler v. Moore, 94 Wis 385, 69 NW 164.

[27] **Illinois.** People v. Willy, 301 Ill 307, 133 NE 859.

Missouri. Bennett v. Standard Acc. Ins. Co., 209 MoApp 81, 237 SW 144.

Ohio. Industrial Comm. v. Ripke, 129 OhSt 649, 196 NE 640, 3 OhO 35.

West Virginia. Penix v. Grafton, 86 WVa 278, 103 SE 106; Zinn v. Cabot, 88 WVa 118, 106 SE 427; Thomas v. Monongahela Valley Trac. Co., 90 WVa 681, 112 SE 228.

Wisconsin. Eggett v. Allen, 106 Wis 633, 82 NW 556; Yerkes v. Northern Pac. Ry. Co., 112 Wis 184, 88 NW 33, 88 AmSt 961; Schmidt v. State, 124 Wis 516, 102 NW 1071.

[28] **Federal.** In Lewis v. United States, 74 F2d 173, instructions were held not so inconsistent as to warrant reversal.

Alabama. Carter v. Fulgham, 134 Ala 238, 32 S 684.

Arkansas. Rector v. Robins, 74 Ark 437, 86 SW 667; St. Louis, I. M. & S. Ry. Co. v. Hudson, 95 Ark 506, 130 SW 534; Chicago Mill & Lbr. Co. v. Johnson, 104 Ark 67, 147 SW 86; Simmons v. Lusk, 128 Ark 336, 194 SW 11; Harkrider v. Howard, 134 Ark 575, 203 SW 14.

California. Bank of Stockton v. Bliven, 53 Cal 708; Abbott v. Arp, 179 Cal 328, 176 P 458; Tognazzini v. Freeman, 18 CalApp 468, 123 P 540; DeSoto v. Pacific Elec. Ry. Co., 49 CalApp 285, 193 P 270; Pittam v. Riverside, 128 CalApp 57, 16 P2d 768.

Colorado. Barr v. Colorado Springs & I. Ry. Co., 63 Colo 556, 168 P 263; Arnett v. Huggins, 18 ColoApp 115, 70 P 765.

Connecticut. Pollak v. Danbury Mfg. Co., 103 Conn 553, 131 A 426.

Florida. Escambia County Elec. Light & Power Co. v. Sutherland, 61 Fla 167, 55 S 83; Farnsworth v. Tampa Elec. Co., 62 Fla 166, 57 S 233.

Illinois. People v. Emmel, 292 Ill 477, 127 NE 53; Wood v. Olson, 117 IllApp 128.

Indiana. Fowler v. Wallace, 131 Ind 347, 31 NE 53; Michigan City v. Werner, 186 Ind 149, 114 NE 636; State ex rel. Roe v. Dudley, 45 IndApp 674, 91 NE 605; Steele v. Michigan Buggy Co., 50 IndApp 635, 95 NE 435.

Iowa. Kerr v. Topping, 109 Ia 150, 80 NW 321; State v. Glaze, 177 Ia 457, 159 NW 260; Peterson v. McManus, 187 Ia 522, 172 NW 460.

Kentucky. Wells v. Cumberland Tel. & T. Co., 178 Ky 261, 198 SW

Even if one of the instructions is a correct statement of the law, most courts agree that the correct instruction does not cure the error in giving another that is inconsistent with it.[29] Some courts, however, hold that the error is cured if the incorrect instruction is expressly withdrawn,[30] or that conflicting instructions must be prejudicial,[31] or tend to mislead the jury in deliberating on conflicting evidence.[32]

721; Equitable Life Assur. Soc. v. McDaniel, 223 Ky 505, 3 SW2d 1093.

Maryland. Philadelphia & B. Cent. R. Co. v. Holden, 93 Md 417, 49 A 625; Canton Lbr. Co. v. Liller, 112 Md 258, 76 A 415.

Michigan. Lake Shore & M. S. Ry. Co. v. Miller, 25 Mich 274; Pettersch v. Grand Rapids Gas Light Co., 245 Mich 277, 222 NW 123.

Missouri. State v. Herrell, 97 Mo 105, 10 SW 387, 10 AmSt 289; Kelley v. United Rys. Co., 153 Mo App 114, 132 SW 269; Crone v. United Rys. Co. (Mo), 236 SW 654; Mott v. Chicago R. I. & P. Ry. Co. (MoApp), 79 SW2d 1057.

Nebraska. Omaha Street Ry. Co. v. Boesen, 68 Neb 437, 94 NW 619.

North Carolina. Edwards v. Atlantic Coast Line R. Co., 129 NC 78, 39 SE 730; Brewer v. Ring, 177 NC 476, 99 SE 358.

Ohio. Miller & Co. v. Florer, 19 OhSt 356; Pendleton Street R. Co. v. Stallmann, 22 OhSt 1; Industrial Comm. v. Ripke, 129 OhSt 649, 196 NE 640, 3 OhO 35; St. Bernard v. Gohman, 10 OhApp 402, 31 OCA 273; Ohio Stock-Food Co. v. Gintling, 22 OhApp 82, 153 NE 341; Swisher v. Kimbrough, 25 OhApp 233, 157 NE 823; McCombs v. Landes, 35 OhApp 164, 171 NE 862, 32 OLR 199; Interstate Motor Freight Corp. v. Beecher, 37 OhApp 23, 174 NE 27.

Oklahoma. Payne v. McCormick Harvesting Mach. Co., 11 Okl 318, 66 P 287; Schulte v. Garrett, 99 Okl 52, 225 P 904.

Oregon. Malloy v. Marshall-Wells Hdw. Co., 90 Or 303, 173 P 267, 175 P 659, 176 P 589.

Pennsylvania. Elk Tanning Co. v. Brennan, 203 Pa 232, 52 A 246.

South Carolina. Warren v. Wilson, 89 SC 420, 71 SE 818, 992.

Texas. Patterson v. Williams (TexCivApp), 225 SW 89.

Utah. Konold v. Rio Grande W. Ry. Co., 21 Utah 379, 60 P 1021, 81 AmSt 693.

Vermont. W. B. Johnson & Co. v. Central Vermont Ry. Co., 84 Vt 486, 79 A 1095.

Virginia. Winchester v. Carroll, 99 Va 727, 40 SE 37.

Washington. Lee v. H. E. Gleason Co., 146 Wash 66, 262 P 133.

West Virginia. McKelvey v. Chesapeake & O. Ry. Co., 35 WVa 500, 14 SE 261; Stuck v. Kanawha & M. R. Co., 78 WVa 490, 89 SE 280; Producers Coal Co. v. Mifflin Coal Min. Co., 82 WVa 311, 95 SE 948.

[29] **Federal.** Nicola v. United States, 72 F2d 780.

Indiana. Emge v. Sevedge, 118 IndApp 277, 76 NE2d 687.

North Carolina. Green v. Bowers, 230 NC 651, 55 SE2d 192.

Pennsylvania. Hisak v. Lehigh Valley Transit Co., 360 Pa 1, 59 A2d 900.

[30] Cosgrave v. Malstrom, 127 NJL 505, 23 A2d 288; Horton v. Smith, 128 NJL 488, 27 A2d 193.

[31] Cole v. New York Cent. R. Co., 150 OhSt 175, 37 OhO 459, 80 NE2d 854.

[32] Cover v. Platte Valley Public Power & Irrigation Dist., 162 Neb 146, 75 NW2d 661.

Illustrations of conflict in civil cases.

(1). *Libel.* In an action for libel there is inconsistency between an instruction that the article involved is libelous per se, and another instruction authorizing the jury to find a verdict for either party.[33] In libel action an instruction that good faith would relieve the defendant from liability was inconsistent with another that good faith was not a defense but only went in mitigation of damages.[34]

(2). *Damages.* Instructions should be refused where they are so absolutely inconsistent upon the measure of damages that conformity with one necessarily implies a disregard of the other.[35]

(3). *Trespass.* Where the court instructs that the plaintiff is entitled, in any event, to recover damages for the tortious cutting of certain timber, and in a subsequent part of the charge leaves the jury to determine whether, under such circumstances, there can be any liability, the effect will be so to confuse the jury as to lead to an erroneous verdict.[36] An instruction that blankets are not baggage is inconsistent with an instruction leaving it to the determination of the jury whether they were baggage.[37]

(4). *Negligence.* In an automobile damage action there is an inconsistency in a charge that unless defendant's rate of speed was unreasonable and improper his driving in excess of the speed prescribed by statute would not authorize a recovery for plaintiff.[38] In an accident case based on injury from street car, there is an inconsistency where the court tells the jury that the issue is whether the car gave a violent and unusual jolt, and further charges them that if they find the car's moving was but incidental to its operation they should find for the defendant even if the car had given a violent jolt.[39] The inconsistency may occur in the laying down of two contradictory rules with respect to the care required of the driver of an automobile.[40]

There was conflict between an instruction that the driver of an automobile must use all possible care to avoid injuring pedestrians and one that he must use the care of an ordinarily prudent man to avoid causing injury.[41]

[33] Hansen v. Parks, 139 Wash 241, 246 P 584.

[34] Warren v. Pulitzer Publishing Co., 336 Mo 184, 78 SW2d 404.

[35] Arnett v. Huggins, 18 ColoApp 115, 70 P 765; Catanzaro Di Giorgio Co. v. F. W. Stock & Sons, 116 Md 201, 81 A 385.

[36] Elk Tanning Co. v. Brennan, 203 Pa 232, 52 A 246.

[37] Pullman Co. v. Custer (Tex CivApp), 140 SW 847.

[38] Frochter v. Arenholz, 242 Ill App 93.

[39] Laible v. Wells, 317 Mo 141, 296 SW 428.

[40] Morehouse v. Everett, 141 Wash 399, 252 P 157, 58 ALR 1482.

[41] Greenhalch v. Barber (RI), 104 A 769. See Haton v. Illinois Cent.

The initial part of an instruction which told the jury that it was not negligence as a matter of law for a person to go upon a street car track without looking or listening, contradicted a concluding portion of the same instruction which stated that such persons must use due care and that ordinary care means that he must look and listen before going on the track, especially where the track is partially obstructed.[42]

In action for damages to property allegedly resulting from blasting operations in a stone quarry, submission of question of defendant's alleged negligence together with a charge which in effect stated to the jury that defendant was liable in the absence of negligence if damage was result of blasting operations conducted in the quarry, was error, since charge was conflicting and confusing.[43]

(5). *Miscellaneous.* It is error to instruct on the law of a stated issue, and then to withdraw that issue from the consideration of the jury on the ground that there was no evidence to support it.[44]

In an action to recover insurance, there is a conflict between an instruction that the insurer had a right to rely on the statement of the insured, and another instruction that the insurer's lack of knowledge of the facts in making settlement was of no avail.[45]

Illustrations of conflict in criminal cases.

The principle is the same in criminal cases.[46] A verdict

R. Co., 335 Mo 1186, 76 SW2d 127, for similar application of the principle.

[42] Roanoke Ry. & Elec. Co. v. Carroll, 112 Va 598, 72 SE 125.

In malpractice action an instruction simply defining negligence was inconsistent with one relative to the degree of skill required of specialists which gave the jury no rule for applying it to the facts of the case. Owens v. McCleary, 313 Mo 213, 281 SW 682.

An instruction on last clear chance precludes a contradictory one on assumption of risk. Amos v. Fleming, 221 MoApp 559, 285 SW 134.

[43] Vogel v. Suburban Constr. Co., 144 PaSuper 588, 20 A2d 905.

[44] Logan v. Logan, 97 IndApp 209, 180 NE 32.

[45] Detroit Fire & Marine Ins. Co. v. Sargent, 42 Idaho 369, 246 P 311.

[46] **Federal.** Sunderland v. United States, 19 F2d 202.

Alabama. Gordon v. State, 147 Ala 42, 41 S 847.

Arizona. Hurley v. State, 22 Ariz 211, 196 P 159.

Arkansas. An instruction that the accused must establish the defense of alibi offered or must be convicted was in conflict with an instruction that if the proof on the subject raises a reasonable doubt as to guilt, the accused must be acquitted. Wells v. State, 102 Ark 627, 145 SW 531.

California. The giving of an instruction inconsistent with a proper one is calculated to prevent the jury from giving due consideration to the evidence in the light of the correct

rendered on conflicting instructions will be set aside.[47] The defendant is entitled to instructions that are free from contradictions, and that are clear, succinct, and unambiguous.[48]

The error in an instruction which incorrectly states the law is not nullified by another instruction which contains a correct statement of the law on the subject,[49] unless the erroneous instruction is withdrawn.[50]

The rule is all the more important where the evidence is conflicting.[51] So, it is reversible error to predicate an instruction on a theory not covered by the indictment, unsupported in the evidence, and in conflict with a correct instruction which has been given at the request of the defendant.[52] There is a conflict between an instruction on the right of the accused to act on appearances and another on the right to kill if deceased sought to prevent arrest.[53] An instruction to acquit if accused did not have a specific intent to kill is inconsistent with an instruction submitting manslaughter.[54] In a prosecution for homicide, the giving of an erroneous instruction as to the law of self-defense, prejudicial to the accused, is not cured by the giving of a correct instruction thereon.[55]

instruction. People v. Ross, 19 Cal App 469, 126 P 375.

Colorado. Eby v. People, 63 Colo 276, 165 P 765.

Idaho. State v. Webb, 6 Idaho 428, 55 P 892; State v. Hines, 43 Idaho 713, 254 P 217.

Illinois. People v. Washington, 327 Ill 152, 158 NE 386.

Indiana. McDougal v. State, 88 Ind 24; Blume v. State, 154 Ind 343, 56 NE 771.

Iowa. State v. Walker, 192 Ia 823, 185 NW 619.

Missouri. State v. Fellers, 140 MoApp 723, 127 SW 95; State v. Ward, 337 Mo 425, 85 SW2d 1.

Montana. State v. Peel, 23 Mont 358, 59 P 169, 75 AmSt 529; State v. Blaine, 45 Mont 482, 124 P 516.

Texas. Yeager v. State, 106 Tex Cr 462, 294 SW 200; Shannon v. State, 117 TexCr 429, 36 SW2d 521.

If the court has instructed that a certain witness was an accomplice, such instruction conflicted with another to the effect that the jury could not convict the defendant on the testimony of the witness if they believed him to be an accomplice; for one instruction determines as a matter of law that the witness was an accomplice, and the other leaves the determination to the jury whether he was an accomplice. Garza v. State, 125 TexCr 447, 69 SW2d 110.

West Virginia. State v. Cain, 20 WVa 679.

[47] People v. Gilday, 351 Ill 11, 183 NE 573.

[48] Perkins v. State, 117 TexCr 415, 37 SW2d 163.

[49] People v. Barnett, 347 Ill 127, 179 NE 450.

[50] Flick v. State, 207 Ind 473, 193 NE 603.

[51] Rector v. Robins, 74 Ark 437, 86 SW 667.

[52] State v. Newman, 101 WVa 356, 132 SE 728.

[53] Mercer v. Commonwealth, 150 Va 588, 142 SE 369.

[54] Merka v. State, 82 TexCr 550, 199 SW 1123.

[55] People v. Miller, 403 Ill 561, 87 NE2d 649.

Instructions not in conflict.

Instructions are not inconsistent where they merely assert alternative propositions on either of which a claimant may recover,[56] or are merely supplementary or explanatory of instructions given.[57] Neither are instructions contradictory which make plain and definite certain matters stated indefinitely in prior instructions.[58] There is harmony between an instruction in a negligence case that the defendant must use the utmost care of a cautious person, and another that it must guard against accident in the manner that a reasonable and prudent person would have foreseen to have been necessary.[59]

There is no conflict between an instruction that tells the jury they are at liberty to disregard the testimony of a witness they believe has testified falsely, and another which informs them that they have no right to reject the testimony of any witness without good reason.[60] There was no conflict between an instruction that it was the duty of the master to furnish reasonably safe appliances and an instruction that the test of the duty of the master is the ordinary conduct of a reasonably prudent man in such situation.[61] Nor was there conflict between an instruction that negligence was not presumed and one that it might be inferred from facts established by evidence.[62] Nor is there a case of inconsistency in instructions which go no further than to state the theories of the parties to the case.[63]

[56] **Iowa.** See also Powers v. Iowa Glue Co., 183 Ia 1082, 168 NW 326.

Maryland. Huff v. Simmers, 114 Md 548, 79 A 1003.

Missouri. Robison v. Floesch Constr. Co. (MoApp), 242 SW 421.

Nebraska. There was no inconsistency where the court in one instruction told the jury what the plaintiff was required to prove in order to recover and in another paragraph informed them what would be a complete defense to the matters mentioned in the former paragraph and the instructions when considered together properly stated the law applicable to the facts of the case. Bloomfield v. Pinn, 84 Neb 472, 121 NW 716.

Virginia. Richmond v. Gentry, 111 Va 160, 68 SE 274.

[57] **Arkansas.** Bush v. Brewer, 136 Ark 246, 206 SW 322; Central Coal & Coke Co. v. Burns, 140 Ark 147, 215 SW 265.

Iowa. Black v. Chicago Great Western R. Co., 187 Ia 904, 174 NW 774.

Texas. Ellis v. State, 80 TexCr 208, 189 SW 1074.

[58] Gray v. Washington Water Power Co., 30 Wash 665, 71 P 206.

[59] Rayl v. Syndicate Bldg. Co., 118 CalApp 396, 5 P2d 476.

[60] Moore v. Pacific Mut. Life Ins. Co., 128 Neb 605, 259 NW 916.

[61] Trumbull v. Martin, 137 Ark 495, 208 SW 803.

[62] Drake v. Slessor, 65 Colo 292, 176 P 301.

[63] **Arkansas.** Wylie v. State, 140 Ark 24, 215 SW 593; Subiaco Coal Co. v. Krallman, 143 Ark 469, 220 SW 664.

California. Burge v. Albany Nurseries, Inc., 176 Cal 313, 168 P 343.

Missouri. Hendrix v. Corning, 201 MoApp 555, 214 SW 253; Coshow v. Otey (Mo), 222 SW 804;

There is no inconsistency or conflict in telling the jury that the accused might be convicted of murder if he advised, aided, and abetted in the killing, although his defense was alibi.[64]

§ 105. Undue prominence to particular features in civil cases.

Instructions should not be given which may mislead the jury by giving undue prominence to some particular feature, phase or theory of the case.

If an instruction lays especial stress upon certain features of the case in such a way as to draw the jury's attention away from other phases, it should be refused,[65] even if the instruction asserts a correct principle of law.[66]

Brown & Fenwick Real Estate & Abstract Co. v. Marks (MoApp), 226 SW 55; Stussy v. Kansas City Rys. Co. (MoApp), 228 SW 531.

Oklahoma. Chicago, R. I. & P. Ry. Co. v. Morton, 57 Okl 711, 157 P 917.

Virginia. Stapleton v. Commonwealth, 123 Va 825, 96 SE 801; Vaughan v. Mayo Milling Co., 127 Va 148, 102 SE 597.

[64] State v. Uhls, 121 Kan 377, 587, 247 P 1050, reh. den. 121 Kan 587, 249 P 597.

[65] **Federal.** Northern Cent. Coal Co. v. Barrowman, 246 F 906; Aetna Life Ins. Co. v. Kelley, 70 F2d 589, 93 ALR 471.

Alabama. Rutherford v. Dyer, 146 Ala 665, 40 S 974; Western Union Tel. Co. v. Robbins, 3 AlaApp 234, 56 S 879; Birmingham Candy Co. v. Sheppard, 14 AlaApp 312, 70 S. 193 (undue prominence to fact of minority of injured person); Minor v. Coleman, 16 AlaApp 5, 74 S 841 (previous depredations of dog killed while molesting property).

Arkansas. Grayling Lbr. Co. v. Hemingway, 128 Ark 535, 194 SW 508.

California. Treadwell v. Nickel, 194 Cal 243, 228 P 25; Stuart v. Preston, 2 CalApp2d 310, 38 P2d 155, reh. den. in 39 P2d 441.

District of Columbia. Sullivan v. Capital Trac. Co., 34 AppDC 358.

Florida. Jacksonville Elec. Co. v. Adams, 50 Fla 429, 39 S 183, 7 Ann Cas 241.

Georgia. Summers Buggy Co. v. Estes, 34 GaApp 407, 130 SE 350.

Illinois. Slack v. Harris, 200 Ill 96, 65 NE 669; Hoffman v. Ernest Tosetti Brew. Co., 257 Ill 185, 100 NE 531; Fox v. People, 84 IllApp 270; Gruber v. Adams, 155 IllApp 110; Trainer v. Baker, 195 IllApp 216.

Indiana. North v. Jones, 53 Ind App 203, 100 NE 84.

Iowa. In re Townsend's Estate, 122 Ia 246, 97 NW 1108; Gray v. Chicago, R. I. & P. Ry. Co., 160 Ia 1, 139 NW 934; Wilkins v. Keokuk Elec. Co. (Ia), 174 NW 231.

Kansas. Kerr v. Coberly, 81 Kan 376, 105 P 520.

Kentucky. Jones v. Jones, 102 Ky 450, 43 SW 412; Chesapeake & O. R. Co. v. Lang's Admx., 141 Ky 592, 133 SW 570.

Massachusetts. Kenny v. Ipswich, 178 Mass 368, 59 NE 1007; Roach v. Hinchcliff, 214 Mass 267, 101 NE 383; Morrison v. Holder, 214 Mass 366, 101 NE 1067.

Michigan. Beurmann v. Van Buren, 44 Mich 496, 7 NW 67; First Nat. Bank v. Union Trust Co., 158 Mich 94, 122 NW 547, 133 AmSt 362.

Minnesota. Fransen v. Falk Paper Co., 135 Minn 284, 160 NW 789; Draves v. Minneapolis & St. P. Suburban R. Co., 142 Minn 321, 172 NW 128.

Mississippi. Potera v. Brookhaven, 95 Miss 774, 49 S 617; Hooks v. Mills, 101 Miss 91, 57 S 545; Gur-

Illustrations of overemphasis. A frequent example of this vice occurs in instructions which single out facts favorable to a party and lay stress on them without referring to matters tending to overcome them,[67] or single out facts unfavorable to a party and stress them, without reference to favorable aspects.[68] An overemphasis occurs where the jury are told that in determining the value of a dog they might consider that the plaintiff failed to assess the dog.[69] It is error for the court to single out the testimony of witnesses for a landowner in condemnation proceedings and instruct that if such witnesses wilfully overstated the value of the land the jury could disregard their testimony to the extent of the overvaluation.[70] A tendered instruction emphasing a particular fact in dispute and pointing out a single witness as the subject of impeachment, should be refused, as

ley v. Tucker, 170 Miss 565, 155 S 189.

Missouri. Corder v. O'Neill, 176 Mo 401, 75 SW 764; Hencke v. St. Louis & H. R. Co., 335 Mo 393, 72 SW2d 798; Kepley v. Park Circuit & Realty Co. (MoApp), 200 SW 750; Henry v. Missouri Ins. Co. (MoApp), 68 SW2d 852.

Montana. Albertini v. Linden, 45 Mont 398, 123 P 400.

New Hampshire. Davis v. Concord & M. R., 68 NH 247, 44 A 388.

North Dakota. Holmes v. Anderson, 50 ND 959, 198 NW 544.

Ohio. Cincinnati Trac. Co. v. Nellis, 81 OhSt 535, 91 NE 1125; Simpson v. Newinger, 28 OhApp 133, 162 NE 439; Interstate Motor Freight Corp. v. Beecher, 37 OhApp 23, 174 NE 27; Lake Shore & M. S. Ry. Co. v. Whidden, 13 OhCirDec 85, 2 Oh CirCt (N. S.) 544; Jahraus v. Fryman, 129 NE2d 200 (Court of Appeals of Ohio, Montgomery County).

Oregon. Crossen v. Oliver, 41 Or 505, 69 P 308.

Rhode Island. Reynolds v. Narragansett Elec. Lighting Co., 26 RI 457, 59 A 393.

South Carolina. Carr v. Mouzon, 86 SC 461, 68 SE 661.

Texas. Ft. Worth Belt Ry. Co. v. Johnson, 59 TexCivApp 105, 125 SW 387; Texas & N. O. R. Co. v. Syfan (TexCivApp), 43 SW 551; El Paso v. Wiley (TexCivApp), 180 SW 661 (undue prominence to continuity of adverse possession); Houston Oil Co. v. Brown (TexCivApp), 202 SW 102.

Vermont. Vaillancourt v. Grand Trunk Ry. Co., 82 Vt 416, 74 A 99.

Virginia. Bradshaw v. Booth, 129 Va 19, 105 SE 555; Diamond Cab Co. v. Jones, 162 Va 412, 174 SE 675.

Wisconsin. Fidelity Trust Co. v. Wisconsin Iron & Wire Works, 145 Wis 385, 129 NW 615.

The court may properly refer to features of the evidence, making no attempt to give particular prominence to any part, so as to suggest the weight that should be given thereto. Secard v. Rhinelander Lighting Co., 147 Wis 614, 133 NW 45.

[66] **Alabama.** Hanchey v. Brunson, 175 Ala 236, 56 S 971, AnnCas 1914C, 804.

New Hampshire. Davis v. Concord & M. R., 68 NH 247, 44 A 388.

West Virginia. Cain v. Kanawha Trac. & Elec. Co., 85 WVa 434, 102 SE 119.

[67] Raney v. Raney, 216 Ala 30, 112 S 313; Cerriglio v. Pettit, 113 Va 533, 75 SE 303.

[68] Tuckel v. Hartford, 118 Conn 334, 172 A 222.

[69] Missouri Pacific R. Co. v. Green, 172 Ark 423, 288 SW 908.

[70] People ex rel. Dept. of Public Works & Bldgs. v. Hubbard, 355 Ill 196, 189 NE 23.

stating a rule as to credibility not contained in approved instructions.[71]

It is reversible error, where different injuries are pleaded and there is some testimony tending to prove their existence, for the trial court in addressing the jury to mention but one of the alleged injuries, as such a charge unduly minimizes the other injuries.[72]

Undue prominence may be given by underscoring portions of instructions; and this practice is condemned for its tendency to cause the jury to undervalue the portions not so underscored.[73] This objectionable prominence may occur where the court charges that particular acts may or may not constitute negligence,[74] or unnecessarily stresses the question of contributory negligence.[75] It has been held error to repeat three times that the plaintiff had the burden of proof, the result being considered an undue emphasis on the matter.[76] Undue repetition of statements, such as "you must find for the plaintiff," or "you must find for the defendant," or of any other matter emphasizing or deprecating the importance of any issue in the case, may constitute error, if proper objection is made.[77]

No overemphasis found. An objection, however, that in the instruction assailed the statute quoted in it was indented and thus set out more prominently than the rest, was held to be hypercritical.[78] But, while the court should carefully avoid singling out a particular fact or phase of the case in such a way as to give it undue emphasis, yet it is within the bounds of propriety to make mention of certain evidential facts and instruct as to the law applicable thereto.[79] An instruction which

[71] Gerick v. Brock, 120 Colo 394, 210 P2d 214.

[72] Cleveland Ry. Co. v. Kozlowski, 128 OhSt 445, 191 NE 787.

[73] **Illinois.** Wright v. Brosseau, 73 Ill 381; Warner Constr. Co. v. Lincoln Park Comrs., 278 IllApp 42. See also Bednar v. Mt. Olive & Staunton Coal Co., 197 IllApp 216.

Iowa. But see Philpot v. Lucas, 101 Ia 478, 70 NW 625, where it is held that the court may underscore words usually italicized in legal treatises.

Kentucky. But see Breckenridge v. Commonwealth, 176 Ky 686, 197 SW 395.

[74] **Federal.** Boston Elevated Ry. Co. v. Teele, 160 CCA 434, 248 F 424.

Arizona. Wiser v. Copeland, 23 Ariz 325, 203 P 565.

Missouri. See Gardner v. St. Louis Union Trust Co. (Mo), 85 SW2d 86.

[75] Freire v. Kaupman, 245 App Div 844, 281 NYS 408.

[76] Fantroy v. Schirmer (MoApp), 296 SW 235. See Galveston, H. & S. A. Ry. Co. v. Andrews (TexCiv App), 291 SW 590.

[77] Bean v. Gorby, 80 Ariz 25, 292 P2d 199.

[78] Fisher v. Johnson, 238 IllApp 25.

[79] Haines v. Goodlander, 73 Kan 183, 84 P 986.

told the jury that the driver of the automobile should not attempt to pass a vehicle which was passing another automobile, was held unobjectionable in a negligence case.[80] The fact that the contentions of one party are stated at greater length than those of the other party does not conclusively show that undue stress is laid upon the contentions of the former.[81] An instruction is not defective merely because the court refers more often to the theory of the plaintiff than to that of the defendant.[82] Nor is the principle violated by instructions specifying different species of negligence for which, if established, defendant might be liable.[83] So there is no undue emphasis of the matter of damages by reason of their mention in different instructions.[84]

§ 106. Undue prominence to matters of evidence in civil cases.

The rule against undue emphasis is violated where an instruction places (1) extra stress upon specified evidential matters, (2) or upon the testimony of a certain witness.

(1) The action of the court in directing attention to particular features of the evidence, in such a way as to single them out and give them an undue prominence, will constitute prejudicial error.[85] A trial judge should avoid directing especial attention

[80] Sheetinger v. Dawson, 236 Ky 571, 33 SW2d 609.

[81] Phinizy v. Bush, 135 Ga 678, 70 SE 243; May Bros. v. Srochi, 23 GaApp 33, 97 SE 277; Atlanta Gaslight Co. v. Cook, 35 GaApp 622, 134 SE 198.

[82] Cincinnati Trac. Co. v. Gramont, 19 OhApp 272.

[83] Rio Grande, E. P. & S. F. Ry. Co. v. Starnes (TexCivApp), 185 SW 366.

[84] Bergen v. Tulare County Power Co., 173 Cal 709, 161 P 269.

There may be undue emphasis in singling out particular injuries for which recovery may be had. St. Louis Southwestern Ry. Co. v. Aydelott, 128 Ark 479, 194 SW 873.

[85] **Alabama.** Pearson v. Adams, 129 Ala 157, 29 S 977; Keller v. Jones & Weeden, 196 Ala 417, 72 S 89; Kuykendall v. Edmondson, 200 Ala 650, 77 S 24; Nashville, C. & St. L. Ry. v. Blackwell, 201 Ala 657, 79 S 129; Miller v. Whittington, 202 Ala 406, 80 S 499 (will contest); Birmingham Ry., Light & Power Co. v. Kyser, 203 Ala 121, 82 S 151; Carter v. Gaines, 204 Ala 640, 87 S 109; Mizell v. Sylacauga Groc. Co., 214 Ala 204, 106 S 858; Dillworth v. Holmes Furn. & Vehicle Co., 15 AlaApp 340, 73 S 288.

Arizona. Leeker v. Ybanez, 24 Ariz 574, 211 P 864.

Arkansas. Western Coal & Min. Co. v. Jones, 75 Ark 76, 87 SW 440.

Illinois. Illinois Cent. R. Co. v. Griffin, 184 Ill 9, 56 NE 337; Richter v. Maywood, 191 IllApp 475 (eight instructions on degree of care to be exercised by plaintiff); McCormick v. Decker, 204 IllApp 554; Vaughn v. Director General of Railroads, 218 IllApp 595; Green v. Ross, 257 Ill App 344.

Indiana. Danville Trust Co. v. Barnett, 184 Ind 696, 111 NE 429.

Iowa. Anfenson v. Banks, 180 Ia 1066, 163 NW 608, LRA 1918D, 482; Noyes v. Des Moines Club, 186 Ia 378, 170 NW 461, 3 ALR 605; Haman v. Preston, 186 Ia 1292, 173 NW 894.

Kansas. Honick v. Metropolitan Street Ry. Co., 66 Kan 124, 71 P 265.

to the evidence on one side, while ignoring the other,[86] and although particular elements or phases of the evidence are proper subjects for comment on the part of counsel in the argument of the case before the jury, the court will be right

Kentucky. Chesapeake & O. Ry. Co. v. Kornhoff, 167 Ky 353, 180 SW 523; Moran v. Higgins, 19 KyL 456, 40 SW 928.

Maryland. Safe-Deposit & Trust Co. v. Berry, 93 Md 560, 49 A 401; Middendorf, Williams & Co. v. Alexander Milburn Co., 137 Md 583, 113 A 348.

Massachusetts. Howe v. Howe, 99 Mass 88; Whitney v. Lynch, 222 Mass 112, 109 NE 826; Jacobsen v. Simons, 222 Mass 449, 111 NE 46; Doherty v. Phoenix Ins. Co., 224 Mass 310, 112 NE 940; Goldsmith v. Gryzmish, 238 Mass 341, 130 NE 671.

It is error to single out part of the relevant but controverted facts and give a ruling as to their effect. Lounsbury v. McCormick, 237 Mass 328, 129 NE 598.

Michigan. Webster v. Sibley, 72 Mich 630, 40 NW 772; Wood v. Standard Drug Co., 190 Mich 654, 157 NW 403.

Missouri. Rose v. Spies, 44 Mo 20; Rice v. Jefferson City Bridge & Transit Co. (Mo), 216 SW 746; Metropolitan Street Ry. Co. v. Broderick Rope Co. (MoApp), 182 SW 765; Pasche v. South St. Joseph Town-Site Co. (MoApp), 190 SW 30.

Nebraska. Kleutsch v. Security Mut. Life Ins. Co., 72 Neb 75, 100 NW 139.

North Carolina. Wallace v. Norfolk Southern R. Co., 174 NC 171, 93 SE 731.

North Dakota. Brookings v. Northern Pacific Ry. Co., 47 ND 111, 180 NW 972.

Ohio. Krekeler v. Cincinnati Trac. Co., 16 OhApp 125; Simpson v. Newinger, 28 OhApp 133, 162 NE 439; Lake Shore & M. S. Ry. Co. v. Ford, 18 OhCirCt 239, 9 OhCirDec 786; East Cleveland Ry. Co. v. Everett, 19 OhCirCt 205, 10 OhCirDec 493; Cleveland, C., C. & St. L. Ry. Co. v. Richerson, 19 OhCirCt 385, 10 OhCirDec 326; Lake Shore & M. S. Ry. Co. v. Whidden, 2 OhCirCt (N. S.) 544, 13 OhCirDec 85.

Oregon. Service v. Sumpter Valley Ry. Co., 88 Or 554, 171 P 202.

South Carolina. Pearlstine v. Westchester Fire Ins. Co., 70 SC 75, 49 SE 4.

Texas. Lauchheimer v. Saunders, 27 TexCivApp 484, 65 SW 500; Southern Trac. Co. v. Gee (TexCiv App), 198 SW 992.

An instruction repeatedly emphasizing the principle of procedure that the burden of proof is upon the plaintiff has been held erroneous. Owens v. Navarro County Levee Imp. Dist. No. 8 (TexCivApp), 281 SW 577.

Vermont. Douglass & Varnum v. Morrisville, 89 Vt 393, 95 A 810; Maidment v. Frazier, 90 Vt 520, 98 A 987; G. R. Bianchi Granite Co. v. Terre Haute Monument Co., 91 Vt 177, 99 A 875.

West Virginia. McMechen v. McMechen, 17 WVa 683, 41 AmRep 682.

[86] **Federal.** Pullman Co. v. Hall, 46 F2d 399.

Arizona. Griswold v. Horne, 19 Ariz 56, 165 P 318, LRA 1918A, 862.

Illinois. Jeger v. Julius Kessler & Co., 218 IllApp 39.

Kentucky. Stearns Coal & Lbr. Co. v. Williams, 171 Ky 46, 186 SW 931.

An instruction was not erroneous because it defined the duties of the motorman at some length, while stating the duty of decedent as that of exercising ordinary care. South Covington & C. Street Ry. Co. v. Miller's Admx., 176 Ky 701, 197 SW 403.

Missouri. Ferguson v. Missouri Pacific Ry. Co. (MoApp), 186 SW 1134.

West Virginia. Daniels v. Charles

in declining to notice such points specially or so as to put undue emphasis upon them.[87]

The question of negligence or contributory negligence is generally to be determined by all the surrounding circumstances, and hence it is improper to make a portion of the evidence the basis of instructions on either question.[88] Instructions are not open to the objection of undue emphasis which do no more than recite such facts as are necessary to be proved under the averments of the pleadings.[89]

Undue prominence is given to particular testimony by instructions that the jury "can look to" the evidence or "may look to" that fact.[90] Emphasizing the subject of last clear chance by several references thereto has been held unobjectionable.[91] Under the facts of a particular case it has been held error to give two instructions on the burden of proof, on the ground that the matter was thereby unduly emphasized.[92]

As a general rule, however, though an instruction may give special prominence to particular evidentiary facts, it will not afford ground for reversal, if such evidentiary facts are of controlling importance.[93] It is error in a railroad accident case to

Boldt Co., 78 WVa 124, 88 SE 613; Palmer v. Magers, 85 WVa 415, 102 SE 100.

Wisconsin. Coman v. Wunderlich, 122 Wis 138, 99 NW 612.

[87] **Alabama.** Central of Georgia Ry. Co. v. Wilson, 215 Ala 612, 111 S 901.

California. McNally v. Casner, 128 CalApp 680, 18 P2d 94.

Massachusetts. Glass v. Metropolitan Life Ins. Co., 258 Mass 127, 154 NE 563.

Minnesota. Atwood Lbr. Co. v. Watkins, 94 Minn 464, 103 NW 332.

New Hampshire. Noel v. Lapointe, 86 NH 162, 164 A 769.

[88] **Alabama.** Louisville & N. R. Co. v. Watson, 208 Ala 319, 94 S 551.

Illinois. Healy v. Chicago City Ry. Co., 196 IllApp 1; Osborn v. Mt. Vernon, 197 IllApp 267.

Iowa. Farwark v. Chicago, M. & St. P. Ry. Co., 202 Ia 1229, 211 NW 875.

Kentucky. Stearns Coal & Lbr. Co. v. Williams, 171 Ky 46, 186 SW 931.

Maryland. Caroline County Comrs. v. Beulah, 153 Md 221, 138 A 25.

Missouri. Costello v. Kansas City, 280 Mo 576, 219 SW 386; Burtch v. Wabash Ry. Co. (Mo), 236 SW 338.

North Carolina. Lee v. Southern Ry. Co., 180 NC 413, 105 SE 15.

Oklahoma. Wetumka v. Burke, 88 Okl 186, 211 P 522.

Pennsylvania. It is error to unduly stress the fact in the charge that the X-ray is a dangerous instrumentality. Stemons v. Turner, 274 Pa 228, 117 A 922, 26 ALR 727.

Texas. Dowdy v. Southern Trac. Co. (TexComApp), 219 SW 1092.

Utah. Kent v. Ogden, L. & I. Ry. Co., 50 Utah 328, 167 P 666.

[89] Maryland Casualty Co. v. Dunlap, 68 F2d 289; Raxworthy v. Heisen, 191 IllApp 457, affd. in 274 Ill 398, 113 NE 699.

[90] Dillworth v. Holmes Furn. & Vehicle Co., 15 AlaApp 340, 73 S 288.

[91] Richard v. New York, N. H. & H. R. Co., 104 Conn 229, 132 A 451.

[92] Miller v. Williams (Mo), 76 SW2d 355.

[93] Harding v. St. Louis Nat. Stock Yards, 149 IllApp 370, affd. in 242 Ill 444, 90 NE 205; Public Utilities

charge that the plaintiff exercising due care may recover for injury resulting from failure to sound whistle or bell.[94]

(2) Placing undue stress upon the testimony of a particular witness should be avoided.[95] Thus an instruction will be faulty where it directs the jury to find for the defendant in case they do not believe the evidence of a certain witness, naming him, or to find for the defendant if they do believe the evidence of another specified witness.[96]

So where an instruction unduly singles out the testimony of certain witnesses and makes the whole question of the signing of a note turn upon their evidence, it is erroneous.[97] An instruction unduly singles out the testimony of the plaintiff where it informs the jury that all admissions by the plaintiff against his interest are presumed to be true.[98]

But a general instruction as to the right of the jury to disregard the testimony of any witness who has wilfully sworn falsely as to any material matter, unless corroborated, has been held not to give undue prominence to the testimony of any particular witness but to leave it to the jury to say to what witnesses, if any, it applies.[99] Nor, is there undue prominence in an instruction which tells the jury that the testimony of a disinterested witness "is of the utmost importance in the case."[1]

Co. v. Handorf, 185 Ind 254, 112 NE 775.

To instruct singly with respect to a particular substantive defense is not the singling out or selection of a particular fact. Sheridan v. Chicago & O. P. Elevated R. Co., 153 IllApp 70.

[94] Baltimore, C. & A. Ry. Co. v. Turner, 152 Md 216, 136 A 609.

[95] **Alabama.** Louisville & N. R. Co. v. Perkins, 144 Ala 325, 39 S 305.

Georgia. But see Atlanta Oil & Fertilizer Co. v. Phosphate Min. Co., 25 GaApp 430, 103 SE 873.

Illinois. Hoffman v. Stephens, 269 Ill 376, 109 NE 994; Donahue v. Egan, 85 IllApp 20; Neville v. Chicago, 191 IllApp 372 (physicians); Wolf v. Mattox, 193 IllApp 482.

Mississippi. Mississippi Cent. R. Co. v. Hardy, 88 Misc 732, 41 S 505.

Missouri. Fitzsimmons v. Commerce Trust Co. (MoApp), 200 SW 437; Markland v. Clover Leaf Casualty Co. (MoApp), 209 SW 602.

New York. Schwartz v. Lawrence, 214 AppDiv 559, 212 NYS 494.

North Carolina. Cogdell v. Southern Ry. Co., 129 NC 398, 40 SE 202; Bowman v. Fidelity Trust & Dev. Co., 170 NC 301, 87 SE 46; Starling v. Selma Cotton Mills, 171 NC 222, 88 SE 242.

Texas. Hines v. Popino (TexCiv App), 235 SW 1095.

[96] Louisville & N. R. Co. v. Morgan, 114 Ala 449, 22 S 20; Gay & Bruce v. W. B. Smith & Sons, 217 Ala 33, 114 S 468.

It is error for the court to single out expert witnesses and tell the jury that the opinions of such witnesses are merely advisory and not binding on the jury. Phares v. Century Elec. Co., 336 Mo 961, 82 SW2d 91.

[97] Donahue v. Egan, 85 IllApp 20.

[98] Ham v. Hammond Packing Co., 221 MoApp 403, 277 SW 938.

[99] Healea v. Keenan, 244 Ill 484, 91 NE 646.

[1] Warruna v. Dick, 261 Pa 602, 104 A 749.

§ 107. Undue prominence in criminal cases.

The principle which condemns instructions giving undue prominence to particular evidence or phases of a case applies with equal force in criminal cases.

The cases supporting this rule are numerous.[2] But in some states, this fault will not ordinarily work a reversal unless it is clear that prejudice has resulted to the accused.[3]

[2] **Federal.** Stout v. United States, 142 CCA 323, 227 F 799; Urban v. United States, 46 F2d 291.

Alabama. Teague v. State, 144 Ala 42, 40 S 312; Whatley v. State, 144 Ala 68, 39 S 1014; Tribble v. State, 145 Ala 23, 40 S 938; Griffin v. State, 165 Ala 29, 50 S 962; Pope v. State, 174 Ala 63, 57 S 245; Montgomery v. State, 2 AlaApp 25, 56 S 92; Herndon v. State, 2 AlaApp 118, 56 S 85; Hosey v. State, 5 Ala App 1, 59 S 549; Kirby v. State, 5 AlaApp 128, 59 S 374; Herring v. State, 14 AlaApp 93, 71 S 974; Coplon v. State, 15 AlaApp 331, 73 S 225; Miller v. State, 16 AlaApp 143, 75 S 819; Bowling v. State, 18 Ala App 231, 90 S 33.

Arizona. Stephens v. State, 20 Ariz 37, 176 P 579.

Arkansas. McKinney v. State, 140 Ark 529, 215 SW 723.

California. People v. Converse, 28 CalApp 687, 153 P 734; People v. Vuyacich, 57 CalApp 233, 206 P 1031.

Florida. Baldwin v. State, 46 Fla 115, 35 S 220; Graham v. State, 72 Fla 510, 73 S 594; Hall v. State, 78 Fla 420, 83 S 513, 8 ALR 1034.

Georgia. Harrell v. State, 121 Ga 607, 49 SE 703.

Idaho. State v. Jones, 28 Idaho 428, 154 P 378; State v. Pettit, 33 Idaho 326, 193 P 1015.

Illinois. People v. Strauch, 247 Ill 220, 93 NE 126, 139 AmSt 319; People v. Stankevic, 299 Ill 241, 132 NE 539; Graff v. People, 108 IllApp 168; People v. Dressen, 158 IllApp 139.

Iowa. State v. Asbury, 172 Ia 606, 154 NW 915, AnnCas 1918A, 856.

Massachusetts. Commonwealth v. Borasky, 214 Mass 313, 101 NE 377; Commonwealth v. Sherman, 234 Mass 7, 124 NE 423.

Missouri. State v. Shelton, 223 Mo 118, 122 SW 732; State v. Mitchell, 229 Mo 683, 129 SW 917, 138 AmSt 425; State v. Gentry, 320 Mo 389, 8 SW2d 20.

Montana. State v. Jones, 32 Mont 442, 80 P 1095; State v. Pippi, 59 Mont 116, 195 P 556.

Nebraska. Chapman v. State, 61 Neb 888, 86 NW 907.

Ohio. Daugherty v. State, 41 Oh App 239, 180 NE 656.

Oklahoma. Black v. State, 5 Okl Cr 512, 115 P 604.

Oregon. State v. Newlin, 92 Or 589, 182 P 133.

South Carolina. State v. Driggers, 84 SC 526, 66 SE 1042, 137 AmSt 855, 19 AnnCas 1166.

Tennessee. Cooper v. State, 123 Tenn 37, 138 SW 826.

Texas. Beard v. State, 57 TexCr 323, 123 SW 147; Wadkins v. State, 58 TexCr 110, 124 SW 959, 137 AmSt 922, 21 AnnCas 556; Canon v. State, 59 TexCr 398, 128 SW 141; Harrelson v. State, 60 TexCr 534, 132 SW 783; Barber v. State, 64 TexCr 96, 142 SW 577; Tucker v. State, 67 TexCr 510, 150 SW 190; Hunt v. State, 85 TexCr 622, 214 SW 983 (rape); Smith v. State (Tex Cr), 49 SW 583.

Virginia. Montgomery v. Commonwealth, 98 Va 852, 37 SE 1.

West Virginia. State v. Morgan, 35 WVa 260, 13 SE 385; State v. Morrison, 49 WVa 210, 38 SE 481; State v. Dodds, 54 WVa 289, 46 SE 228; State v. Ison, 104 WVa 217, 139 SE 704.

[3] Jacobi v. State, 133 Ala 1, 32 S 158; Whatley v. State, 144 Ala

Under this rule it is improper for the court to select the evidence of any witness,[4] though it be that given by the accused,[5] and charge specially on such evidence and especially if

68, 39 S 1014; State v. Strome, 26 ONP (N. S.) 406.

[4] **Federal.** Minner v. United States, 57 F2d 506.

Alabama. Jones v. State, 174 Ala 85, 57 S 36; Cardwell v. State, 1 AlaApp 1, 56 S 12; Coates v. State, 1 AlaApp 35, 56 S 6; Parker v. State, 7 AlaApp 9, 60 S 995.

Arkansas. Shank v. State, 189 Ark 243, 72 SW2d 519.

California. People v. Haugh, 90 CalApp 354, 265 P 891; People v. Littlefield, 1 CalApp2d 725, 37 P2d 200.

The judge should not instruct the jury that the fact that the defendant attempted to commit suicide may be taken as evidence of insanity, since such instruction makes this fact of itself evidence of insanity whereas it is only one phase of the evidence to be considered with all the other evidence. People v. Owens, 123 Cal 482, 56 P 251.

Illinois. People v. Andreanos, 323 Ill 34, 153 NE 707; People v. Bell, 328 Ill 446, 159 NE 807; People v. Whalen, 151 IllApp 16; People v. Spencer, 171 IllApp 237.

Indiana. Where there had been as many as 30 witnesses in the case, an instruction was improper which singled out two of them and advised the jury that they could disregard the testimony of the two witnesses if the jury believed they had testified falsely. Moore v. State, 198 Ind 547, 153 NE 402, 154 NE 388.

Kentucky. Milburn v. Commonwealth, 223 Ky 188, 3 SW2d 204.

Minnesota. Requested instruction was erroneous where it singled out only two of the numerous witnesses, whose testimony should be considered under the caution of "Falsus in uno, falsus in omnibus." State v. Dunn, 140 Minn 308, 168 NW 2.

Missouri. State v. Chinn, 153 Mo App 611, 133 SW 1196.

Montana. State v. McClellan, 23 Mont 532, 59 P 924, 75 AmSt 558.

North Carolina. Such instruction was erroneous where the court on its own motion called an alienist and examined him, and charged that his testimony was admirably lucid. State v. Horne, 171 NC 787, 88 SE 433.

Oklahoma. Mitchell v. State, 2 OklCr 442, 101 P 1100; Price v. United States, 2 OklCr 449, 101 P 1036, 139 AmSt 930; Clark v. State, 4 OklCr 368, 111 P 659; Heacock v. State, 4 OklCr 606, 112 P 949; Peck v. State, 5 OklCr 104, 113 P 200; Williams v. State, 53 OklCr 285, 10 P2d 731.

Texas. Allen v. State, 64 TexCr 225, 141 SW 983.

Particular testimony was singled out by an instruction that the fact that the deceased had money before but not after his death was not evidence of the guilt of defendant but merely showed motive. Mims v. State, 68 TexCr 432, 153 SW 321.

Virginia. In Hensley v. Commonwealth, 163 Va 1048, 177 SE 104, the defendant was prosecuted for assault and his son testified that he, the son, committed the assault. The court was held to have committed reversible error in pointing out this fact to the jury and telling them that nevertheless they were the sole judges of the credibility of the son's testimony.

[5] **Federal.** The comment of the court on the credibility of witnesses, even in the federal courts, should not be one-sided; and if in the charge to the jury the court dwells at length on the credibility of the defendant, it is error for him to refrain from commenting on the credibility of the witnesses for the prosecution. Hunter v. United States, 62 F2d 217.

the comment is disparaging.[6] The tendency of such instruction is to lead the jury to dissociate such evidence from the rest of the evidence while it is their duty to consider all the evidence.[7]

The correct practice is to give a general instruction applying to all witnesses alike,[8] and not to give undue consideration to

California. People v. Adams, 199 Cal 361, 249 P 186.

Missouri. State v. Summers (Mo App), 281 SW 123.

West Virginia. State v. Green, 101 WVa 703, 133 SE 379.

[6] Koss v. State, 217 Wis 325, 258 NW 860.

[7] **Alabama.** Johnson v. State, 1 AlaApp 102, 55 S 321.

An instruction is objectionable as singling where it tells the jury that it is their duty to contrast the manner and demeanor of defendant while testifying with that of the witnesses for the state. Pope v. State, 168 Ala 33, 53 S 292.

Arkansas. An instruction was condemned as singling out facts where instruction declared that the fact that defendant was an infant could be considered in determining whether he acted deliberately or with criminal negligence. Gilchrist v. State, 100 Ark 330, 140 SW 260.

California. People v. Hinshaw, 194 Cal 1, 227 P 156; People v. Blunkall, 31 CalApp 778, 161 P 997.

Colorado. But see Bruno v. People, 67 Colo 146, 186 P 718.

Illinois. People v. Sawhill, 299 Ill 393, 132 NE 477; People v. Sanders, 357 Ill 610, 192 NE 697.

Iowa. In Iowa court may instruct that defendant had the right to testify, and was competent, and that his testimony should be considered, taking account of his interest, the reasonableness of the testimony, his candor, and all other tests applied to other witnesses. State v. Brooks, 181 Ia 874, 165 NW 194.

Mississippi. Murphy v. State, 119 Miss 220, 80 S 636 (consideration of interest to determine credibility); Hood v. State, 170 Miss 530, 155 S 679.

Missouri. State v. Pace, 269 Mo 681, 192 SW 428; State v. Goode, 271 Mo 43, 195 SW 1006; State v. Rose (Mo), 193 SW 811; State v. Fish (Mo), 195 SW 997; State v. Clark (MoApp), 202 SW 259.

Oklahoma. Culpepper v. State, 4 OklCr 103, 111 P 679, 31 LRA (N. S.) 1166, 140 AmSt 668; Madison v. State, 6 OklCr 356, 118 P 617, Ann Cas 1913C, 484.

An instruction gives undue prominence where it charges that accused is a competent witness for himself but the jury may consider his interest in the event in determining his credibility. Guiaccimo v. State, 5 OklCr 371, 115 P 129.

Texas. In a prosecution for murder an instruction which told the jury that the defendant was a competent witness and that the jury were the sole judges of his testimony and should weigh it as they would that of any other witness, was properly refused because singling out testimony of the defendant. Tardy v. State, 46 TexCr 214, 78 SW 1076.

Washington. An instruction that while the defendant is a competent witness the jury may consider his situation and interest in the result and all the circumstances surrounding him and give to his testimony only such weight as in their judgment it is fairly entitled to is not open to the objection that it singled out defendant from the body of witnesses for comment. State v. Melvern, 32 Wash 7, 72 P 489.

[8] **California.** People v. Fritz, 54 CalApp 137, 201 P 348; People v. Chew Juey, 57 CalApp 606, 207 P 911; People v. Lavender, 137 CalApp 582, 31 P2d 439.

Florida. Roberts v. State, 72 Fla 132, 72 S 649.

Idaho. State v. Rogers, 30 Idaho 259, 163 P 912.

the testimony of particular classes of witnesses such as detectives,[9] prosecuting witnesses,[10] impeaching witnesses,[11] and accomplices.[12]

It is error to tell the jury to consider the interest and the demeanor of the defendant as a witness, where the instruction did not apply to other witnesses also.[13] Like error may be predicated on the court's action in singling out the defendants and telling the jury they might disregard the whole of what the defendants had testified to if the jury believed they had lied.[14] Thus, in a prosecution for violation of the narcotic laws, it was flagrantly error for the court to say to the jury in the instructions that there was no motive prompting the federal agents to testify falsely, but that there was such a motive to prompt the accused.[15] On the other hand, the rule is violated by instructions emphasizing previous good character of accused as evidence to create reasonable doubt of guilt.[16] It is erroneously singling out and commenting upon the testimony of a witness for the court to tell the jury that the prosecutrix in a rape case need not be corroborated.[17]

Where the testimony of the witnesses for the state is especially referred to and narrated in the charge to the jury, it is the duty of the court to also give like prominence to the testimony and explanations relating to the same subject on the part of the accused.[18]

An instruction which gives undue prominence to unfavorable evidence to the defendant in a criminal case is erroneous.[19]

Louisiana. State v. Rock, 162 La 299, 110 S 482.

Nevada. State v. Rothrock, 45 Nev 214, 200 P 525.

North Dakota. State v. Young, 55 ND 194, 212 NW 857.

Olahoma. Darneal v. State, 14 OklCr 540, 174 P 290, 1 ALR 638; Carter v. State, 35 OklCr 421, 250 P 807.

Oregon. State v. Wisdom, 122 Or 148, 257 P 826.

Pennsylvania. Commonwealth v. Weber, 271 Pa 330, 114 A 257.

Wisconsin. Strabel v. State, 192 Wis 452, 211 NW 773.

[9] People v. Longland, 52 CalApp 499, 199 P 546; People v. Fritz, 54 CalApp 137, 201 P 348; State v. Meyers, 132 Minn 4, 155 NW 766.

[10] **Arkansas.** Clark v. State, 135 Ark 569, 205 SW 975.

California. People v. Carey, 53 CalApp 742, 200 P 835.

Kansas. State v. Ewing, 103 Kan 399, 173 P 927 (statutory rape).

Missouri. State v. Bowman, 278 Mo 492, 213 SW 64; State v. Edelen, 288 Mo 160, 231 SW 585 (rape).

[11] Babb v. State, 18 Ariz 505, 163 P 259, AnnCas 1918B, 925.

[12] State v. Dallas, 145 Minn 92, 176 NW 491.

[13] People v. Washington, 327 Ill 152, 158 NE 386.

[14] People v. Schuele, 326 Ill 366, 157 NE 215.

[15] Strader v. United States, 72 F2d 589.

[16] Fowler v. State, 130 Ark 365, 197 SW 568; State v. Hare, 87 OhSt 204, 100 NE 825.

[17] Davidson v. State, 57 OklCr 188, 46 P2d 572.

[18] People v. Murray, 72 Mich 10, 40 NW 29.

[19] State v. Bayless, 362 Mo 109, 240 SW2d 114.

But the fact that the trial judge takes more time in charging the jury in regard to the evidence of the state than he does in charging as to the evidence of the defendant does not place undue emphasis on the case of the state, where the evidence of the state is much more voluminous than that of the defendant.[20]

Undue emphasis on particular evidence was held to have been given by an instruction that the theory of the law in admitting dying declarations is that a person would be just as sure to make a truthful statement when he is in the article of death as he would if under the sanctity of an oath.[21]

Undue emphasis may be accomplished by the unnecessary repetition of instructions on vital questions.[22]

It has been held that undue prominence to the importance of conviction was to be inferred from an instruction which told the jury that, if accused was guilty he should not be erroneously convicted, but that if guilty he should not be erroneously acquitted, and that by acquittal of the guilty a contempt of law is aroused among the criminal classes and the safeguards of society are weakened.[23]

Commenting upon and placing undue weight upon the credibility of circumstantial evidence as compared with direct evidence is error.[24]

Undue weight is given to instructions by underscoring words and phrases therein, and this practice should not be indulged.[25]

§ 108. Argumentative instructions in civil cases.

Instructions which take the form of an argument to the jury should not be given by the court.

The purpose of instructions is to state the issues and the applicable law. It follows, then, that instructions which argue the question in controversy should not be given by the court.[26]

[20] Smith v. State, 24 GaApp 654, 101 SE 764; Johnson v. State, 27 GaApp 668, 109 SE 508; Commonwealth v. Clemmer, 190 Pa 202, 42 A 675.

[21] Baker v. State, 12 GaApp 553, 77 SE 884. See also Jones v. Commonwealth, 186 Ky 283, 216 SW 607.

[22] Mulligan v. State, 18 GaApp 464, 89 SE 541; State v. Totten, 185 Ind 580, 114 NE 82.

It was not prejudicial undue prominence that charge in two separate and distinct places stated language or substance of indictment. Quinn v. State, 22 GaApp 632, 97 SE 84.

[23] Hess v. State, 192 Ind 50, 133 NE 880, 135 NE 145.

[24] Lambert v. State, 105 OhSt 219, 136 NE 921.

[25] State v. Cater, 100 Ia 501, 69 NW 880.

[26] Federal. Northern Cent. Coal Co. v. Barrowman, 246 F 906.

The court should refuse instructions prepared by counsel stating general propositions which merely support an argument in favor of the party presenting it. San Pedro,

It is not error to refuse such an instruction, although the argument itself may be entirely legitimate.[27] One objection to instructions of this kind is that they tend to lead the court to invade the jury's function to determine the weight, probative

L. A. & S. L. R. Co. v. Thomas, 109 CCA 638, 187 F 790.

Alabama. King v. Franklin, 132 Ala 559, 31 S 467; Penry v. Dozier, 161 Ala 292, 49 S 909; Louisville & N. R. Co. v. Perkins, 165 Ala 471, 51 S 870, 21 AnnCas 1073; Southern Ry. Co. v. Smith, 177 Ala 367, 58 S 429; Keller v. Jones & Weeden, 196 Ala 417, 72 S 89; Fail v. Gulf States Steel Co., 205 Ala 148, 87 S 612; Sloss-Sheffield Steel & Iron Co. v. Jones, 207 Ala 7, 91 S 808; Alabama Great Southern R. Co. v. Molette, 207 Ala 624, 93 S 644; Nashville Broom & Supply Co. v. Alabama Broom & Mattress Co., 211 Ala 192, 100 S 132; Hale v. Cox, 222 Ala 136, 131 S 233.

Arkansas. Terry Dairy Co. v. Parker, 144 Ark 401, 223 SW 6; Kelly Handle Co. v. Shanks, 146 Ark 208, 225 SW 302; Volentine v. Wyatt, 164 Ark 172, 261 SW 308.

California. In re Dolbeer's Estate, 149 Cal 227, 86 P 695, 9 AnnCas 795; Sellars v. Southern Pacific Co., 33 CalApp 701, 166 P 599.

Colorado. McCormick v. Parriott, 33 Colo 382, 80 P 1044; Parris v. Jaquith, 70 Colo 63, 197 P 750.

Florida. Escambia County Elec. Light & Power Co. v. Sutherland, 61 Fla 167, 55 S 83.

Georgia. Macon Ry. & Light Co. v. Vining, 123 Ga 770, 51 SE 719; Landrum v. Rivers, 148 Ga 774, 98 SE 477; Western & A. R. Co. v. Jarrett, 22 GaApp 313, 96 SE 17.

Illinois. Griffin Wheel Co. v. Markus, 79 IllApp 82; Vacker v. Yeager, 151 IllApp 144; Dickey v. Ghere, 163 IllApp 641; Brewster v. Rockford Public Service Co., 257 IllApp 182.

Where long and unnecessary instruction is given containing mere repetitions amounting to an argument, a reversal should be granted if the verdict is clearly the result of such instruction. Grudzinski v. Chicago City R. Co., 165 IllApp 152.

Iowa. Strasberger v. Farmers' Elevator Co., 184 Ia 66, 167 NW 184; Noyes v. Des Moines Club, 186 Ia 378, 170 NW 461, 3 ALR 605; Haman v. Preston, 186 Ia 1292, 173 NW 894.

Massachusetts. Wyman v. Whicher, 179 Mass 276, 60 NE 612.

Michigan. O'Dea v. Michigan Cent. R. Co., 142 Mich 265, 105 NW 746; Wood v. Standard Drug Store, 190 Mich 654, 157 NW 403.

Minnesota. Reem v. St. Paul City Ry. Co., 82 Minn 98, 84 NW 652.

Missouri. Melican v. Missouri-Edison Elec. Co., 90 MoApp 595; Asbury v. Kansas City, 161 MoApp 496, 144 SW 127; Pasche v. South St. Joseph Town-Site Co. (MoApp), 190 SW 30; Eads v. Galt Tel. Co. (MoApp), 199 SW 710.

New Jersey. Cottrell v. Fountain, 80 NJL 1, 77 A 465.

North Carolina. Daniel v. Dixon, 161 NC 377, 77 SE 305.

Ohio. Washington Mut. Ins. Co. v. Merchants & Mfrs. Mut. Ins. Co., 5 OhSt 450; Jackson Knife & Shear Co. v. Hathaway, 17 OhCirDec 745, 7 OhCirCt (N. S.) 242.

Texas. Missouri, K. & T. Ry. Co. v. Carter, 95 Tex 461, 68 SW 159; Gilmore v. Brown (TexCivApp), 150 SW 964; El Paso Elec. Ry. Co. v. Benjamin (TexCivApp), 202 SW 996; Smith v. Bryan (TexCivApp), 204 SW 359; Shelton v. Shelton (Tex CivApp), 281 SW 331 (undue influence).

Utah. Smith v. Gilbert, 49 Utah 510, 164 P 1026; Moore v. Utah Idaho Cent. R. Co., 52 Utah 373, 174 P 873.

Washington. Cowie v. Seattle, 22 Wash 659, 62 P 121.

[27] In re Clark's Estate, 180 Cal 395, 181 P 639; Southern Trac. Co. v. Kirksey (TexCivApp), 222 SW

effect, and sufficiency of the evidence, and what inferences of fact should be drawn from the evidence introduced.[28] The rule is violated by instructions which seek to emphasize matters properly subject for argument to the jury.[29]

But, while the giving of argumentative instructions is a practice to be condemned, the fact that an instruction is argumentative in form will not necessarily cause a reversal, if the charge, as a whole, correctly instructs the jury as to the material issues.[30]

An instruction is argumentative in directing the jury to find for plaintiff if the evidence preponderates in his favor, although the preponderance be slight.[31] Instructions have been held argumentative which told the jury that the law abhors fraud;[32] that it is a sound rule of law that if a witness is found to wilfully swear falsely in one material thing, the jury may disregard the whole of his testimony;[33] that no one is required to anticipate that another will fail to obey the law;[34] that the failure to safeguard machinery may be actionable negligence;[35] that an accusation of slander is easy to be brought and hard to defend, though the defendant is innocent;[36] that certain acts would not justify a wife in assaulting a husband or put him in fault;[37] that intoxication, though a matter for consideration, does not constitute contributory negligence;[38] that the law does not impose on a railroad company the duty of so providing for the safety of persons going from the train to a boat that they will encounter no possible danger in the use of the appliances provided;[39] and that liability for pollution of

702; Nason v. Lord-Merrow Excelsior Co., 92 NH 251, 29 A2d 464.

[28] Wolff v. Carstens, 148 Wis 178, 134 NW 400.

[29] **Georgia.** In a personal injury action against a city a charge was clearly argumentative which told the jury that calamities and casualties were common to all, but it did not follow that their victims were entitled to compensation from a city unless the city failed to exercise ordinary care. Holloway v. Milledgeville, 35 GaApp 87, 132 SE 106.

Kentucky. Snyder v. Hudson, 223 Ky 525, 4 SW2d 410.

Missouri. Gleason v. Texas Co. (Mo), 46 SW2d 546; Dawes v. Starrett, 336 Mo 897, 82 SW2d 43.

Montana. Albertini v. Linden, 45 Mont 398, 123 P 400.

Washington. Forman v. Shields, 183 Wash 333, 48 P2d 599.

[30] McCormick v. Parriott, 33 Colo 382, 80 P 1044.

[31] Wolczek v. Public Service Co., 342 Ill 482, 174 NE 577.

[32] McClendon v. McKissack, 143 Ala 188, 38 S 1020.

[33] McClendon v. McKissack, 143 Ala 188, 38 S 1020.

[34] Missouri, K. & T. Ry. Co. v. Merchant (TexComApp), 231 SW 327.

[35] Lewis v. Wallace, 203 Ala 113, 82 S 127.

[36] McLaughlin v. Beyer, 181 Ala 427, 61 S 62.

[37] Johnson v. Johnson, 201 Ala 41, 77 S 335, 6 ALR 1031.

[38] Chapman v. Chicago City R. Co., 205 IllApp 497.

[39] Yazoo & M. V. R. Co. v. Hill,

water course depends on the density of population along banks of stream and is less where stream runs through thinly populated district.[40] So an instruction is argumentative which attempts to point out what acts or omissions on the part of the plaintiff, in an action for personal injuries, constitute negligence.[41]

An instruction in an action for the death of a boy from contact with a highly charged wire was held argumentative which told the jury that "boys can seldom be said to be negligent when they merely follow the irresistible impulses of their own nature, and instincts common to all boys."[42] In an action to recover on a life policy, where the claim was that the insured lost his life in a fire, and the insurer defended on the theory that the insured was not dead, an instruction was declared argumentative which told the jury to find for the defendant if they found that the fire was not intense enough to consume the human body.[43]

In a will contest involving the question of undue influence an instruction was argumentative which told the jury that affection and desire to gratify another's wishes are not such coercion as defeats testamentary disposition, all the better instincts being left in full play, and are harmless, unless testator's power of independent action is overcome.[44] And where it is sought to probate a will that is alleged to have been lost or destroyed, it is argumentative for the court to hold forth at length on facts relative to the revocation of the will.[45] An instruction in a will contest was held argumentative which told the jury that

141 Ark 378, 216 SW 1054; Rice v. Jefferson City Bridge & Transit Co. (Mo), 216 SW 746.

[40] American Tar Products Co. v. Jones, 17 AlaApp 481, 86 S 113.

[41] **Illinois.** Pittsburgh, C., C. & St. L. Ry. Co. v. Banfill, 206 Ill 553, 69 NE 499.

Michigan. An instruction was argumentative which said "I charge you that it was plaintiff's duty to be observant and to heed what was going on around her, to notice whether or not train was stationary, and to observe when it started, and, when alighting, it was her duty to protect herself and assist herself by the handrails on the car platform and running down the steps of the car, which were prepared for that purpose, and to be vigilant and see that no sudden movement would trip or throw her if she could prevent it; and, if plaintiff failed to use due and ordinary precaution that a prudent person would under the circumstances, and was injured in consequence of such failure to protect herself from injury as a prudent person would have done, then she cannot recover in this action." O'Dea v. Michigan Cent. R. Co., 142 Mich 265, 105 NW 746.

Washington. Cowie v. Seattle, 22 Wash 659, 62 P 121 (sidewalk injuries).

[42] Pierce v. United Gas & Elec. Co., 161 Cal 176, 118 P 700.

[43] Henry v. Missouri Ins. Co. (Mo App), 68 SW2d 852.

[44] Councill v. Mayhew, 172 Ala 295, 55 S 314.

[45] Baucum v. Harper, 176 Ga 296, 168 SE 27.

wills are often made in extremis and when the bodily powers are broken and the mental faculties enfeebled. The instruction was also open to the objection that it did not state a rule of law.[46]

An instruction is argumentative which tells the jury that a partnership is not to be determined by the fact that parties or witnesses called the relation such, but by the facts testified to as to the arrangement and contract, and that the mere interest in profits does not constitute a partnership.[47]

In an accident case, where motorist had collided with standing truck in the nighttime, the court's charge was held argumentative for telling the jury that they might consider matters of common and general knowledge in addition to the evidence and the instructions of the court.[48] It is judicial argument for the defense in a damage action for the court to charge that if a motorist drove into path of street car so that even though he exercised ordinary care the motorman could not avoid collision, there was no negligence on the part of the motorman, and that the motorist could not recover.[49] An instruction in a railroad crossing personal injury case, that if the plaintiff could have seen the train at the time and place he testified to having looked therefor, he must be held to have seen it, or to have not looked, has been held argumentative.[50]

§ 109. Argumentative instructions in criminal cases.

The rule against argumentative instructions is equally applicable to criminal prosecutions.

The court is not required to argue the case for either side, under the guise of instructions to the jury.[51] Hence, instructions which amount to no more than mere argument should not be given to the jury,[52] although they may be abstractly

[46] Huffman v. Graves, 245 Ill 440, 92 NE 289.

[47] Brown v. Cassidy-Southwestern Comm. Co. (TexCivApp), 225 SW 833.

[48] Phoenix Ref. Co. v. Tips, 125 Tex 69, 81 SW2d 60, revg. 66 SW2d 396.

[49] Cunningham v. Kansas City Public Service Co., 229 MoApp 174, 77 SW2d 161.

[50] Case v. Chicago Great Western Ry. Co., 147 Ia 747, 126 NW 1037.

[51] Ryan v. State, 46 GaApp 347, 167 SE 720; Commonwealth v. Polian, 288 Mass 194, 193 NE 68, 96 ALR 615.

[52] **Federal.** Weare v. United States, 1 F2d 617; Silkworth v. United States, 10 F2d 711; Gridley v. United States, 44 F2d 716; United States v. Hirsch, 74 F2d 215.

Alabama. Mitchell v. State, 129 Ala 23, 30 S 348; Pope v. State, 137 Ala 56, 34 S 840; Tribble v. State, 145 Ala 23, 40 S 938; Simmons v. State, 145 Ala 61, 40 S 660; Turner v. State, 160 Ala 40, 49 S 828; Troup v. State, 160 Ala 125, 49 S 332; Gaston v. State, 161 Ala 37, 49 S 876; Montgomery v. State, 169 Ala 12, 53 S 991; Fowler v. State, 170 Ala 65, 54 S 115; Pope v. State, 174 Ala 63, 57 S 245; Gaston v. State, 179 Ala 1, 60 S 805; Burton v. State, 194 Ala 2, 69 S 913; Husch v. State,

correct.[53] Yet an instruction may be argumentative, and still not be prejudicial as requiring a reversal.[54]

It does not make the use of argumentative instructions legitimate that their subject matter is not covered by other instructions.[55]

Instructions are generally open to the charge of argumentativeness where they go into general dissertations on the relative rights of society and the accused and the solicitude of society that no innocent person should be condemned.[56] The same is

211 Ala 274, 100 S 321; Barney v. State, 5 AlaApp 302, 57 S 598; Kuhn v. State, 16 AlaApp 489, 79 S 394; Barnett v. State, 16 AlaApp 539, 79 S 675; Evans v. State, 17 AlaApp 155, 82 S 645; Vaughn v. State, 17 AlaApp 383, 84 S 879; Marker v. State, 20 AlaApp 260, 101 S 355; Brock v. State (AlaApp), 61 S 474.

An instruction was argumentative which told the jury that they were not required to find who did the shooting unless they should be convinced beyond a reasonable doubt that the defendant did it. Spraggins v. State, 139 Ala 93, 35 S 1000.

Arkansas. White v. State, 105 Ark 698, 152 SW 163; Nordin v. State, 143 Ark 364, 220 SW 473.

California. People v. Hatch, 163 Cal 368, 125 P 907; People v. Converse, 28 CalApp 687, 153 P 734; People v. Lopez, 33 CalApp 530, 165 P 722; People v. Musumeci, 51 Cal App 454, 197 P 129.

Colorado. McQueary v. People, 48 Colo 214, 110 P 210, 21 AnnCas 560.

Florida. Baldwin v. State, 46 Fla 115, 35 S 220; Bass v. State, 58 Fla 1, 50 S 531; Wolf v. State, 72 Fla 572, 73 S 740.

Georgia. Johnson v. State, 148 Ga 546, 97 SE 515; Ballard v. State, 11 GaApp 104, 74 SE 846.

Idaho. State v. Cosler, 39 Idaho 519, 228 P 277.

Illinois. Zuckerman v. People, 213 Ill 114, 72 NE 741; People v. Clement, 285 Ill 614, 121 NE 213; People v. Davis, 300 Ill 226, 133 NE 320; People v. Polak, 360 Ill 440, 196 NE 513.

Louisiana. State v. Ardoin, 49 LaAnn 1145, 22 S 620, 62 AmSt 678.

Michigan. People v. Hanaw, 107 Mich 337, 65 NW 231; People v. Dupree, 175 Mich 632, 141 NW 672.

Missouri. An instruction selecting certain parts of the evidence and submitting it to the attention of the jury, and directing the attention of the jury to a certain witness and what he stated, is bad as being argumentative. State v. Chinn, 153 Mo App 611, 133 SW 1196.

Montana. State v. Kahn, 56 Mont 108, 182 P 107.

Nevada. State v. Buralli, 27 Nev 41, 71 P 532.

Oklahoma. Dunn v. State, 15 Okl Cr 245, 176 P 86.

Texas. Perkins v. State, 98 TexCr 329, 265 SW 702.

Utah. State v. McCurtain, 52 Utah 63, 172 P 481.

Virginia. Gottlieb v. Commonwealth, 126 Va 807, 101 SE 872.

Washington. State v. Storrs, 112 Wash 675, 192 P 984, 197 P 17.

New Jersey. But see State v. Dichter, 95 NJL 203, 112 A 413.

[53] Brocton v. Wiese, 204 IllApp 556; State v. Burns, 51 Utah 73, 168 P 955.

[54] Commonwealth v. Talarico, 317 Pa 481, 177 A 1.

[55] McFee v. United States, 53 F2d 553.

[56] **Alabama.** Bell v. State, 140 Ala 57, 37 S 281; Parker v. State, 165 Ala 1, 51 S 260; Smith v. State, 165 Ala 74, 51 S 632; Humphries v. State, 2 AlaApp 1, 56 S 72; Minor v. State, 15 AlaApp 556, 74 S 98; Hankins v. State, 15 AlaApp 581, 74 S 400 (justice tempered with

true with reference to admonitions to jurors to stand by their individual convictions,[57] or to disregard racial prejudices.[58]

The court should refuse argumentative instructions bearing upon the weight and credibility of the accused as a witness,[59] of expert witnesses,[60] of officers as witnesses,[61] of circumstantial evidence,[62] and of dying declarations.[63]

mercy); West v. State, 16 AlaApp 117, 75 S 709; Adkins v. State, 16 AlaApp 181, 76 S 465.

An instruction was argumentative which advised the jury that the law does not desire the punishment of persons only reasonably guilty but only of those who are guilty to a moral certainty. Saulsberry v. State, 178 Ala 16, 59 S 476.

California. People v. Ebanks, 117 Cal 652, 49 P 1049, 40 LRA 269.

A court properly refuses an instruction as to the policy of the law in relation to the conviction of innocent persons as the court is required to state to the jury the law and not the reason for its enactment. People v. Smith, 13 CalApp 627, 110 P 333.

Georgia. Mixon v. State, 123 Ga 581, 51 SE 580, 107 AmSt 149.

Idaho. State v. Fleming, 17 Idaho 471, 106 P 305.

Illinois. People v. Davidson, 240 Ill 191, 88 NE 565.

Indiana. Lindley v. State, 199 Ind 18, 154 NE 867.

Iowa. Such an instruction, however, was held unobjectionable in State v. Kneeskern, 203 Ia 929, 210 NW 465.

North Dakota. State v. Rodman, 57 ND 230, 221 NW 25.

Virginia. McCue v. Commonwealth, 103 Va 870, 49 SE 623.

[57] White v. State, 195 Ala 681, 71 S 452.

[58] Johnson v. State, 15 AlaApp 298, 73 S 210; McDonald v. State, 23 GaApp 58, 97 SE 448 (killing Chinaman).

[59] People v. Holden, 13 CalApp 354, 109 P 495 (caution as to verbal admission); People v. Keating, 247 Ill 76, 93 NE 95.

The following requested instruction was argumentative: "You are instructed that it is the law that verbal statements, or as they are sometimes called extrajudicial statements—that is, statements made by the defendant out of court—are to be received by the jury with caution; and you have a right to consider that there is danger of mistakes from misapprehension of the witnesses, the misuse of the words, the failure of the party to express his own meaning, the infirmity of memory on the part of the witness attempting to relate all of the conversation, and this rule applies when only a part of the defendant's declarations at the time are written down or remembered and proven." People v. Muhly, 11 CalApp 129, 104 P 466.

[60] Miller v. State, 9 OklCr 255, 131 P 717, LRA 1915A, 1088.

[61] An instruction was argumentative which told the jury in a trial for violating a prohibitory law that in determining the weight to be given the testimony of certain witnesses, the jury should consider that they were deputy sheriffs and that the sheriff gets his compensation from fees. Sapp v. State, 2 AlaApp 190, 56 S 45.

[62] Lawson v. State, 16 AlaApp 174, 76 S 411; State v. Marren, 17 Idaho 766, 107 P 993.

An instruction was argumentative where it advised the jury that the fact that the jurors had said on oath they would convict on circumstantial evidence did not mean that the jury must convict. Phillips v. State, 162 Ala 14, 50 S 194.

[63] An instruction which told the jury that although the dying declarations of deceased are admissible in evidence, yet they must be received with grave caution, was properly refused as argumentative in prose-

An instruction was argumentative where it informed the jury that if the evidence failed to show any motive of accused, this should be considered in his favor with all other facts and circumstances.[64] An instruction was argumentative where it stated that the jury should find defendant not guilty if there was reasonable ground to believe from the evidence that another could have killed the deceased.[65] It has been held argumentative for the court to say to the jury, "the evidence justifies the claim of the government."[66] In a prosecution of a husband and father for desertion, it is argumentative for the court to charge that the defendant is not guilty if he provided a home for his wife and child at the home of his parents.[67] It is argumentative to tell the jury that a defendant on trial for violation of the prohibition laws is entitled to the same consideration as one on trial for any other crime.[68]

§ 110. Appeals to sympathy or prejudice.

Instructions which tend to excite sympathy or prejudice should not be given. The giving of such instruction will ordinarily result in a reversal.

A fair trial on the issues is defeated by instructions which have a tendency to excite sympathy, passion, or prejudice. If given, this kind of instruction will ordinarily work a reversal at the instance of the party prejudiced.[69]

The court may, in its discretion, when the circumstances warrant it, instruct the jury that it is their duty to be guided by the evidence and that they should not be influenced by prejudice or sympathy;[70] but an instruction which implies that the jury is sympathetic for the injured party and charges them that sympathy is not to be the basis of their verdict is erroneous and prejudicial to the defendant.[71]

There was a violation of the rule by an instruction that "in passing upon this case you will be governed by the law and the evidence and it is your duty not to allow yourselves to be

cution for murder. Twitty v. State, 168 Ala 59, 53 S 308.

[64] Fields v. State, 154 Ark 188, 241 SW 901.

[65] Wright v. State, 15 AlaApp 91, 72 S 564.

[66] Sunderland v. United States, 19 F2d 202.

[67] Stephens v. State, 172 Ark 398, 288 SW 926.

[68] McFarland v. State, 22 AlaApp 609, 118 S 500.

[69] Northwestern Mut. Life Ins. Co. v. Stevens, 18 CCA 107, 71 F 258; Wolf v. United States, 170 CCA 364, 259 F 388.

[70] Dewert v. Cincinnati Milling Mach. Co., 38 OLR 318; Pletcher v. Bodie, 13 OLA 708.

[71] Toledo, C. & O. R. R. Co. v. Miller, 103 OhSt 17, 132 NE 156.

influenced by the presence of a lobby in the court-room opposed to the granting of the plaintiff's petition."[72]

In an action against a benefit society, there was an appeal to sympathy by an instruction which asked the jury to determine the issues "in the same manner as if the widow was plaintiff, and not the brother."[73] In an action for seduction, the jury were told in one instruction that a certain state of facts would constitute a strong circumstance tending to establish plaintiff's right to recover and in another instruction were informed that if these same facts were susceptible of explanation as well on the theory of innocence as guilt, such facts, from considerations of sympathy and public policy, should be construed favorably to defendant. The instruction was erroneous, as the question to be decided was whether the plaintiff had sustained damage and he was entitled to have the matter determined free from the influence of sentimental considerations.[74]

So there was an improper appeal in a case where it was charged that the fact that one of the parties was a corporation should not affect the verdict and that there should be no sympathy or favor shown plaintiff because of the relative financial condition of the parties.[75] The case was the same with a charge which reminded the jury of the benefits conferred on the public by corporations.[76]

There was a clear attempt to arouse prejudice in an action by a widow and her child against an insurance company, where the charge of the court was in part in the following language: "Now, gentlemen of the jury, I try to close my eyes as well as I can to the fact that a woman and child have any interest whatever in the result of a controversy when it is brought into court. I can not always do that. I don't suppose you can. It is not expected. If a man can do that, he is no better than a brute. He is as bad as the heathen is supposed to be and worse than the horse-thief is thought to be. If he could close his eyes to that fact, lose all sense of decency and self-respect, he would not be fit for a juror. But, so far as it is possible for you to do that, you do so, and decide the case precisely as you would if it were between man and man or between a woman and a woman."[77]

[72] Lynch v. Bates, 139 Ind 206, 38 NE 806.

[73] National Council Knights & Ladies of Security v. O'Brien, 112 IllApp 40.

[74] Robertson v. Brown, 56 Neb 390, 76 NW 891.

[75] Fletcher v. Kansas City Rys. Co. (MoApp), 221 SW 1070.

[76] Starling v. Selma Cotton Mills, 171 NC 222, 88 SE 242.

[77] Northwestern Mut. Life Ins. Co. v. Stevens, 18 CCA 107, 71 F 258.

In a suit against a street railway company for negligently causing the death of a child, where the trial judge told the jury it was natural for them to have their sympathies aroused in behalf of suffering, and was not asked to instruct that the jury must not allow their sympathies to enter into the consideration of the case, and where the court afterward cautioned the jury to divest themselves of sympathy or prejudice in arriving at their verdict, it was held that there was no reversible error.[78]

§ 111. Special verdicts, interrogatories, and findings—Preparation, form, and submission.

A "special verdict" consists of questions on all the issues in a case, submitted to and answered by the jury and not accompanied by a general verdict.

"Special findings" or "interrogatories" are questions on only part of the issues, submitted to and answered by the jury and are accompanied by a general verdict.

The terms "special verdict" and "special findings" (or "interrogatories") have been loosely interchanged as denoting the same thing in actions tried by a jury. They have no true application to findings of a court sitting as a trier of facts.

Rightly understood, these terms are not interchangeable. A "special verdict" consists of questions submitted to and answered by a jury, which cover all the issues in a case necessary to be determined in order to grant a judgment.[79] A special verdict is never properly accompanied by a general verdict by which the jury find generally in favor of a party.[80] "Special findings" or interrogatories are questions submitted and answered

[78] Citizens Street Ry. Co. v. Dan, 102 Tenn 320, 52 SW 177.

[79] **California.** Montgomery v. Sayre, 91 Cal 206, 27 P 648.

Connecticut. Freedman v. New York, N. H. & H. R. Co., 81 Conn 601, 71 A 901, 15 AnnCas 464.

Missouri. Fine Art Pictures Corp. v. Karzin (MoApp), 29 SW2d 170.

New York. Carr v. Carr, 52 NY 251; People v. McClure, 148 NY 95, 42 NE 523; Daley v. Brown, 167 NY 381, 60 NE 752.

Oregon. Turner v. Cyrus, 91 Or 462, 179 P 279.

Pennsylvania. Panek v. Scranton Ry. Co., 258 Pa 589, 102 A 274; James v. Columbia County Agricultural, Horticultural & Mechanical Assn., 117 PaSuper 277, 178 A 326 (nature and essentials of special verdict stated).

Wisconsin. Lee v. Chicago, St. P., M. & O. Ry. Co., 101 Wis 352, 77 NW 714.

A special verdict is one by which the jury find the facts, leaving the judgment to the court. The court said: "Too much emphasis can not be laid on this requirement." Bigelow v. Danielson, 102 Wis 470, 78 NW 599; Mauch v. Hartford, 112 Wis 40, 87 NW 816; Olwell v. Skobis, 126 Wis 308, 105 NW 777.

[80] Ward v. Chicago, M. & St. P. Ry. Co., 102 Wis 215, 78 NW 442; Schaidler v. Chicago & N. W. Ry. Co., 102 Wis 564, 78 NW 732; Wills v. Ashland Light, Power & Street Ry. Co., 108 Wis 255, 84 NW 998.

on only part of the material issues and are accompanied by a general verdict; special findings are not a complete verdict in themselves.[81]

The practice depends much upon the statutes of each state. But the use of special verdicts is proper under the common law and originated in the Statute of Westminster II. In states not controlled by statutory provision, it is held to be within the discretion of the trial court to require a special verdict or require special findings.[82]

In some states, a statute requires that a special verdict or special finding be submitted when demand is made in due time.[83] Some of these statutes provide that the court may on

[81] **Federal.** Elliott v. E. C. Miller & Co., 158 F 868.

Connecticut. Freedman v. New York, N. H. & H. R. Co., 81 Conn 601, 71 A 901, 15 AnnCas 464.

Indiana. Consolidated Stone Co. v. Williams, 26 IndApp 131, 57 NE 558, 84 AmSt 278.

Ohio. Gale v. Priddy, 66 OhSt 400, 64 NE 437.

A peculiarity in the Ohio Statute permits interrogatories to accompany a special verdict. R. C. § 2315.16.

Wisconsin. McDougall v. Ashland Sulphite-Fibre Co., 97 Wis 382, 73 NW 327.

[82] **Arkansas.** Southern Life Ins. Co. v. Roberts, 173 Ark 903, 294 SW 14.

California. In re Witt's Estate, 198 Cal 407, 245 P 197; Weintraub v. Soronow, 115 CalApp 145, 1 P2d 28; De Martini v. Wheatley, 126 Cal App 230, 14 P2d 869; Boomer v. Muir (CalApp), 24 P2d 570; Walton v. Southern Pacific Co. (CalApp), 48 P2d 108; Hughes v. Quakenbush, 1 CalApp2d 349, 37 P2d 99.

Colorado. London Guarantee & Acc. Co. v. Officer, 78 Colo 441, 242 P 989; Denver Tramway Corp. v. Kuttner, 95 Colo 312, 35 P2d 852.

Connecticut. Ford v. H. W. Dubiskie Co., 105 Conn 572, 136 A 560; Morgan v. Marchesseault, 117 Conn 607, 169 A 609.

Illinois. Cripe v. Pevely Dairy Co., 275 IllApp 231.

Indiana. Oaktown Tel. Co. v. Miller, 101 IndApp 108, 194 NE 741.

Kansas. Alexander v. Wehkamp, 171 Kan 285, 232 P2d 440.

Massachusetts. Stone v. Orth Chevrolet Co., 284 Mass 525, 187 NE 910.

Michigan. Rich v. Daily Creamery Co., 303 Mich 344, 6 NW2d 539.

Nebraska. Masonic Bldg. Corp. v. Carlsen, 128 Neb 108, 258 NW 44.

New Hampshire. Bridges v. Great Falls Mfg. Co., 85 NH 220, 156 A 697.

North Carolina. Gasque v. Asheville, 207 NC 821, 178 SE 848.

Oklahoma. LaFayette v. Bass, 122 Okl 182, 252 P 1101; Kirk v. Leeman, 163 Okl 236, 22 P2d 382.

South Carolina. Barton v. Southern Ry. Co., 171 SC 46, 171 SE 5.

Washington. Child v. Hill, 155 Wash 133, 283 P 1076; Schirmer v. Nethercutt, 157 Wash 172, 288 P 265.

West Virginia. Bartlett v. Mitchell, 113 WVa 465, 168 SE 662.

Wyoming. Opitz v. Newcastle, 35 Wyo 358, 249 P 799; Shikany v. Salt Creek Transp. Co., 48 Wyo 190, 45 P2d 645.

[83] **New York.** Bergman v. Scottish Union & Nat. Ins. Co., 264 NY 205, 190 NE 409, revg. 240 AppDiv 714, 265 NYS 1006; Sherman v. Millard, 144 Misc 748, 259 NYS 415.

Ohio. Dowd-Feder Co. v. Schreyer, 124 OhSt 504, 179 NE 411; Horwitz v. Eurove, 129 OhSt 8, 193 NE 644, 96 ALR 782; Pecsok v. Millikin, 86

its own motion require a special verdict or submit interrogatories.[84]

The object of the special verdict is to have the jury find the facts upon all the material ultimate issues, leaving the court to apply the law to the facts and thereupon to render judgment.[85] The effect is that the jury finds the facts without having the knowledge of the legal result of such findings, thus removing from the jury's findings any bias or prejudice or sympathy of the jury in favor of or against any party.[86]

"Special findings" are intended to test or explain or limit the effect of a general verdict; to enable the court to obtain the jury's view on some material issues and to guard against any misapplication of the law by the jury.[87] They do not in

OhApp 543, 173 NE 626; Cincinnati Street Ry. Co. v. Blackburn, 45 OhApp 153, 186 NE 826, 39 OLR 26.

A special interrogatory offered, but not suggested or tendered until after the general charge when the jury is about to retire for deliberations, may be rejected by the court, in the exercise of a sound discretion. Bobbitt v. Maher Beverage Co., 152 OhSt 246, 40 OhO 290, 89 NE2d 583.

Texas. Missouri-Kansas-Texas R. Co. v. Rockwall County Levee Imp. Dist. No. 3, 117 Tex 34, 297 SW 206, revg. 266 SW 163; Robert Oil Corp. v. Garrett (TexCivApp), 22 SW2d 508; City Ice Delivery Co. v. Suggs (TexCivApp), 60 SW2d 538; Singer Iron & Steel Co. v. Republic Iron & Metal Co. (TexCivApp), 80 SW2d 1037.

Wisconsin. Dick v. Heisler, 184 Wis 77, 198 NW 734; Millard v. North River Ins. Co., 201 Wis 69, 228 NW 746; Brown Deer Lbr. Co. v. Campbell-Shirk Co., 201 Wis 333, 230 NW 81; Conway v. Providence Washington Ins. Co., 201 Wis 502, 230 NW 630; Liberty Tea Co. v. La Salle Fire Ins. Co., 206 Wis 639, 238 NW 399; Paluczak v. Jones, 209 Wis 640, 245 NW 655; Rebholz v. Wettengel, 211 Wis 285, 248 NW 109.

Wisconsin Stat. 1955, § 270.27.

[84] Gherke v. Cochran, 198 Wis 34, 222 NW 304, 223 NW 425; Honore v. Ludwig, 211 Wis 354, 247 NW 335.

Wisconsin Stat. 1955, § 270.27.

[85] Bigelow v. Danielson, 102 Wis 470, 78 NW 599.

[86] Ward v. Chicago, M. & St. P. Ry. Co., 102 Wis 215, 78 NW 442.

[87] **Connecticut.** Ziman v. Whitley, 110 Conn 108, 147 A 370.

Indiana. Cleveland, C., C. & St. L. Ry. Co. v. True, 53 IndApp 156, 100 NE 22.

Kansas. Morrow v. Board of County Comrs., 21 Kan 484; Jones v. Southwestern Interurban Ry. Co., 92 Kan 809, 141 P 999.

Michigan. Holman v. Cole, 242 Mich 402, 218 NW 795.

Minnesota. Boese v. Langley, 213 Minn 440, 7 NW2d 355.

New York. Lierness v. Long Island R. Co., 217 AppDiv 301, 216 NYS 656.

Ohio. Pecsok v. Millikin, 36 Oh App 543, 173 NE 626; Kennard v. Palmer, 143 OhSt 1, 27 OhO 554, 53 NE2d 908; Simpson v. Springer, 143 OhSt 324, 28 OhO 293, 55 NE2d 418, 155 ALR 583; Masters v. New York Cent. R. Co., 147 OhSt 293, 34 OhO 223, 70 NE2d 898; Anderson v. S. E. Johnson Co., 150 OhSt 169, 37 OhO 451, 80 NE2d 757; Klever v. Reid Bros. Express, Inc., 151 Oh St 467, 39 OhO 280, 86 NE2d 608.

A peculiarity in the Ohio Statute permits special interrogatories to be submitted with special verdicts. R. C. § 2315.15.

themselves furnish a complete factual basis for a judgment; but are a check upon the uncertainty of a general verdict.[88]

Evidentiary matters are not to be submitted for special findings or verdicts, but only the ultimate controlling facts.[89] If the verdict as framed correctly covers all essential issues, it is not error to refuse to submit other questions requested in different form.[90] If the verdict as framed by the court does

[88] Morrow v. Board of County Comrs., 21 Kan 484.

[89] Illinois. Wicks v. Cuneo-Henneberry Co., 319 Ill 344, 150 NE 276, affg. 234 IllApp 502; Schluraff v. Shore Line Motor Coach Co., 269 IllApp 569. See Keys v. North, 271 IllApp 119.

Kansas. Doty v. Crystal Ice & Fuel Co., 122 Kan 653, 253 P 611.

Ohio. Mellon v. Weber, 115 OhSt 91, 152 NE 753; Baltimore & O. R. Co. v. Brown, 36 OhApp 404, 173 NE 298; Wills v. Anchor Cartage & Storage Co., 38 OhApp 358, 33 OLR 299, 176 NE 680; Orville v. Gochnauer, 43 OhApp 422, 183 NE 391; Blum v. Shepard, 4 OLA 314; Zilch v. Sadowski, 10 OLA 423; Ohio Bell Tel. Co. v. Corley, 13 OLA 720.

Texas. Texas & P. Ry. Co. v. Ray (TexCivApp), 287 SW 91; Houston Compress Co. v. Houston Steel & Foundry Co. (TexCivApp), 22 SW2d 737; Scales v. Lindsay (TexCivApp), 43 SW2d 286; Northern Texas Trac. Co. v. Bruce (TexCivApp), 77 SW2d 889; Wright v. State (TexCivApp), 80 SW2d 1015; Bush v. Gaffney (TexCivApp), 84 SW2d 759; Freeman v. Galveston, H. & S. A. Ry. Co. (TexComApp), 285 SW 607, revg. 273 SW 979, reh. den. in 287 SW 902.

Wisconsin. Goesel v. Davis, 100 Wis 678, 76 NW 768; Baxter v. Chicago & N. W. Ry. Co., 104 Wis 307, 80 NW 644; Rowley v. Chicago, M. & St. P. Ry. Co., 135 Wis 208, 115 NW 865; Baraboo v. Excelsior Creamery Co., 171 Wis 242, 177 NW 36; Williams v. Williams, 210 Wis 304, 246 NW 322.

In Mauch v. Hartford, 112 Wis 40, 87 NW 816, an action to recover for personal injuries to a pedestrian on a sidewalk, based on a statute making the municipality liable for maintaining a walk that was "insufficient and out of repair," the following questions were suggested as a substantive basis for framing question for a special verdict: (1) Was the place where plaintiff was injured insufficient for public travel? (2) If so, did the officers of the city, charged with the immediate duty of attending to such matters, have notice of such insufficient condition for a sufficient length of time to have repaired the walk before the accident, by the exercise of reasonable diligence? (3) Was the insufficient condition of the sidewalk, claimed to have existed, the proximate cause of the injury plaintiff received? (4) Was plaintiff guilty of any want of ordinary care which contributed to produce the injury received? (5) What sum of money will it take to compensate plaintiff for the injury she received?

[90] Lyle v. McCormick Harvesting Mach. Co., 108 Wis 81, 84 NW 18, 51 LRA 906; Simmer v. Fox River Valley Elec. Ry. Co., 118 Wis 614, 95 NW 957; Anderson v. Sparks, 142 Wis 398, 125 NW 925; Mickuczauski v. Helmholz Mitten Co., 148 Wis 153, 134 NW 369; Krawiecki v. Kieckhefer Box Co., 151 Wis 176, 138 NW 710; Hess v. Zimmer, 152 Wis 193, 139 NW 740; Langowski v. Wisconsin Cent. Ry. Co., 153 Wis 418, 141 NW 236; Hilden v. Great Lakes Coal & Dock Co., 156 Wis 205, 145 NW 770; Taylor v. Northern Coal & Dock Co., 161 Wis 223, 152 NW 465, Ann Cas 1916C, 167; Guillaume v. Wisconsin-Minnesota Light & Power Co., 161 Wis 636, 155 NW 143; Kellner v. Christiansen, 169 Wis 390, 172

not cover all controlling issues of fact, it is the duty of counsel to request a question on any omitted issue. In the absence of such request, any issue omitted is deemed to be submitted for decision by the court.[91]

There should be a separate submission for separate issues of fact,[92] and mixed questions of law and fact should not be submitted.[93] Abstract propositions, or conclusions of law, should not be submitted under the guise of special interrogatories.[94] Nor should undisputed facts be submitted.[95]

In some states, the questions submitted should be framed by the court and the court has a large discretion in respect thereto.[96]

NW 796; Baraboo v. Excelsior Creamery Co., 171 Wis 242, 177 NW 36; Lozon v. Leamon Bakery Co., 186 Wis 84, 202 NW 296; Kastler v. Tures, 191 Wis 120, 210 NW 415; Honore v. Ludwig, 211 Wis 354, 247 NW 335.

[91] Gist v. Johnson-Carey Co., 158 Wis 188, 147 NW 1079, AnnCas 1916E, 460; Phelps v. Monroe, 166 Wis 315, 165 NW 471; Weiberg v. Kellogg, 188 Wis 97, 205 NW 896; Delfosse v. New Franken Oil Co., 201 Wis 401, 230 NW 31; Breuer v. Arenz, 202 Wis 453, 233 NW 76; Lefebvre v. Autoist Mut. Ins. Co., 205 Wis 115, 236 NW 684; Schumacher v. Carl J. Neumann Dredging & Imp. Co., 206 Wis 220, 239 NW 459.

Wisconsin Stat. 1955, § 270.28.

[92] Salo v. Dorau, 191 Wis 618, 211 NW 762; Gherke v. Cochran, 198 Wis 34, 222 NW 304, 223 NW 425; Pettric v. Gridley Dairy Co., 202 Wis 289, 232 NW 595.

Only special questions covering the issues made by the pleadings and controverted in the evidence, each so framed as to cover a single issue and to admit of a direct answer, should be included in a special verdict. Mauch v. Hartford, 112 Wis 40, 87 NW 816.

Issues that are single should not be subdivided, nor should the jury be required to decide a single issue by viewing it in various aspects. Mauch v. Hartford, 112 Wis 40, 87 NW 816.

The number of questions should coincide with the number of single controverted issues of fact and be arranged in logical order. Mauch v. Hartford, 112 Wis 40, 87 NW 816.

MacDonald v. State ex rel. Fulton, 47 OhApp 223, 40 OLR 236, 191 NE 837.

[93] Board of Comrs. of Huntington County v. Bonebrake, 146 Ind 311, 45 NE 470; Grossnickle v. Avery, 96 IndApp 479, 152 NE 288; Bence v. Denbo, 98 IndApp 52, 183 NE 326; Gilmore v. Chapman (TexCiv App), 283 SW 243; First State Bank v. Dillard (TexCivApp), 71 SW2d 407; Commercial Union Assur. Co., Ltd. v. Everidge (TexCivApp), 72 SW2d 311.

[94] Socony Burner Corp. v. Gold, 227 AppDiv 369, 237 NYS 552.

[95] **North Carolina.** Clark v. Dill, 208 NC 421, 181 SE 281.

Pennsylvania. But see Altman v. Standard Refrigerator Co., 315 Pa 465, 173 A 411, where it was held that the court could submit all the essential facts, disputed as well as undisputed.

Texas. Garrett v. State (TexCiv App), 51 SW2d 822; Gaines v. Stewart (TexCivApp), 57 SW2d 207; Daniels v. Starnes (TexCivApp), 61 SW2d 548.

Wisconsin. Ridgeway State Bank v. Severson, 185 Wis 504, 201 NW 806; E. L. Chester Co. v. Wisconsin Power & Light Co., 211 Wis 158, 247 NW 861.

[96] Wright v. Mulvaney, 78 Wis

The questions should be so framed that the burden of proof on each question is on the affirmative.[97] It is the jury's duty to answer each question according to the preponderance of the evidence thereon, rather than to reconcile the answers. Hence it is error to instruct that "your answers to these questions, if any, should be consistent with each other."[98]

§ 112. Special verdicts—Instructions concerning.

Where a special verdict is submitted to the jury, the instructions should be confined to matters to be considered by the jury in answering the questions.

In submitting a special verdict to the jury, it is reversible error to instruct the jury generally upon the law of the case and thus inform the jury of the effect of their answers to the questions.[99] So, special prayers concluding with the request

89, 46 NW 1045, 9 LRA 807, 23 AmSt 393; McCoy v. Milwaukee Street Ry. Co., 88 Wis 56, 59 NW 453; Ohlweiler v. Lohmann, 88 Wis 75, 59 NW 673; Farley v. Chicago M. & St. P. Ry. Co., 89 Wis 206, 61 NW 769; McGowan v. Chicago & N. W. Ry. Co., 91 Wis 147, 64 NW 891; Bagnowski v. A. J. Lindermann & Hoverson Co., 93 Wis 592, 67 NW 1131; Pier v. Chicago, M. & St. P. Ry. Co., 94 Wis 357, 68 NW 464; Schumaker v. Heinemann, 99 Wis 251, 74 NW 785; Goesel v. Davis, 100 Wis 678, 76 NW 768; Baxter v. Chicago & N. W. R. Co., 104 Wis 307, 80 NW 644; Dodge v. O'Dell's Estate, 106 Wis 296, 82 NW 135; Boyce v. Wilbur Lbr. Co., 119 Wis 642, 97 NW 563; Olk v. Marquardt, 203 Wis 479, 234 NW 723; Liberty Tea Co. v. La Salle Fire Ins. Co., 206 Wis 639, 238 NW 399; Honore v. Ludwig, 211 Wis 354, 247 NW 335.

Wisconsin Stat. 1955, § 270.27.

[97] Sloan v. Brown County State Bank, 174 Wis 36, 182 NW 363.

In Kausch v. Chicago, M. Elec. Ry. Co., 176 Wis 21, 186 NW 257, the court said: "The questions were so framed that the burden of proof was on the affirmative side in each instance. With reference to each question the jury were told that before they could return an affirmative answer they must be satisfied to a reasonable certainty by a consideration of all the evidence that the fact inquired about existed. If not so satisfied, they were directed to answer the question, 'No.' This most effectually placed the burden of proof upon the party required to prove the affirmative of each question propounded, and made a charge with reference to the burden of proof unnecessary. * * * It appears to be a simple and effective way of impressing upon the jury the rule which should govern them in arriving at their determination, and rendered an instruction with reference to the burden of proof unnecessary."

[98] St. Louis & S. F. R. Co. v. Burrows, 62 Kan 89, 61 P 439.

[99] **Indiana.** Louisville, N. A. & C. Ry. Co. v. Frawley, 110 Ind 18, 9 NE 594; Louisville, N. A. & C. Ry. Co. v. Lynch, 147 Ind 165, 44 NE 997, 46 NE 471, 34 LRA 293; Boyce v. Schroeder, 21 IndApp 28, 51 NE 376.

Kansas. Snyder v. Eriksen, 109 Kan 314, 198 P 1080.

Massachusetts. Tarbell v. Forbes, 177 Mass 238, 58 NE 873.

Michigan. Taylor v. Davarn, 191 Mich 243, 157 NW 572; Mitchell v. Perkins, 334 Mich 192, 54 NW2d 293.

that the court instruct that the "plaintiff cannot recover" are rightly refused, since the jury responds to the issues instead of finding a general verdict, and instructions of this character might have a tendency to confuse.[1]

But general instructions as to burden of proof, credibility of witnesses, rules for computing damages and similar matter

North Carolina. Earnhardt v. Clement, 137 NC 91, 49 SE 49.

North Dakota. Morrison v. Lee, 13 ND 591, 102 NW 223; Daniels v. Payne, 48 ND 60, 182 NW 1010; Olson v. Horton Motor Co., 48 ND 490, 185 NW 365; Asch v. Washburn Lignite Coal Co., 48 ND 734, 186 NW 757.

Ohio. Dowd-Feder Co. v. Schreyer, 124 OhSt 504, 179 NE 411; Landon v. Lee Motors, 161 OhSt 82, 53 OhO 25, 118 NE2d 147; Gendler v. Cleveland R. Co., 18 OhApp 48.

Rhode Island. Smith v. Rhode Island Co., 39 RI 146, 98 A 1.

South Dakota. In re Fleming's Estate, 42 SD 193, 173 NW 836.

Texas. Petty v. San Antonio (Tex), 181 SW 224: Eureka Ice Co. v. Buckaloo (TexCivApp), 188 SW 510; Hovey v. See (TexCivApp), 191 SW 606; Dallas Hotel Co. v. Fox (TexCivApp), 196 SW 647; Rosser v. Cole (TexCivApp), 226 SW 510; Hines v. Hodges (TexCivApp), 238 SW 349; Fort Worth & D. C. Ry. Co. v. Amason (TexCivApp), 239 SW 359; Humble Oil & Ref. Co. v. Strauss (TexCivApp), 243 SW 528; Southwestern Tel. & T. Co. v. French (TexCivApp), 245 SW 997; Galveston, H. & S. A. Ry. Co. v. Todd (Tex CivApp), 8 SW2d 1104; Looney v. Elliott (TexCivApp), 52 SW2d 949; Texas & N. O. R. Co. v. Harrington (TexComApp), 235 SW 188; Peveto v. Texas & N. O. Ry. Co. (TexCom App), 238 SW 892.

Wisconsin. Coolican v. Milwaukee & Sault Ste. Marie Imp. Co., 79 Wis 471, 48 NW 717; Reed v. Madison, 85 Wis 667, 56 NW 182; Klatt v. N. C. Foster Lbr. Co., 97 Wis 641, 73 NW 563; Johnson v. St. Paul & W. Coal Co., 126 Wis 492, 105 NW 1048; Campbell v. Germania Fire Ins. Co., 163 Wis 329, 158 NW 63; Christl v. Hauert, 164 Wis 624, 160 NW 1061; McHatton v. McDonnell's Estate, 166 Wis 323, 165 NW 468; Becker v. West Side Dye Works, 172 Wis 1, 177 NW 907; Kausch v. Chicago & M. Elec. Ry. Co., 176 Wis 21, 186 NW 257; Beach v. Gehl, 204 Wis 367, 235 NW 778.

In Wisconsin an instruction in somewhat the following form is given relative to special verdicts: "In all cases triable by a jury it is the duty of the presiding judge to decide all questions of law and to instruct the jury upon the law applicable to their duties in the case. It is the duty of the jury to decide the disputed issues of fact. The proper performance of these duties by judge and jury results in a proper judgment. In this case, in order to assist the jury to decide the issues of fact, such issues have been framed by the court in the form of special questions. Your answers to these questions will constitute your verdict. You are to answer the questions solely upon the evidence received on this trial. You are to consider the evidence in the light of the court's instructions and of sound judgment, and leave out consideration of everything else. You should not concern yourselves about whether your answers to the questions will be favorable to one party or the other nor with what may be the final result. You should give sole attention to your duty to ascertain and announce the facts as the evidence discloses the facts to be. The consequence of your findings, if honestly and intelligently made, will be justice."

[1] People v. Murray, 52 Mich 288, 17 NW 843; Witsell v. West Asheville & S. S. Ry. Co., 120 NC 557, 27 SE 125.

which do not inform the jury as to the effect of their answers are proper.[2] Instructions which define the terms used in the questions and which assist the jury to understand and apply the evidence in answering each question are proper.[3]

All parts of the charge bearing on a particular question should be given together in connection with the submission of the question and failure to do so will be considered error if it appears that the jury was misled thereby.[4]

An instruction which does not relate to any issue of fact in the case should not be given.[5]

The court should inform the jury that their findings are to be based on a preponderance of the evidence.[6] No additional

[2] San Antonio v. Fike (TexCiv App), 224 SW 911; Montgomery v. Gallas (TexCivApp), 225 SW 557; Schaff v. Lynn (TexCivApp), 238 SW 1034; Lyle v. McCormick Harvesting Mach. Co., 108 Wis 81, 84 NW 18, 51 LRA 906; Horn v. La-Crosse Box Co., 131 Wis 384, 111 NW 522.

[3] Baxter v. Chicago & N. W. R. Co., 104 Wis 307, 80 NW 644; Fox v. Martin, 104 Wis 581, 80 NW 921; Bump v. Voights, 212 Wis 256, 249 NW 508.

[4] Bartlett v. Collins, 109 Wis 477, 85 NW 703, 83 AmSt 928; Banderob v. Wisconsin Cent. R. Co., 133 Wis 249, 113 NW 738; Becker v. West Side Dye Works, 172 Wis 1, 177 NW 907.

It is proper to refuse requests inapplicable to any of the questions of the special verdict. Guillaume v. Wisconsin-Minnesota Light & Power Co., 161 Wis 636, 155 NW 143. See also Schlaidler v. Chicago & N. W. Ry. Co., 102 Wis 564, 78 NW 732; Rhyner v. Menasha, 107 Wis 201, 83 NW 303; Schrunk v. St. Joseph, 120 Wis 223, 97 NW 946.

[5] McHatton v. McDonnell's Estate, 166 Wis 323, 165 NW 468; Wiger v. Mutual Life Ins. Co., 205 Wis 95, 236 NW 534; Vaningan v. Mueller, 208 Wis 527, 243 NW 419.

[6] Frazier v. Brown, 124 Neb 746, 248 NW 69.

Under the Wisconsin practice, the court should state under each question submitted that the burden of proof is upon the plaintiff or upon the defendant, as the case may be. In Schacht v. Quick, 178 Wis 330, 190 NW 87, 25 ALR 130, a damage action for the death of plaintiff's husband from being struck by an automobile while he was making repairs to his own car at the left side of the highway, it was said on appeal: "This court has frequently criticized the giving of general instructions where a special verdict is submitted. Instructions as to the law of the case should be given under appropriate questions, so that there can be no mistake on the part of the jury as to what questions they apply. * * * Under the verdict submitted, the burden of proof was on the plaintiff as to questions one, two, three, and four and on the defendant as to question five relating to contributory negligence. In instructing under question three the court said: ' . . . The burden of proof as to each of the first five questions of the special verdict is on the affirmative, and what I have said on that subject in connection with the first and second question applies with equal force to the five.' While this was technically correct, it was confusing because of the fact that plaintiff had the affirmative of the first four questions, and the defendant had the affirmative of question five. The jury might well have had the impression that the burden of proof was upon the plaintiff as to all of the first five

charge on the matter of preponderance of the evidence is necessary where the court in submitting a special issue began it thus: "Do you find from a preponderance of the evidence that * * *."[7] If the questions be so framed that each inquires whether a specified ultimate fact in issue existed or occurred, it is sufficient on the burden of proof to instruct the jury generally that in case they become satisfied from the evidence to a reasonable certainty on any question that the alleged fact existed or occurred then they should answer the question "yes," and if not so satisfied they should answer it "no."[8]

questions. The better practice is to state under each question that the burden of proof is upon the defendant or upon the plaintiff as the case may be, instead of using the terms affirmative or negative. We do not hold that there is reversible error as to instructions on the question of burden of proof, but, as there must be a new trial for failure to give the instruction with reference to the right of the deceased to stop on the left-hand side of the road, we deem it best to call attention to the confusion that might arise were similar instructions repeated when the case is again tried."

It is proper and sufficient for the court to tell the jury that as to any question submitted, if the greater weight of the evidence satisfies them to a reasonable certainty that their answer should be "yes," that they should so answer, and conversely if the greater weight of the evidence satisfies them that they should answer "no." Kaboth v. Schrewe, 211 Wis 280, 247 NW 835.

[7] Commercial Standard Ins. Co. v. Lee (TexCivApp), 37 SW2d 789; Texas Employers Ins. Assn. v. Finney (TexCivApp), 45 SW2d 298; Texas Indem. Ins. Co. v. Bridges (TexCivApp), 52 SW2d 1075.

[8] Kausch v. Chicago, M. Elec. Ry. Co., 176 Wis 21, 186 NW 257.

CHAPTER 5

PERTINENCY

Section.
115. Necessity that instructions should be pertinent in civil cases.
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§ 115. Necessity that instructions should be pertinent in civil cases.

Instructions must be pertinent to the evidence and the issues made by the pleadings.

In other words, the instructions must fairly and reasonably present no more than the issues joined by the pleadings and presented by the evidence,[1] and this is true though a proposition of

[1] **Federal.** Memphis Street Ry. Co. v. Illinois Cent. R. Co., 155 CCA 307, 242 F 617.

California. Wahlgren v. Market Street Ry. Co., 132 Cal 656, 62 P 308, 64 P 993; Shelton v. Michael, 31 CalApp 328, 160 P 578; Dover v. Archambault, 57 CalApp 659, 208 P 178.

Colorado. Davis v. Shepherd, 31 Colo 141, 72 P 57.

Connecticut. Court Harmony, A. O. F. v. Court Abraham Lincoln, A. O. F., 70 Conn 634, 40 A 606; Kornblau v. McDermant, 90 Conn 624, 98 A 587.

Florida. Seaboard Air Line Ry. v. Royal Palm Soap Co., 80 Fla 800, 86 S 835; Charlotte Harbor & N. Ry. Co. v. Truette, 81 Fla 152, 87 S 427.

Georgia. Hill v. Ludden & Bates Southern Music House, 118 Ga 320, 38 SE 752; Sammons v. Wilson, 20 GaApp 241, 92 SE 950 (and allegation or proof as to damages and expenses in suit for slander); Cuthbert v. Gunn, 21 GaApp 442, 94 SE 637.

Idaho. Austin v. Brown Bros. Co., 30 Idaho 167, 164 P 95; Nordquist v. W. A. Simons Co., 54 Idaho 21, 28 P2d 207.

Illinois. Bell v. Toluca Coal Co., 272 Ill 576, 112 NE 311; Travelers Ins. Co. v. Ayers, 119 IllApp 402; Schoen v. Wolfson, 263 IllApp 414.

In an action for collision between automobile and interurban car, where there was no evidence or pleading with respect to failure of the car to stop, it was error to charge with respect to the speed of the car at the crossing. Butler v. Illinois Traction, Inc., 253 IllApp 135.

Indiana. Norris v. Casel, 90 Ind 143; Cleveland, C., C. & St. L. Ry. Co. v. Griswold, 51 IndApp 497, 97 NE 1030; Conder v. Griffith, 61 Ind App 218, 111 NE 816; Chicago & E. R. Co. v. Biddinger, 61 IndApp 419, 109 NE 953; Chicago & E. I. Ry. Co. v. Whipking, 96 IndApp 167, 170 NE 548; Bodine v. Justice, 119 Ind App 393, 85 NE2d 504; Automobile Underwriters v. Smith, 126 IndApp 332, 133 NE2d 72.

It is not error to refuse a request to charge on matters that are not within the issues. Welch v. Page, 85 IndApp 301, 154 NE 24.

Iowa. Davis v. Hansen, 187 Ia 583, 172 NW 1; Waldman v. Sanders Motor Co., 214 Ia 1139, 243 NW 555.

Kansas. Wade v. Empire Dist. Elec. Co., 98 Kan 366, 158 P 28.

Kentucky. Louisville & N. R. Co. v. Logan's Admx., 178 Ky 29, 198 SW 537; Pugh v. Eberlein, 190 Ky 386, 227 SW 467; Rosenham's Exr. v. Bruens, 194 Ky 290, 238 SW 740; Louisville & N. R. Co. v. O'Flynn, 213 Ky 346, 281 SW 174; Conn v. Lexington Utilities Co., 233 Ky 230, 25 SW2d 370; Mannington Fuel Co. v. Ray's Admx., 250 Ky 736, 63 SW2d 933; Suter's Admr. v. Kentucky Power & Light Co., 256 Ky 356, 76 SW2d 29.

Massachusetts. Lindsey v. Leighton, 150 Mass 285, 22 NE 901, 15 AmSt 199; Holmes v. Sullivan, 241 Mass 195, 134 NE 821 (no allegation or proof of gross carelessness).

Missouri. State ex rel. Duvall v. Ellison, 283 Mo 532, 223 SW 651; State ex rel. John Hancock Mut. Life Ins. Co. v. Allen, 313 Mo 384, 282 SW 46 (saying that a charge is defective whether it restricts or enlarges the issues); Neal v. Curtis & Co. Mfg. Co., 328 Mo 389, 41 SW2d 543; Russell v. Empire Storage & Ice Co., 332 Mo 707, 59 SW2d 1061; Stalzer v. Jacob Dold Packing Co., 84 MoApp 565; Wagner v. Chicago & A. R. Co., 209 MoApp 121, 232 SW 771.

Montana. Schumacher v. Murray Hosp., 58 Mont 447, 193 P 397.

Nebraska. Hanover Fire Ins. Co. v. Stoddard, 52 Neb 745, 73 NW 291; Muller v. Pratt, 108 Neb 473, 187 NW 902.

New Mexico. Rarey v. McAdoo, 28 NM 14, 205 P 731; Federal Reserve Bank v. Upton, 34 NM 509, 285 P 494.

New York. Lamkin v. Palmer, 164 NY 201, 58 NE 123; Franklin v. Hoadley, 145 AppDiv 228, 130 NYS 47.

North Carolina. Willis v. Atlantic & D. R. Co., 122 NC 905, 29 SE 941.

Ohio. Pennsylvania Co. v. Hart, 101 OhSt 196, 128 NE 142; Astrup v. Rehburg, 42 OhApp 126, 181 NE 551, 36 OLR 405; Britton v. Lakewood, 89 OhApp 150, 45 OhO 390, 97 NE2d 78.

Oklahoma. Ft. Smith & W. R. Co. v. Collins, 26 Okl 82, 108 P 550; St. Louis & S. F. Ry. Co. v. Dobyns, 57 Okl 643, 157 P 735; Dill v. Johnston, 121 Okl 62, 247 P 349; Prest-O-Lite Co. v. Howery, 169 Okl 408, 37 P2d 303; Osenbaugh v. Virgin & Morse Lbr. Co., 173 Okl 110, 46 P2d 952.

South Carolina. Long v. Hunter, 58 SC 152, 36 SE 579.

Tennessee. Fletcher v. Louisville & N. R. Co., 102 Tenn 1, 49 SW 739.

Texas. Pecos & N. T. Ry. Co. v. Winkler (TexCivApp), 179 SW 691; Corpus Christi Street & Interurban Ry. Co. v. Kjellberg (TexCivApp), 185 SW 430.

Utah. Davis v. Midvale City, 56 Utah 1, 189 P 74; Riding v. Roylance, 63 Utah 221, 224 P 885.

Virginia. Alexandria Sav. Inst. v. McViegh, 84 Va 41, 3 SE 885.

Washington. In a damage action, where there was neither pleading nor evidence as to plaintiff's impaired earning capacity, an instruction thereon was erroneous. Cole v. Schaub, 164 Wash 162, 2 P2d 669, 7 P2d 1119.

West Virginia. Blagg v. Baltimore & O. R. Co., 83 WVa 449, 98 SE 526; Lively v. Virginian Ry. Co., 104 WVa 335, 140 SE 51.

law be correctly stated, for such a statement would amount to giving an abstract instruction.[2] Even though immaterial matter may be pleaded by a party, the court should not charge thereon because the result would be confusing as to the actual issues between the parties.[3] The theory is that the jury shall not be called upon to pass upon immaterial matters.[4]

Accordingly, the jury should not be charged as to defenses neither pleaded nor attempted to be proved.[5] So, the court should not instruct on special damages where such damages are neither pleaded nor proved.[6] So, in an action to recover for

[2] **Florida.** American Mfg. Co. v. A. H. McLeod & Co., 78 Fla 162, 82 S 802.

Georgia. Rowe v. Cole, 176 Ga 592, 168 SE 882.

Illinois. Hoffman v. Stephens, 269 Ill 376, 109 NE 994; Des Plaines v. Winkelman, 270 Ill 149, 110 NE 417; Commercial State Bank v. Folkerts, 200 IllApp 385.

Minnesota. Rosenberg v. Nelson, 145 Minn 455, 177 NW 659.

Missouri. Bergfeld v. Kansas City Rys. Co., 285 Mo 654, 227 SW 106.

New Mexico. O'Neal v. Geo. E. Breece Lbr. Co., 38 NM 94, 28 P2d 523.

Oklahoma. Cosden Pipe Line Co. v. Berry, 87 Okl 237, 210 P 141.

Oregon. Miami Quarry Co. v. Seaborg Packing Co., 103 Or 362, 204 P 492.

South Dakota. Haines v. Waite, 61 SD 250, 248 NW 207.

Wisconsin. Ward v. Babcock, 162 Wis 539, 156 NW 1007.

[3] Rudd v. Jackson (Ia), 207 NW 342.

[4] **Georgia.** Elrod v. Chamblee, 26 GaApp 703, 106 SE 915.

Idaho. Smith v. Graham, 30 Idaho 132, 164 P 354; Moreland v. Mason, 45 Idaho 143, 260 P 1035.

Iowa. Rudd v. Jackson, 203 Ia 661, 213 NW 428.

Kansas. Minneapolis Steel & Mach. Co. v. Schalansky, 100 Kan 562, 165 P 289.

Massachusetts. Fisher v. Ford, 232 Mass 56, 121 NE 529.

Missouri. Gittings v. Jeffords, 292 Mo 678, 239 SW 84; Barnett v. Smith (MoApp), 230 SW 681.

Oklahoma. Holmes v. Halstid, 76 Okl 31, 183 P 969.

Oregon. Fulp v. Brashears, 116 Or 538, 241 P 69.

Texas. First Nat. Bank v. Mangum (TexCivApp), 194 SW 647.

Washington. Bounds v. Galbraith, 117 Wash 225, 200 P 1082.

[5] **Federal.** Boston & M. R. Co. v. Baker, 150 CCA 158, 236 F 896.

Indiana. Terre Haute, I. & E. Trac. Co. v. Ellsbury, 74 IndApp 167, 123 NE 810.

Kentucky. Where there was neither pleading nor proof that operating automobile at more than 20 miles per hour was prima facie unreasonable, it was not error to refuse so to charge. Sharp v. Rawls, 234 Ky 438, 28 SW2d 493.

Missouri. Boles v. Dunham (Mo App), 208 SW 480; Traw v. Heydt (MoApp), 216 SW 1009; Chapman v. Kansas City Rys. Co. (MoApp), 217 SW 623.

Oregon. Howland v. Fenner Mfg. Co.. 104 Or 373, 206 P 730, 207 P 1096.

Pennsylvania. Luks v. American Ice Co., 267 Pa 337, 109 A 680.

Texas. Sherman Ice Co. v. Klein (TexCivApp), 195 SW 918.

It is error to instruct on statutory liability for killing cattle at crossing where cattle were not killed at crossing. Ft. Worth & D. C. Ry. Co. v. Decatur Cotton Seed Oil Co. (TexCivApp), 179 SW 1104.

[6] **Federal.** Rode v. Gonterman, 41 F2d 1; Shell Petroleum Corp. v. Scully, 71 F2d 772.

Arizona. Sisters of St. Joseph v. Edwards, 45 Ariz 407, 44 P2d 155

personal injuries alleged to have been sustained at the hands of a fellow servant, the court's refusal to charge with relation to the matter of sudden emergency is not erroneous where no such feature is presented by the declaration and there is nothing in the case showing such emergency.[7] In an action on contract it has been held proper for the court to charge as to both express and implied contract where the first petition alleged an express agreement and an amended petition declared on an implied contract.[8] Where there is neither pleading nor evidence with respect to contributory negligence, an instruction thereon is neither required nor proper.[9] In a case with several defendants an instruction applicable to issues between the plaintiff and one defendant should be given though it is not pertinent to the pleadings or evidence as between the plaintiff and another defendant.[10]

In some of the states the procedure is adopted that if the parties to an action by mutual assent or acquiescence litigate matters not made issues by the pleadings, the court may submit such matters for decision of the jury as if they had been properly pleaded.[11]

(submitting question of permanent injury in automobile collision, when there was neither pleading nor proof thereof).

Florida. St. Petersburg & G. Ry. Co. v. Van Smith, 71 Fla 64, 70 S 940.

Missouri. In Koebel v. Tieman Coal & Material Co., 337 Mo 561, 85 SW2d 519, there was no evidence or claim for medical or hospital expenses, yet the court instructed that if the jury found for the plaintiff they should allow nothing for such items.

Oklahoma. Missouri, K. & T. Ry. Co. v. Watkins, 77 Okl 270, 188 P 99.

Texas. Wichita Falls Trac. Co. v. Elliott, 125 Tex 248, 81 SW2d 659.

Singer Sewing Mach. Co. v. Mendoza (TexCivApp), 62 SW2d 656 (instruction as to alarm, fear, mental and physical suffering, neither pleaded nor proved in an action for damages for officer's unlawfully breaking into house in service of sequestration writ).

[7] Fletcher v. Louisville & N. R. Co., 102 Tenn 1, 49 SW 739.

[8] Dean's Exr. v. Griffin, 217 Ky 603, 290 SW 483.

[9] Barnett v. Bull, 141 Wash 139, 250 P 955.

If the plaintiff dismisses his action as to one of the defendants, it is proper for the court to refuse a request for instructions applicable only to the defendant dismissed. Norton v. Great Northern R. Co., 78 Mont 273, 254 P 165.

[10] Nance v. Lansdell (MoApp), 73 SW2d 346; Okmulgee Supply Co. v. Rotman, 144 Okl 293, 291 P 1.

[11] **Arizona.** Salt River Valley Water Users Assn. v. Berry, 31 Ariz 39, 250 P 356.

Georgia. Davis v. McDuffie, 35 GaApp 786, 134 SE 800.

Washington. So, where the defendant gave in evidence matters disclosing an affirmative defense which was not pleaded in the answer, an instruction was proper which placed on the defendant the burden of proof as to the affirmative defense. Kane v. Lindsey, 143 Wash 61, 254 P 461.

§ 116. Pertinency of instructions in criminal prosecutions.

In criminal prosecutions, the instructions must be pertinent to the facts charged in the indictment and shown by the evidence admitted.

Instructions should not be given on issues which do not arise in the case being tried[12] or which are immaterial and unrelated thereto,[13] even though they state correct propositions of law.[14]

[12] **Federal.** Hamburg-American Steam Packet Co. v. United States, 163 CCA 79, 250 F 747; Bishop v. United States, 16 F2d 406.

Alabama. Kuykendall v. State, 17 AlaApp 582, 87 S 878; Hall v. State, 130 Ala 45, 30 S 422; Drinkard v. State, 26 AlaApp 475, 162 S 412.

California. People v. Carroll, 20 CalApp 41, 128 P 4; People v. Northcott, 46 CalApp 706, 189 P 704; People v. Allen, 138 Cal 652, 33 P2d 77.

Florida. Peeler v. State, 64 Fla 385, 59 S 899; Ward v. State, 75 Fla 756, 79 S 699; Bradley v. State, 82 Fla 108, 89 S 359.

Georgia. Lindsay v. State, 138 Ga 818, 76 SE 369; Phillips v. State, 149 Ga 255, 99 SE 874; Stanford v. State, 153 Ga 219, 112 SE 130; Hickox v. State, 26 GaApp 416, 107 SE 81 (larceny); Hillery v. State, 51 GaApp 373, 180 SE 499.

Illinois. People v. Davis, 269 Ill 256, 110 NE 9; People v. Miller, 278 Ill 490, 116 NE 131, LRA 1917E, 797; People v. Geary, 297 Ill 608, 131 NE 97; People v. Flanagan, 338 Ill 353, 170 NE 265; People v. Buzan, 351 Ill 610, 184 NE 890.

Indiana. Kocher v. State, 189 Ind 578, 127 NE 3; Lindley v. State, 199 Ind 18, 154 NE 867.

An instruction only slightly pertinent to the evidence should be refused. Rigsby v. State, 174 Ind 284, 91 NE 925.

Kansas. State v. Thompson, 119 Kan 743, 241 P 110.

Kentucky. Gamble v. Commonwealth, 151 Ky 372, 151 SW 924; Ratliff v. Commonwealth, 182 Ky 246, 206 SW 497; Jackson v. Commonwealth, 248 Ky 47, 58 SW2d 263.

Morgan v. Commonwealth, 172 Ky 684, 189 SW 943 (adultery not issue in prosecution for carnal knowledge of child); Cook v. Commonwealth, 240 Ky 766, 43 SW2d 1.

Louisiana. State v. McCall, 162 La 471, 110 S 723.

Missouri. State v. Richardson (Mo), 228 SW 789.

Nebraska. Spaulding v. State, 61 Neb 289, 85 NW 80.

New Jersey. State v. Unger, 93 NJL 50, 107 A 270.

New Mexico. State v. Martinez, 30 NM 178, 230 P 379.

Oklahoma. Kirk v. Territory, 10 Okl 46, 60 P 797; Anderson v. State, 13 OklCr 264, 164 P 128; Johnson v. State, 16 OklCr 428, 183 P 926; Lady v. State, 18 OklCr 59, 192 P 699; Colby v. State, 57 OklCr 162, 46 P2d 377.

Rhode Island. State v. Saccoccio, 50 RI 356, 147 A 878.

Texas. Green v. State, 84 TexCr 162, 205 SW 988; Aycock v. State, 88 TexCr 238, 225 SW 1099; Irlbeck v. State, 118 TexCr 5, 40 SW2d 124.

Utah. State v. Marasco, 81 Utah 325, 17 P2d 919.

Virginia. Lane v. Commonwealth, 122 Va 916, 95 SE 466; Hardyman v. Commonwealth, 153 Va 954, 151 SE 286.

West Virginia. State v. Newman, 101 WVa 356, 132 SE 728.

Wyoming. James v. State, 27 Wyo 378, 196 P 1045.

[13] **Federal.** Franklin v. United States, 113 CCA 258, 193 F 334; Lopez v. United States, 17 F2d 462.

Alabama. Miller v. State, 16 Ala App 143, 75 S 819.

Thus on a trial for an illegal sale of liquor it was held improper to instruct on a sale on prescription where there was no issue as to a sale on prescription.[15] It is error in a prosecution for the death of an infant, alleged to have been produced by choking, to instruct as to a conviction for manslaughter if the infant's death resulted from an abortion.[16] It is error to charge as to carrying concealed weapons in a prosecution for assault with intent to kill.[17]

§ 117. Pertinency to pleadings in civil cases.

The purpose of instructions is to apply principles of law to the issues, and this purpose is defeated and error is committed by instructions which present issues not made by the pleadings.

It is error for the court to submit a case to the jury upon issues not made by the pleadings.[18] A very serious objection to instructions affected with this vice is that they mislead the jury.[19] The issues made by the pleadings must not be broad-

Florida. Settles v. State, 75 Fla 296, 78 S 287; Milligan v. State, 75 Fla 815, 78 S 535.

Georgia. Garrett v. State, 21 GaApp 801, 95 SE 301.

Oklahoma. Teague v. State, 13 OklCr 270, 163 P 954.

Pennsylvania. Commonwealth v. Brletic, 113 PaSuper 508, 173 A 686.

Washington. State v. Ewing, 67 Wash 395, 121 P 834.

West Virginia. State v. Clark, 51 WVa 457, 41 SE 204.

[14] **Alabama.** Goodman v. State, 15 AlaApp 161, 72 S 687 (insanity).

California. People v. Cornell, 29 CalApp 430, 155 P 1026; People v. Bracklis, 54 CalApp 40, 200 P 1062.

Illinois. People v. Williams, 240 Ill 633, 88 NE 1053; People v. Israel, 269 Ill 284, 109 NE 969; People v. Gould, 345 Ill 288, 178 NE 133.

Kansas. State v. Labore, 80 Kan 664, 103 P 106.

Louisiana. State v. Marsalise, 172 La 796, 135 S 361.

Missouri. State v. Yocum (Mo App), 205 SW 232.

New Jersey. State v. Rombolo, 91 NJL 560, 103 A 203.

New Mexico. State v. Sedillo, 24 NM 549, 174 P 985.

New York. People v. Hassan, 196 AppDiv 89, 187 NYS 115.

Wisconsin. Pollack v. State, 215 Wis 200, 253 NW 560, 254 NW 471.

[15] Edwards v. State (TexCr), 38 SW 779.

[16] Bradley v. Commonwealth, 218 Ky 788, 292 SW 343.

[17] State v. Cyty, 50 Nev 256, 256 P 793, 52 ALR 1015.

[18] **Federal.** Kennedy Lbr. Co. v. Rickborn, 40 F2d 228.

Alabama. Sovereign Camp, W. O. W. v. Cox, 221 Ala 58, 127 S 847; Bond Bros. v. Kay, 223 Ala 431, 136 S 817.

Georgia. Mitchell v. Gunter, 170 Ga 135, 152 SE 466.

Iowa. Redfern v. Redfern, 212 Ia 454, 236 NW 399.

Kentucky. Wilder v. Bailey, 233 Ky 238, 25 SW2d 381.

Missouri. Spears v. Carter, 224 MoApp 726, 24 SW2d 717; Benson v. Smith (MoApp), 38 SW2d 749.

Montana. Bose v. Sullivan, 87 Mont 476, 288 P 614.

Ohio. Crisafi v. Kowalski, 70 OLA 581, 117 NE2d 465 (OCA, Cuyahoga County).

Pennsylvania. Srednick v. Sylak, 343 Pa 486, 23 A2d 333.

[19] **Arkansas.** N. P. Sloan Co. v. Barham, 138 Ark 350, 211 SW 381;

ened,[20] and this, of course, excludes consideration of abandoned

Sherrin v. Coffman, 143 Ark 8, 219 SW 348; Taylor v. Martin, 151 Ark 200, 235 SW 411.

Connecticut. Mills v. Roto Co., 104 Conn 645, 133 A 913.

Illinois. Goddard Tool Co. v. Crown Elec. Mfg. Co., 219 IllApp 34.

Missouri. Munoz v. American Car & Foundry Co., 220 MoApp 902, 296 SW 228; Sooby v. Postal Telegraphic-Cable Co. (MoApp), 217 SW 877.

Montana. Robison v. Dover Lbr. Co., 58 Mont 231, 191 P 383.

Oklahoma. Frick-Reid Supply Co. v. Aggers, 28 Okl 425, 114 P 622.

[20] **Federal.** Consolidated Lead & Zinc Co. v. Corcoran, 37 F2d 296 (amount of recovery).

Alabama. Jones v. Union Foundry Co., 171 Ala 225, 55 S 153.

California. Cooper v. Spring Valley Water Co., 16 CalApp 17, 116 P 298; Conlin v. Southern Pacific R. Co., 40 CalApp 733, 182 P 67; Reed v. Wells, 102 CalApp 333, 282 P 997.

Colorado. Walsh v. Jackson, 33 Colo 454, 81 P 258.

Connecticut. Kornblau v. McDermant, 90 Conn 624, 98 A 587; Hawes v. Engler, 92 Conn 608, 103 A 975.

District of Columbia. Bowdler v. Billings-Chapin Co., 47 AppDC 164.

Florida. Savannah, F. & W. Ry. Co. v. Tiedeman, 39 Fla 196, 22 S 658; Collins v. Godwin, 65 Fla 283, 61 S 632.

Georgia. Sanders v. Southern Ry. Co., 107 Ga 132, 32 SE 840; Grimsley v. Singletary, 133 Ga 56, 65 SE 92, 134 AmSt 196; Gaskins v. Gaskins, 145 Ga 806, 89 SE 1080; Daniels v. Cagle, 180 Ga 853, 181 SE 178; Southern Ry. Co. v. Parham, 10 GaApp 531, 73 SE 763.

Illinois. W. W. Kimball Co. v. Piper, 111 IllApp 82.

Indiana. Indianapolis Trac. & Terminal Co. v. Mathews, 177 Ind 88, 97 NE 320; Indiana Union Trac. Co. v. Downey, 177 Ind 599, 98 NE 634; Evansville Rys. Co. v. Cooksey, 63 IndApp 482, 112 NE 541.

Iowa. Vernon v. Iowa State Traveling Mens Assn., 158 Ia 597, 138 NW 696; H. W. Emeny Auto Co. v. Neiderhauser, 175 Ia 219, 157 NW 143; Conner v. Henry, 201 Ia 253, 207 NW 119; Granteer v. Thompson, 203 Ia 127, 208 NW 497; Balik v. Flacker, 212 Ia 1381, 238 NW 467.

Kansas. Douglas v. Wolf, 6 Kan 88; Lebanon State Bank v. Garber, 105 Kan 44, 181 P 572; Missouri Pacific Ry. Co. v. Haggart, 9 KanApp 393, 58 P 796.

Kentucky. Mathis v. Bank of Taylorsville, 136 Ky 634, 124 SW 876; Minor v. Gordon, 171 Ky 790, 188 SW 768; Penn Furn. Co. v. Ratliff, 194 Ky 162, 238 SW 393; Knoxville Tinware & Mfg. Co. v. Howard, 219 Ky 106, 292 SW 762; West v. Butler's Exr., 248 Ky 404, 58 SW2d 662; Sehon, Blake & Stevenson v. Whitt, 28 KyL 1222, 29 KyL 691, 92 SW 280.

Maryland. J. E. Smith Co. v. Smick, 119 Md 279, 86 A 500.

Massachusetts. Lury v. New York, N. H. & H. R., 205 Mass 540, 91 NE 1018; Krock v. Boston Elevated Ry. Co., 214 Mass 398, 101 NE 968.

Minnesota. Pearson v. United States Fidelity & Guaranty Co., 138 Minn 240, 164 NW 919.

The instructions may submit the case to the jury on a narrower ground of negligence than set out in the complaint if consistent with the complaint and the theory of plaintiff. Bannister v. George H. Hurd Realty Co., 131 Minn 448, 155 NW 627.

Missouri. Kingman & Co. v. Cornell-Tebbetts Mach. & Buggy Co., 150 Mo 282, 51 SW 727; Degonia v. St. Louis, I. M. & S. Ry. Co., 224 Mo 564, 123 SW 807; Satterlee v. St. Louis-San Francisco Ry. Co., 336 Mo 943, 82 SW2d 69; Craton v. Huntzinger, 163 MoApp 718, 147 SW 512; Stumpf v. United Rys. Co. (MoApp), 227 SW 852; Counts v. Thomas (MoApp), 63 SW2d 416; Bennett v. National Union Fire Ins. Co., 230 MoApp 939, 80 SW2d 914.

or withdrawn issues,[21] and matters which are no more than conclusions of the pleader.[22]

The court must not change the issues made by the pleadings. Sinnamon v. Moore, 161 MoApp 168, 142 SW 494.

Montana. Davidson v. Stagg, 94 Mont 272, 22 P2d 152.

Nebraska. Andresen v. Jetter, 76 Neb 520, 107 NW 789.

New Hampshire. Martel v. White Mills, 79 NH 439, 111 A 237.

New Mexico. Bank of Commerce v. Broyles, 16 NM 414, 120 P 670.

North Carolina. Roberts v. Baldwin, 155 NC 276, 71 SE 319; Edwards v. Cleveland Mill & Power Co., 193 NC 780, 138 SE 131, 53 ALR 1404.

North Dakota. Schwabel v. First Nat. Bank, 53 ND 904, 208 NW 236.

Ohio. St. Paul Fire & Marine Ins. Co. v. Baltimore & O. R. Co., 129 OhSt 401, 2 OhO 396, 195 NE 861 (instruction properly refused).

Oklahoma. Obenchain & Boyer v. Roff, 29 Okl 211, 116 P 782; Chambers v. Van Wagner, 32 Okl 774, 123 P 1117; Chicago, R. I. & P. Ry. Co. v. Mailes, 52 Okl 278, 152 P 1131; Sand Springs Ry. Co. v. Baldridge, 60 Okl 102, 159 P 487; Prest-O-Lite Co. v. Howery, 169 Okl 408, 37 P2d 303.

Oregon. De War v. First Nat. Bank, 88 Or 541, 171 P 1106.

South Carolina. Richey v. Southern Ry. Co., 69 SC 387, 48 SE 285; Craig Milling Co. v. Cromer, 85 SC 350, 67 SE 289; Fanning v. Stroman, 113 SC 495, 101 SE 861.

Texas. International & G. N. R. Co. v. Tisdale, 36 TexCivApp 174, 81 SW 347; Whitehead v. Reiger (TexCivApp), 282 SW 651 (estoppel not pleaded makes instruction thereon inappropriate); Southland Life Ins. Co. v. Norwood (TexCivApp), 76 SW2d 166.

Utah. Larson v. Calder's Park Co., 54 Utah 325, 180 P 599, 4 ALR 731.

Vermont. Dodge Bros. v. Central Vermont Ry. Co., 92 Vt 454, 104 A 873.

Virginia. The fact that a plea which presents no defense is not met with objection or demurrer, but issue is taken thereto does not require the court to instruct thereon. Newman v. McComb, 112 Va 408, 71 SE 624.

Washington. In a suit for services, where there was no claim in the pleadings for recovery on a contingent basis, but testimony was admitted raising that question, it was held error to refuse to instruct that there was no question of a contingent fee before the jury. Miller v. Puget Sound Bridge & Dredging Co., 140 Wash 663, 250 P 64.

Wisconsin. Haueter v. Marty, 150 Wis 490, 137 NW 761.

[21] **Alabama.** Southern Ry. Co. v. Bynum, 194 Ala 190, 69 S 820; Macher v. Farmers' & Ginners' Cotton Oil Co., 203 Ala 601, 84 S 845; American Ry. Exp. Co. v. Compton, 205 Ala 298, 87 S 810.

No reference should be made to issues taken out by demurrer. Fike v. Stratton, 174 Ala 541, 56 S 929.

Georgia. Brinson R. Co. v. Green, 20 GaApp 397, 93 SE 38.

Illinois. Reeb v. Bronson, 196 Ill App 518.

Indiana. Smith v. Farr, 88 Ind App 237, 157 NE 111, reh. den. in 158 NE 492.

Kansas. Cobe v. Coughlin Hdw. Co., 83 Kan 522, 112 P 115, 31 LRA (N. S.) 1126.

Missouri. Phillips v. East St. Louis & S. Ry. Co. (Mo), 226 SW 863; Miller v. Schaff (Mo), 228 SW 488; Unterlachner v. Wells (Mo), 278 SW 79.

Nebraska. Gray v. Chicago, St. P., M. & O. R. Co., 90 Neb 795, 134 NW 961.

North Dakota. Gunther v. Baker, 48 ND 1071, 188 NW 575.

Ohio. Liberty Highway Co. v. Mastin, 34 OhApp 183, 170 NE 604.

[22] Andrew v. Oregon-Washington R. & Nav. Co., 90 Or 611, 178 P 181.

In many jurisdictions, the issues made by the pleadings must not be changed by the instructions whatever the scope of the evidence,[23] although in some states, the court should charge on an issue if there is evidence on the issue in the case.[24]

Illustrations of pertinency or lack of pertinency to pleadings follow.

Negligence. Where negligence is the subject of the action, the instructions must confine the verdict to the grounds of negligence alleged,[25] and wilful and reckless negligence should

[23] **Federal.** Himrod v. Ft. Pitt Min. & Milling Co., 151 CCA 596, 238 F 746.

California. Stuart v. Preston (Cal App), 39 P2d 441, denying reh. of 2 CalApp2d 310, 38 P2d 155.

Iowa. Dimond v. Peace River Land & Dev. Co., 182 Ia 400, 165 NW 1032.

Kentucky. Moran v. Choate, 253 Ky 470, 69 SW2d 994; Prudential Ins. Co. v. Bond, 257 Ky 45, 77 SW 2d 373.

Missouri. McKenzie v. Randolph (MoApp), 238 SW 828; First Nat. Bank v. Hoover (MoApp), 242 SW 107.

Oregon. Mayer & Co. v. Smith, 112 Or 559, 230 P 355.

Wisconsin. But see Rule v. J. L. Gates Land Co., 121 Wis 544, 99 NW 333, holding that the pleadings may be deemed amended to conform to proof received without objection.

[24] Centrello v. Basky, 164 OhSt 41, 57 OhO 77, 128 NE2d 80.

[25] **Federal.** Grand-Morgan Theater Co. v. Kearney, 40 F2d 235.

Alabama. Alabama City, G. & A. Ry. Co. v. Bessiere, 197 Ala 5, 72 S 325.

California. Brisbin v. Wise Co., 6 CalApp2d 441, 44 P2d 622 (instruction properly refused).

Colorado. Hunter v. Quaintance, 69 Colo 28, 168 P 918.

Georgia. Davis v. Southern Ry. Co., 18 GaApp 134, 88 SE 919.

Illinois. Garvey v. Chicago Rys. Co., 339 Ill 276, 171 NE 271; Williams v. Mt. Vernon Car Mfg. Co., 197 IllApp 271.

Indiana. Emerson - Brantingham Co. v. Growe, 191 Ind 564, 133 NE 919; Indianapolis & C. Trac. Co. v. Sherry, 65 IndApp 1, 116 NE 594; United Tel. Co. v. Barva, 76 IndApp 145, 131 NE 794.

Kansas. Angell v. Chicago, R. I. & P. Ry. Co., 97 Kan 688, 156 P 763.

Kentucky. Powell v. Louisville & N. R. Co., 172 Ky 285, 189 SW 213; Wells v. Cumberland Tel. & T. Co., 178 Ky 261, 198 SW 721; Nash v. Searcy, 256 Ky 234, 75 SW2d 1052.

In a damage action against operator of toll bridge based on a claim that the injury was caused through failure to light the bridge, it was reversible error to instruct that it was the duty of the operator "to use ordinary care to protect vehicular traffic using said bridge at nighttime, by giving such notice, by the use of lights or other means as was reasonably sufficient to give timely warning to the traveling public of the presence of said timber guard referred to," since the words "or other means" submitted a question not within the issues of the pleadings. Louisville & N. R. Co. v. Loesch, 215 Ky 452, 284 SW 1097, 47 ALR 347.

Minnesota. Falk v. Chicago & N. W. Ry. Co., 133 Minn 41, 157 NW 904; Baer v. Chowning, 135 Minn 453, 161 NW 144.

Mississippi. Hines v. McCullers, 121 Miss 666, 83 S 734.

Missouri. Richardson v. Kansas City Rys. Co., 288 Mo 258, 231 SW 938; Talbert v. Chicago, R. I. & P. Ry. Co., 314 Mo 352, 284 SW 499;

not be charged unless pleaded.[26] Neither should the court ordinarily submit the question of mere negligence where that issue is not involved, but the issue is gross or wilful negligence.[27]

Among other matters which may not be submitted to the jury unless pleaded are contributory negligence,[28] comparative

Crone v. United Rys. Co. (Mo), 236 SW 654; Priebe v. Crandall (Mo App), 187 SW 605; Witham v. Lusk (MoApp), 190 SW 403; Oliver v. St. Louis-San Francisco Ry. Co. (Mo App), 211 SW 699; Walling v. Missouri Stair Co. (MoApp), 227 SW 879; Peters v. Enderle Drug Co. (Mo App), 294 SW 740.

Where cause of action was based on claim of injury from sagging electric wire caused by storm, an instruction which did not confine the jury to a consideration of that as the sole basis of liability as pleaded by the plaintiff was erroneous. Kessler v. West Missouri Power Co., 221 MoApp 644, 283 SW 705.

Nebraska. Shick v. Johnson, 101 Neb 328, 163 NW 300.

Oregon. Pickett v. Gray, McLean & Percy, 147 Or 330, 31 P2d 652.

Texas. Lancaster v. Tudor (Tex CivApp), 222 SW 990; Texas General Utilities Co. v. Nixon (TexCiv App), 81 SW2d 250.

Vermont. Bucklin v. Narkwich, 107 Vt 168, 177 A 198.

Washington. Bleitz v. Bryant Lbr. Co., 110 Wash 437, 188 P 509; Kerr v. Hansen, 140 Wash 459, 249 P 977; Cleasby v. Taylor, 176 Wash 251, 28 P2d 795.

[26] Morenci Southern Ry. Co. v. Monsour, 21 Ariz 148, 185 P 938; Moseley v. Carolina, C. & O. Ry. Co., 106 SC 368, 91 SE 380.

[27] **Alabama.** Southern Ry. Co. v. Fricks, 196 Ala 61, 71 S 701.

California. Tognazzini v. Freeman, 18 CalApp 468, 123 P 540.

Maryland. Darby Candy Co. v. Hoffberger, 111 Md 84, 73 A 565.

Massachusetts. Stager v. G. E. Lothrop Theatres Co., 291 Mass 464, 197 NE 86.

Missouri. Plate v. Ludlow-Saylor Wire Co. (MoApp), 227 SW 899.

Wisconsin. Turtenwald v. Wisconsin Lakes Ice & Cartage Co., 121 Wis 65, 98 NW 948.

[28] **Federal.** Cavoretto v. Alaska Gastineau Min. Co., 158 CCA 193, 245 F 853.

Alabama. Birmingham Ry., Light & Power Co. v. Fisher, 173 Ala 623, 55 S 995; Seaboard Air Line Ry. Co. v. Pemberton, 202 Ala 55, 79 S 393; Birmingham Ry., Light & Power Co. v. Demmins, 3 AlaApp 359, 57 S 404; Centennial Ice Co. v. Mitchell, 215 Ala 688, 112 S 239.

Arizona. Southwest Cotton Co. v. Ryan, 22 Ariz 520, 199 P 124.

Arkansas. Western Union Tel. Co. v. Wilson, 97 Ark 198, 133 SW 845.

California. Hall v. San Francisco, 188 Cal 641, 206 P 459.

Georgia. Southern Ry. Co. v. Weatherby, 20 GaApp 399, 93 SE 31.

Kentucky. Smith v. Paducah Trac. Co., 179 Ky 322, 200 SW 460; Warfield Natural Gas Co. v. Hall, 254 Ky 805, 72 SW2d 417.

Missouri. Aronovitz v. Arky (Mo), 219 SW 620; Heriford v. Kansas City Rys. Co. (Mo), 220 SW 899; Looff v. Kansas City Rys. Co. (Mo), 246 SW 578; Seneker v. Lusk (Mo App), 190 SW 96; Dignum v. Weaver (MoApp), 204 SW 566; Lester v. United Rys. Co. (MoApp), 219 SW 666; Beckner v. Kansas City Rys. Co. (MoApp), 232 SW 745; O'Sullivan v. Kansas City Rys. Co. (MoApp), 237 SW 843; Gavin v. Forrest, 230 MoApp 662, 72 SW2d 177.

Ohio. Where evidence is admitted tending to show contributory negligence, the court should charge on the question of contributory negligence though not raised by the pleadings. Glass v. William Heffron Co., 86 OhSt 70, 98 NE 923. See also Cincinnati Trac. Co. v. Forrest,

negligence,[29] assumption of risk,[30] imputed negligence of infant guest injured through claimed negligence of driver,[31] unavoidable accident,[32] the doctrine of last clear chance,[33] contributory negligence where action submitted solely on humanitarian doctrine,[34] accident where the cause of injury was alleged negligence,[35] doctrine of res ipsa loquitur,[36] safety of machinery

73 OhSt 1, 75 NE 818; Cincinnati Trac. Co. v. Stephens, 75 OhSt 171, 79 NE 235; Behm v. Cincinnati, D. & T. Trac. Co., 86 OhSt 209, 99 NE 383; Rayland Coal Co. v. McFadden, 90 OhSt 183, 107 NE 330; Woolley v. Cincinnati, H. & D. R. Co., 90 OhSt 387, 108 NE 1135; Gibbs v. Scioto Valley Ry. & Power Co., 111 OhSt 498, 145 NE 854; Bradley v. Cleveland Ry. Co., 112 OhSt 35, 146 NE 805; Cincinnati Trac. Co. v. Young, 115 OhSt 160, 152 NE 666.

Oregon. Adams v. Portland Ry., Light & Power Co., 87 Or 602, 171 P 219, LRA 1918D, 526; Smith v. Laflar, 143 Or 65, 20 P2d 391.

Pennsylvania. Goodstein v. King, 298 Pa 313, 148 A 300.

Texas. San Antonio & A. P. Ry. Co. v. Littleton (TexCivApp), 180 SW 1194; North Texas Gas Co. v. Meador (TexCivApp), 182 SW 708; El Paso Elec. Ry. Co. v. Terrazas (TexCivApp), 208 SW 387; Northern Texas Trac. Co. v. Martin (Tex CivApp), 224 SW 319.

Washington. Bruenn v. North Yakima School Dist. No. 7, 101 Wash 374, 172 P 569.

Wisconsin. Contra: Jones v. Sheboygan & F. du L. R. Co., 42 Wis 306; McQuade v. Chicago & N. W. Ry. Co., 68 Wis 616, 32 NW 633; Harper v. Holcomb, 146 Wis 183, 130 NW 1128.

[29] Rome v. Phillips, 37 GaApp 299, 139 SE 828.

[30] **Federal.** Montgomery Ward & Co. v. Hammer, 38 F2d 636.

Florida. Atlantic Coast Line R. Co. v. Shouse, 83 Fla 156, 91 S 90.

Illinois. Pennsylvania R. Co. v. Gavin, 234 IllApp 28.

Iowa. Duffey v. Consolidated Block Coal Co., 147 Ia 225, 124 NW 609, 30 LRA (N. S.) 1067; Powers v. Iowa Glue Co., 183 Ia 1082, 168 NW 326.

South Carolina. Hopkinson v. Mason & Hanger Contracting Co., 114 SC 297, 103 SE 534.

Texas. Lewis v. Texas & P. Ry. Co., 57 TexCivApp 585, 122 SW 605; Kirby Lbr. Co. v. Bratcher (TexCiv App), 191 SW 700; Panhandle & S. F. Ry. Co. v. Kornegay (TexCiv App), 206 SW 708; Texas & Pacific Coal Co. v. Ervin (TexCivApp), 212 SW 234.

[31] Ross v. Willamette Valley Transfer Co., 119 Or 395, 248 P 1088.

[32] Evans v. Kent, 28 GaApp 172, 110 SE 685; Wilson v. Elkins, 86 WVa 379, 103 SE 118.

[33] **Indiana.** Lake Erie & W. R. Co. v. Sanders, 72 IndApp 283, 125 NE 793.

Missouri. Knapp v. Dunham (Mo App), 195 SW 1062.

Ohio. Harris v. Mansfield Ry., Light & Power Co., 4 OhApp 108, 21 OhCirCt (N. S.) 209, 26 OhCir Dec 17; Toledo Ry. & Light Co. v. Poland, 7 OhApp 397, 27 OhCirApp 105, 28 OhCirDec 198; Steinman v. Cleveland Ry. Co., 23 OhApp 448, 155 NE 149.

It is not error to charge as to the doctrine of last clear chance if the evidence makes out a case for such doctrine though the issue is not specifically raised by the pleadings. Ohio Elec. Ry. v. Burkham, 7 Oh App 434, 27 OhCirApp 366, 29 Oh CirDec 176.

[34] Steger v. Meehan (Mo), 63 SW 2d 109.

[35] Brewer v. Silverstein (Mo), 64 SW2d 289.

[36] Arnall Mills v. Smallwood, 68 F2d 57.

for servant where theory of action is unsafe premises.[37] So where, in a suit for personal injuries, an instruction is based upon the question whether the plaintiff and other workmen used a certain passageway, and this question is not in issue in the case, it is rightly refused.[38]

Fraud. Fraud may not be submitted to the jury where conversion is pleaded.[39] So also an instruction was held erroneous where it had the effect of advising the jury that if the defendant should establish, by a preponderance of the evidence, fraud in either one of two sales, he should be entitled to recover, and upon the trial no evidence was given questioning the good faith of one of these transactions.[40] It is error to instruct on misrepresentations in the execution and delivery of a note in the absence of all allegations in the answer of fraudulent representations.[41]

Defenses. It is improper to instruct on an affirmative defense where the defendant's answer consists of only a general denial.[42] If the statute of limitations is not pleaded, it is not proper to instruct on limitations.[43] The same prohibition applies to the statute of frauds,[44] or duress,[45] or qualified privilege in an action for libel.[46] Where a charitable institution sued for tort did not allege its immunity in its answer, it was not error for the court to fail to instruct on such immunity from liability.[47]

Contracts. Matters which may not be submitted to the jury unless pleaded are implied contract where the action is on express contract,[48] implied warranty where the action is on express warranty,[49] or breach of warranty where conversion is pleaded.[50]

[37] National Motor Vehicle Co. v. Pake, 60 IndApp 366, 109 NE 787.

[38] Dolphin v. Plumley, 175 Mass 304, 56 NE 281.

[39] Platt v. Walker, 69 Colo 584, 196 P 190; Pierce v. Barks, 60 Okl 97, 159 P 323.

[40] Williams v. McConaughey, 58 Neb 656, 79 NW 549.

[41] **California.** California Credit & Collection Corp. v. Brandlin, 75 Cal App 609, 243 P 41.

Kentucky. Brenard Mfg. Co. v. Raffel, 214 Ky 604, 283 SW 964.

Massachusetts. See Beatty v. Ammidon, 260 Mass 566, 157 NE 702.

[42] State ex rel. Blick v. Mueller (MoApp), 278 SW 1094.

[43] Mosely v. Verner, 215 Ala 420, 110 S 895.

[44] Gambo v. F. M. Dugas & Son, 145 Ga 614, 89 SE 679. Contra: Langley v. Sanborn, 135 Wis 178, 114 NW 787.

[45] Grimes Sav. Bank v. McHarg, 197 Ia 1393, 199 NW 365.

[46] Hickman v. Nelson (MoApp), 211 SW 131.

[47] Bunnell v. Waterbury Hosp., 103 Conn 520, 131 A 501.

[48] Cable Co. v. Shelby, 203 Ala 28, 81 S 818; Moore v. Mansfield (MoApp), 61 SW2d 415.

[49] Whitlock Printing & Press Mfg. Co. v. Williams, 23 GaApp 761, 99 SE 312.

[50] Platt v. Walker, 69 Colo 584, 196 P 190; Pierce v. Barks, 60 Okl 97, 159 P 323.

Damages. Items of damages[51] and aggravation of damages[52] should not be included in instructions if not pleaded. If no claim be made in the petition for an allowance of damages for mental anguish, it is error to charge the jury as to the allowance of such damages.[53] Allegations of a promise to pay the actual cost of replacing a foundation do not justify an instruction as to reasonable cost.[54]

Miscellaneous. In an action for nuisance counting on unnecessary noises, it is error to instruct on the right to recover for unusual noises.[55]

Among other matters which may not be submitted to the jury unless pleaded are estoppel,[56] foreign law,[57] or quantum meruit.[58]

[51] **Federal.** Guerini Stone Co. v. P. J. Carlin Constr. Co., 240 US 264, 60 LEd 636, 36 SupCt 300.

Hawaii. Chin Kee v. Kaeleku Sugar Co., Ltd., 29 Hawaii 524.

Illinois. Metcalf v. Chicago Sandoval Coal Co., 211 IllApp 31; Little v. Peoria R. Co., 215 IllApp 385 (permanent injuries).

Indiana. Baker v. Leimgruber, 86 IndApp 324, 157 NE 444. But see Haskell & Barker Car Co. v. Trzop (IndApp), 123 NE 182.

Iowa. King v. Chicago, R. I. & P. Ry. Co., 185 Ia 1227, 172 NW 268; Smith v. Standard Oil Co., 218 Ia 709, 255 NW 674.

Kentucky. Warren v. Cumberland R. Co., 175 Ky 92, 193 SW 1037 (permanent injuries); Elkhorn & B. V. Ry. Co. v. Martin, 195 Ky 20, 241 SW 344; Dowdy v. McGuire, 216 Ky 374, 287 SW 948; Damron v. Stewart & Weir, 253 Ky 394, 69 SW2d 685.

Michigan. Kitchen v. Hill, 215 Mich 668, 184 NW 465 (loss of profit under contract).

Missouri. Abernathy v. Lusk (Mo App), 182 SW 1049 (consideration of party's condition in life); Bond v. Sedalia (MoApp), 194 SW 740; Chapman v. American Creosoting Co., 220 MoApp 419, 286 SW 837; Long v. Freeman, 228 MoApp 1002, 69 SW2d 973; Bohling v. Richardson (MoApp), 78 SW2d 495.

South Dakota. Fletcher v. South Dakota Cent. Ry. Co., 36 SD 401, 155 NW 3.

Texas. St. Louis S. W. Ry. Co. v. Kerr (TexCivApp), 184 SW 1058 (inherent vice of animals); North American Acc. Ins. Co. v. Miller (TexCivApp), 193 SW 750 (instruction on partial disability where total disability pleaded); Walker v. Kellar (TexCivApp), 218 SW 792; Houston Oil Co. v. Wilson (TexCivApp), 70 SW2d 285 (mental anguish not pleaded).

Virginia. Altavista Cotton Mills v. Lane, 133 Va 1, 112 SE 637.

Washington. Davis v. Thurston County, 119 Wash 414, 205 P 840 (profits on contract).

[52] Baker v. Sparks (TexCivApp), 234 SW 1109.

[53] Chicago, I. & L. Ry. Co. v. Blankenship, 85 IndApp 332, 154 NE 44.

[54] Ben Schaefer Bldg. Co. v. Granada Gardens, 43 OhApp 527, 183 NE 882.

[55] Passons v. Missouri, K. & T. Ry. Co. (TexCivApp), 137 SW 435.

[56] **Indiana.** Prudential Ins. Co. v. Smith, 90 IndApp 355, 168 NE 864.

Kentucky. Fort v. Wiser, 179 Ky 706, 201 SW 7; O'Kain v. Davis, 186 Ky 184, 216 SW 354.

Montana. Dalke v. Pancoast, 63 Mont 524, 208 P 589.

Texas. Bankers Trust Co. v. Cooper, Merrill & Lumpkin (TexCiv App), 179 SW 541.

[57] Boyer v. North End Drayage Co. (MoApp), 67 SW2d 769; Lutton v. Mt. Ida School, 44 OhApp 322, 37 OLR 579, 185 NE 429.

[58] Dupuy v. Shilling (TexCiv

§ 118. Pertinency to averments in indictment.

In criminal prosecutions, the court may not instruct on any other crime than that charged in the indictment.

Not only may the judge not instruct on any other crime than that charged in the indictment,[59] but neither should he instruct as to counts withdrawn or those to which a nolle prosequi had been entered[60] or on a count barred by limitation.[61]

Under this general rule it is erroneous to charge on the subject of larceny where the defendant is indicted for embezzlement[62] or burglary.[63] An instruction as to knowingly receiving stolen property should not be given in a prosecution for grand larceny.[64] And so in a prosecution under counts for burglary and grand larceny an instruction should be refused which applies only to the offense of larceny.[65]

App), 298 SW 934. But see Delaplaine v. Turnley, 44 Wis 31; Lemke v. Daegling, 52 Wis 498, 9 NW 399; Manning v. School Dist. No. 6, 124 Wis 84, 102 NW 356.

[59] **Federal.** Sinclair v. United States, 49 AppDC 351, 265 F 991.

Alabama. Drinkard v. State, 26 AlaApp 475, 162 S 412.

Arkansas. Johnson v. State, 132 Ark 128, 200 SW 982.

California. People v. Mulkey, 65 Cal 501, 4 P 507.

Idaho. State v. Griffith, 55 Idaho 60, 37 P2d 402; State v. Cox, 55 Idaho 694, 46 P2d 1093.

Kansas. State v. Hobl, 108 Kan 261, 194 P 921.

Kentucky. Bynum v. Commonwealth, 248 Ky 564, 59 SW2d 550 (saying that court in charging the jury should follow the language of the indictment substantially).

Missouri. State v. Robb, 90 Mo 30, 2 SW 1; State v. McLaughlin, 149 Mo 19, 50 SW 315; State v. Ballew (MoApp), 56 SW2d 827.

Where the state's evidence shows the actual commission of a crime there is no error in refusing a requested instruction on the subject of an attempt to commit the same crime. State v. Sykes, 248 Mo 708, 154 SW 1130.

Nebraska. Bundy v. State, 114 Neb 121, 206 NW 21.

Oklahoma. Martin v. State, 48 OklCr 102, 289 P 787.

It is only where the testimony given by the defendant presents issues upon which he might be acquitted or upon which the offense might be reduced to a lower degree, that he is entitled to have the jury instructed upon the hypothesis that such testimony is true. Holmes v. State, 6 OklCr 541, 119 P 430, 120 P 300.

Texas. Coney v. State, 43 Tex 414; Bacchus v. State, 18 TexApp 15; Miller v. State, 81 TexCr 237, 195 SW 192; Cannon v. State, 83 TexCr 154, 202 SW 83; Hall v. State, 115 TexCr 548, 27 SW2d 187.

Where an information is insufficient to charge the offense intended, though it sufficiently charges a lesser included offense, a charge which permits a conviction of the higher offense is reversible error, when the record leaves it uncertain of which offense the defendant is guilty. Lomax v. State, 38 TexCr 318, 43 SW 92.

[60] Oakley v. State, 135 Ala 29, 33 S 693.

[61] State v. Wolfe, 61 SD 195, 247 NW 407.

[62] Willis v. State, 134 Ala 429, 33 S 226.

[63] Ewing v. State, 190 Ind 565, 131 NE 43.

[64] Eaton v. Commonwealth, 235 Ky 466, 31 SW2d 718.

[65] Rose v. State, 117 Ala 77, 23 S 638.

The issue of insanity should be raised by plea to justify instructions on that defense.[66]

§ 119. Pertinency to evidence admitted in civil cases.

Instructions should be based on the evidence adduced and where not so predicated, should not be given.

An instruction should cover those and only those issues made by the pleadings that have been developed by the proof.[67]

[66] Matthews v. State, 16 AlaApp 514, 79 S 507. See also Taylor v. State, 88 TexCr 470, 227 SW 679.

[67] **Federal.** Moses & Sons v. Lockwood, 54 AppDC 115, 295 F 936, 33 ALR 1467; Nocatee Fruit Co. v. Fosgate, 12 F2d 250, affg. 299 F 963, 3 F2d 606.

Alabama. Wadsworth v. Dunnam, 117 Ala 661, 23 S 699; Phillips v. Bradshaw, 167 Ala 199, 52 S 662.

Arizona. Grant Bros. Constr. Co. v. United States, 13 Ariz 388, 114 P 955.

Arkansas. Snapp v. Stanwood, 65 Ark 222, 45 SW 546; Doniphan Lbr. Co. v. Fix, 95 Ark 623, 129 SW 287.

California. Jones v. Goldtree Bros. Co., 142 Cal 383, 77 P 939.

Colorado. Denver & R. G. R. Co. v. Spencer, 25 Colo 9, 52 P 211; Denver City Tramway Co. v. Hills, 50 Colo 328, 116 P 125, 36 LRA (N. S.) 213; Alley v. Tovey, 78 Colo 532, 242 P 999.

Connecticut. Griswold v. Guilford, 75 Conn 192, 52 A 742.

District of Columbia. Washington, A. & Mt. V. R. Co. v. Lukens, 32 AppDC 442.

Florida. Volusia County Bank v. Bertola, 44 Fla 734, 33 S 448; Seaboard Air Line Ry. v. Royal Palm Soap Co., 80 Fla 800, 86 S 835.

Georgia. Inman & Co. v. Crawford & Maxwell, 116 Ga 63, 42 SE 473; Heard v. Coggins, 134 Ga 52, 67 SE 429; Bateman v. Cherokee Fertilizer Co., 21 GaApp 158, 93 SE 1021.

Idaho. Gwin v. Gwin, 5 Idaho 271, 48 P 295.

Illinois. West Chicago Street R. Co. v. Petters, 196 Ill 298, 63 NE 662; Randall Dairy Co. v. Pevely Dairy Co., 278 IllApp 350.

Indiana. Eggleston v. Castle, 42 Ind 531.

Iowa. Sylvester v. Casey, 110 Ia 256, 81 NW 455; Enslow & Son v. Ennis, 155 Ia 266, 135 NW 1105; Thompson v. Chicago & N. W. Ry. Co., 158 Ia 235, 139 NW 557.

Kansas. Dowell v. Williams, 33 Kan 319, 6 P 600.

Kentucky. Simpson v. Simpson, 145 Ky 45, 139 SW 1100.

Where the evidence conclusively showed that a trespasser on a railroad track saw an approaching train in time to leave the track in safety, it was error to submit the question of the negligence of defendant in failing to ring the bell or blow the whistle. Chesapeake & O. Ry. Co. v. Montjoy's Admr., 148 Ky 279, 146 SW 371.

Maine. Braley v. Powers, 92 Me 203, 42 A 362.

Maryland. Jones v. Collins, 94 Md 403, 51 A 398; Doyle v. Gibson, 119 Md 36, 85 A 961; Philadelphia, B. & W. R. Co. v. Baltimore, 131 Md 368, 102 A 471; Johnston v. Schmidt, 158 Md 555, 149 A 283.

Massachusetts. Dale v. Harris, 109 Mass 193; Marcy v. Shelburne Falls & C. Street Ry. Co., 210 Mass 197, 96 NE 130.

Michigan. Johnson v. McKee, 27 Mich 471; Wendt v. Richmond, 164 Mich 173, 129 NW 38.

Minnesota. McInnis v. National Casualty Co., 113 Minn 156, 129 NW 125, 388.

Mississippi. Burnley v. Mullins, 86 Miss 441, 38 S 635; Mayor & Board of Hickory v. Semmes, 123

The tendency of instructions not so grounded is to confuse and mislead the jury.[68]

Miss 436, 86 S 273; Alabama & V. Ry. Co. v. Baldwin, 96 Miss 52, 52 S 358.

Missouri. Chouteau v. Searcy, 8 Mo 733; Dillon v. Weinberg, 214 Mo App 223, 260 SW 809.

Montana. Bullard v. Smith, 28 Mont 387, 72 P 761; Mason v. Northern Pacific Ry. Co., 45 Mont 474, 124 P 271; Frost v. J. B. Long & Co., 71 Mont 141, 228 P 75; Farnum v. Montana-Dakota Power Co., 99 Mont 217, 43 P2d 640.

Nebraska. Cardwell v. State, 60 Neb 480, 83 NW 665; Wallenburg v. Missouri Pacific Ry. Co., 86 Neb 642, 126 NW 289, 37 LRA (N. S.) 135.

New Hampshire. Hersey v. Hutchins, 70 NH 130, 46 A 33; Johnson v. Director General of Railroads, 81 NH 289, 125 A 147; Lindberg v. Swenson, 95 NH 184, 60 A2d 458.

New Jersey. Consolidated Trac. Co. v. Haight, 59 NJL 577, 37 A 135; Cottrell v. Fountain, 80 NJL 1, 77 A 465; Schweers v. Elizabeth-Union-Hillside-Irvington Line, 13 NJMisc 188, 178 A 68.

New Mexico. Cowles v. Hagerman, 15 NM 600, 110 P 843.

New York. Gilbertson v. Forty-Second Street, M. & St. N. Ave. Ry. Co., 14 AppDiv 294, 43 NYS 782.

North Carolina. Hinson v. Postal Tel. Cable Co., 132 NC 460, 43 SE 945; Grace & Co. v. Strickland, 188 NC 369, 124 SE 856, 35 ALR 1296.

North Dakota. Foster v. Dwire, 51 ND 581, 199 NW 1017, 51 ALR 21.

Ohio. Pennsylvania R. Co. v. Hart, 101 OhSt 196, 128 NE 142; Mansfield Public Utility & Service Co. v. Grogg, 103 OhSt 301, 133 NE 481; Astrup Co. v. Rehburg, 42 OhApp 126, 181 NE 551, 36 OLR 405; Mougey v. Becker, 49 OhApp 521, 3 OhO 376, 197 NE 388.

Oklahoma. Bouquot v. Awad, 54 Okl 55, 153 P 1104.

Oregon. Morris v. Perkins, 6 Or 350.

Pennsylvania. Brooks v. Pennsylvania R. Co., 2 PaSuper 581.

Rhode Island. Guckian v. Newbold, 22 RI 279, 47 A 543; Hobin v. Hobin, 33 RI 249, 80 A 595.

South Dakota. Haggarty v. Strong, 10 SD 585, 74 NW 1037; Quackenbush v. Graf, 37 SD 385, 158 NW 409.

Tennessee. Louisville & N. R. Co. v. Ray, 101 Tenn 1, 46 SW 554.

Utah. Fritz v. Western Union Tel. Co., 25 Utah 263, 71 P 209; Sargent v. Union Fuel Co., 37 Utah 392, 108 P 928.

Vermont. Birney v. Martin, 3 Vt 236; Jenness v. Simpson, 84 Vt 127, 78 A 886; Lang v. Clark, 85 Vt 222, 81 A 625.

Virginia. Richmond City Ry. Co. v. Scott, 86 Va 902, 11 SE 404.

Washington. Towle v. Stimson Mill Co., 33 Wash 305, 74 P 471; Brydges v. Cunningham, 69 Wash 8, 124 P 131; Nagel v. McDermott, 138 Wash 536, 244 P 977.

West Virginia. Campbell v. Hughes, 12 WVa 183; Brogan v. Union Trac. Co., 76 WVa 698, 86 SE 753.

Wisconsin. Eggett v. Allen, 106 Wis 633, 82 NW 556; Bruno v. State, 165 Wis 377, 162 NW 167.

[68] **Federal.** Stewart & Co. v. Newby, 266 F 287.

Illinois. Schlauder v. Chicago & Southern Trac. Co., 253 Ill 154, 97 NE 233; Woods v. Chicago, B. & O. R. Co., 306 Ill 217, 137 NE 806.

Iowa. Millard v. Northwestern Mfg. Co., 200 Ia 1063, 205 NW 979.

Montana. Melzner v. Chicago, M. & St. P. Ry. Co., 51 Mont 487, 153 P 1019.

New Hampshire. Lindberg v. Swenson, 95 NH 184, 60 A2d 458.

Oklahoma. Continental Supply Co. v. Patrick, 66 Okl 287, 168 P 996.

West Virginia. Bond v. National Fire Ins. Co., 77 WVa 736, 88 SE 389.

Narrower applications of the general rule are that the instructions may not be based on evidence excluded,[69] or withdrawn from the jury's consideration,[70] or improperly admitted by the court,[71] or abandoned issues,[72] or on immaterial and unprobative facts incidentally revealed on the trial.[73] Assumption of facts, or of the existence of evidence to prove them, is not permissible in the court's charge.[74]

It follows from the general rule that a refusal to grant an instruction not based on the evidence would not be error.[75] But if such an instruction is given, either as a requested charge or in the general charge, although erroneous, is it necessarily prejudicial or reversible error? One court has gone so far as to hold that under the circumstances of the case it was harmless error to instruct on an issue which was neither pleaded nor

[69] **Alabama.** Birmingham Ry., Light & Power Co. v. Moseley, 164 Ala 111, 51 S 424.

Iowa. Schmidt v. Schumacher, 190 Ia 1, 179 NW 846.

Maryland. Citizens Mut. Fire Ins. Co. v. Conowingo Bridge Co., 116 Md 422, 82 A 372.

Missouri. Nafziger v. Mahan (Mo App), 191 SW 1080.

Oregon. Ritchey v. Tubandt, 119 Or 69, 247 P 1081.

South Carolina. Crosland v. Graham, 83 SC 228, 65 SE 233.

South Dakota. Smith v. Munson, 59 SD 6, 238 NW 27.

Texas. Buchanan v. Houston & T. C. R. Co. (TexCivApp), 180 SW 625; Crosgrove v. Smith (TexCiv App), 183 SW 109.

Virginia. Clark v. Miller, 148 Va 83, 138 SE 556.

Washington. Rich v. Ryan, 103 Wash 474, 175 P 32; Hanson v. Roesch, 104 Wash 257, 176 P 349.

West Virginia. Bluefield Produce & Comm. Co. v. Bluefield, 71 WVa 696, 77 SE 277.

[70] **Indiana.** Dickover v. Owen, 84 IndApp 463, 151 NE 349.

Massachusetts. Di Rienzo v. Goldfarb, 257 Mass 272, 153 NE 784.

Michigan. Union Trust Co. v. Parker, 251 Mich 630, 232 NW 360.

Pennsylvania. Stewart v. Pen Argyl Nat. Bank, 307 Pa 328, 161 A 327.

[71] **California.** Martin v. Pacific Gas & Elec. Co. (CalApp), 255 P 284.

Georgia. Wilkes v. Folsom, 154 Ga 618, 115 SE 4.

Illinois. Kraft-Phenix Cheese Corp. v. H. B. Smith Mach. Co., 267 IllApp 539.

New Jersey. O. J. Gude Co. v. Newark Sign Co., 90 NJL 686, 101 A 392.

Vermont. Ryder v. Vermont Last Block Co., 91 Vt 158, 99 A 733.

[72] Jaques v. Order of United Commercial Travelers, 104 Kan 612, 180 P 200.

[73] Palmer v. Magers, 85 WVa 415, 102 SE 100.

[74] **Illinois.** May v. DiCenso, 277 IllApp 248.

Iowa. Steen v. Hunt, 234 Ia 38, 11 NW2d 690.

Michigan. Fortner v. Koch, 272 Mich 273, 261 NW 762; Lord v. Winningham, 307 Mich 300, 11 NW2d 897.

Pennsylvania. Kirschman v. Pitt Publishing Co., 318 Pa 570, 178 A 828, 100 ALR 1062.

[75] Kimberling v. Wabash Ry. Co., 337 Mo 702, 85 SW2d 736; Mutual Benefit Health & Acc. Assn. v. Smith, 257 Ky 288, 77 SW2d 957; Minster v. Philadelphia Rapid Transit Co., 115 PaSuper 562, 176 A 72.

See also the cases in note 67, *supra.*

supported by the evidence,[76] while another court has held that such an instruction is prejudicial.[77] Where the pleadings raise an issue, but no evidence, the courts are not in agreement. Some hold that such an instruction is necessarily prejudicial,[78] while others hold otherwise.[79]

It is clear that an instruction should not be given if there is an entire absence of evidence.[80] Will any evidence, however

[76] Blackburn v. Cornette, 220 Ky 758, 295 SW 1046.

[77] Osenbaugh v. Virgin & Morse Lbr. Co., 173 Okl 110, 46 P2d 952.

[78] **Iowa.** Wilkinson v. Queal Lbr. Co., 203 Ia 476, 212 NW 682; Smith v. Standard Oil Co., 218 Ia 709, 255 NW 674.

Kentucky. Pierce v. Crisp, 260 Ky 519, 86 SW2d 293.

But see the Kentucky case cited in note 79, *infra*.

Utah. State Bank v. Hollingshead, 82 Utah 416, 25 P2d 612.

But see the Utah case cited in note 79, *infra*.

[79] **California.** Smith v. Hale, 3 CalApp2d 277, 39 P2d 445.

Kentucky. Major Taylor & Co. v. Harding, 182 Ky 236, 206 SW 285.

But see the Kentucky case cited in note 78, *supra*.

Missouri. Miller v. Williams (Mo), 76 SW2d 355.

Nebraska. Weber v. Weber, 124 Neb 878, 248 NW 642.

New Hampshire. Lindberg v. Swenson, 95 NH 184, 60 A2d 458.

Oklahoma. Guest v. Shamburger, 120 Okl 164, 251 P 97; Earl W. Baker & Co. v. Hollis, 169 Okl 253, 36 P2d 757.

Texas. Texas & P. Ry. Co. v. Greene (TexCivApp), 291 SW 929, affd. in 299 SW 639.

Utah. Jenson v. S. H. Kress & Co., 87 Utah 434, 49 P2d 958.

But see the Utah case cited in note 78, *supra*.

[80] **Federal.** Tacoma Ry. & Power Co. v. Erpelding, 120 CCA 401, 202 F 187 (instruction on negligence of physician in performing operation where there was no evidence of unskillfulness).

Alabama. Stockburger v. Aderholt, 204 Ala 557, 86 S 464; Walden v. Warren, 215 Ala 94, 109 S 749 (no evidence of lack of consideration for note).

Arizona. Scott v. Scott, 75 Ariz 116, 252 P2d 571.

California. Tompkins v. Montgomery, 123 Cal 219, 55 P 997.

Colorado. Lawson v. VanAuken, 6 Colo 52; McNulty v. Durham, 63 Colo 354, 167 P 773.

Georgia. Gaskins v. Gaskins, 145 Ga 806, 89 SE 1080.

Idaho. Whitman v. McComas, 11 Idaho 564, 83 P 604.

Illinois. Vallette v. Bilinski, 167 Ill 564, 47 NE 770; Casey v. Chicago Rys. Co., 269 Ill 386, 109 NE 984, LRA 1916B, 824; Smith v. Bellrose, 200 IllApp 368; Rowan v. Bartonville Bus Line, 242 IllApp 451; R. A. Watson Orchards, Inc. v. New York, C. & St. L. R. Co., 263 IllApp 397.

In a negligence action where the evidence shows one of the parties was negligent, it is error to instruct on the theory that the occurrence was an accident. Peters v. Madigan, 262 IllApp 417.

Indiana. Scobel v. Crisswell, 25 Ind 241; Buchanan v. Morris, 198 Ind 79, 151 NE 385.

Iowa. Frank v. Berry, 128 Ia 223, 103 NW 358; Dunnegan & Briggs v. Chicago, R. I. & P. R. Co., 202 Ia 787, 211 NW 364.

Submission of numerous grounds of negligence is prejudicial where there was evidence as to only a portion of them. Butler v. Globe Plumbing & Heating Co. (Ia), 126 NW 954.

Kentucky. Olive Hill Fire Brick Co. v. Ash, 146 Ky 253, 142 SW 403

slight, support an instruction? Is the test the same as that used in passing on a motion for a directed verdict? The most common expressions used by the courts is that the instruction must be sustained by, supported by, justified by, or grounded on the evidence. These expressions are of little help. Some courts are more specific. An instruction may be given though the evidence on which it is based is slight.[81] This appears to

(no evidence on which to base instruction on fellow servant doctrine).

Maryland. Thistle Mills v. Sparks, 137 Md 117, 111 A 769.

Massachusetts. Jacobs v. Brown, 254 Mass 474, 150 NE 206; Snell v. Rousseau, 257 Mass 559, 154 NE 70.

Michigan. Gallaway v. Burr, 32 Mich 332. See Pratt v. Van Rensselaer, 235 Mich 633, 209 NW 807 (holding that under the evidence it was proper to refuse to charge that the acts of architect amounting to negligence were not binding on the property owner).

Minnesota. Farrell v. G. O. Miller Co., 147 Minn 52, 179 NW 566.

Missouri. Cobb v. St. Louis & H. Ry. Co., 149 Mo 609, 50 SW 894; Kansas City, C. C. & St. J. Ry. Co. v. Couch (Mo), 187 SW 64.

Montana. Hageman v. Arnold, 79 Mont 91, 254 P 1070 (no evidence of justification for assault).

Nebraska. Russell v. Gillespie, 38 Neb 461, 56 NW 981; Miller Rubber Products Co. v. Anderson, 123 Neb 247, 242 NW 449.

Nevada. Van Fleet v. O'Neil, 44 Nev 216, 192 P 384; Davis v. Davis, 54 Nev 267, 13 P2d 1109.

New Hampshire. Woodbury v. Butler, 67 NH 545, 38 A 379.

New York. Schmit v. Gillen, 41 AppDiv 302, 58 NYS 458; Mara v. Tunney, 236 AppDiv 82, 258 NYS 191.

Ohio. Kolp v. Stevens, 45 OhApp 147, 39 OLR 4, 186 NE 821.

Oklahoma. Lawton v. McAdams, 15 Okl 412, 83 P 429; Chicago, R. I. & P. Ry. Co. v. Holland, 117 Okl 30, 245 P 611.

In an action on a life policy, it was proper to refuse to charge that the plaintiff could not recover if he knew at the time of making the application that he had tuberculosis, where there was no evidence that the insured had tuberculosis at the time. Loyal Union Circle v. Rose, 117 Okl 25, 245 P 624.

South Carolina. Welch v. Clifton Mfg. Co., 55 SC 568, 33 SE 739.

Vermont. Gaudenzio v. Bissell, 90 Vt 349, 98 A 760.

Virginia. Lynchburg v. Wallace, 95 Va 640, 29 SE 675.

Washington. Copeland v. North Coast Transp. Co., 169 Wash 84, 13 P2d 65.

In an action against a physician for malpractice, it is error to charge the jury that the defendant must possess skill commensurate with the advanced condition of science, where there is no evidence as to what is the advanced condition of science. Corey v. Radabaugh, 143 Wash 653, 255 P 1037.

West Virginia. Roberts v. Lykins, 102 WVa 409, 135 SE 388.

[81] **California.** Brandes v. Rucker-Fuller Desk Co., 102 CalApp 221, 282 P 1009; Veall v. Sanborn, 115 CalApp 87, 300 P 974.

Georgia. Sovereign Camp, W. O. W. v. McDaniel, 20 GaApp 430, 93 SE 105.

Kansas. Wyrick v. Parsons Ry. & Light Co., 100 Kan 122, 163 P 1059.

Kentucky. Minor v. Gordon, 171 Ky 790, 188 SW 768.

Nebraska. It is reversible error to refuse a requested instruction applicable to the evidence where the point is not covered by any other instruction. Forsha v. Nebraska

be an application of the scintilla rule. On the other hand, in states where the scintilla doctrine is repudiated, it is not required that the court instruct where the evidence to support the instruction is such that a verdict founded upon the instruction cannot be maintained.[82] Perhaps another way to state it is that the instruction must have substantial support in the testimony.[83]

Illustrations of the application of the rule of instructions supported by the evidence:

Negligence. No specific acts of negligence should be covered by the instructions unless they have support in the evidence.[84] In a negligence case it is prejudicial error for the trial court to charge the jury on the subject of wilful tort when such charge is unsupported by the evidence.[85]

So an instruction on contributory negligence should be refused where there is no evidence of negligence on the part of the plaintiff.[86] The instruction on the last clear chance doctrine

Moline Plow Co., 89 Neb 770, 132 NW 384.

Rhode Island. Arava v. Bebe, 48 RI 478, 139 A 302.

Virginia. Smyth Bros.-McCleary-McClellan Co. v. Beresford, 128 Va 137, 104 SE 371.

West Virginia. Snedeker v. Rulong, 69 WVa 223, 71 SE 180; Barna v. Gleason Coal & Coke Co., 83 WVa 216, 98 SE 158; Myers v. Cook, 87 WVa 265, 104 SE 593 (though insufficient to sustain a verdict).

[82] Upton & Walker v. R. D. Holloway & Co., 126 Va 657, 102 SE 54.

[83] Neibert v. Stone, 247 Ia 366, 73 NW2d 763.

[84] **Federal.** Erie R. Co. v. Vajo, 41 F2d 738.

Iowa. Kelly v. Muscatine, B. & S. R. Co., 195 Ia 17, 191 NW 525; Ryan v. Trenkle, 203 Ia 443, 212 NW 888.

Kentucky. Louisville & N. R. Co. v. Clark, 211 Ky 315, 277 SW 272.

Massachusetts. Goldstein v. Slutsky, 254 Mass 501, 150 NE 326; Walsh v. Gillis, 276 Mass 79, 176 NE 802.

Missouri. State ex rel. Goessling v. Daues, 314 Mo 282, 284 SW 463; Galber v. Grossberg, 324 Mo 742, 25 SW2d 96; James v. Mott (MoApp), 215 SW 913; Bauer v. Fahr (Mo App), 282 SW 150.

New Jersey. Cohen v. Delaware, L. & W. R. Co., 10 NJMisc 727, 160 A 398.

New York. McCormick v. Merritt, 232 AppDiv 619, 250 NYS 443.

[85] Denzer v. Terpstra, 129 OhSt 1, 1 OhO 303, 193 NE 647.

[86] **Alabama.** Birmingham Southern R. Co. v. Guest, 16 AlaApp 252, 77 S 241; Webb & Co. v. Riley, 16 AlaApp 570, 80 S 144.

Arkansas. Sun Oil Co. v. Hedge, 173 Ark 729, 293 SW 9.

California. Marston v. Pickwick Stages, 78 CalApp 526, 248 P 930.

In a suit for personal injuries alleged to have been occasioned by the overturning of a vehicle, an instruction is rightly refused which directs the jury to find for the defendant if they believe from the evidence that the plaintiff jumped from the conveyance, where there is no evidence justifying a finding that the plaintiff did so. Tompkins v. Montgomery, 123 Cal 219, 55 P 997.

Colorado. Finding v. Gitzen, 24 ColoApp 38, 131 P 1042.

Florida. Harris v. Florida Public Service Co., 100 Fla 90, 129 S 333.

should be refused where there is no evidence on which to base it.[87]

In a case where the evidence showed a violation of a speed ordinance by a street car, the court properly instructed that a pedestrian could presume that the ordinance would not be violated though there was no evidence that he knew of the existence of the ordinance.[88] In an action against truck owner for damages to plaintiff's automobile predicated on evidence showing plaintiff's automobile was knocked in front of street car by defendant's truck suddenly turning to the left and was hit by the street car while the plaintiff was attempting to pass the truck, the court properly refused to charge the jury with respect to a city ordinance prohibiting automobiles passing street cars stopping to discharge or take on passengers.[89] Where there was no evidence of intoxication of automobile driver charged with negligence, it was error to charge the jury to consider whether he

Indiana. Ross v. Lambert, 79 Ind App 30, 137 NE 185.

Kansas. Brower v. Western Union Tel. Co., 81 Kan 109, 105 P 497.

Maryland. Anne Arundel County Comrs. v. Carr, 111 Md 141, 73 A 668; Baltimore & O. R. Co. v. Engle, 149 Md 152, 131 A 151.

Missouri. Taylor v. Missouri Pacific R. Co., 311 Mo 604, 279 SW 115; Ottofy v. Mississippi Valley Trust Co., 197 MoApp 473, 196 SW 428.

Montana. Kelley v. John R. Daily Co., 56 Mont 63, 181 P 326.

Nebraska. Koehn v. Hastings, 114 Neb 106, 206 NW 19; Martin v. Brownell Bldg. Co., 115 Neb 749, 214 NW 635; Reals v. Grazis, 125 Neb 877, 252 NW 413.

New York. Middendorf v. International R. Co., 218 AppDiv 218, 218 NYS 126.

Ohio. Lindeman v. Roche, 18 Oh App 366. See Paragon Ref. Co. v. Higbea, 22 OhApp 440, 153 NE 860.

Oklahoma. Okmulgee Window Glass Co. v. Bright, 65 Okl 53, 183 P 898.

Oregon. Gunnell v. Van Emon Elev. Co., 81 Or 408, 159 P 971 (safe and unsafe method of work).

Texas. Marshall & E. T. Ry. Co. v. Blackburn (TexCivApp), 155 SW 625; Paris & G. N. Ry. Co. v. Atkins (TexCivApp), 185 SW 306.

[87] **California.** Ebrite v. Crawford, 215 Cal 724, 12 P2d 937.

Colorado. Murray v. Newmyer, 66 Colo 459, 182 P 888.

Connecticut. Biedrzicki v. O'Keefe, 105 Conn 373, 135 A 388; Bullard v. De Cordova, 119 Conn 262, 175 A 673.

Indiana. Indianapolis Trac. & Terminal Co. v. Lee, 67 IndApp 105, 118 NE 959.

Iowa. Robbins v. Weed, 187 Ia 64, 169 NW 773.

Missouri. Albright v. Joplin Oil Co., 206 MoApp 412, 229 SW 829. See Sisk v. Industrial Track Constr. Co., 316 Mo 1143, 295 SW 751.

New Mexico. Thayer v. Denver & R. G. R. Co., 21 NM 330, 154 P 691.

Ohio. Pennsylvania R. Co. v. Hart, 101 OhSt 196, 128 NE 142.

Oklahoma. Webb v. Missouri, O. & G. Ry. Co., 74 Okl 223, 179 P 17.

Utah. Daley v. Salt Lake & U. R. Co., 67 Utah 238, 247 P 293.

Virginia. Southern Ry. Co. v. Mason, 119 Va 256, 89 SE 225.

Washington. Johnson v. Seattle, 113 Wash 487, 194 P 417.

[88] Richmond v. Tacoma Ry. & Power Co., 67 Wash 444, 122 P 351. See Dawson v. San Diego Elec. Ry. Co., 82 CalApp 141, 255 P 215.

[89] Ruffin Coal & Transfer Co. v. Rich, 214 Ala 633, 108 S 596.

was under the influence of strong drink.[90] In a personal injury action, it is not proper to instruct on the theory of accident where the evidence shows that the injury resulted either from the negligence of the employer or that of the employee combined with that of the employer.[91] In a damage action based on collision between plaintiff's bicycle and defendant's automobile, the court properly refused to charge with respect to the proper center of the street intersection where the accident occurred, where the evidence showed that the defendant in making the turn cut the corner.[92]

Damages. The instruction on damages should cover only those elements covered by the evidence.[93] An instruction on

[90] Holloway v. Milledgeville, 35 GaApp 87, 132 SE 106.

[91] Mills v. F. W. Steadley & Co. (MoApp), 279 SW 160. See Keller v. Gartin, 220 Ia 78, 261 NW 776 (where there was no evidence tending to show that the injury sued for resulted from accident).

[92] Nagel v. McDermott, 138 Wash 536, 244 P 977.

[93] **Federal.** Public Utilities Corp. v. Oliver, 64 F2d 60.

Alabama. Tennessee River Nav. Co. v. Woodward, 18 AlaApp 34, 88 S 364 (aggravation of damages).

Arizona. Atchison, T. & S. F. Ry. Co. v. Gutierrez, 30 Ariz 491, 249 P 66 (authorizing medical expenses where there was no evidence with respect thereto).

California. Withrow v. Becker, 6 CalApp2d 723, 45 P2d 235.

Georgia. Sammons v. Wilson, 20 GaApp 241, 92 SE 950; Atlanta v. Feeney, 42 GaApp 135, 155 SE 370; Mitchell v. Mullen, 45 GaApp 282, 164 SE 276.

Illinois. Ryan v. Chicago City R. Co., 205 IllApp 592 (medical expenses).

Iowa. Richardson v. Sioux City, 172 Ia 260, 154 NW 430, AnnCas 1918A, 618; Looney v. Parker, 210 Ia 85, 230 NW 570; Waldman v. Sanders Motor Co., 214 Ia 1139, 243 NW 555.

Kansas. United Iron Works v. L. J. Smith Constr. Co., 116 Kan 482, 227 P 369.

Kentucky. Louisville & N. R. Co. v. Johnson, 214 Ky 189, 282 SW 1087 (loss of earning power); Prestonsburg v. Lafferty, 218 Ky 652, 291 SW 1030 (damage to health by overflow of property); Hunt-Forbes Constr. Co. v. Martt, 247 Ky 376, 57 SW2d 37; Humphrey v. Mansbach, 251 Ky 66, 64 SW2d 454; Kreuzman's Admr. v. Nienaber, 253 Ky 241, 69 SW2d 367; Southeastern Tel. Co. v. Payne, 253 Ky 245, 69 SW2d 358.

Maryland. Mt. Royal Cab Co. v. Dolan, 166 Md 581, 171 A 854.

Michigan. Fitzgerald v. Detroit United Ry., 206 Mich 273, 172 NW 608 (permanency of injury).

Mississippi. Baker v. First Nat. Bank, 147 Miss 530, 113 S 205.

Missouri. Cordray v. Brookfield, 334 Mo 249, 65 SW2d 938; Moses v. Klusmeyer, 194 MoApp 634, 186 SW 958; Thompson v. United Rys. Co., 203 MoApp 356, 218 SW 343 (value of nursing services); Lehmer v. Smith, 220 MoApp 251, 284 SW 167 (loss of time); Colby v. Thompson (MoApp), 207 SW 73 (permanency of injuries); Brown v. John M. Darr & Sons Planing Mill Co. (MoApp), 217 SW 332 (loss of earnings).

Nebraska. Mick v. Oberle, 124 Neb 433, 246 NW 869.

New Jersey. Pavlika v. Giglio, 5 NJMisc 590, 137 A 528.

New York. Wiser v. Van Dyke Transfer Co., 218 AppDiv 222, 218 NYS 146.

Ohio. Swisher v. Kimbrough, 25 OhApp 233, 157 NE 823.

exemplary damages should not be given where there is an entire lack of evidence of wilfulness, malice, or reckless indifference to consequences.[94] It is error to instruct the jury in a slander action that they may consider the financial condition of the parties if there is no evidence before the jury touching such matter.[95]

Miscellaneous. Even though a rule of law, such as that governing positive and negative testimony, is correctly stated in an instruction, it may be rejected if inapplicable to the evidence,[96] and the principle is the same where the basis of an instruction is a certain hypothesis not sustained by the evidence.[97]

Oklahoma. Missouri Pacific R. Co. v. Qualls, 120 Okl 49, 250 P 774.

Pennsylvania. Boyle v. Philadelphia Rapid Transit Co., 286 Pa 536, 134 A 446.

Tennessee. Tennessee Cent. Ry. Co. v. Dial, 16 TennApp 646, 65 SW2d 610; Murfreesboro v. Haynes, 18 TennApp 653, 82 SW2d 236.

Texas. San Antonio Trac. Co. v. Cox (TexCivApp), 184 SW 722; Red Arrow Freight Lines, Inc. v. Gravis (TexCivApp), 84 SW2d 540.

Utah. Haycraft v. Adams, 82 Utah 347, 24 P2d 1110.

Virginia. Dreyfus & Co. v. Wooters, 123 Va 42, 96 SE 235 (medical expenses); Eastern Coal & Export Corp. v. Norfolk & W. Ry. Co., 133 Va 525, 113 SE 857.

Washington. Estes v. Babcock, 119 Wash 270, 205 P 12 (mental anguish).

West Virginia. Miller v. United Fuel Gas Co., 88 WVa 82, 106 SE 419 (permanency of injury).

[94] **Alabama.** Louisville & N. R. Co. v. Cornelius, 6 AlaApp 386, 60 S 740.

Colorado. Western Light & Power Co. v. Poor, 69 Colo 380, 194 P 613.

Georgia. Savannah Elec. Co. v. Jackson, 132 Ga 559, 64 SE 680.

Illinois. Malloy v. Chicago Tel. Co., 159 IllApp 556.

North Carolina. Brown v. Martin, 176 NC 31, 96 SE 642.

Virginia. Norfolk & W. Ry. Co. v. Stone, 111 Va 730, 69 SE 927.

Wisconsin. Langowski v. Wisconsin Cent. Ry. Co., 153 Wis 418, 141 NW 236.

[95] Barker v. Green, 34 GaApp 574, 130 SE 599.

[96] Lawton v. McAdams, 15 Okl 412, 83 P 429.

[97] **Federal.** May Department Stores Co. v. Runge, 154 CCA 351, 241 F 575.

Alabama. Massachusetts Mut. Life Ins. Co. v. Crenshaw, 195 Ala 263, 70 S 768; Birmingham Fuel Co. v. Taylor, 202 Ala 674, 81 S 630; Kelly v. Cook, 15 AlaApp 350, 73 S 220.

Illinois. Carlin v. Chicago Rys. Co., 205 IllApp 303.

Indiana. Chicago & E. R. Co. v. Mitchell, 184 Ind 588, 110 NE 680.

Iowa. Plantz v. Kreutzer & Wasem, 175 Ia 562, 154 NW 785; Steele v. Ingraham, 175 Ia 653, 155 NW 294; W. T. Rawleigh Medical Co. v. Bane, 181 Ia 734, 165 NW 42.

Maryland. Forest Hill Permanent Bldg. Assn. v. Fisher, 140 Md 666, 118 A 164.

Michigan. Moynahan v. Connor, 30 Mich 136.

Where an instruction is founded upon an assumed state of facts, and the evidence points to a condition directly opposite, it will be prejudicially erroneous. Dodge v. Brown, 22 Mich 446.

Missouri. J. F. Meyer Mfg. Co. v. Sellers, 192 MoApp 489, 182 SW 789; Miller v. Peoples Sav. Bank, 193 MoApp 498, 186 SW 547.

Nebraska. Owens v. Omaha & C. B. Street Ry. Co., 99 Neb 364, 156 NW 661; Hammang v. Chicago & N. W. Ry. Co., 107 Neb 684, 186 NW 991.

In an action to recover land, where an instruction is based on the theory that plaintiff made no claim to the land until "after he procured certificate of entry from the government," and there was no evidence supporting such theory, the instruction was rightly refused.[98]

Where there was no evidence showing, or tending to show, that a guardian ad litem had or had not been appointed for infant defendants, an instruction was correctly refused which told the jury that if they found from the evidence that certain defendants were "infants under the age of twenty-one, and that no guardian ad litem for them had been appointed in this cause, then their verdict must be for said defendants."[99]

A foreign statute should be proved before an instruction thereon should be given,[1] as should also a city ordinance.[2] For like reasons an instruction on estoppel should be given only where supported by the evidence.[3]

In action by wife on policy covering life of husband, it is error to instruct that plaintiff cannot recover if she killed her husband, there being no evidence of homicide.[4]

It is improper to submit the question of undue influence in the execution of a will where there is no evidence in regard thereto.[5]

§ 120. Pertinency to evidence admitted in criminal prosecutions.

Instructions in criminal prosecutions should not be given unless supported by evidence pertinent to the allegations in the indictment.

Pennsylvania. Gandy v. Klaw, 269 Pa 320, 112 A 464.

Rhode Island. Di Sandro v. Providence Gas Co., 40 RI 551, 102 A 617.

Texas. Gulf States Tel. Co. v. Evetts (TexCivApp), 188 SW 289; J. Kennard & Sons Carpet Co. v. Houston Hotel Assn. (TexCivApp), 197 SW 1139.

Virginia. New York Life Ins. Co. v. Franklin, 118 Va 418, 87 SE 584.

West Virginia. Ellison v. Norfolk & W. Ry. Co., 83 WVa 316, 98 SE 257; Penix v. Grafton, 86 WVa 278, 103 SE 106.

[98] Coker v. Payne (Ala), 39 S 1025.

[99] Campbell v. Hughes, 12 WVa 183.

[1] Buchholz v. Standard Oil Co., 211 MoApp 397, 244 SW 973.

[2] **California.** Ebrite v. Crawford, 215 Cal 724, 12 P2d 937.

Indiana. Chicago, I. & L. Ry. Co. v. Blankenship, 85 IndApp 332, 154 NE 44.

Kentucky. Cline v. Cook, 216 Ky 366, 287 SW 927.

Ohio. Astrup Co. v. Rehburg, 42 OhApp 126, 36 OLR 405; 181 NE 551.

[3] **California.** Davis v. Cline, 184 Cal 548, 195 P 42.

Colorado. Farmers Bank & Trust Co. v. Miller, 80 Colo 121, 249 P 644.

Georgia. Parker v. Crosby, 150 Ga 1, 102 SE 446.

Missouri. Lally v. Morris (Mo App), 26 SW2d 52.

[4] Marlowe v. Hoosier Casualty Co., 114 PaSuper 181, 174 A 627.

[5] Jones v. Jones, 215 Ky 218,

In criminal prosecutions, the instructions must be based on facts supported by evidence pertinent to the allegations in the indictment and should not be given unless they have such support.[6] The same prohibition applies to instructions on theories

284 SW 993. See Erickson v. Lundgren (Mo), 286 SW 120.

[6] **Federal.** Bird v. United States, 187 US 118, 47 LEd 100, 23 SupCt 42; Clifton v. United States, 54 AppDC 104, 295 F 925.

Alabama. Plant v. State, 140 Ala 52, 37 S 159; Phillips v. State, 162 Ala 53, 50 S 326; Parker v. State, 165 Ala 1, 51 S 260; Granberry v. State, 182 Ala 4, 62 S 52; Lewis v. State, 18 AlaApp 263, 89 S 904.

Arizona. Macias v. State, 36 Ariz 140, 283 P 711; Viliborghi v. State, 45 Ariz 275, 43 P2d 210.

Arkansas. Brown v. State, 99 Ark 648, 138 SW 633; Diggs v. State, 126 Ark 455, 190 SW 448.

California. People v. Trebilcox, 149 Cal 307, 86 P 684; People v. Davis, 210 Cal 540, 293 P 32; People v. Ferlin (Cal), 257 P 857; People v. Williams, 29 CalApp 552, 156 P 882; People v. Allen, 138 CalApp 652, 33 P2d 77.

Colorado. Mow v. People, 31 Colo 351, 72 P 1069; Reagan v. People, 49 Colo 316, 112 P 785.

District of Columbia. Norman v. United States, 20 AppDC 494.

Florida. Melbourne v. State, 51 Fla 69, 40 S 189; Carlton v. State, 63 Fla 1, 58 S 486; Gadsden v. State, 77 Fla 627, 82 S 50.

Georgia. Rooks v. State, 119 Ga 431, 46 SE 631.

Illinois. Lyman v. People, 198 Ill 544, 64 NE 974; People v. Reno, 324 Ill 484, 155 NE 329.

In People v. Corbishly, 327 Ill 312, 158 NE 732, the court held that it would be improper to instruct in a prosecution for assault with intent to murder, as to the penalty for rape and mayhem.

Indiana. Braxton v. State, 157 Ind 213, 61 NE 195; Brunaugh v. State, 173 Ind 483, 90 NE 1019.

Iowa. State v. Denhardt, 129 Ia 135, 105 NW 385; State v. Smalley, 211 Ia 109, 233 NW 55.

It is error to give an instruction on maintaining nuisance in a prosecution for bootlegging. State v. Moore, 201 Ia 743, 229 NW 701.

Kentucky. Middleton v. Commonwealth, 136 Ky 354, 124 SW 355; Flynn v. Commonwealth, 204 Ky 572, 264 SW 1111; Fry v. Commonwealth, 259 Ky 337, 82 SW2d 431.

In Yarbrough v. Commonwealth, 219 Ky 319, 292 SW 806, the court held it error to instruct that officers had a right to arrest the defendant if he was drunk at the time, where no evidence was introduced showing his intoxication.

Louisiana. State v. Guidor, 113 La 727, 37 S 622; State v. Howard, 127 La 435, 53 S 677; State v. Suire, 142 La 101, 76 S 254.

Maryland. Bell v. State, 200 Md 223, 88 A2d 567.

Michigan. People v. Hilliard, 119 Mich 24, 77 NW 306.

Mississippi. Wheeler v. State, 76 Miss 265, 24 S 310; Smith v. State, 161 Miss 430, 137 S 96; Cole v. State, 172 Miss 19, 159 S 296.

Missouri. State v. Rollins, 226 Mo 524, 126 SW 478; State v. Nord, 230 Mo 655, 132 SW 239; State v. Worten (Mo), 263 SW 124.

Instruction that defendant, a boy under fourteen years of age, by reason of his intelligence was capable of crime was erroneous where there was no evidence on which to base it. State v. Tice, 90 Mo 112, 2 SW 269.

Montana. State v. Evans, 60 Mont 367, 199 P 440.

North Carolina. State v. Hicks, 130 NC 705, 41 SE 803.

Ohio. State v. Linder, 76 OhSt 463, 81 NE 753 (sale of intoxicating liquors); Cromley v. State, 19 Oh CirCt (N. S.) 526, 26 OhCirDec 209, 59 OhBull 363.

It is not error to give a true hypothetical proposition founded up-

not based on evidence.[7] The necessary support is present even though the evidence is slight[8] or inconsistent.[9] But the fact

on extraneous facts. Stoughton v. State, 2 OhSt 562.

Oklahoma. Ryan v. State, 8 Okl Cr 623, 129 P 685; Yarbrough v. State, 13 OklCr 140, 162 P 678.

Oregon. State v. Miller, 43 Or 325, 74 P 658; State v. Hamilton, 80 Or 562, 157 P 796.

Pennsylvania. Commonwealth v. Danz, 211 Pa 507, 60 A 1070.

South Carolina. State v. Waldrop, 73 SC 60, 52 SE 793.

Tennessee. Cooper v. State, 123 Tenn 37, 138 SW 826.

Texas. Woodland v. State, 57 TexCr 352, 123 SW 141; Johnson v. State, 59 TexCr 263, 128 SW 614; Powell v. State, 60 TexCr 201, 131 SW 590; Jones v. State, 60 TexCr 426, 132 SW 476; Alexander v. State, 63 TexCr 102, 138 SW 721; Smith v. State, 67 TexCr 27, 148 SW 699; Corley v. State, 69 TexCr 626, 155 SW 227; O'Neal v. State, 106 TexCr 158, 291 SW 892; Teals v. State, 127 TexCr 198, 75 SW2d 678; Blair v. State, 120 TexCr 269, 80 SW2d 978.

The court should not instruct that rape was committed by threats or fraud where there was no pretense that it was so committed. Reyna v. State (TexCr), 75 SW 25.

Utah. State v. Gordon, 28 Utah 15, 76 P 882.

Virginia. Johnson v. Commonwealth, 102 Va 927, 46 SE 789.

Washington. State v. Patrick, 179 Wash 510, 38 P2d 261.

West Virginia. State v. Sheppard, 49 WVa 582, 39 SE 676; State v. Donahue, 79 WVa 260, 90 SE 834; State v. Wilson, 95 WVa 525, 121 SE 726; State v. Shelton, 116 WVa 75, 178 SE 633.

[7] **Federal.** De Groot v. United States, 78 F2d 244.

Alabama. Jones v. State, 16 Ala App 7, 74 S 843 (commission of offense by another).

Arizona. Clark v. State, 23 Ariz 470, 204 P 1032 (commission of offense by another).

Georgia. Wolfe v. State, 121 Ga 587, 49 SE 688; Taylor v. State, 138 Ga 826, 76 SE 347.

Iowa. State v. Mullen, 151 Ia 392, 131 NW 679, AnnCas 1913A, 399.

Kentucky. Anderson v. Commonwealth, 144 Ky 215, 137 SW 1063; King v. Commonwealth, 187 Ky 782, 220 SW 755.

Michigan. People v. Cummins, 47 Mich 334, 11 NW 184, 186.

Missouri. State v. Swain, 239 Mo 723, 144 SW 427; State v. Byrd, 278 Mo 426, 213 SW 35 (that another had committed the offense).

New York. People v. Tirnauer, 77 Misc 387, 136 NYS 833, 28 NYCr 29.

Oklahoma. Newby v. State, 17 OklCr 291, 188 P 124; Tucker v. State, 17 OklCr 580, 191 P 201; Holmes v. State, 18 OklCr 415, 195 P 508.

Oregon. State v. Weston, 102 Or 102, 201 P 1083 (declarations as res gestae).

Pennsylvania. Commonwealth v. Calhoun, 238 Pa 474, 86 A 472.

Texas. Wash v. State (TexCr), 47 SW 469; Taylor v. State, 62 Tex Cr 611, 138 SW 615; Ice v. State, 84 TexCr 509, 208 SW 343; Hasley v. State, 87 TexCr 444, 222 SW 579; Grissom v. State, 87 TexCr 465, 222 SW 237; Johns v. State, 129 TexCr 206, 86 SW2d 235.

Washington. State v. Hessel, 112 Wash 53, 191 P 637.

West Virginia. State v. Donahue, 79 WVa 260, 90 SE 834; State v. Weissengoff, 89 WVa 279, 109 SE 707.

[8] **Alabama.** Talley v. State, 26 AlaApp 130, 154 S 611.

Florida. Ward v. State, 51 Fla 133, 40 S 177.

Indiana. Harris v. State, 155 Ind 265, 58 NE 75.

Kansas. State v. Gallamore, 83 Kan 412, 111 P 472.

West Virginia. State v. McKinney, 88 WVa 400, 106 SE 894.

that the instruction states a correct principle of law does not make it proper if not based on the evidence adduced.[10]

So where there is an entire absence of evidence on the subject the court may not instruct on such matters, among others, as the credibility of witnesses,[11] alibi,[12] admissions,[13] confessions,[14] threats,[15] insanity,[16] entrapment,[17] motive or its ab-

Wisconsin. Holmes v. State, 124 Wis 133, 102 NW 321.

[9] Hayes v. State (TexCr), 39 SW 106.

But it has been held that if the accused's testimony upon a particular point is so completely refuted by the physical facts as to render it utterly unreasonable, the court need not charge upon the theory attempted to be raised thereby. Williams v. State, 56 OklCr 147, 35 P2d 282.

[10] **Indiana.** Davis v. State, 152 Ind 34, 51 NE 928, 71 AmSt 322.

Louisiana. State v. Capaci, 179 La 462, 154 S 419.

Oklahoma. Sigler v. State, 54 OklCr 353, 21 P2d 1073.

Utah. State v. Marasco, 81 Utah 325, 17 P2d 919.

Washington. State v. Powell, 142 Wash 463, 253 P 645.

[11] **Alabama.** Nabors v. State, 120 Ala 323, 25 S 529; Woods v. State, 18 AlaApp 123, 90 S 52.

Arkansas. Davis v. State, 150 Ark 500, 234 SW 482.

California. People v. Ward, 134 Cal 301, 66 P 372; People v. Blunkall, 31 CalApp 778, 161 P 997.

Florida. Graham v. State, 72 Fla 510, 73 S 594.

Georgia. Amerson v. State, 18 GaApp 176, 88 SE 998 (impeachment by contradictory statements).

Idaho. State v. Boyles, 34 Idaho 283, 200 P 125 (falsus in uno, falsus in omnibus).

Illinois. Johnson v. People, 197 Ill 48, 64 NE 286; People v. Rukavina, 338 Ill 128, 170 NE 240.

Indiana. Colondro v. State, 188 Ind 533, 125 NE 27; Leinberger v. State, 204 Ind 311, 183 NE 798 (character, if not attacked, cannot be submitted as bearing on credibility of witness).

Kansas. State v. Covington, 99 Kan 151, 160 P 1009.

Missouri. State v. Broyles, 317 Mo 276, 295 SW 554.

Pennsylvania. Commonwealth v. Loomis, 267 Pa 438, 110 A 257.

[12] **Alabama.** Morris v. State, 124 Ala 44, 27 S 336.

Georgia. Foy v. State, 26 GaApp 205, 105 SE 657.

Illinois. People v. Reno, 324 Ill 484, 155 NE 329; People v. Ryan, 349 Ill 637, 182 NE 803.

Iowa. State v. Steffen, 210 Ia 196, 230 NW 536, 78 ALR 748.

Kansas. State v. Calvert, 96 Kan 813, 153 P 499; State v. Wolkow, 110 Kan 722, 205 P 639, 42 ALR 265.

Pennsylvania. Commonwealth v. Bednorciki, 264 Pa 124, 107 A 666.

Texas. Johnson v. State (TexCr), 58 SW 105.

[13] State v. Duncan, 101 Wash 542, 172 P 915. See People v. Powell, 83 CalApp 62, 256 P 561.

[14] **Federal.** Rossi v. United States, 278 F 349.

Alabama. Dickerson v. State, 21 AlaApp 631, 111 S 190.

Georgia. Knight v. State, 114 Ga 48, 39 SE 928, 88 AmSt 17; Owens v. State, 120 Ga 296, 48 SE 21; Chislon v. State, 19 GaApp 607, 91 SE 893; Easterling v. State, 24 Ga App 424, 100 SE 727; Hillery v. State, 51 GaApp 373, 180 SE 499.

Illinois. People v. Fiereto, 303 Ill 186, 135 NE 417.

North Carolina. Where the state relied on the confession of accused and on circumstances showing an opportunity to commit the crime charged, and accused relied on an alibi, instructions on circumstantial evidence, though correct as abstract propositions, were properly refused. State v. West, 152 NC 832, 68 SE 14.

sence for commission of crime,[18] flight of accused,[19] former jeopardy,[20] accessories after the fact,[21] conspiracy to commit

Oregon. State v. Howard, 102 Or 431, 203 P 311.

Texas. Fox v. State (TexCr), 87 SW 157.

Where there was no evidence that confession was involuntary, it was not necessary to instruct that confession is not to be considered unless the jury believe that it was made voluntarily. Bailey v. State, 42 Tex Cr 289, 59 SW 900.

Where in addition to the confession of the accused there is other evidence of guilt, there is no error in a refusal to charge that a confession alone is not sufficient proof of guilt. Franks v. State (TexCr), 45 SW 1013.

Where there is positive testimony of the robbery alleged, it is not error to refuse to charge that defendant may not be convicted on his confession alone. Murphy v. State, 43 TexCr 515, 67 SW 108.

Washington. State v. Rader, 118 Wash 198, 203 P 68.

[15] Shannon v. State, 147 Ga 172, 93 SE 86; Goings v. State, 24 Oh CirCt (N. S.) 145, 30 OhCirDec 628.

[16] **Alabama.** Rice v. State, 204 Ala 104, 85 S 437.

California. People v. Keyes, 178 Cal 794, 175 P 6; People v. Goodrum, 31 CalApp 430, 160 P 690.

Georgia. Swain v. State, 162 Ga 777, 135 SE 187.

Idaho. A refusal to charge the law covering the defense of insanity is not error where there was no evidence of accused tending to show that he was insane at the time of the commission of the offense. State v. Gruber, 19 Idaho 692, 115 P 1.

Missouri. State v. Duckworth (Mo), 226 SW 15.

Texas. Stokes v. State (TexCr), 70 SW 95; Mikeska v. State, 79 TexCr 109, 182 SW 1127; Marion v. State, 80 TexCr 478, 190 SW 499 (insanity from use of drugs); Johnson v. State, 81 TexCr 71, 193 SW 674 (insanity by use of intoxicants); Holland v. State, 84 TexCr 144, 206 SW 88.

No instruction on insanity should be given where there is merely evidence of weak mind. Griffith v. State, 47 TexCr 64, 78 SW 347.

Utah. See State v. Green, 86 Utah 192, 40 P2d 961.

Wyoming. Mortimore v. State, 24 Wyo 452, 161 P 766.

[17] Brown v. United States, 171 CCA 490, 260 F 752; Neumann v. State, 116 Fla 98, 156 S 237.

[18] State v. Orfanakis, 22 NM 107, 159 P 674.

[19] **Colorado.** Orin v. People, 68 Colo 1, 188 P 1114.

Georgia. Jones v. State, 123 Ga 129, 51 SE 312; Griffin v. State, 47 GaApp 188, 170 SE 106.

Illinois. People v. Lawson, 351 Ill 457, 184 NE 606.

Iowa. An instruction on flight was justified where the evidence connected defendant with theft and it was shown that he left the state three days thereafter and did not return until brought back under arrest. State v. Alley, 149 Ia 196, 128 NW 343.

Missouri. State v. Goodwin (Mo), 217 SW 264.

Where the evidence as to the defendant's guilt was conflicting, and no clear motive for the crime was shown, an instruction that flight by the defendant was a circumstance to be considered against him, but which left out of view defendant's explanation of such flight, was erroneous. State v. Harris, 232 Mo 317, 134 SW 535.

Oregon. An instruction that flight is a fact which the jury could consider in determining guilt was defective where it failed to advise the jury to consider other facts, where there was evidence of other reasons than fear of arrest causing the defendant to flee. State v. Hogg, 64 Or 57, 129 P 115.

[20] **Indiana.** Harlan v. State, 190 Ind 322, 130 NE 413.

the offense charged,[22] included crimes,[23] another degree of the crime,[24] defense of another,[25] the comparative weight of posi-

Oklahoma. Yarbrough v. State, 13 OklCr 140, 162 P 678.

Texas. Stephens v. State, 80 TexCr 74, 188 SW 976.

[21] **Illinois.** People v. Kubulis, 298 Ill 523, 131 NE 595; People v. Corbishly, 327 Ill 312, 158 NE 732.

Kentucky. Anderson v. Commonwealth, 193 Ky 663, 237 SW 45; Pelfry v. Commonwealth, 255 Ky 442, 74 SW2d 913; Smith v. Commonwealth, 257 Ky 669, 79 SW2d 20.

Montana. State v. De Wolfe, 29 Mont 415, 74 P 1084.

Texas. Yeager v. State, 106 Tex Cr 462, 294 SW 200.

Virginia. Hutzler v. Commonwealth, 126 Va 828, 101 SE 785.

[22] **Alabama.** Warren v. State, 18 AlaApp 245, 90 S 277.

Where the evidence on a trial for homicide showed the existence of a conspiracy between the accused and his son to murder the decedent, an instruction was properly refused which ignored the theory of a conspiracy. Morris v. State, 146 Ala 66, 41 S 274.

Arkansas. Humphrey v. State, 74 Ark 554, 86 SW 431.

California. People v. Sheffield, 108 CalApp 721, 293 P 72, 77.

Kentucky. Burkheart v. Commonwealth, 250 Ky 410, 63 SW2d 471; Tillman v. Commonwealth, 259 Ky 73, 82 SW2d 222; Bosse v. Commonwealth, 13 KyL 217, 16 SW 713.

Where in a prosecution for murder it is admitted that the accused inflicted the fatal wound, there is no error in the failure to give an instruction defining conspiracy, notwithstanding that the indictment charges conspiracy, for the question of conspiracy in such a case is not material. Ross v. Commonwealth, 24 KyL 1621, 59 SW 28.

Missouri. State v. Simpson (Mo), 237 SW 748.

North Carolina. State v. Potter, 134 NC 719, 47 SE 1.

Oregon. State v. Booth, 82 Or 394, 161 P 700.

Texas. Bennett v. State, 83 TexCr 268, 202 SW 730.

[23] **California.** People v. Barbera, 29 CalApp 604, 157 P 532.

Georgia. Todd v. State, 25 GaApp 411, 103 SE 496.

Illinois. People v. Moore, 276 Ill 392, 114 NE 906; People v. Preston, 341 Ill 407, 173 NE 383, 77 ALR 631.

Iowa. State v. Leete, 187 Ia 305, 174 NW 253; State v. Huckelberry, 195 Ia 13, 188 NW 587.

Kansas. State v. Barbour, 142 Kan 200, 46 P2d 841.

Kentucky. Wellman v. Commonwealth, 181 Ky 346, 205 SW 328; Wattles v. Commonwealth, 185 Ky 486, 215 SW 291.

Louisiana. State v. Fruge, 106 La 694, 31 S 323.

Minnesota. State v. Damuth, 135 Minn 76, 160 NW 196.

Missouri. State v. Mundy (Mo), 76 SW2d 1088.

Nebraska. Strong v. State, 63 Neb 440, 88 NW 772; Thompson v. State, 85 Neb 244, 122 NW 986.

Nevada. State v. Enkhouse, 40 Nev 1, 160 P 23.

New Mexico. State v. Moss, 24 NM 59, 172 P 199.

New York. People v. Travis, 172 AppDiv 959, 157 NYS 577.

Ohio. Dresback v. State, 38 OhSt 365. See also Bandy v. State, 102 OhSt 384, 131 NE 499, 21 ALR 594; State v. Snouffer, 20 ONP (N. S.) 65, 27 OhDecCt 386.

Oklahoma. Fooshee v. State, 3 OklCr 666, 108 P 554; Inklebarger v. State, 8 OklCr 316, 127 P 707.

Washington. State v. Murphy, 101 Wash 425, 172 P 544; State v. Shaffer, 120 Wash 345, 207 P 229.

[24] Martin v. State, 48 OklCr 102, 289 P 787.

[25] Rodriguez v. State, 89 TexCr 373, 232 SW 512.

tive and negative testimony,[26] dying statements,[27] disparity in size and strength of parties,[28] on circumstantial evidence where the evidence is not wholly circumstantial,[29] on accomplice testi-

[26] State v. Henson, 105 Kan 581, 185 P 1059.

[27] People v. Lim Foon, 29 CalApp 270, 155 P 477; State v. Gaunt, 98 Kan 186, 157 P 447.

[28] Thompson v. State, 20 GaApp 176, 92 SE 959; Folds v. State, 23 GaApp 147, 97 SE 872.

[29] **Federal.** Bedell v. United States, 78 F2d 358.

Alabama. Wilson v. State, 128 Ala 17, 29 S 569; Bailey v. State, 168 Ala 4, 53 S 296, 390; Spencer v. State, 228 Ala 537, 154 S 527.

In Burkett v. State, 215 Ala 453, 111 S 34, the court held it no error to refuse to instruct on circumstances in a prosecution for murder where the killing was admitted by the defendant.

Arkansas. Brown v. State, 134 Ark 597, 203 SW 1031; Bartlett v. State, 140 Ark 553, 216 SW 33; Griffin v. State, 141 Ark 43, 216 SW 34; Nordin v. State, 143 Ark 364, 220 SW 473; Purcell v. State, 174 Ark 656, 296 SW 59.

California. People v. De Voe, 123 CalApp 233, 11 P2d 26.

Where there is direct evidence that defendant committed the crime charged it is not error to refuse a charge assuming that a conviction must necessarily be based on circumstantial evidence. People v. Clark, 145 Cal 727, 79 P 434.

Instruction on circumstantial evidence is improper in murder trial where the defendant admits the killing. People v. Harvey, 109 Cal App 111, 292 P 654.

Georgia. Brown v. State, 148 Ga 264, 96 SE 435; Medlin v. State, 149 Ga 23, 98 SE 551; Williamson v. State, 22 GaApp 787, 97 SE 195; Ingram v. State, 24 GaApp 332, 100 SE 773; Walker v. State, 24 GaApp 656, 101 SE 776; McClure v. State, 25 GaApp 549, 103 SE 807; Shiflett v. State, 26 GaApp 483, 106 SE 750.

Illinois. People v. McGeoghegan, 325 Ill 337, 156 NE 378 (where there was testimony of eyewitnesses to the alleged murder). See People v. Harrison, 359 Ill 295, 194 NE 518 (where instruction on circumstantial evidence was held proper although there was some direct evidence); People v. Touhy, 361 Ill 332, 197 NE 849 (kidnapping case).

Indiana. Evans v. State, 199 Ind 55, 155 NE 203.

Kansas. State v. Kennedy, 105 Kan 347, 184 P 734; State v. Davis, 106 Kan 527, 188 P 231.

It was not error to refuse instructions on circumstantial evidence, where the circumstances shown were merely corroborative of direct proof of guilt. State v. Link, 87 Kan 738, 125 P 70.

Louisiana. State v. Gordon, 115 La 571, 39 S 625.

Minnesota. State v. Kasper, 140 Minn 259, 167 NW 1035.

Missouri. State v. Soper, 148 Mo 217, 49 SW 1007; State v. Dipley, 242 Mo 461, 147 SW 111; State v. Jackson (Mo), 186 SW 990; State v. Stegner, 276 Mo 427, 207 SW 826; State v. Emmons, 285 Mo 54, 225 SW 894; State v. Sanford, 317 Mo 865, 297 SW 73.

New Mexico. State v. McKnight, 21 NM 14, 153 P 76.

Ohio. Gibbs v. State, 7 OLA 374 (instruction on circumstantial evidence was properly refused).

Oklahoma. Scroggins v. State, 54 OklCr 54, 14 P2d 237.

South Carolina. State v. Ready, 110 SC 177, 96 SE 287; State v. Quick, 141 SC 442, 140 SE 97.

Texas. Camarillo v. State (Tex Cr), 68 SW 795; Bass v. State, 59 TexCr 186, 127 SW 1020; Wilson v. State, 79 TexCr 7, 182 SW 891; Cleveland v. State, 82 TexCr 439, 200 SW 152; Wilson v. State, 83 TexCr 593, 204 SW 321; Wray v.

mony where no accomplice has testified,[30] or on the presumption of good character of accused where his character is not attacked, and there is no evidence on this issue,[31] or on the probative value of the uncorroborated evidence of prosecutrix where there

State, 89 TexCr 632, 232 SW 808; Pinkerton v. State, 89 TexCr 657, 232 SW 827; Atwood v. State, 90 TexCr 112, 234 SW 85; Coleman v. State, 90 TexCr 297, 235 SW 898; Rundell v. State, 90 TexCr 410, 235 SW 908; Boles v. State, 105 TexCr 224, 288 SW 198; Hicks v. State, 128 TexCr 595, 83 SW2d 349.

It was proper to omit instructions on circumstantial evidence in a larceny case where accused relied on a claim of ownership. Smith v. State, 62 TexCr 124, 136 SW 481.

In Thomas v. State, 108 TexCr 131, 299 SW 408, the court held that, the alleged confession of the defendant being in evidence, it was not necessary to instruct on circumstantial evidence.

In Davis v. State, 107 TexCr 134, 295 SW 608, the court held it not necessary to charge as to circumstances in a burglary prosecution where the defendant admitted that he entered the house.

Washington. State v. Hunter, 183 Wash 143, 48 P2d 262.

West Virginia. State v. Cook, 69 WVa 717, 72 SE 1025.

[30] **Alabama.** Morris v. State, 17 AlaApp 126, 82 S 574.

California. People v. Ward, 134 Cal 301, 66 P 372.

Georgia. Walker v. State, 118 Ga 34, 44 SE 850; De Witt v. State, 27 GaApp 644, 109 SE 681.

Illinois. People v. Niles, 295 Ill 525, 129 NE 97; People v. Clark, 211 IllApp 586.

Kentucky. Elmendorf v. Commonwealth, 171 Ky 410, 188 SW 483.

Missouri. State v. Pfeiffer, 277 Mo 202, 209 SW 925.

Nevada. State v. Burns, 27 Nev 289, 74 P 983.

New York. See People v. Youlio, 243 NY 519, 154 NE 588.

Oklahoma. Hisaw v. State, 13 Okl Cr 484, 165 P 636.

It was not error to refuse to instruct on law applicable to accomplices where the evidence failed to show that the alleged accomplice aided, abetted, or encouraged defendant. Maggard v. State, 9 Okl Cr 236, 131 P 549.

Texas. Gracy v. State, 57 TexCr 68, 121 SW 705; Fisher v. State, 81 TexCr 568, 197 SW 189; White v. State, 129 TexCr 59, 84 SW2d 465.

[31] **Alabama.** Grimsley v. State, 20 AlaApp 155, 101 S 156.

California. People v. Hopper, 42 CalApp 499, 183 P 836; People v. Smith, 81 CalApp 126, 251 P 958.

Georgia. Mixon v. State, 123 Ga 581, 51 SE 580, 107 AmSt 149.

Illinois. Williams v. People, 166 Ill 132, 46 NE 749.

Missouri. State v. Gartrell, 171 Mo 489, 71 SW 1045; State v. Byrd, 278 Mo 426, 213 SW 35; State v. Clinkenbeard (MoApp), 185 SW 553; State v. Perkins (MoApp), 240 SW 851.

New Mexico. State v. Goodrich, 24 NM 660, 176 P 813.

New York. People v. Lingley, 207 NY 396, 101 NE 170, 46 LRA (N. S.) 342, AnnCas 1913D, 403.

Ohio. Gibbs v. State, 7 OLA 374 (refusal of defendant's requested instruction on good character held proper).

Utah. Where the defendant introduces evidence of good character, it is error for the court to charge the jury that they should draw no unfavorable inference from the defendant from the fact that she offered no proof as to her good character. State v. Marks, 16 Utah 204, 51 P 1089.

Virginia. Robinson v. Commonwealth, 118 Va 785, 87 SE 553.

was no such evidence.[32] The court may not instruct on documents exhibited but not introduced in evidence.[33]

It is error to charge the jury to consider evidence which has been improperly admitted.[34]

The court may base his illustrations to explain instructions on matters not in evidence.[35] The court may instruct on matters of which he has judicial notice though not shown by the evidence.[36]

§ 121. Abstract instructions in civil cases.

An abstract proposition should not be given as an instruction.

An abstract proposition may be defined as one having no application to the evidence adduced[37] or, although applicable to the evidence, too general.[38] In either case, an abstract proposition should not be given as an instruction, though correct in principal, for its tendency is to confuse and mislead the jury.[39]

[32] People v. Currie, 16 CalApp 731, 117 P 941. See also People v. Smith, 13 CalApp 627, 110 P 333.

[33] Camp v. State, 31 GaApp 737, 122 SE 249.

[34] People v. Knight, 323 Ill 567, 154 NE 418.

[35] **Federal.** Wells v. United States, 168 CCA 555, 257 F 605.

Georgia. Collier v. State, 154 Ga 68, 113 SE 213.

Indiana. Robertson v. State, 199 Ind 122, 155 NE 549.

New York. People v. Reiter, 130 Misc 105, 222 NYS 595.

[36] Seebach v. United States, 262 F 885.

[37] West v. Butler's Exr., 248 Ky 404, 58 SW2d 662; Cook v. Danaher Lbr. Co., 61 Wash 118, 112 P 245.

On this definition of abstract, the rule prohibiting abstract instructions is merely another way of stating the rule that instructions must be pertinent to the evidence adduced. See §§ 119 and 120, *supra*.

[38] Pope-Cawood Lumber & Supply Co. v. Cleet, 236 Ky 366, 33 SW 2d 360.

[39] **Federal.** Baltimore & O. R. Co. v. Reeves, 10 F2d 329.

Alabama. Montgomery Moore Mfg. Co. v. Leeth, 162 Ala 246, 50 S 210; Robinson v. Crotwell, 175 Ala 194, 57 S 23; Nashville Broom & Supply Co. v. Alabama Broom & Mattress Co., 211 Ala 192, 100 S 132.

Arkansas. Warren Vehicle Stock Co. v. Siggs, 91 Ark 102, 120 SW 412; Southern Anthracite Coal Co. v. Bowen, 93 Ark 140, 124 SW 1048; Helena Gas Co. v. Rogers, 104 Ark 59, 147 SW 473.

Colorado. Rocky Mountain Motor Co. v. Walker, 71 Colo 53, 203 P 1095.

Connecticut. New England Fruit & Produce Co. v. Hines, 97 Conn 225, 116 A 243; Crane v. Hartford-Connecticut Trust Co., 111 Conn 313, 149 A 782.

Florida. Seaboard Air Line Ry. v. Royal Palm Soap Co., 80 Fla 800, 86 S 835.

Georgia. Farmers Banking Co. v. Key, 112 Ga 301, 37 SE 447; Conant v. Jones, 120 Ga 568, 48 SE 234.

Illinois. Mayer v. Gersbacher, 207 Ill 296, 69 NE 789; Asmossen v. Swift & Co., 243 Ill 93, 90 NE 250; Dowdey v. Palmer, 287 Ill 42, 122 NE 102; Diefenthaler v. Hall, 116 IllApp 422; James v. Conklin & Hill, 158 IllApp 640; Brown v. Illinois Terminal Co., 237 IllApp 145, affd. in 319 Ill 326, 150 NE 242; Clark v. Public Service Co., 278 IllApp 426.

Indiana. Musselman v. Pratt, 44 Ind 126; Salem v. Goller, 76 Ind 291.

Although the refusal to give such an instruction would not be prejudicial error, it does not follow that the giving of such an instruction is necessarily prejudicial.[40]

Iowa. Ohlson v. Sac County Farmers Mut. Fire Ins. Assn., 191 Ia 479, 182 NW 879.

Instructions should not announce abstract principles of law, but should state the law correctly and in such a way as to guide the jury to consider the facts in evidence. Mitchell v. Des Moines City Ry. Co., 161 Ia 100, 141 NW 43.

Kansas. State v. Medlicott, 9 Kan 257; Meyer v. Reimer, 65 Kan 822, 70 P 869.

Kentucky. Louisville v. Uebelhor, 142 Ky 151, 134 SW 152; Mann v. Watson, 214 Ky 729, 283 SW 1052.

Maine. Lunge v. Abbott, 114 Me 177, 95 A 942.

Maryland. Jones v. Mechanics Bank, 8 Gill (Md) 123; Mutual Life Ins. Co. v. Murray, 111 Md 600, 75 A 348; Mitchell v. Slye, 137 Md 89, 111 A 814.

Massachusetts. Howes v. Grush, 131 Mass 207; Merrick v. Betts, 214 Mass 223, 101 NE 131.

Michigan. Mosaic Tile Co. v. Chiera, 133 Mich 497, 95 NW 537; Fors v. Fors, 159 Mich 156, 123 NW 579.

Minnesota. McClure v. Browns Valley, 143 Minn 339, 173 NW 672, 5 ALR 1168; Young v. Yeates, 153 Minn 366, 190 NW 791.

Missouri. Grigsby v. Fullerton, 57 Mo 309; Edwards v. Lee, 147 Mo App 38, 126 SW 194; Perles v. Feldman (MoApp), 28 SW2d 375; First Nat. Bank v. Aquamsi Land Co. (MoApp), 70 SW2d 90.

Montana. Newer v. First Nat. Bank, 74 Mont 549, 241 P 613.

New Hampshire. Smith v. Bank of New England, 72 NH 4, 54 A 385; Osgood v. Maxwell, 78 NH 35, 95 A 954.

New Jersey. Mehkanyies v. North Jersey Street Ry. Co. (NJ), 52 A 280; Altieri v. Public Service R. Co., 103 NJ 351, 135 A 786; Ploeser v. Central R. Co. of New Jersey, 92 NJL 490, 105 A 228.

New Mexico. Marcus v. St. Paul Fire & Marine Ins. Co., 35 NM 471, 1 P2d 567.

North Carolina. Cashwell v. Fayetteville Pepsi-Cola Bottling Co., 174 NC 324, 93 SE 901.

Ohio. Coal Co. v. Estievenard, 53 OhSt 43, 40 NE 725; Columbus Ry. Co. v. Ritter, 67 OhSt 53, 48 OhBull 27, 65 NE 613; Hurlbut v. Jones, 84 OhSt 457, 95 NE 1150; Long v. Taplin-Rice-Clerkin Co., 38 OhApp 546, 177 NE 55; Souder v. Hassenfeldt, 48 OhApp 377, 194 NE 47, 1 OhO 554.

Oklahoma. Fowler v. Fowler, 61 Okl 280, 161 P 227, LRA 1917C, 89.

Oregon. Pacific Export Lbr. Co. v. North Pacific Lbr. Co., 46 Or 194, 80 P 105; Myrtle Point Mill & Lbr. Co. v. Clarke, 102 Or 533, 203 P 588.

South Carolina. Harzburg & Co. v. Southern Ry. Co., 65 SC 539, 44 SE 75.

South Dakota. Williamson v. Aberdeen Automobile & Supply Co., 36 SD 387, 155 NW 2.

Texas. Prentice v. Security Ins. (TexCivApp), 153 SW 925. See also Ft. Worth & D. C. Ry. Co. v. Morrow (TexCivApp), 235 SW 664.

Utah. Smith v. Clark, 37 Utah 116, 106 P 653, 26 LRA (N. S.) 953, AnnCas 1912B, 1366; Everts v. Worrell, 58 Utah 238, 197 P 1043.

Virginia. Shenandoah Valley R. Co. v. Moose, 83 Va 827, 3 SE 796.

West Virginia. Claiborne v. Chesapeake & O. Ry. Co., 46 WVa 363, 33 SE 262; Chaney v. Moore, 101 WVa 621, 134 SE 204, 47 ALR 800; Polen v. Huber, 116 WVa 455, 181 SE 718.

[40] **Alabama.** Marbury Lbr. Co. v. Westbrook, 121 Ala 179, 25 S 914.

California. Smith v. Pacific Greyhound Corp., 139 CalApp 696, 35 P 2d 169.

Illinois. Taylor v. Felsing, 164 Ill 331, 45 NE 161; Neumann v. Neumann, 147 IllApp 218; Forney v. Schlachter, 168 IllApp 295; Hanke

A definition of a term used in other instructions is not abstract.[41]

There is a plain violation of the rule where the court gives abstract propositions pertaining to negligence and contributory negligence and applies such instructions only to the claimed negligence of the defendant but does not apply them to the question of contributory negligence.[42] The instruction on the last clear chance doctrine is abstract where there is no evidence on contributory negligence on the part of the plaintiff.[43]

And in an action against a city for personal injuries alleged to have been sustained by falling from a sidewalk into an unguarded excavation, where there was no issue of gross negligence and no evidence to support such a claim, it was held erroneous to instruct that "when the negligence of the defendant is so gross as to imply a disregard for consequences, or a willingness to inflict the injury, the plaintiff may recover, though he be a trespasser or did not use ordinary care to avoid the injury."[44] In a suit for the conversion of a note, an instruction regarding the effect and operation of an agreement for extension and the materiality of the consideration was properly refused where there was no question in the case to which the instruction could be applied.[45]

§ 122. Abstract instructions in criminal prosecutions.

In criminal prosecutions, an abstract proposition should not be given as in instruction.

Practically the same statements made regarding abstract instructions in civil cases may be made regarding abstract propositions in criminal cases. An abstract instruction is either one having no application to the evidence or one that is too general. Again, in either case, an abstract charge should not be given though it asserts a correct legal proposition.[46] Such an

v. Chicago Rys. Co., 208 IllApp 293; Fisher v. Johnson, 238 IllApp 25; Barnstable v. Calandro, 270 IllApp 57.

Kentucky. Pope-Cawood Lumber & Supply Co. v. Cleet, 236 Ky 366, 33 SW2d 360.

Missouri. Hemphill v. Kansas City, 100 MoApp 563, 75 SW 179.

Montana. Mellon v. Kelly, 99 Mont 10, 41 P2d 49.

Ohio. Reed v. McGrew, 5 Oh 375, Wright 105; Gill v. Sells, 17 OhSt 195; Schneider v. Hosier, 21 OhSt 98.

West Virginia. Morrison v. Roush, 110 WVa 398, 158 SE 514.

[41] Quisenberry v. Stewart (Mo), 219 SW 625; Burgher v. Neidorp (MoApp), 50 SW2d 174.

[42] Polluck v. Minneapolis & St. L. Ry. Co., 45 SD 210, 186 NW 830. See Liston v. Miller, 113 WVa 730, 169 SE 398.

[43] Sanders v. Taber, 79 Or 522, 155 P 1194.

[44] Salem v. Goller, 76 Ind 291.

[45] Hide & Leather Nat. Bank v. Alexander, 184 Ill 416, 56 NE 809.

[46] **Federal.** United States v. Stil-

instruction may work a reversal where it misleads the jury to the prejudice of the defendant.[47]

The character of abstract attaches to instructions given over to the rights of society and the enforcement of the criminal laws,[48] or which advise the jury that it is as much their duty

son, 254 F 120. See Jenkins v. United States, 59 F2d 2.

Alabama. Montgomery v. State, 160 Ala 7, 49 S 902; Osborn v. State, 198 Ala 21, 73 S 985; Minor v. State, 15 AlaApp 556, 74 S 98; Harmon v. State, 20 AlaApp 254, 101 S 353; Miller v. State, 21 AlaApp 653, 111 S 648; Wingard v. State, 26 Ala App 383, 161 S 107.

In a prosecution for murder committed in an attempt to escape from a penitentiary, an instruction was abstract which charged that an attempt to escape from a penitentiary was not a felony. Miller v. State, 145 Ala 677, 40 S 47.

In a requested charge in a homicide case based on injury from automobile driven by the defendant, a requested charge to the effect that the jury could not convict the defendant for the offense of speeding was held properly refused as abstract. Jones v. State, 21 AlaApp 234, 109 S 189.

Arkansas. McCain v. State, 132 Ark 497, 201 SW 840; Lomax v. State, 165 Ark 386, 264 SW 823; Sims v. State, 171 Ark 799, 286 SW 981.

California. People v. Buckley, 143 Cal 375, 77 P 169; People v. Richardson, 83 CalApp 302, 256 P 616.

Florida. Miller v. State, 76 Fla 518, 80 S 314.

Illinois. People v. Findley, 286 Ill 368, 121 NE 608; People v. Karpovich, 288 Ill 268, 123 NE 324; People v. Adams, 289 Ill 339, 124 NE 575; People v. Arthur, 314 Ill 296, 145 NE 413 (alibi where no evidence on question).

Iowa. State v. Alexander (Ia), 169 NW 657.

Kentucky. Greer v. Commonwealth, 111 Ky 93, 23 KyL 489, 63 SW 443; Robinson v. Commonwealth, 149 Ky 291, 148 SW 45.

Massachusetts. Commonwealth v. John T. Connor Co., 222 Mass 299, 110 NE 301, LRA 1916B, 1236, Ann Cas 1918C, 337; Commonwealth v. Mara, 257 Mass 198, 153 NE 793.

Minnesota. State v. Ford, 151 Minn 382, 186 NW 812.

Mississippi. Refusal of abstract charge is not error. Scott v. State, 166 Miss 6, 148 S 239.

Missouri. State v. Holmes, 239 Mo 469, 144 SW 417; State v. Marshall, 317 Mo 413, 297 SW 63.

Montana. State v. Trosper, 41 Mont 442, 109 P 858; State v. Belland, 59 Mont 540, 197 P 841.

Ohio. Dresback v. State, 38 OhSt 365; Bandy v. State, 102 OhSt 384, 131 NE 499, 21 ALR 594.

Oklahoma. Conley v. State, 15 Okl Cr 531, 179 P 480; Roddie v. State, 19 OklCr 63, 198 P 342.

Texas. Stewart v. State (TexCr), 77 SW 791; Reagan v. State, 84 Tex Cr 468, 208 SW 523.

Vermont. Vermont Box Co. v. Hanks, 92 Vt 92, 102 A 91.

West Virginia. State v. Long, 88 WVa 669, 108 SE 279; State v. Stafford, 89 WVa 301, 109 SE 326; State v. Wilson, 95 WVa 525, 121 SE 726.

[47] **Alabama.** Beck v. State, 80 Ala 1. See also Culliver v. State, 15 AlaApp 375, 73 S 556.

Florida. Neumann v. State, 116 Fla 98, 156 S 237.

Illinois. People v. Lembke, 320 Ill 553, 151 NE 535. But see People v. Schullo, 360 Ill 580, 196 NE 723.

Oklahoma. Welch v. State, 16 Okl Cr 513, 185 P 119.

[48] **Alabama.** An instruction was properly refused as abstract and argumentative which told the jury that it was for them to say whether the same punishment should be inflicted on the defendant who had taken the life of a turbulent, revengeful, bloodthirsty, dangerous

to acquit the innocent as to convict the guilty,[49] and to instructions which recite abstract propositions of law quoted from textbooks without indicating to what class of evidence in the case they apply.[50] So, an instruction is abstract in which the court says: "I charge you, there is a difference between a prima facie case and a conclusive case."[51] An instruction was held abstract which said that the mere possession of any article, whether it can or cannot be used in the perpetration of a crime, is not of itself sufficient to convict accused but is merely a circumstance for the consideration of the jury.[52] It is proper to refuse, as abstract, an instruction which tells the jury that the return of an indictment against the defendant is no evidence of his guilt.[53]

But an instruction in the language of the statute under which an indictment was found is not objectionable as abstract and not based on the evidence.[54] And so it has been held that a requested charge was not abstract where the facts hypothesized therein had been testified to by the defendant.[55] So, an instruction is not abstract where it is preliminary to and part of another instruction which concretely applies itself to the facts.[56]

§ 123. Ignoring issues in civil cases.

The charge must cover all the material issues in the case.

Not only must the charge cover all the material issues in the case,[57] but it must also cover the contentions of the parties

man who had recently, only a few hours before, violated and outraged the person of defendant as though the deceased had been a man of good character and peaceable disposition. Harrison v. State (Ala), 40 S 57.

Illinois. An instruction was abstract which contained a general dissertation on the rights of accused to life and liberty, the duties of jurors, and the importance of convicting the guilty, informing the jury as to the method by which they were chosen, the reason why they were impaneled, and that they were selected as intelligent and qualified jurors. People v. Davidson, 240 Ill 191, 88 NE 565.

Minnesota. State v. Ronk, 91 Minn 419, 98 NW 334.

[49] State v. Blackwood, 162 La 266, 110 S 417.

[50] State v. Prater, 52 WVa 132, 43 SE 230.

[51] Levine v. State, 16 AlaApp 686, 81 S 134.

[52] People v. Weber, 149 Cal 325, 86 P 671.

[53] Gulley v. State, 21 AlaApp 493, 109 S 527.

[54] White v. People, 179 Ill 356, 53 NE 570. See People v. Adams, 79 CalApp 373, 249 P 536.

[55] Dial v. State, 159 Ala 66, 49 S 230, 133 AmSt 19.

[56] State v. Yocum (MoApp), 205 SW 232.

[57] **Federal.** Alaska Anthracite R. Co. v. Moller, 168 CCA 515, 257 F 511.

Alabama. Sloss-Sheffield Steel & Iron Co. v. Smith (Ala), 40 S 91; R. D. Burnett Cigar Co. v. Art Wall Paper Co., 164 Ala 547, 51 S 263; Sloss-Sheffield Steel & Iron Co. v. Smith, 166 Ala 437, 52 S 38; Pelham Sitz & Co. v. Herzberg-Loveman Dry Goods Co., 194 Ala 237, 69 S

on every substantial issue,[58] and be broad enough to present

881; Brown v. Shorter, 195 Ala 692, 71 S 103; Chenault v. Stewart, 198 Ala 288, 73 S 501; Seaboard Air Line Ry. Co. v. Pemberton, 202 Ala 55, 79 S 393; Herring v. Louisville & N. R. Co., 203 Ala 136, 82 S 166; Mobile Light & R. Co. v. Gadik, 211 Ala 582, 100 S 837; Hooper v. Herring, 14 AlaApp 455, 70 S 308; J. T. Camp Transfer Co. v. Davenport, 15 AlaApp 507, 74 S 156.

Instructions are erroneous where they tend to limit the recovery to part only of the counts in the complaint. Prattville Cotton Mills Co. v. McKinney, 178 Ala 554, 59 S 498.

A defendant sued for failure to furnish water to plaintiff is not entitled to a charge that the plaintiff cannot recover if such failure was caused by accident, where such instruction ignores a requirement that the defendant exercise due diligence in giving notice to the plaintiff. Alabama Water Co. v. Wilson, 214 Ala 364, 107 S 821.

Arkansas. Bayles v. Daugherty, 77 Ark 201, 91 SW 304; Commonwealth Public Service Co. v. Lindsay, 139 Ark 283, 214 SW 9.

Colorado. Denver & R. G. Ry. Co. v. Iles, 25 Colo 19, 53 P 222; Alley v. Tovey, 78 Colo 532, 242 P 999.

Georgia. Dodge Bros. v. Hart, 24 GaApp 633, 101 SE 693.

Illinois. Costly v. McGowan, 174 Ill 76, 50 NE 1047; Hill v. Dougherty, 161 IllApp 553; Flennor v. Cleveland, C., C. & St. L. R. Co., 163 IllApp 536; Trainer v. Baker, 195 IllApp 216; Smith v. Kewanee Light & Power Co., 196 IllApp 118; Kresin v. Brotherhood of American Yeoman, 217 IllApp 448.

Indiana. An instruction undertaking to state what is necessary to maintain an action or defense must be complete and correct. New v. Jackson, 50 IndApp 120, 95 NE 328.

Iowa. Faust v. Hosford, 119 Ia 97, 93 NW 58.

Kentucky. Louisville & N. R. Co. v. Allen's Admr., 174 Ky 736, 192 SW 863.

Maryland. Bluthenthal & Bickart v. May Advertising Co., 127 Md 277, 96 A 434; Booth Packing Co. v. Greuner, 129 Md 392, 99 A 714; Waddell v. Phillips, 133 Md 497, 105 A 771; Patapsco Loan Co. v. Hobbs, 134 Md 222, 106 A 619; Rice v. Baltimore Apartments Co., 141 Md 507, 119 A 364.

Massachusetts. Rogers v. French, 214 Mass 337, 101 NE 988.

Michigan. Commercial Bank v. Chatfield, 121 Mich 641, 80 NW 712; Piowaty v. Sheldon, 167 Mich 218, 132 NW 517, AnnCas 1913A, 610.

Missouri. Grady v. Royar (Mo), 181 SW 428; Thomas v. Thomas (Mo), 186 SW 993; Funk v. Fulton Iron Works Co., 311 Mo 77, 277 SW 566: Head v. M. E. Leming Lbr. Co. (Mo), 281 SW 441; Ern v. Rubinstein, 72 MoApp 337; Beggs v. Shelton, 173 MoApp 127, 155 SW 885; Crossley v. Summitt Lbr. Co. (Mo App), 187 SW 113; Van Zandt v. St. Louis Wholesale Grocer Co., 196 Mo App 640, 190 SW 1050; Farmers Sav. Bank v. American Trust Co., 199 MoApp 491, 203 SW 674; Jones v. St. Louis-San Francisco Ry. Co., 226 MoApp 1152, 50 SW2d 217.

Nebraska. Globe Oil Co. v. Powell, 56 Neb 463, 76 NW 1081; Kor v. American Eagle Fire Ins. Co., 104 Neb 610, 178 NW 182.

Nevada. Ramezzano v. Avansino, 44 Nev 72, 189 P 861.

New Hampshire. Goddard v. Berlin Mills Co., 82 NH 225, 131 A 601.

New Jersey. Mettie v. De Baghian, 2 NJMisc 990, 126 A 419.

New York. Leonard v. Brooklyn Heights R. Co., 57 AppDiv 125, 67 NYS 985; Badger v. Scobell Chem. Co., 221 AppDiv 490, 224 NYS 648 (where the question of the statute of frauds was ignored).

Ohio. Acklin Stamping Co. v. Kutz, 98 OhSt 61, 120 NE 229, 14 ALR 812; Payne v. Vance, 103 OhSt 59, 133 NE 85; Grant-Holub Co. v. Goodman, 23 OhApp 540, 156 NE 151; Conte v. Mill & Mine Supply Co., 24 OhApp 488, 156 NE 233;

all material phases of the issue to which they relate.[59] If there are two or more counts in a complaint, it is not proper to instruct that defendant is entitled to a verdict on one of the counts if the jury believe the evidence.[60]

Obviously, there is no requirement to instruct on abandoned issues.[61] And where an instruction does not attempt to cover

John Hancock Mut. Life Ins. Co. v. Hatchie, 42 OhApp 398, 182 NE 53; Johnson v. Youngstown, 14 OLA 117; East Ohio Gas Co. v. Cunning, 15 OLA 152.

Oregon. Buhl Malleable Co. v. Cronan, 59 Or 242, 117 P 317; Mount v. Welsh, 118 Or 568, 247 P 815.

Pennsylvania. Kennedy v. Forest Oil Co., 199 Pa 644, 49 A 133.

Rhode Island. Leiter v. Lyons, 24 RI 42, 52 A 78.

South Carolina. Lancaster v. Lee, 71 SC 280, 51 SE 139.

Texas. First Nat. Bank v. Mangum (TexCivApp), 194 SW 647.

Vermont. Douglass & Varnum v. Morrisville, 89 Vt 393, 95 A 810.

Virginia. Norfolk & W. Ry. Co. v. Mann, 99 Va 180, 37 SE 849; Atlantic Coast Line R. Co. v. Caple's Admx., 110 Va 514, 66 SE 855; Trauerman v. Oliver, 125 Va 458, 99 SE 647.

Washington. Riverside Land Co. v. Pietsch, 35 Wash 210, 77 P 195.

West Virginia. Snider v. Robinett, 78 WVa 88, 88 SE 599.

Wisconsin. Dabareiner v. Weisflog, 253 Wis 23, 33 NW2d 220.

Wyoming. An instruction which ignores an admission in the pleadings is properly refused. Mutual Life Ins. Co. v. Summers, 19 Wyo 441, 120 P 185.

[58] **Georgia.** Freeman v. Nashville, C. & St. L. Ry. Co., 120 Ga 469, 47 SE 931.

Missouri. Laughlin v. Gerardi, 67 MoApp 372; Miller v. Missouri & Kansas Tel. Co., 141 MoApp 462, 126 SW 187.

North Carolina. Kimbrough v. Hines, 180 NC 274, 104 SE 684; Smith v. Seaboard Air Line Ry. Co., 182 NC 290, 109 SE 22.

[59] **Alabama.** Law v. Gulf States Steel Co., 229 Ala 305, 156 S 835.

Arkansas. Smith v. Arkansas Power & Light Co., 191 Ark 389, 86 SW2d 411.

Georgia. Hardeman v. Ellis, 162 Ga 664, 135 SE 195.

Illinois. An instruction was properly refused where it ignored the theory of recovery supported by a good count of the declaration. Swanson v. Chicago City Ry. Co., 148 Ill App 135, affd. in 242 Ill 388, 90 NE 210.

Indiana. A single instruction need not give all the law applicable to the case, but is sufficient if it correctly states the law applicable to its sphere. Harrod v. Bisson, 48 IndApp 549, 93 NE 1093.

Iowa. Keller v. Gartin, 220 Ia 78, 261 NW 776.

Kentucky. Comer v. Yancy, 251 Ky 461, 65 SW2d 459.

Mississippi. J. C. Penney Co. v. Morris, 173 Miss 710, 163 S 124.

Missouri. Harting v. East St. Louis Ry. Co. (Mo), 84 SW2d 914 (admitted facts ignored); Nimmo v. Perkinson Bros. Constr. Co. (Mo), 85 SW2d 98; Aronson v. Maryland Casualty Co., 222 MoApp 490, 280 SW 724; Counts v. Thomas (Mo App), 63 SW2d 416.

Ohio. Gaff Estate Co. v. Grote, 22 OhApp 44, 153 NE 919.

Oklahoma. National Life & Acc. Ins. Co. v. Roberson, 169 Okl 136, 36 P2d 479.

West Virginia. Instructions which ignore the direct and vital issue in a case are erroneous though they cover subsidiary and inconclusive issues. Mylius v. Raine-Andrew Lbr. Co., 69 WVa 346, 71 SE 404.

[60] Smith & Sons v. Gay, 21 Ala App 130, 106 S 214; Thames v. Batson & Hattson Lbr. Co., 143 Miss 5, 108 S 181.

[61] Carney v. Anheuser-Busch

the entire case and a right of recovery is not based upon it, no objection can arise from the mere fact that it omits an issue or a point in the case, for the instructions are all to be considered together.[62]

Furthermore, where a correct instruction has been given at the request of either of the parties, the fact that the court subsequently ignores the issue in charging of its own motion will not constitute error.[63]

Illustrations of the application of the rule follow.

Negligence. The instruction in the action for negligence should cover such matters in issue as contributory negligence,[64]

Brew. Assn., 150 MoApp 437, 131 SW 165.

[62] Norton v. Kramer, 180 Mo 536, 79 SW 699.

[63] Ennulat v. Taylor, 127 CalApp 420, 15 P2d 900; Minden v. Vedene, 72 Neb 657, 101 NW 330.

[64] **Federal.** Shell Pipe Line Co. v. Robinson, 66 F2d 861.

Alabama. Johnson v. Louisville & N. R. Co., 203 Ala 86, 82 S 100; Dudley v. Alabama Utilities Service Co., 225 Ala 531, 144 S 5; J. T. Camp Transfer Co. v. Davenport, 15 AlaApp 507, 74 S 156.

An instruction should not ignore the alleged negligence of the defendant after he discovered his peril. Bradley v. Powers, 214 Ala 122, 106 S 799.

Arizona. Bruno v. Grande, 31 Ariz 206, 251 P 550.

California. Lindenbaum v. Barbour, 213 Cal 277, 2 P2d 161; Bellinger v. Hughes, 31 CalApp 464, 160 P 838; Brown v. Lemon Cove Ditch Co., 36 CalApp 94, 171 P 705; Beyerle v. Clift, 59 CalApp 7, 209 P 1015; Miner v. Dabney-Johnson Oil Corp. (CalApp), 22 P2d 265, affd. in 219 Cal 580, 28 P2d 23.

Colorado. Fox Colorado Theater Co. v. Zipprodt, 89 Colo 446, 3 P2d 798.

Illinois. Conrad v. St. Louis, S. & P. R. Co., 201 IllApp 276.

Indiana. Union Trac. Co. v. Ringer, 199 Ind 405, 155 NE 826; Southern Indiana Gas & Elec. Co. v. Harrison, 85 IndApp 350, 151 NE 703 (holding that element of last clear chance should not be omitted from instruction on contributory negligence).

Failure of instruction to take into account the question of contributory negligence does not make the instruction bad, when it does not purport to state the entire law of the case, and the question is covered in other instructions. Indianapolis Trac. & Terminal Co. v. Howard, 190 Ind 97, 128 NE 35.

See Gerow v. Hawkins, 99 IndApp 352, 192 NE 713 (where the instruction was held not to have ignored contributory negligence).

Missouri. Laurent v. United Rys. Co. (Mo), 191 SW 992; Daniel v. Pryor (Mo), 227 SW 102; Pence v. Kansas City Laundry Service Co., 332 Mo 930, 59 SW2d 633; Lynch v. Missouri-Kansas-Texas R. Co., 333 Mo 89, 61 SW2d 918; Allison v. Dittbrenner (MoApp), 50 SW2d 199; Long v. Binnicker, 228 MoApp 193, 63 SW2d 831.

New York. Maher v. Buffalo, R. & P. Ry. Co., 217 AppDiv 532, 216 NYS 629.

Oklahoma. Kansas City, M. & O. Ry. Co. v. McDaniel, 65 Okl 268, 165 P 1144.

Texas. Adams & Washam v. Southern Trac. Co. (TexCivApp), 188 SW 275; Chicago, R. I. & G. R. Co. v. Wentzel (TexCivApp), 214 SW 710; Texas & Pacific Ry. Co. v. Hancock (TexCivApp), 59 SW2d 313.

Virginia. Belcher v. Goff Bros., 145 Va 448, 134 SE 588.

West Virginia. Petry v. Cabin

ordinary care,[65] assumption of risk,[66] last clear chance,[67] negligence of fellow servants,[68] unavoidable accident,[69] failure of employer to furnish safe places for work[70] or to warn of danger,[71] the humanitarian doctrine,[72] doctrine of res ipsa loquitur,[73] statute of limitations,[74] and the essential element of proximate cause.[75]

Creek Consol. Coal Co., 77 WVa 654, 88 SE 105; Evans v. Kirson, 88 WVa 343, 106 SE 647; Swiger v. Runnion, 90 WVa 322, 111 SE 318; Ewing v. Chapman, 91 WVa 641, 114 SE 158; Nichols v. Raleigh Wyoming Min. Co., 113 WVa 631, 169 SE 451.

[65] Simensky v. Zwyer, 40 OhApp 275, 178 NE 422.

[66] **Arkansas.** Des Arc Oil Mill, Inc. v. McLeod, 137 Ark 615, 206 SW 655; Edgar Lbr. Co. v. Denton, 156 Ark 46, 245 SW 177; Postal Telegraph-Cable Co. v. White, 188 Ark 361, 66 SW2d 642.

An instruction on assumption of risk must include element of appreciation of danger. Missouri Pacific R. Co. v. Carey, 138 Ark 563, 212 SW 80.

Georgia. Gray v. Garrison, 49 GaApp 472, 176 SE 412.

Indiana. Decatur v. Eady, 186 Ind 205, 115 NE 577, LRA 1917E, 242; New York C. & St. L. R. Co. v. Peele, 88 IndApp 532, 164 NE 705.

Missouri. Bennett v. G. T. O'Maley Tractor Co., 209 MoApp 619, 238 SW 144.

Texas. Swann v. Texas & Pacific Ry. Co. (TexCivApp), 200 SW 1131.

Vermont. Watterlund v. Billings, 112 Vt 256, 23 A2d 540.

Washington. Belkin v. Skinner & Eddy Corp., 119 Wash 80, 204 P 1046.

[67] Haber v. Pacific Elec. Ry. Co., 78 CalApp 617, 248 P 741; Rasmussen v. Fresno Trac. Co., 138 CalApp 540, 32 P2d 1091. See Central of Georgia Ry. Co. v. Pruden, 21 Ala App 281, 107 S 716.

[68] Russell v. Williams, 168 Miss 181, 150 S 528, 151 S 372; El Paso & S. W. R. Co. v. Lovick (TexCiv App), 210 SW 283.

[69] Booth v. Frankenstein, 209 Wis 362, 245 NW 191.

[70] Southwestern Portland Cement Co. v. Challen (TexCivApp), 200 SW 213.

[71] Musgrave v. Great Falls Mfg. Co., 86 NH 375, 169 A 583.

[72] Washington Ry. & Elec. Co. v. Upperman, 47 AppDC 219. See Bartner v. Darst (Mo), 285 SW 449 (where the charge was approved); Elders v. Missouri Pacific R. Co. (MoApp), 280 SW 1048.

[73] Glasco Elec. Co. v. Union Elec. Light & Power Co., 332 Mo 1079, 61 SW2d 955.

[74] Collier v. Thompson, 180 Ark 695, 22 SW2d 562.

[75] **California.** Shipley v. San Diego Elec. Ry. Co., 106 CalApp 659, 289 P 662.

Indiana. Utterback v. Gootee, 197 Ind 206, 150 NE 101; Chicago, I. & L. Ry. Co. v. Prohl, 64 IndApp 302, 115 NE 962; Bonham v. Mendenhall, 98 IndApp 189, 188 NE 695.

Michigan. Richardson v. Williams, 249 Mich 350, 228 NW 766.

Missouri. Miller v. Collins, 328 Mo 313, 40 SW2d 1062.

Montana. Kansier v. Billings, 56 Mont 250, 184 P 630; Stroud v. Chicago M. & St. P. Ry. Co., 75 Mont 384, 243 P 1089.

Texas. Panhandle & S. F. Ry. Co. v. Kornegay (TexComApp), 227 SW 1100; Pearson v. Texas & N. O. Ry. Co. (TexComApp), 238 SW 1108.

Utah. Sutton v. Otis Elev. Co., 68 Utah 85, 249 P 437.

West Virginia. Slaven v. Baltimore & O. R. Co., 114 WVa 315, 171 SE 818.

In damage action against railway it is error to charge that negligence could be found against the defendant for failure to keep flagman at crossing, where the speed of the train and the way in which it was being operated were ignored in the charge.[76] In an action against a physician for malpractice in leaving sponge in patient's body, it was held error to instruct that the defendant was not liable if his failure to remove the sponge was due to the patient's condition, for the question of his negligence was thereby decided by the court rather than the jury.[77]

Where an instruction stated that a railroad company is not liable for fires set out by its locomotives where it employs competent engineers and its engines are equipped with proper spark arrestors, the instruction was held erroneous as excluding negligence in keeping its right of way clear of combustibles.[78] An instruction that an employee assumed the risk where he knew that cogs on machinery were open and dangerous was properly refused as ignoring an issue of promise to repair which had support in the evidence.[79]

Fraud. The instruction on false representations should include the element of reliance on such representations.[80]

Damages. In a slander case an instruction should not ignore the question of mitigation of damages, in telling the jury that it would be no defense, as against actual damages, that the defendant published the words in good faith with a belief in their truth.[81]

Property. In an action of ejectment where there is a claim of adverse possession, a charge ignoring this feature is rightly refused.[82] An instruction as to adverse possession is erroneous if it ignores the element of hostile occupancy.[83]

Defenses. Where a plea of set-off is interposed and evidence is given thereunder, the jury should be permitted to consider this defense.[84] So also where the defendant's answer is in the nature of a plea in abatement, and there is evidence tending to

[76] Chicago, I. & L. Ry. Co. v. American Trust Co., 85 IndApp 193, 153 NE 419.

[77] Manley v. Coleman, 19 OhApp 284, 22 OLR 242.

[78] Denny v. Atlantic Coast Line R. Co., 179 NC 529, 103 SE 24.

[79] A. L. Clark Lbr. Co. v. Johns, 98 Ark 211, 135 SW 892.

[80] **Arizona.** Morenci Southern Ry. Co. v. Monsour, 21 Ariz 148, 185 P 938.

Kansas. Griffin v. Kaufman, 110 Kan 182, 203 P 924.

West Virginia. Ohio Valley Bank v. Berry, 85 WVa 95, 100 SE 875.

[81] Aldridge v. Zorn (MoApp), 287 SW 650.

[82] Pearson v. Adams, 129 Ala 157, 29 S 977.

[83] Sackett v. Miniard, 219 Ky 765, 294 SW 487.

[84] Colwell v. Brown, 103 IllApp 22.

support it, the court errs in ignoring the issue and giving no instruction with reference thereto.[85]

False imprisonment. Where the action is for an unlawful arrest, the question of good faith of the defendant should not be ignored.[86]

Contracts. If a written contract was the only one proved, it is proper for a charge to ignore an alleged oral contract.[87] So, the court may not ignore the issue of capacity to execute releases.[88]

§ 124. Ignoring evidence in civil cases.

The court should not give instructions based upon a part only of the material evidential facts.

A charge must not call special attention to a part only of the evidence and disregard other evidence; the jury should be permitted to consider the evidence in its entirety.[89]

[85] Steele v. Crabtree, 130 Ia 313, 106 NW 753.

[86] St. Louis, I. M. & S. Ry. Co. v. Vaughan, 122 Ark 436, 183 SW 980.

[87] Atlantic Nat. Bank v. Korrick, 29 Ariz 468, 242 P 1009, 43 ALR 1184.

[88] Schaff v. Hollin (TexCivApp), 213 SW 279.

[89] **Federal.** Erie R. Co. v. Purucker, 244 US 310, 61 LEd 1166, 37 SupCt 629, LRA 1917F, 1184; Manchester Mill & Elev. Co. v. Strong, 146 CCA 72, 231 F 876; Young v. Travelers Ins. Co., 68 F2d 83, revg. 2 FSupp 624 (comment by court on testimony of certain witnesses wherein court failed to discuss contradictory statements elicited on their cross-examination).

Alabama. Elliott v. Howison, 146 Ala 568, 40 S 1018; Ray v. Brannan, 196 Ala 113, 72 S 16; Keller v. Jones & Weeden, 196 Ala 417, 72 S 89; O'Brien v. Birmingham Ry., Light & Power Co., 197 Ala 97, 72 S 343; Oil-Well Supply Co. v. West Huntsville Cotton Mills Co., 198 Ala 501, 73 S 899; Bradley v. Powers, 214 Ala 122, 106 S 799; Gulf Trading Co. v. Radcliff, 216 Ala 645, 114 S 308; Metropolitan Life Ins. Co. v. James, 228 Ala 383, 153 S 759; Southern Ry. Co. v. Freeman, 16 AlaApp 687, 81 S 135; Allison v. Fuller-Smith & Co., 20 AlaApp 216, 101 S 626.

Arkansas. Raymond v. Raymond, 134 Ark 484, 204 SW 311.

California. Berliner v. Travelers Ins. Co., 121 Cal 451, 53 P 922; Fidelity & Casualty Co. v. Paraffine Paint Co., 188 Cal 184, 204 P 1076; Sinan v. Atchison, T. & S. F. Ry. Co., 103 CalApp 703, 284 P 1041; Reuter v. Hill, 136 CalApp 67, 28 P2d 390; Keller v. Pacific Tel. & T. Co., 2 CalApp2d 513, 38 P2d 182.

Connecticut. Bullard v. De Cordova, 119 Conn 262, 175 A 673.

Georgia. Moore v. Walton, 158 Ga 408, 123 SE 812.

Illinois. Dowdey v. Palmer, 287 Ill 42, 122 NE 102; Chicago Hydraulic Press Brick Co. v. Campbell, 116 IllApp 322; Alschuler & Sons v. Anderson, 142 IllApp 323; Compton v. Compton, 204 IllApp 629; Steinberg v. Schwartz, 219 IllApp 138; West v. Cincinnati, I. & W. R. Co., 240 IllApp 512.

Where the evidence is very slight on a certain matter, the court may ignore it with respect to such matter. Walker v. Struthers, 273 Ill 387, 112 NE 961.

Indiana. Decatur v. Eady, 186 Ind 205, 115 NE 577, LRA 1917E, 242; Buchanan v. Morris, 198 Ind 79, 151 NE 385; Brown v. Terre

Haute, I. & E. Trac. Co., 63 IndApp 327, 110 NE 703, 113 NE 313 (ignoring evidence of retention of fare after ejecting passenger).

Iowa. Hanson v. Anamosa, 177 Ia 101, 158 NW 591.

A requested instruction was improper where it told the jury that the negligence of plaintiff in not having a release read would estop him from claiming fraud in its procurement. Farwark v. Chicago, M. & St. P. Ry. Co., 202 Ia 1229, 211 NW 875.

Kentucky. L. E. Meyers' Co. v. Logue's Admr., 212 Ky 802, 280 SW 107; Aetna Ins. Co. v. Weekly, 232 Ky 548, 24 SW2d 292.

Maryland. Commonwealth Bank v. Goodman, 128 Md 452, 97 A 1005; State v. C. J. Benson & Co., 129 Md 693, 100 A 505; Winslow v. Atz, 168 Md 230, 177 A 272.

Massachusetts. Dolphin v. Plumley, 175 Mass 304, 56 NE 281; Merchants Nat. Bank v. Marden, Orth & Hastings Co., 234 Mass 161, 125 NE 384; Tully v. Mandell, 269 Mass 307, 168 NE 923; Cushing v. Jolles, 292 Mass 72, 197 NE 466.

Michigan. Sikori v. Fellowcraft Club, 189 Mich 235, 155 NW 495.

Mississippi. Bank of Tupelo v. Hulsey, 112 Miss 632, 73 S 621; Waddle v. Sutherland, 156 Miss 540, 126 S 201.

Missouri. Fitzgerald v. Hayward, 50 Mo 516; Norton v. Kowazek (Mo), 193 SW 556; McCollum v. Winnwood Amusement Co., 332 Mo 779, 59 SW2d 693; Rissmiller v. St. Louis & H. Ry. Co. (MoApp), 187 SW 573; Saulan v. St. Joseph Ry. Co. (MoApp), 199 SW 714; Wirtel v. Nuelle (MoApp), 27 SW2d 501; Sutton v. Kansas City Star Co. (MoApp), 54 SW2d 454; Berry v. Adams (MoApp), 71 SW2d 126.

In an automobile collision case brought by a guest riding with the defendant, the court erroneously told the jury to find for defendant if the collision was due to the negligence of the driver of the other car, where there was no evidence in the case as to the defendant's negligence. Brooks v. Menaugh (Mo), 284 SW 803.

Nebraska. Norton v. Bankers Fire Ins. Co., 115 Neb 490, 213 NW 515.

New Jersey. Blackmore v. Ellis, 70 NJL 264, 57 A 1047; Heitman v. Kaltenbach & Stephens, 95 NJL 118, 112 A 306; Hotchkiss v. Walter, 4 NJMisc 211, 132 A 242; Stiles v. McLean, 103 NJL 537, 138 A 119.

North Carolina. Davidson v. Seaboard Air Line Ry. Co., 171 NC 634, 88 SE 759.

A charge correct on the law on one phase of the evidence is incomplete unless embracing the law as applicable to the respective contentions of each party. Lea v. Southern Public Utilities Co., 176 NC 511, 97 SE 492.

Ohio. Atley v. Atley, 20 OhApp 497, 152 NE 761; Smythe v. Harsh, 24 OhApp 391, 156 NE 619. See Lake Shore Elec. Ry. Co. v. Ordway, 24 OhApp 317, 156 NE 235.

Instruction in automobile collision case was held erroneous as ignoring evidence as to defendant's negligence in driving with defective brakes. Chapman v. Blackmore, 39 OhApp 425, 177 NE 772.

Oklahoma. Ed. M. Seamens & Co. v. Overholser & Avey, 116 Okl 276, 244 P 796.

Oregon. Houston v. Keats Auto Co., 85 Or 125, 166 P 531.

Pennsylvania. Babayan v. Reed, 257 P 206, 101 A 339; De Pietro v. Great Atlantic & Pacific Tea Co., 315 Pa 209, 173 A 165.

Texas. Gulf, C. & S. F. Ry. Co. v. Warner, 22 TexCivApp 167, 54 SW 1064; Southern Trac. Co. v. Rogan (TexCivApp), 199 SW 1135; Jones v. Jones (TexCivApp), 41 SW2d 496; Southland Life Ins. Co. v. Dunn (TexCivApp), 71 SW2d 1103.

Utah. Morgan v. Child, Cole & Co., 47 Utah 417, 155 P 451.

Virginia. Haney v. Breeden, 100 Va 781, 42 SE 916; Franklin Plant Farm v. Nash, 118 Va 98, 86 SE 836 (ignored evidence justifying punitive damages); Carpenter v. Smithey, 118 Va 533, 88 SE 321;

Facts necessary to a verdict cannot be omitted merely for the sake of brevity.[90] Yet this does not make an instruction applicable to the facts erroneous because not more fully expressed.[91]

It is not error to omit an instruction concerning a fact not in dispute,[92] although error has been deduced from a failure to charge as to conceded facts.[93]

Negligence. An instruction on the question of the insufficiency of a scaffold based wholly on quality of timber used was erroneous where there was evidence of improper construction aside from the quality of the timber used.[94]

In action for damage from collision of automobiles, an instruction is erroneous which ignores the question of speed or relative position of the parties, though charging that the one approaching from the right had the right of way.[95] An instruction allowing recovery by passenger in bus which collided with a truck on doctrine of res ipsa loquitur is erroneous where it ignores evidence of the truck driver's negligence.[96] In an action for damages against an automobile driver, a charge on his negligence in driving on the left side of the street, without consideration of the purpose for which he did so, is erroneous.[97]

An instruction on contributory negligence is improper which ignores evidence of negligence of defendant after becoming aware of the danger of plaintiff.[98] And it is error to limit the

Rosenbaum Hdw. Co. v. Paxton Lbr. Co., 124 Va 346, 97 SE 784; Chesapeake & O. Ry. Co. v. Arrington, 126 Va 194, 101 SE 415 (ignored evidence of defects in couplers); Sands & Co. v. Norvell, 126 Va 384, 101 SE 569.

Washington. Shanks v. Oregon-Washington R. & Nav. Co., 98 Wash 509, 167 P 1074.

West Virginia. Robinson v. Lowe, 50 WVa 75, 40 SE 454; Wiggin v. Marsh Lbr. Co., 77 WVa 7, 87 SE 194; Stuck v. Kanawha & M. Ry. Co., 78 WVa 490, 89 SE 280; Palmer v. Magers, 85 WVa 415, 102 SE 100 (boundary-line); Pierson v. Liming, 113 WVa 145, 167 SE 131 (where defense of contributory negligence was ignored).

[90] Preston v. Union Pacific R. Co., 292 Mo 442, 239 SW 1080.

[91] Indianapolis & C. Trac. Co. v. Senour, 71 IndApp 10, 122 NE 772.

[92] Neumann v. Neumann, 147 Ill App 218; Byrnes v. Poplar Bluff Printing Co. (Mo), 74 SW2d 20; Montgomery v. Hammond Packing Co. (MoApp), 217 SW 867.

It was error to withdraw question of care after discovery of danger where evidence showed motorman tried to stop car by improper method. Harrington v. Dunham, 273 Mo 414, 202 SW 1066.

[93] Harting v. East St. Louis Ry. Co. (Mo), 84 SW2d 914.

[94] Koppers Co. v. Jernigan, 206 Ala 159, 89 S 706.

[95] Friedman v. Hendler Creamery Co., 158 Md 131, 148 A 426.

[96] Cumberland & Westernport Transit Co. v. Metz, 158 Md 424, 149 A 4.

[97] Richardson v. Franklin, 235 Ill App 440.

[98] Alabama Great Southern R. Co. v. Molette, 207 Ala 624, 93 S 644.

matter of contributory negligence to the defendant's evidence, by charging that the defendant must by its evidence prove contributory negligence by a preponderance of the evidence.[99] An instruction in a negligence action is erroneous where it purports to state the facts entitling plaintiff to a verdict but omits to state that the plaintiff must have been free from negligence.[1] Where there was evidence of contributory negligence, an instruction was erroneous which failed to present the requirement of ordinary care.[2]

Damages. It is improper to instruct that the question of the permanency of an injury sued for is to be determined from the testimony of physicians and surgeons.[3] So, it is improper to instruct as to some of the evidence on the question of value and ignore other evidence on this question.[4]

Kinds of evidence. An instruction that "the evidence is what the witnesses swear before you on the stand" ignores interrogatories and documents admitted in evidence.[5] If there is both oral and documentary evidence the jury should not be confined to a consideration of one to the exclusion of the other.[6] So, an instruction is erroneous which ignores statutes and ordinances admitted in evidence.[7]

Agency. The instruction on liability for acts of one assuming to act as agent should include the question of ratification where there is evidence of ratification.[8]

§ 125. Ignoring issues and evidence in criminal prosecutions.

In criminal prosecutions, instructions applicable to the issues supported by evidence should be given to the jury.

In criminal prosecutions, instructions applicable to every issue of the case deducible from the testimony or supported by it to any extent should be given to the jury.[9]

[99] Tudor Boiler Mfg. Co. v. Teeken, 33 OhApp 512, 169 NE 704, 29 OLR 39.

[1] Noblesville Milling Co. v. Witham, 86 IndApp 209, 156 NE 522.

[2] Louisville & N. R. Co. v. Slusher's Admr., 217 Ky 738, 290 SW 677.

[3] Ekelberg v. Tacoma, 142 Wash 240 252 P 915.

[4] Payne v. James, 207 Ala 134, 91 S 801.

[5] Byrd v. Byrd, 22 GaApp 354, 96 SE 10. See also Newman v. Newman, 208 IllApp 97.

[6] May v. Leverette, 164 Ga 552, 139 SE 31.

[7] Seitz v. Pelligreen Constr. & Inv. Co. (MoApp), 215 SW 485.

[8] Pittsburgh Constr. Co. v. Gannon, 46 AppDC 131; Crossley v. Summit Lbr. Co. (MoApp), 187 SW 113.

[9] **Federal.** Showalter v. United States, 171 CCA 457, 260 F 719.

Alabama. Crittenden v. State, 134 Ala 145, 32 S 273; Morris v. State, 146 Ala 66, 41 S 274; Pynes v. State, 207 Ala 395, 92 S 663; Minor v. State, 15 AlaApp 556, 74 S 98;

Ignoring evidence. The rule is very clearly violated by instructions which ignore or obscure the testimony of witnesses for either side, [10] or authorize a verdict on part of the evidence.[11] So it was proper to refuse an instruction which required an acquittal upon a reasonable doubt resting solely upon a part of the evidence.[12] There should be an instruction on honest

Thompson v. State, 16 AlaApp 393, 78 S 309; Wiggins v. State, 16 Ala App 419, 78 S 413; Warsham v. State, 17 AlaApp 181, 84 S 885; Ewing v. State, 18 AlaApp 166, 90 S 136; Hammond v. State, 21 Ala App 434, 109 S 172.

A charge may ignore proof of venue in a prosecution only where there has been no proof of a venue. Ragsdale v. State, 134 Ala 24, 32 S 674.

A charge that unless the confession of the defendant tends to corroborate the testimony of his accomplice he should be acquitted, was properly refused since it ignored other corroborating evidence. Crittenden v. State, 134 Ala 145, 32 S 273.

It is proper to refuse requested instruction constituting a mere argument in favor of defendant based on part of the testimony. Steele v. State, 168 Ala 25, 52 S 907.

California. People v. Wagner, 65 CalApp 704, 225 P 464.

Florida. Mims v. State, 42 Fla 199, 27 S 865; Lamb v. State, 90 Fla 844, 107 S 530; Dwyer v. State, 93 Fla 777, 112 S 62.

Georgia. Southern Exp. Co. v. State, 23 GaApp 67, 97 SE 550.

Kentucky. Agee v. Commonwealth, 9 KyL 272, 5 SW 47.

Massachusetts. Commonwealth v. Este, 140 Mass 279, 2 NE 769; Commonwealth v. Gavin, 148 Mass 449, 18 NE 675, 19 NE 554; Commonwealth v. Turner, 224 Mass 229, 112 NE 864.

New Jersey. State v. Blaime, 5 NJMisc 633, 137 A 829.

North Carolina. State v. Orr, 175 NC 773, 94 SE 721.

Oregon. State v. Holbrook, 98 Or 43, 188 P 947, 192 P 640, 193 P 434.

Texas. Requested charges requiring the court to single out certain evidence and by a process of reasoning to eliminate it from the consideration of the jury was properly refused. Lemons v. State, 59 TexCr 299, 128 SW 416.

Virginia. Webb v. Commonwealth, 122 Va 899, 94 SE 773; Dennis v. Commonwealth, 144 Va 559, 131 SE 131.

West Virginia. State v. Price, 83 WVa 71, 97 SE 582, 5 ALR 1247.

[10] **Alabama.** Suther v. State, 118 Ala 88, 24 S 43.

California. People v. Lonnen, 139 Cal 634, 73 P 586.

Illinois. People v. Davis, 300 Ill 226, 133 NE 320 (reasonable doubt).

Mississippi. Dedeaux v. State, 125 Miss 326, 87 S 664.

[11] King v. State, 15 AlaApp 67, 72 S 552; West v. State, 16 AlaApp 117, 75 S 709 (reasonable doubt); Edmonds v. State, 16 AlaApp 157, 75 S 873; Bryan v. State, 18 AlaApp 199, 89 S 894.

[12] **Alabama.** Liner v. State, 124 Ala 1, 27 S 438; Bardin v. State, 143 Ala 74, 38 S 833; Burkett v. State, 215 Ala 453, 111 S 34; Spencer v. State, 228 Ala 537, 154 S 527; Voss v. State, 21 AlaApp 481, 109 S 891, cert. den. in 215 Ala 107, 109 S 892; Ford v. State, 22 AlaApp 59, 112 S 182.

Arkansas. See Francis v. State, 189 Ark 288, 71 SW2d 469.

California. People v. Watts, 198 Cal 776, 247 P 884 (instruction held correct).

Florida. An instruction for acquittal was properly refused where it was predicated upon an isolated fact or only part of the evidence that was not conclusive of the merits of the case. Kennard v. State, 42 Fla 581, 28 S 858.

acquisition where there is evidence on a prosecution for theft which tends to establish an honest acquisition of the articles by the accused.[13] The instruction on flight should embody the explanation of defendant,[14] and hence should not ignore evidence that accused fled to escape mob violence.[15] It is error to refuse to charge on evidence tending to reduce the grade or degree of the offense or the punishment therefor.[16]

Ignoring issues. A court may ignore a defective count of an indictment in his charge and charge on the valid counts alone.[17] Nor is it error to omit instructions on abandoned counts in indictment.[18] But the court must embody every material element necessary to authorize a conviction, if an attempt is made to detail the material allegations of the indictment.[19]

The instruction defining accessory should specifically negative the possibility of innocent aid.[20]

In a larceny prosecution it is error to fail to charge as to felonious intent.[21]

In a prosecution for killing an officer during attempted arrest, it is error to fail to charge upon reasonable doubt.[22]

A charge is erroneous if it ignores a defense claimed, as to which there is evidence before the jury.[23]

[13] Hall v. State, 120 Ga 142, 47 SE 519; Beckham v. State, 8 TexApp 52; Parker v. State (TexCr), 57 SW 668.

Court properly refused a charge in a prosecution for receiving stolen property which ignored all issues raised except that of concealment. Watkins v. State, 21 AlaApp 585, 111 S 43, cert. den. in 215 Ala 484, 111 S 44.

[14] State v. Mills, 272 Mo 526, 199 SW 131. But see People v. Minamino, 56 CalApp 386, 205 P 463.

[15] State v. Schmulbach, 243 Mo 533, 147 SW 966.

[16] Plymel v. State, 164 Ga 677, 139 SE 349; State v. Sipes, 202 Ia 173, 209 NW 458, 47 ALR 407.

[17] Butler v. State (TexCr), 43 SW 992. But see Shelton v. State, 143 Ala 98, 39 S 377.

[18] State v. Smith (MoApp), 201 SW 942.

[19] Bailey v. State, 115 Neb 77, 211 NW 200.

[20] **Federal.** In Fisher v. United States, 13 F2d 756, the court held it error to omit to charge as to agreement or understanding as to commission of act, in an instruction that defendant's participation with others constituted a conspiracy.

Arkansas. See Pennell v. State, 170 Ark 1119, 282 SW 992.

Connecticut. State v. Enanno, 96 Conn 420, 114 A 386.

[21] State v. Eunice, 194 NC 409, 139 SE 774.

[22] People v. Cash, 326 Ill 104, 157 NE 76.

[23] **Federal.** Where there was evidence, in a prosecution of a bank official for making false entries, tending to show that the defendant had asked the advice of reputable bankers as the particular transaction, and, consequently, to show his good faith in the matter, an instruction which excluded consideration of such facts was erroneous. Hyde v. United States, 15 F2d 816.

Alabama. Enzor v. State, 24 Ala App 346, 135 S 595 (reasonable doubt).

Illinois. People v. Lacey, 339 Ill

§ 126. Directing verdict if jury believes certain evidence or finds certain facts—Formula instructions.

Where an instruction directs a verdict if the jury finds certain facts, the instruction must include every fact which is essential for such a verdict.

Formula or hypothetical instructions should not be confused with directed verdicts. The former type of instruction still permits the jury to decide the verdict, whereas a directed verdict takes that decision away from the jury. Formula instructions are conditional upon the jury finding all the necessary facts which would result in a decision for one party or the other. Some courts frown upon the use of formula instructions and rightly so. They can be and are involved and confusing and are unnecessary if the judge has covered the necessary matter in the rest of his charge.

At any rate, in those jurisdictions permitting formula instructions, they must include all the facts and conditions essential to a verdict, unless omitted facts are conclusively established.[24]

480, 171 NE 544 (alibi); People v. Moor, 355 Ill 393, 189 NE 318 (insanity).

Missouri. State v. Welch, 311 Mo 476, 278 SW 755 (charge held erroneous for ignoring a claim of self-defense); State v. Malone, 327 Mo 1217, 39 SW2d 786 (self-defense); State v. Johnson, 334 Mo 10, 64 SW2d 655 (prosecution for forgery in which charge ignored defense that defendant acted under authority of makers). See State v. Douglas, 312 Mo 373, 278 SW 1016 (where the defense of insanity was held sufficiently covered by the instructions).

New Jersey. Where the claim of the defendant was that at the time the crime was committed he was in such a drunken stupor as to be unable to participate in the offense, an instruction which assumed that such a defense was relied on merely in mitigation and not in justification was erroneous. State v. Di Canio, 104 NJL 188, 138 A 923, affg. State v. Letter, 4 NJMisc 395, 133 A 46.

Pennsylvania. Commonwealth v. Westley, 300 Pa 16, 150 A 94 (alibi); Commonwealth v. Trunk, 311 Pa 555, 167 A 333, revg. 105 PaSuper 569, 161 A 767.

Texas. Ratliff v. State, 114 TexCr 142, 25 SW2d 343; Wilson v. State, 122 TexCr 478, 56 SW2d 463.

Virginia. Harris v. Commonwealth, 161 Va 1028, 170 SE 717; Wessells v. Commonwealth, 164 Va 664, 180 SE 419 (insanity).

[24] **Alabama.** Southern Ry. Co. v. Alsobrook, 223 Ala 540, 137 S 437.

Arizona. Pickwick Stages Corp. v. Messinger, 44 Ariz 174, 36 P2d 168.

Arkansas. Johnson v. State, 142 Ark 573, 219 SW 32.

California. Jordan v. Great Western Motorways, 213 Cal 606, 2 P2d 786; White v. Davis, 103 CalApp 531, 284 P 1086.

Illinois. McNulta v. Jenkins, 91 IllApp 309; Mason v. Illinois Bankers Life Assn., 199 IllApp 184; Williams v. Prudential Ins. Co., 271 Ill App 532.

Kentucky. Hoskins v. Commonwealth, 188 Ky 80, 221 SW 230; Federal Surety Co. v. Guerrant, 238 Ky 562, 38 SW2d 425.

Missouri. Thomas v. Babb, 45 Mo 384; Cassin v. Lusk, 277 Mo 663, 210 SW 902; Boomshaft v. Klauber, 196 MoApp 222, 190 SW 616; Van Zandt v. St. Louis Wholesale Grocer

The jury should be charged in such cases that their belief of the stated facts must be based upon the evidence.[25] In this connection, the instruction is sufficient if premised by the statement, "if you find from the evidence that * * *."[26]

Notwithstanding that all the hypothetical facts given in an instruction may be true, still if material evidence is disregarded, the instruction should be refused.[27] On the other hand, it is error if such an instruction assumes facts not in evidence.[28]

If an essential fact is omitted, the instruction is erroneous and the error is not cured by supplying the omission in another instruction.[29] Moreover, this error may be relied upon by the aggrieved party even though no proper instruction had been requested.[30]

Co., 196 MoApp 640, 190 SW 1050; Weller v. Plapao Laboratories Incorporation, 197 MoApp 47, 191 SW 1056; Peoples Bank v. Baker (Mo App), 193 SW 632; Sutter v. Metropolitan Street Ry. Co. (MoApp), 208 SW 851; Shortridge v. Raiffeisen, 204 MoApp 166, 222 SW 1031; Llywelyn v. Lowe (MoApp), 239 SW 535; Edelman v. Wells (MoApp), 242 SW 990; Herron v. Smith (Mo App), 285 SW 544; Gash v. Mansfield (MoApp), 28 SW2d 127; Nelson v. Kansas City Public Service Co. (MoApp), 30 SW2d 1044; Koury v. Home Ins. Co. (MoApp), 57 SW2d 750; Sells v. Fireside Life Assn. (MoApp), 66 SW2d 955; J. A. Tobin Constr. Co. v. Davis (MoApp), 81 SW2d 474; McCullough v. St. Louis Public Service Co. (MoApp), 86 SW2d 334.

Nebraska. Standard Distilling & Distributing Co. v. Harris, 75 Neb 480, 106 NW 582; Altis v. State, 107 Neb 540, 186 NW 524.

New York. Scheer v. Continental Wonder Bakeries Corp., 229 AppDiv 437, 242 NYS 1.

Ohio. Richardson v. Curtis, 33 OhSt 329; Fagan v. Welsh, 19 Oh CirCt (N. S.) 177, 32 OhCirDec 409.

Oklahoma. Murphy v. Hood & Lumley, 12 Okl 593, 73 P 261.

Texas. Dismukes v. Gilmer (Tex CivApp), 286 SW 495.

Virginia. Atlantic Coast Line R. Co. v. Newton, 118 Va 222, 87 SE 618; Baylor v. Hoover, 123 Va 659, 97 SE 309; Winn Bros. & Baker v. Lipscombe, 127 Va 554, 103 SE 623; Hughes v. Kelly (Va), 30 SE 387.

West Virginia. Claiborne v. Chesapeake & O. Ry. Co., 46 WVa 363, 33 SE 262; Penix v. Grafton, 86 WVa 278, 103 SE 106; State v. Smith, 92 WVa 12, 114 SE 375; Curry v. New Castle Auto Express, 112 WVa 268, 164 SE 147.

[25] **Federal.** United States Potash Co. v. McNutt, 70 F2d 126.

Alabama. Mizell v. Sylacauga Groc. Co., 214 Ala 204, 106 S 858. See Metropolitan Life Ins. Co. v. Halsey, 230 Ala 193, 160 S 248.

Kentucky. Louisville & N. R. Co. v. Slusher's Admr., 217 Ky 738, 290 SW 677.

Missouri. Ligon v. Exhibitors' Film Delivery & Service Co. (Mo App), 22 SW2d 1058.

Pennsylvania. Pringle v. Smith, 289 Pa 356, 137 A 603; Finkbeiner v. Philadelphia Rapid Transit Co., 86 PaSuper 364.

[26] Smith v. Hale, 3 CalApp2d 277, 39 P2d 445.

[27] Hughes v. Kelly (Va), 30 SE 387.

[28] Duffy v. Cortesi, 2 Ill2d 511, 119 NE2d 241.

[29] Redd v. Indianapolis Rys., Inc., 121 IndApp 472, 97 NE2d 501; Taylor v. Fitzpatrick, 235 Ind 238, 132 NE2d 919.

[30] Cover v. Platte Valley Public Power & Irrigation Dist., 162 Neb 146, 75 NW2d 661.

Where an instruction authorizes the jury to find for the plaintiff without regard to a certain fact which is a prerequisite to recovery, error is committed.[31] So where contributory negligence is interposed as a defense and there is evidence tending to sustain it, a hypothetical instruction directing a finding for plaintiff omitting any reference to facts bearing upon contributory negligence will be erroneous.[32]

In an action against a street railway company for a wrongful death, an instruction that "if the jury believe from the evidence that the defendant's servants exercised, at the time and place in question, ordinary care to avoid injuring the plaintiff's intestate, but that nevertheless the deceased was injured, then they should find the defendant not guilty" was held to be rightly refused, since the declaration charged, and the evidence tended to prove, negligence not only in the operation of the car, but also in the company's failure to equip the car with a fender as required by city ordinance, and one important feature of the evidence therefore was disregarded.[33]

[31] Birtwhistle v. Woodward, 95 Mo 113, 7 SW 465.

[32] McCreery's Admx. v. Ohio River R. Co., 43 WVa 110, 27 SE 327.

[33] Chicago City Ry. Co. v. O'Donnell, 114 IllApp 359.

CHAPTER 6

CONSTRUCTION AND EFFECT

Section.
135. Interpretation—In general.
136. Construction of charge as an entirety in civil cases.
137. Construction of charge as an entirety in criminal cases.
138. Cure of erroneous instruction by correct instruction in civil cases.
139. Cure of erroneous instruction by correct instruction in criminal cases.
140. Cure of ambiguous instruction by another instruction.
141. Cure by withdrawal of erroneous instruction.

§ 135. Interpretation—In general.

In interpreting instructions, consideration should be given to the issues and pertinent evidence, as well as to all the other instructions.

The interpretation of instructions is necessary when there is a question whether the instructions were properly understood by the jury. On this matter, prior sections are pertinent.[1]

Obviously, the language of the instructions must be considered. Beyond this, are the vague general rules of interpretation that are applicable to any field of law where the question is language ambiguity. For example, the phraseology of instructions must receive a reasonable construction, in view of all the circumstances.[2] Some of the "circumstances" that should be considered are the issues[3] and the evidence pertinent to such issues,[4] as well as the rest of the instructions.[5] More detailed treatment is included in the remaining sections of this chapter.

[1] See §§ 90, 94, 103, *supra.*

[2] Behrend v. Behrend, 233 Ia 812, 10 NW2d 651.

[3] **Alabama.** Empire Life Ins. Co. v. Gee, 171 Ala 435, 55 S 166; Windham v. Hydrick, 197 Ala 125, 72 S 403; Higdon v. Fields, 6 AlaApp 281, 60 S 594.

Florida. Winfield v. Truitt, 71 Fla 38, 70 S 775.

Illinois. Dettmer v. Illinois Terminal R. Co., 210 IllApp 653.

Iowa. Hart v. Cedar Rapids & M. C. Ry. Co., 109 Ia 631, 80 NW 662; Dickson v. Yates, 194 Ia 910, 188 NW 948, 27 ALR 533.

Montana. Surman v. Cruse, 57 Mont 253, 187 P 890.

North Carolina. Tillotson v. Currin, 176 NC 479, 97 SE 395.

Virginia. Richmond Granite Co. v. Bailey, 92 Va 554, 24 SE 232.

Wisconsin. Neumann v. LaCrosse, 94 Wis 103, 68 NW 654.

[4] **Federal.** Southern Pacific Co. v. Hall, 41 CCA 50, 100 F 760; Hall v. McKinnon, 113 CCA 440, 193 F 592; Ocean Acc. & Guarantee Corp., Ltd. v. Schachner, 70 F2d 28.

Alabama. Meighan v. Birmingham Terminal Co., 165 Ala 591, 51 S 775; Central of Georgia Ry. Co. v.

If the danger is misleading the jury,[6] a questioned charge must be viewed from the standpoint of the jury, and its language must be given the plain common sense meaning it was evidently intended to convey.[7] The theory is that jurors are men of understanding and intelligence.[8]

Chicago Varnish Co., 169 Ala 287, 53 S 832.

California. People v. Alba, 52 CalApp 603, 199 P 894; Hodge v. Weinstock, Lubin & Co., 109 CalApp 393, 293 P 80.

Georgia. Brown v. State, 24 Ga App 774, 102 SE 450.

Illinois. Drda v. Illinois Terminal R. Co., 210 IllApp 640.

Iowa. Yeager v. Chicago, R. I. & P. Ry. Co., 148 Ia 231, 123 NW 974.

Kansas. Wyandotte v. White, 13 Kan 191.

Maryland. Street v. Hodgson, 139 Md 137, 115 A 27.

Missouri. Esstman v. United Rys. Co. (Mo), 216 SW 526; Bertke v. Hoffman, 330 Mo 584, 50 SW2d 107.

New Jersey. Kneip v. New York & L. B. R. Co., 102 NJL 374, 131 A 886.

North Carolina. Penn v. Standard Life Ins. Co., 160 NC 399, 76 SE 262, 42 LRA (N. S.) 597; Jones v. Bland, 182 NC 70, 108 SE 344, 16 ALR 1383.

Oklahoma. Missouri, K. & T. Ry. Co. v. Taylor, 69 Okl 79, 170 P 1148; Drum Standish Comm. Co. v. First Nat. Bank & Trust Co., 168 Okl 400, 31 P2d 843.

Oregon. Instructions are to be considered in the light of the facts shown in the particular case. Disch v. Closset, 118 Or 111, 244 P 71.

South Dakota. Smith & Co. v. Kimble, 38 SD 511, 162 NW 162.

Texas. Dickinson v. Sanders (Tex CivApp), 39 SW2d 102.

Virginia. Williams Printing Co. v. Saunders, 113 Va 156, 73 SE 472, AnnCas 1913E, 693; Clinchfield Coal Corp. v. Redd, 123 Va 420, 96 SE 850, 46 ALR 186; Lucas v. Craft, 161 Va 228, 170 SE 836.

Washington. Wheeler v. Hotel Stevens Co., 71 Wash 142, 127 P 840, AnnCas 1914C, 576.

An instruction must always be construed in the light of the evidence and the particular case, and if it applies to that it will not be held erroneous, though conditions may be conceived where it would be incorrect. Harkins v. Seattle Elec. Co., 53 Wash 184, 101 P 836.

[5] Walters v. Western & Southern Life Ins. Co., 318 Pa 382, 178 A 499, affg. 113 PaSuper 221, 172 A 406.

[6] **Illinois.** An instruction should be construed in the sense in which it would likely be understood by the jury in the light of the evidence. Bickel v. Martin, 115 IllApp 367.

North Carolina. Sutton v. Melton-Rhodes Co., 183 NC 369, 111 SE 630.

Oklahoma. Ft. Smith & W. R. Co. v. Holcombe, 59 Okl 54, 158 P 633, LRA 1916F, 1237.

Texas. Texas & P. Ry. Co. v. Jones, 58 TexCivApp 202, 123 SW 434; Northern Texas Trac. Co. v. Thetford (TexCivApp), 28 SW2d 906.

[7] **Indiana.** Instructions should be taken in the sense in which they would be understood by men of ordinary intelligence. Kingan & Co. v. King, 179 Ind 285, 100 NE 1044.

Mississippi. St. Louis & S. F. R. Co. v. Ault, 101 Miss 341, 58 S 102.

Missouri. Jackson v. Sewell (Mo App), 284 SW 197.

Oregon. Storla v. Spokane, Portland & Seattle Transp. Co., 136 Or 315, 297 P 367, 298 P 1065.

Texas. Orange Lbr. Co. v. Ellis, 105 Tex 363, 150 SW 582; West v. Cashin (TexCivApp), 83 SW2d 1001.

[8] Harris v. Harris, 178 NC 7, 100 SE 125.

§ 136. Construction of charge as an entirety in civil cases.

The court's charge should be construed in its entirety.

Probably the most repeated general rule in the law of instructions is that, in passing on a claimed instruction error, the charge is considered as a whole; and if so considered, there is no tendency to mislead the jury, there is no error.[9]

[9] **Federal.** Stilson v. United States, 250 US 583, 63 LEd 1154, 40 SupCt 28; Allen v. Roydhouse, 232 F 1010; Memphis Street Ry. Co. v. Pierce, 168 CCA 609, 257 F 659; Mendelson v. Davis, 281 F 18; Automobile Ins. Co. v. Central Nat. Bank, Savings & Trust Co., 20 F2d 619 (instruction held erroneous as to burden of proof).

Alabama. Thrasher v. Neely, 196 Ala 576, 72 S 115; Ex parte Cowart, 201 Ala 525, 78 S 879; Wilson v. Vassar, 214 Ala 435, 108 S 250; Lincoln Reserve Life Ins. Co. v. Armes, 215 Ala 407, 110 S 818; Dempsey v. State, 15 AlaApp 199, 72 S 773; Anders v. Wallace, 17 AlaApp 154, 82 S 644.

Arizona. Inspiration Consol. Copper Co. v. Lindley, 20 Ariz 95, 177 P 24; Phoenix Ry. Co. v. Beals, 20 Ariz 386, 181 P 379; Lorden v. Stapp, 21 Ariz 646, 192 P 246; Lee v. State, 27 Ariz 52, 229 P 939; Peppers Fruit Co. v. Charlebois, 39 Ariz 195, 4 P2d 905 (instruction on measures of damages).

Arkansas. Redman v. Hudson, 124 Ark 26, 186 SW 312; Cohn v. Chapman, 150 Ark 258, 234 SW 42.

California. Taylor v. Pacific Elec. Ry. Co., 172 Cal 638, 158 P 119; People v. Wolff, 182 Cal 728, 190 P 22; Hammond v. Pacific Elec. R. Co., 32 CalApp 756, 164 P 50; Williamson v. Hardy, 47 CalApp 377, 190 P 646; People v. Argrusa, 49 Cal App 565, 193 P 819; Alcamisi v. Market Street Ry. Co., 67 CalApp 710, 228 P 410; Truman v. Sutter-Butte Canal Co., 76 CalApp 293, 244 P 923; Smith v. Pacific Greyhound Corp., 139 CalApp 696, 35 P2d 169; Hill v. Fresno County, 140 CalApp 272, 35 P2d 593.

Colorado. First Nat. Bank v. Shank, 53 Colo 446, 128 P 56; McAllister v. McAllister, 72 Colo 28, 209 P 788; Blackman v. Edsall, 17 ColoApp 429, 68 P 790.

Connecticut. Appeal of Wheeler, 91 Conn 388, 100 A 13; Dunn v. Poirot, 97 Conn 713, 118 A 33; Smart v. Bissonette, 106 Conn 447, 138 A 365; C. I. T. Corp. v. Deering, 119 Conn 347, 176 A 553.

Florida. McRainey v. Langston, 92 Fla 903, 110 S 536; McDonald v. Stone, 114 Fla 608, 154 S 327.

Georgia. Sisson v. Roberts, 25 GaApp 725, 104 SE 910; Phillips v. Georgia Ry. & Power Co., 27 Ga App 21, 107 SE 357; McCommons-Thompson-Boswell Co. v. White, 33 GaApp 20, 125 SE 76.

Idaho. Lyons v. Lambrix, 33 Idaho 99, 190 P 356; Raide v. Dollar, 34 Idaho 682, 203 P 469; State v. Cosler, 39 Idaho 519, 228 P 277.

Illinois. Baker v. Baker, 202 Ill 595, 67 NE 410; Chicago Union Trac. Co. v. Hanthorn, 211 Ill 367, 71 NE 1022; Wilke v. Moll, 338 IllApp 6, 86 NE2d 589.

Indiana. Robinson v. Shanks, 118 Ind 125, 20 NE 713; New York, C. & St. L. R. Co. v. Shields, 185 Ind 704, 112 NE 762; Lavene v. Friedrichs, 186 Ind 333, 115 NE 324, 116 NE 421; Massachusetts Bonding & Ins. Co. v. State ex rel. Gary, 191 Ind 595, 131 NE 398; Baltimore & O. R. Co. v. Peck, 68 IndApp 269, 114 NE 475; Yellow Cab Co. v. Kruszynski, 101 IndApp 187, 196 NE 136.

Iowa. Becker v. Churdan, 175 Ia 159, 157 NW 221; Thompson v. Illinois Cent. R. Co., 177 Ia 328, 158 NW 676; Fuller v. Illinois Cent. R. Co., 186 Ia 686, 173 NW 137; Fletcher v. Ketcham, 188 Ia 340, 176 NW 245; Cawley v. Peoples Gas

& Elec. Co., 193 Ia 536, 187 NW 591; Ray v. Council Bluffs, 193 Ia 620, 187 NW 447; High v. Waterloo, C. F. & N. Ry. Co., 195 Ia 304, 190 NW 331; Behrend v. Behrend, 233 Ia 812, 10 NW2d 651.

Kansas. Weathers v. Kansas City Bridge Co., 99 Kan 632, 162 P 957; State v. Wilson, 108 Kan 433, 195 P 618; Childers v. Tobin, 111 Kan 347, 206 P 876; Mayes v. Kansas City Power & Light Co., 121 Kan 648, 249 P 599; Wooster v. National Bank of America, 139 Kan 429, 32 P2d 235; John V. Farwell Co. v. Thomas, 8 KanApp 614, 56 P 151.

Kentucky. Louisville & N. R. Co. v. Edwards' Admx., 183 Ky 555, 209 SW 519; Davidson v. Commonwealth, 204 Ky 414, 264 SW 1051; R. B. Tyler Co. v. Kirby's Admr., 219 Ky 389, 293 SW 155; Paducah Comm. Co. v. Boswell, 26 KyL 1062, 83 SW 144.

Maine. If the charge as a whole is free from misleading inferences, and correctly states the law, it will be sufficient though some of the separate instructions may contain loose expressions or simple inaccuracies. Reed v. Central Maine Power Co., 132 Me 476, 172 A 823.

Maryland. Gosman Ginger Ale Co. v. Keystone Bottle Mfg. Co., 134 Md 360, 106 A 747.

Massachusetts. Lambeth Rope Co. v. Brigham, 170 Mass 518, 49 NE 1022; Savageau v. Boston & M. R., 210 Mass 164, 96 NE 67; Comstock v. Biltmore Amusement Co., 227 Mass 146, 116 NE 531; Draper v. Cotting, 231 Mass 51, 120 NE 365.

Michigan. Eggleston v. Boardman, 37 Mich 14; Wegner v. Herkimer, 167 Mich 587, 133 NW 623; In re Rockett's Estate, 191 Mich 499, 158 NW 12; Jacobs v. Hagenback-Wallace Shows, 198 Mich 73, 164 NW 548, LRA 1918A, 604; White v. Cowing, 205 Mich 318, 171 NW 450; Inter-State Constr. Co. v. United States Fidelity & Guaranty Co., 207 Mich 265, 174 NW 173; Holmes v. Borowski, 233 Mich 407, 206 NW 374; Gaffka v. Grand Trunk Western R. Co., 306 Mich 246, 10 NW2d 844; Van Dyke v. Rozneck, 324 Mich 29, 36 NW2d 201.

Minnesota. McCusky v. Kuhlman, 147 Minn 460, 179 NW 1000; Pratschner v. Electric Short Line Ry. Co., 149 Minn 425, 184 NW 188; In re Oronoco School Dist., 170 Minn 49, 212 NW 8.

Mississippi. Godfrey v. Meridian Ry. & Light Co., 101 Miss 565, 58 S 534; Hemming v. Rawlings, 144 Miss 643, 110 S 118.

Missouri. Hulse v. St. Joseph Ry. Co. (Mo), 214 SW 150; State v. Hostetter (Mo), 222 SW 750; Prentiss v. Illinois Life Ins. Co. (Mo), 225 SW 695; McKinstry v. St. Louis Transit Co., 108 MoApp 12, 82 SW 1108; Metz v. Kansas City, 229 Mo App 402, 81 SW2d 462.

Montana. Pure Oil Co. v. Chicago, M. & St. P. Ry. Co., 56 Mont 266, 185 P 150; McGonigle v. Prudential Ins. Co., 100 Mont 203, 46 P2d 687.

Nebraska. Chicago, B. & Q. R. Co. v. Oyster, 58 Neb 1, 78 NW 359; Whelan v. Union Pacific R. Co., 91 Neb 238, 136 NW 20; Forrest v. Koehn, 99 Neb 441, 156 NW 1046; Ruhs v. Ruhs, 105 Neb 663, 181 NW 547; Interstate Airlines v. Arnold, 127 Neb 665, 256 NW 513.

New Hampshire. Monroe v. Connecticut River Lbr. Co., 68 NH 89, 39 A 1019.

New Jersey. Veader v. Veader, 89 NJL 727, 99 A 309; Republic of France v. Lehigh Valley R. Co., 96 NJL 25, 114 A 242; McLaughlin v. Damboldt, 100 NJL 127, 125 A 314; Nolan v. Public Service Ry. Co. (NJS), 132 A 237.

Under the general rule requiring consideration of the entire charge, it has been held that an instruction was not erroneous which said to the jury in a negligence action: "Was the defendant negligent in what he did? If he was driving at sixty miles an hour on the wrong side of the road and hit the other car on the wrong side of the road, obviously

he was." Lyon v. Fabricant, 113 NJL 62, 172 A 567, affg. 12 NJMisc 39, 169 A 548.

New Mexico. State v. Rodriguez, 23 NM 156, 167 P 426, LRA 1918A, 1016; Hubert v. American Surety Co., 26 NM 365, 192 P 487.

New York. Zimmer v. Third Ave. R. Co., 36 AppDiv 265, 55 NYS 308; Hurley v. Olcott, 134 AppDiv 631, 119 NYS 430; Scutt v. Woolsey, 20 AppDiv 541, 47 NYS 320.

North Carolina. Everett v. Spencer, 122 NC 1010, 30 SE 334; McCurry v. Purgason, 170 NC 463, 87 SE 244, AnnCas 1918A, 907; Reed Coal Co. v. Fain, 171 NC 646, 89 SE 29; Danville Lbr. & Mfg. Co. v. Gallivan Bldg. Co., 177 NC 103, 97 SE 718; Maney v. Greenwood, 182 NC 579, 109 SE 636; Cook v. Mebane, 191 NC 1, 131 SE 407.

North Dakota. Soules v. Northern Pacific Ry. Co., 34 ND 7, 157 NW 823, LRA 1917A, 501; Munster v. Stoddard, 44 ND 105, 170 NW 871; Fuchs v. Lehman, 47 ND 58, 181 NW 85; Reuter v. Olson, 79 ND 834, 59 NW2d 830.

Ohio. Ohio Farmers Ins. Co. v. Cochran, 104 OhSt 427, 135 NE 537; Ochsner v. Cincinnati Trac. Co., 107 OhSt 33, 140 NE 644; Flynn v. Sharon Steel Corp., 142 OhSt 145, 26 OhO 343, 50 NE2d 319; Clark Restaurant Co. v. Rau, 41 OhApp 23, 179 NE 196, 35 OLR 318; Morris v. Cleveland Hockey Club, Inc., 59 OLA 145, 98 NE2d 49.

Oklahoma. Sapulpa v. Deason, 81 Okl 51, 196 P 544; Badger Oil Co. v. Clay, 83 Okl 25, 200 P 433; Rubin v. Greenwood, 116 Okl 194, 244 P 785; Hope Natural Gas Co. v. Ideal Gasoline Co., 114 Okl 30, 243 P 206; Hall & Briscoe v. Roberts, 163 Okl 12, 20 P2d 188.

Oregon. Wadhams & Co. v. Inman, Poulsen & Co., 38 Or 143, 63 P 11; Michellod v. Oregon-Washington R. & Nav. Co., 86 Or 329, 168 P 620; Hinton v. Roethler, 90 Or 440, 177 P 59; State v. Butler, 96 Or 219, 186 P 55; Rorvik v. North Pacific Lbr. Co., 99 Or 58, 190 P 331, 195 P 163; Oregon Box & Mfg. Co. v. Jones Lbr. Co., 117 Or 411, 244 P 313.

Pennsylvania. Weiss v. London Guarantee & Acc. Co., Ltd., 285 Pa 251, 132 A 120; Phillips v. American Liability & Surety Co., 309 Pa 1, 162 A 435; Szvitih v. Doernte, 360 Pa 415, 61 A2d 823; Renn v. Tallman, 25 PaSuper 503.

South Carolina. Willoughby v. Northeastern R. Co., 52 SC 166, 29 SE 629; Best v. Barnwell County, 114 SC 123, 103 SE 479; Murrell v. Charleston & W. C. R. Co., 115 SC 228, 105 SE 350; Pinson v. Bowles, 115 SC 47, 106 SE 775; Crawford v. Davis, 136 SC 95, 134 SE 247; Garrett Engineering Co. v. Auburn Foundry, 176 SC 59, 179 SE 693.

Tennessee. Provident Life & Acc. Ins. Co. v. Prieto, 169 Tenn 124, 83 SW2d 251.

Texas. Atchison, T. & S. F. Ry. Co. v. Stevens (TexCivApp), 192 SW 304; Bain Peanut Co. v. Pinson v. Texas & N. O. Ry. Co. (Tex son (TexCivApp), 287 SW 87; PearComApp), 238 SW 1108.

Utah. Cromeenes v. San Pedro, L. A. & S. L. R. Co., 37 Utah 475, 109 P 10, AnnCas 1912C, 307.

Vermont. State v. Bolton, 92 Vt 157, 102 A 489; Tetreault v. Campbell, 115 Vt 369, 61 A2d 591.

Virginia. Virginia Portland Cement Co. v. Luck's Admr., 103 Va 427, 49 SE 577; Chesapeake & O. Ry. Co. v. McCarthy, 114 Va 181, 76 SE 319; Levine v. Levine, 144 Va 330, 132 SE 320; Adamson's Admr. v. Norfolk & P. Trac. Co., 111 Va 556, 69 SE 1055.

Washington. Bell v. Spokane, 30 Wash 508, 71 P 31; Morran v. Chicago, M. & P. S. Ry. Co., 70 Wash 114, 126 P 73; Isitt v. Seattle, 140 Wash 161, 248 P 379; White v. Rigg, 143 Wash 46, 254 P 459; Frazee v. Western Dairy Products, 182 Wash 578, 47 P2d 1037; Ballard v. Yellow Cab Co., 20 Wash2d 67, 145 P2d 1019.

West Virginia. Howes v. Baltimore & O. R. Co., 77 WVa 362, 87

Not only must a single instruction be considered with other instructions, but a part of an instruction must be considered in context.[10] The rule applies to special verdict instructions as well as general verdict instructions.[11] So also does the rule apply to an instruction given by the court in answer to the question of a juror.[12]

The charge is to be construed as a whole where it is claimed that a particular instruction assumes facts,[13] or is misleading,[14]

SE 456; Truman v. Wink-O Products Co., 96 WVa 256, 122 SE 745.

Wisconsin. Karshian v. Milwaukee Elec. Ry. & Light Co., 192 Wis 269, 212 NW 643.

Wyoming. Wood v. Wood, 25 Wyo 26, 164 P 844.

[10] Roberts v. Carlson, 142 Neb 851, 8 NW2d 175.

[11] Reynolds v. Wargus, 240 Wis 94, 2 NW2d 842; Fischer v. Harmony Town Ins. Co., 249 Wis 438, 24 NW2d 887.

[12] McLellan v. Fuller, 226 Mass 374, 115 NE 481.

[13] **Alabama.** Birmingham Ry., Light & Power Co. v. Moore, 163 Ala 43, 50 S 115.

California. Drinkhouse v. Van Ness, 202 Cal 359, 260 P 869; Marston v. Pickwick Stages, 78 Cal App 526, 248 P 930.

Missouri. Grubbs v. Kansas City Public Service Co. (MoApp), 30 SW2d 441.

An instruction may properly assume facts properly hypothesized in an earlier instruction in the trial. Williams v. St. Louis Public Service Co., 335 Mo 335, 73 SW2d 199.

Oklahoma. Chicago, R. I. & P. Ry. Co. v. Kahl, 168 Okl 578, 35 P2d 731.

[14] **Alabama.** Little Cahaba Coal Co. v. Arnold, 206 Ala 598, 91 S 586.

California. Hoy v. Tornich, 199 Cal 545, 250 P 565.

A misleading special instruction cannot be cured by the general charge. Nickell v. Rosenfield, 82 CalApp 369, 255 P 760.

Idaho. Just v. Idaho Canal & Imp. Co., 16 Idaho 639, 102 P 381, 133 AmSt 140; Taylor v. Lytole, 29 Idaho 546, 160 P 942; Kelly v. Lemhi Irr. & Orchard Co., 30 Idaho 778, 168 P 1076.

Illinois. Wilkinson v. Service, 249 Ill 146, 94 NE 50, AnnCas 1912A, 41; Donovan v. St. Joseph's Home, 295 Ill 125, 129 NE 1.

Indiana. The jury was not misled by use of word "per se" in one intimation. Indianapolis Trac. & Terminal Co. v. Thornburg, 74 Ind App 642, 125 NE 57.

Iowa. In re Workman's Estate, 174 Ia 222, 156 NW 438.

Massachusetts. Forra v. Hume, 289 Mass 266, 194 NE 301.

Missouri. Cape Girardeau v. Hunze, 314 Mo 438, 284 SW 471, 47 ALR 25 (instruction on measure of damages); Warsham v. Lewis (MoApp), 281 SW 82.

Nebraska. Armstrong v. Auburn, 84 Neb 842, 122 NW 43.

Ohio. Unintentional expression in charge to jury that if the person himself contributes to his own injury the "defendant" is liable, was held not misleading. Tynroka v. Haydu, 3 OLA 151.

Oklahoma. First State Bank v. Dickerson, 119 Okl 103, 245 P 54; Dalton v. Bilbo, 126 Okl 139, 258 P 274.

But if two instructions contain inconsistent propositions confusing to the jury, the error will require reversal. Champlin Ref. Co. v. Puckett, 118 Okl 300, 248 P 610.

Pennsylvania. Nusbaum v. Hartford Fire Ins. Co., 285 Pa 332, 132 A 177 (charge on measure of damages).

Washington. St. John v. Cascade Lbr. & Shingle Co., 53 Wash 193, 101 P 833; Farley v. Fidelity Rent

or is abstract,[15] or is indefinite or vague,[16] or is confusing,[17] or is an expression of opinion.[18]

It is not necessary that each instruction cover all the issues,[19] so the omissions of one may be supplied in another given by the court in the main charge,[20] or in an instruction given at the in-

& Collection Co., 137 Wash 485, 242 P 1097; Hamm v. Seattle, 140 Wash 427, 249 P 778.

[15] Virginia Ry. & Power Co. v. Hill, 120 Va 397, 91 SE 194.

[16] Georgia. Barnett v. Strain, 151 Ga 553, 107 SE 530; Satterfield v. Medlin, 161 Ga 269, 130 SE 822.

Ohio. Goebel v. Hummel, 21 Oh App 486, 153 NE 223.

Washington. Ahlman v. Wilson, 102 Wash 677, 174 P 970.

[17] Alabama. Pryor v. Limestone County, 230 Ala 295, 160 S 700.

Georgia. Western & A. R. Co. v. Jarrett, 22 GaApp 313, 96 SE 17.

Missouri. Sitts v. Daniel (MoApp), 284 SW 857.

[18] Georgia. Hines v. Hendricks, 25 GaApp 682, 104 SE 520.

Kentucky. Frye's Exr. v. Bennett, 189 Ky 546, 225 SW 499.

Massachusetts. Comstock v. Biltmore Amusement Co., 227 Mass 146, 116 NE 531.

Mississippi. Hattiesburg ex rel. Coston v. Beverly, 123 Miss 759, 86 S 590.

North Carolina. Brown v. Kinston Mfg. Co., 175 NC 201, 95 SE 168.

[19] Arizona. Perazzo v. Ortega, 29 Ariz 334, 241 P 518.

California. Anderson v. Pickens, 118 CalApp 212, 4 P2d 794; Beni v. Abrons, 130 CalApp 206, 19 P2d 523.

Florida. Pensacola Elec. Co. v. Bissett, 59 Fla 360, 52 S 367.

Georgia. Hilton & Dodge Lbr. Co. v. Ingram, 135 Ga 696, 70 SE 234.

Where an instruction is sound within itself, it is not made defective by the fact that the court failed in immediate connection therewith to charge some other principle or rule of law. Southern Ry. Co. v. Williams, 139 Ga 357, 77 SE 153.

Illinois. Minnis v. Friend, 360 Ill 328, 196 NE 191.

Indiana. Grand Trunk Western Ry. Co. v. Poole, 175 Ind 567, 93 NE 26; American Maize Products Co. v. Widiger, 186 Ind 227, 114 NE 457.

Kansas. Gillies v. Linscott, 98 Kan 78, 157 P 423.

Missouri. Royle Min. Co. v. Fidelity & Casualty Co., 161 MoApp 185, 142 SW 438.

Montana. Reynolds v. Trbovich, Inc., 123 Mont 224, 210 P2d 634.

Nebraska. Lord v. Roberts, 102 Neb 49, 165 NW 892.

New Jersey. Johnson v. Central R. Co., 111 NJL 93, 166 A 180.

Oklahoma. St. Louis & S. F. R. Co. v. Akard, 60 Okl 4, 159 P 344; Chicago, R. I. & P. Ry. Co. v. Johnson, 71 Okl 118, 175 P 494; Lazzell v. Harvey, 174 Okl 86, 49 P2d 519.

[20] California. An instruction which does not direct a verdict is not objectionable for omitting the law relative to some element if such omission is supplied by other instructions. Winslow v. Glendale Light & Power Co., 12 CalApp 530, 107 P 1020.

Illinois. Moore v. Aurora, E. & C. R. Co., 246 Ill 56, 92 NE 573; McFarlane v. Chicago City Ry. Co., 288 Ill 476, 123 NE 638; Coolahan v. Marshall Field & Co., 159 IllApp 466; Tindall v. Chicago & N. W. R. Co., 200 IllApp 556; Leeper v. Gay, 253 IllApp 176; Howard v. Rockford, 270 IllApp 155.

The omission of an instruction may be cured by the contents of other instructions given, if the instruction subject to criticism does not assume to direct a verdict. Dukeman v. Cleveland, C., C. & St. L. Ry. Co., 142 IllApp 622.

Indiana. Angola Ry. & Power Co. v. Butz, 52 IndApp 420, 98 NE 818.

stance of the opposite party.[21] Another way of stating the same rule is that where the instructions as a whole properly apply the law, it is not demanded that each instruction shall repeat the proposition.[22] Or the fact that an instruction does not embody limitations on a general doctrine charged therein is immaterial

An explanatory instruction was construed with the instruction sought to be explained. Lake Erie & W. R. Co. v. Douglas, 71 IndApp 567, 125 NE 474.

Kansas. Hunter v. Greer, 137 Kan 772, 22 P2d 489.

Mississippi. Yazoo & M. V. R. Co. v. Kelly, 98 Miss 367, 53 S 779.

Montana. Brockway v. Blair, 53 Mont 531, 165 P 455.

North Carolina. Marriner v. Mizzelle, 207 NC 34, 175 SE 711.

Ohio. A charge will be considered as a whole in order to determine whether any part of it is erroneous, and if erroneous, whether it is prejudicial. When a statement might mislead the jury if considered alone, but not if considered as a whole, there is no prejudicial error. The fact that a part of the charge does not state the law completely does not constitute error where other parts of the charge correctly state the law. Special charges given before argument, together with general charge, constitute the charge of the court, and should be read and considered together. Industrial Comm. v. Boyles, 127 OhSt 20, 186 NE 619; Cohen v. Smith, 26 OhApp 32, 159 NE 329; Louisville & N. R. Co. v. Greene, 26 OhApp 392, 160 NE 495; Hess v. Avon Constr. Co., 34 OhApp 327, 171 NE 318; Dayton Biscuit Co. v. Aerni, 40 OhApp 49, 177 NE 775, 34 OLR 346; Alloy Cast Steel Co. v. Arthur, 40 OhApp 503, 179 NE 743, 11 OLA 147; Clark Restaurant Co. v. Rau, 41 OhApp 23, 179 NE 196, 35 OLR 318; Schomer v. State ex rel. Bettman, 47 OhApp 84, 190 NE 638; Morgan Engineering Co. v. Bowser, 32 OLR 322; Evans v. Bruggeman, 7 OLA 536; Menk Bros. Wet Wash Co. v. McDonald, OLA; American Surety & Trust Co. v. White, 42 OhApp 272, 181 NE 918, 12 OLA 321.

An instruction that transactions between relatives "are always viewed with suspicion, and their testimony with regard to such transactions must be taken with allowance," where immediately followed by the statement that, if such testimony "is of such a nature as to carry conviction that said witnesses are telling the truth, then it is entitled to as much weight as that of any other witness" is without prejudice. Crawford v. Merrell, 5 OhApp 146, 25 OhCirCt (N. S.) 537, 27 OhCirDec 104.

Oklahoma. Nichlos v. Hanbury-Russell Supply Co., 168 Okl 371, 33 P2d 198.

Pennsylvania. Burns v. Pittsburgh Rys. Co., 109 PaSuper 490, 167 A 421.

Tennessee. Clinchfield R. Co. v. Harvey, 16 TennApp 324, 64 SW2d 513.

[21] Arkansas. Louisiana & N. W. R. Co. v. J. P. Machen & Co., 174 Ark 122, 294 SW 714.

Illinois. Moore v. Aurora, E. & C. R. Co., 246 Ill 56, 92 NE 573.

Missouri. Morrow v. Missouri Gas & Elec. Service Co., 315 Mo 367, 286 SW 106; Null v. Stewart (Mo), 78 SW2d 75; Roman v. Hendricks (MoApp), 80 SW2d 907; Lyons v. St. Joseph Belt Ry. Co. (MoApp), 84 SW2d 933.

[22] Arkansas. Clark County Bank v. Shaver, 184 Ark 1193, 42 SW2d 759.

Illinois. Mirkovich v. Maravich, 206 IllApp 463; Cyrulik v. Ritchey Coal Co., 215 IllApp 254; King v. Swanson, 216 IllApp 294.

Ohio. Where it was stated in a special charge, and repeated often in the general charge, that in order

where that matter is considered in other instructions.[23] So, the failure of an instruction on contributory negligence to cover the doctrine of last clear chance is not fatal where that doctrine is sufficiently covered by other instructions.[24]

If the instructions as a whole state the law correctly, an error in a single instruction will not ordinarily work a reversal.[25] Also,

to recover the plaintiff must prove that death was the direct result of the injury, omission of that condition in one place toward the end of the charge was immaterial. Cook v. Industrial Comm., 32 ONP (N. S.) 83.

[23] **Missouri.** It was not prejudicial error where an inapt definition of contributory negligence was followed by other instructions explaining what constituted contributory negligence. Bongner v. Zeigenhein, 165 MoApp 328, 147 SW 182.

South Carolina. The fact that an instruction on negligence did not refer to the issue of contributory negligence did not make it erroneous where a later instruction charged fully and correctly on contributory negligence. Clifford v. Southern Ry. Co., 87 SC 324, 69 SE 513.

Washington. Edwards v. Seattle, R. & S. Ry. Co., 62 Wash 77, 113 P 563.

[24] **California.** Stein v. United Railroads, 159 Cal 368, 113 P 663.

Indiana. Public Utilities Co. v. Walden, 69 IndApp 623, 122 NE 591.

Ohio. Cincinnati Trac. Co. v. Schmidt, 22 OhApp 413, 153 NE 274.

Washington. O'Connell v. Home Oil Co., 180 Wash 461, 40 P2d 991.

[25] **California.** Klenzendorf v. Shasta Union High School Dist., 4 CalApp2d 164, 40 P2d 878; Carrillo v. Helms Bakeries, Ltd., 6 CalApp2d 299, 44 P2d 604.

Connecticut. Tappin v. Rider Dairy Co., 119 Conn 591, 178 A 428.

Idaho. Hayhurst v. Boyd Hosp., 43 Idaho 661, 254 P 528.

Illinois. Aldridge v. Morris, 337 IllApp 369, 86 NE2d 143.

Indiana. Pennsylvania R. Co. v. Welsh, 93 IndApp 404, 178 NE 4, den. reh. of 174 NE 821; Livingston v. Rice, 96 IndApp 176, 184 NE 583; Curnick v. Torbert, 101 IndApp 113, 194 NE 771.

Iowa. Kerr v. Tysseling (Ia), 239 NW 233.

Kentucky. Murphey's Exrx. v. Clinkinger, 244 Ky 336, 50 SW2d 942.

Minnesota. Ward v. Bandel, 181 Minn 32, 231 NW 244.

Mississippi. Durrett v. Mississippian Ry. Co., 171 Miss 899, 158 S 776.

Missouri. Jenkins v. Missouri State Life Ins. Co., 334 Mo 941, 69 SW2d 666; Ivey v. Hanson, 226 MoApp 38, 41 SW2d 840 (instruction held erroneous and not cured by other instructions).

Nebraska. Wright v. Lincoln City Lines, 163 Neb 679, 81 NW2d 170.

New Jersey. Lyon v. Fabricant, 113 NJL 62, 172 A 567, affg. 12 NJMisc 39, 169 A 548; Poling v. Melee, 115 NJL 191, 178 A 737.

North Carolina. Fleming v. Charlotte Elec. Ry. Co., 193 NC 262, 136 SE 723.

Ohio. Dayton Biscuit Co. v. Aerni, 40 OhApp 49, 177 NE 775, 34 OLR 346; Flynn v. Sharon Steel Corp., 142 OhSt 145, 26 OhO 343, 50 NE2d 319.

Oklahoma. Tradesmens Nat. Bank v. Harris, 145 Okl 54, 291 P 38; Grayson v. Brown, 166 Okl 43, 26 P2d 204; Skaggs v. Gypsy Oil Co., 169 Okl 209, 36 P2d 865; Oil Reclaiming Co. v. Reagin, 169 Okl 505, 37 P2d 289; Champlin Ref. Co. v. Brooks, 172 Okl 124, 42 P2d 811; Atchison, T. & S. F. Ry. Co. v. Wood & Co., 171 Okl 510, 43 P2d 727; Johnson v. Short, 204 Okl 656, 232 P2d 944.

Oregon. United States Nat. Bank v. Miller, 119 Or 682, 250 P 1098.

verbal defects and inaccuracies will be disregarded where the instructions as a whole clearly present the issues.[26]

Instructions presenting opposing theories of the parties should be read together to determine the sufficiency of either.[27]

As will appear in following sections,[28] the rule that instructions must be considered as a whole is not applied to cure error by conflicting instructions.

§ 137. Construction of charge as an entirety in criminal cases.

The rule that a charge is construed as an entirety applies with full force to instructions in criminal cases.

The charge must be viewed as a whole and each clause or instruction must be considered in connection with others. If when taken together they properly express the law applicable, no ground of complaint exists, though a single clause or instruction is inaccurate or incomplete.[29]

Pennsylvania. Robinson v. Philadelphia Transp. Co., 347 Pa 288, 32 A2d 26.

South Carolina. Crouch v. Cudd, 158 SC 1, 155 SE 136.

West Virginia. Shumaker v. Thomas, 108 WVa 204, 151 SE 178.

[26] **Arkansas.** Russ v. Strickland, 144 Ark 642, 220 SW 451.

Connecticut. Adams v. Pierce, 94 Conn 613, 110 A 50 (use of plaintiff for defendant); Harris v. Schuerer, 106 Conn 506, 138 A 442.

Georgia. Rogers, Cassels & Fleming v. Bennett, 19 GaApp 520, 91 SE 917.

Illinois. McConnell v. Chicago Rys. Co., 199 IllApp 490; Wilson v. Chicago Heights Terminal Transfer R. Co., 212 IllApp 271 (mistake in date).

Iowa. In re Champion's Estate, 190 Ia 451, 180 NW 174 (use of "agreement" for "argument").

Missouri. Anderson v. Voeltz (Mo App), 206 SW 584; Granneman v. Commercial Auto Body Co. (Mo App), 296 SW 437; Roman v. Hendricks (MoApp), 80 SW2d 907.

Nebraska. Kocar v. Whelan, 102 Neb 503, 167 NW 775.

Ohio. Piqua v. Morris, 98 OhSt 42, 120 NE 300, 7 ALR 129 (failure to define technical term).

A judgment based upon the finding of a jury, supported by evidence, will not be disturbed for technical errors in the charge of the court, where it appears from the entire record that substantial justice has been rendered under all the circumstances. Kronenberg v. Whale, 21 OhApp 322, 153 NE 302.

The criterion as to whether an instruction is correct is the fair meaning of the language used. Cincinnati Street Ry. Co. v. Henkel, 38 OhApp 243, 176 NE 101, 34 OLR 495.

A verbal slip in one part of the general charge is not ground on which to base error where the charge as a whole fairly and accurately states the proposition of law relied upon by the complaining party. Doepker v. Harding, 17 OLA 399.

[27] White Swan Laundry v. Boyd, 212 Ky 747, 279 SW 345; Bowling Green v. Knight, 216 Ky 838, 288 SW 741; Rosenberg v. Turner, 124 Va 769, 98 SE 763.

[28] See §§ 138, 139, *infra*.

[29] **Federal.** Boyd v. United States, 271 US 104, 70 LEd 857, 46 SupCt 442, affg. 4 F2d 1014; Walsh v. United States, 98 CCA 461, 174 F 615; Stout v. United States, 142

CCA 323, 227 F 799; Le More v. United States, 165 CCA 367, 253 F 887; Degnan v. United States, 271 F 291; Johnson v. United States, 59 F2d 42; Morrissey v. United States, 67 F2d 267; Clark v. United States, 69 F2d 258; Mansfield v. United States, 76 F2d 224.

Alabama. Hope v. State, 21 Ala App 491, 109 S 521; McMurphy v. State, 4 AlaApp 20, 58 S 748.

Arizona. Faltin v. State, 17 Ariz 278, 151 P 952; Hann v. State, 30 Ariz 366, 247 P 129; Maseeh v. State, 46 Ariz 94, 47 P2d 423.

Arkansas. Reed v. State, 102 Ark 525, 145 SW 206; Guerin v. State, 150 Ark 295, 234 SW 26.

California. People v. Akey, 163 Cal 54, 124 P 718; People v. Fowler, 178 Cal 657, 174 P 892; People v. Watts, 198 Cal 776, 247 P 884; People v. Sprague, 52 CalApp 363, 198 P 820; People v. Johnson, 57 Cal App 271, 207 P 257; People v. Maggio, 140 CalApp 246, 35 P2d 369.

Connecticut. State v. Cabaudo, 83 Conn 160, 76 A 42; State v. Tobin, 90 Conn 58, 96 A 312; State v. Perretta, 93 Conn 328, 105 A 690.

Florida. Padgett v. State, 64 Fla 389, 59 S 946, AnnCas 1914B, 897; Mathis v. State, 70 Fla 194, 69 S 697; Ward v. State, 75 Fla 756, 79 S 699; Butler v. State, 94 Fla 163, 113 S 699.

Georgia. Helms v. State, 138 Ga 826, 76 SE 353; Moore v. State, 28 GaApp 553, 112 SE 155; Dudley v. State, 28 GaApp 711, 113 SE 24; Williams v. State, 29 GaApp 46, 113 SE 22.

Idaho. State v. Curtis, 29 Idaho 724, 161 P 578; Brayman v. Russell & Pugh Lbr. Co., 31 Idaho 140, 169 P 932; State v. Jurko, 42 Idaho 319, 245 P 685.

Illinois. People v. Strauch, 247 Ill 220, 93 NE 126; People v. Foster, 288 Ill 371, 123 NE 534; People v. Laures, 289 Ill 490, 124 NE 585; People v. Schwartz, 298 Ill 218, 131 NE 806; People v. Mundro, 326 Ill 324, 157 NE 167; People v. Hartwell, 341 Ill 155, 173 NE 112; People v. Marsh, 403 Ill 81, 85 NE2d 715.

Indiana. Welty v. State, 180 Ind 411, 100 NE 73; Brewster v. State, 186 Ind 369, 115 NE 54; Koehler v. State, 188 Ind 387, 123 NE 111; Gielow v. State, 198 Ind 248, 153 NE 409; Anderson v. State, 205 Ind 607, 186 NE 316; Southerland v. State, 209 Ind 308, 197 NE 841; Peltz v. State, 232 Ind 518, 112 NE 2d 853.

Iowa. State v. Bell, 146 Ia 617, 125 NW 652; State v. Graves, 192 Ia 623, 185 NW 78; State v. Gibson, 204 Ia 1306, 214 NW 743.

Kansas. Zuspann v. Roy, 102 Kan 188, 170 P 387; State v. Ewing, 103 Kan 399, 173 P 927.

Kentucky. Smith v. Commonwealth, 148 Ky 60, 146 SW 4; Borderland Coal Co. v. Miller, 179 Ky 769, 201 SW 299; McGehee v. Commonwealth, 181 Ky 422, 205 SW 577; Brock v. Commonwealth, 221 Ky 424, 298 SW 1087.

Maine. State v. Sanborn, 120 Me 170, 113 A 54.

Michigan. People v. Sharac, 209 Mich 249, 176 NW 431; People v. Depew, 215 Mich 317, 183 NW 750.

Mississippi. Williams v. State, 95 Miss 671, 49 S 513; Carter v. State, 169 Miss 285, 152 S 876.

Missouri. State v. Hall, 228 Mo 456, 128 SW 745; State v. Burgess (Mo), 193 SW 821; State v. Arnett (Mo), 210 SW 82; State v. Reppley, 278 Mo 333, 213 SW 477; State v. Caldwell (Mo), 231 SW 613; State v. Robinett, 312 Mo 635, 281 SW 29; Rappaport v. Roberts (MoApp), 203 SW 676.

Montana. State v. Van, 44 Mont 374, 120 P 479; State v. Smith, 57 Mont 563, 190 P 107; State v. Colbert, 58 Mont 584, 194 P 145.

Nebraska. Boche v. State, 84 Neb 845, 122 NW 72; Samuels v. State, 101 Neb 383, 163 NW 312; Mauzy v. State, 103 Neb 775, 174 NW 325; Browne v. State, 115 Neb 225, 212 NW 426.

New Jersey. State v. Timmerari, 96 NJL 442, 115 A 394; State v. Martin, 102 NJL 388, 132 A 93; State v. Di Dolce, 109 NJL 233, 160

Inartificiality of expression or slight mere inaccuracy in some of the language will be disregarded where it is virtually corrected by the general import of the entire charge.[30]

A 516; State v. Peterson, 10 NJ 155, 89 A2d 680.

New York. People v. Sanducci, 195 NY 361, 88 NE 385.

North Carolina. State v. Fowler, 151 NC 731, 66 SE 567; State v. Wentz, 176 NC 745, 97 SE 420; State v. Jones, 182 NC 781, 108 SE 376; State v. Baldwin, 183 NC 682, 112 SE 419; State v. Brinkley, 183 NC 720, 110 SE 783; State v. Sheffield, 183 NC 783, 111 SE 617.

North Dakota. State v. Finlayson, 22 ND 233, 133 NW 298; State v. Berenson, 65 ND 480, 260 NW 256.

Ohio. Eckels v. State, 20 OhSt 508; Graham v. State, 98 OhSt 77, 120 NE 232, 18 ALR 1272; State v. Karayians, 108 OhSt 505, 141 NE 334.

If from the entire charge it appears that a correct statement of the law was given, so that the jury could not have been misled, there is no prejudicial error. Schomer v. State ex rel. Bettman, 47 OhApp 84, 190 NE 638.

A jury is not likely to have been misled by omission in one place in the charge of the words "prima facie," where the court used these words in the proper relation several times. Deibel v. State, 30 OLR 378.

Oklahoma. Rogers v. State, 15 OklCr 434, 183 P 41; January v. State, 16 OklCr 166, 181 P 514; Sherman v. State, 19 OklCr 269, 200 P 262; Wilkie v. State, 33 OklCr 225, 242 P 1057; Tritthart v. State, 35 OklCr 41, 247 P 1111; Campion v. State, 56 OklCr 49, 33 P2d 511.

Oregon. State v. Hinton, 56 Or 428, 109 P 24; State v. Rosasco, 103 Or 343, 205 P 290.

Pennsylvania. Commonwealth v. Legins, 285 Pa 97, 131 A 667.

The court is not bound to repeat legal principles every time he takes up a new phase, but charge will be sustained if, when interpreted as a whole, it is a correct and an impartial presentation of case. Commonwealth v. Webb, 252 Pa 187, 97 A 189.

South Carolina. State v. Jones, 90 SC 290, 73 SE 177; State v. Kilgore, 105 SC 261, 89 SE 668; State v. Burton, 111 SC 526, 98 SE 856; State v. Randall, 118 SC 158, 110 SE 123.

South Dakota. State v. Sonnenschein, 37 SD 585, 159 NW 101.

Texas. Pinson v. State, 68 TexCr 311, 151 SW 556; Arensman v. State, 79 TexCr 546, 187 SW 471; Anderson v. State, 86 TexCr 207, 217 SW 390; Johnson v. State, 86 TexCr 276, 216 SW 192; Stroud v. State, 127 TexCr 486, 77 SW2d 237; McCann v. State, 129 TexCr 105, 83 SW2d 967.

Utah. State v. Cerar, 60 Utah 208, 207 P 597.

Vermont. State v. Orlandi, 106 Vt 165, 170 A 908.

Virginia. Wright v. Commonwealth, 109 Va 847, 65 SE 19; Stapleton v. Commonwealth, 123 Va 825, 96 SE 801.

Washington. State v. Wappenstein, 67 Wash 502, 121 P 989; State v. Rappaport, 136 Wash 603, 241 P 4.

West Virginia. State v. Driver, 88 WVa 479, 107 SE 189, 15 ALR 917; State v. Long, 88 WVa 669, 108 SE 279; State v. Kincaid, 104 WVa 396, 140 SE 338.

Wisconsin. Eckman v. State, 191 Wis 63, 209 NW 715.

Wyoming. Loy v. State, 26 Wyo 381, 185 P 796; Flanders v. State, 24 Wyo 81, 156 P 39, 1121.

[30] **Federal.** Hargreaves v. United States, 75 F2d 68.

Arkansas. Lindsey v. State, 151 Ark 227, 235 SW 782 ("sale" instead of "purchase" of intoxicants).

Georgia. Thomas v. State, 27 Ga App 38, 107 SE 418.

Illinois. People v. Savant, 301 Ill 225, 133 NE 775.

The rule is applied in cases where the contention is that the instruction is misleading,[31] or confusing,[32] or is abstract.[33] So, the instruction is construed as a whole where the claim is that the province of the jury is invaded,[34] as by an instruction expressive of an opinion by the court,[35] or is argumentative,[36] or assumes facts,[37] or is upon the weight of the evidence,[38] or

New Jersey. State v. Timmerari, 96 NJL 442, 115 A 394.

New York. People v. Russell, 266 NY 147, 194 NE 65.

North Carolina. State v. Robinson, 181 NC 516, 106 SE 155.

Oklahoma. Murnand v. State, 18 OklCr 426, 195 P 787; McCarty v. State, 21 OklCr 365, 207 P 1069; Thompson v. State, 53 OklCr 342, 11 P2d 772.

Pennsylvania. Commonwealth v. Carney, 74 PaSuper 262.

Texas. McBride v. State, 121 Tex Cr 409, 51 SW2d 385.

Washington. State v. Emonds, 107 Wash 688, 182 P 584.

West Virginia. State v. Galford, 87 WVa 358, 105 SE 237.

[31] Federal. Pomerantz v. United States, 51 F2d 911.

California. People v. Swan, 188 Cal 759, 207 P 386; People v. Wyett, 49 CalApp 289, 193 P 153.

Georgia. Phillips v. State, 149 Ga 255, 99 SE 874.

Indiana. Kocher v. State, 189 Ind 578, 127 NE 3; Cox v. State, 207 Ind 553, 194 NE 149.

Iowa. State v. Howard, 191 Ia 728, 183 NW 482.

Missouri. State v. Cain (MoApp), 31 SW2d 559.

Nebraska. McIntosh v. State, 105 Neb 328, 180 NW 573, 12 ALR 798.

New York. People v. Trimarchi, 231 NY 263, 131 NE 910.

Oregon. State v. Turnbow, 99 Or 270, 193 P 485, 195 P 569.

South Carolina. Sandel v. State, 115 SC 168, 104 SE 567, 13 ALR 1268.

Texas. Davis v. State, 77 TexCr 598, 179 SW 702.

Washington. State v. Sowders, 109 Wash 10, 186 P 260.

[32] Underwood v. State, 146 Ga 137, 90 SE 861; Hawkins v. State, 16 OklCr 382, 186 P 490.

[33] Arkansas. Bird v. State, 154 Ark 297, 242 SW 71.

Florida. Barton v. State, 72 Fla 408, 73 S 230.

Iowa. State v. Pelser, 182 Ia 1, 163 NW 600.

[34] Arkansas. Camp v. State, 144 Ark 641, 215 SW 170; Markham v. State, 149 Ark 507, 233 SW 676.

California. People v. Wolff, 182 Cal 728, 190 P 22; People v. Gibson, 39 CalApp 202, 178 P 338.

Connecticut. State v. Thomas, 105 Conn 757, 136 A 475.

Michigan. People v. Lintz, 203 Mich 683, 169 NW 918.

Pennsylvania. Commonwealth v. Bishop, 285 Pa 49, 131 A 657; Commonwealth v. Winter, 289 Pa 284, 137 A 261.

[35] Federal. Shea v. United States, 163 CCA 458, 251 F 440.

California. People v. Zarate, 54 CalApp 372, 201 P 955 (confessions).

Georgia. Towns v. State, 149 Ga 613, 101 SE 678; Wilson v. State, 152 Ga 337, 110 SE 8; Weldon v. State, 21 GaApp 330, 94 SE 326; Washington v. State, 24 GaApp 65, 100 SE 31; Lamb v. McAfee, 26 Ga App 3, 105 SE 250; Smith v. State, 28 GaApp 125, 110 SE 752.

[36] Arkansas. Nick v. State, 144 Ark 641, 215 SW 899.

Connecticut. State v. Reynolds, 95 Conn 186, 110 A 844.

Georgia. Cox v. State, 17 GaApp 727, 88 SE 214.

[37] State v. Daems, 97 Mont 486, 37 P2d 322; State v. Mueller, 40 ND 35, 168 NW 66.

[38] California. People v. Chiappari, 81 CalApp 207, 253 P 338.

Illinois. People v. Sepich, 237 Ill App 178.

which singles out and gives emphasis to the testimony of a particular witness.[39]

The rule is properly invoked for erroneous or insufficient instructions on the following matters: reasonable doubt;[40] recent possession of stolen property;[41] rules of evidence as to presumptions and burden of proof;[42] weight of evidence as to character and reputation;[43] testimony of experts,[44] accom-

Michigan. People v. Quigley, 217 Mich 213, 185 NW 787.

New Jersey. State v. Merra, 103 NJL 361, 137 A 575.

North Dakota. State v. Severin, 58 ND 792, 228 NW 199.

Pennsylvania. Commonwealth v. Martin, 98 PaSuper 13.

South Carolina. State v. Cooper, 118 SC 300, 110 SE 152.

[39] McKinney v. State, 140 Ark 529, 215 SW 723; State v. Rini, 151 La 163, 91 S 664.

[40] **Federal.** Shea v. United States, 163 CCA 451, 251 F 433; Sotello v. United States, 168 CCA 67, 256 F 721.

Alabama. Brown v. State, 15 Ala App 611, 74 S 733.

Georgia. Phillips v. State, 149 Ga 255, 99 SE 874; Ponder v. State, 18 GaApp 727, 90 SE 376; Walker v. State, 26 GaApp 70, 105 SE 717; Phillips v. State, 26 GaApp 263, 105 SE 823; Waddell v. State, 29 Ga App 33, 113 SE 94.

Indiana. Scherer v. State, 188 Ind 14, 121 NE 369; Campbell v. State, 197 Ind 112, 149 NE 903.

Michigan. People v. Williams, 208 Mich 586, 175 NW 187; People v. Maglich, 234 Mich 88, 207 NW 865 (where the court told the jury that "reasonable doubt" was not intended as a stumbling block for the jury).

Mississippi. Hall v. State, 128 Miss 641, 91 S 397.

North Carolina. State v. Bailey, 179 NC 724, 102 SE 406; State v. Walker, 193 NC 489, 137 SE 429.

Oregon. State v. Morris, 83 Or 429, 163 P 567.

South Carolina. State v. Cooper, 118 SC 300, 110 SE 152; State v. Sharpe, 138 SC 58, 135 SE 635.

Texas. Allen v. State, 122 TexCr 159, 54 SW2d 519.

Utah. State v. Green, 86 Utah 192, 40 P2d 961.

Virginia. McCoy v. Commonwealth, 133 Va 731, 112 SE 704.

Washington. State v. Lance, 94 Wash 484, 162 P 574.

[41] **Alabama.** Driver v. State, 18 AlaApp 261, 89 S 897; Gilbreath v. State, 23 AlaApp 579, 129 S 312.

California. People v. Stennett, 51 CalApp 370, 197 P 372; People v. Mackey, 58 CalApp 123, 208 P 135.

Kansas. State v. Badgley, 140 Kan 349, 37 P2d 16.

Minnesota. State v. Couplin, 146 Minn 189, 178 NW 486; State v. Jatal, 152 Minn 262, 188 NW 284.

North Carolina. State v. Jenkins, 182 NC 818, 108 SE 767.

South Dakota. State v. James, 39 SD 263, 164 NW 91.

Wisconsin. McGillis v. State, 177 Wis 522, 188 NW 597.

[42] **Federal.** Dell'Aira v. United States, 10 F2d 102.

Arkansas. Williams v. State, 149 Ark 601, 233 SW 776.

Florida. Blackwell v. State, 79 Fla 709, 86 S 224, 15 ALR 465.

Georgia. Robinson v. State, 18 Ga App 394, 89 SE 434 (presumption of innocence); Walker v. State, 26 Ga App 70, 105 SE 717.

Illinois. People v. Haensel, 293 Ill 33, 127 NE 181 (presumption of sanity).

Louisiana. State v. Rini, 151 La 163, 91 S 664.

Montana. State v. Colbert, 58 Mont 584, 194 P 145 (insanity).

New Jersey. State v. Tachin, 93 NJL 485, 108 A 318.

[43] Hood v. State, 18 AlaApp 287, 92 S 30; Commonwealth v. Ten-

plices,[45] detectives,[46] or interested parties;[47] the presumption from the flight of accused;[48] or definition of a "conspirator."[49]

The entire charge is to be consulted where a single instruction or part of an instruction insufficiently states or omits to state the elements of the offense,[50] or the defense of alibi[51] and self-defense.[52]

The rule of entirety in construction applies to cases in which the instructions are partly oral and partly written.[53]

broeck, 265 Pa 251, 108 A 635; Commonwealth v. De Palma, 268 Pa 25, 110 A 756.

[44] State v. Weagley, 286 Mo 677, 228 SW 817.

[45] Jelke v. United States, 166 CCA 434, 255 F 264; Levine v. United States, 79 F2d 364; State v. Martin (Mo), 56 SW2d 137.

[46] People v. Utter, 217 Mich 74, 185 NW 830.

[47] People v. Washburn, 54 CalApp 124, 201 P 335 (defendant); People v. Wassmus, 214 Mich 42, 182 NW 66.

[48] State v. Chin Borkey, 91 Or 606, 176 P 195.

[49] Commonwealth v. Perri, 97 Pa Super 78.

[50] **Arkansas.** Hines v. State, 140 Ark 13, 215 SW 735.

California. People v. Lathrop, 49 CalApp 63, 192 P 722.

Connecticut. State v. Reynolds, 95 Conn 186, 110 A 844.

Georgia. Carter v. State, 26 Ga App 253, 105 SE 652.

Kentucky. Long v. Commonwealth, 177 Ky 391, 197 SW 843; Copley v. Commonwealth, 184 Ky 185, 211 SW 558.

Nebraska. Francis v. State, 104 Neb 5, 175 NW 675.

New Jersey. State v. Unger, 93 NJL 50, 107 A 270.

North Carolina. State v. Taylor, 175 NC 833, 96 SE 22.

South Carolina. State v. Hanahan, 111 SC 58, 96 SE 667.

Washington. State v. Denby, 143 Wash 288, 255 P 141.

Wyoming. Loy v. State, 26 Wyo 381, 185 P 796.

[51] Long v. State, 170 Ark 1193, 278 SW 648; Horton v. State, 21 Ga App 120, 93 SE 1012; McDonald v. State, 21 GaApp 125, 94 SE 262.

[52] **Alabama.** Williams v. State, 26 AlaApp 531, 163 S 663, cert. den. in 163 S 667.

Arkansas. Branscum v. State, 134 Ark 66, 203 SW 13; Slaytor v. State, 141 Ark 11, 215 SW 886; Mallory v. State, 141 Ark 496, 217 SW 482; Fields v. State, 154 Ark 188, 241 SW 901.

Georgia. Rutland v. State, 28 Ga App 145, 110 SE 634.

Illinois. People v. Woodward, 337 Ill 493, 169 NE 321.

Kentucky. Decker v. Commonwealth, 195 Ky 64, 241 SW 817.

Louisiana. State v. Joiner, 161 La 518, 109 S 51.

Ohio. Koppe v. State, 21 OhApp 33, 153 NE 109.

Oklahoma. Smith v. State, 20 Okl Cr 301, 202 P 519.

Pennsylvania. Commonwealth v. Corsino, 261 Pa 593, 104 A 739.

South Carolina. State v. Gandy, 113 SC 147, 101 SE 644.

Texas. Goree v. State, 106 TexCr 528, 293 SW 827; Matthews v. State, 118 TexCr 468, 38 SW2d 815.

[53] Newsom v. State, 15 AlaApp 43, 72 S 579.

§ 138. Cure of erroneous instruction by correct instruction in civil cases.

A prejudicial instruction cannot be cured by a correct instruction which does not call the jury's attention to the prejudicial instruction.

While ambiguities or omissions in one instruction may sometimes be corrected in another instruction without confusing the jury, it is rare that positive error can be so corrected. A material error in an instruction, complete in itself, is not cured by a correct statement of law in another instruction, for the jury cannot know which instruction is correct and the court cannot know which instruction influenced the jury.[54] There is no presumption

[54] **Federal.** Schroble v. Lehigh Valley R. Co., 62 F2d 993; Shell Pipe Line Co. v. Robinson, 66 F2d 861.

Alabama. New York Life Ins. Co. v. Jenkins, 229 Ala 474, 158 S 309 (erroneously placing burden of proof).

Arizona. Instruction that damages must be based upon the evidence in the case did not cure the error in another instruction which authorized the allowance of damages for medical bills where there was no evidence to justify the allowance. Atchison, T. & S. F. Ry. Co. v. Gutierrez, 30 Ariz 491, 249 P 66.

Arkansas. St. Louis, I. M. & S. Ry. Co. v. Beecher, 65 Ark 64, 44 SW 715; St. Louis, I. M. & S. Ry. Co. v. Thompson-Hailey Co., 79 Ark 12, 94 SW 707; St. Louis, I. M. & S. Ry. Co. v. Woods, 96 Ark 311, 131 SW 869, 33 LRA (N. S.) 855; Hodge & Downey Constr. Co. v. Carson, 100 Ark 433, 140 SW 708; Oak Leaf Mill Co. v. Cooper, 103 Ark 79, 146 SW 130; Marianna Hotel Co. v. Livermore Foundry & Mach. Co., 107 Ark 245, 154 SW 952; Cloar v. Earle Compress Co., 150 Ark 419, 234 SW 272.

California. Miner v. Dabney-Johnson Oil Corp., 219 Cal 580, 28 P2d 23; Kalash v. Los Angeles Ladder Co., 1 Cal2d 229, 34 P2d 481; Mortensen v. Fairbanks, 1 Cal2d 489, 35 P2d 1030; Dameron v. Ansbro, 39 CalApp 289, 178 P 874; Gaster v. Hinkley, 85 CalApp 55, 258 P 988; Ward v. Read (CalApp), 16 P2d 799; Thompson v. Dentman, 131 CalApp 680, 21 P2d 1009; Maggini v. West Coast Life Ins. Co., 136 CalApp 472, 29 P2d 263.

Colorado. Alpha Realty & Rental Co. v. Randolph, 23 ColoApp 69, 127 P 245.

Georgia. Morris v. Warlick, 118 Ga 421, 45 SE 407; Central of Georgia Ry. Co. v. Deas, 22 GaApp 425, 96 SE 267; Meritas Mills v. Way, 23 GaApp 354, 98 SE 237; Southern Groc. Stores v. Cain, 50 GaApp 629, 179 SE 128.

Illinois. Pardridge v. Cutler, 168 Ill 504, 48 NE 125; Chicago & A. R. Co. v. Keegan, 185 Ill 70, 56 NE 1088; McDonald v. Chicago Rys. Co., 286 Ill 239, 121 NE 571; Herring v. Chicago & A. R. Co., 299 Ill 214, 132 NE 792; Hurzon v. Schmitz, 262 IllApp 337; Luke v. Marion, 271 IllApp 48.

Indiana. McCole v. Loehr, 79 Ind 430; Indiana Natural Gas & Oil Co. v. Vauble, 31 IndApp 370, 68 NE 195; Pittsburgh, C., C. & St. L. R. Co. v. Boughton, 81 IndApp 129, 142 NE 869.

Iowa. Ford v. Chicago, R. I. & P. Ry. Co., 106 Ia 85, 75 NW 650; Rudd v. Dewey, 121 Ia 454, 96 NW 973; Desmond v. Smith, 219 Ia 83, 257 NW 543.

Kansas. Pfeifer v. Basgall, 112 Kan 269, 211 P 134.

Kentucky. Chicago, M. & G. R.

Co. v. Stahr, 184 Ky 529, 212 SW 115; Stover v. Cincinnati, N. & C. Ry. Co., 252 Ky 425, 67 SW2d 484.

Massachusetts. Gray v. Kinnear, 290 Mass 31, 194 NE 817.

Minnesota. Poppe v. Bowler, 184 Minn 415, 238 NW 890.

Mississippi. Clegg v. Johnson, 164 Miss 198, 143 S 848; Russell v. Williams, 168 Miss 181, 150 S 528, 151 S 372; Columbus & G. R. Co. v. Coleman, 172 Miss 514, 160 S 277.

An erroneous instruction is not cured by other instructions embodying other facts and not modifying or explaining it. Godfrey v. Meridian Ry. & Light Co., 101 Miss 565, 58 S 534.

Missouri. McCoy v. Hill, 296 Mo 135, 246 SW 582; Macklin v. Fogel Constr. Co., 326 Mo 38, 31 SW2d 14; Dawes v. Starrett, 336 Mo 897, 82 SW2d 43; Herbert v. Mound City Boot & Shoe Co., 90 MoApp 305; Sands v. G. W. Marquardt & Sons, 113 MoApp 490, 87 SW 1011; Cordy v. Manufacturers' Coal & Coke Co., 151 MoApp 455, 132 SW 21; Pyburn v. Kansas City, 166 MoApp 150, 148 SW 193; Flintjer v. Kansas City (MoApp), 204 SW 951; Murdock v. Dunham (MoApp), 206 SW 915; Schaff v. Nelson (MoApp), 285 S 1036; Zeikle v. St. Paul & K. C. S. L. R. Co. (MoApp), 71 SW2d 154; Mott v. Chicago, R. I. & P. Ry. Co. (MoApp), 79 SW2d 1057 (erroneously placing burden of proof); State ex rel. State Highway Comm. v. Scheer (MoApp), 84 SW2d 641.

An instruction founded upon the humanitarian rule which permitted a recovery upon a ground of negligence not alleged was not cured by correct instruction for defendant. Arata v. Metropolitan Street Ry. Co., 167 MoApp 90, 150 SW 1122.

Montana. Smith v. Perham, 33 Mont 309, 83 P 492; Nagle v. Billings, 77 Mont 205, 250 P 445.

Nebraska. Missouri Pacific Ry. Co. v. Fox, 56 Neb 746, 77 NW 130; Standard Distilling & Distributing Co. v. Harris, 75 Neb 480, 106 NW 582; Koehn v. Hastings, 114 Neb 106, 206 NW 19; Wilch v. Western Asphalt Paving Corp., 124 Neb 177, 245 NW 605; Brooks v. Thayer County, 126 Neb 610, 254 NW 413.

New Jersey. State v. Tachin, 92 NJL 269, 106 A 145; Friel v. Wildwood Ocean Pier Corp., 129 NJL 376, 29 A2d 554.

Error in charging that burden of proof shifted where the doctrine of res ipsa loquitur applied was not obviated by another charge upon the subject correctly stating the rule. Nemecz v. Morrison & Sherman, 109 NJL 517, 162 A 622.

New Mexico. State v. Crosby, 26 NM 318, 191 P 1079.

North Carolina. Jones v. Life Ins. Co., 151 NC 54, 65 SE 602; Warren v. Armour Fertilizer Works, 191 NC 416. 131 SE 723.

Ohio. Pettibone v. McKinnon, 125 OhSt 605, 183 NE 786.

A misleading and incomplete special charge is not cured by the general charge. Krekeler v. Cincinnati Trac. Co., 16 OhApp 125.

An erroneous charge as to burden of proof in action for killing dogs was held not cured by correct instruction later. Smith v. Ward, 32 OhApp 177, 166 NE 396.

Oklahoma. Welge v. Thompson, 103 Okl 114, 229 P 271.

Oregon. Provo v. Spokane, P. & S. R. Co., 87 Or 467, 170 P 522; Anderson v. Columbia Contract Co., 94 Or 171, 184 P 240, 185 P 231, 7 ALR 653.

Pennsylvania. Fitzpatrick v. Union Trac. Co., 206 Pa 335, 55 A 1050; Commonwealth v. Divomte, 262 Pa 504, 105 A 821; Irwin Gas Coal Co. v. Logan Coal Co., 270 Pa 443, 113 A 667; Parish Mfg. Corp. v. Martin-Parry Corp., 285 Pa 131, 131 A 710.

South Carolina. Dickson v. Epps, 104 SC 381, 89 SE 354.

Tennessee. Citizens Street Ry. Co. v. Shepherd, 107 Tenn 444, 64 SW 710.

Texas. Missouri, K. & T. Ry. Co. v. Mills, 27 TexCivApp 245, 65 SW 74; Petty v. Jordan-Spencer Co. (TexCivApp), 135 SW 227; Baker v. Magee (TexCivApp), 136 SW 1161; Wilkinson v. Fralin (TexCivApp),

that the jury followed the correct instruction rather than a conflicting one that was erroneous.[55] In jurisdictions where oral instructions are permitted, an error in an oral charge is not cured by a statement of the correct rule in a written instruction.[56] The principle is especially plain in a case where the wrong rule is concretely applied to facts and the right rule abstractly stated.[57]

Although it is not necessarily prejudicially erroneous when there is a conflict between instructions,[58] most courts would hold that the only way an erroneous instruction can be cured by a correct one that accompanies it is to withdraw it from the jury's consideration.[59]

Illustrations of the application of the rule follow.

Generally. An instruction may be incurable for assuming facts in dispute.[60] The error of an instruction presenting a wrong

149 SW 548; Ft. Worth & R. G. Ry. Co. v. Bryson & Burns (TexCiv App), 195 SW 1165; St. Louis Southwestern Ry. Co. v. Roach-Manigan Paving Co. (TexCivApp), 209 SW 182; Texas & Pacific Ry. Co. v. Gibson (TexComApp), 288 SW 823, affg. 281 SW 652.

Utah. Sorenson v. Bell, 51 Utah 262, 170 P 72.

Vermont. Farmers Exch. v. Brown, 106 Vt 65, 169 A 906.

Virginia. Continental Casualty Co. v. Peltier, 104 Va 222, 51 SE 209; Washington-Southern Ry. Co. v. Grimes' Admr., 124 Va 460, 98 SE 30; Hines v. Beard, 130 Va 286, 107 SE 717; Gale v. Wilber, 163 Va 211, 175 SE 739; James v. Haymes, 163 Va 873, 178 SE 18.

West Virginia. Ward v. Ward, 47 WVa 766, 35 SE 873; Stuck v. Kanawha & M. Ry. Co., 78 WVa 490, 89 SE 280; Producers' Coal Co. v. Mifflin Coal Min. Co., 82 WVa 311, 95 SE 948; Liston v. Miller, 113 W Va 730, 169 SE 398.

Wisconsin. Eggett v. Allen, 106 Wis 633, 82 NW 556; Driscoll v. Allis-Chalmers Co., 144 Wis 451, 129 NW 401; Carle v. Nelson, 145 Wis 593, 130 NW 467.

Wyoming. Acme Cement Plaster Co. v. Westman, 20 Wyo 143, 122 P 89; McClintock v. Ayres, 36 Wyo 132, 253 P 658, 255 P 355.

[55] Hoover v. Haggard, 219 Ia 1232, 260 NW 540; Westropp v. E. W. Scripps Co., 148 OhSt 365, 35 OhO 341, 74 NE2d 340.

[56] Johnson v. Louisville & N. R. Co., 227 Ala 103, 148 S 822; Birmingham v. Latham, 230 Ala 601, 162 S 675.

[57] **Arkansas.** Natural Gas & Fuel Co. v. Lyles, 174 Ark 146, 294 SW 395 (omitting contributory negligence and assumption of risk).

Georgia. Pelham Mfg. Co. v. Powell, 6 GaApp 308, 64 SE 1116.

Kansas. Kastrup v. Yellow Cab & Baggage Co., 124 Kan 375, 260 P 635.

Missouri. Bentley v. Hurley, 222 MoApp 51, 299 SW 604.

Ohio. See also Stark v. Cress, 4 OhApp 92, 22 OhCirCt (N. S.) 88, 28 OhCirDec 442; Sablack v. Glenn, 58 OLA 348, 96 NE2d 417.

[58] **California.** Beckley v. Archer, 74 CalApp 598, 241 P 422.

Georgia. Neville v. National Life & Acc. Ins. Co., 36 GaApp 8, 135 SE 315.

Washington. Milne v. Seattle, 20 Wash2d 30, 145 P2d 888.

See also § 141, *infra.*

[59] Gary Rys., Inc. v. Chumcoff, 122 IndApp 139, 96 NE2d 685; Evans v. Evans, 121 IndApp 104, 96 NE2d 688; Cox v. Rosenvinge, 4 NJ Misc 949, 135 A 59; O'Donnell v. Kraut, 242 Wis 268, 7 NW2d 889.

See also cases in note 54, *supra.*

[60] **Alabama.** Louisville & N. R.

theory of an entire case is not cured by other instructions on the right theory.[61] Very clearly an incorrect instruction or an instruction omitting any essential element cannot be cured by another incorrect instruction.[62]

Matters of evidence. In one of the cases it is held that an instruction unduly emphasizing the evidence of one of the parties

Co. v. Rush, 22 AlaApp 195, 114 S 21.

California. Smith v. Hollander, 85 CalApp 535, 259 P 958.

Missouri. Boyer v. General Oil Products (MoApp), 78 SW2d 450.

[61] Flucks v. St. Louis, I. M. & S. Ry. Co., 143 MoApp 17, 122 SW 348. See State ex rel. State Highway Comm. v. Sharp (MoApp), 62 SW2d 928; Christner v. Chicago, R. I. & P. Ry. Co., 228 MoApp 220, 64 SW2d 752.

[62] **Alabama.** Johnson v. Louisville & N. R. Co., 220 Ala 649, 127 S 216.

Arkansas. Kelly Handle Co. v. Shanks, 146 Ark 208, 225 SW 302; Edgar Lbr. Co. v. Denton, 156 Ark 46, 245 SW 177; Herring v. Bollinger, 181 Ark 925, 29 SW2d 676.

California. Starr v. Los Angeles Ry. Corp., 187 Cal 270, 201 P 599; Dahms v. General Elev. Co. (Cal App), 1 P2d 446; White v. Davis, 103 CalApp 531, 284 P 1086 (contributory negligence); Dow v. Southern Pacific Co., 105 CalApp 378, 288 P 89 (eliminating question of speed of train at street crossing); Wessling v. Southern Pacific Co., 116 CalApp 447, 3 P2d 22 (statement that certain act of motorist was negligence); La Rue v. Powell, 5 CalApp2d 439, 42 P2d 1063.

Illinois. Garvey v. Chicago Rys. Co., 339 Ill 276, 171 NE 271; Dean v. Yelloway Pioneer System, 259 Ill App 180 (too high a degree of care required).

Indiana. Union City v. Fisher, 91 IndApp 672, 173 NE 330.

Kentucky. Gibraltar Coal Min. Co. v. Miller, 233 Ky 129, 25 SW2d 38 (duty of coal company to furnish reasonably safe place to work).

Maryland. Washington, B. & A. R. Co. v. State, 136 Md 103, 111 A 163.

Michigan. Karl v. New York Cent. R. Co., 262 Mich 457, 247 NW 715.

Mississippi. Ellis v. Ellis, 160 Miss 345, 134 S 150 (placing burden of proof on contestant to show that signature to will was forgery); Durrell v. Mississippian Ry. Co., 171 Miss 899, 158 S 776.

Missouri. State ex rel. Long v. Ellison, 272 Mo 571, 199 SW 984; Jenkins v. Missouri State Life Ins. Co., 334 Mo 941, 69 SW2d 666; McCombs v. Ellsberry, 357 Mo 491, 85 SW2d 135; McDonough v. Freund (MoApp), 39 SW2d 818 (that jury was not bound to believe expert testimony as against their own judgment); Trippennsee v. Schmidt (Mo App), 52 SW2d 197; La Font v. Bryant (MoApp), 60 SW2d 415; McCombs v. Bowen, 228 MoApp 754, 73 SW2d 300.

New York. Heibeck v. Hess, 228 AppDiv 194, 239 NYS 200 (collision of automobiles, charge giving superior right to leading car and assuming driver of rear car was negligent); Dee v. Spencer, 233 AppDiv 217, 251 NYS 311; Rella v. National City Bank, 240 AppDiv 513, 271 NYS 51.

Texas. Kansas City, M. & O. Ry. Co. v. Foster (TexCivApp), 38 SW2d 391 (authorizing consideration of element of damages not pleaded).

Vermont. Newman v. Kendall, 103 Vt 421, 154 A 662 (measure of damages).

West Virginia. Shaver v. Consolidation Coal Co., 108 WVa 365, 151 SE 326 (instruction to find for plaintiff ignored a material defense); Curry v. New Castle Auto Exp., 112 WVa 268, 164 SE 147.

was held not cured by another instruction that the jury were not to be governed thereby but to determine itself what the evidence was.[63] A general charge as to preponderance of the evidence is not curative of the error in an instruction which requires fraud as a defense to an action on a note to be proved clearly and convincingly.[64]

Negligence. In damage action based on negligence other instructions cannot cure erroneous charge that from proof of the employee's injury there arose a presumption that the employer was negligent and that the employer carried the burden of proving due care.[65] It is reversible error, not cured by other instructions, for the court to charge in a negligence case that the employer was guilty of actionable negligence if the place had become unsafe in which to work, or the appliances had become broken and dangerous.[66]

In a negligence case other instructions are not curative of the error in one which incorrectly places the burden of proving contributory negligence.[67] Other instructions cannot cure the error in a charge that an injured person who had taken an unsafe way was guilty of negligence.[68] In action brought under federal Employers' Liability Act, additional charge could not cure the error in an instruction to disregard contributory negligence if the injury occurred while the plaintiff was engaged in interstate commerce.[69]

Wills. In will contest case an error in an instruction defining "sound mind" without referring otherwise to the elements of testamentary capacity, was not cured by other instructions which included such elements in the definition.[70]

Insurance. In an action to recover on a life policy, on the ground of death by accidental means, an instruction correctly

[63] Demara v. Rhode Island Co. (RI), 103 A 708.

[64] Korona Jewelry & Music House v. Loveland, 25 OhApp 116, 157 NE 500; Hunt v. Sherrill, 195 Miss 688, 15 S2d 426.

Contra: Richards v. Millard, 146 Wis 552, 131 NW 365; DeGroot v. Veldboom, 167 Wis 107, 166 NW 662.

[65] Geneva Mill Co. v. Andrews, 11 F2d 924.

[66] Champlin Ref. Co. v. Puckett, 118 Okl 300, 248 P 610.

[67] Williams v. Pennsylvania R. Co., 235 IllApp 49; O'Donnell v. Kraut, 242 Wis 268, 7 NW2d 889.

A charge of court which required the plaintiff to show by a preponderance of evidence that at the time of the accident she was in the exercise of due and ordinary care for her own safety, is prejudicial error, even if the court later correctly placed the burden. McCombs v. Landes, 35 OhApp 164, 171 NE 862, 32 OLR 199.

[68] Huggin v. Gaffney, 134 SC 114, 132 SE 163.

[69] Lierness v. Long Island R. Co., 217 AppDiv 301, 216 NYS 656.

[70] Hartman v. Hartman, 314 Mo 305, 284 SW 488. See Wiedner v. Katt (TexCivApp), 279 SW 909.

defining "accidental means" will not cure the error in another instruction which fails to distinguish between "accidental death" and "death by accidental means."[71]

§ 139. Cure of erroneous instruction by correct instruction in criminal cases.

In criminal prosecutions, a prejudicial instruction cannot be cured by a correct instruction, unless the judge withdraws the prejudicial instruction from the jury's consideration.

The reason for the rule in criminal cases is the same as the reason for the rule in civil cases: the jury should not be required to make a choice between conflicting instructions.[72] If the

[71] Dark v. Prudential Ins. Co., 4 CalApp 338, 40 P2d 906.

[72] **Federal.** Kuhn v. United States, 42 F2d 210 (where an instruction required the defendant to prove his defense beyond a reasonable doubt); Nicola v. United States, 72 F2d 780.

Alabama. Vacalis v. State, 204 Ala 345, 86 S 92; Smith v. State, 15 AlaApp 662, 74 S 755.

Arkansas. Pearrow v. State, 146 Ark 182, 225 SW 311 (possession of recently stolen property).

California. People v. Westlake, 124 Cal 452, 57 P 465; People v. Maughs, 149 Cal 253, 86 P 187; People v. Ranney, 213 Cal 70, 1 P2d 423; People v. McDonnell, 32 Cal App 694, 163 P 1046; People v. Elgar, 36 CalApp 114, 171 P 697 (rape); People v. Neetens, 42 Cal App 596, 184 P 27; People v. Hardwick (CalApp), 260 P 946.

Colorado. Oldham v. People, 61 Colo 413, 158 P 148 (insanity).

Georgia. Wilson v. State, 176 Ga 198, 167 SE 111; White v. State, 24 GaApp 122, 100 SE 9; Phillips v. State, 27 GaApp 1, 107 SE 343; Watson v. State, 50 GaApp 114, 176 SE 899.

Illinois. People v. Dettmering, 278 Ill 580, 116 NE 205 (embezzlement); People v. Harvey, 286 Ill 593, 122 NE 138 (assumption of controverted facts); People v. Lowhone, 292 Ill 32, 126 NE 620; People v. True, 314 Ill 89, 145 NE 198; People v. Heywood, 321 Ill 380, 152 NE 215.

Indiana. Dorak v. State, 183 Ind 622, 109 NE 771; Moore v. State, 197 Ind 640, 151 NE 689; Lindley v. State, 199 Ind 18, 154 NE 867.

Iowa. State v. Sipes, 202 Ia 173, 209 NW 458.

Kentucky. Orlando v. Commonwealth, 218 Ky 836, 292 SW 497.

Louisiana. State v. Ardoin, 49 La Ann 1145, 22 S 620, 62 AmSt 678.

Maine. State v. Budge, 126 Me 223, 137 A 244, 53 ALR 241.

Michigan. People v. De Witt, 233 Mich 222, 206 NW 562.

Mississippi. Barnes v. State, 118 Miss 621, 79 S 815.

Missouri. State v. Cable, 117 Mo 380, 22 SW 953; State v. Clough, 327 Mo 700, 38 SW2d 36 (erroneous instruction as to self-defense); State v. Thompson, 333 Mo 1069, 64 SW2d 277.

Nebraska. Thompson v. State, 61 Neb 210, 85 NW 62, 87 AmSt 453; Howell v. State, 61 Neb 391, 85 NW 289.

New Jersey. State v. Lionetti, 93 NJL 24, 107 A 47; State v. Tachin, 93 NJL 485, 108 A 318; State v. Parks, 96 NJL 360, 115 A 305.

North Carolina. State v. Cornett, 199 NC 634, 155 SE 451; State v. Mickey, 207 NC 608, 178 SE 220.

North Dakota. State v. Hoerner, 55 ND 761, 215 NW 277.

Ohio. Sharkey v. State, 4 OhCir Ct 101, 2 OhCirDec 443; Cromley v. State, 19 OhCirCt (N. S.) 526, 26 OhCirDec 209, 59 OhBull 363.

The reviewing court will not presume that the jury followed the cor-

instruction is prejudicial, it can be cured only by withdrawal from the jury's consideration.[73]

Presumptions and burden of proof. Correct instructions requiring the state to prove defendant's guilt beyond a reasonable doubt will not cure the error of another instruction that the state must prove the charge against the accused by a preponderance of the evidence.[74] So, likewise an instruction requiring defendant to prove the material elements of his defense beyond a reasonable doubt was held not cured by a general instruction that he was presumed to be innocent until his guilt was established beyond a reasonable doubt.[75]

Additional or supplementary instructions do not cure the error in a charge that good character is a circumstance to rebut a presumption of guilt from circumstantial evidence.[76]

So, an instruction that flight of accused raised a presumption of guilt was held not cured by an instruction that the accused was presumed innocent till proved guilty.[77]

Other evidentiary matters. Other instructions cannot supplement and cure a charge of the court which gives to the jury a clear impression that the judge believes or disbelieves certain witnesses.[78] If the court make comments derogatory to the defense interposed, the error is not cured by admonishing the jury to arrive at a decision uninfluenced by his opinion.[79] Where only the evidence and arguments unfavorable to the defendant were submitted by the court, the error therein was not cured by the court's statement that the jury could disregard the court's views.[80]

rect instruction and failed to follow the incorrect instruction. State v. Hauser, 101 OhSt 404, 131 NE 66.

Pennsylvania. Commonwealth v. Ross, 266 Pa 580, 110 A 327; Commonwealth v. Berkenbush, 267 Pa 455, 110 A 263.

Virginia. Painter v. Commonwealth, 140 Va 459, 124 SE 431.

Washington. State v. Rader, 118 Wash 198, 203 P 68.

West Virginia. State v. Ringer, 84 WVa 546, 100 SE 413; State v. Parsons, 90 WVa 307, 110 SE 698; State v. Garner, 97 WVa 222, 124 SE 681.

Wyoming. State v. Eldredge, 45 Wyo 488, 21 P2d 545.

[73] McCutcheon v. State, 199 Ind 247, 155 NE 544; Todd v. State, 229 Ind 664, 101 NE2d 45.

See also § 141, *infra*.

[74] Cox v. State, 207 Ind 553, 194 NE 149.

[75] **Alabama.** Meadows v. State, 26 AlaApp 311, 159 S 268.

Oklahoma. Brown v. State, 14 OklCr 115, 167 P 762.

Utah. See also State v. Green, 86 Utah 192, 40 P2d 961.

[76] State v. Dunn, 202 Ia 1188, 211 NW 850.

[77] Jenkins v. Commonwealth, 132 Va 692, 111 SE 101, 25 ALR 882.

[78] State v. Gallogly, 47 RI 483, 134 A 20.

[79] People v. Stiglin, 238 AppDiv 407, 264 NYS 832; Commonwealth v. Miller, 313 Pa 567, 170 A 128.

[80] O'Shaughnessy v. United States, 17 F2d 225.

Defenses. Other instructions may properly supplement and complete a charge to the jury to examine the defense of insanity with care.[81]

If the court gave a correct instruction as to self-defense, it is not a cure of another in which the jury are misled as to such defense.[82] An instruction, for example, on self-defense which tells the jury that unless the necessity for taking the life of the deceased was actual, present and urgent, the defense of self-defense could not be set up, is erroneous because of the omission of the qualification that an assailed person may act on appearances; and this error is not cured by disconnected instructions from which the correct rule may be gathered.[83]

Where the defense was that the theft charged against the defendant was never committed, and the court charged that the fact that the accused returned stolen property to the owner did not constitute a defense, the error therein was not cured by another instruction.[84]

Miscellaneous. Instructions in a murder case properly defining malice will not nullify the error of a separate instruction to the effect that malice consists not only of anger, hatred, and revenge, but every other unlawful and unjustifiable motive.[85]

A charge to convict both of the defendants if either was guilty was not cured by another charge under which they could convict either defendant.[86]

It was reversible error for the court to refer, in a prosecution for rape, to the penalty and to the jurisdiction of the parole board.[87]

§ 140. Cure of ambiguous instruction by another instruction.

An instruction which is ambiguous or defective but not incorrect may be cured by another instruction covering the same matter which makes the ambiguous element clear.

It is another statement of the principle to say an instruction which standing alone is ambiguous is not erroneous if all the instructions considered together fairly submit the case to the

[81] People v. Sloper, 198 Cal 238, 244 P 362.

[82] People v. Bradley, 324 Ill 294, 155 NE 301.

[83] **Federal.** De Groot v. United States, 78 F2d 244.

Kentucky. Barney v. Commonwealth, 258 Ky 432, 80 SW2d 513 (where the instruction was held cured by others relating to self-defense).

Oregon. State v. Miller, 43 Or 325, 74 P 658.

Wyoming. See also Clay v. State, 15 Wyo 42, 86 P 17, 544.

[84] State v. Cox, 55 Idaho 694, 46 P2d 1093.

[85] State v. Hunter, 55 Idaho 161, 39 P2d 301.

[86] Easler v. State, 25 OhApp 273, 157 NE 813.

[87] State v. Tennant, 204 Ia 130, 214 NW 708.

jury.[88] The incompleteness of one instruction may ordinarily be

[88] **Federal.** United Commercial Travelers v. Greer, 43 F2d 499; O'Boyle v. Northwestern Fire & Marine Ins. Co., 49 F2d 713; Shannon v. Shaffer Oil & Ref. Co., 51 F2d 878, 78 ALR 851; Kloss v. United States, 77 F2d 462.

Alabama. Louisville & N. R. Co. v. Young, 168 Ala 551, 53 S 213; Gilbert v. Southern Bell Tel. & T. Co., 200 Ala 3, 75 S 315.

California. Wood v. Los Angeles R. Corp., 172 Cal 15, 155 P 68; People v. Gee Gong, 15 CalApp 28, 114 P 78. 81; Weihe v. Rathjen Mercantile Co., 34 CalApp 302, 167 P 287; People v. McClure, 117 CalApp 381, 4 P2d 211; Sim v. Weeks, 7 CalApp2d 28, 45 P2d 350; People v. Groves, 9 CalApp2d 317, 49 P 2d 888.

Colorado. Expansion Gold Min. & Leasing Co. v. Campbell, 62 Colo 410, 163 P 968; Denver City Tramway Co. v. Carson, 21 ColoApp 604, 123 P 680.

District of Columbia. A proper instruction may cure an improper one, where the correct one explains away the defect in the improper one; but when they conflict, a correct statement of the law in one does not cure the error in the other. Baltimore & O. R. Co. v. Morgan, 35 AppDC 195.

Georgia. Sutton v. Ford, 144 Ga 587, 87 SE 799, LRA 1918D, 561 AnnCas 1918A, 106; Cosby v. Reid, 21 GaApp 604, 94 SE 824.

Idaho. State v. Emory, 55 Idaho 649, 46 P2d 67.

Illinois. Shekerjian v. Shekerjian, 346 Ill 101, 178 NE 365; Springfield v. Williams, 72 IllApp 439; Gardner v. Ben Steele Weigher Mfg. Co., 142 IllApp 348; Hoffman v. Chicago Wood & Coal Co., 162 IllApp 332.

Indiana. Boss v. Deak, 201 Ind 446, 169 NE 673, 68 ALR 788; Polk Sanitary Milk Co. v. Qualiza, 92 Ind App 72, 172 NE 576.

Iowa. Citizens Nat. Bank v. Converse, 105 Ia 669, 75 NW 506.

Kansas. Storm v. Leavenworth Light, Heat & Power Co., 102 Kan 40, 169 P 556; Doyle v. Herington, 142 Kan 169, 45 P2d 890.

Kentucky. West Kentucky Transp. Co. v. Dezern, 259 Ky 470, 82 SW2d 486.

Maryland. United R. & Elec. Co. v. Mantik, 127 Md 197, 96 A 261; Guth v. Elliott, 158 Md 243, 148 A 216.

Massachusetts. Grenda v. Kitchen, 270 Mass 559, 170 NE 619.

Michigan. Whoram v. Argentine Tp., 112 Mich 20, 70 NW 341; Haara v. Vreeland, 254 Mich 462, 236 NW 836; Daigle v. Berkowitz, 273 Mich 140, 262 NW 652.

Missouri. Anderson v. Union Terminal R. Co., 161 Mo 411, 61 SW 874; Clark v. Long (MoApp), 196 SW 409; Sutter v. Metropolitan St. R. Co. (MoApp), 208 SW 851.

Nebraska. Bailey v. Kling, 88 Neb 699. 130 NW 439.

New Jersey. Newbury v. American Stores Co., 115 NJL 604, 180 A 875; Worthington v. Clark, 9 NJ Misc 1020, 156 A 314.

New Mexico. Crespin v. Albuquerque Gas & Elec. Co., 39 NM 473, 50 P2d 259.

New York. McMahon v. New York News Publishing Co., 51 AppDiv 488, 64 NYS 713.

Ohio. Silberman v. National City Bank, 36 OhApp 442, 173 NE 16.

Oklahoma. Lonsdale v. Schlegel, 68 Okl 31, 171 P 330.

Tennessee. Knoxville, C., G. & L. R. Co. v. Wyrick, 99 Tenn 500, 42 SW 434.

Texas. Wells v. Houston, 23 Tex CivApp 629, 57 SW 584; Gulf, C. & S. F. Ry. Co. v. Rodriquez (TexCiv App), 185 SW 311.

Vermont. Ide v. Boston & M. R. R., 83 Vt 66, 74 A 401.

Virginia. Sun Life Assur. Co. v. Bailey, 101 Va 443, 44 SE 692.

Washington. Pronger v. Old Nat. Bank, 20 Wash 618, 56 P 391.

Wisconsin. Schabow v. Wisconsin

supplied in other instructions.[89] Thus, any error in a statement, of the court to the jury in an action against the owners of smelters, that society would eventually pay any loss the defendant suffered, was held cured by the later statement of the court that the jury were not to be influenced by what he had said.[90]

§ 141. Cure by withdrawal of erroneous instruction.

The error in giving an erroneous instruction may be cured by its withdrawal by the court and instruction to disregard it.

An instruction erroneous as stating a rule inapplicable to the case may be cured by another charge that the rule has no application to the case.[91] Probably it is better practice that after the withdrawal, a correct instruction should be given unless already in the charge.[92]

Trac., Light, Heat & Power Co., 162 Wis 175, 155 NW 951; Cole v. Christensen, 163 Wis 409, 158 NW 56; Zutter v. O'Connell, 200 Wis 601, 229 NW 74.

[89] **Arkansas.** Citizens Bank v. Fairweather, 127 Ark 63, 191 SW 911.

Idaho. Judd v. Oregon Short Line R. Co., 55 Idaho 461, 44 P2d 291.

Illinois. People v. Lenhardt, 340 Ill 538, 173 NE 155; Hinton v. Muhlman, 201 IllApp 177.

Indiana. Landreth v. State, 201 Ind 691, 171 NE 192, 72 ALR 891; Kleihege v. State, 206 Ind 206, 188 NE 786; Maywood Stock Farm Importing Co. v. Pratt, 60 IndApp 131, 110 NE 243.

Iowa. Baker v. Zimmerman, 179 Ia 272, 161 NW 479.

Kentucky. West Kentucky Coal Co. v. Key, 178 Ky 220, 198 SW 724.

Missouri. Shaw v. Kansas City (Mo), 196 SW 1091; Boardman v. Beeker (MoApp), 195 SW 508.

Texas. Littlefield v. Clayton Bros. (TexCivApp), 194 SW 194.

West Virginia. Bank of Greenville v. S. T. Lowry & Co., 81 WVa 578, 94 SE 985.

[90] United Verde Copper Co. v. Jordan, 14 F2d 299, affg. 9 F2d 144.

[91] **Federal.** Chicago, B. & Q. R. Co. v. Kelley, 74 F2d 80. See Mitten Bank Securities Corp. v. Huber, 74 F2d 297, 299.

Alabama. Choctaw Coal & Min. Co. v. Dodd, 201 Ala 622, 79 S 54; Harris v. Wright, 225 Ala 627, 144 S 834; Kelly v. Hanwick, 228 Ala 336, 153 S 269; Johnson v. State, 15 AlaApp 380, 73 S 748; Moore v. State, 17 AlaApp 625, 88 S 25; Forsythe v. State, 19 AlaApp 669, 100 S 198.

By withdrawal the court corrected the error of charge in a criminal case that crime is rampant in the county, state, and nation. Hall v. State, 18 AlaApp 407, 92 S 527.

Arkansas. Middleton v. State, 162 Ark 530, 258 SW 995; Decker v. State, 185 Ark 1085, 51 SW2d 521.

California. Tonner v. Spears-Wells Mach. Co., 126 CalApp 763, 14 P2d 1051.

Connecticut. Craney v. Donovan, 95 Conn 482, 111 A 796.

Georgia. Southern Ry. Co. v. Holbrook, 124 Ga 679, 53 SE 203; Smith v. State, 146 Ga 36, 90 SE 475; Ivey v. Louisville & N. R. Co., 18 GaApp 434, 89 SE 629; Granison v. State, 49 GaApp 216, 174 SE 636.

Illinois. Roberts v. Patterson, 77 IllApp 394; Mengelkamp v. Consolidated Coal Co., 173 IllApp 370.

Indiana. Gallivan v. Strickler, 187 Ind 201, 118 NE 679; Lauer v. Roberts, 99 IndApp 216, 192 NE 101.

Iowa. Stodgel v. Elder, 172 Ia 739, 154 NW 877.

As a general rule the withdrawal should be made before the jury retires,[93] but there is strong authority that instructions may be corrected or withdrawn either before or by recalling the jury after their retirement.[94] The trial judge, after granting preargument request to charge, may withdraw it from the jury if he determines that it erroneously states the law.[95]

The withdrawal of an incorrect charge on contributory negligence and the giving of a proper one have been held to cure the original error.[96] Where the trial court improperly charged as to the speed limitation applicable, in the first part of his charge, his later withdrawal thereof and correction of the error, and his instruction with reference to the proper speed limit and the law applicable at the place where the accident occurred, cured the error.[97]

Kansas. The rule is the same in criminal cases where the withdrawal is made in such a manner as to be understood by the jury. State v. Wells, 54 Kan 161, 37 P 1005.

Kentucky. Belcher v. Commonwealth, 203 Ky 757, 263 SW 8; Scott v. Commonwealth, 29 KyL 571, 93 SW 668.

Louisiana. State v. Jones, 36 La Ann 204.

Maine. State v. Derry, 118 Me 431, 108 A 568.

Massachusetts. Rudberg v. Bowden Felting Co., 188 Mass 365, 74 NE 590.

Michigan. Wenzel v. Johnston, 112 Mich 243, 70 NW 549; Atherton v. Bancroft, 114 Mich 241, 72 NW 208; In re Reynolds' Estate, 273 Mich 71, 262 NW 649.

Missouri. Wells v. Wilson (Mo), 293 SW 127; Carroll v. Wiggains (MoApp), 199 SW 280.

Nebraska. Reed v. State, 66 Neb 184, 92 NW 321.

New Jersey. Collins v. Central R. Co., 90 NJL 593, 101 A 287.

North Carolina. State v. May, 15 NC 328; Champion v. Daniel, 170 NC 331, 87 SE 214; State v. Baldwin, 178 NC 693, 100 SE 345.

Ohio. Rogers v. Garford, 26 Oh App 244, 159 NE 334; Pecsok v. Millikin, 36 OhApp 543, 173 NE 626; Warn v. Whipple, 45 OhApp 285, 187 NE 88, 39 OLR 49.

Oregon. Picket v. Gray, McLean & Percy, 147 Or 330, 31 P2d 652.

Pennsylvania. Stroud v. Smith, 194 Pa 502, 45 A 329; Wally v. Clark, 263 Pa 322, 106 A 542; McKnight v. S. S. Kresge Co., 285 Pa 489, 132 A 575.

Tennessee. Green v. State, 97 Tenn 50, 36 SW 700.

Texas. Nussbaum & Scharff v. Trinity & B. V. Ry. Co., 108 Tex 407, 194 SW 1099.

Vermont. Dyer v. Lalor, 94 Vt 103, 109 A 30.

Wisconsin. State ex rel. Jahn v. Rydell, 250 Wis 377, 27 NW2d 486.

[92] Brothers v. Brothers, 208 Ala 258, 94 S 175.

[93] **Missouri.** State v. Taylor, 293 Mo 210, 238 SW 489; Lumsden v. Arbaugh, 207 MoApp 561, 227 SW 868.

New Jersey. Mesgleski v. Public Service Coordinated Transport, 160 NJMisc 321, 160 A 321.

Pennsylvania. Seiber v. Pettitt, 200 Pa 58, 49 A 763.

[94] State v. Derry, 118 Me 431, 108 A 568. See also Keaton v. State, 27 GaApp 164, 107 SE 599.

[95] Warn v. Whipple, 45 OhApp 285, 187 NE 88, 39 OLR 49.

[96] Jones v. Atlantic Coast Line R. Co., 194 NC 227, 139 SE 242.

[97] Greenawalt v. Yuhas, 83 Oh App 426, 38 OhO 469, 84 NE2d 221.

CHAPTER 7

REQUESTS

Section.
150. Duty to make timely request and tender proper instructions in civil cases.
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§ 150. Duty to make timely request and tender proper instructions in civil cases.

In civil cases it is the duty of the parties to request instructions (1) on questions of law, if desired, (2) but in any event requests should be made in apt time, as determined by statute or by rule of court (3) and should be limited in the matter of number (4) and length.

(1) Where instructions are desired, in civil actions, the parties should make a request therefor.[1] A party to a civil

[1] **Federal.** Illinois Cent. R. Co. v. Skaggs, 240 US 66, 60 LEd 528, 36 SupCt 249; Stephenson v. Atlantic Terra Cotta Co., 144 CCA 312, 230 F 14.

Arkansas. Choctaw, O. & G. R. Co. v. Baskins, 78 Ark 355, 93 SW 757.

California. Cunningham v. Cox, 126 CalApp 685, 15 P2d 169.

Georgia. Wooten v. Weston, 157 Ga 421, 121 SE 806; Belle Isle v. Kindig, 25 GaApp 293, 103 SE 269.

Illinois. McKeown v. Dyniewicz, 83 IllApp 509.

Indiana. Kluge v. Ries, 66 Ind App 610, 117 NE 262.

Iowa. Rosenbaum Bros. v. Levitt, 109 Ia 292, 80 NW 393.

Kansas. Warders v. Union Pacific R. Co., 105 Kan 4, 181 P 604.

Kentucky. Louisville & N. R. Co. v. Stephens, 188 Ky 17, 220 SW 746; Otis Hidden Co. v. Newhouse, 204 Ky 324, 264 SW 731; Codell Constr. Co. v. Steele, 247 Ky 173, 56 SW2d 955; J. V. Pilcher Mfg. Co. v. Teupe's Exrx., 28 KyL 1350, 91 SW 1125.

Massachusetts. Butler v. Butler, 225 Mass 22, 113 NE 577; Sawyer v. Worcester Consol. Street Ry., 231 Mass 215, 120 NE 404.

Michigan. Record Publishing Co. v. Merwin, 115 Mich 10, 72 NW 998; Geglio v. Huizenga, 261 Mich 512, 246 NW 210.

Missouri. Eagle Constr. Co. v. Wabash R. Co., 71 MoApp 626; Sneed v. St. Louis Public Service Co. (MoApp), 53 SW2d 1062.

action will not generally be heard to complain of the failure of the court to instruct on particular matters and issues in the absence of a request for such instruction.[2] As a general rule

Montana. Kansier v. Billings, 56 Mont 250, 184 P 630.

Nebraska. Van Dorn v. Kimball, 100 Neb 590, 160 NW 953.

New Hampshire. Oulette v. J. H. Mendell Engineering & Constr. Co., 79 NH 112, 105 A 414.

New Jersey. State v. Taylor, 92 NJL 135, 104 A 709.

North Carolina. Bloxham v. Stave & Timber Corp., 172 NC 37, 89 SE 1013; Webb v. Rosemond, 172 NC 848, 90 SE 306; America Potato Co. v. Jeanette Bros. Co., 174 NC 236, 93 SE 795.

North Dakota. Ruddick v. Buchanan, 37 ND 132, 163 NW 720; Andrieux v. Kaeding, 47 ND 17, 181 NW 59.

Ohio. Delivery Co. v. Callachan, 9 OhApp 65, 31 OCA 345; Galliher v. Campbell, 69 OLA 378, 125 NE2d 758 (Court of Appeals of Ohio, Clark County).

In absence of specific request, the trial court need not charge all the statutory law involved in an action at law. Varner v. Eppley, 125 OhSt 526, 182 NE 496.

Oklahoma. Muskogee Elec. Trac. Co. v. Eaton, 49 Okl 344, 152 P 1109.

Pennsylvania. Haughney v. Gannon, 274 P 443, 118 A 427.

Rhode Island. Warner Sugar Ref. Co. v. Metropolitan Wholesale Groc. Co., 46 RI 158, 125 A 276.

South Carolina. Providence Mach. Co. v. Browning, 72 SC 424, 52 SE 117; Friedman v. Fludas, 122 SC 153, 115 SE 200.

South Dakota. Chrestenson v. Harms, 38 SD 360, 161 NW 343; Kirk v. Thompson, 40 SD 392, 167 NW 399.

Texas. Willis v. First Nat. Bank (TexCivApp), 262 SW 851.

[2] **Federal.** Order of United Commercial Travelers v. Nicholson, 9 F2d 7.

Alabama. Where a party considers that admissible evidence may be confusing, he should request a proper charge explaining it. First Nat. Bank v. Alexander, 161 Ala 580, 50 S 45.

Arkansas. Jones v. Seymour, 95 Ark 593, 130 SW 560.

California. Sherman v. Kirkpatrick, 83 CalApp 307, 256 P 570.

Connecticut. Hedberg v. Cooley, 115 Conn 352, 161 A 665; Bullard v. De Cordova, 119 Conn 262, 175 A 673.

Georgia. Mobley v. Merchants & Planters Bank, 157 Ga 658, 122 SE 233; Tietjen v. Dobson, 170 Ga 123, 152 SE 222, 69 ALR 1408; Guyton v. State, 32 GaApp 429, 123 SE 623; Williams v. Thompson, 32 GaApp 751, 124 SE 810; Central of Georgia Ry. Co. v. Cooper, 45 GaApp 806, 165 SE 858.

Illinois. Wilkinson v. Service, 249 Ill 146, 94 NE 50, AnnCas 1912A, 41.

Indiana. Taggart v. Keebler, 198 Ind 633, 154 NE 485; Chicago, S. B. & N. I. Ry. Co. v. Brown, 81 IndApp 411, 143 NE 609; Jasonville v. Griggs, 82 IndApp 104, 144 NE 560.

Iowa. Greenlee v. Ealy, 145 Ia 394, 124 NW 166.

Kentucky. Frankfort Modes Glass Works v. Arbogast, 148 Ky 4, 145 SW 1122; Brucken v. Myers, 153 Ky 274, 155 SW 383; Ray v. Shemwell, 186 Ky 442, 217 SW 351; Berea Bank & Trust Co. v. Mokwa, 194 Ky 556, 239 SW 1044; New York Underwriters Ins. Co. v. Mullins, 244 Ky 788, 52 SW2d 697; National Life & Acc. Ins. Co. v. Bradley, 245 Ky 311, 53 SW2d 701; Berkshire Life Ins. Co. v. Goldstein, 259 Ky 451, 82 SW2d 501.

It is not error to fail to instruct, in absence of request, that a city ordinance required the driver of an automobile to stop at boulevard. Cline v. Cook, 216 Ky 366, 287 SW 927.

Massachusetts. Dodge v. Sawyer, 288 Mass 402, 193 NE 15.

instructions of a general character should be given though not requested,[3] but in several states it is the rule that where no

Michigan. Record Publishing Co. v. Merwin, 115 Mich 10, 72 NW 998.

Montana. Mellon v. Kelly, 99 Mont 10, 41 P2d 49.

Nebraska. In re Strelow's Estate, 120 Neb 235, 231 NW 837, 233 NW 889; Spittler v. Callan, 127 Neb 331, 255 NW 27; Derr v. Gunnell, 127 Neb 708, 256 NW 725.

New Jersey. Rowland v. Wunderlick, 113 NJL 223, 174 A 168; Lanio v. Steneck, 9 NJMisc 866, 156 A 9.

New Mexico. King v. Tabor, 15 NM 488, 110 P 601.

North Carolina. Sears v. Atlantic Coast Line R. Co., 178 NC 285, 100 SE 433.

North Dakota. Blackstead v. Kent, 63 ND 246, 247 NW 607.

Ohio. Norris v. Jones, 110 OhSt 598, 22 OLR 173, 144 NE 274; Gradison Constr. Co. v. Braun, 41 OhApp 389, 36 OLR 149, 180 NE 274.

Oklahoma. Drum Standish Comm. Co. v. First Nat. Bank & Trust Co., 168 Okl 400, 31 P2d 843.

Texas. Lattimore v. Tarrant County, 57 TexCivApp 610, 124 SW 205; Newton v. Shivers (TexCiv App), 136 SW 805.

Wisconsin. Austin v. Moe, 68 Wis 458, 32 NW 760; National Bank v. Illinois & Wisconsin Lbr. Co., 101 Wis 247, 77 NW 185; Morrison v. Superior Water, Light & Power Co., 134 Wis 167, 114 NW 434; Madison Trust Co. v. Helleckson, 216 Wis 443, 257 NW 691, 96 ALR 992.

[3] **Arizona.** Southwest Cotton Co. v. Ryan, 22 Ariz 520, 199 P 124.

Connecticut. Gross v. Boston, W. & N. Y. Street Ry. Co., 117 Conn 589, 169 A 613.

Where it is likely that the jury may not understand the rule on a material point, the court must as a general rule instruct on that point without request for a charge. Wolfe v. Ives, 83 Conn 174, 76 A 526, 19 AnnCas 752.

Georgia. Wright v. Harber, 175 Ga 696, 165 SE 616; Central of Georgia Ry. Co. v. Reid, 23 GaApp 694, 99 SE 235; McDonald v. Southern Ry. Co., 24 GaApp 608, 101 SE 714; Bank of LaFayette v. Phipps, 24 GaApp 613, 101 SE 696; Southern Cotton Oil Co. v. Brownlee, 26 GaApp 782, 107 SE 355; Florence v. Byrd, 28 GaApp 695, 113 SE 227; Southern R. Co. v. Ray, 28 GaApp 792, 113 SE 590; Van Valkenburg v. Wood, 41 GaApp 564, 153 SE 924; Awbrey v. Johnson, 45 GaApp 663, 165 SE 846.

It is not good practice to omit entirely to charge on the measure of damages or mitigation of damages even in the absence of requests. Central of Georgia Ry. Co. v. Madden, 135 Ga 205, 69 SE 165, 31 LRA (N. S.) 813, 21 AnnCas 1077.

Indiana. Cleveland v. Emerson, 51 IndApp 339, 99 NE 796.

Iowa. Busch v. Tjentland, 182 Ia 360, 165 NW 999; McSpadden v. Axmear, 191 Ia 547, 181 NW 4; Des Moines Asphalt Paving Co. v. Lincoln Place Co., 201 Ia 502, 207 NW 563; Kaufman v. Borg, 214 Ia 293, 242 NW 104; Jensen v. Magnolia, 219 Ia 209, 257 NW 584; Keller v. Gartin, 220 Ia 78, 261 NW 776.

Kentucky. Gibson v. Commonwealth, 204 Ky 748, 265 SW 339.

Massachusetts. Hughes v. Whiting, 276 Mass 76, 176 NE 812.

Michigan. Pierson v. Smith, 211 Mich 292, 178 NW 659; Daigle v. Berkowitz, 273 Mich 140, 262 NW 652.

Mississippi. The cause must be submitted to the jury though the plaintiff requests no instructions. J. C. Penney Co. v. Evans, 172 Miss 900, 160 S 779.

Nebraska. Hall v. Rice, 117 Neb 813, 223 NW 4, 78 ALR 1421; Blue Valley State Bank v. Milburn, 120 Neb 421, 232 NW 777; Wagner v. Watson Bros. Transfer Co., 128 Neb 535, 259 NW 373.

New Hampshire. Burke v. Boston & M. R., 82 NH 350, 134 A 574.

instruction has been prepared and offered by either party, the court is not bound to instruct the jury at all.[4]

Where a party fails to make a proper request, he cannot complain of the failure of the judge to instruct the jury on the following matters: burden of proof,[5] preponderance of evidence,[6] inferences from facts in evidence,[7] expert testimony,[8]

North Carolina. Butler v. Holt-Williamson Mfg. Co., 182 NC 547, 109 SE 559; Darden v. Baker, 193 NC 386, 137 SE 146.

Oklahoma. First Nat. Bank v. Cox, 83 Okl 1, 200 P 238; Treeman v. Frey, 140 Okl 201, 282 P 452; Martin v. McCune, 170 Okl 196, 39 P2d 978; Craig v. Wright, 169 Okl 245, 43 P2d 1017.

Pennsylvania. Kerns v. Ripka, 85 PaSuper 97.

The court should instruct on the measure of damages in an action for personal injuries without request for specific instructions. McLane v. Pittsburgh Rys. Co., 230 Pa 29, 79 A 237.

Vermont. In re Bean's Will, 85 Vt 452, 82 A 734; Merrihew v. Goodspeed, 102 Vt 206, 147 A 346, 66 ALR 1109.

Wisconsin. Ordinarily the court should give suitable instructions upon proximate cause whether requested to do so or not, but failure to instruct is not reversible error where no request is made. Stumm v. Western Union Tel. Co., 140 Wis 528, 122 NW 1032.

[4] **Illinois.** Buttitta v. Lawrence, 346 Ill 164, 178 NE 390, revg. 260 IllApp 94; McKeown v. Dyniewicz, 83 IllApp 509.

Kentucky. Major v. Rudolph, 218 Ky 1, 290 SW 688; Hoopes Bros. & Thomas Co. v. Adams, 221 Ky 527, 299 SW 162; Reed v. Philpot's Admr., 235 Ky 429, 31 SW2d 709; Aetna Life Ins. Co. v. Daniel, 251 Ky 760, 65 SW2d 1025.

Mississippi. Gulf & Ship Island R. Co. v. Simmons, 153 Miss 327, 121 S 144.

Missouri. Steinberg v. Merchants Bank, 334 Mo 297, 67 SW2d 63; Biskup v. Hoffman, 220 MoApp 542, 287 SW 865; Scanlan v. Kansas City, 223 MoApp 1203, 19 SW2d 522.

Nebraska. Berggren v. Hannan, Odell & Van Brunt, 116 Neb 18, 215 NW 556.

New York. Haas v. King, 216 AppDiv 821, 215 NYS 641.

Virginia. See Seaboard Air Line Ry. Co. v. J. E. Bowden & Co., 144 Va 154, 131 SE 245.

West Virginia. See Scales v. Majestic Steam Laundry, 114 WVa 355, 171 SE 899.

[5] **District of Columbia.** Capital Trac. Co. v. Copland, 47 AppDC 152.

Georgia. Albany Warehouse Co. v. Hillman, 147 Ga 490, 94 SE 569; Southern Ry. Co. v. Wright, 6 Ga App 172, 64 SE 703; Temples v. Central of Georgia Ry. Co., 19 Ga App 307, 91 SE 502; Kline Car Corp. v. Watkins Motor Co., 26 GaApp 338, 106 SE 211; Bowling v. Hathcock, 27 GaApp 67, 107 SE 384; Yarbrough v. Stuckey, 39 GaApp 265, 147 SE 160.

Indiana. Nicholich v. Shasovich, 72 IndApp 294, 125 NE 803.

Missouri. Denny v. Brown (Mo), 193 SW 552; Eminence Realty & Brokerage Co. v. Randolph (Mo App), 180 SW 25; Robinson v. Springfield (MoApp), 191 SW 1094.

Tennessee. Shelby County v. Fisher, 137 Tenn 507, 194 SW 576.

Texas. Texas Baptist University v. Patton (TexCivApp), 145 SW 1063; Hall v. Ray (TexCivApp), 179 SW 1135; San Antonio & A. P. Ry. Co. v. Moerbe (TexCivApp), 189 SW 128; Holden v. Evans (TexCiv App), 231 SW 146; Humble Oil & Ref. Co. v. Strauss (TexCivApp), 243 SW 528.

[6] **California.** Hardy v. Schirmer, 163 Cal 272, 124 P 993.

experimental evidence,[9] mortality or life expectancy tables,[10] the principle of falsus in uno, falsus in omnibus,[11] definitions of particular terms used,[12] credibility of witnesses

Georgia. Rudulph v. Brown, 161 Ga 319, 130 SE 559; Tullulah Falls Ry. Co. v. Taylor, 20 GaApp 786, 93 SE 533; Terry Shipbuilding Corp. v. Gregory, 26 GaApp 450, 106 SE 803.

Wisconsin. McHatton v. McDonnell's Estate, 166 Wis 323, 165 NW 468.

[7] Pfarr v. Standard Oil Co., 176 Ia 577, 157 NW 132.

[8] Weber v. Strobel (Mo), 194 SW 272.

[9] St. Paul Fire & Marine Ins. Co. v. Baltimore & O. R. Co., 129 OhSt 401, 2 OhO 396, 195 NE 861.

[10] **Kentucky.** Chicago Veneer Co. v. Jones, 143 Ky 21, 135 SW 430; Stearns Coal & Lbr. Co. v. Calhoun, 166 Ky 607, 179 SW 590; Stearns Coal & Lbr. Co. v. Williams, 171 Ky 46, 186 SW 931.

Missouri. Peters v. Kansas City Rys. Co., 204 MoApp 197, 224 SW 25.

Oregon. Askay v. Maloney, 85 Or 333, 166 P 29.

[11] Mauchle v. Panama—Pacific International Exposition Co., 37 Cal App 715, 174 P 400.

[12] **Arkansas.** Morris v. Collins, 127 Ark 68, 191 SW 963 (reason).

California. Mecham v. Crump, 137 CalApp 200, 30 P2d 568.

Georgia. Smith v. Brinson, 145 Ga 406, 89 SE 363; Lowry v. Lowry, 170 Ga 349, 153 SE 11, 70 ALR 488; Freeman v. Petty, 22 GaApp 199, 95 SE 737; Tallapoosa v. Brock, 28 GaApp 384, 111 SE 88 (patent and latent defects).

Illinois. Lichtenstein v. L. Fish Furn. Co., 272 Ill 191, 111 NE 729, AnnCas 1918A, 1087; Varney v. Ajax Forge Co., 204 IllApp 208 (proximate cause).

Indiana. Economy Hog & Cattle Powder Co. v. Compton, 192 Ind 222, 135 NE 1.

In order to preserve the right to complain of an indefinite term used in an instruction, a party should tender an instruction defining such term. Jenney Elec. Mfg. Co. v. Flannery, 53 IndApp 397, 98 NE 424.

Iowa. Wickwire v. Webster City Sav. Bank, 153 Ia 225, 133 NW 100 (preference); Wegner v. Kelley, 182 Ia 259, 165 NW 449; State v. Fountain, 183 Ia 1159, 168 NW 285; Friedman v. Weeks, 190 Ia 1083, 181 NW 390; Altfilisch v. Wessel, 208 Ia 361, 225 NW 862 ("under control" in accident case involving automobile collision).

Kentucky. Blue Grass Trac. Co. v. Ingles, 140 Ky 488, 131 SW 278 (ordinary care); Pitman v. Drown, 176 Ky 263, 195 SW 815; Pennyroyal Fair Assn. v. Hite, 195 Ky 732, 243 SW 1046; Ben Humpich Sand Co. v. Moore, 253 Ky 667, 69 SW2d 996.

Massachusetts. Rocci v. Massachusetts Acc. Co., 226 Mass 545, 116 NE 477.

Minnesota. Kocolos v. Chicago Great Western Ry. Co., 167 Minn 502, 210 NW 62; Clark v. Banner Grain Co., 195 Minn 44, 261 NW 596.

Missouri. Schlueter v. East St. Louis Connecting Ry. Co., 316 Mo 1266, 296 SW 105; Thompson v. Lamar, 322 Mo 514, 17 SW2d 960; Smith v. Ohio Millers Mut. Fire Ins. Co., 330 Mo 236, 49 SW2d 42 (independent contractor); Quinn v. Atchison, T. & S. F. Ry. Co. (Mo App), 193 SW 933 (cattle guards); Tucker v. Carter (MoApp), 211 SW 138; American Paper Products Co. v. Morton Salt Co. (MoApp), 279 SW 761; Van Horn v. Union Fuel & Ice Co. (MoApp), 31 SW2d 262 (failure to define n e g l i g e n c e); Greaves v. Kansas City Junior Orpheum Co., 229 MoApp 663, 80 SW 2d 228; Gore v. Whitmore Hotel Co., 229 MoApp 910, 83 SW2d 114 (failure to define "abated" in action to abate public nuisance).

generally,[13] impeachment of witnesses,[14] construction or interpretation of contracts,[15] the nature and effect of fraud,[16] and the degree of proof necessary to establish the same,[17] the principles of estoppel or waiver,[18] limitation of evidence to a special purpose,[19] withdrawal of immaterial evidence,[20] the

Nebraska. Pittenger v. Salisbury & Almquist, 125 Neb 672, 251 NW 287.

Texas. Stamford Oil Mill Co. v. Barnes, 55 TexCivApp 420, 119 SW 872 (negligence); Black v. Wilson (TexCivApp), 187 SW 493; Millsaps v. Johnson (TexCivApp), 196 SW 202; Jagoe Constr. Co. v. Harrison (TexCivApp), 28 SW2d 232 (failure to define negligence and proximate cause).

Washington. Singer v. Martin, 96 Wash 231, 164 P 1105 (proximate cause).

[13] Campbell v. Dysard Constr. Co., 40 GaApp 328, 149 SE 713; Winters v. York Motor Exp. Co., 116 PaSuper 421, 176 A 812.

[14] Georgia. Giles v. Voiles, 144 Ga 853, 88 SE 207; Western & A. R. Co. v. Holt, 22 GaApp 187, 95 SE 758; Gilstrap v. Leith, 24 GaApp 720, 102 SE 169.

Massachusetts. Leavitt v. Maynes, 228 Mass 350, 117 NE 343.

Oklahoma. Brownell v. Moorehead, 65 Okl 218, 165 P 408.

Texas. Kampmann v. Cross (Tex CivApp), 194 SW 437; Epting v. Nees (TexCivApp), 25 SW2d 717; Latham v. Jordan (TexComApp), 17 SW2d 805, revg. 3 SW2d 555.

Washington. Blystone v. Walla Walla Valley Ry. Co., 97 Wash 46, 165 P 1049.

[15] Indiana. Western Brass Mfg. Co. v. Haynes Automobile Co., 61 IndApp 524, 112 NE 108.

Kansas. State Bank v. Abbott, 104 Kan 344, 179 P 326 (chattel mortgage).

New Hampshire. Hill v. Carr, 78 NH 458, 101 A 525.

Washington. Sladjoe v. National Casualty Co., 95 Wash 522, 164 P 203.

[16] Macksville State Bank v. Ehrlich, 119 Kan 796, 241 P 462.

[17] Societe Titanor v. Sherman Mach. & Iron Works, 172 Okl 213, 45 P2d 144.

[18] Payne v. Ryan, 183 Wash 590, 49 P2d 53.

[19] Arkansas. Lisko v. Uhren, 130 Ark 111, 196 SW 816.

California. Ahern v. Livermore Union High School (CalApp), 279 P 1032; In re Lenci's Estate, 106 Cal App 171, 288 P 841; Gajanich v. Gregory, 116 CalApp 622, 3 P2d 389.

Colorado. McAllister v. McAllister, 72 Colo 28, 209 P 788.

Idaho. Boomer v. Isley, 49 Idaho 666, 290 P 405.

Indiana. Clark v. Clark, 187 Ind 25, 118 NE 123; Citizens Tel. Co. v. Prickett, 189 Ind 141, 125 NE 193; Irvine v. Baxter Stove Co., 70 Ind App 105, 123 NE 185; Chesapeake & O. R. Co. v. Perry, 71 IndApp 506, 125 NE 414.

Iowa. McKenney v. Davis, 189 Ia 358, 178 NW 330.

Kentucky. Louisville & N. R. Co. v. Stephens, 188 Ky 17, 220 SW 746; Sally v. Brown, 220 Ky 576, 295 SW 890.

Maryland. County Comrs. v. Timmons, 150 Md 511, 133 A 322.

Massachusetts. Wagman v. Ziskind, 234 Mass 509, 125 NE 633; Faircloth v. Framingham Waste Material Co., 286 Mass 320, 190 NE 609.

Michigan. Metcalf v. Peerless Laundry & Dye Co., 215 Mich 601, 184 NW 482.

Minnesota. Klein v. Pasch, 153 Minn 291, 190 NW 338.

Missouri. Quinn v. Van Raalte, 276 Mo 71, 205 SW 59; Yant v. Charles (Mo), 219 SW 572; Hollinghausen v. Ade, 289 Mo 362, 233 SW 39; Dabbs v. Kansas City S. Ry. Co. (MoApp), 202 SW 276; Hickman v. Nelson (MoApp), 211 SW 131;

weight and significance of particular evidence,[21] failure to call certain witnesses,[22] delays in transportation by carrier,[23] the theories of the case contended for by the parties,[24] contributory negligence,[25] specific acts of negligence plaintiff required to

Lanham v. Vesper-Buick Automobile Co. (MoApp), 21 SW2d 890.

New Hampshire. Wemyss v. Wyoming Valley Paper Co., 86 NH 587, 172 A 438.

New Jersey. Vapor Vacuum Heating Co. v. Kaltenbach & Stephens, 94 NJL 450, 111 A 171; Blum v. Parsons Mfg. Co., 95 NJL 471, 112 A 848; In re Board of Recreation Comrs., 103 NJL 419, 136 A 176.

North Carolina. Roberson v. Stokes, 181 NC 59, 106 SE 151.

Oklahoma. Tishomingo Elec. Light & Power Co. v. Gullett, 52 Okl 180, 152 P 849.

South Carolina. Harwell v. Columbia Mills, 112 SC 177, 98 SE 324.

South Dakota. L. A. McKean Auto Co. v. O'Marro, 54 SD 435, 223 NW 354, revg. 53 SD 55, 220 NW 144.

Texas. Massie v. Hutchison, 110 Tex 558, 222 SW 962; Posener v. Harvey (TexCivApp), 125 SW 356; Pyron v. Brownfield (TexCivApp), 238 SW 725; Reese v. Carey (Tex CivApp), 286 SW 307; Hamilton v. Houston E. & W. T. Ry. Co. (Tex CivApp), 22 SW2d 331; Reynolds v. Porter (TexCivApp), 54 SW2d 1086.

Wisconsin. Newberry v. Minneapolis, St. P. & S. S. M. Ry. Co., 214 Wis 547, 252 NW 579.

[20] Co-operative Raw Fur Co. v. American Credit Indem. Co., 153 CCA 103, 240 F 67; Fenley Model Dairy v. Secuskie, 218 Ky 59, 290 SW 1044.

[21] Fierberg v. Whitcomb, 119 Conn 390, 177 A 135.

[22] Smith v. Triplett (TexCivApp), 83 SW2d 1104.

[23] Lovelace v. Atlantic Coast Line R. Co., 172 NC 12, 89 SE 797.

[24] **Federal.** Waters v. Guile, 148 CCA 298, 234 F 532; Sutherland v. Payne, 274 F 360.

Alabama. Postal Telegraph-Cable Co. v. Minderhout, 14 AlaApp 392, 71 S 89.

Georgia. Callaway v. Wynne, 27 GaApp 723, 109 SE 679.

Indiana. International Harvester Co. v. Haueisen, 66 IndApp 355, 118 NE 320.

Iowa. Shuck v. Conway (Ia), 186 NW 858.

Missouri. Maloney v. United Ry. Co. (Mo), 237 SW 509; Jenkins v. Clopton, 141 MoApp 74, 121 SW 759.

Nebraska. Prairie Life Ins. Co. v. Heptonstall, 105 Neb 829, 182 NW 483.

New Hampshire. Janvrin v. Powers, 79 NH 44, 104 A 252.

North Carolina. McMillan v. Atlanta & C. Air Line Ry. Co., 172 NC 853, 90 SE 683; Muse v. Ford Motor Co., 175 NC 466, 95 SE 900.

Texas. Wichita Valley Ry. Co. v. Somerville (TexCivApp), 179 SW 671.

Washington. Zolawenski v. Aberdeen, 72 Wash 95, 129 P 1090.

[25] **Georgia.** Southern Ry. Co. v. Weatherby, 20 GaApp 399, 93 SE 31; Western & A. R. Co. v. Jarrett, 22 GaApp 313, 96 SE 17.

Kentucky. Major v. Rudolph, 218 Ky 1, 290 SW 688.

Michigan. Korstange v. Kroeze, 261 Mich 298, 246 NW 127.

Missouri. Moran v. Atchison, T. & S. F. Ry. Co., 330 Mo 278, 48 SW 2d 881; Lafever v. Pryor (MoApp), 218 SW 970; Neagle v. Edina (Mo App), 53 SW2d 1077 (failure to define contributory negligence).

Nebraska. Wilson v. Morris & Co., 108 Neb 255, 187 NW 805. But see McCulley v. Anderson, 119 Neb 105, 227 NW 321.

New Jersey. Illis v. Oberle, 106 NJL 244, 147 A 461; Tobish v. Cohen, 110 NJL 296, 164 A 415.

Ohio. Cincinnati Trac. Co. v. Piker, 11 OhApp 54.

prove,[26] last clear chance,[27] humanitarian doctrine,[28] comparative negligence,[29] concurrent negligence,[30] unavoidable accident,[31] res ipsa loquitur,[32] proximate cause,[33] the measure and elements of damages,[34] the care required of a master toward his

Where the defendant did not request submission to the jury of the issue of plaintiff's contributory negligence, nonsubmission is not available to the defendant as ground for a new trial. Bethel v. Taxicabs of Cincinnati, 30 ONP (N. S.) 425.

Oklahoma. Ferris v. Shandy, 71 Okl 35, 174 P 1060.

South Carolina. Case v. Atlanta & C. A. L. Ry. Co., 107 SC 216, 92 SE 472.

[26] Brown v. Terminal R. Assn. (MoApp), 85 SW2d 226.

[27] **California.** Carbaugh v. White Bus Line, 51 CalApp 1, 195 P 1066.

Connecticut. Mongillo v. New England Banana Co., 115 Conn 112, 160 A 433.

Kentucky. Corlew's Admr. v. Young, 216 Ky 237, 287 SW 706.

Missouri. Sisk v. Industrial Track Constr. Co., 316 Mo 1143, 295 SW 751.

[28] Yuronis v. Wells, 322 Mo 1039, 17 SW2d 518.

[29] Lady v. Douglass, 105 Neb 489, 181 NW 173.

[30] If the plaintiff desires the court to charge on the question of concurrent negligence of the defendant and a third person, he should request such a charge or call the court's attention to the omission. Fincher v. Summit Beach Park Co., 13 OLA 665.

[31] Malon v. Adley Exp. Co., 118 Conn 565, 173 A 159; Thomas v. Haspel, 126 Neb 255, 253 NW 73.

[32] Mills v. Los Angeles Junk Co., 3 CalApp2d 546, 40 P2d 285; Milam v. Mandeville Mills, 41 GaApp 62, 151 SE 672.

[33] **Iowa.** Lang v. Siddall, 218 Ia 263, 254 NW 783.

Massachusetts. Coddaire v. Sibley, 270 Mass 41, 169 NE 797.

New Jersey. Cerami v. Zimmerman, 8 NJMisc 24, 148 A 154.

[34] **Federal.** Interstate Stage Lines Co. v. Ayers, 42 F2d 611.

Alabama. Sloss-Sheffield Steel & Iron Co. v. Bearden, 202 Ala 220, 80 S 42.

California. Oakland v. Wheeler, 34 CalApp 442, 168 P 23; Hollander v. Wilson Estate Co., 135 CalApp 646, 27 P2d 785.

Georgia. Contra: Jones v. Harris, 169 Ga 665, 151 SE 343; Danville Lbr. Co. v. McArthur, 36 Ga App 546, 137 SE 294.

Indiana. Carter v. Richart, 65 IndApp 255, 114 NE 110.

Kentucky. Nashville, C. & St. L. Ry. Co. v. Banks, 168 Ky 579, 182 SW 660; Louisville & N. R. Co. v. Payne's Admr., 177 Ky 462, 197 SW 928, LRA 1918C, 376; R. C. Tway Min. Co. v. Tyree, 183 Ky 248, 208 SW 817.

Massachusetts. Winslow v. New England Co-op Soc., 225 Mass 576, 114 NE 748.

Michigan. Hartwig v. Kell, 199 Mich 603, 165 NW 693.

Missouri. Delano v. Roberts (Mo App), 182 SW 771; McDonald v. Central Illinois Constr. Co., 196 Mo App 57, 190 SW 633; Dyrcz v. Hammond Packing Co. (MoApp), 194 SW 761; Alexander v. Star-Chronicle Publishing Co., 197 MoApp 601, 198 SW 467; Rodgers v. St. Louis-San Francisco Ry. Co. (MoApp), 31 SW 2d 546.

Nebraska. Ellwanger v. Goss, 103 Neb 132, 170 NW 830.

North Carolina. Gurley v. Southern Power Co., 172 NC 690, 90 SE 943; Bradley v. Camp Mfg. Co., 177 NC 153, 98 SE 318.

Pennsylvania. Leonard v. Baltimore & O. R. Co., 259 Pa 51, 102 A 279. But see Gail v. Philadelphia, 273 Pa 275, 117 A 69.

In an action for wrongful death the judge should instruct the jury

servants,[35] the care required of aged persons,[36] the presumption that one sees and hears what he should have seen and heard,[37] the rule that the jury are the exclusive judges of the facts,[38] improper inferences drawn or argument made by opposing counsel,[39] or advice of counsel as a defense to an action for malicious prosecution.[40]

So it has been held that the duty of the court to construe pleadings, deeds, and contracts and to state their legal effect does not extend to the construction of documents introduced in evidence merely as admissions against interest, in the absence of any request for such construction.[41] The court is not bound to instruct as to statutory law without request therefor.[42]

(2) It is necessary that requests be made within the time required by statute or rules of court.[43] It is within the province

on the measure of damages though not requested to do so. Milyak v. Philadelphia Rural Transit Co., 300 Pa 457, 150 A 622. See also Tomlinson v. Northwestern Elec. Co., 301 Pa 72, 151 A 680.

Texas. Andrews v. York (TexCiv App), 192 SW 338.

Washington. Tigner v. Zosel, 172 Wash 552, 21 P2d 239.

Wisconsin. McHatton v. McDonnell's Estate, 166 Wis 323, 165 NW 468.

[35] Brown v. Forrester & Nace Box Co. (Mo), 243 SW 330; Jaeger v. City Ry. Co., 72 WVa 307, 78 SE 59.

[36] Hall v. Shenandoah, 179 Ia 1192, 162 NW 575.

[37] Cleveland, C., C. & St. L. Ry. Co. v. Lynn, 177 Ind 311, 95 NE 577, 98 NE 67.

[38] Kansas City, M. & O. Ry. Co. v. Worsham (TexCivApp), 149 SW 755; Valiotis v. Utah-Apex Min. Co., 55 Utah 151, 184 P 802.

[39] Elerath Steel & Iron Co. v. Cornfoot, 121 Or 232, 253 P 529.

[40] Lindsey v. Testa, 118 CCA 298, 200 F 124. See Kissel-Skiles Co. v. Neff, 232 Ky 825, 24 SW2d 588.

[41] Kincart v. Shambrook, 64 Or 27, 128 P 1003.

[42] Barbieri v. Pandiscio, 116 Conn 48, 163 A 469 (statute making it crime for pedestrian to use highway negligently); Southern Ry. Co. v. Tudor, 46 GaApp 563, 168 SE 98 (statute precluding recovery against railroad for injury when victim was negligent).

[43] Federal. Astruc v. Star Co., 182 F 705; Houston v. Delaware, L. & W. R. Co., 274 F 599; Kimble v. Kiser, 59 F2d 626 (sufficient if presented at any time before the jury retires).

California. Gore v. Market Street Ry. Co. (CalApp), 37 P2d 1059, 38 P2d 804.

Georgia. Georgia Southern & F. Ry. Co. v. Thornton, 144 Ga 481, 87 SE 388; Giles v. Voiles, 144 Ga 853, 88 SE 207; Richmond Hosiery Mills v. Hayes, 146 Ga 240, 91 SE 54; Rountree v. Neely, 147 Ga 435, 94 SE 542; Boykin v. Bohler, 163 Ga 807, 137 SE 45; Henley v. Toole, 20 GaApp 146, 92 SE 760; Central of Georgia Ry. Co. v. Deas, 22 GaApp 425, 96 SE 267; Camp v. Bagwell & Bagwell, 23 GaApp 690, 99 SE 234; Manhattan Life Ins. Co. v. Boykin, 43 GaApp 146, 158 SE 449; Pybus v. Goldstein, 45 GaApp 669, 165 SE 866 (made too late after jury retired).

Illinois. In Kelley v. United Benefit Life Ins. Co., 275 IllApp 112, rule of court required requests to be presented before argument commenced, but counsel did not offer the requests until fifteen minutes after the argument had begun.

of the trial court's discretion to waive or to insist upon the question of time, in the absence of prejudice to the opposite party.[44] The request comes too soon when it is made before any evidence is introduced,[45] and is generally too late when tendered after argument has begun.[46] A request for a ruling

Kentucky. Miller v. Barnes, 181 Ky 473, 205 SW 549.

Massachusetts. Lincoln v. Finkelstein, 255 Mass 486, 152 NE 332.

Michigan. Musgrove v. Manistique & L. S. Ry., 259 Mich 469, 244 NW 132 (too late when made while jury was retiring; the point was sufficiently covered by other instructions).

Minnesota. Wilkinson v. Turnbull, 166 Minn 29, 206 NW 950.

New Hampshire. Though a rule of court required the requests to be handed to the court before argument, the point as to which a special charge was requested arose after the argument had commenced, and it was held that the rule of court referred to was inapplicable. Nicholaides v. Wallace, 86 NH 465, 169 A 874.

New Jersey. Lambert v. Trenton & Mercer County Trac. Co., 103 NJMisc 23, 135 A 270.

Ohio. Under Revised Code § 2315.01 there is conferred upon parties in civil actions the right to have instructions, presented in writing, given to the jury before argument, upon request, if same contain correct statements of the law and are pertinent to one or more of the issues in the case. A denial of such right is prejudicial error. Bartson v. Craig, 121 OhSt 371, 169 NE 291. See also Cincinnati Trac. Co. v. Kroger, 114 OhSt 303, 151 NE 127; Lima Used Car Exch. Co. v. Hemperly, 120 OhSt 400, 166 NE 364; Washington Fidelity Nat. Ins. Co. v. Herbert, 125 OhSt 591, 183 NE 537; Rogers v. Ziegler, 21 OhApp 186, 152 NE 781; Mulvihill v. Frohmiller, 21 OhApp 210, 153 NE 115; John Bright Shoe Stores Co. v. Scully, 24 OhApp 15, 156 NE 155; Patton Motor Trucking Co. v. Knapp, 25 OhApp 89, 157 NE 402; Rogers v. Garford, 26 OhApp 244, 159 NE 334; Bartolas v. Coleman, 27 OhApp 119, 161 NE 20; Baltimore & O. R. Co. v. Shober, 38 OhApp 216, 176 NE 88.

Oklahoma. Mills v. Hollinshed, 82 Okl 250, 200 P 200.

Oregon. Bean v. Tripp, 99 Or 216, 195 P 355.

Pennsylvania. Fluke v. Lang, 286 Pa 31, 132 A 800; Wanamaker v. Ellis, 306 Pa 222, 159 A 1.

South Carolina. Porter-Constructors v. Dixon Motor Service Co., 171 SC 396, 172 SE 419.

Wisconsin. City of Baraboo v. Excelsior Creamery Co., 171 Wis 242, 177 NW 36.

[44] Roberson v. Loose-Wiles Biscuit Co. (MoApp), 285 SW 127; Seaboard Air Line Ry. Co. v. J. E. Bowden & Co., 144 Va 154, 131 SE 245.

[45] Comstock v. Livingston, 210 Mass 581, 97 NE 106.

[46] **Federal.** Griffin Groc. Co. v. Richardson, 10 F2d 467.

Connecticut. Farrington v. Cheponis & Panarausky, 84 Conn 1, 78 A 652 (court has discretion to receive after argument commenced).

Georgia. Central of Georgia Ry. Co. v. Borland, 12 GaApp 729, 78 SE 352; Farkas v. S. Cohn & Son, 19 GaApp 472, 91 SE 892; Southern Ry. Co. v. Williams, 19 GaApp 544, 91 SE 1001.

Illinois. Rauch v. Bankers Nat. Bank, 143 IllApp 625; Bochat v. Knisely, 144 IllApp 551 (too late after jury about to retire).

Indiana. Duckwall v. Williams, 29 IndApp 650, 63 NE 232.

Iowa. Davidson v. Vast, 233 Ia 534, 10 NW2d 12.

Massachusetts. Manning v. Anthony, 208 Mass 399, 94 NE 466, 32 LRA (N. S.) 1179 (too late after special findings are submitted and

after the charge of the court has been given and the jury have retired is rightly refused.[47] But it has been held error for the judge to refuse to give a correct instruction requested during[48] or after the argument to the jury,[49] or at the close of the charge,[50] or at any time "before the cause is submitted to the jury."[51]

(3) The number of requested instructions should be confined within reasonable limits.[52] Where numerous instructions are

answered); Randall v. Peerless Motor Car Co., 212 Mass 352, 99 NE 221 (too late where tendered after conclusion of argument).

Michigan. Haynes v. Clark, 252 Mich 295, 233 NW 321.

Missouri. Hall v. St. Joseph, 163 MoApp 214, 146 SW 458; Sweet v. Bunn, 195 MoApp 500, 193 SW 897.

Where there is a rule of court requiring all instructions to be submitted and passed upon before the commencement of argument, there will be no error in declining to give an instruction tendered in violation of the rule. McPheeters v. Hannibal & St. J. R. Co., 45 Mo 22.

New Jersey. Carmany v. West Jersey & S. S. R. Co., 78 NJL 552, 74 A 656.

North Carolina. Biggs v. Gurganus, 152 NC 173, 67 SE 500; Holder v. Giant Lbr. Co., 161 NC 177, 76 SE 485.

Ohio. Hocking Valley Ry. Co. v. James, 1 OhApp 335, 18 OhCirCt (N. S.) 210, 28 OhCirDec 507; National Mach. Co. v. Towne, 11 OhApp 186, 30 OhCtApp 225; Silberman v. National City Bank, 36 OhApp 442, 173 NE 16; Tucker v. Sherman, 9 OhCirCt (N. S.) 70, 19 OhCirDec 368; Clark v. Boltz, 10 OhCirCt (N. S.) 1, 19 OhCirDec 665; Sherman v. Tucker, 16 OhCirCt (N. S.) 190, 31 OhCirDec 492; Cline v. Lantz, 2 OLA 215.

South Carolina. Salley v. Cox, 94 SC 216, 77 SE 933, 46 LRA (N. S.) 53, AnnCas 1915A, 1111.

South Dakota. White v. Amrhien, 14 SD 270, 85 NW 191.

Texas. Missouri, K. & T. Ry. Co. v. Harrison, 56 TexCivApp 17, 120 SW 254 (discretion to give after jury has retired).

Vermont. Johnson & Co. v. Central Vermont Ry. Co., 84 Vt 486, 79 A 1095 (too late after conclusion of argument); Russ v. Good, 90 Vt 236, 97 A 987.

[47] **Georgia.** Seaboard Air Line Ry. v. Barrow, 18 GaApp 261, 89 SE 383; Seaboard Air Line Ry. v. Lyon, 18 GaApp 266, 89 SE 384; Weeks v. Reliance Fertilizer Co., 23 GaApp 128, 97 SE 664; Ray v. Warren, 28 GaApp 663, 112 SE 831.

Massachusetts. Garrity v. Higgins, 177 Mass 414, 58 NE 1010.

Nebraska. In re Strelow's Estate, 120 Neb 235, 231 NW 837, 233 NW 889 (too late at close of charge).

Vermont. Clark v. Tudhope, 89 Vt 246, 95 A 489.

Washington. In Spokane Valley State Bank v. Murphy, 150 Wash 640, 274 P 702, requests were held properly denied when not made until the court was about to instruct the jury.

Wisconsin. Derge v. Carter, 248 Wis 500, 22 NW2d 505.

[48] Cleveland Punch & Shear Works Co. v. Consumers Carbon Co., 75 OhSt 153, 78 NE 1009; Stark v. Cress, 4 OhApp 92, 22 OhCirCt (N. S.) 88, 28 OhCirDec 442; Hoge v. Turner, 96 Va 624, 32 SE 291.

[49] Baltimore & O. R. Co. v. McCamey, 12 OhCirCt 543, 5 OhCirDec 631.

[50] Wagner Elec. Corp. v. Snowden, 38 F2d 599.

[51] Cleveland Punch & Shear Works Co. v. Consumers Carbon Co., 75 OhSt 153, 78 NE 1009.

[52] **Alabama.** Requests asked in bulk may be refused. Basenberg v. Lawrence, 160 Ala 422, 49 S 771.

Florida. Atlantic Coast Line R. Co. v. Whitney, 65 Fla 72, 61 S 179.

requested, it is unreasonable to expect the trial court to give them all a close examination or to hope for a critical review by the appellate court in order to find one that might appropriately have been given.[53] Thus, it is imposing an undue burden upon the trial judge to ask him to pass upon eighty-four instructions requested by one of the parties, and he will be justified in refusing them all without examination and substituting therefor an instruction of his own covering the party's theory of the case.[54] So, where a party tendered thirty-one instructions, in a case involving few principles of law, the number was held to be beyond reasonable limits.[55]

(4) Prayers of extreme length are discouraged.[56] A prayer of unusual length fails to subserve the purpose of an instruction by assisting and enlightening the jury,[57] and where the issues are not intricate, there is a tendency, in multiplying points and requests, to confuse and mislead.[58] Thus where an instruction is unduly prolix and has the fault of "excessive verbiage," it may be refused, particularly when the charge as given covers all the questions involved in the case.[59] So, a

Illinois. Lichtenstein v. L. Fish Furn. Co., 272 Ill 191, 111 NE 729, AnnCas 1918A, 1087; Duggan v. Wells Bros. Co., 191 IllApp 499; Nix v. Brunswick-Balke-Collender Co., 191 IllApp 503; Lovas v. Independent Breweries Co., 199 IllApp 60.

Indiana. Terre Haute, I. & E. Trac. Co. v. Phillips, 191 Ind 374, 132 NE 740.

Maryland. Neighbors v. Leatherman, 116 Md 484, 82 A 152 (refusal proper for indefiniteness).

Massachusetts. Herrick v. Waitt, 224 Mass 415, 113 NE 205.

Minnesota. Burgess v. Crafts, 184 Minn 384, 238 NW 798.

Mississippi. Yazoo & M. V. R. Co. v. Dees, 121 Miss 439, 83 S 613.

Missouri. Perkins v. Kansas City Southern Ry. Co., 329 Mo 1190, 49 SW2d 103 (saying that it is the better practice to submit all the facts in one instruction); Cutts v. Davison (MoApp), 184 SW 921; Friend v. Jones (MoApp), 185 SW 1159; Jeffries v. Walsh Fire Clay Products Co. (MoApp), 233 SW 259.

Ohio. American Steel Packing Co. v. Conkle, 86 OhSt 117, 99 NE 89; Mutual Benefit Life Ins. Co. v. French, 13 OhDecRep 927, 2 CSCR 321; Bates, Haven & Co. v. Benninger, 13 OhDecRep 1073, 2 CSCR 568; Marsch v. Cincinnati, 2 OLA 475.

Rhode Island. Faccenda v. Rhode Island Co., 43 RI 199, 110 A 601; Williams v. Allen, 44 RI 14, 114 A 138.

[53] Bergman v. Indianapolis & St. L. R. Co., 104 Mo 77, 15 SW 992.

[54] Woodward v. Waterbury, 113 Conn 457, 155 A 825 (45 requests were made); Chicago Athletic Assn. v. Eddy Elec. Mfg. Co., 77 IllApp 204.

[55] Salem v. Webster, 192 Ill 369, 61 NE 323.

[56] Castle v. Wilson (MoApp), 183 SW 1106.

If an instruction is long and involved and contains an improper statement even though otherwise correct, the court is justified in its refusal. Castelano v. Chicago & J. Elec. Ry. Co., 149 IllApp 250.

[57] Maryland Steel Co. v. Engleman, 101 Md 661, 61 A 314.

[58] Kimball & Austin Mfg. Co. v. Vroman, 35 Mich 310, 24 AmRep 558.

[59] Ryan v. Washington & G. R. Co., 8 AppDC 542.

prayer containing nearly two thousand words has been held one of such unusual length as would tax the patience and discriminative powers of the jury and was rightly refused.[60]

§ 151. Duty to make timely request and tender proper instructions in criminal cases.

The rule in civil cases as to necessity for requests for instructions applies in general to criminal cases.

Although the court should instruct on all essential questions of law involved in the case whether requested or not,[61] it is not error for the court to fail to charge as to a special feature of the case if instructions thereon are not requested.[62] The court

[60] Maryland Steel Co. v. Engleman, 101 Md 661, 61 A 314. See Goebel v. Hummel, 21 OhApp 486, 153 NE 223.

[61] **Federal.** Kreiner v. United States, 11 F2d 722; Stassi v. United States, 50 F2d 526.

California. People v. Scofield (CalApp), 258 P 656; People v. Martin, 114 CalApp 337, 300 P 108.

Colorado. White v. People, 79 Colo 261, 245 P 349.

Georgia. Webb v. State, 11 Ga App 850, 75 SE 815, 76 SE 990; Martin v. State, 17 GaApp 516, 87 SE 715; Butler v. State, 17 GaApp 769, 88 SE 593; Bryant v. State, 23 GaApp 3, 97 SE 271; Persons v. State, 27 GaApp 592, 109 SE 533; Sellers v. State, 32 GaApp 447, 123 SE 722; Smith v. State, 50 GaApp 105, 177 SE 76.

Kentucky. King v. Commonwealth, 187 Ky 782, 220 SW 755; Duroff v. Commonwealth, 192 Ky 31, 232 SW 47; Jackson v. Commonwealth, 215 Ky 800, 287 SW 17; Barton v. Commonwealth, 238 Ky 356, 38 SW2d 218; Williams v. Commonwealth, 254 Ky 277, 71 SW2d 626; Carter v. Commonwealth, 258 Ky 807, 81 SW2d 883.

Massachusetts. Commonwealth v. Johnson, 250 Mass 320, 145 NE 425.

Missouri. State v. Lackey, 230 Mo 707, 132 SW 602; State v. Gaultney, 242 Mo 388, 146 SW 1153; State v. Goode (Mo), 220 SW 854.

Nebraska. Kraus v. State, 102 Neb 690, 169 NW 3; Bailey v. State, 115 Neb 77, 211 NW 200; Foreman v. State, 127 Neb 824, 257 NW 237, revg. 126 Neb 619, 253 NW 898.

New Jersey. But see State v. Haines, 103 NJL 534, 138 A 203.

New York. People v. Odell, 230 NY 481, 130 NE 619.

North Dakota. But see State v. Hazer, 57 ND 900, 225 NW 319.

Oklahoma. Weems v. State, 16 OklCr 198, 182 P 264.

Pennsylvania. Commonwealth v. Ferko, 269 Pa 39, 112 A 38; Commonwealth v. McCloskey, 273 Pa 456, 117 A 192; Commonwealth v. Mull, 316 Pa 424, 175 A 418.

In Commonwealth v. Norris, 87 PaSuper 66, it was held not enough for the court to inquire of counsel whether anything had been omitted from the charge.

South Carolina. See State v. Blanden, 177 SC 1, 180 SE 681.

South Dakota. But see State v. Cline, 27 SD 573, 132 NW 160.

Tennessee. Webb v. State, 140 Tenn 205, 203 SW 955, 15 ALR 1034; Pearson v. State, 143 Tenn 385, 226 SW 538.

Vermont. State v. Stacy, 104 Vt 379, 160 A 257, 747 (though it is not required that instructions unasked be given on every conceivable phase of a case).

Wyoming. Gardner v. State, 27 Wyo 316, 196 P 750, 15 ALR 1040.

[62] **Federal.** Hughes v. United States, 145 CCA 238, 231 F 50; Gay v. United States, 12 F2d 433, affg. 2 F2d 635.

should give reasonable opportunity for counsel to prepare requests.[63]

What the courts consider essential and special is sometimes surprising.

It has been held not error for the court to fail to charge on the following matters, in the absence of a request therefor: burden of proof,[64] no presumption from the fact that the indictment or information was found or filed,[65] reasonable doubt,[66]

Arizona. Bush v. State, 19 Ariz 195, 168 P 508; Hann v. State, 30 Ariz 366, 247 P 129.

Arkansas. Hays v. State, 129 Ark 324, 196 SW 123; Lowmack v. State, 178 Ark 928, 12 SW2d 909.

California. People v. Montezuma, 117 CalApp 125, 3 P2d 370, mfd. & reh. den. in 117 CalApp 125, 4 P2d 285.

Colorado. McClary v. People, 79 Colo 205, 245 P 491.

Florida. Herndon v. State, 73 Fla 451, 74 S 511; Hobbs v. State, 77 Fla 228, 81 S 444; Witt v. State, 80 Fla 38, 85 S 249.

Georgia. Renfroe v. State, 10 Ga App 38, 72 SE 520.

Illinois. People v. Lucas, 244 Ill 603, 91 NE 659; People v. Gibbs, 349 Ill 83, 181 NE 628.

Kansas. State v. Wilson, 108 Kan 433, 195 P 618; State v. Cary, 124 Kan 219, 257 P 719; State v. Redmon, 128 Kan 712, 280 P 754; State v. Jones, 137 Kan 273, 20 P2d 514.

Massachusetts. Commonwealth v. Enwright, 259 Mass 152, 156 NE 65.

Michigan. People v. Robinson, 228 Mich 64, 199 NW 622.

Missouri. State v. Garrett, 285 Mo 279, 226 SW 4; State v. Aurentz, 315 Mo 242, 286 SW 69.

Montana. State v. Powell, 54 Mont 217, 169 P 46; State v. Bess, 60 Mont 558, 199 P 426.

Nebraska. Marshall v. State, 116 Neb 45, 215 NW 564; Williams v. State, 118 Neb 281, 224 NW 286.

North Carolina. State v. Merrick, 171 NC 788, 88 SE 501; State v. Martin, 173 NC 808, 92 SE 597.

North Dakota. State v. Murbach, 55 ND 846, 215 NW 552.

Ohio. Scott v. State, 107 OhSt 475, 141 NE 19; Rucker v. State, 119 OhSt 189, 162 NE 802.

Oklahoma. Roberts v. State, 36 OklCr 28, 251 P 612; Dilbeck v. State, 43 OklCr 42, 277 P 284.

Oregon. State v. Wilder, 98 Or 130, 193 P 444.

South Carolina. State v. Sanders, 103 SC 216, 88 SE 10; State v. Evans, 112 SC 43, 99 SE 751.

Tennessee. Moore v. State, 159 Tenn 112, 17 SW2d 30.

Texas. Montgomery v. State, 97 TexCr 503, 262 SW 755; Hall v. State, 102 TexCr 329, 277 SW 129 (misdemeanor case).

[63] Brewer v. State, 13 OklCr 514, 165 P 634.

[64] Finch v. State, 24 GaApp 339, 100 SE 793; Fiehn v. State, 124 Neb 16, 245 NW 6.

[65] Brooks v. State, 19 GaApp 3, 90 SE 989; State v. Gilmore, 336 Mo 784, 81 SW2d 431; State v. Magruder (MoApp), 219 SW 701.

[66] **Alabama.** White v. State, 195 Ala 681, 71 S 452.

Arizona. Bush v. State, 19 Ariz 195, 168 P 508.

Arkansas. Prewitt v. State, 150 Ark 279, 234 SW 35.

Georgia. Jackson v. State, 132 Ga 570, 64 SE 656; Williamson v. State, 151 Ga 352, 106 SE 545.

Indiana. Epple v. State, 190 Ind 87, 129 NE 403.

Michigan. Reasonable doubt need not be defined by the court unless requested by the defendant. People v. Spears, 241 Mich 67, 216 NW 398.

Minnesota. State v. Hines, 148 Minn 393, 182 NW 450.

Missouri. Such an instruction is mandatorily required in felony cases

credibility of witnesses generally,[67] the maxim falsus in uno, falsus in omnibus,[68] idiots and lunatics as witnesses,[69] the impeachment of witnesses,[70] expert testimony,[71] credibility and corroboration of testimony of rape victim,[72] the testimony of accomplices,[73] credibility of the testimony or statement of

but not in misdemeanors. State v. Halbrook, 311 Mo 664, 279 SW 395.

Nebraska. Trimble v. State, 118 Neb 267, 224 NW 274.

North Carolina. State v. Johnson, 193 NC 701, 138 SE 19.

Oklahoma. Nelson v. State, 5 Okl Cr 368, 114 P 1124; Choate v. State, 19 OklCr 169, 197 P 1060.

Pennsylvania. Commonwealth v. Varano, 258 Pa 442, 102 A 131; Commonwealth v. Berney, 262 Pa 176, 105 A 54; Commonwealth v. Scutack, 105 PaSuper 524, 161 A 610.

[67] **Idaho.** State v. Dunn, 44 Idaho 636, 258 P 553.

Iowa. State v. McMahon (Ia), 211 NW 409.

Missouri. State v. Miller (Mo), 292 SW 440; State v. Shuls, 329 Mo 245, 44 SW2d 94.

Wisconsin. Ring v. State, 192 Wis 391, 212 NW 662.

[68] State v. Blaha, 39 Nev 115, 154 P 78.

[69] Watkins v. State, 19 GaApp 234, 91 SE 284. See State v. Fine, 110 NJL 67, 164 A 433.

[70] **California.** People v. Haydon, 18 CalApp 543, 123 P 1102, 1114; People v. Hovermale, 76 CalApp 91, 243 P 878.

Georgia. Jackson v. State, 135 Ga 684, 70 SE 245; Washington v. State, 138 Ga 370, 75 SE 253; Kelly v. State, 145 Ga 210, 88 SE 822; Benjamin v. State, 150 Ga 78, 102 SE 427; Thomas v. State, 150 Ga 269, 103 SE 244; Craig v. State, 9 GaApp 233, 70 SE 974; Garrison v. State, 17 GaApp 314, 86 SE 743; Wyatt v. State, 18 GaApp 29, 88 SE 718; Williams v. State, 25 Ga App 193, 102 SE 875; Evans v. State, 26 GaApp 50, 105 SE 385; Wyatt v. State, 27 GaApp 45, 107 SE 417; Dunn v. State, 32 GaApp 491, 123 SE 905.

Iowa. State v. Wrenn, 194 Ia 552, 188 NW 697.

Kentucky. Ayres v. Commonwealth, 195 Ky 343, 242 SW 624.

Missouri. State v. Hardin, 324 Mo 28, 21 SW2d 758.

Montana. State v. Willette, 46 Mont 326, 127 P 1013.

[71] Woodruff v. State, 164 Tenn 530, 51 SW2d 843.

[72] Oakes v. State, 135 Ark 221, 205 SW 305; McQueary v. People, 48 Colo 214, 110 P 210, 21 AnnCas 560.

[73] **Federal.** Perez v. United States, 10 F2d 352; Hall v. United States, 78 F2d 168.

California. People v. Northcott, 209 Cal 639, 289 P 634, 70 ALR 806; People v. Rose, 42 CalApp 540, 183 P 874; People v. Northcott, 46 CalApp 706, 189 P 704; People v. Casey, 79 CalApp 295, 249 P 525, reh. den. in 250 P 653.

Georgia. Hammontree v. State, 25 GaApp 544, 103 SE 738.

Iowa. But see State v. Myers, 207 Ia 555, 223 NW 166.

Kansas. State v. Miller, 83 Kan 410, 111 P 437.

Missouri. State v. London (Mo), 295 SW 547; State v. Crow, 337 Mo 397, 84 SW2d 926.

New York. People v. Richardson, 222 NY 103, 118 NE 514.

North Carolina. Contra: State v. Shew, 196 NC 386, 145 SE 679; State v. Wallace, 203 NC 284, 165 SE 716.

North Dakota. State v. Berenson, 65 ND 480, 260 NW 256.

Pennsylvania. Commonwealth v. Emmett, 77 PaSuper 396.

South Dakota. State v. Ham, 24 SD 639, 124 NW 955, AnnCas 1912A, 1070.

[74] **Federal.** Harris v. United States, 59 AppDC 353, 41 F2d 976.

Arkansas. Carroll v. State, 181 Ark 1145, 29 SW2d 670.

accused,[74] confessions,[75] failure of the accused to testify,[76] the relative value of positive and negative testimony,[77] dying declarations,[78] circumstantial evidence,[79] the purpose of particular evidence and the effect to be given the same,[80]

Georgia. Swilling v. State, 18 GaApp 618, 90 SE 78; Lott v. State, 18 GaApp 747, 90 SE 727; Brinson v. State, 22 GaApp 649, 97 SE 102; Hart v. State, 28 GaApp 258, 110 SE 745; Barton v. State, 35 GaApp 574, 134 SE 185; Watson v. State, 45 GaApp 320, 164 SE 482; Roberts v. State, 49 GaApp 139, 174 SE 358; Richardson v. State, 51 GaApp 140, 179 SE 771.

New Mexico. State v. Dickens, 23 NM 26, 165 P 850.

South Carolina. State v. King, 158 SC 251, 155 SE 409.

Texas. Garcia v. State, 88 TexCr 605, 228 SW 938.

Washington. State v. Zupan, 155 Wash 80, 283 P 671; State v. Williams, 156 Wash 6, 286 P 65.

[75] **California.** People v. Fowler, 178 Cal 657, 174 P 892.

Colorado. Reagan v. People, 49 Colo 316, 112 P 785.

Georgia. Story v. State, 145 Ga 43, 88 SE 548; Jones v. State, 150 Ga 628, 104 SE 425; Harris v. State, 152 Ga 193, 108 SE 777; Brown v. State, 154 Ga 54, 113 SE 161; Brantley v. State, 154 Ga 80, 113 SE 200; Stiles v. State, 154 Ga 86, 113 SE 208; Cook v. State, 9 GaApp 208, 70 SE 1019; McDuffie v. State, 17 GaApp 342, 86 SE 821; Sutton v. State, 17 GaApp 713, 88 SE 122, 587; Simmons v. State, 18 GaApp 104, 88 SE 904; Scarboro v. State, 24 GaApp 27, 99 SE 637; Johnson v. State, 27 GaApp 315, 108 SE 116.

[76] Bradley v. State, 35 Ariz 420, 279 P 256; State v. Pavelich, 153 Wash 379, 279 P 1102; State v. Comer, 176 Wash 257, 28 P2d 1027.

[77] Patterson v. State, 134 Ga 264, 67 SE 816.

[78] **Georgia.** Thomas v. State, 150 Ga 269, 103 SE 244; Propes v. State, 22 GaApp 254, 95 SE 939; Logan v. State, 25 GaApp 756, 104 SE 920.

Missouri. State v. Morgan (Mo), 56 SW2d 385.

Washington. State v. Walker, 104 Wash 472, 177 P 315.

[79] **Federal.** Robinson v. United States, 96 CCA 307, 172 F 105; Herman v. United States, 48 F2d 479.

Florida. Ford v. State, 80 Fla 781, 86 S 715.

Georgia. Barron v. State, 12 Ga App 342, 77 SE 214; Garrett v. State, 21 GaApp 801, 95 SE 301; Strickland v. State, 24 GaApp 157, 99 SE 890; Howard v. State, 27 Ga App 191, 107 SE 629; Switzer v. State, 28 GaApp 747, 113 SE 55.

It is only where the state relies wholly on circumstantial evidence that it is incumbent on the court without request to instruct as to the probative value of circumstantial evidence. Young v. State, 12 Ga App 86, 76 SE 753.

Idaho. State v. Nolan, 31 Idaho 71, 169 P 295.

Kansas. State v. Kennedy, 105 Kan 347, 184 P 734; State v. Davis, 106 Kan 527, 188 P 231.

Montana. State v. Francis, 58 Mont 659, 194 P 304.

Nebraska. Goldsberry v. State, 92 Neb 211, 137 NW 1116; Fetty v. State, 121 Neb 228, 236 NW 694 (cautionary instructions as to weight of circumstantial evidence); Doerffler v. State, 129 Neb 720, 262 NW 678.

North Carolina. State v. Willoughby, 180 NC 676, 103 SE 903.

Oklahoma. Murn v. State, 43 Okl Cr 187, 277 P 684.

South Dakota. State v. Millard, 30 SD 169, 138 NW 366.

Texas. Burrows v. State, 123 TexCr 71, 57 SW2d 846.

[80] **Federal.** Moffatt v. United States, 146 CCA 480, 232 F 522; Hallowell v. United States, 165 CCA 345, 253 F 865; Silkworth v. United

proof of alibi,[81] threats,[82] explanation by defendant of his

States, 10 F2d 711; United States v. McCann, 32 F2d 540; Doyle v. United States, 33 F2d 265; Harris v. United States, 48 F2d 771; Butler v. United States, 53 F2d 800; Shepard v. United States, 62 F2d 683; Patterson v. United States, 62 F2d 968; Hartzell v. United States, 72 F2d 569.

Alabama. Houston v. State, 203 Ala 261, 82 S 503; Winford v. State, 16 AlaApp 143, 75 S 819.

California. People v. Escalera, 36 CalApp 212, 171 P 975; People v. Germino, 38 CalApp 100, 175 P 489; People v. Peck, 43 CalApp 638, 185 P 881; People v. Rubalcado, 56 CalApp 440, 205 P 709.

Illinois. People v. Bransfield, 289 Ill 72, 124 NE 365; People v. Mason, 301 Ill 370, 133 NE 767; People v. Rewland, 335 Ill 432, 167 NE 10.

Indiana. Thompson v. State, 189 Ind 182, 125 NE 641; Hengstler v. State, 207 Ind 28, 189 NE 623.

Iowa. State v. Pelzer, 182 Ia 1, 163 NW 600; State v. McCutchan, 219 Ia 1029, 259 NW 23.

Kentucky. Day v. Commonwealth, 173 Ky 269, 191 SW 105; Bennett v. Commonwealth, 175 Ky 540, 194 SW 797; Stacey v. Commonwealth, 189 Ky 402, 225 SW 37, 25 ALR 490; McCarty v. Commonwealth, 216 Ky 110, 287 SW 363; Eaton v. Commonwealth, 230 Ky 250, 19 SW2d 218; Keller v. Commonwealth, 230 Ky 815, 20 SW2d 998; Miller v. Commonwealth, 235 Ky 182, 30 SW2d 484; Johnson v. Commonwealth, 240 Ky 123, 41 SW2d 913; McGee v. Commonwealth, 246 Ky 445, 55 SW2d 382; Shorter v. Commonwealth, 248 Ky 37, 58 SW2d 224 (the effect of impeaching evidence); Stigall v. Commonwealth, 257 Ky 342, 78 SW2d 22; Gregory v. Commonwealth, 257 Ky 438, 78 SW2d 327 (impeaching testimony).

Massachusetts. Commonwealth v. Selesnick, 272 Mass 354, 172 NE 343.

Michigan. People v. Manchester, 235 Mich 594, 209 NW 815.

Montana. State v. Francis, 58 Mont 659, 194 P 304; State v. Schlaps, 78 Mont 560, 254 P 858.

Nebraska. Osborne v. State, 115 Neb 65, 211 NW 179.

New Hampshire. State v. Belisle, 79 NH 444, 111 A 316.

New Jersey. State v. Stanford, 90 NJL 724, 101 A 53; State v. Columbus, 9 NJMisc 512, 154 A 605, reh. den. in 9 NJMisc 568, 155 A 11.

North Carolina. State v. Stancill, 178 NC 683, 100 SE 241; State v. McKeithan, 203 NC 494, 166 SE 336; State v. Tuttle, 207 NC 649, 178 SE 76.

Ohio. Hitchcock v. State, 47 Oh App 90, 40 OLR 171, 190 NE 773.

Oregon. State v. Jordan, 146 Or 504, 26 P2d 558, 30 P2d 751.

Vermont. State v. Williams, 94 Vt 423, 111 A 701.

Virginia. Faulkner v. South Boston, 139 Va 569, 123 SE 358.

West Virginia. State v. Baker, 84 WVa 151, 99 SE 252.

[81] **California.** People v. Foster, 198 Cal 112, 243 P 667.

Georgia. Moore v. State, 17 Ga App 344, 86 SE 822; Thomas v. State, 18 GaApp 101, 88 SE 917; Pritchett v. State, 18 GaApp 737, 90 SE 492; Haynes v. State, 18 Ga App 741, 90 SE 485; Barbour v. State, 24 GaApp 31, 99 SE 782; Bonner v. State, 26 GaApp 185, 105 SE 863. But see Holland v. State, 17 GaApp 311, 86 SE 739.

A request is unnecessary where alibi is the only defense. Hobbs v. State, 8 GaApp 53, 68 SE 515.

Illinois. People v. Bolik, 241 Ill 394, 89 NE 700.

Iowa. State v. Sampson, 220 Ia 142, 261 NW 769.

Kansas. State v. McManaman, 120 Kan 376, 244 P 225.

Michigan. People v. Genther, 218 Mich 289, 187 NW 241.

Missouri. State v. Dockery, 243 Mo 592, 147 SW 976; State v. Hubbard (Mo), 295 SW 788; State v. Wilson, 321 Mo 564, 12 SW2d 445.

flight,[83] provocation,[84] self-defense,[85] the good character of accused,[86] the character of deceased for violence,[87] evidence of other crimes,[88] intent,[89] physical impossibility of committing offense as charged,[90] capacity to consent to rape,[91] failure of victim to make outcry,[92] accidental killing,[93] the grade or

Nebraska. Hynes v. State, 115 Neb 391, 213 NW 347.

Tennessee. Curry v. State, 154 Tenn 95, 290 SW 25.

Texas. Jones v. State, 64 TexCr 510, 143 SW 621.

[82] Kimbrell v. State, 138 Ga 413, 75 SE 252; State v. Fletcher (Mo), 190 SW 317.

[83] State v. Conrad, 322 Mo 246, 14 SW2d 608.

[84] Curry v. State, 17 GaApp 312, 86 SE 742; Harris v. State, 18 Ga App 752, 90 SE 491; Harrelson v. State, 60 TexCr 534, 132 SW 783.

[85] **Arizona.** State v. Lee, 80 Ariz 213, 295 P2d 380.

Georgia. Brown v. State, 150 Ga 756, 105 SE 289.

Michigan. People v. Droste, 160 Mich 66, 125 NW 87.

Missouri. Contra: State v. Singleton (Mo), 77 SW2d 80.

Nevada. State v. Acosta, 49 Nev 184, 242 P 316.

Ohio. Szalkai v. State, 96 OhSt 36, 117 NE 12.

Oklahoma. But see Collegenia v. State, 9 OklCr 425, 132 P 375.

South Carolina. State v. Pittman, 137 SC 75, 134 SE 514.

Texas. Hall v. State, 111 TexCr 605, 13 SW2d 366.

Washington. State v. Lathrop, 112 Wash 560, 192 P 950.

[86] **Federal.** Kreiner v. United States, 11 F2d 722.

Georgia. Ellison v. State, 137 Ga 193, 73 SE 255; Brantley v. State, 154 Ga 80, 113 SE 200; Johnson v. State, 21 GaApp 497, 94 SE 630; Scarboro v. State, 24 GaApp 27, 99 SE 637; Jenkins v. State, 27 GaApp 640, 109 SE 510; Strickland v. State, 28 GaApp 638, 112 SE 740.

Iowa. State v. Brandenberger, 151 Ia 197, 130 NW 1065; State v. Poder, 154 Ia 686, 135 NW 421.

Michigan. People v. Luce, 210 Mich 621, 178 NW 54.

Missouri. State v. Henderson (Mo), 284 SW 799 (holding it to be the duty of the court, whether or not a request therefor is made, to charge as to good character); State v. Kimmel, 156 MoApp 461, 137 SW 329.

Contra: State v. Duvall (Mo), 76 SW2d 1097.

New York. Contra: People v. Viscio, 241 AppDiv 499, 272 NYS 213.

Utah. State v. Baroni, 79 Utah 285, 10 P2d 622.

[87] Tillman v. State, 136 Ga 59, 70 SE 876; Crews v. State, 17 GaApp 465, 87 SE 604; Moon v. State, 22 GaApp 617, 97 SE 81.

[88] **Arkansas.** Kyles v. State, 143 Ark 419, 220 SW 458.

Missouri. State v. Rasco, 239 Mo 535, 144 SW 449; State v. Broaddus, 315 Mo 1279, 289 SW 792.

Utah. State v. Sullivan, 73 Utah 582, 276 P 166.

Wisconsin. Purpero v. State, 190 Wis 363, 208 NW 475.

[89] State v. Smailes, 51 Idaho 321, 5 P2d 540 (intoxication considered on question of intent); Williams v. State, 120 TexCr 484, 48 SW2d 304.

[90] State v. King, 101 Kan 189, 165 P 665.

[91] Underhill v. State, 190 Ind 558, 130 NE 225.

[92] State v. Barnes, 325 Mo 545, 29 SW2d 156.

[93] **Georgia.** Webb v. State, 149 Ga 211, 99 SE 630.

Iowa. State v. Richardson (Ia), 240 NW 695 (manslaughter with automobile).

Missouri. State v. Ray (Mo), 225 SW 969.

South Carolina. State v. Wilson, 115 SC 248, 105 SE 341.

degree of the offense,[94] the definition of lesser but included offenses,[95] the punishment for the offense,[96] and the form of the verdict.[97]

[94] **Arkansas.** Martin v. State, 189 Ark 408, 72 SW2d 539.

California. People v. Woods, 1 CalApp2d 172, 36 P2d 212.

Georgia. When there is nothing in the evidence to indicate that the killing was not voluntary and where no charge is requested on that subject, involuntary manslaughter is not an issue in the case, and no allusion should be made to it in charging the jury, even though the prisoner's statement by indirection suggested such a theory. Jackson v. State, 91 Ga 271, 18 SE 298, 44 AmSt 22. See also Taylor v. State, 36 GaApp 639, 138 SE 83.

In connection with the foregoing cases see Tucker v. State, 34 GaApp 670, 131 SE 112, and Jenkins v. State, 34 GaApp 688, 131 SE 112 in which the court held that where defendants were convicted of assault with intent to murder and the evidence showed a mutual intent to fight and that mutual blows were struck, the trial court, even without request, should have instructed on the law of voluntary manslaughter, and failure to do so was reversible error.

Illinois. People v. Funk, 325 Ill 57, 155 NE 838; People v. McNeal, 346 Ill 329, 179 NE 109.

Indiana. Bowman v. State, 207 Ind 358, 192 NE 755, 96 ALR 522.

Kansas. State v. Post, 139 Kan 345, 30 P2d 1089.

Minnesota. State v. Beaudette, 168 Minn 444, 210 NW 286.

Mississippi. Tatum v. State, 142 Miss 110, 107 S 418; Dobbs v. State, 167 Miss 609, 142 S 500; Rutland v. State, 170 Miss 650, 155 S 681, 156 S 520.

Missouri. The court is bound to instruct on lower degrees if evidence warrants it, and defendant is not required to make request therefor. State v. Green, 331 Mo 723, 55 SW2d 965. See also State v. Fine, 324 Mo 194, 23 SW2d 7; State v. Perno (Mo), 23 SW2d 87.

New Mexico. By virtue of statute and rules of court, second degree murder and manslaughter, where raised by evidence in the case, must be submitted in a murder prosecution whether or not requested. State v. Diaz, 36 NM 284, 13 P2d 883.

North Dakota. State v. Martin, 54 ND 840, 211 NW 585.

Oklahoma. Logan v. State, 42 OklCr 294, 275 P 657; Pryor v. State, 51 OklCr 345, 1 P2d 797.

[95] **Arkansas.** Rogers v. State, 152 Ark 40, 237 SW 435.

Florida. Cross v. State, 73 Fla 530, 74 S 593.

Georgia. Pollard v. State, 144 Ga 229, 86 SE 1096; James v. State, 158 Ga 524, 123 SE 880; Duhart v. State, 18 GaApp 287, 89 SE 343; Tyson v. State, 23 GaApp 20, 97 SE 458.

Illinois. People v. Hobbs, 297 Ill 399, 130 NE 779.

Kansas. State v. Truskett, 85 Kan 804, 118 P 1047; State v. Ewing, 103 Kan 399, 173 P 927; State v. Young, 109 Kan 526, 200 P 285; State v. Lower, 110 Kan 669, 205 P 364.

Michigan. People v. Allie, 216 Mich 133, 184 NW 423; People v. Collins, 216 Mich 541, 185 NW 850; People v. Utter, 217 Mich 74, 185 NW 830.

Minnesota. State v. Morris, 149 Minn 41, 182 NW 721.

Mississippi. McLeod v. State, 130 Miss 83, 92 S 828.

Nebraska. Krause v. State, 88 Neb 473, 129 NW 1020, AnnCas 1912B, 736.

North Carolina. State v. Davidson, 172 NC 944, 90 SE 688.

Oklahoma. Each degree of homicide should be defined without request. Atchison v. State, 3 OklCr 295, 105 P 387.

South Dakota. State v. Frazer, 23 SD 304, 121 NW 790.

It has been held not error for the court to fail to define the following terms, in the absence of a request therefor: "prima facie evidence,"[98] "heat of passion,"[99] "wilfully,"[1] "preponderance of evidence,"[2] "aid,"[3] "pass, utter and punish,"[4] "forgery,"[5] "malice,"[6] "felony,"[7] "inmate,"[8] "premises,"[9] "malt" or "alcoholic" liquors,[10] and other terms or phrases.[11]

It is held not error to preface the instruction with the statement that it is given by request, as the instructions are the law of the case whether given on request or on court's own motion.[12]

Requests for instructions in criminal cases should be made within the time required by statute or rules of court.[13] Generally

[96] Cason v. State, 23 GaApp 540, 99 SE 61.

[97] People v. Minamino, 56 CalApp 386, 205 P 463; People v. Rivera, 57 CalApp 447, 206 P 897.

[98] State v. Delaplain, 132 Or 627, 287 P 681; Fagnani v. State, 66 TexCr 291, 146 SW 542.

[99] Beauregard v. State, 146 Wis 280, 131 NW 347.

[1] Stephens v. State, 90 TexCr 245, 234 SW 540.

[2] People v. Williams, 184 Cal 590, 194 P 1019.

[3] State v. McDonald, 107 Kan 568, 193 P 179.

[4] Brown v. State, 26 GaApp 189, 105 SE 723 (aiding and abetting); State v. Hobl, 108 Kan 261, 194 P 921.

[5] People v. Meyer, 289 Ill 184, 124 NE 447.

[6] State v. Moynihan, 93 NJL 253, 106 A 817.

[7] Cook v. State, 22 GaApp 266, 96 SE 393; Smith v. State, 23 Ga App 541, 99 SE 142.

[8] State v. Burley, 181 Ia 981, 165 NW 190.

[9] Carter v. State, 21 GaApp 493, 94 SE 630.

[10] Edwards v. Gulfport, 95 Miss 148, 49 S 620.

[11] **California.** People v. Emmons, 114 CalApp 26, 299 P 541 (proximate cause); People v. Cline, 138 CalApp 184, 31 P2d 1095 (narcotic and anesthetic).

Indiana. Alexander v. State, 202 Ind 1, 170 NE 542.

Iowa. State v. Tibbits, 207 Ia 1033, 222 NW 423; State v. Grimm, 212 Ia 1193, 237 NW 451 (defining crimes of rape and included offenses).

Kansas. State v. Goodman, 123 Kan 19, 254 P 333 (failure to define alibi); State v. McMahan, 131 Kan 257, 291 P 745 (constructively present).

Missouri. State v. Judge, 315 Mo 156, 285 SW 718 (legally qualified voter).

New Jersey. State v. Larsen, 105 NJL 266, 144 A 875.

Pennsylvania. Commonwealth v. Riggs, 313 Pa 457, 169 A 896 (robbery); Commonwealth v. State Loan Corp., 116 PaSuper 365, 176 A 516 (usurious interest).

South Carolina. State v. Dodenhoff, 153 SC 7, 150 SE 315.

[12] **Georgia.** Brantley v. State, 28 GaApp 536, 112 SE 170.

Idaho. But see State v. Marren, 17 Idaho 766, 107 P 993.

Texas. Lott v. State, 66 TexCr 152, 146 SW 544.

Washington. State v. Poyner, 57 Wash 489, 107 P 181.

[13] **Federal.** Hamburg-American Steam Packet Co. v. United States, 163 CCA 79, 250 F 747; Linn v. United States, 163 CCA 470, 251 F 476.

Alabama. Osborn v. State, 198 Ala 21, 73 S 985 (during closing argument too late).

Arkansas. Lee v. State, 145 Ark 75, 223 SW 373 (after argument begins too late).

such requests should be made before the commencement of the argument to the jury,[14] but it has been held error to refuse to give instructions that were not requested until after the commencement of the argument to the jury.[15]

California. People v. Germino, 38 CalApp 100, 175 P 489 (untimely to request while court is ruling on evidence).

Georgia. Lindsay v. State, 138 Ga 818, 76 SE 369; Maddox v. State, 9 GaApp 448, 71 SE 498; McLeod v. State, 22 GaApp 241, 95 SE 934; Towler v. State, 24 GaApp 167, 100 SE 42; Brown v. State, 24 GaApp 268, 100 SE 452; Macon v. State, 24 GaApp 337, 100 SE 785; Jones v. State, 27 GaApp 643, 110 SE 409; Foster v. State, 27 GaApp 650, 110 SE 416.

Massachusetts. Commonwealth v. Hassan, 235 Mass 26, 126 NE 287.

Minnesota. State v. Townley, 149 Minn 5, 182 NW 773, 17 ALR 253 (time to enable court to examine).

Mississippi. King v. State, 121 Miss 230, 83 S 164.

Ohio. Venable v. State, 1 OhCir Ct 301, 1 OhCirDec 165.

Texas. O'Toole v. State, 79 TexCr 153, 183 SW 1160 (after close of argument too late); Merka v. State, 82 TexCr 550, 199 SW 1123; Archbell v. State, 97 TexCr 337, 260 SW 867.

Vermont. State v. Gomez, 89 Vt 490, 96 A 190 (request at close of charge too late).

[14] **Federal.** Kreiner v. United States, 11 F2d 722; La Fountain v. United States, 14 F2d 562 (73 requests tendered after charge had been given); Dwyer v. United States, 17 F2d 696; Gilmore v. United States, 39 F2d 897; Patterson v. United States, 62 F2d 968 (requests too late when made after the jury retired); United States v. Ellis, 67 F2d 765 (rule held sufficiently complied with).

Arkansas. Carter v. State, 181 Ark 665, 27 SW2d 781.

Colorado. Milow v. People, 89 Colo 469, 3 P2d 1077.

Kansas. State v. Eyth, 124 Kan 405, 260 P 976.

Louisiana. State v. Ramkissoonsinghjiki, 163 La 750, 112 S 708.

Massachusetts. Commonwealth v. Allen, 256 Mass 452, 152 NE 739; Commonwealth v. Sacco, 259 Mass 128, 156 NE 57.

New Jersey. State v. Juliano, 103 NJL 663, 138 A 575; State v. Mantis, 108 NJL 204, 155 A 17, affg. 8 NJMisc 669, 151 A 376.

Ohio. Kahoun v. State, 33 OhApp 1, 29 OLR 633, 168 NE 550.

[15] **Federal.** Speiller v. United States, 31 F2d 682.

Alabama. In Harris v. State, 25 AlaApp 215, 143 S 242, it was held erroneous to refuse written requests because they were not presented until after oral charge had been given.

Court cannot fix his own time when charges are to be presented, where a provision of the code controls; and if requests are presented in writing at any time before the jury retires, the judge must either give or refuse to give them. Jackson v. State, 24 AlaApp 601, 139 S 576.

California. In People v. Fink, 121 CalApp 14, 8 P2d 493, the court was held not authorized to refuse the charge asked, though not tendered until after the argument was begun.

New Jersey. In Rowland v. Wunderlick, 113 NJL 223, 174 A 168, it was held immaterial under the particular facts that the request to supply omissions in the charge was not made until after the jury retired.

§ 152. Requests for further or more specific instructions in civil cases.

It is the duty of the party aggrieved to tender at the proper time correct instructions to cure defects of indefiniteness or omission, and if he fails to do so, he cannot be heard to complain on these grounds.

Where the instructions given by the court are correct so far as they go, a party who does not request additional and more explicit instructions may not complain that the instructions are misleading.[16] The rule is the same where the instructions are correct in principle but are expressed in too general terms.[17]

[16] **Federal.** Louisville & N. R. Co. v. Holloway, 246 US 525, 62 LEd 867, 38 SupCt 379; Bryne v. Greene, 70 F2d 137.

Alabama. Birmingham R., Light & Power Co. v. Clark, 148 Ala 673, 41 S 829; Tennessee Coal, Iron & R. Co. v. Williamson, 164 Ala 54, 51 S 144; Aquilino v. Birmingham Ry., Light & Power Co., 201 Ala 34, 77 S 328; Sprinkle v. St. Louis & S. F. R. Co., 215 Ala 191, 110 S 137; Ozark v. Byrd, 225 Ala 332, 143 S 168; Dupuy v. Wright, 7 Ala App 238, 60 S 997; Taylor v. Lunsford, 26 AlaApp 127, 154 S 608.

Where an instruction needs explanation to make it applicable to the case, an explanatory charge should be requested. Central of Georgia R. Co. v. Dothan Mule Co., 159 Ala 225, 49 S 243.

Arizona. Phoenix v. Mayfield, 41 Ariz 537, 20 P2d 296.

Arkansas. McGee v. Smitherman, 69 Ark 632, 65 SW 461; North American Union v. Oliphant, 141 Ark 346, 217 SW 1.

California. Peluso v. City Taxi Co., 41 CalApp 297, 182 P 808; Maus v. Scavenger Protective Assn., 2 Cal App2d 624, 39 P2d 209.

Colorado. Mountz v. Apt, 51 Colo 491, 119 P 150; Cooper v. Woodward, 71 Colo 90, 204 P 336.

Connecticut. Willows v. Snyder, 116 Conn 213, 164 A 385.

Florida. Pensacola Elec. Co. v. Bissett, 59 Fla 360, 52 S 367; Edwards & Sayward v. Fitchner, 104 Fla 52, 139 S 585.

Georgia. A. G. Garbutt Lbr. Co. v. Camp, 137 Ga 592, 73 SE 841; Myers v. Phillips, 179 Ga 701, 177 SE 337; Mills v. Pope, 20 GaApp 820, 93 SE 559.

Illinois. Carlson v. Chicago Great Western R. Co., 205 IllApp 156.

Indiana. Valparaiso Lighting Co. v. Tyler, 177 Ind 278, 96 NE 768; New York, C. & St. L. R. Co. v. First Trust & Sav. Bank, 198 Ind 376, 153 NE 761; Jackson Hill Coal Co. v. Van Hentenryck, 69 IndApp 142, 120 NE 664; Pittsburgh, C., C. & St. L. R. Co. v. Tatman, 72 Ind App 519, 122 NE 357.

A party conceiving that instructions do not fully present all the issues to the jury must request instructions which will supply the deficiency. Valparaiso Lighting Co. v. Tyler, 177 Ind 278, 96 NE 768.

Iowa. O'Mara v. Jensma, 143 Ia 297, 121 NW 518; State v. Geier, 184 Ia 874, 167 NW 186; Walmer-Roberts v. Hennessey, 191 Ia 86, 181 NW 798; Evans v. Oskaloosa Trac. & Light Co., 192 Ia 1, 181 NW 782; Hines v. Haugo (Ia), 188 NW 776; Boles v. Royal Union Life Ins. Co., 219 Ia 178, 257 NW 386, 96 ALR 1400.

Kansas. Dighera v. Wheat, 85 Kan 458, 116 P 616; National Bank v. Ward, 6 KanApp 921, 51 P 58.

Kentucky. Cincinnati, N. O. & T. P. R. Co. v. Martin, 146 Ky 260, 142 SW 410; Louisville & I. R. Co. v. Frazee, 179 Ky 488, 200 SW 948; Helge v. Babey, 228 Ky 197, 14 SW2d 757.

It is not required of the court in the general charge to give the whole law of the case. Additional charges should be requested. Wood v. Rigg, 152 Ky 242, 153 SW 214.

Massachusetts. Pierce v. Arnold Print Works, 182 Mass 260, 65 NE 368; Clarke v. Massachusetts Title Ins. Co., 237 Mass 155, 129 NE 376.

Michigan. Spray v. Ayotte, 161 Mich 593, 126 NW 630; Ripley v. Priest, 169 Mich 383, 135 NW 258; Betts v. Carpenter, 239 Mich 260, 214 NW 96 (contributory negligence); Kellstrom v. Detroit, 249 Mich 431, 228 NW 763.

Minnesota. Gruber v. German Roman Catholic Aid Soc., 113 Minn 340, 129 NW 581.

Mississippi. Bacon v. Bacon, 76 Miss 458, 24 S 968.

Missouri. First Nat. Bank v. Ragsdale, 171 Mo 168, 71 SW 178; Jenkins v. Wabash R. Co., 335 Mo 748, 73 SW2d 1002; Dunham v. Miller, 154 MoApp 314, 133 SW 675; Byram v. East St. Louis Ry. Co. (Mo App), 39 SW2d 376; Garnett v. S. S. Kresge Co. (MoApp), 85 SW2d 157.

Montana. Dalke v. Pancoast, 63 Mont 524, 208 P 589.

Nebraska. Riley v. Missouri Pacific R. Co., 69 Neb 82, 95 NW 20; Webb v. Omaha & S. I. R. Co., 101 Neb 596, 164 NW 564; Cornforth v. Graham Ice Cream Co., 109 Neb 426, 191 NW 661; Johnson v. Nathan, 161 Neb 399, 73 NW2d 398.

New Hampshire. McCarthy v. Souther, 83 NH 29, 137 A 445.

New Jersey. Auer v. Sinclair Ref. Co., 103 NJL 372, 137 A 555, 54 ALR 623.

New York. Felice v. New York Cent. & H. R. R. Co., 14 AppDiv 345, 43 NYS 922; Hammer v. Bloomingdale Bros., 215 AppDiv 308, 213 NYS 743.

North Carolina. Trollinger v. Fleer, 157 NC 81, 72 SE 795; Sherrill v. Hood, 208 NC 472, 181 SE 330.

North Dakota. State ex rel. People v. Banik, 21 ND 417, 131 NW 262.

Ohio. Karr v. Sixt, 146 OhSt 527, 67 NE2d 331.

Where a charge is sound as given but could be made clearer or more specific by definition of terms used, substitution of words, or elaboration, the party complaining must request and tender more specific instructions. Failure of the court to make such charge clearer or more specific is not reversible error in the absence of such request. Northwestern Ohio Natural Gas Co. v. First Congregational Church, 126 OhSt 140, 184 NE 512; Netzel v. Todd, 30 OhApp 300, 165 NE 47; Houston v. Schrieber, 34 OhApp 244, 170 NE 661; Bruce v. Cook, 34 Oh App 563, 171 NE 424; Siegel v. Fischer, 15 OLA 557.

Oklahoma. St. Louis & S. F. R. Co. v. Crowell, 33 Okl 773, 127 P 1063; Slick Oil Co. v. Coffey, 72 Okl 32, 177 P 915.

Oregon. Page v. Finley, 8 Or 45.

Pennsylvania. Kaufman v. Pittsburgh, C. & W. R. Co., 210 Pa 440, 60 A 2; Commonwealth v. Pava, 268 Pa 520, 112 A 103; Meholiff v. River Transit Co., 342 Pa 394, 20 A2d 762.

South Carolina. Leppard v. Western Union Tel. Co., 88 SC 388, 70 SE 1004; Llewellyn v. Atlantic Greyhound Corp., 204 SC 156, 28 SE2d 673.

South Dakota. Connell v. Canton, 24 SD 572, 124 NW 839.

Tennessee. Tennessee Coach Co. v. Young, 18 TennApp 592, 80 SW2d 107.

Texas. Parks v. Sullivan (Tex CivApp), 152 SW 704; Beaumont, S. L. & W. Ry. Co. v. Myrick (Tex CivApp), 208 SW 935; Missouri, K. & T. R. Co. v. O'Connor (TexCiv App), 298 SW 921.

A charge submitting matters of defense conjunctively is not affirmatively erroneous. The defect is one of omission to be corrected by a request for instructions submittting the matters disjunctively. Oar v. Davis (TexCivApp), 135 SW 710, affd. in 105 Tex 479, 151 SW 794.

Vermont. De Nottbeck v. Chapman, 93 Vt 378, 108 A 338.

It is not required that instructions should state to which count of the declaration they apply in the absence of request to that effect.[18]

While a party is entitled on request to clear and accurate instructions to the jury, the charge need not discuss all specific items of evidence desired to be emphasized by plaintiff or defendant. A requested instruction merely calling for comment and emphasis on a specific item of evidence was properly denied.[19]

The inadequacy of instructions as to the measure of damages is not ground for reversal where more explicit instructions were not requested.[20] Instructions should be requested where

Washington. Harris v. Brown's Bay Logging Co., 57 Wash 8, 106 P 152; O'Connell v. Home Oil Co., 180 Wash 461, 40 P2d 991.

West Virginia. Henry C. Werner Co. v. Calhoun, 55 WVa 246, 46 SE 1024.

Wisconsin. Stewart v. Ripon, 38 Wis 584; Murphy v. Martin, 58 Wis 276, 16 NW 603; Braunsdorf v. Fellner, 76 Wis 1, 45 NW 97; Owen v. Long, 97 Wis 78, 72 NW 364; New Home Sewing Mach. Co. v. Simon, 113 Wis 267, 89 NW 144.

[17] **Alabama.** Empire Clothing Co. v. Hammons, 17 AlaApp 60, 81 S 838 (abstract instruction).

Arkansas. Bourland v. Caraway, 183 Ark 848, 39 SW2d 316.

Georgia. Gainesville v. Hanes, 22 GaApp 589, 96 SE 349.

Iowa. Livingstone v. Dole, 184 Ia 1340, 167 NW 639; Stilwell v. Stilwell, 186 Ia 177, 172 NW 177.

Kansas. There should be a request for a more complete instruction if the charge, as given, is lacking in some particular, as in the matter of fullness of statement of a principle of law. Turner v. Tootle, 9 KanApp 765, 58 P 562.

Missouri. Quinn v. Van Raalte, 276 Mo 71, 205 SW 59; Dale v. Smith (MoApp), 185 SW 1183; O'Hara v. Lamb Constr. Co., 200 MoApp 292, 206 SW 253; Baldwin v. Kansas City Rys. Co. (MoApp), 231 SW 280.

Montana. Russell v. Sunburst Ref. Co., 83 Mont 452, 272 P 998.

Nebraska. Christensen v. Tate, 87 Neb 848, 128 NW 622; Haight v. Omaha & C. B. St. Ry. Co., 101 Neb 841, 166 NW 248.

North Carolina. Duguid v. Rasberry, 183 NC 134, 110 SE 840.

North Dakota. Zilke v. Johnson, 22 ND 75, 132 NW 640, AnnCas 1913E, 1005.

Oklahoma. Ada v. Smith, 73 Okl 280, 175 P 924.

Pennsylvania. Ross v. Riffle, 310 Pa 176, 164 A 913.

[18] Adamson's Admr. v. Norfolk & P. Trac. Co., 111 Va 556, 69 SE 1055.

[19] Holmes v. Clear Weave Hosiery Stores, Inc., 95 NH 478, 66 A2d 702.

[20] **United States.** Western & Atlantic R. Co. v. Hughes, 278 US 496, 73 LEd 473, 49 SupCt 231.

Alabama. Liberty Life Assur. Soc. v. Woodard, 219 Ala 24, 121 S 30; Brown v. Woolverton, 219 Ala 112, 121 S 404, 64 ALR 640.

California. Wyseur v. Davis, 58 CalApp 598, 209 P 213; Aladdin Co. v. Gregory, 102 CalApp 272, 282 P 1019.

Connecticut. Hageman v. Freeburg, 115 Conn 469, 162 A 21.

Georgia. Meador v. Patterson, 25 GaApp 267, 103 SE 95.

Indiana. New York Cent. R. Co. v. Reidenbach, 71 IndApp 390, 125 NE 55.

Iowa. Darst v. Ft. Dodge, D. M. & S. R. Co., 194 Ia 1145, 191 NW 288; Rastede v. Chicago, St. P., M. & O. R. Co., 203 Ia 430, 212 NW 751.

Kentucky. Nashville, C. & St. L. R. Co. v. Henry, 168 Ky 453, 182 SW 651; Gray-Von Allmen Sanitary

the party fears that the jury is not sufficiently impressed with the necessity of rendering verdict on evidence alone.[21] A party should request a definition of terms which the charge of the court fails to define or he will be denied the right to complain of this lack.[22]

In a suit to reform a deed, failure to instruct more particularly as to the law of mistake, valuable consideration, and

Milk Co. v. McAfee, 229 Ky 444, 17 SW2d 231.

Michigan. Adelsperger v. Detroit, 248 Mich 399, 227 NW 694.

Missouri. Greenwell v. Chicago, M. & St. P. Ry. Co. (Mo), 224 SW 404; Sallee v. St. Louis-San Francisco R. Co., 321 Mo 798, 12 SW2d 476; Keyes v. Chicago, B. & Q. R. Co., 326 Mo 236, 31 SW2d 50; Voelker v. Hill-O'Meara Constr. Co., 153 MoApp 1, 131 SW 907; Cook v. St. Joseph, 203 MoApp 430, 220 SW 693; Kuhn v. St. Joseph (MoApp), 234 SW 353; Stephens v. Saunders (MoApp), 239 SW 600; Klusman v. Harper, 221 MoApp 1110, 298 SW 121; Pavlo v. Forum Lunch Co. (Mo App), 19 SW2d 510; Lakin v. Chicago, R. I. & P. R. Co. (MoApp), 78 SW2d 481.

Montana. Wallace v. Chicago, M. & P. S. R. Co., 52 Mont 345, 157 P 995.

New Jersey. Jersey City v. Meyer (NJ), 150 A 354.

North Carolina. Gibbs v. Western Union Tel. Co., 196 NC 516, 146 SE 209; Hodgin v. Liberty, 201 NC 658, 161 SE 94.

North Dakota. Soules v. Northern Pacific R. Co., 34 ND 7, 157 NW 823, LRA 1917A, 501; Howlett v. Stockyards Nat. Bank, 48 ND 933, 188 NW 172.

Pennsylvania. Powell v. S. Morgan Smith Co., 237 Pa 272, 85 A 416; Hoffman v. Berwind-White Coal Min. Co., 265 Pa 476, 109 A 234.

South Carolina. Templeton v. Charleston & W. R. Co., 117 SC 44, 108 SE 363; Andrews v. Hurst, 163 SC 86, 161 SE 331.

Texas. Texas & P. Ry. Co. v. Bullard (TexCivApp), 127 SW 1152; Commonwealth Ins. Co. v. Finegold (TexCivApp), 183 SW 833; Rio Grande, E. P. & S. F. R. Co. v. Kraft & Madero (TexCivApp), 212 SW 981.

Virginia. Radford v. Brooks, 125 Va 621, 100 SE 664.

West Virginia. Taylor v. Sturm Lbr. Co., 90 WVa 530, 111 SE 481; Nees v. Julian Goldman Stores, 109 WVa 329, 154 SE 769.

[21] **Alabama.** Conway v. Robinson, 216 Ala 495, 113 S 531.

Montana. Kelley v. John R. Daily Co., 56 Mont 63, 181 P 326.

New Hampshire. Hussey v. Boston & M. R. R. Co., 82 NH 236, 133 A 9.

[22] **Alabama.** Hammett v. Birmingham Ry., Light & Power Co., 202 Ala 520, 81 S 22.

Georgia. Pye v. Pye, 133 Ga 246, 65 SE 424; Freeman v. Petty, 22 GaApp 199, 95 SE 737 (express warranty).

Iowa. Hanna v. Central States Elec. Co., 210 Ia 864, 232 NW 421; McQuillen v. Meyers, 213 Ia 1366, 241 NW 442.

Maine. Farnum v. Clifford, 118 Me 145, 106 A 344.

Maryland. Zulver v. Roberts, 162 Md 636, 161 A 9 (failure to limit term "contributory negligence" as applied to children).

Minnesota. Hayday v. Hammermill Paper Co., 184 Minn 8, 237 NW 600; Clark v. Banner Grain Co., 195 Minn 44, 261 NW 596.

Missouri. Hurlburt v. Bush, 284 Mo 397, 224 SW 323; Berryman v. Southern Surety Co., 285 Mo 379, 227 SW 96; Brickell v. Fleming (Mo), 281 SW 951 (high, dangerous, and negligent rate of speed); Hobart-Lee Tie Co. v. Grodsky, 329 Mo 706, 46 SW2d 859; Rippetoe v.

mental incapacity of grantor was not error, in absence of a written request therefor.[23]

§ 153. Requests for further or more specific instructions in criminal cases.

In criminal cases, it is the duty of the party aggrieved to tender at the proper time correct instructions to cure defects of indefiniteness or omission; his failure to do so will preclude complaint by him.

The rule in civil cases[24] on this matter applies to criminal cases as well.[25] But this rule does not apply to substantive,

Missouri, K. & T. R. Co., 138 Mo App 402, 122 SW 314; Nagle v. Alberter (MoApp), 53 SW2d 289.

New Jersey. Public Nat. Bank v. Patriotic Ins. Co., 105 NJL 477, 144 A 566.

Texas. Gulf, C. & S. F. Ry. Co. v. Conley (TexCivApp), 236 SW 521; Great West Mill & Elev. Co. v. Hess (TexCivApp), 281 SW 234 (contributing proximate cause).

Wisconsin. Thomas v. Williams, 139 Wis 467, 121 NW 148 (malicious).

[23] Boddie v. Ridley, 197 Ga 221, 28 SE2d 773.

[24] See § 152, *supra*.

[25] **Federal.** Steers v. United States, 112 CCA 423, 192 F 1; Schultz v. United States, 118 CCA 420, 200 F 234.

California. People v. Anthony, 20 CalApp 586, 129 P 968; People v. Shaw, 36 CalApp 441, 172 P 401.

Florida. Miller v. State, 76 Fla 518, 80 S 314; Turner v. State, 99 Fla 246, 126 S 158.

Georgia. Dickens v. State, 137 Ga 523, 73 SE 826; Whitley v. State, 8 GaApp 165, 68 SE 863; Wells v. State, 17 GaApp 301, 86 SE 650; Hamilton v. State, 18 GaApp 925, 89 SE 449; Wilkinson v. State, 18 Ga App 330, 89 SE 460 (keeping lewd house); Dumas v. State, 25 GaApp 543, 103 SE 739; Reese v. State, 34 GaApp 600, 130 SE 920.

Illinois. People v. Schmidt, 292 Ill 127, 126 NE 570.

Indiana. Brewster v. State, 186 Ind 369, 115 NE 54; Colondro v. State, 188 Ind 533, 125 NE 27; Kellar v. State, 192 Ind 38, 134 NE 881; Pollard v. State, 201 Ind 180, 166 NE 654, 84 ALR 779; Alexander v. State, 202 Ind 1, 170 NE 542; Lloyd v. State, 206 Ind 359, 189 NE 406; Bowman v. State, 207 Ind 358, 192 NE 755, 96 ALR 522 (forms of verdict); Erfman v. State, 207 Ind 673, 194 NE 326.

Iowa. State v. Christ, 189 Ia 474, 177 NW 54; State v. Griffin, 218 Ia 1301, 254 NW 841.

Louisiana. State v. Charles, 124 La 744, 50 S 699, 18 AnnCas 934.

Massachusetts. Commonwealth v. Hassan, 235 Mass 26, 126 NE 287.

Michigan. People v. Williams, 208 Mich 586, 175 NW 187; People v. Depew, 215 Mich 317, 183 NW 750.

Missouri. State v. Herring, 268 Mo 514, 188 SW 169; State v. Rozell (Mo), 279 SW 705.

North Carolina. State v. Yates, 155 NC 450, 71 SE 317; State v. Burton, 172 NC 939, 90 SE 561; State v. Coleman, 178 NC 757, 101 SE 261; State v. Ellis, 203 NC 836, 167 SE 67.

Ohio. State v. Schiller, 70 OhSt 1, 70 NE 505; Scott v. State, 107 Oh St 475, 141 NE 19; Snook v. State, 34 OhApp 60, 170 NE 444; Hayes v. State, 14 OhCirCt (N. S.) 497, 25 OhCirDec 57, 59 OhBull 322; Murray v. State, 23 OhCirCt (N. S.) 508, 34 OhCirDec 340; Pomeransky v. State, 1 OLA 220.

Where a trial court gives an instruction which is allegedly incomplete, but correct as far as it goes, failure to charge further, if it is error, is an error of omission and not

material, or essential features of the charge against the defendant.[26]

Instructions should be requested where the charge of the court is incomplete,[27] or may have a tendency to mislead,[28] or defines offenses insufficiently,[29] or omits necessary definitions,[30] or fails to state that the jury are judges of the law and the facts in a state where that is the rule,[31] or the charge is thought lacking on the question of insanity[32] or reasonable doubt as

of commission. Unless counsel has requested an instruction to supply the omission, such error will not ordinarily justify reversal. State v. Tudor, 154 OhSt 249, 43 OhO 130, 95 NE2d 385; State v. Elfrink, 161 OhSt 549, 53 OhO 406, 120 NE2d 83.

Oklahoma. Davis v. State, 15 Okl Cr 386, 177 P 621; Reagan v. State, 35 OklCr 332, 250 P 435; Nance v. State, 43 OklCr 247, 278 P 357.

Oregon. State v. Chong Ben, 89 Or 313, 173 P 258, 1173.

Pennsylvania. Commonwealth v. Webb, 252 Pa 187, 97 A 189; Commonwealth v. Russogulo, 263 Pa 93, 106 A 180 (presumption of innocence); Commonwealth v. Bednorciki, 264 Pa 124, 107 A 666; Commonwealth v. Scherer, 266 Pa 210, 109 A 867; Commonwealth v. Dorst, 285 Pa 232, 132 A 168; Commonwealth v. Girardot, 107 PaSuper 274, 163 A 362.

South Carolina. State v. Cokley, 83 SC 197, 65 SE 174; State v. Burns, 107 SC 351, 92 SE 1033; State v. Brown, 113 SC 513, 101 SE 847; State v. Craig, 161 SC 232, 159 SE 559.

Texas. Hoyle v. State, 62 TexCr 297, 137 SW 355; Powdrill v. State, 69 TexCr 340, 155 SW 231; Cross v. State, 85 TexCr 430, 213 SW 638; Carter v. State, 90 TexCr 248, 234 SW 535.

Washington. State v. Willey, 165 Wash 247, 5 P2d 319.

Wyoming. State v. Aragon, 41 Wyo 308, 285 P 803.

[26] **Florida.** Croft v. State, 117 Fla 832, 158 S 454.

Georgia. Gleaton v. State, 50 Ga App 210, 177 SE 362.

North Carolina. State v. Steadman, 200 NC 768, 158 SE 478.

[27] Brundage v. State, 7 GaApp 726, 67 SE 1051; Birmingham v. State, 145 Wis 90, 129 NW 670.

[28] **Alabama.** Jones v. State, 176 Ala 20, 58 S 250; Murphy v. State, 14 AlaApp 78, 71 S 967; Evans v. State, 17 AlaApp 141, 82 S 625.

Illinois. People v. Paisley, 288 Ill 310, 123 NE 573.

South Carolina. Fuller definitions should be requested. State v. Chastain, 85 SC 64, 67 SE 6.

[29] **Georgia.** McKee v. State, 174 Ga 120, 162 SE 139.

Indiana. Partlow v. State, 191 Ind 660, 128 NE 436 (knowledge as element of receiving stolen goods); Hammell v. State, 198 Ind 45, 152 NE 161.

Nevada. State v. Verganadis, 50 Nev 1, 248 P 900.

North Carolina. State v. Gore, 207 NC 618, 178 SE 209.

Texas. Zimmerman v. State, 85 TexCr 630, 215 SW 101.

Utah. State v. Prince, 75 Utah 205, 284 P 108.

[30] **Georgia.** Kelly v. State, 145 Ga 210, 88 SE 822 (successful impeachment); Pope v. State, 150 Ga 703, 105 SE 296 (malice); Yopp v. State, 175 Ga 314, 165 SE 29 (reasonable doubt).

Pennsylvania. Commonwealth v. Bruno, 316 Pa 394, 175 A 518.

South Carolina. State v. Allen, 110 SC 278, 96 SE 401.

[31] People v. Mirabella, 294 Ill 246, 128 NE 374.

[32] **Federal.** Daly v. United States, 38 F2d 443.

Arkansas. Carty v. State, 135 Ark 169, 204 SW 207.

a defense,[33] or is incomplete in so far as it concerns identification,[34] impeaching testimony,[35] or presumption that confession obtained by officers was produced by threats.[36]

So, a defendant deeming an instruction insufficient to present the matter of self-defense is under duty to request a more specific charge.[37] The same is true as to threats claimed to have been made against the defendant by the victim of a homicide,[38] character evidence,[39] or circumstantial evidence.[40]

In the absence of a request for a more specific direction to the jury, it is sufficient for the court to charge on flight that it, if unexplained, is a circumstance indicating guilt.[41]

§ 154. Formal requisites of requests.

The requested instruction should be (1) made in writing, (2) signed by the party or his attorney, (3) filed and tendered to the court, (4) and marked by the court as "given" or "refused."

(1) The requested instruction, as distinguished from the request itself, should be made in writing.[42] It is not good practice

California. People v. Zentgraf, 49 CalApp 336, 193 P 274; People v. Bradshaw, 5 CalApp2d 528, 43 P2d 317.

Georgia. Smith v. McClure, 151 Ga 484, 107 SE 330; Cook v. State, 174 Ga 462, 163 SE 150.

[33] **California.** People v. Geonzelis, 106 CalApp 434, 289 P 667.

Missouri. State v. Carter (Mo App), 16 SW2d 648.

Pennsylvania. Commonwealth v. Grill, 94 PaSuper 330; Commonwealth v. Fisher, 96 PaSuper 155.

[34] People v. De Hoog, 100 Cal App 235, 279 P 1067; Trimble v. State, 118 Neb 267, 224 NW 274.

[35] Eaton v. Commonwealth, 230 Ky 250, 19 SW2d 218.

[36] Snook v. State, 34 OhApp 60, 170 NE 444, error dismissed in 121 OhSt 625, 172 NE 307, and cert. den. in 281 US 722, 74 LEd 1141, 50 Sup Ct 237.

[37] **California.** People v. Bryant, 77 CalApp 375, 246 P 815.

Michigan. People v. Statkiewicz, 247 Mich 260, 225 NW 540.

Missouri. State v. Rozell (Mo), 279 SW 705; State v. Sudduth, 331 Mo 728, 55 SW2d 962.

Nevada. See State v. Hall, 54 Nev 213, 13 P2d 624.

North Dakota. State v. Turner, 59 ND 229, 229 NW 7.

Oklahoma. Carmichael v. State, 44 OklCr 160, 279 P 515.

Pennsylvania. Commonwealth v. Mendola, 294 Pa 353, 144 A 292.

[38] **Georgia.** Hartley v. State, 168 Ga 296, 147 SE 504.

Missouri. State v. Robinett, 312 Mo 635, 281 SW 29.

Tennessee. Green v. State, 154 Tenn 26, 285 SW 554.

[39] C. M. Spring Drug Co. v. United States, 12 F2d 852; Foshay v. United States, 68 F2d 205; State v. Kneeskern, 203 Ia 929, 210 NW 465. See State v. Schenk, 220 Ia 511, 262 NW 129.

[40] State v. Holley, 136 SC 68, 134 SE 213; State v. Wenger, 47 Wyo 401, 38 P2d 339.

[41] Land v. State, 37 GaApp 382, 140 SE 406.

[42] **Alabama.** Oldacre v. State, 196 Ala 690, 72 S 303; Davis v. Brandon, 200 Ala 160, 75 S 908; Norris v. State, 229 Ala 226, 156 S 556 (under requirements of Code 1923, § 9509); Foote v. State, 16 AlaApp 136, 75 S 728.

to mark or indicate passages in law books and statutes and hand them to the court as requests.[43] But the request to correct an omission in a charge is sufficient by referring to the syllabus of a reported case.[44]

California. People v. Newton, 108 CalApp 599, 291 P 853; People v. Shayer, 135 CalApp 755, 28 P2d 48.

Florida. Tindall v. State, 99 Fla 1132, 128 S 494.

Georgia. Hunter v. State, 136 Ga 103, 70 SE 643; Reed v. State, 148 Ga 18, 95 SE 692; Bass v. State, 152 Ga 415, 110 SE 237; Davis v. State, 153 Ga 154, 112 SE 280; Montgomery v. Savannah Elec. Co., 17 GaApp 452, 87 SE 690; Craddock v. Seaboard Air Line Ry., 17 GaApp 472, 87 SE 693; Cash v. State, 18 Ga App 486, 89 SE 603; Richardson v. State, 18 GaApp 755, 90 SE 487; Dumas v. J. W. Stafford & Son, 22 GaApp 365, 95 SE 1009; Freeman v. Metropolitan Life Ins. Co., 35 Ga App 770, 134 SE 639; McCaskell v. State, 39 GaApp 412, 147 SE 408; Byrd v. Grace, 43 GaApp 255, 158 SE 467.

Illinois. Mims v. Mutual Ben. Health & Acc. Assn., 319 IllApp 239, 48 NE2d 796.

Kentucky. Wolfinbarger v. Stanton, 220 Ky 451, 295 SW 467; Fidelity & Deposit Co. v. Commonwealth for Use of Freer, 231 Ky 346, 21 SW2d 452; Howell v. Standard Oil Co., 234 Ky 347, 28 SW2d 3; Murphy v. Phelps, 241 Ky 339, 43 SW2d 1010.

Massachusetts. Commonwealth v. Feci, 235 Mass 562, 127 NE 602.

Michigan. Harnau v. Haight, 189 Mich 600, 155 NW 563.

The Michigan statute relating to requests to charge provides for written requests, but makes no mention of any right to verbally ask a specific instruction (C. L. 1948, § 691.432, Stat. Ann. § 27.1092). But the judge may grant an oral request, but, if he declines, it would not be error. Corpron v. Skiprick, 334 Mich 311, 54 NW2d 601.

Minnesota. Clark v. Banner Grain Co., 195 Minn 44, 261 NW 596 (explanation of statute not required without written request).

Mississippi. The requests must be made in writing, and the judge cannot instruct without such requests. Masonite Corp. v. Lochridge, 163 Miss 364, 140 S 223, 141 S 758.

Missouri. State v. Layton, 332 Mo 216, 58 SW2d 454; Fenton v. Hart (MoApp), 73 SW2d 1034.

Nebraska. Luther v. Luther, 103 Neb 46, 170 NW 364; Grosh v. State, 118 Neb 517, 225 NW 479.

New Hampshire. The presiding judge may waive the requirement that requests must be in writing. O'Dowd v. Heller, 82 NH 387, 134 A 344.

New Jersey. Hartwyck v. Shea, 114 NJL 235, 176 A 390.

North Carolina. State v. Wilkes, 170 NC 735, 87 SE 48 (right to refuse oral request); State v. Holt, 192 NC 490, 135 SE 324.

Ohio. Hocking Valley Ry. Co. v. James, 1 OhApp 335, 18 OhCirCt (N. S.) 210, 28 OhCirDec 507; Pollock v. McGinty, 7 OLA 216.

The instructions presented to the court must be in writing, but the request to give the presented instructions need not be in writing. Dunham v. Mulby, 24 OhApp 509, 156 NE 608.

Oklahoma. Relf v. State, 44 Okl Cr 239, 280 P 851; Ford v. State, 52 OklCr 321. 5 P2d 170; Carpenter v. State, 56 OklCr 76, 33 P2d 637.

Pennsylvania. It is not good practice to give oral instructions. Leonhardt v. Green, 251 Pa 579, 96 A 1096.

Tennessee. Walkup v. Covington, 18 TennApp 117, 73 SW2d 718.

Texas. Stephens v. State, 125 Tex Cr 397, 68 SW2d 181.

Wyoming. Smith v. State, 17 Wyo 481, 101 P 847.

[43] American Nat. Bank v. Ward, 145 Ga 551, 89 SE 578; Stein-

(2) The requested instruction should be signed by the party or his attorney.[45]

(3) The requested instruction should be filed and tendered to the court.[46] Asking permission to offer instructions is not equivalent to requesting the giving of instructions.[47] A bare exception to a charge given is not equivalent to a request for an instruction on the subject covered by the instruction to which exception is taken.[48]

(4) The requested instruction should be marked by the court as "given" or "refused,"[49] although it is not necessarily error merely to fail to mark the requested instruction in this way.[50] In some jurisdictions, it is considered bad practice for the court to announce that the instructions given were requested by one of the parties.[51]

heimer v. Bridges, 146 Ga 214, 91 SE 19; Conley v. State, 21 GaApp 134, 94 SE 261. But see Pickens v. Miller, 119 Conn 553, 177 A 573, applying provisions of Practice Book 1934, p. 59, § 156.

[44] Kelley v. Ohio Trac. Co., 24 Oh App 539, 157 NE 765.

[45] **Alabama.** Winford v. State, 16 AlaApp 143, 75 S 819.

Indiana. Bader v. State, 176 Ind 268, 94 NE 1009; Weigand v. State, 178 Ind 623, 99 NE 999; Logansport v. Green, 192 Ind 253, 135 NE 657.

In Wiley v. State, 200 Ind 572, 165 NE 313, a statutory requirement that requested instructions be signed was held not complied with by the signature of the defendant's attorneys.

Texas. First Nat. Bank v. Patterson (TexCivApp), 185 SW 1018.

[46] Flatters v. State, 189 Ind 287, 127 NE 5; Texas & P. Ry. Co. v. Thorp (TexCivApp), 198 SW 335.

[47] Ross v. Burton, 218 Ky 765, 292 SW 301.

[48] Ripper v. United States, 103 CCA 478, 179 F 497. But see Green v. State, 118 TexCr 428, 38 SW2d 99.

[49] **Alabama.** Indorsement of reasons for refusal was held a "wise and proper precaution." Stevenson v. State, 18 AlaApp 174, 90 S 140.

Illinois. Gibbons v. Paducah & I. R. Co., 211 IllApp 138, affd. in 284 Ill 559, 120 NE 500.

Where the trial court, on the ground that it was contrary to its practice of limiting the number of instructions given in negligence cases to eight, refused to consider fourteen instructions requested by the defendant, and refused to mark them either given or refused, such was held contrary to the practice act, and reversible error. Nugent v. Waters, 266 IllApp 377.

Minnesota. State v. Miller, 151 Minn 386, 186 NW 803.

Mississippi. But see Nelson v. State, 129 Miss 288, 92 S 66 (instruction given without giving other party opportunity for requesting explanatory instruction).

New York. Delisky v. Leonard, 189 AppDiv 623, 179 NYS 112.

Oklahoma. It is error for court to mark instructions "given" and then fail to read it to the jury. Methvine v. Fisher, 64 Okl 309, 166 P 702.

Texas. Kansas City, M. & O. Ry. Co. v. Harral (TexCivApp), 199 SW 659; Daniels v. Franklin (Tex CivApp), 233 SW 380.

[50] Nicol v. Davis, 107 CalApp 26, 290 P 114; Pate v. Rodman, 254 IllApp 372.

[51] Curran v. Chicago Great Western Ry. Co., 134 Minn 392, 159 NW 955; Moore v. P. J. Downes Co., 150 Minn 333, 185 NW 395.

It is the practice in some jurisdictions to require the requested instructions to be numbered.[52]

The requested instruction should not contain more than one proposition of law;[53] but it is not fatal that several of the requested instructions are on a single sheet of paper.[54]

§ 155. Necessity of clear expression in requested instruction.

The request must be stated in clear, distinct, and definite language, and should be refused where the language employed is vague, indefinite, or calculated to mislead the jury.

Since a granted instruction will be read to the jury, it is obvious that a requested instruction should be refused if the language is so ambiguous as to mislead the jury.[55] More particularly, the requested instruction should be refused if it is unin-

[52] Hill v. State, 21 AlaApp 310, 107 S 789.

[53] Kast v. Turley, 111 Conn 253, 149 A 673; Central Casualty Co. v. Fleming, 22 OhApp 129, 153 NE 345; Medford v. Kimmey (TexCiv App), 298 SW 140.

[54] Baltrunas v. Baubles, 23 Oh App 104, 154 NE 747.

[55] **Federal.** Dwyer v. United States, 17 F2d 696; Memphis Press-Scimitar Co. v. Chapman, 62 F2d 565 (adhering to this rule, but holding the request sufficiently definite to direct the court's attention to failure to charge on a material matter); United States v. Great Northern Ry. Co., 73 F2d 736.

Connecticut. Requests should ordinarily contain only plain propositions of law, based on stated assumptions of fact not unwarranted by the evidence. They should not contain statements of disputed facts or evidence. Urbansky v. Kutinsky, 86 Conn 22, 84 A 317.

Illinois. Kehl v. Abram, 112 Ill App 77, affd. in 210 Ill 218, 71 NE 347, 102 AmSt 158; Shope v. Laughlin, 191 IllApp 38.

Maryland. Neighbors v. Leatherman, 116 Md 484, 82 A 152; Penn Oil Co. v. Triangle Petroleum & Gasoline Co., 136 Md 559, 111 A 482.

Missouri. Vague verbal request not sufficient to require court to instruct on collateral matters. State v. Starr, 244 Mo 161, 148 SW 862.

Montana. Melzner v. Chicago, M. & St. P. Ry. Co., 51 Mont 487, 153 P 1019.

New Jersey. Thompson v. Lancaster, 8 NJMisc 71, 148 A 400 (request failing to state provision of traffic law). See Farrell v. Weisman, 108 NJL 458, 158 A 826.

Ohio. American Steel Packing Co. v. Conkle, 86 OhSt 117, 99 NE 89; Cincinnati Trac. Co. v. Lied, 9 OhApp 156, 29 OCA 136; Haley v. Dempsey, 14 OhApp 326; Cleveland, C., C. & St. L. Ry. Co. v. Wehmeier, 33 OhApp 475, 170 NE 27, 31 OLR 45; Great Atlantic & Pacific Tea Co. v. Redmond, 30 OLR 449, 7 OLA 645; Kopachy v. Blank, 7 OLA 281; Griffith v. Griffith, 12 OLA 716.

Pennsylvania. Hanley v. Epstein, 107 PaSuper 507, 164 A 122.

Texas. Barnes v. Dallas Consol. Elec. Street Ry. Co., 103 Tex 387, 128 SW 367; Creager v. Yarborough (TexCivApp), 87 SW 376; Zuniga v. State, 115 TexCr 222, 28 SW2d 822.

Requested instructions in misdemeanor cases, unlike those in felony cases, must state pointedly the law applicable to the case. Brent v. State, 57 TexCr 411, 123 SW 593.

West Virginia. Patton & Shaver v. Elks River Nav. Co., 13 WVa 259.

telligible or meaningless,[56] or abstract,[57] or needs construction to prevent misleading the jury.[58] The court may refuse a request that is interlined and contains erasures as that is calculated to confuse the jury.[59] Where an instruction states the law in technical language and in such a manner that its meaning is apt to be misunderstood by the jury, requiring more than a verbal change to make it clear, there will be no error in refusing it.[60] So, where an instruction fails to make good sense, it should be withheld, and this will be true even though it may be apparent that the word "defendant" was unintentionally used for "plaintiff."[61]

But, while it is true that the form of an instruction should be clear and intelligible, it is not necessary to anticipate and guard against every possibility of misapprehension.[62] The fact of misspelling of words is not ground for refusal if the instruction is otherwise intelligible.[63]

§ 156. Modification of requested instructions.

In both criminal and civil cases, the court may refuse an instruction which is not good as submitted. But if the requested instruction correctly states the applicable law, the court may modify a requested instruction to conform to the facts and give it in his own language.

Civil cases. A requested instruction should be good as asked, and there is no obligation of the court to modify the requested instruction.[64] But if the instruction correctly states the law, the court may modify requests to conform to the facts and he may if he chooses submit the substance of the request in his own language, though the requested instruction is correct.[65] A

[56] McDonald v. State, 165 Ala 85, 51 S 629; Lee v. State, 3 AlaApp 36, 57 S 395.

[57] **Georgia.** Mercantile Nat. Bank v. Stein, 158 Ga 894, 124 SE 697.

Massachusetts. McDonough v. Vozzela, 247 Mass 552, 142 NE 831.

North Carolina. Beck v. Sylva Tanning Co., 179 NC 123, 101 SE 498.

Pennsylvania. Cobb v. Bradford Tp., 232 Pa 198, 81 A 199.

A point should contain but a single legal proposition and be so constructed that the trial court can answer it by a single affirmation or negation. Schweitzer v. Williams, 43 PaSuper 202.

[58] Jebeles & Colias Confectionery Co. v. Booze, 181 Ala 456, 62 S 12; Great Atlantic & Pacific Tea Co. v. Redmond, 30 OLR 449, 7 OLA 645.

[59] Roberts v. State, 171 Ala 12, 54 S 993.

[60] Ramsey v. Burns, 27 Mont 154, 69 P 711.

[61] Macon Consol. Street R. Co. v. Barnes, 113 Ga 212, 38 SE 756.

[62] Parsons v. Lyman, 71 Minn 34, 73 NW 634.

[63] Brewer v. Home Supply Co., 17 AlaApp 273, 84 S 560 ("sole" spelled "sold").

[64] See § 157, *infra.*

[65] **Federal.** Washington Times Co. v. Murray, 55 AppDC 32, 299 F 903.

California. Fiori v. Agnew, 33 Cal App 284, 164 P 899.

Connecticut. Board of Water Comrs. of New London v. Robbins & Potter, 82 Conn 623, 74 A 938; Radwick v. Goldstein, 90 Conn 701, 98 A 583; Fagerholm v. Nielson, 93 Conn 380, 106 A 333; Dunn v. Poirot, 97 Conn 713, 118 A 33; Rohde v. Nock, 101 Conn 439, 126 A 335; Pickens v. Miller, 119 Conn 553, 177 A 573; Goodman v. Norwalk Jewish Center, Inc., 145 Conn 146, 139 A2d 812.

Illinois. Kleet v. Southern Illinois Coal & Coke Co., 197 IllApp 243.

Iowa. Farr v. Mackie Motors Co., 193 Ia 954, 186 NW 52.

Kansas. Evans v. Lafeyth, 29 Kan 736.

Kentucky. West Kentucky Coal Co. v. Key, 178 Ky 220, 198 SW 724; Slusher v. Hopkins, 28 KyL 347, 89 SW 244.

Maine. Dalton v. Callahan, 122 Me 178, 119 A 380.

Massachusetts. Day v. Cooley, 118 Mass 524; O'Leary v. Boston Elev. Ry. Co., 209 Mass 62, 95 NE 85; Holbrook v. Seagrave, 228 Mass 26, 116 NE 889; Heuser v. Tileston & Hollingworth Co., 230 Mass 299, 119 NE 683; Clarke v. Massachusetts Title Ins. Co., 237 Mass 155, 129 NE 376; McDonough v. Vozzela, 247 Mass 552, 142 NE 831; Barnes v. Berkshire Street Ry. Co., 281 Mass 47, 183 NE 416.

Michigan. Bloch v. Detroit United Ry., 211 Mich 252, 178 NW 670.

Minnesota. Anderson v. Foley Bros., 110 Minn 151, 124 NW 987.

New Hampshire. Elwell v. Roper, 72 NH 585, 58 A 507; Graham v. Weber, 79 NH 393, 109 A 717.

New Jersey. Pavan v. Worthen & Aldrich Co., 80 NJL 567, 78 A 658; Gluckman v. Darling, 87 NJL 320, 95 A 1078; State v. Dedge, 100 NJL 70, 125 A 316; McLaughlin v. Damboldt, 100 NJL 127, 125 A 314; Boele v. Colonial Western Airways, 110 NJL 76, 164 A 436, affg. 10 NJMisc 217, 158 A 440; Hamilton v. Althouse, 115 NJL 248, 178 A 792; Leavitt v. Leavitt, 7 NJMisc 124, 144 A 186, affd. in 106 NJL 247, 148 A 918; Hauranchalk v. Warren & Arthur Smadbeck, Inc., 13 NJMisc 190, 177 A 240.

North Carolina. In re Craven's Will, 169 NC 561, 86 SE 587; Lloyd v. Bowen, 170 NC 216, 86 SE 797; Reed Coal Co. v. Fain, 171 NC 646, 89 SE 29; Beck v. Sylva Tanning Co., 179 NC 123, 101 SE 498; Jones v. D. L. Taylor & Co., 179 NC 293, 102 SE 397; In re Hinton's Will, 180 NC 206, 104 SE 341.

Ohio. A party requesting an instruction is entitled to have it given or refused in the form requested. Commissioners v. Swanson, 7 OhApp 405, 27 OhCtApp 167, 28 OhCirDec 353. See also Premier Service Co. v. Sefton, 31 OhApp 154, 166 NE 140; Lake Shore & M. S. Ry. Co. v. Schultz, 19 OhCirCt 639, 9 OhCirDec 816.

Statutory provision forbidding modification of written instructions is inapplicable to written charges given before argument. Pratt v. Byers, 41 OhApp 112, 179 NE 747.

Oklahoma. Finch v. American State Bank, 97 Okl 172, 223 P 631; Campbell v. Breece, 134 Okl 266, 274 P 1085.

Oregon. Nutt v. Isensee, 60 Or 395, 119 P 722; Laird v. Frick, 142 Or 639, 18 P2d 1029.

Pennsylvania. Hufnagle v. Delaware & Hudson Co., 227 Pa 476, 76 A 205, 40 LRA (N. S.) 982, 19 Ann Cas 850.

South Carolina. Pooler v. Smith, 73 SC 102, 52 SE 967; Hair v. Winnsboro Bank, 103 SC 343, 88 SE 26; Dutton v. Atlantic Coast Line R. Co., 104 SC 16, 88 SE 263; North State Lbr. Co. v. Charleston Consol. Ry. & Lighting Co., 115 SC 267, 105 SE 406.

Texas. Western Union Tel. Co. v. Goodson (TexCivApp), 202 SW 766.

The court should give or refuse a charge as requested; it is improper to alter a charge without the consent of the party asking it and

party is not entitled to require the giving of an instruction in any particular word formation,[66] since the court as a general rule is under no obligation to instruct in the identical language of the request,[67] but may change the instruction to make it more clear.[68]

then give it as such party's charge. St. Louis S. W. Ry. Co. v. Ball, 28 TexCivApp 287, 66 SW 879.

Utah. Speight v. Rocky Mountain Bell Tel. Co., 36 Utah 483, 107 P 742.

Vermont. Desmarchier v. Frost, 91 Vt 138, 99 A 782; Rice v. Bennington County Sav. Bank, 93 Vt 493, 108 A 708.

Virginia. Fitzgerald v. Southern Farm Agency, 122 Va 264, 94 SE 761.

Washington. Edwards v. Seattle, R. & S. Ry. Co., 62 Wash 77, 113 P 563; Perry Bros. v. Diamond Ice & Storage Co., 92 Wash 105, 158 P 1008, AnnCas 1918C, 891; Lund v. Griffiths & Sprague Stevedoring Co., 108 Wash 220, 183 P 123; Fehler v. Montesano, 110 Wash 143, 188 P 5; Hayes v. Staples, 129 Wash 436, 225 P 417; Child v. Hill, 155 Wash 133, 283 P 1076.

West Virginia. Griffith v. American Coal Co., 78 WVa 34, 88 SE 595; Atlas Realty Co. v. Monroe, 116 W Va 337, 180 SE 261; Polen v. Huber, 116 WVa 455, 181 SE 718.

Wisconsin. Hamus v. Weber, 199 Wis 320, 226 NW 392.

[66] **Maryland.** United Rys. & Elec. Co. v. Perkins, 152 Md 105, 136 A 50.

Missouri. Goudie v. National Surety Co. (MoApp), 288 SW 369.

New Hampshire. Salvas v. Cantin, 85 NH 489, 160 A 727.

New Jersey. Karnitsky v. Machanic, 94 NJL 127, 109 A 303; Hochreutener v. Pfenninger, 113 NJL 317, 174 A 513.

North Carolina. Security Life & Annuity Co. v. Forrest, 152 NC 621, 68 SE 139; Bailey v. Hassell, 184 NC 450, 115 SE 166.

Ohio. In Premier Service Co. v. Sefton, 31 OhApp 154, 166 NE 140, it was held that where a special charge is requested by one party, the court should either refuse to give it if erroneous, or should give it without comment if proper, but it is error for the court to modify such charge.

Error cannot be predicated on refusal of charges, one of which was given with corrections admittedly necessary, and others of which were substantially covered. Becker S. S. Co. v. Snyder, 31 OhApp 379, 166 NE 645.

The trial judge has no right of his own volition to change context of written preargument request to charge; and by voluntarily changing such request to charge and giving it in a changed form he makes it his own. Warn v. Whipple, 45 OhApp 285, 187 NE 88, 39 OLR 49.

Oregon. Riley v. Good, 142 Or 155, 18 P2d 222.

Utah. Nelson v. Lott, 81 Utah 265, 17 P2d 272.

Washington. Averbuch v. Great Northern Ry. Co., 55 Wash 633, 104 P 1103.

[67] **Federal.** Rice v. Eisner, 16 F2d 358; Guardian Trust Co. v. Meyer, 19 F2d 186; O'Boyle v. Northwestern Fire & Marine Ins. Co., 49 F2d 713; United States v. Burke, 50 F2d 653; New England Trust Co. v. Farr, 57 F2d 103.

Connecticut. Sizer v. Waterbury, 113 Conn 145, 154 A 639.

Massachusetts. Ponticelli v. Cataldo, 255 Mass 473, 152 NE 81.

New Jersey. Van Pelt v. Sturgis, 102 NJL 708, 133 A 303; Runyon v. Monarch Acc. Ins. Co., 108 NJL 489, 158 A 530; Ryan v. Deans, 114 NJL 199, 176 A 160.

Oklahoma. First State Bank v. Dickerson, 119 Okl 103, 245 P 54.

Oregon. Howland v. Fenner Mfg. Co., 121 Or 1, 252 P 962.

The court may modify the requested instruction by eliminating argumentative matter,[69] or he may eliminate from an instruction a part which ignores a material point of fact,[70] or he may modify an abstract proposition so as to cover a concrete case presented by the evidence.[71] He may change the words "should find" to "may find."[72] He may modify a request in an automobile collision case by adding thereto a declaration that a given rate of speed through a village would constitute prima facie negligence, if the question whether there was negligence is left to the determination of the jury.[73] Where the request contained the word "insanity," it was permissible for the court to substitute "unsoundness of mind."[74]

A request which is not supported by the evidence may be refused[75] or modified.[76] And the party offering the instruction cannot complain that it is modified by the court, where it is not

Rhode Island. Hatch v. Sallinger, 47 RI 395, 133 A 621.

Washington. Nicolle v. United Auto Transp. Co., 138 Wash 48, 244 P 127.

[68] **Arkansas.** Allen v. Northern, 121 Ark 150, 180 SW 465 (example of modification making instruction confusing and misleading).

Illinois. Pulver v. Ainsworth, 205 IllApp 80; Harovsky v. Chicago City R. Co., 205 IllApp 570; Costello v. Federal Life Ins. Co., 259 IllApp 321.

Missouri. Lefever v. Stephenson (Mo), 193 SW 840.

An instruction should be redrawn where modification has not aided clearness. Esstman v. United Rys. Co. (Mo), 216 SW 526.

New Jersey. Schweers v. Elizabeth-Union-Hillside-Irvington Line, Inc., 13 NJMisc 188, 178 A 68.

New York. Fowler v. International Ry. Co., 217 AppDiv 537, 216 NYS 558.

South Carolina. See also Autrey v. Bell, 114 SC 370, 103 SE 749.

[69] **California.** People v. Palassou, 14 CalApp 123, 111 P 109 (criminal case); Fitzgerald v. Southern Pacific Co., 36 CalApp 660, 173 P 91.

Massachusetts. Whitman v. Fournier, 233 Mass 154, 125 NE 303.

Montana. Simons v. Jennings, 100 Mont 55, 46 P2d 704.

Utah. Gibson v. George G. Doyle & Co., 37 Utah 21, 106 P 512.

Washington. Jones v. Elliott, 111 Wash 138, 189 P 1007.

[70] Capitol Trac. Co. v. McKeon, 132 Md 79, 103 A 314.

[71] **California.** Moeller v. Packard, 86 CalApp 459, 261 P 315.

Illinois. Oetgen v. Lowe, 204 Ill App 608.

Minnesota. Lamoreaux & Champlin v. Norman, 151 Minn 489, 187 NW 606.

Pennsylvania. See Glasco v. Green, 273 Pa 353, 117 A 79.

Washington. Kennedy v. Supreme Tent of Knights of Maccabees, 100 Wash 36, 170 P 371.

West Virginia. Parfitt v. Sterling Veneer & Basket Co., 68 WVa 438, 69 SE 985.

[72] Elliott v. Maves, 196 IllApp 605.

[73] Livingston v. Rice, 96 IndApp 176, 184 NE 583.

[74] Miller v. Ahrbecker, 320 Ill 577, 151 NE 526.

[75] Baltimore & O. R. Co. v. Few's Exrs., 94 Va 82, 26 SE 406. But see Levine Bros. v. Mantell, 90 WVa 166, 111 SE 501.

[76] Fisher v. St. Louis Transit Co., 198 Mo 562, 95 SW 917. See also Baldwin v. Cobb, 190 Ark 899, 82 SW2d 12; United States Fidelity & Guaranty Co. v. Country Club, 129 Va 306, 105 SE 686.

founded on the evidence and where it assumes the existence of a nonexisting fact,[77] but there is no obligatory duty to recast the requested instructions.[78]

It is not an alteration to define a word used in a requested instruction.[79] Nor is explanatory matter given by the court to be regarded as a modification of the instruction.[80] The court may strike from requested instructions matter which is but repetition or restatement of other matter therein.[81]

The practice of modifying instructions and leaving the part struck out so it may be read by the jury is not approved.[82]

Criminal cases. The right to modify requests is the same in criminal as civil cases.[83] In such cases the court may ordinarily

[77] Crown Coal & Tow Co. v. Taylor, 184 Ill 250, 56 NE 328; Stroud v. Chicago, M. & St. P. Ry. Co., 75 Mont 384, 243 P 1089.

[78] Jackson v. United States, 48 AppDC 272; Johnson v. St. Charles, 200 IllApp 184.

[79] Louis Pizitz Dry Goods Co. v. Cusimano, 206 Ala 689, 91 S 779; St. Louis Dairy Co. v. Northwestern Bottle Co. (MoApp), 204 SW 281.

[80] Montgomery Light & Water Power Co. v. Thombs, 204 Ala 678, 87 S 205.

[81] **Illinois.** Snedden v. Illinois Cent. R. Co., 234 IllApp 234.

Missouri. Kunkel v. Griffith, 325 Mo 392, 29 SW2d 64.

Oklahoma. Liberty Nat. Bank v. Exendine, 156 Okl 26, 11 P2d 154.

Utah. Broadbent v. Denver & R. G. Ry. Co., 48 Utah 598, 160 P 1185.

Virginia. Southern Ry. Co. v. Johnson, 151 Va 345, 146 SE 363.

[82] People v. Lacey, 339 Ill 480, 171 NE 544; Harris v. Schlink, 200 IllApp 202.

[83] **Arkansas.** Owens v. State, 120 Ark 562, 179 SW 1014; Patterson v. State, 140 Ark 236, 215 SW 629; Milloway v. State, 158 Ark 642, 240 SW 718.

California. People v. Carantan, 11 CalApp 561, 105 P 768; People v. Cox, 29 CalApp 419, 155 P 1010; People v. Fuski, 49 CalApp 4, 192 P 552.

Delaware. Colombo v. State, 2 Boyce (25 Del) 28, 78 A 595.

Florida. Pittman v. State, 82 Fla 24, 89 S 336.

Georgia. Waller v. State, 23 Ga App 156, 97 SE 876.

The court is not required to elaborate requested instruction given by him. Fulford v. State, 149 Ga 162, 99 SE 303.

Illinois. People v. Foster, 288 Ill 371, 123 NE 534; People v. Le Morte, 289 Ill 11, 124 NE 301; People v. Limeberry, 298 Ill 355, 131 NE 691; People v. Bermingham, 301 Ill 513, 134 NE 54; People v. Beil, 322 Ill 434, 153 NE 639; People v. Andrews, 327 Ill 162, 158 NE 462.

It is not error for the court to give numerous requests as one instruction by striking from each of them, but the first, the introductory words "The court instructs the jury." People v. Allegretti, 29 Ill 364, 126 NE 158.

Kentucky. Morgan v. Commonwealth, 188 Ky 458, 222 SW 940.

Maine. State v. Mockus, 120 Me 84, 113 A 39, 14 ALR 871.

North Carolina. A request to charge that it is dangerous to convict on the testimony of an accomplice was changed so that the jury were told that they should accept the testimony of an accomplice with caution. State v. McKeithan, 203 NC 494, 166 SE 336.

South Carolina. State v. Jones, 104 SC 141, 88 SE 444; State v. Cooper, 120 SC 280, 113 SE 132.

charge the substance of the request in his own language.[84] The form of the instruction being immaterial, the appellate courts will not make a comparison of the given instructions with those requested, to ascertain which would have been the better.[85] The court will strike from the proffered instruction matter that is argumentative.[86] A request to charge on self-defense may be modified by striking therefrom words that define the amount of force that may be used in self-defense, where the subject of self-defense was covered by other instructions.[87]

[84] **United States.** Sugarman v. United States, 249 US 182, 63 LEd 550, 39 SupCt 191.

Federal. O'Hare v. United States, 165 CCA 208, 253 F 538; Fraina v. United States, 166 CCA 356, 255 F 28; Bonness v. United States, 20 F2d 754; White v. United States, 30 F2d 590; Gibson v. United States, 31 F2d 19; Frisina v. United States, 49 F2d 733; Dean v. United States, 51 F2d 481; Faircloth v. United States, 55 F2d 655.

Arkansas. Sheppard v. State, 120 Ark 160, 179 SW 168.

California. People v. Adams, 79 CalApp 373, 249 P 536; People v. Howard, 120 CalApp 45, 8 P2d 176; People v. Mesa, 121 CalApp 345, 8 P2d 920.

Connecticut. State v. Castelli, 92 Conn 58, 101 A 476.

Georgia. Autrey v. State, 24 Ga App 414, 100 SE 782.

Illinois. People v. Cash, 326 Ill 104, 157 NE 76; People v. Dunham, 344 Ill 268, 176 NE 325.

Michigan. People v. Cutler, 197 Mich 6, 163 NW 493.

Nebraska. Johnson v. State, 88 Neb 328, 129 NW 281, AnnCas 1912B, 965; Kirchman v. State, 122 Neb 624, 241 NW 100.

New Jersey. State v. Rombolo, 91 NJL 560, 103 A 203; State v. Fischer, 97 NJL 34, 117 A 519; State v. Juliano, 103 NJL 663, 138 A 575.

New York. People v. Radcliffe, 232 NY 249, 133 NE 577.

North Carolina. State v. Barrett, 151 NC 665, 65 SE 894; State v. Price, 158 NC 641, 74 SE 587; State v. Tate, 161 NC 280, 76 SE 713; State v. Horner, 174 NC 788, 94 SE 291; State v. Fulcher, 176 NC 724, 97 SE 2; State v. Baldwin, 178 NC 693, 100 SE 345; State v. Bailey, 179 NC 724, 102 SE 406; State v. Kincaid, 183 NC 709, 110 SE 612.

Ohio. National Mach. Co. v. Towne, 11 OhApp 186, 30 OhCtApp 225; Hunt v. State, 42 OhApp 119, 181 NE 651, 36 OLR 557.

Oregon. State v. Butler, 96 Or 219, 186 P 55; State v. Cody, 116 Or 509, 241 P 983; State v. Wisdom, 122 Or 148, 257 P 826.

South Carolina. State v. Simmons, 112 SC 451, 100 SE 149.

South Dakota. State v. Kammel, 23 SD 465, 122 NW 420.

Texas. Substance should be given where request is sufficient to call attention of court to its failure to submit defense. Eubanks v. State, 57 TexCr 153, 122 SW 35.

Utah. State v. Franco, 76 Utah 202, 289 P 100.

Virginia. Lufty v. Commonwealth, 126 Va 707, 100 SE 829.

Washington. State v. Cherry Point Fish Co., 72 Wash 420, 130 P 499; State v. Colagino, 119 Wash 301, 205 P 413; State v. Simpson, 119 Wash 653, 206 P 561; State v. Adelstein, 152 Wash 65, 277 P 387; State v. Moore, 182 Wash 111, 45 P2d 605.

West Virginia. But see State v. Rice, 83 WVa 409, 98 SE 432.

[85] State v. Lowenthal, 183 Wash 14, 48 P2d 909.

[86] McKinney v. State, 140 Ark 529, 215 SW 723; Warren v. State, 153 Ark 497, 241 SW 15; Pope v. State, 172 Ark 61, 287 SW 747; People v. Andrews, 327 Ill 162, 158 NE 462.

[87] Harmon v. State, 190 Ark 823, 81 SW2d 30.

Where, however, the law is correctly stated in the request, the court should not weaken the statement by adding matter not pertinent although correct in the abstract.[88]

§ 157. Refusal for errors in request.

In both criminal and civil cases, it is not error for the court to refuse to give a requested instruction not correct as presented.

If a requested instruction does not correctly state the law applicable to the issues, it is not error to refuse to give it.[89] The same rule applies to requested instructions which invade the province of the jury,[90] fail to state a complete legal proposition,[91] contain language discrediting the claim of the opposite party,[92] are argumentative,[93] unintelligible,[94] or abstract.[95] But

[88] **Alabama.** Bailum v. State, 17 AlaApp 679, 88 S 200.

Arkansas. See also Harris v. State, 140 Ark 46, 215 SW 620.

California. People v. Emmons, 13 CalApp 487, 110 P 151.

Florida. Taylor v. State, 98 Fla 881, 124 S 445 (refusal of request held error).

Illinois. People v. Pursley, 302 Ill 62, 134 NE 128.

North Carolina. State v. Bowman, 152 NC 817, 67 SE 1058.

[89] **Federal.** A requested instruction should not be refused merely because it is susceptible to such an interpretation as to make its propositions not absolutely accurate. Rothe v. Pennsylvania Co., 195 F 21.

Indiana. Keller v. Reynolds, 12 IndApp 383, 40 NE 76, 280.

Missouri. Davis v. Springfield Hosp. (MoApp), 196 SW 104.

Ohio. Baltimore & O. R. Co. v. Schultz, 43 OhSt 270, 1 NE 324, 54 AmRep 805; Hartford Fire Ins. Co. v. Cincinnati Ice Mfg. & Cold Storage Co., 9 OhApp 403, 28 OCA 273, 30 OhCirDec 167; Gallup v. Toledo Terminal R. Co., 26 OhApp 447, 160 NE 493.

Virginia. Keen v. Monroe, 75 Va 424.

[90] Beekes v. Cutler, 322 Mass 392, 77 NE2d 402; Rowy v. Mainella, 68 RI 149, 26 A2d 755.

[91] **Federal.** Lehigh Valley R. Co. v. Mangan, 278 F 85.

Alabama. Turner v. State, 160 Ala 55, 49 S 304.

Georgia. Wright v. Western & A. R. Co., 139 Ga 343, 77 SE 161.

The trial judge did not err in refusing a request to charge "the law on impeachment of witnesses." Waller v. State, 164 Ga 128, 138 SE 67.

Louisiana. State v. Blount, 124 La 202, 50 S 12.

Massachusetts. It is proper to refuse request omitting a material qualification of the subject-matter. Arlington Nat. Bank v. Bennett, 214 Mass 352, 101 NE 982.

South Carolina. Garrison v. Coca Cola Bottling Co., 174 SC 396, 177 SE 656.

[92] Potter v. Chicago, M. & St. P. R. Co., 208 IllApp 363; Hensley v. Hilton, 191 Ind 309, 131 NE 38.

[93] Altavilla v. Old Colony St. R. Co., 222 Mass 322, 110 NE 970.

[94] Griffin Groc. Co. v. Richardson, 10 F2d 467.

[95] **Arizona.** MacDonald v. Calkins, 31 Ariz 161, 251 P 458.

California. People v. Smith, 81 CalApp 126, 251 P 958.

Georgia. Childers v. Ackerman Constr. Co., 211 Ga 350, 86 SE2d 227; City of Summerville v. Sellers, 94 GaApp 152, 94 SE2d 69.

Nebraska. Frazier v. Anderson, 143 Neb 905, 11 NW2d 764.

Ohio. Kohn v. B. F. Goodrich Co., 139 OhSt 141, 38 NE2d 592.

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it is not proper to refuse a request that is otherwise correct and appropriate, merely because it is unduly technical.[96]

The court is under no obligation to modify it or substitute a correct instruction to remedy the defect,[97] unless the instruction asked for is of such a character that to give or refuse it might mislead the jury.[98]

If part of a single requested instruction is incorrect, the court commits no error in wholly refusing it.[99] The court is not

Rapid Transit Co., 116 Vt 75, 68 A2d 912.

[96] Bolivar v. Kelly, 69 F2d 58. See Island Exp. v. Frederick, 5 W. W. Harr. (35 Del) 569, 171 A 181.

[97] **Alabama.** Colley v. State, 167 Ala 109, 52 S 832.

Arkansas. American Ins. Co. v. Haynie, 91 Ark 43, 120 SW 825.

District of Columbia. Capital Trac. Co. v. Copland, 47 AppDC 152.

Illinois. Weeks v. Jones, 200 Ill App 215; Potter v. Chicago, M. & St. P. R. Co., 208 IllApp 363.

Maine. State v. Fogg, 107 Me 177, 77 A 714.

Maryland. Annapolis Gas & Elec. Light Co. v. Fredericks, 112 Md 449, 77 A 53.

Missouri. D'Arcy v. Catherine Lead Co., 155 MoApp 260, 133 SW 1191.

New Jersey. It is proper to refuse request that would need modification to make it state correct proposition. Manchester Bldg. & Loan Assn. v. Allee, 81 NJL 605, 80 A 466.

Texas. Perkins v. State, 65 TexCr 311, 144 SW 241; Mealer v. State, 66 TexCr 140, 145 SW 353.

[98] **Maryland.** Winslow v. Atz, 168 Md 230, 177 A 272.

Utah. The court may properly refuse instruction either too broad or too restricted though the court might well have charged on subjects suggested thereby. Hydraulic Cement Block Co. v. Christensen, 38 Utah 525, 114 P 524.

Virginia. Keen v. Monroe, 75 Va 424.

[99] **Federal.** Bergera v. United States, 297 F 102.

Alabama. Alabama State Land Co. v. Slaton, 120 Ala 259, 24 S 720; May v. Draper, 214 Ala 324, 107 S 862; Harris v. Wright, 225 Ala 627, 144 S 834; Dunaway v. Roden, 14 AlaApp 501, 71 S 70.

In Britling Cafeteria Co. v. Irwin, 229 Ala 687, 159 S 228, the court was held to have properly rejected a charge consisting of quoted portions of the language of the court in another case.

Arizona. Arizona Eastern R. Co. v. Bryan, 18 Ariz 106, 157 P 376; Mutual Benefit Health & Acc. Assn. v. Neale, 43 Ariz 532, 33 P2d 604.

Arkansas. Russell v. Russell, 123 Ark 619, 185 SW 289.

California. Bellandi v. Park Sanitarium Assn., 214 Cal 472, 6 P2d 508; Hart v. Farris, 218 Cal 69, 21 P2d 432, affg. (CalApp), 13 P2d 790; People v. Wagner, 65 CalApp 704, 225 P 464; Lloyd v. Boulevard Exp., 79 CalApp 406, 249 P 837; Morris v. Purity Sausage Co., 2 CalApp2d 536, 38 P2d 193.

Colorado. Ft. Collins v. Smith, 84 Colo 511, 272 P 6.

Connecticut. Stern v. Leopold Simons & Co., 77 Conn 150, 58 A 696; Johnson v. Connecticut Co., 85 Conn 438, 83 A 530.

Georgia. Thompson v. O'Connor, 115 Ga 120, 41 SE 242; Alabama Great Southern R. Co. v. Brown, 144 Ga 269, 86 SE 1084; Spillar v. Dickson, 148 Ga 90, 95 SE 994; Bank of Waynesboro v. Ellison, 162 Ga 657, 134 SE 751.

Illinois. Smythe's Estate v. Evans, 209 Ill 376, 70 NE 906; Kelly v. Chicago City R. Co., 282 Ill 640, 119 NE 622; Anderson v. Inter-State Business Mens Assn., 354 Ill 538, 188 NE 844.

Indiana. Citizens Tel. Co. v. Prick-

ett, 189 Ind 141, 125 NE 193; Howlett v. Dilts, 4 IndApp 23, 30 NE 313; Chicago, S. B. & N. I. R. Co. v. Brown, 81 IndApp 411, 143 NE 609 (use of word "plaintiff" for "defendant").

Iowa. Stutsman v. Des Moines City R. Co., 180 Ia 524, 163 NW 580.

Kansas. Kansas Ins. Co. v. Berry, 8 Kan 159.

Maine. York v. Parker, 109 Me 414, 84 A 939.

Massachusetts. Twomey v. Linnehan, 161 Mass 91, 36 NE 590; Rand v. Farquhar, 226 Mass 91, 115 NE 286.

Michigan. Bedford v. Penny, 58 Mich 424, 25 NW 381; Severson v. Family Creamery Co., 268 Mich 348, 256 NW 348.

Missouri. Hogan v. Kansas City Public Service Co., 322 Mo 1103, 19 SW2d 707, 65 ALR 129; McManus v. Metropolitan St. R. Co., 116 Mo App 110, 92 SW 176; Sneed v. Shapleigh Hdw. Co. (MoApp), 242 SW 696; Murray v. Wells (MoApp), 17 SW2d 613.

Montana. Robinson v. F. W. Woolworth Co., 80 Mont 431, 261 P 253.

New Jersey. Christy v. New York Cent. & H. R. R. Co., 90 NJL 540, 101 A 372; Max v. Kahn, 91 NJL 170, 102 A 737; Clayton v. Clayton, 125 NJL 537, 17 A2d 496; Wilson Transp. Co. v. Owens-Illinois Glass Co., 125 NJL 636, 17 A2d 581; Alling v. Walton, 7 NJMisc 101, 144 A 324; Tiernan v. B. & S. Motor Service, Inc., 10 NJMisc 294, 158 A 845.

New Mexico. First Nat. Bank v. George, 26 NM 176, 190 P 1026.

New York. Wittleder v. Citizens Elec. Illuminating Co., 47 AppDiv 410, 62 NYS 297.

North Carolina. Vanderbilt v. Brown, 128 NC 498, 39 SE 36; Harris v. Atlantic Coast Line R. Co., 132 NC 160, 43 SE 589.

Ohio. Wymer-Harris Constr. Co. v. Glass, 122 OhSt 398, 171 NE 857, 69 ALR 517; Ford Motor Co. v. Barry, 30 OhApp 528, 165 NE 865; Ritter v. Finch, 7 OLA 436.

The trial judge need not give a special requested instruction unless it literally states correctly the legal proposition intended. Gallup v. Toledo Terminal R. Co., 26 OhApp 447, 160 NE 493.

Where some special requests to charge did not state correct propositions of law applicable to the facts of the case, and the requests were not offered as independent propositions of law, all requests were properly refused, since they are to be considered as offered in a series. Macdonald v. State ex rel. Fulton, 47 OhApp 223, 191 NE 837, 40 OLR 236.

Oklahoma. Friedman v. Weisz, 8 Okl 392, 58 P 613; Wichita Falls & N. W. R. Co. v. Puckett, 53 Okl 463, 157 P 112; Siefker v. State, 128 Okl 96, 261 P 211; Chicago, R. I. & P. R. Co. v. Brooks, 155 Okl 53, 11 P2d 142; Shell Petroleum Corp. v. Wood, 168 Okl 271, 32 P2d 879.

Oregon. Samchuck v. Insurance Co., 91 Or 692, 179 P 257; Diller v. Riverview Dairy, 133 Or 442, 288 P 401.

Rhode Island. Perry v. Sheldon, 30 RI 426, 75 A 690.

South Carolina. Earle v. Poat, 63 SC 439, 41 SE 525; Garrison v. Coca Cola Bottling Co., 174 SC 396, 177 SE 656.

South Dakota. Grant v. Whorton, 28 SD 599, 134 NW 803.

Tennessee. Knoxville v. Cox, 103 Tenn 368, 53 SW 734; Louisville & N. R. Co. v. Smith, 123 Tenn 678, 134 SW 866; National Life & Acc. Ins. Co. v. American Trust Co., 17 TennApp 516, 68 SW2d 971.

Texas. St. Louis Southwestern R. Co. v. Baer, 39 TexCivApp 16, 86 SW 653; Rishworth v. Moss (TexCiv App), 191 SW 843.

Utah. Evans v. Oregon Short Line R. Co., 37 Utah 431, 108 P 638, Ann Cas 1912C, 259.

Vermont. Amsden v. Atwood, 69 Vt 527, 38 A 263; Needham v. Boston & M. R. Co., 82 Vt 518, 74 A 226.

Virginia. Peele v. Bright, 119 Va 182, 89 SE 238.

Washington. Howe v. West Seattle Land & Imp. Co., 21 Wash 594, 59 P 495; Nollmeyer v. **Tacoma Ry.**

required to weed out and reject the bad and give only the good part.[1] The request must be correct in all respects.[2] The court may properly refuse an instruction which is merely supplementary to an erroneous request.[3]

The rules in these matters are the same with respect to instructions in criminal cases.[4] The court may refuse requests

& Power Co., 95 Wash 595, 164 P 229; Wescott v. Wood, 122 Wash 596, 212 P 144; Fennel v. Yellow Cab Co., 138 Wash 198, 224 P 253 (last clear chance doctrine); Jahns v. Clark, 138 Wash 288, 244 P 729; Myers v. Newnham, 155 Wash 609, 285 P 663; Colburn v. Great Northern R. Co., 166 Wash 200, 6 P2d 635.

West Virginia. The court did not err in refusing a requested instruction which was susceptible of an interpretation that would make it variant from the law. Cook v. Coleman, 90 WVa 748, 111 SE 750.

Wisconsin. Lyle v. McCormick Harvesting Mach. Co., 108 Wis 81, 84 NW 18, 51 LRA 906.

[1] **Federal.** Miles v. Lavender, 10 F2d 450, affg. 4 F2d 161; American Surety Co. v. Blount County Bank, 30 F2d 882.

Missouri. But in State v. Fielder, 330 Mo 747, 50 SW2d 1031, it was held that it was the court's duty to give an appropriate instruction on an essential phase of the case, though the request therefor was not faultlessly framed.

Oregon. Naftzger v. Henneman, 94 Or 109, 185 P 233.

Texas. Pullman Co. v. McGowan (TexCivApp), 210 SW 842; Waggoner v. Zundelowitz (TexComApp), 231 SW 721; Pullman Co. v. Gulf, C. & S. F. Ry. Co. (TexComApp), 231 SW 741.

Washington. Singer v. Martin, 96 Wash 231, 164 P 1105; Fehler v. Montesano, 110 Wash 143, 188 P 5; Bayers v. Barry, 114 Wash 252, 194 P 993; Yenor v. Spokane United Rys., 143 Wash 541, 255 P 947; Kelley v. Cohen, 152 Wash 1, 277 P 74.

[2] Linton v. St. Louis Lightning Rod Co. (MoApp), 285 SW 183; Hotchkiss v. Walter (NJ), 132 A 242.

[3] Bloecher & Schaaf v. Pennsylvania R. Co., 162 Md 463, 160 A 281; Weller v. Plapao Laboratories Incorporation, 197 MoApp 47, 191 SW 1056.

[4] **Alabama.** Alford v. State, 24 AlaApp 418, 136 S 280.

Arkansas. Johnson v. State, 127 Ark 516, 192 SW 895; Atkinson v. State, 133 Ark 341, 202 SW 709; Prewitt v. State, 150 Ark 279, 234 SW 35; Clark v. State, 172 Ark 23, 287 SW 765.

California. People v. Wagner, 29 CalApp 363, 155 P 649; People v. Byler, 35 CalApp 208, 169 P 431; People v. Wieler, 55 CalApp 687, 204 P 410 (omission of definition of "wilfully"); People v. Gordon, 78 CalApp 167, 248 P 289; People v. Albori, 97 CalApp 537, 275 P 1017.

District of Columbia. Jackson v. United States, 48 AppDC 272.

Georgia. Jones v. State, 147 Ga 356, 94 SE 248; Wooten v. State, 23 GaApp 768, 99 SE 316.

Idaho. State v. Dowell, 47 Idaho 457, 276 P 39, 68 ALR 1061.

Illinois. People v. Israel, 269 Ill 284, 109 NE 969; People v. Stella, 344 Ill 589, 176 NE 909.

Massachusetts. Commonwealth v. Perry, 254 Mass 520, 150 NE 854.

Missouri. Viles v. Viles (MoApp), 190 SW 41.

Montana. State v. Groom, 89 Mont 447, 300 P 226.

New Jersey. State v. Reilly, 89 NJL 627, 99 A 329.

New Mexico. State v. Starr, 24 NM 180, 173 P 674; State v. Bailey, 27 NM 145, 198 P 529; State v. Chaves, 27 NM 504, 202 P 694.

A request may properly be refused if it couples information as

which need qualifications, modification or restriction.[5] It has been said that unless the charge ought to be given in the very terms requested, it should be refused altogether.[6] The trial court is not under any obligation to rewrite an instruction which either party requests to be given.[7]

Where several distinct propositions of law are embodied in one request and are not offered as separate instructions, the entire request must fall if one of the propositions is unsound.[8]

to the statutory penalty with a direction to the jury as to their right to recommend mercy. State v. Brigance, 31 NM 436, 246 P 897.

North Carolina. State v. Hand, 170 NC 703, 86 SE 1005; State v. Bailey, 179 NC 724, 102 SE 406; State v. Kincaid, 183 NC 709, 110 SE 612.

Tennessee. Raine v. State, 143 Tenn 168, 226 SW 189.

Vermont. State v. Rivers, 84 Vt 154, 78 A 786.

Washington. State v. Patrick, 179 Wash 510, 38 P2d 261 (where the instruction requested was incorrect in part).

West Virginia. State v. McDonie, 89 WVa 185, 109 SE 710 (inaccurate definitions).

[5] **Federal.** Watlington v. United States, 233 F 247; Kreiner v. United States, 11 F2d 722.

Alabama. Brewer v. State, 15 Ala App 681, 74 S 764; Love v. State, 17 AlaApp 149, 82 S 639; Warsham v. State, 17 AlaApp 181, 84 S 885; Lightfoot v. State, 21 AlaApp 278, 107 S 734, cert. den. in 214 Ala 264, 107 S 735.

California. Dover v. Archambeault, 57 CalApp 659, 208 P 178.

Colorado. White v. People, 79 Colo 261, 245 P 349.

District of Columbia. Jackson v. United States, 48 AppDC 272.

[6] State v. Quartier, 118 Or 637, 247 P 783.

[7] People v. Andrews, 327 Ill 162, 158 NE 462; State v. Siers, 103 WVa 30, 136 SE 503.

[8] **Federal.** Sweeney v. Erving, 228 US 233, 57 LEd 815, 33 SupCt 416, AnnCas 1914D, 905; William H. Rankin Co. v. Associated Billposters, 42 F2d 152; Two Certain Ford Coupé Automobiles v. United States, 53 F2d 187; Carpenter v. Connecticut General Life Ins. Co., 68 F2d 69 (holding it proper to refuse a request that could not be given in the form tendered); Fidelity & Deposit Co. v. Bates, 76 F2d 160.

Alabama. Southern R. Co. v. Bradford, 145 Ala 684, 40 S 100; Bohanan v. Darden, 7 AlaApp 220, 60 S 955.

California. Wiley v. Young, 178 Cal 681, 174 P 316.

Georgia. Grace v. McKinney, 112 Ga 425, 37 SE 737; Hunt v. Travelers' Ins. Co., 139 Ga 464, 77 SE 375; Western Union Tel. Co. v. Owens, 23 GaApp 169, 98 SE 116; New York Life Ins. Co. v. Thompson, 50 GaApp 413, 178 SE 389.

Illinois. Nelson v. Fehd, 203 Ill 120, 67 NE 828.

Kansas. Auwarter v. Kansas City, 136 Kan 571, 16 P2d 547.

Maryland. Sline & Sons v. Hooper, 164 Md 244, 164 A 548.

Massachusetts. Schusterman v. Rosen, 280 Mass 582, 183 NE 414.

Michigan. Bedford v. Penny, 58 Mich 424, 25 NW 381.

Minnesota. Gross v. General Inv. Co., 194 Minn 23, 259 NW 557.

Missouri. McCarthy v. Sheridan, 336 Mo 1201, 83 SW2d 907; Howerton v. Iowa State Ins. Co., 105 Mo App 575, 80 SW 27.

Montana. In re Carroll's Estate, 59 Mont 403, 196 P 996.

New Jersey. Schreiber v. Public Service R. Co., 89 NJL 183, 98 A 316; Miller v. I. P. Thomas & Son Co., 89 NJL 364, 98 A 193; Geiger Sons v. Edward M. Waldron, Inc., 100 NJL 93, 125 A 18.

To avoid this result, the request should state that "such instructions to be given severally, and not as series." This is the rule in criminal as well as in civil cases.[9]

In both criminal and civil cases, the rule in many jurisdictions is that where the erroneous requested instruction calls the attention of the court to an essential omission in his charge, the court should give a correct instruction.[10]

Ohio. Ford Motor Co. v. Barry, 30 OhApp 528, 165 NE 865; Holmes v. Ashtabula Rapid Transit Co., 10 OhCirDec 638; Pugh v. Akron-Chicago Transp. Co., Inc., 64 OhApp 479, 28 NE2d 1015 [affirmed, 137 OhSt 164, 28 NE2d 501].

Pennsylvania. Seifred v. Pennsylvania R. Co., 206 Pa 399, 55 A 1061.

South Carolina. McGee v. Wells, 52 SC 472, 30 SE 602.

Tennessee. Provident Life & Acc. Ins. Co. v. Campbell, 18 TennApp 452, 79 SW2d 292.

Texas. Western Union Tel. Co. v. McConnico, 27 TexCivApp 610, 66 SW 592; Merchants' Ice Co. v. Scott & Dodson (TexCivApp), 186 SW 418; Moore v. Davis (TexCiv App), 16 SW2d 380.

The general rule in Texas is that where the charge asked consists of several separate subdivisions, defining as many distinct and supposed necessary conditions of fact to be found by the jury, and one of such subdivisions is not the law as applied to the facts, the court may eliminate such subdivision and give the special charge so modified, and the same will not be reversible error, but the court is not required to make this modification. Grigsby v. Reib (TexCivApp), 139 SW 1027.

Washington. Amann v. Tacoma, 170 Wash 296, 16 P2d 601.

[9] **Alabama.** Howard v. State, 165 Ala 18, 50 S 954; Burk v. State, 16 AlaApp 110, 75 S 702; Mancill v. State, 16 AlaApp 113, 75 S 705.

California. People v. Metzler, 21 CalApp 80, 130 P 1192.

Florida. Gorey v. State, 71 Fla 195, 71 S 328.

Georgia. Woodard v. State, 18 GaApp 59, 88 SE 825; May v. State, 24 GaApp 379, 100 SE 797.

Indiana. Ruse v. State, 186 Ind 237, 115 NE 778, LRA 1917E, 726; Spurlin v. State, 189 Ind 273, 124 NE 753; Schaffer v. State, 202 Ind 318, 173 NE 229.

Louisiana. State v. Lee, 180 La 494, 156 S 801.

Missouri. Contra: State v. Lawrence (Mo), 71 SW2d 740.

New Mexico. State v. Mersfelder, 34 NM 465, 284 P 113.

Ohio. Bandy v. State, 13 OhApp 461, 32 OCA 360.

Texas. Berry v. State, 80 TexCr 87, 188 SW 997; Plemons v. State, 127 TexCr 141, 74 SW2d 1009.

[10] **Federal.** Armstrong v. United States, 41 F2d 162; Freihage v. United States, 56 F2d 127.

Arizona. City of Globe v. Rabogliatti, 24 Ariz 392, 210 P 685.

California. See People v. Mock Ming Fat, 82 CalApp 618, 256 P 270.

Iowa. Kinyon v. Chicago & N. W. Ry. Co., 118 Ia 349, 92 NW 40, 96 AmSt 382.

Kentucky. Stearns Coal & Lbr. Co. v. Williams, 171 Ky 46, 186 SW 931; Cumberland R. Co. v. Girdner, 174 Ky 761, 192 SW 873; Stearns Coal & Lbr. Co. v. Spradlin, 176 Ky 405, 195 SW 781; Louisville & N. R. Co. v. McCoy, 177 Ky 415, 197 SW 801; Louisville & N. R. Co. v. Stephens, 188 Ky 1, 220 SW 746; Louisville Gas & Elec. Co. v. Beaucond, 188 Ky 725, 224 SW 179; Louisville & N. R. Co. v. Craft, 192 Ky 314, 233 SW 741; Berea Bank & Trust Co. v. Mokwa, 194 Ky 556, 239 SW 1044; Jefferson's Adm'x. v. Baker, 232 Ky 98, 22 SW2d 448; Springfield Fire & Marine Ins. Co. v. Ramey, 245 Ky 367, 53 SW2d 560.

§ 158. Refused instructions in civil cases substantially covered by other instructions given.

It is not reversible error in a civil case to refuse a correct requested instruction where the substance thereof is correctly, substantially, and fairly covered by the general charge of the court or by the requested instructions of either party given by the court.

The rule as stated is supported by the cases in numerous jurisdictions.[11] Such refusal is justified because repeating in-

If the instructions tendered are defective, it is the duty of the court to prepare proper charges. Louisville Cemetery Assn. v. Downs, 241 Ky 773, 45 SW2d 5.

Massachusetts. Black v. Buckingham, 174 Mass 102, 54 NE 494.

Missouri. State v. Goode (Mo), 220 SW 854; State v. Singleton (Mo), 77 SW2d 80.

Nebraska. Pospisil v. Acton, 118 Neb 200, 224 NW 11.

New Hampshire. Burke v. Boston & M. R. R., 82 NH 350, 134 A 574.

New Mexico. See State v. Williams, 39 NM 165, 42 P2d 1111.

North Carolina. See Groome v. Statesville, 207 NC 538, 177 SE 638.

Oklahoma. Thomas v. State, 13 OklCr 414, 164 P 995.

Oregon. Sorensen v. Kribs, 82 Or 130, 161 P 405.

Texas. Roberts v. Houston Motor Car Co. (TexCivApp), 188 SW 257; McNabb v. McNabb (TexCivApp), 207 SW 129; Chicago, R. I. & G. Ry. Co. v. Wentzel (TexCivApp), 214 SW 710; Hines v. Parry (TexCiv App), 227 SW 339; Western Union Tel. Co. v. Coleman (TexCivApp), 284 SW 279; Kansas City, M. & O. Ry. Co. v. Rochester Independent School Dist. (TexCivApp), 292 SW 964; St. Louis, S. F. & T. Ry. Co. v. Houze (TexCivApp), 28 SW2d 865; Silva v. State, 102 TexCr 415, 278 SW 216.

Utah. Smith v. Lenzi, 74 Utah 362, 279 P 893.

Virginia. Hatton v. Mountford, 105 Va 96, 52 SE 847.

West Virginia. State v. Brown, 107 WVa 60, 146 SE 887.

Wisconsin. Montgomery v. State, 128 Wis 183, 107 NW 14.

[11] **Federal.** Erie R. Co. v. Kazanecki, 10 F2d 337; American Creosote Works, Inc. v. Wren, 13 F2d 991; Mason & Hanger Co. v. Burnam, 36 F2d 330; Louisiana Oil Ref. Corp. v. Reed, 38 F2d 159; Gaillard v. Boynton, 70 F2d 552.

Alabama. Stuart v. Mitchum, 15 Ala 546, 33 S 670; Welch v. Evans Bros. Constr. Co., 201 Ala 496, 78 S 850; Southern R. Co. v. Cates, 211 Ala 282, 100 S 356; Rowe v. Johnson, 214 Ala 510, 108 S 604.

Arkansas. Western Coal & Min. Co. v. Jones, 75 Ark 76, 87 SW 440.

California. Cook v. Los Angeles & P. Elec. Ry. Co., 134 Cal 279, 66 P 306; Sickles v. Mt. Whitney Power & Elec. Co., 177 Cal 278, 170 P 599; Baldwin v. Pacific Elec. R. Co., 208 Cal 364, 281 P 380 (duty to illuminate crossing); Loper v. Morrison, 23 Cal2d 600, 145 P2d 1; Zuckerman v. Underwriters at Lloyd's, London, 42 Cal2d 460, 267 P2d 777; Juchert v. Tenent, 126 CalApp 216, 14 P2d 617 (credibility of witness); Johnson v. Johnson, 137 CalApp 701, 31 P2d 237.

If in the main charge the court does not tell the jury that the doctrine of res ipsa loquitur changes the burden of proof, it is not error to refuse a request to charge that such doctrine does not change the burden of proof. Timbrell v. Suburban Hosp., 4 Cal2d 68, 47 P2d 737.

Request as to duty of automobile driver toward pedestrian was covered in other instructions. Morris v. Purity Sausage Co., 2 CalApp2d 536, 38 P2d 193.

Colorado. Denver Consol. Elec. Co. v. Lawrence, 31 Colo 301, 73 P 39; Commercial Credit Co. v. Calkins, 78 Colo 257, 241 P 529; Jennings v. Board of County Comrs., 85 Colo 498, 277 P 467; Frosh v. Sun Drug Co., 91 Colo 440, 16 P2d 428.

Connecticut. Tiesler v. Norwich, 73 Conn 199, 47 A 161; McGarry v. Healey, 78 Conn 365, 62 A 671; Kuczon v. Tomkievicz, 100 Conn 560, 124 A 226; Spicer v. Hincks, 113 Conn 366, 155 A 508, 76 ALR 1519.

Burden of proof as to contributory evidence was covered by charge that the burden was on the defendant and that it must be met by a fair preponderance of the evidence. Piascik v. Railway Exp. Agency, 119 Conn 277, 175 A 919.

District of Columbia. Washington, A. & Mt. V. Ry. Co. v. Lukens, 32 AppDC 442; Madison v. White, 60 AppDC 329, 54 F2d 440.

Florida. Maultsby v. Boulware, 47 Fla 194, 36 S 713.

Georgia. Macon Ry. & Light Co. v. Barnes, 121 Ga 443, 49 SE 282; Southern Cotton Oil Co. v. Skipper, 125 Ga 368, 54 SE 110.

Idaho. North v. Woodland, 12 Idaho 50, 85 P 215, 6 LRA (N. S.) 921; Baggett v. Pace, 51 Idaho 694, 10 P2d 301; French v. Tebben, 53 Idaho 701, 27 P2d 475.

Principles governing assumption of risk were covered by charge that party must have used ordinary care to discover extraordinary danger. Roy v. Oregon Short Line R. Co., 55 Idaho 404, 42 P2d 476.

Illinois. Inlet Swamp Drainage Dist. v. Anderson, 257 Ill 214, 100 NE 909; Shutt Imp. Co. v. Thompson, 109 IllApp 540; Gordon v. Current, 263 IllApp 435; Trust Co. v. Cummings, 320 IllApp 437, 51 NE2d 616; Elmore v. Cummings, 321 Ill App 234, 52 NE2d 827; Pittman v. Duggan, 336 IllApp 502, 84 NE2d 701.

Indiana. Tucker v. Call, 45 Ind 31; Heltonville Mfg. Co. v. Fields, 138 Ind 58, 36 NE 529; Koplovitz v. Jensen, 197 Ind 475, 151 NE 390; Taylor v. Fitzpatrick, 235 Ind 238, 132 NE2d 919; Chesapeake & O. R. Co. v. Perry, 66 IndApp 532, 118 NE 548; Supreme Tribe of Ben Hur v. Bastian, 85 IndApp 327, 151 NE 346; Jewett v. Farlow, 88 IndApp 301, 157 NE 458, 158 NE 489; Western & Southern Life Ins. Co. v. Ross, 91 IndApp 552, 171 NE 212; Beard v. Ball, 96 IndApp 156, 182 NE 102; Marshall v. Temperley, 100 IndApp 131, 192 NE 106; Stull v. Davidson, 125 IndApp 565, 127 NE2d 130; Liggett & Meyer Tobacco Co., Inc. v. Meyer (IndApp), 194 NE 206; Oaktown Tel. Co. v. Miller (IndApp), 194 NE 741.

Requested charge as to monomania in will contest was covered in other instructions. Curnick v. Torbert (IndApp), 194 NE 771.

Iowa. Thompson v. National Cable & Mfg. Co., 160 Ia 403, 141 NW 912; Lemon v. Kessel, 202 Ia 273, 209 NW 393; Orr v. Hart, 219 Ia 408, 258 NW 84; Davidson v. Vast, 233 Ia 534, 10 NW2d 12; Steen v. Hunt, 234 Ia 38, 11 NW2d 690; Duncanson v. Fort Dodge, 233 Ia 1325, 11 NW2d 583.

Kansas. Evans v. Lafeyth, 29 Kan 736; Chicago, R. I. & P. Ry. Co. v. Parks, 59 Kan 709, 54 P 1052.

Kentucky. Bonte v. Postell, 109 Ky 64, 58 SW 536, 51 LRA 187; Burgauer v. McClellan, 205 Ky 51, 265 SW 439; Bean's Adm'r v. Bean, 216 Ky 95, 287 SW 239; Globe & Rutgers Fire Ins. Co. v. Frankfort Distillery, 226 Ky 706, 11 SW2d 968; Louisville & N. R. Co. v. Vandiver, 238 Ky 846, 38 SW2d 965; Phillips' Committee v. Ward's Adm'r, 241 Ky 25, 43 SW2d 331; Tevis v. Carter, 28 KyL 749, 90 SW 264.

Maine. Bernard v. Merrill, 91 Me 358, 40 A 136; Labrecque v. Catholic Order of Foresters, 119 Me 190, 110 A 194; Pratt v. Cloutier, 119 Me 203, 110 A 353, 10 ALR 1434.

Maryland. McCarty v. Harris, 93 Md 741, 49 A 414; Steinberg v. Pullman Co., 156 Md 329, 144 A 363.

Massachusetts. Thayer v. Old

Colony St. Ry. Co., 214 Mass 234, 101 NE 368, 44 LRA (N. S.) 1125, AnnCas 1914B, 865; Coyne v. Maniatty, 235 Mass 181, 126 NE 377; Fitzmaurice v. Boston, R. B. & L. R. Co., 256 Mass 217, 152 NE 239; Coates v. Bates, 265 Mass 444, 164 NE 448 (right to carry luggage projecting from automobile); Searls v. Loring, 275 Mass 403, 176 NE 212; Isaacson v. Boston, W. & N. Y. St. R. Co., 278 Mass 378, 180 NE 118; Lopardi v. John Hancock Mut. Life Ins. Co., 289 Mass 492, 194 NE 706.

Michigan. Hurd v. Newton, 36 Mich 35; Alton v. Meenwenberg, 108 Mich 629, 66 NW 571; Kasprzak v. Chapman, 197 Mich 552, 164 NW 258; Louthain v. Hesse, 234 Mich 693, 209 NW 138; Andrews v. Murphy, 235 Mich 236, 209 NW 63; Miller v. Beasley, 255 Mich 15, 237 NW 47; Essenberg v. Achterhof, 255 Mich 55, 237 NW 43; Bunker v. Reid, 255 Mich 536, 238 NW 265 (duty of drivers of automobiles entering street intersections).

Minnesota. Moratzky v. Wirth, 74 Minn 146, 76 NW 1032; Quinn v. Zimmer, 184 Minn 589, 239 NW 902; Markle v. Haase, 245 Minn 520, 73 NW2d 362.

Mississippi. Mississippi Cent. R. Co. v. Hardy, 88 Miss 732, 41 S 505.

Missouri. Bradley v. West, 60 Mo 59; Tyler v. Hall, 106 Mo 313, 17 SW 319, 27 AmSt 337; Gorman v. St. Louis Merchants' Bridge Terminal R. Co., 325 Mo 326, 28 SW2d 1023; Becker v. Federal Garage Co. (Mo), 38 SW2d 473.

Montana. McCrimmon v. Murray, 43 Mont 457, 117 P 73; Currie v. Langston, 92 Mont 570, 16 P2d 708.

Nebraska. Bryant v. Cunningham, 52 Neb 717, 72 NW 1054.

New Hampshire. Bond v. Bean, 72 NH 444, 57 A 340, 101 AmSt 686; Smith v. Boston & M. R. R., 87 NH 246, 177 A 729; Walsh v. Public Service Co., 92 NH 331, 30 A2d 494; Lynch v. L. B. Sprague, Inc., 95 NH 485, 66 A2d 697.

New Jersey. Christensen v. Lambert, 67 NJL 341, 51 A 702; Schomer v. Hoffman, 102 NJL 347, 131 A 919; Meckert v. Prudential Ins. Co., 114 NJL 320, 176 A 587 (charge on presumption of death from absence for statutory period, where same matter substantially covered by other instructions); Gribbin v. Fox, 130 NJL 357, 32 A2d 853; Zito v. Ingersoll, 7 NJMisc 893, 147 A 400 (assumption of risk by guest in automobile); Putkowski v. Jarmoli, 9 NJ Misc 1189, 157 A 107.

New Mexico. Pearce v. Strickler, 9 NM 467, 54 P 748; State v. Abeyta, 30 NM 59, 227 P 756.

New York. Lawson v. Metropolitan St. Ry. Co., 166 NY 589, 59 NE 1124; Rommeney v. New York, 49 AppDiv 64, 63 NYS 186; Kennell v. Rider, 225 AppDiv 391, 233 NYS 252; Samuel v. Manrith Realty Corp., 243 AppDiv 552, 275 NYS 892.

North Carolina. Harris v. Atlantic Coast Line R. Co., 132 NC 160, 43 SW 598; Hall v. Geissell, 179 NC 657, 103 SE 392.

North Dakota. Donahue v. Noltimier, 61 ND 735, 240 NW 862.

Ohio. Refusal to give a proper special charge, not duly requested to be given before argument, is not error if the substance thereof is given in other requested instructions or in the general charge. Rheinheimer v. Aetna Life Ins. Co., 77 OhSt 360, 83 NE 491, 15 LRA (N. S.) 245. See also Wellston Coal Co. v. Smith, 65 OhSt 70, 61 NE 143, 55 LRA 99, 87 AmSt 547; State ex rel. Lattanner v. Hills, 94 OhSt 171, 113 NE 1045, LRA 1917B, 684; Bartson v. Craig, 121 OhSt 371, 169 NE 291.

Refusal to give proper special charge, duly presented and requested to be given before argument, is not prejudicial error if the substance thereof is fully embodied in another special charge requested by the same party and given before argument. Limbaugh v. Western Ohio R. Co., 94 OhSt 12, 113 NE 687. See also Schweinfurth v. Cleveland, C., C. &

St. L. Ry. Co., 60 OhSt 215, 54 NE 89; Gibbs v. Scioto Valley Ry. & Power Co., 111 OhSt 498, 145 NE 854; Netzel v. Todd, 30 OhApp 300, 165 NE 47.

Refusal to give before argument a proper special charge, duly presented and requested to be given before argument, is error, though the court fully covers the subject (1) in the court's own special charge given, without request, before argument, or (2) in the court's general charge after argument. Premier Service Co. v. Sefton, 31 OhApp 154, 166 NE 140. See also Gray v. Gordon, 96 OhSt 490, 117 NE 891; Niemes v. Niemes, 97 OhSt 145, 119 NE 503; Lima Used Car Exch. Co. v. Hemperly, 120 OhSt 400, 166 NE 364; Shellock v. Klempay Bros., 167 OhSt 279, 148 NE2d 57; Smith v. Torbett (OhApp), 142 NE2d 868.

Oklahoma. St. Louis & S. F. R. Co. v. Walker, 31 Okl 494, 122 P 492; Drumright State Bank v. Westerheide, 124 Okl 108, 254 P 80; Keys v. Border, 135 Okl 249, 274 P 1082; Cushing Ref. & Gasoline Co. v. Deshan, 149 Okl 225, 300 P 312; Keen Bottling Co. v. Morgan, 154 Okl 167, 7 P2d 147; Enid Transfer & Storage Co. v. Fisher, 169 Okl 484, 37 P2d 825; Stroud v. Tompkins, 193 Okl 483, 145 P2d 396; Garrett v. Kennedy, 193 Okl 605, 145 P2d 407; Farmers' Union Co-op Gin Co. v. Squyres, 193 Okl 578, 145 P2d 949; Moore v. Cason Bros. (Okl), 212 P2d 460.

Oregon. Pacific Export Co. v. North Pacific Lbr. Co., 46 Or 194, 80 P 105; Agee v. Chapin, 128 Or 526, 274 P 1097 (request to instruct that violation of law was negligence); Parish v. Columbia Nat. Bank, 139 Or 126, 8 P2d 584; Heider v. Barendrick, 149 Or 220, 39 P2d 957.

Pennsylvania. Carey v. Buckley, 192 Pa 276, 43 A 1019; Fleming v. Dixon, 194 Pa 67, 44 A 1064.

Rhode Island. McGowan v. Probate Court of Newport, 27 RI 394, 62 A 571, 114 AmSt 52.

South Carolina. Banks v. Southern Exp. Co., 73 SC 211, 53 SE 166.

South Dakota. Blair v. Groton, 13 SD 211, 83 NW 48.

Tennessee. Record v. Chickasaw Cooperage Co., 108 Tenn 657, 69 SW 334; National Life & Acc. Ins. Co. v. Turner, 159 Tenn 130, 17 SW2d 13; Bourne v. Barlar, 17 TennApp 375, 67 SW2d 751; Tennessee Coach Co. v. Young, 18 TennApp 592, 80 SW2d 107.

Texas. St. Louis Southwestern R. Co. v. Burke, 36 TexCivApp 222, 81 SW 774; San Antonio & A. P. R. Co. v. Dickson, 42 TexCivApp 163, 93 SW 481; North Fort Worth Townsite Co. v. Taylor (TexCiv App), 262 SW 505; Custer v. Thaxton (TexCivApp), 287 SW 528; Texas & P. Ry. Co. v. Aaron (Tex CivApp), 19 SW2d 930 (contributory negligence).

Utah. Holland v. Oregon Short Line R. Co., 26 Utah 209, 72 P 940; Hirabelli v. Daniels, 40 Utah 513, 121 P 966; Barry v. Los Angeles & S. L. R. Co., 56 Utah 69, 189 P 70; Cowan v. Salt Lake & U. R. Co., 56 Utah 94, 189 P 599; Miller v. New York Life Ins. Co., 84 Utah 539, 37 P2d 547.

Vermont. Kilpatrick v. Grand Trunk Ry. Co., 74 Vt 288, 52 A 531, 93 AmSt 887.

Virginia. Richmond Trac. Co. v. Wilkinson, 101 Va 394, 43 SE 622; Richmond v. Wright, 151 Va 964, 145 SE 732.

Washington. Morrison v. Northern Pacific Ry. Co., 34 Wash 70, 74 P 1064; Lindsey v. Elkins, 154 Wash 588, 283 P 447; Settles v. Johnson, 162 Wash 466, 298 P 690; Milne v. Seattle, 20 Wash2d 30, 145 P2d 888; McCall v. Washington Co-op. Farmers Assn., 35 Wash2d 337, 212 P2d 813.

West Virginia. Maxwell v. Cunningham, 50 WVa 298, 40 SE 499; Gilmore v. Montgomery Ward & Co., 133 WVa 342, 56 SE2d 105. See also, to the same effect, Somerville v. Dellosa, 133 WVa 435, 56 SE2d 756.

structions would have a tendency to mislead the jury.[12] There would obviously be no prejudicial error if the refused request is less favorable than the instructions given by the court.[13]

Where the matter is sufficiently covered, the request is properly refused if it is no more than an elaboration of the points of the main charge,[14] or its statement in a converse form,[15] or involves no more than the use of different expressions of equivalent meaning.[16]

Wisconsin. Kenyon v. Mondovi, 98 Wis 50, 73 NW 314; Behl v. Schuett, 104 Wis 76, 80 NW 73; Warden v. Miller, 112 Wis 67, 87 NW 828; Hein v. Mildebrandt, 134 Wis 582, 115 NW 121.

Wyoming. Mutual Life Ins. Co. v. Summers, 19 Wyo 441, 120 P 185.

[12] **Alabama.** Birmingham v. Henderson, 26 AlaApp 389, 160 S 778.

Arkansas. Nixon v. Fulkerson, 128 Ark 172, 193 SW 500.

Iowa. Jordan v. Hill, 172 Ia 414, 154 NW 579.

Rhode Island. Melone v. Rhode Island Co. (RI), 112 A 426.

[13] **Alabama.** Southern Ry. Co. v. Pruett, 200 Ala 675, 77 S 49.

Kansas. Refusal was proper where the subject was more adequately treated in instruction given than in instruction offered. Bilderback v. Clark, 106 Kan 737, 189 P 977, 9 ALR 1622.

Montana. Simpson v. Miller, 97 Mont 328, 34 P2d 528.

[14] **Federal.** Kimble v. Kiser, 59 F2d 626.

Illinois. Gamble v. Hayes Transfer & Storage Co., 278 IllApp 365.

Kentucky. McGeough v. Lewis, 245 Ky 363, 53 SW2d 544 (contributory negligence).

Michigan. Gray v. Briggs, 259 Mich 440, 243 NW 254 (duty to mitigate damages).

Nebraska. Blackwell v. Omaha Athletic Club, 123 Neb 332, 242 NW 664.

Oklahoma. Rock Island Coal Min. Co. v. Toleikis, 67 Okl 299, 171 P 17.

Virginia. Nelson County v. Loving, 126 Va 283, 101 SE 406.

Washington. Phoenix Assur. Co. v. Columbia & P. S. R. R., 92 Wash 419, 159 P 369; Smith v. Harrington, 93 Wash 681, 161 P 465.

Wisconsin. Vaningan v. Mueller, 208 Wis 542, 243 NW 424.

[15] South Covington & C. St. R. Co. v. Miller, 176 Ky 701, 197 SW 403; Aetna Life Ins. Co. v. McCullagh, 185 Ky 664, 215 SW 821.

[16] **Federal.** DeSoto Motor Corp. v. Stewart, 62 F2d 914.

California. Anderson v. Southern Pacific Co., 129 CalApp 206, 18 P2d 703.

Colorado. Parris v. Jaquith, 70 Colo 63, 197 P 750.

Connecticut. Tefft v. New York, N. H. & H. R. Co., 116 Conn 127, 163 A 762.

Idaho. McCoy v. Krengel, 52 Idaho 626, 17 P2d 547.

Illinois. Wintersteen v. National Cooperage & Woodenware Co., 361 Ill 95, 197 NE 578; Bunch v. McAllister, 266 IllApp 248.

Indiana. J. F. Darmody Co. v. Reed, 60 IndApp 662, 111 NE 317; Pennsylvania R. Co. v. Boyd, 98 Ind App 439, 185 NE 160.

Kentucky. Western Automobile Casualty Co. v. Lee, 246 Ky 364, 55 SW2d 1; Louisville Ry. Co. v. Breeden, 257 Ky 95, 77 SW2d 368.

New Jersey. Neipert v. Yellow Cab Co., 110 NJL 351, 164 A 452.

Oregon. Johnson v. Roberts Bros., 151 Or 311, 49 P2d 455.

Texas. Galveston, H. & S. A. Ry. Co. v. Miller (TexCivApp), 192 SW 593.

Washington. Colvin v. Simonson, 170 Wash 341, 16 P2d 839.

It matters not that the main charge is oral in a jurisdiction allowing oral charges, if it covers the point of the written request.[17]

The court properly refuses request on the subject of definitions sufficiently covered by the charge.[18]

So, in an action brought by a physician to recover on quantum meruit for professional services, an instruction that the plaintiff was not barred from recovering a larger sum by reason of having originally presented his bill for fifty dollars was rendered unnecessary by an instruction to award such amount, not in excess of one hundred dollars, as the services were shown by the evidence to be worth.[19]

Where the jury are informed, in an action for personal injuries, that if plaintiff was negligent he could not recover, it is sufficient to cover this phase of the case and there is no error in refusing to instruct that if both plaintiff and defendant were negligent, then plaintiff was not entitled to recover.[20] In an action against a dentist for malpractice, where the general charge had fairly covered the case, it was not error to refuse to charge that the injury from tooth extraction was no evidence of the dentist's negligence.[21]

In a collision case, where the complaint asked for compensatory damages only, as to which the court had properly charged the jury, it was not error to refuse a charge relating to exemplary damages.[22]

[17] Hood & Wheeler Furn. Co. v. Royal, 200 Ala 607, 76 S 965; Alabama Packing Co. v. Smith, 203 Ala 679, 85 S 19; Payne v. Smitherman, 206 Ala 591, 91 S 575; Vann v. State, 207 Ala 152, 92 S 182; Seaboard Air Line R. Co. v. McFry, 221 Ala 296, 128 S 239; Crawley v. State, 16 AlaApp 545, 79 S 804; Hines v. McMillan, 17 AlaApp 509, 87 S 696; Birmingham Iron & Dev. Co. v. Hood, 19 AlaApp 4, 94 S 835.

[18] **Alabama.** West v. Arrington, 200 Ala 420, 76 S 352 (mental capacity).

California. Abbott v. Cavalli, 114 CalApp 379, 300 P 67 (gross negligence).

Kentucky. Aetna Life Ins. Co. v. McCullagh, 185 Ky 664, 215 SW 821 (habit).

Missouri. Evans v. General Explosives Co., 293 Mo 364, 239 SW 487 (assumption of risk); Boeckmann v. Valier & Spies Milling Co. (MoApp), 199 SW 457 (ordinary care); Lord v. Austin (MoApp), 39 SW2d 575 (negligence and degree of care).

Oregon. Brown v. O'Flynn, 127 Or 497, 272 P 673 (proximate cause).

Vermont. Duprat v. Chesmore, 94 Vt 218, 110 A 305 (proximate cause).

Washington. Comfort v. Penner, 166 Wash 177, 6 P2d 604 (proximate cause).

[19] Ladd v. Witte, 116 Wis 35, 92 NW 365.

[20] St. Louis Southwestern Ry. Co. v Byers (TexCivApp), 70 SW 558.

[21] Francis v. Brooks, 24 OhApp 136, 156 NE 609.

[22] Armstrong v. Dav, 103 CalApp 465, 284 P 1083.

But in a collision action where the court had instructed that the driver on the left must yield to the driver on the right if a collision was "imminent," it was held error to refuse a request to charge that the driver on the left must yield if the collision was reasonably to be "apprehended."[23] In an action on an insurance policy it was error to deny a request to charge that plaintiff was required to prove his right of recovery by a preponderance of the evidence.[24] A request for a charge as to what constitutes reasonable time should be given if not already covered by other instructions.[25]

§ 159. Refused instructions in criminal cases substantially covered by other instructions given.

It is not reversible error in a criminal case to refuse a correct requested instruction if it is substantially covered by the general charge or by the requested instructions of either party given by the court.

The judge is not required to give a requested instruction, even though correct, if the matter is substantially covered by any other instruction given.[26] And, of course, if not substantially covered, then the requested instruction should be given.[27]

[23] Collins v. Liddle, 67 Utah 242, 247 P 476.

[24] Union Indemnity Co., Inc. v. S. N. Kleier Co., Inc., 34 F2d 738.

[25] Janus v. United States ex rel. Humphrey, 38 F2d 431, revg. 30 F2d 530.

[26] **Federal.** Holt v. United States, 218 US 245, 54 LEd 1021, 31 SupCt 2, 20 AnnCas 1138; Bennett v. United States, 227 US 333, 57 LEd 531, 33 SupCt 288; Wuichet v. United States, 8 F2d 561; Russell v. United States, 12 F2d 683; Kercheval v. United States, 12 F2d 904; Tyson v. United States, 54 F2d 26; Addis v. United States, 62 F2d 329; Richards v. United States, 63 F2d 338.

Alabama. Powe v. State, 214 Ala 91, 106 S 503; Hyde v. State, 230 Ala 243, 160 S 237; Sills v. State, 2 AlaApp 73, 57 S 89.

Arizona. Hurley v. Territory, 13 Ariz 2, 108 P 222.

Arkansas. Williams v. State, 100 Ark 218, 139 SW 1119.

California. People v. Hall, 220 Cal 166, 30 P2d 23, 996; People v. Latona, 2 Cal2d 714, 43 P2d 260; People v. Crosby, 17 CalApp 518, 120 P 441; People v. Foster, 117 CalApp 439, 4 P2d 173; People v. White, 137 CalApp 467, 30 P2d 555; People v. Raucho (CalApp), 47 P2d 1108; People v. Todd, 9 CalApp2d 237, 49 P2d 611; People v. Groves, 9 CalApp2d 317, 49 P2d 888, 50 P2d 813.

Colorado. Ryan v. People, 50 Colo 99, 114 P 306, AnnCas 1912B, 1232; Roll v. People, 78 Colo 589, 243 P 641; Windolph v. People, 96 Colo 285, 42 P2d 197.

Connecticut. State v. Burns, 82 Conn 213, 72 A 1083, 16 AnnCas 465.

District of Columbia. De Camp v. United States, 56 AppDC 119, 10 F2d 984.

Florida. Gilbert v. State, 61 Fla 25, 55 S 464; Crosby v. State, 90 Fla 381, 106 S 741.

Illinois. People v. Weil, 244 Ill 176, 91 NE 112; People v. Kaswick, 319 Ill 306, 150 NE 16; People v. Vozel, 346 Ill 209, 178 NE 473; People v. Resnick, 348 Ill 544, 181 NE

415; People v. Gibbs, 349 Ill 83, 181 NE 628 (defense of habitation); People v. Buzan, 351 Ill 610, 184 NE 890; People v. Anderson, 355 Ill 289, 189 NE 338.

Indiana. Malone v. State, 176 Ind 338, 96 NE 1; Blackburn v. State, 203 Ind 332, 180 NE 180; Daveros v. State, 204 Ind 604, 185 NE 443; Hamilton v. State, 205 Ind 26, 184 NE 170; Kleihege v. State, 206 Ind 206, 188 NE 786; Yoder v. State, 208 Ind 50, 194 NE 645; Southerland v. State, 209 Ind 308, 197 NE 841 (language of instruction given was practically the same as language of requested instruction); Flowers v. State, 236 Ind 151, 139 NE2d 185.

In Beneks v. State, 208 Ind 317, 196 NE 73, it was held to be immaterial that the requested instruction was a correct statement of the law, since the substance was included in the charge given.

If one or more of the essential elements of the crime charged be omitted from an instruction, such instruction must be withdrawn before the error is cured by the giving of a correct instruction thereon. Kirk v. State, 207 Ind 623, 194 NE 349.

Iowa. State v. Becker, 159 Ia 72, 140 NW 201.

Kentucky. International Harvester Co. v. Commonwealth, 147 Ky 564, 144 SW 1064; Warford v. Commonwealth, 213 Ky 675, 281 SW 819.

Louisiana. State v. Williams, 129 La 795, 56 S 891; State v. Hill, 160 La 579, 107 S 433; State v. Jenkins, 160 La 757, 107 S 564; State v. Linam, 175 La 865, 144 S 600; State v. Davis, 178 La 203, 151 S 78.

Massachusetts. Commonwealth v. Brisbois, 281 Mass 125, 183 NE 168.

Michigan. People v. Auerbach, 176 Mich 23, 141 NW 869, AnnCas 1915B, 557; People v. Dunn, 233 Mich 185, 206 NW 568.

Missouri. State v. Martin, 226 Mo 538, 126 SW 442; State v. Weaver (Mo), 56 SW2d 25.

Montana. State v. Van, 44 Mont 374, 120 P 479; State v. Sheldon, 54 Mont 185, 169 P 37; State v. Vuckovich, 61 Mont 480, 203 P 491.

Nebraska. Nixon v. State, 92 Neb 115, 138 NW 136; Witt v. State, 123 Neb 799, 244 NW 395.

Nevada. State v. Smithson, 54 Nev 417, 19 P2d 631, 22 P2d 129.

New Mexico. State v. Rodriguez, 23 NM 156, 167 P 426.

New York. People v. Fisher, 136 AppDiv 57, 120 NYS 659.

North Carolina. State v. Leak, 156 NC 643, 72 SE 567.

Ohio. Stewart v. State, 1 OhSt 66; Bond v. State, 23 OhSt 349; State v. Stout, 49 OhSt 270, 30 NE 437; Earp v. State, 21 OhApp 417, 153 NE 245; Greger v. State, 27 OhApp 272, 161 NE 37; Stover v. State, 37 OhApp 213, 33 OLR 598, 174 NE 613; Romeo v. State, 39 OhApp 309, 34 OLR 150, 177 NE 483; Lesnick v. State, 48 OhApp 517, 40 OLR 301, 194 NE 443; Watha v. State, 14 OhCirCt (N. S.) 145, 24 OhCir Dec 60; Donald v. State, 21 OhCirCt 124, 11 OhCirDec 483; Avant v. State, 3 OLA 156; Gibbs v. State, 7 OLA 374.

The court is not bound to give special charges in a criminal case. Lesnick v. State, 48 OhApp 517, 40 OLR 301, 2 OLO 99, 194 NE 443.

Oklahoma. Jones v. State, 51 Okl Cr 377, 1 P2d 833; Bond v. State, 54 OklCr 39, 14 P2d 425.

Oregon. State v. Hardin, 63 Or 305, 127 P 789.

Pennsylvania. Commonwealth v. Brown, 116 PaSuper 1, 175 A 748.

South Dakota. State v. Harbour, 27 SD 42, 129 NW 565; State v. Cline, 27 SD 573, 132 NW 160.

Tennessee. Nash v. State, 167 Tenn 288, 69 SW2d 235.

Texas. Warren v. State, 67 TexCr 273, 149 SW 130; Smith v. State, 104 TexCr 100, 283 SW 508; Williams v. State, 104 TexCr 565, 286 SW 237; Rose v. State, 123 TexCr 261, 58 SW2d 526 (intent to kill); Yurash v. State, 125 TexCr 664, 69 SW2d 135; Cobb v. State, 127 TexCr 504, 77 SW2d 667; Bradshaw v. State, 128 TexCr 345, 81 SW2d 83.

Washington. State v. Smails, 63 Wash 172, 115 P 82; State v. Cherry Point Fish Co., 72 Wash 420, 130

Accordingly, if the several matters are substantially covered by the general charge, the court properly refuses charges in criminal prosecutions on such subjects as reasonable doubt,[28] self-defense,[29] good character of accused,[30] presumption of in-

P 499; State v. Holcomb, 73 Wash 652, 132 P 416.

West Virginia. State v. Huffman, 69 WVa 770, 73 SW 292; State v. Koski, 101 WVa 477, 133 SE 79.

Wisconsin. Reismier v. State, 148 Wis 593, 135 NW 153.

[27] **Federal.** Western Union Tel. Co. v. Morris, 105 F 49.

California. People v. Manriquez, 138 CalApp 614, 33 P2d 36.

Illinois. People v. Moor, 355 Ill 393, 189 NE 318.

Indiana. See Diblee v. State, 202 Ind 571, 177 NE 261.

Iowa. State v. Sanford, 218 Ia 951, 256 NW 650.

Kentucky. Burks v. Commonwealth, 254 Ky 193, 71 SW2d 418.

New York. In People v. Alex, 265 NY 192, 192 NE 289, the court refused to charge the statute to the effect that unnecessary delay in arraigning an accused person is contrary to law.

Pennsylvania. Commonwealth v. Brletic, 113 PaSuper 508, 173 A 686.

Texas. Andrew v. Mace (TexCiv App), 194 SW 598.

Virginia. Campbell v. Commonwealth, 162 Va 818, 174 SE 856.

Wisconsin. See also John v. Pierce, 172 Wis 44, 178 NW 297.

[28] **Federal.** United States v. Becker, 62 F2d 1007.

Alabama. Jackson v. State, 18 AlaApp 259, 89 S 892.

Arkansas. Monk v. State, 130 Ark 358, 197 SW 580.

Colorado. Gould v. People, 89 Colo 596, 5 P2d 580.

District of Columbia. Aldridge v. United States, 61 AppDC 103, 57 F 2d 942.

Florida. Street v. State, 76 Fla 217, 79 S 729.

Georgia. Campbell v. State, 144 Ga 224, 87 SE 277; Brown v. State, 148 Ga 264, 96 SE 435; Thompson v. State, 20 GaApp 176, 92 SE 959.

Illinois. People v. Venckus, 278 Ill 124, 115 NE 880; People v. Davidson, 298 Ill 455, 131 NE 640.

Kansas. State v. Gaunt, 98 Kan 186, 157 P 447.

Michigan. People v. Goodfellow, 257 Mich 196, 241 NW 184; People v. Dellabonda (People v. Salimone), 265 Mich 486, 251 NW 594.

New Jersey. State v. Burrell, 112 NJL 330, 170 A 843.

Ohio. Beck v. State, 129 OhSt 582, 196 NE 423.

Oregon. State v. Wilder, 98 Or 130, 193 P 444.

Pennsylvania. Commonwealth v. Del Giorno, 303 Pa 509, 154 A 786.

Texas. McCarty v. State, 123 Tex Cr 34, 57 SW2d 114; Wall v. State, 125 TexCr 588, 69 SW2d 61.

Utah. State v. Shaw, 59 Utah 536, 205 P 339; State v. Fairclough, 86 Utah 326, 44 P2d 692.

[29] **Alabama.** Nickerson v. State, 205 Ala 684, 88 S 905; Crumley v. State, 18 AlaApp 105, 89 S 847; Teel v. State, 18 AlaApp 405, 92 S 518; Beverett v. State, 24 AlaApp 470, 136 S 843, cert. den. in 223 Ala 405, 136 S 845.

Arkansas. Rankin v. State, 149 Ark 670, 234 SW 23.

California. People v. Chober, 29 CalApp 627, 157 P 533; People v. Anderson, 57 CalApp 721, 208 P 204.

Florida. Allen v. State, 119 Fla 345, 161 S 406.

Indiana. Southerland v. State, 209 Ind 308, 197 NE 841.

Iowa. State v. Russo, 193 Ia 992, 188 NW 660.

Kansas. State v. Barbour, 142 Kan 200, 46 P2d 841.

Nevada. State v. Robison, 54 Nev 56, 6 P2d 433.

New Jersey. State v. Flynn, 108 NJL 19, 156 A 117.

Texas. Rawls v. State, 127 TexCr 414, 76 SW2d 1053.

Virginia. Ballard v. Common-

nocence,[31] alibi,[32] intent,[33] motive,[34] accomplice testimony,[35] confessions,[36] opinion of expert as to disputed handwriting,[37] and accidental killing.[38]

Where the court in a criminal case has fairly charged the law of reasonable doubt, it is not error to refuse to give a requested charge on the presumption of innocence.[39]

§ 160. Refusal of inconsistent requests.

Where a party requests instructions which are inconsistent with each other, the court is at liberty to choose between them, giving one and rejecting the other.

If requested instructions are inconsistent with each other, the judge may properly reject both.[40] But the judge is free to

wealth. 156 Va 980, 159 SE 222.

Washington. State v. Bezemer, 169 Wash 559, 14 P2d 460.

Wyoming. State v. Radon, 45 Wyo 383, 19 P2d 177.

[30] **California.** People v. Miller, 126 CalApp 162, 14 P2d 342.

Georgia. Knight v. State, 148 Ga 40, 95 SE 679.

Illinois. People v. Hrdlicka, 344 Ill 211, 176 NE 308.

[31] **Federal.** Hayes v. United States, 52 F2d 388.

Arkansas. Thompson v. State, 130 Ark 217, 197 SW 21.

California. People v. Anderson, 58 CalApp 267, 208 P 324.

Indiana. Mack v. State, 203 Ind 355, 180 NE 279, 83 ALR 1349.

Missouri. State v. Lassieur (Mo), 242 SW 900.

South Carolina. State v. Bigham, 119 SC 368, 112 SE 332.

Texas. Gleason v. State, 79 TexCr 185, 183 SW 891; Wood v. State, 80 TexCr 398, 189 SW 474.

[32] **California.** People v. Lim Foon, 29 CalApp 270, 155 P 477; People v. Visconti, 31 CalApp 169, 160 P 410, 411.

Georgia. Williams v. State, 152 Ga 498, 110 SE 286.

Indiana. Gears v. State, 203 Ind 380, 180 NE 585.

Missouri. State v. Simpson (Mo), 237 SW 748; State v. Tracy, 294 Mo 372, 243 SW 173.

New Mexico. State v. Compton, 39 NM 130, 42 P2d 203.

Ohio. It is not sufficient charge on alibi to instruct on reasonable doubt and the presumption of innocence. McGoon v. State, 39 OhApp 212, 177 NE 238.

Oregon. State v. La Plant, 149 Or 615, 42 P2d 158.

Washington. State v. Simons, 172 Wash 438, 20 P2d 844.

West Virginia. State v. Summerville, 112 WVa 398, 164 SE 508.

[33] People v. Smith, 192 Mich 355, 158 NW 849.

[34] People v. Garcia, 2 Cal2d 673, 42 P2d 1013.

[35] **Federal.** Cheatham v. State of Texas, 48 F2d 749.

Florida. Bass v. State, 121 Fla 208, 163 S 485.

Michigan. People v. Knoll, 258 Mich 89, 242 NW 222.

Oklahoma. Hadley v. State, 52 OklCr 423, 6 P2d 451.

Texas. Dunn v. State, 129 TexCr 90, 83 SW2d 963.

Washington. State v. Dickey, 181 Wash 249, 42 P2d 790.

[36] Hopkins v. People, 89 Colo 296, 1 P2d 937; Mosley v. State, 48 OhApp 554, 194 NE 613.

[37] State v. Hauptmann, 115 NJL 412, 180 A 809.

[38] Curtis v. State, 28 GaApp 219, 110 SE 907.

[39] State v. Snider, 151 MoApp 699, 132 SW 299.

[40] St. Paul Fire & Marine Ins. Co. v. Pipkin (TexCivApp), 207 SW 360.

choose between them, and the requesting party cannot complain of the choice made,[41] even if the one refused is a correct statement of the law applicable to the case.[42]

Where instructions given at the request of one of the parties submit to the jury an issue of fact as to care or negligence, the court will be justified in refusing to submit, separately, a group of the same facts involved in a form which assumes the issue arising therefrom to be one of law only.[43] So, where instructions which assume the existence of facts necessary to make out a case for the plaintiff are given at the request of the defendant, there is no error in refusing another of defendant's requested instructions that "the evidence in this case would not justify a verdict for the plaintiff and your verdict must be for the defendant."[44] So, where a party has requested a charge that an action was ex contractu, the court properly refused a subsequent request that the action was ex delicto.[45]

But there is no such inconsistency as to prevent an injured plaintiff from submitting both the doctrine of negligence and the humanitarian doctrine.[46]

[41] **Colorado.** Healey v. Rupp, 28 Colo 102, 63 P 319.

District of Columbia. Washington Ry. & Elec. Co. v. Clark, 46 AppDC 88.

Illinois. Chicago City Ry. Co. v. Taylor, 170 Ill 49, 48 NE 831; Phillips v. Stone, 208 IllApp 478.

Maryland. Aetna Indem. Co. v. George A. Fuller Co., 111 Md 321, 73 A 738, 74 A 369.

Missouri. Tetherow v. St. Joseph & D. M. Ry. Co., 98 Mo 74, 11 SW 310, 14 AmSt 617.

Nebraska. Missouri Pacific Ry. Co. v. Fox, 60 Neb 531, 83 NW 744.

New York. Ramsey v. National Contr. Co., 49 AppDiv 11, 63 NYS 286.

Ohio. Miller & Co. v. Florer, 19 OhSt 356.

Pennsylvania. Griesemer v. Suburban Elec. Co., 224 Pa 328, 73 A 340.

Texas. St. Paul Fire & Marine Ins. Co. v. Pipkin (TexCivApp), 207 SW 360; State v. Texas Pacific Coal & Oil Co. (TexCivApp), 236 SW 1021.

West Virginia. Lazzell v. Mapel, 1 WVa 43.

[42] Healey v. Rupp, 28 Colo 102, 63 P 319.

See also cases in note 41, *supra*.

[43] Tetherow v. St. Joseph & D. M. Ry. Co., 98 Mo 74, 11 SW 310, 14 AmSt 617.

In an action for personal injuries, where the court, at defendant's request, charges that the jury could not award as damages a sum which would capitalize the plaintiff's yearly losses, a second request to instruct that the jury must consider the award in the light of capital to be invested, producing a yearly income, is antagonistic to the first and therefore rightly refused. Ramsey v. National Contr. Co., 49 AppDiv 11, 63 NYS 286.

[44] Chicago City Ry. Co. v. Taylor, 170 Ill 49, 48 NE 831.

[45] Western Union Tel. Co. v. Griffith, 161 Ala 241, 50 S 91.

[46] De Rousse v. West, 198 MoApp 293, 200 SW 783.

§ 161. Requests for special verdict or findings on interrogatories by jury.

It is the duty of a party desiring the jury to return a special verdict or special findings on interrogatories to make timely and proper request to the court therefor.

In jurisdictions where the jury may be required to return a special verdict, or where parties are entitled to have the jury make special findings of fact upon any of the issues, it may or may not be in the court's discretion to submit such special verdict or interrogatories for findings of fact, depending upon either statutory provision, or upon the practice adopted in the particular jurisdiction.[47] Whatever the practice, however, the court is not required to make such submission sua sponte, but the party at whose instance the submission is to be made must present proper requests therefor.[48] If a party desires findings as to special issues of negligence, he must make request for a special verdict.[49]

Where the court gives a main charge, submission of special issues or findings should not include matters already covered by the court's instructions.[50] On the other hand, it has been held

[47] See § 111, *supra*.

In Grand Lodge, K. of P. v. Central States Fire Ins. Co., 136 Kan 342, 15 P2d 466, it was held that the trial court, in the exercise of discretionary power, could submit additional special questions after verdict and answers to other questions had been brought in.

[48] **Federal.** If no requests for special findings be made, it is not error to fail to require a special verdict. United States Fidelity & Guaranty Co. v. Barber, 70 F2d 220.

Ohio. McDowell v. Rockey, 32 Oh App 26, 29 OLR 371, 167 NE 589.

It is the duty of counsel to submit special interrogatories to determine whether the error, if any, shall operate to defeat substantial justice. Jones v. Erie R. Co., 106 OhSt 408, 140 NE 366.

Texas. Southern Surety Co. v. Adams (TexCivApp), 278 SW 943; Childress v. Pyron (TexCivApp), 285 SW 1100; Moore v. Orgain (TexCiv App), 291 SW 583; Ratcliffe v. Ormsby (TexCivApp), 298 SW 930.

Wisconsin. Brown Deer Lbr. Co. v. Campbell-Shirk Co., 201 Wis 333, 230 NW 81; Conway v. Providence Washington Ins. Co., 201 Wis 502, 230 NW 630. See Hamus v. Weber, 199 Wis 320, 226 NW 392; Hoffman v. Regling, 217 Wis 66, 258 NW 347.

[49] Gherke v. Cochran, 198 Wis 34, 222 NW 304, 223 NW 425.

[50] **Maryland.** See R. N. McCulloh & Co. v. Restivo, 152 Md 60, 136 A 54.

North Carolina. Sugg v. St. Mary's Oil Engine Co., 193 NC 814, 138 SE 169.

Texas. McBurnett v. Smith & McCallin (TexCivApp), 286 SW 599; Cohen v. Hill (TexCivApp), 286 SW 661.

If one of several interrogatories presented together has been covered by instructions, all should be refused. Tucker v. Smellage (TexCiv App), 297 SW 875.

Wisconsin. Necedah Mfg. Corp. v. Juneau County, 206 Wis 316, 237 NW 277, 240 NW 405, 96 ALR 4.

to be the duty of the trial court to supply slight omissions or defects in requests made for submission of interrogatories.[51]

Requests are defective if the answers to the proposed interrogatories would not establish the ultimate probative facts.[52]

The time when the requests are to be made is not uniform in the states where such submissions may be made.[53]

[51] Ziman v. Whitley, 110 Conn 108, 147 A 370. See Pettric v. Gridley Dairy Co., 202 Wis 289, 232 NW 595.

[52] McFadden v. Thomas, 154 OhSt 405, 43 OhO 340, 96 NE2d 254; Macdonald v. State ex rel. Fulton, 47 OhApp 223, 40 OLR 236, 191 NE 837.

[53] Special question tendered during argument comes too late. Holden v. Meehan, 239 Mich 266, 214 NW 206.

Special interrogatories must be submitted before commencement of argument of counsel. Proudfoot v. Pocahontas Transp. Co., 100 WVa 733, 132 SE 746.

CHAPTER 8

PRESERVATION OF ERROR FOR REVIEW

Section.
170. In general.
171. Timeliness of objections and exceptions.
172. Clearness of statement of grounds of objection or exception.
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174. General objections or exceptions to entire charge.
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§ 170. In general.

Normally, to preserve for appellate review an alleged error in instructions, the aggrieved party must satisfy the local procedural requirements relating to objections and exceptions.

Necessity for objection. Instructions, whether by the court or granted requests, may be erroneous because the substantive law stated is incorrect or inapplicable or because there is an omission, or because of ambiguity, or for other reasons.[1] In any case, an appellate court will normally review an allegedly incorrect charge only if the aggrieved party has satisfied the procedural requirements.

One of the procedural requirements is that objection must be made in the trial court to the giving of an allegedly incorrect charge.[2] The obligation to object is normally not excused, except in cases of impossibility. The trial judge's mere failure to ask for objections is no excuse.[3] Even the hasty retirement of the judge after delivering the charge is no excuse; counsel must pursue the judge to his chambers to request an opportunity to object in the courtroom;[4] critical discussion with the judge in his chambers is no substitute for an objection.[5]

A party desiring to preserve an error of omission has a similar duty to object,[6] some courts indicating that the objection

[1] See, generally, Chapters 4, 5 and 6, *supra*.

[2] Scarber v. State, 226 Ark 503, 291 SW2d 241; Downing v. Silberstein, 89 CalApp2d 838, 202 P2d 91; State v. Perretta, 93 Conn 328, 105 A 690; Orban v. Stoll, 328 IllApp 398, 66 NE2d 316; Shattuck v. Shattuck's Estate, 118 Minn 60, 136 NW 409; Charles A. Burton, Inc. v. Durkee, 162 OhSt 433, 49 OhO 174, 123 NE2d 432; Koenig v. Flaherty, 383 Pa 186, 117 A2d 719.

[3] Eamiello v. Piscitelli, 133 Conn 360, 51 A2d 912.

[4] Seaboard Freight Line v. Castro Elec. Co., 132 Conn 572, 46 A2d 10.

[5] Eamiello v. Piscitelli, 133 Conn 360, 51 A2d 912.

[6] Karr v. Sixt, 146 OhSt 527, 33 OhO 14, 67 NE2d 331.

plus a request for amplification is sufficient.[7] More courts, however, require counsel to present the charge to fill the gap.[8]

In order to preserve for appeal an ambiguous instruction, objection again must be made, coupled, in some courts, with a mere request for clarification,[9] but in other courts, with the submission of explanatory instructions.[10]

Besides the proper content of the objection, all the formalities required by the local statutes or rules of procedure must be complied with.[11]

Although it is not generally required that the objections shall be submitted to the opposing counsel,[12] the aggrieved party's counsel should be given a reasonable opportunity to be heard on his objection before the instruction is read to the jury.[13]

In the absence of objections,[14] or where the review transcript does not contain the court's charge at all,[15] the presumption is that the trial judge correctly charged the jury.

When objection unnecessary or ineffective. As a general rule, manifestly erroneous instructions do not require objection.[16] But because the application of this rule is discretionary, the attorney should play safe and object.

Generally, only the aggrieved party can object.[17] Under the invited error doctrine, an appellant cannot complain about a charge that was given at his request.[18] Nor can he complain of

[7] Hodina v. Bordewick, 279 App Div 267, 110 NYS2d 62.

[8] Perry v. City of San Diego, 80 CalApp2d 166, 181 P2d 98; Macal v. Chicago Tumor Institute, 9 IllApp2d 389, 132 NE2d 809; Galliher v. Campbell, 69 OLA 378, 125 NE2d 758; Schmidt v. Martz, 161 PaSuper 439, 55 A2d 588; Forbes v. Hejkal (Tex CivApp), 271 SW2d 435.

[9] Sullivan v. Matt, 130 CalApp2d 134, 278 P2d 499.

[10] Sunset Motor Lines v. Blasingame (TexCivApp), 245 SW2d 288.

[11] Chicago & N. W. Ry. Co. v. Green, 164 F2d 55 (8thCir); Henschel v. Schreiber, 47 OLA 234, 72 NE2d 107.

[12] Atchison, T. & S. F. Ry. Co. v. Smith (TexCivApp), 190 SW 761.

[13] Russell v. State, 17 OklCr 164, 194 P 242.

[14] Hartford Fire Ins. Co. v. Thompson, 175 F2d 10 (8thCir 1949); Jettre v. Healy, 245 Ia 294, 60 NW2d 541.

[15] Reid v. Hathaway Bakeries, Inc., 333 Mass 485, 132 NE2d 161; Verplanck v. Morgan, 55 OLA 574, 90 NE2d 872.

[16] Chicago & N. W. Ry. Co. v. Green, 164 F2d 55 (8thCir); Kading v. Willis, 135 CalApp2d 82, 286 P2d 861; Love v. United States, 138 A2d 666 (DCMunApp); Finton v. Mercury Motors, 29 TennApp 150, 194 SW2d 354.

Under the Kentucky practice, the court is required to charge the entire law correctly, and it is not incumbent upon a party to object or except to the instructions given or refused. Barton v. Commonwealth, 238 Ky 356, 38 SW2d 218.

The same rule is prescribed by statute in Wisconsin. Wisconsin Stat. § 270.39.

[17] United States v. Fischer, 245 F2d 477; Chicago Union Trac. Co. v. Hansen, 125 IllApp 153.

[18] Dime Sav. Bank v. Morton, 25 OhApp 157, 157 NE 825; Asteri v.

the giving of an instruction which is similar to one he requested.[19]

Exception to the error.[20] Although the courts often interchange the terms "objection" and "exception," they are not strictly synonymous. An objection is an expression of disapproval of the trial judge's non-ruling conduct. After the objection, the trial judge rules upon the objection. If the objection is overruled, the aggrieved party excepts to the ruling as a foundation for appeal.

In many states, an objection alone is insufficient to preserve the question for appeal.[21] But in other states, an exception is not necessary.[22]

Bill of exceptions. Objections to instructions are not part of the common law record. Yet a reviewing court passes upon alleged errors as contained in the record. In the absence of a statutory provision incorporating the charge and objection into the record, the usual method of inserting the objection into the record is by a bill of exceptions. Instructions do not become part of the record merely by being copied into the transcript.[23]

A bill of exceptions is a formal written statement of the objections with the supporting circumstances and signed by the trial judge.[24] It is necessary to state by whom the instructions were requested to avoid the invited error rule.[25] Obviously the questioned instruction should be set forth.[26]

Youngstown, 67 OLA 605, 121 NE2d 143.

[19] Smith v. Pellissier, 134 Cal App2d 562, 286 P2d 66; Hocker v. Vande Walle, 16 IllApp2d 414, 148 NE2d 618; Illinois Transit Lines v. Packer City Transit Lines, 9 IllApp 2d 161, 132 NE2d 433; Coca Cola Bottling Works, Inc. v. Williams, 111 Ind 502, 37 NE2d 702; Keeshin Motor Exp. Co. Inc. v. Glassman, 219 Ind 538, 38 NE2d 847.

[20] See also § 185, *infra.*

[21] Fields v. New York, 4 NY2d 334, 151 NE2d 188; Cravens v. Hughes, 207 Okl 503, 250 P2d 877; Oja v. LeBlanc, 185 Or 333, 203 P2d 267.

[22] Fla. Stat., 1955, § 59.07; Oh. Rev. Code, §§ 2321.03, 2945.09.

[23] J. R. Watkins Co. v. Chapman, 197 Okl 466, 172 P2d 768.

[24] Van Laaten v. Chicago Athletic Assn., 351 IllApp 373, 115 NE2d 112; City of Mangum v. Garrett, 200 Okl 274, 191 P2d 998; Gowan v. Reimers (TexCivApp), 220 SW2d 331.

[25] City of Chicago v. Callender, 396 Ill 371, 71 NE2d 643. In a later Illinois Appellate Court case, the court held that even though the record failed to indicate who had requested the instructions, the court might examine the assigned errors, although the party was identified only in the abstract. Miller v. Green, 345 IllApp 255, 103 NE2d 188.

[26] See Thomas v. Laguna, 113 CalApp2d 657, 248 P2d 929; Tir v. Shearn, 2 IllApp2d 257, 119 NE2d 406.

Further steps necessary for preservation of error. Normally, the aggrieved party must make a motion for a new trial based on errors in the instructions.[27]

The alleged errors must be enumerated by the appellant in an assignment of errors, in effect, his pleading in the appellate court. The assignment of errors should not only identify the instructions containing alleged errors, but should also state why the errors were prejudicial.[28] The assignment of errors is insufficient if it merely states that the instructions were contradictory or erroneous,[29] or that all of the instructions are erroneous and any one is correct.[30]

Some reviewing courts require a record abstract which is a summary of the material portions of the record. This eliminates searching the entire record transcript. An abstract which is so inadequate as to require a search ordinarily justifies dismissal.[31] Not only must the questioned instruction be included in the abstract, but also at whose instance the instruction was given.[32]

§ 171. Timeliness of objections and exceptions.

The right to urge error in instructions will be lost if the objection or exception is not made within the time fixed by the local code or rules.

Not only must an objection or exception be made to preserve the error for appeal, but they must be made within the time fixed by the code or rules of the particular jurisdiction.[33]

[27] Henrikson v. Knox, 350 IllApp 57, 111 NE2d 384; Leisure v. Hicks, 336 Mich 148, 57 NW2d 473; Adams v. New Kensington, 374 Pa 104, 97 A2d 354.

[28] Miller v. Jackson, 92 OhApp 199, 49 OhO 321, 107 NE2d 922.

[29] Batchelor v. Caslavka, 128 Cal App2d 819, 276 P2d 64; Bloxham v. Robinson, 67 Idaho 369, 181 P2d 189; Texas Life Ins. Co. v. Jordan (Tex CivApp), 253 SW2d 906.

[30] North v. Evans, 199 Okl 284, 185 P2d 901; Jones v. Eppler, 266 P2d 451, 48 ALR2d 333.

[31] Chicago Park Dist. v. Harris, 402 Ill 214, 83 NE2d 702.

[32] Rawls v. Tansil, 221 Ark 699, 255 SW2d 973; Thomas v. Mosheim, 345 IllApp 184, 102 NE2d 555.

[33] **Federal.** Sending the jury out before counsel had stated all of his exceptions to the charge is not reversible error, where the judge allowed all the exceptions to be noted in open court. Gandia v. Pettingill, 222 US 452, 56 LEd 267, 32 SupCt 127, 9 OLR 590.

Exceptions must be taken before the case is submitted to the jury. Cudahy Packing Co. v. Luyben, 9 F2d 32. See also Griffin Groc. Co. v. Richardson, 10 F2d 467.

Indiana. Fame Laundry Co. v. Henry, 195 Ind 453, 144 NE 545.

Iowa. Busch v. Tjentland, 182 Ia 360, 165 NW 999.

Massachusetts. Garfield & Proctor Coal Co. v. New York, N. H. & H. R. Co., 248 Mass 502, 143 NE 312.

Minnesota. R. W. Bonyea Piano Co. v. Wendt, 135 Minn 374, 160 NW 1030.

North Carolina. Muse v. Ford Motor Co., 175 NC 466, 95 SE 900;

State v. Chambers, 180 NC 705, 104 SE 670; Dees v. Lee, 183 NC 206, 111 SE 3.

North Dakota. Under Comp. Laws 1913, § 10824, exceptions may, and must, be taken within 20 days. State v. Balliet, 61 ND 703, 240 NW 604.

Ohio. That charges asked are given to the jury in the manuscript instead of being read to them must be objected to at the time or it is not reversible error. Little Miami R. Co. v. Washburn, 22 OhSt 324.

In Ohio Power Co. v. Fittro, 36 OhApp 186, 32 OLR 227, 173 NE 33, it was held that error in a charge not excepted to, but made ground for a new trial, must be considered on appeal where the exceptions contained all the evidence and the charge.

In Sullivan v. Grant, 32 OLR 558, it was held that where there were no exceptions to the charge at the time the case went to the jury, there was nothing to consider on appeal as to the charge.

An exception to the charge need not be in the presence of the jury nor before their retirement, provided it be made in time for the court to correct the charge. Salomon v. Reis, 5 OhCirCt 375, 3 OhCirDec 184.

Oregon. Colgan v. Farmers & Mechanics Bank, 59 Or 469, 106 P 1134, 114 P 460, 117 P 807.

Pennsylvania. First Nat. Bank v. Delone, 254 Pa 409, 98 A 1042; Sikorski v. Philadelphia & R. Ry. Co., 260 Pa 243, 103 A 618.

Texas. Middleton v. State, 86 Tex Cr 307, 217 SW 1046; Blackwell v. State, 107 TexCr 58, 294 SW 852; Noble v. Long (TexCivApp), 298 SW 618.

Objections to court's charge must be made before it is read to the jury. Campbell v. Johnson (TexCiv App), 284 SW 261.

[34] Federal. Mann v. Dempster, 104 CCA 110, 181 F 76; Wells Fargo & Co. v. Zimmer, 108 CCA 242, 186 F 130; American Issue Publishing Co. v. Sloan, 160 CCA 329, 248 F 251; Rothman v. United States, 270 F 31; Fisk v. United States, 279 F 12; Elderd v. United States, 44 F2d 170; Davis v. United States, 78 F2d 501.

Exceptions to charge must be taken in jury's presence before they retire to deliberate upon their verdict. Booth v. United States, 57 F2d 192.

Illinois. Edson Keith & Co. v. Eisendrath, 192 IllApp 155 (oral charge).

Louisiana. State v. Rini, 151 La 163, 91 S 664; State v. Wilson, 169 La 684, 125 S 854; State v. Johnson, 171 La 95, 129 S 684; State v. Terrell, 175 La 758, 144 S 488.

Maine. Jameson v. Weld, 93 Me 345, 45 A 299; Poland v. McDowell, 114 Me 511, 96 A 834.

Maryland. State Roads Comm. v. Berry, 208 Md 461, 118 A2d 649.

Massachusetts. Maxwell v. Massachusetts Title Ins. Co., 206 Mass 197, 92 NE 42.

Minnesota. Sembum v. Duluth & I. R. R. Co., 121 Minn 439, 141 NW 523; State v Shtemme, 133 Minn 184, 158 NW 48.

New Hampshire. Pitman v. Mauran, 69 NH 230, 40 A 392; State v. Rheaume, 80 NH 319, 116 A 758.

New Jersey. J. B. Wolfe, Inc. v. Salkind, 3 NJ 312, 70 A2d 72.

New Mexico. State v. Hurst, 34 NM 447, 283 P 904.

North Carolina. Green v. W. M. Ritter Lbr. Co., 182 NC 681, 110 SE 56.

Oklahoma. St. Louis & S. F. R. C. v. Fling, 36 Okl 25, 127 P 473.

Pennsylvania. McGinley v. Philadelphia & R. Ry. Co., 257 Pa 519, 101 A 825; Commonwealth v. Stabinsky, 313 Pa 231, 169 A 439; Commonwealth v. Taylor, 65 Pa Super 113; General Roofing Co. v. Greensburg Title & Trust Co., 71 PaSuper 373.

Tennessee. Smith v. State, 159 Tenn 674, 21 SW2d 400.

Texas. Republic Production Co. v. Collins (TexCivApp), 41 SW2d 100.

Exceptions or objections filed three

In most jurisdictions it is required that exceptions shall be taken before the jury retires,[34] in some at the time they are given,[35] and in some before they are read to the jury.[36] In some cases, the court decided that exceptions are too late if taken after verdict.[37] In a few other states, it is held that exceptions to a charge may be taken at any time before the verdict has been returned, even though the jury has retired.[38]

In most states, the exception would come too late where taken after the filing of the motion for a new trial.[39] An Iowa statute authorizes the filing of exceptions to instructions within five

months after the trial, under statute requiring same to be filed before the case is submitted to the jury, are not in time. Levine v. Trammell (TexCivApp), 41 SW2d 334, applying Rev. Stat. 1925, art. 2185.

[35] Jenkins v. United States, 58 F2d 556.

[36] **Federal.** See Paschen v. United States, 70 F2d 491.

Iowa. Seitsinger v. Iowa City Elec. Ry. Co., 181 Ia 739, 165 NW 205; Freeby v. Sibley, 183 Ia 827, 167 NW 770.

Maine. Skene v. Graham, 116 Me 202, 100 A 938.

New Mexico. State v. Lucero, 24 NM 343, 171 P 785.

Oklahoma. Stribbling v. State, 41 OklCr 252, 272 P 488 (unless the errors are of a fundamental character).

Texas. McLaughlin v. Terrell Bros. (TexCivApp), 179 SW 932; Ochoa v. Edwards (TexCivApp), 189 SW 1022; Fred Mercer Dry Goods Co. v. Fikes (TexCivApp), 191 SW 1178; Shumaker v. Byrd (TexCivApp), 203 SW 461; Thomas v. Corbett (TexCivApp), 211 SW 806; Queen v. Turman (TexCivApp), 241 SW 786; Schaff v. Copass (Tex CivApp), 262 SW 234; Capitol Bldg. & Loan Assn. v. Sosa (TexCivApp), 72 SW2d 936.

West Virginia. State v. Noble, 96 WVa 432, 123 SE 237.

[37] **United States.** Illinois Cent. R. Co. v. Skaggs, 240 US 66, 60 LEd 528, 36 SupCt 249.

Federal. Brent v. Charles H. Lilly Co., 202 F 335.

Arkansas. Huffman v. Sudbury, 128 Ark 559, 194 SW 510.

Indiana. Neff v. Masters, 173 Ind 196, 89 NE 846.

Louisiana. State v. Henderson, 148 La 713, 87 S 721.

New Hampshire. Noel v. Lapointe, 86 NH 162, 164 A 769.

North Carolina. State v. Harris, 120 NC 577, 26 SE 774; Phifer v. Cabarrus County, 157 NC 150, 72 SE 852; State v. Kincaid, 183 NC 709, 110 SE 612; Keller v. Caldwell Furn. Co., 199 NC 413, 154 SE 674 (but holding that an exception to the trial court's expression of opinion may be taken after verdict).

Texas. Walker v. State, 78 TexCr 237, 181 SW 191; Arensman v. State, 79 TexCr 546, 187 SW 471.

Virginia. Newport News & O. P. Ry. & Elec. Co. v. Bradford, 99 Va 117, 37 SE 807.

[38] **New York.** Polykranas v. Krausz, 73 AppDiv 583, 77 NYS 46; Hunt v. Becker, 173 AppDiv 9, 160 NYS 45; Utica Nat. Bank & Trust Co. v. Nickel, 128 Misc 614, 219 NYS 556.

North Carolina. State v. Graham, 194 NC 459, 140 SE 26.

Oklahoma. First Nat. Bank v. Gum, 146 Okl 53, 293 P 188 (but not after the verdict has been returned); Patterson v. State, 4 Okl Cr 542, 113 P 216.

Washington. State v. Neis, 68 Wash 599, 123 P 1022.

[39] **Florida.** Clark v. State, 59 Fla 9, 15, 52 S 518.

Louisiana. State v. Wright, 104 La 44, 28 S 909.

days after verdict, or within such additional time as the trial court may allow.[40] The exceptions may be embodied in the motion for a new trial filed within the five days. But an extension of time to file a motion for a new trial does not extend the time for filing the exceptions to the charge.[41]

It is also the general rule in criminal cases that objections and exceptions must be made before the jury retires.[42] Where the jury retired for deliberation, and then returned into open court and were given additional instructions, an exception to the charges made after the jury had retired the second time was held to have been too late.[43]

As a general rule the giving of oral instead of written instructions is waived by failure to object and take an exception at the time.[44]

Massachusetts. Nagle v. Laxton, 191 Mass 402, 77 NE 719.

Minnesota. Turrittin v. Chicago, St. P., M. & O. Ry. Co., 95 Minn 408, 104 NW 225.

Missouri. State v. Dewitt, 152 Mo 76, 53 SW 429.

Nebraska. Bradstreet v. Grand Island Banking Co., 89 Neb 590, 131 NW 956.

Washington. State v. Peeples, 71 Wash 451, 129 P 108.

[40] Lein v. John Morrell & Co., 207 Ia 1271, 224 NW 576; Pomerantz v. Pennsylvania-Dixie Cement Corp., 212 Ia 1007, 237 NW 443.

[41] Henry v. Henry, 190 Ia 1257, 179 NW 856; Crow v. Casady, 191 Ia 1357, 182 NW 884; State v. Smith, 192 Ia 218, 180 NW 4; Shaw v. Des Moines City Ry. Co., 192 Ia 488, 184 NW 1034; Blakesley v. Standard Oil Co., 193 Ia 315, 187 NW 28.

[42] **Florida.** Morrison v. State, 42 Fla 149, 28 S 97.

Louisiana. State v. Bush, 117 La 463, 41 S 793; State v. Mitchell, 127 La 270, 53 S 561.

New York. People v. Spohr, 206 NY 516, 100 NE 444.

North Carolina. State v. Foster, 172 NC 960, 90 SE 785; State v. Wiseman, 178 NC 784, 101 SE 629; State v. Westmoreland, 181 NC 590, 107 SE 438; State v. Brinkley, 183 NC 720, 110 SE 783.

Ohio. Jones v. State, 20 Oh 34; Doll v. State, 45 OhSt 445, 15 NE 293; State v. Schaeffer, 96 OhSt 215, 117 NE 220, LRA 1918B, 945, Ann Cas 1918E, 1137; Fabian v. State, 97 OhSt 184, 119 NE 410.

Oklahoma. Brewer v. State, 13 OklCr 514, 165 P 634; Russell v. State, 17 OklCr 164, 194 P 242.

Pennsylvania. Commonwealth v. Razmus, 210 Pa 609, 60 A 264; Commonwealth v. Wilston & Wilston, 73 PaSuper 161.

Rhode Island. But see State v. Pirlot, 20 RI 273, 38 A 656.

South Dakota. State v. Hofer, 39 SD 281, 164 NW 79.

Texas. Gould v. State, 66 TexCr 122, 146 SW 172; McPherson v. State, 79 TexCr 93, 182 SW 1114.

[43] United States v. Sprinkle, 57 F2d 968.

[44] **Arkansas.** Barnett Bros. v. Porter, 134 Ark 268, 203 SW 842.

South Carolina. So where the court, in charging orally, errs in stating the contentions of counsel, attention should be directed thereto at the time in order to preserve an exception. Hatchell v. Chandler, 62 SC 380, 40 SE 777.

Washington. Gerber v. Aetna Indem. Co., 61 Wash 184, 112 P 272 (filing with clerk after trial too late); Taylor v. Kidd, 72 Wash 18, 129 P 406.

The parties may not stipulate for extensions of time for filing exceptions not allowed by law.[45]

§ 172. Clearness of statement of grounds of objection or exception.

A clear and definite statement must be made of the grounds of the objection to the charge.

Clearness is an essential element of an objection or exception. This requires a clear and definite statement of the grounds of the objection or exception to the questioned instruction.[46]

Since clearness is essential, a mere statement by the court that "I understand counsel to except to my failure to charge all the requests not charged, and to all modifications of requests," raises no question for review.[47] Where an exception sets out neither the words nor the substance of the ruling objected to, it is too vague and indefinite.[48] So, an exception to a portion of a sentence in the court's charge, apart from its context, is not commendable and may be so improper as to justify the reviewing court in ignoring it.[49]

The exact statement made by the trial judge must be designated as that to which exception is taken, and merely a descriptive exception to part of an oral charge is not sufficient.[50] A defect in an instruction defining an accessory as one who aids

[45] State v. Brown, 39 SD 567, 165 NW 987.

[46] **Georgia.** Reeves v. H. C. Allgood & Co., 133 Ga 835, 67 SE 82.

Indiana. Hickman v. State, 203 Ind 93, 177 NE 837.

Iowa. State v. Derry, 202 Ia 352, 209 NW 514.

Missouri. De Ford v. Johnson, 152 MoApp 209, 133 SW 393.

Montana. Ross v. Saylor, 39 Mont 559, 104 P 864.

New Jersey. Paramount Upholstering Works v. David, 7 NJMisc 179, 144 A 628, affd. in 106 NJL 588, 148 A 920.

North Dakota. Russell v. Olson, 22 ND 410, 133 NW 1030, 37 LRA (N. S.) 1217, AnnCas 1914B, 1069.

Oregon. Smith v. Pacific Northwest Public Service Co., 146 Or 422, 29 P2d 819.

Texas. Woodell v. State, 103 Tex Cr 86, 279 SW 840 (where the objection was held to be too indefinite); Gideon v. State, 119 TexCr 612, 44 SW2d 687; Cadle v. State, 122 TexCr 595, 57 SW2d 147.

Washington. Casual remark that the ruling is erroneous is not a sufficient exception. Gerber v. Aetna Indem. Co., 61 Wash 184, 112 P 272.

[47] Henderson v. Bartlett, 32 App Div 435, 53 NYS 149.

[48] **Alabama.** As a general rule an exception should recite the instruction so as to give the court an opportunity to correct or modify it. Birmingham Ry. Light & Power Co. v. Cockrum, 179 Ala 372, 60 S 304.

Maine. Atkins v. Fields, 89 Me 281, 36 A 375, 56 AmSt 424.

Massachusetts. See Pendleton v. Boston Elev. Ry. Co., 266 Mass 214, 165 NE 36.

[49] Indiana Fruit Co. v. Sandlin, 125 Ga 222, 54 SE 65.

[50] Byrd v. State, 24 AlaApp 451, 136 S 431; Ferguson v. State, 24 AlaApp 491, 137 S 315, 223 Ala 521, 137 S 317.

"or" abets, instead of "and" abets, is not reached by an objection that the charge was inapplicable to the facts of the case.[51]

But the mere fact that a portion of a charge is quoted and excepted to will not make the exception too indefinite. If the error is clearly pointed out, it will be sufficient.[52]

§ 173. Particularity in statement of grounds of objection or exception.

General objections or exceptions will be disregarded by reviewing courts; the particular ground of objection to an instruction must be stated.

The particular ground of objection to an instruction must be pointed out, so that the trial court may have an opportunity to correct the error. General and too comprehensive objections prevent this and will be disregarded by a reviewing court.[53]

[51] State v. McClain, 76 Mont 351, 246 P 956.

[52] Norris v. Clinkscales, 59 SC 232, 37 SE 821.

[53] **Federal.** United States v. Hammond, 226 F 849; Bowater v. Worley, 57 F2d 970; Mergenthaler Linotype Co. v. Evans, 69 F2d 287; Strader v. United States, 72 F2d 589.

Alabama. Harris v. Wright, 225 Ala 627, 144 S 834.

It is insufficient merely to "except to that part of the charge defining wantonness." Conway v. Robinson, 216 Ala 495, 113 S 531.

Arkansas. St. Louis, I. M. & S. Ry. Co. v. Dunn, 94 Ark 407, 127 SW 464; Dierks Lbr. & Coal Co. v. Coffman, 96 Ark 505, 132 SW 654; Townsley v. Yentsch, 98 Ark 312, 135 SW 882; St. Louis, I. M. & S. Ry. Co. v. Prince, 101 Ark 315, 142 SW 499; Taylor v. Evans, 102 Ark 640, 145 SW 564; Emerson v. Stevens Grocer Co., 105 Ark 575, 151 SW 1003; Rittenhouse v. Bell, 106 Ark 315, 153 SW 1111; Bocquin v. Theurer, 133 Ark 448, 202 SW 845; New Coronado Coal Co. v. Jasper, 144 Ark 58, 222 SW 22; Cohn v. Chapman, 150 Ark 258, 234 SW 42.

Connecticut. State v. Tripps, 84 Conn 640, 81 A 247; Syms v. Harmon, 134 Conn 653, 60 A2d 166.

District of Columbia. Washington Ry. & Elec. Co. v. Washington Terminal Co., 44 AppDC 470.

Georgia. Flowery Branch Gin & Oil Co. v. Shore, 20 GaApp 361, 93 SE 70.

Illinois. Continental Inv. & Loan Soc. v. Schubnell, 63 IllApp 379.

Indiana. McCague v. New York Cent. & St. L. R. Co., 225 Ind 83, 71 NE2d 569, 73 NE2d 48.

Iowa. Hanna v. Central States Elec. Co., 210 Ia 864, 232 NW 421; State v. Miller, 217 Ia 1283, 252 NW 121.

Kansas. Merrick v. Missouri-Kansas-Texas R. Co., 141 Kan 591, 42 P2d 950.

Massachusetts. Roselli v. Riseman, 280 Mass 338, 182 NE 567; Hathaway v. Checker Taxi Co., 321 Mass 406, 73 NE2d 603.

Nebraska. Barton v. Shull, 70 Neb 324, 97 NW 292.

Nevada. State v. Clarke, 48 Nev 134, 228 P 582.

New Hampshire. Harris v. Smith, 71 NH 330, 52 A 854.

New York. Ebenreiter v. Dahlman, 19 Misc 9, 42 NYS 867.

North Carolina. Hampton v. Norfolk & W. R. Co., 120 NC 534, 27 SE 96, 35 LRA 808; State v. Herron, 175 NC 754, 94 SE 698; Harrison v. Norfolk-Southern R. Co., 184 NC 86, 113 SE 678.

Ohio. Eli v. State, 3 OLA 443.

But a general exception is sufficient where the charge omits to explain the issue, even though the

An exception merely describing the subject treated by the court in an oral charge is insufficient.[54]

The court's attention, among other things, must be called to such defects as vagueness,[55] any inaccuracies of statement,[56] assumption of facts,[57] inconsistencies,[58] erroneous definitions,[59] and argumentativeness.[60]

An exception is not sufficiently specific which merely states that the charge presents "improper measure of damages."[61] It

attorney who takes such exception does not call attention of the court to such omission, and does not ask a further explanation of the issues. Telinde v. Ohio Trac. Co., 109 OhSt 125, 141 NE 673.

Where the issue of contributory negligence is developed by the evidence, and the court fails to charge upon the burden of proof as to that issue, a general exception to a charge otherwise correct does not bring in review such failure to charge. Bradley v. Cleveland R. Co., 112 OhSt 35, 146 NE 805.

The failure of counsel to point out to the court omissions and errors in the charge works estoppel of error. Miller v. Hempy, 1 OLA 781.

Oklahoma. Duroderigo v. Culwell, 52 Okl 6, 152 P 605.

Oregon. Erb v. Shope, 140 Or 253, 12 P2d 308; Weinstein v. Wheeler, 141 Or 246, 15 P2d 383.

Pennsylvania. Sikorski v. Philadelphia & R. Ry. Co., 260 Pa 243, 103 A 618 (minute particularization not required); Sgier v. Philadelphia & R. Ry. Co., 260 Pa 343, 103 A 730.

Rhode Island. Ralph v. Taylor, 33 RI 503, 82 A 279.

South Carolina. Carter & Co. v. Kaufman, 67 SC 456, 45 SE 1017.

South Dakota. Werth v. Davidson, 59 SD 300, 239 NW 751.

Texas. Panhandle & S. F. Ry. Co. v. Wright-Herndon Co. (TexCiv App), 195 SW 216; Baker Co. v. Turpin (TexCivApp), 53 SW2d 154; McDonald v. Cartwright (TexCiv App), 72 SW2d 337.

Vermont. In re Chisholm's Will, 93 Vt 453, 10 A 393.

Virginia. Hickerson v. Burner, 186 Va 66, 41 SE2d 451.

Wisconsin. Lee v. Hammond, 114 Wis 550, 90 NW 1073.

[54] Ex parte Cowart, 201 Ala 55, 77 S 349.

[55] Little Cahaba Coal Co. v. Arnold, 206 Ala 598, 91 S 586; St. Louis, I. M. & S. Ry. Co. v. Walker, 93 Ark 457, 125 SW 135; Rogers v. Robertson, 142 Ark 210, 218 SW 206 (improper use of word); Texarkana & Ft. S. Ry. Co. v. Adcock, 149 Ark 110, 231 SW 866; Huckaby v. Holland, 150 Ark 85, 233 SW 913.

[56] **Arkansas.** Hamburg Bank v. George, 92 Ark 472, 123 SW 654; Murry v. State, 150 Ark 461, 234 SW 485.

Iowa. Willis v. Schertz, 188 Ia 712, 175 NW 321.

New Jersey. Thibodeau v. Hamley, 95 NJL 180, 112 A 320.

[57] St. Louis Southwestern Ry. Co. v. McLaughlin, 129 Ark 377, 196 SW 460.

[58] Pistorio v. Washington R. & E. Co., 46 AppDC 479; Dawson Paper Shell Pecan Co. v. Montezuma Fertilizer Co., 19 GaApp 42, 90 SE 984.

[59] Banks v. State, 133 Ark 169, 202 SW 43; Guerin v. State, 150 Ark 295, 234 SW 26. But see Trotter v. State, 148 Ark 466, 231 SW 177; Robinson v. State, 149 Ark 1, 231 SW 2.

[60] Goldstein v. Smiley, 168 Ill 438, 48 NE 203.

[61] Duane Jones Co. v. Burke, 306 NY 172, 117 NE2d 237; Chase Bag Co. v. Longoria (TexCivApp), 45 SW2d 242; Abilene & S. Ry. Co. v. Herman (TexCivApp), 47 SW2d 915.

is too general merely to except to an instruction on the ground that "it is an incorrect statement of the law under the facts";[62] or that it is "confusing and misleading."[63]

A general objection is not sufficient to call the attention of the court to the fact that words used in the instruction should be defined.[64] Where an exception is taken by arranging in divisions a number of extracts from the charge, without indicating any specific error, the appellate court will be justified in declining to consider it.[65]

Objection to form as distinguished from substance must be specifically made.[66]

An exception to an instruction as given does not raise the question of whether there was error in failing to give another or further instruction.[67] Errors claimed to have been committed by the trial court in refusing to instruct as requested must be specifically pointed out.[68] It is not enough to merely except to the court's refusal to give "requested instruction No. 15."[69]

The rule is the same in criminal cases. The exception must point out the particular point claimed to be erroneous.[70] It is

[62] Baltimore & O. S. W. Ry. Co. v. Spaulding, 21 IndApp 323, 52 NE 410; Nelson v. Owens, 166 Wash 647, 8 P2d 301; Lunz v. Neuman, 48 Wash2d 26, 290 P2d 697.

[63] King's Indiana Billiard Co. v. Winters, 123 IndApp 110, 106 NE2d 713; McCue v. McCue, 100 Conn 448, 123 A 914.

[64] Kirby v. Lower, 139 MoApp 677, 124 SW 34; Grow v. Utah Light & Ry. Co., 37 Utah 41, 106 P 514.

[65] Hampton v. Ray, 52 SC 74, 29 SE 537.

[66] Ft. Smith & W. Ry. Co. v. Messek, 96 Ark 243, 131 SW 686, 966; Fort Worth & D. C. Ry. Co. v. Amason (TexCivApp), 239 SW 359.

[67] Lang v. Clark, 85 Vt 222, 81 A 625.

[68] Duncan v. Rhomberg, 212 Ia 389, 236 NW 638.

[69] Nelson v. Owens, 166 Wash 647, 8 P2d 301.

[70] **Federal.** Gilson v. United States, 258 F 588.

The failure of the court to instruct the jury that certain record evidence was admitted as to one defendant only cannot be assigned as error where no objection thereto was made on behalf of the other defendants. Foster v. United States, 178 F 165; Dawson v. United States, 10 F2d 106; Strauss v. United States, 13 F2d 122; English v. United States, 30 F2d 518.

Alabama. McGee v. State, 178 Ala 4, 59 S 573; Beech v. State, 205 Ala 342, 87 S 573; Brown v. State, 17 AlaApp 30, 81 S 366; Bowling v. State, 18 AlaApp 231, 90 S 33; Mayhall v. State, 18 Ala App 290, 92 S 33; Hampton v. State, 18 AlaApp 402, 92 S 517.

A single objection to a part of a charge involving several propositions, some of which are correct, is properly overruled. Sanders v. State, 181 Ala 35, 61 S 336.

Arkansas. Jackson v. State, 94 Ark 169, 126 SW 843; Adkisson v. State, 142 Ark 15, 218 SW 165; Markham v. State, 149 Ark 507, 233 SW 676 (not enough to request instructions on subject); Coppersmith v. State, 149 Ark 597, 233 SW 777.

Florida. Davis v. State, 91 Fla 512, 107 S 632.

Georgia. Mitchell v. State, 18 GaApp 501, 89 SE 602.

Louisiana. State v. Scott, 163 La

not a sufficient exception merely to state that the defendant objects to the instructions because they do not adequately present an affirmative theory of defense,[71] or that the charge is "insufficient,"[72] or that "the court does not properly instruct the jury as to the law of self-defense."[73] An objection to a charge on insanity is not sufficiently specific which states that such charge "makes it more onerous on the defendant and does not correctly charge the law on insanity."[74]

In some states, a general exception is sufficient to reach an instruction invading the province of the jury,[75] or which is inherently erroneous.[76]

§ 174. General objections or exceptions to entire charge.

A general objection or exception to an entire charge will be disregarded if any of the instructions given are correct.

The rule as stated is supported by many cases.[77] It does not help if the objection to the instructions as a whole are also to each clause separately.[78]

25, 111 S 483; State v. Covington, 169 La 939, 126 S 431.

Massachusetts. Commonwealth v. Congdon, 265 Mass 166, 165 NE 467.

Nebraska. Goff v. State, 89 Neb 287, 131 NW 213.

New Jersey. State v. Whittick, 7 NJMisc 293, 145 A 229.

New Mexico. State v. Orfanakis, 22 NM 107, 159 P 674.

North Carolina. State v. Bowman, 152 NC 817, 67 SE 1058.

An exception to a charge must distinctly point out the particular part thereof claimed to be erroneous and exceptions will be disregarded where the accused by his exceptions covers some instructions that were erroneous and some that were not. State v. Bowman, 152 NC 817, 67 SE 1058.

Oklahoma. Roth v. State, 52 Okl Cr 15, 2 P2d 595.

Pennsylvania. Commonwealth v. Ford, 86 PaSuper 483.

Rhode Island. State v. Wagner (RI), 86 A 147.

South Carolina. State v. Crosby, 88 SC 98, 70 SE 440.

Texas. Walker v. State, 68 Tex Cr 346, 151 SW 822; McDonald v. State, 77 TexCr 612, 179 SW 880; James v. State, 86 TexCr 598, 219 SW 202; Morris v. State, 102 TexCr 578, 279 SW 273; Magana v. State, 115 TexCr 7, 26 SW2d 1072 (the statute requiring the exception to be definite); Wiggins v. State, 115 TexCr 434, 27 SW2d 236; Maloney v. State, 119 TexCr 273, 45 SW2d 216; Stanley v. State, 120 TexCr 450, 48 SW2d 279.

Utah. State v. Riley, 41 Utah 225, 126 P 294; State v. Warner, 79 Utah 500, 291 P 307.

Vermont. State v. Lucia, 104 Vt 53, 157 A 61.

[71] Mathis v. State, 121 TexCr 131, 50 SW2d 312.

[72] Jennings v. State, 122 TexCr 124, 54 SW2d 102.

[73] Malin v. State, 122 TexCr 650, 57 SW2d 167.

[74] McKenny v. State, 105 TexCr 353, 288 SW 465.

[75] Union Seed & Fertilizer Co. v. St. Louis, I. M. & S. Ry. Co., 121 Ark 585, 181 SW 898.

[76] Yaffee v. Ft. Smith Light & Trac. Co., 153 Ark 416, 240 SW 705; Missouri Valley Bridge & Iron Co. v. Malone, 153 Ark 454, 240 SW 719. See also Strunks v. Payne, 184 NC 582, 114 SE 840.

[77] **Federal.** Burns v. United States, 274 US 328, 71 LEd 1077,

47 SupCt 650; Palmer v. Hoffman, 318 US 109, 87 LEd 645, 63 SupCt 477, 144 ALR 719 (which involved a personal injury case brought in a federal court on the ground of diversity of citizenship); Globe Furn. Co. v. Gately, 51 AppDC 367, 279 F 1005; Donegan v. United States, 296 F 843; American Glycerin Co. v. Brown, 30 F2d 316.

Alabama. Postal Tel. Cable Co. v. Hulsey, 115 Ala 193, 22 S 854; Sheffield Co. v. Harris, 183 Ala 357, 61 S 88; Birmingham Waterworks Co. v. Justice, 204 Ala 547, 86 S 389; Belt Automobile Indem. Assn. v. Endsley Transfer & Supply Co., 211 Ala 84, 99 S 787; Sulser v. Sayre, 4 AlaApp 452, 58 S 758; Addington v. State, 16 AlaApp 10, 74 S 846; Shoemake v. State, 17 AlaApp 461, 86 S 151 (rule applies to oral instructions).

It is the rule in criminal cases that an exception to an entire charge will not avail if the charge contains a single correct proposition. Ragsdale v. State, 134 Ala 24, 32 S 674. But see Birmingham v. Latham, 230 Ala 601, 162 S 675.

Arkansas. Darden v. State, 73 Ark 315, 84 SW 507; Young v. Stevenson, 75 Ark 181, 86 SW 1000; L. J. Smith Constr. Co. v. Tate, 151 Ark 278, 237 SW 83; Aydelotte v. State, 170 Ark 1192, 281 SW 369.

Colorado. Adams Exp. Co. v. Aldridge, 20 ColoApp 74, 77 P 6.

Florida. Thomas v. State, 47 Fla 99, 36 S 161.

Georgia. Oats v. Jones, 136 Ga 704, 71 SE 1097; Gore v. State, 162 Ga 267, 134 SE 36; Guthrie v. Harper, 167 Ga 588, 146 SE 320.

Illinois. Louthan v. Chicago City Ry. Co., 198 IllApp 329.

Indiana. State v. Ray, 146 Ind 500, 45 NE 693; Habich v. University Park Bldg. Co., 177 Ind 193, 97 NE 539; Chicago & E. I. R. Co. v. Coon, 48 IndApp 675, 93 NE 561, 95 NE 596; Cathcart v. Brewer, 70 IndApp 304, 123 NE 358.

Kansas. Standard Life & Acc. Ins. Co. v. Davis, 59 Kan 521, 53 P 856 (18 distinct instructions, many of which were unobjectionable—general objection); Carter v. Carter, 6 KanApp 923, 50 P 948.

Massachusetts. Blanchard Lbr. Co. v. Maher, 250 Mass 159, 145 NE 62.

Michigan. Tupper v. Kilduff, 26 Mich 394.

Minnesota. Peterson v. Great Northern Ry. Co., 159 Minn 308, 199 NW 3.

Nebraska. Bennett v. McDonald, 52 Neb 278, 72 NW 268.

New Jersey. Thibodeau v. Hamley, 95 NJL 180, 112 A 320.

New Mexico. Hagin v. Collins, 15 NM 621, 110 P 840.

New York. Brozek v. Steinway Ry. Co., 161 NY 63, 55 NE 395.

North Carolina. State v. Hall, 132 NC 1094, 44 SE 553; Quelch v. Futch, 175 NC 694, 94 SE 713; Bradley v. Camp Mfg. Co., 177 NC 153, 98 SE 318; Buchanan v. Cranberry Furnace Co., 178 NC 643, 101 SE 518; Fox v. Texas Co., 180 NC 543, 105 SE 437.

Ohio. Shaffer v. Cincinnati, H. & D. Ry. Co., 14 OhCirCt 488, 8 Oh CirDec 66. See Industrial Comm. of Ohio v. Likens, 23 OhApp 167, 155 NE 414, for instance when general exception held sufficient.

Oklahoma. Glaser v. Glaser, 13 Okl 389, 74 P 944; Denson v. Fowler, 56 Okl 670, 155 P 1184; Farmers Union Coop. Gin Co. v. Squyres, 193 Okl 578, 145 P2d 949.

Oregon. Reimers v. Pierson, 58 Or 86, 113 P 436; Hahn v. Mackay, 63 Or 100, 126 P 12, 991; Hill v. Wood, 142 Or 143, 19 P2d 89.

Pennsylvania. Felo v. Kroger Groc. & Baking Co., 347 Pa 142, 31 A2d 552.

South Dakota. Reeves v. National Fire Ins. Co., 41 SD 341, 170 NW 575, 4 ALR 1293.

Texas. Stedman Fruit Co. v. Smith (TexCivApp), 45 SW2d 804.

Utah. Smith v. Columbus Buggy Co., 40 Utah 580, 123 P 580; Rampton v. Cole, 52 Utah 36, 172 P 477.

Vermont. Needham v. Boston &

But in some states a general objection or exception to the court's charge is sufficient to preserve error if the charge is fundamentally defective.[79] In Ohio, it will preserve any prejudicial error, except one of omission.[80]

The rule is the same where there is a general exception or objection to the refusal of a series of requested instructions and any of them are unsound.[81] In a case where three requests to charge were written on the same sheet of paper and numbered, but not torn apart, and the court refused them collectively, it was held that a general exception to such refusal would not lie if any one of the charges were correctly refused.[82]

§ 175. Waiver of objections and exceptions.

An objection or exception will be considered as waived if the party entitled to object fails to do so or by his conduct shows an intention to abandon the right.

To say that an aggrieved party waives his right to object or accept if he fails to do so is simply another way of stating that he has not preserved a ground for appeal.[83] But a party

M. R. Co., 82 Vt 518, 74 A 226; Usher v. Severance, 86 Vt 523, 86 A 741; Barnard v. Leonard, 91 Vt 369, 100 A 876; State v. Long, 95 Vt 485, 115 A 734; State v. Haskins (Vt), 139 A2d 827.

Washington. Rush v. Spokane Falls & N. Ry. Co., 23 Wash 501, 63 P 500.

West Virginia. Ocheltree v. McClung, 7 WVa 232.

Wisconsin. Hayes v. State, 112 Wis 304, 87 NW 1076; Elwell v. Bosshard, 151 Wis 46, 138 NW 46. But see Wisconsin Stat. § 270.39.

[78] Gardner v. United States, 144 CCA 629, 230 F 575; Savage v. Milum, 170 Ala 115, 54 S 180; Gattavara v. General Ins. Co., 166 Wash 691, 8 P2d 421.

[79] Steele v. France, 363 Pa 165, 69 A2d 368; Knight v. Allegheny County, 371 Pa 484, 92 A2d 225.

[80] New York Life Ins. Co. v. Hosbrook, 130 OhSt 101, 3 OhO 138, 196 NE 888; Karr v. Sixt, 146 OhSt 527, 33 OhO 14, 67 NE2d 331.

[81] **Federal.** Otis Elev. Co. v. Luck, 120 CCA 558, 202 F 452; Dunagan v. Appalachian Power Co., 33 F2d 876, 68 ALR 1393.

Alabama. Pearson v. Adams, 129 Ala 157, 29 S 977.

Indiana. Rastetter v. Reynolds, 160 Ind 133, 66 NE 612.

Massachusetts. Randall v. Peerless Motor Car Co., 212 Mass 352, 99 NE 221.

Nebraska. South Omaha v. Powell, 50 Neb 798, 70 NW 391.

New York. Barker v. Cunard S. S. Co., 157 NY 693, 51 NE 1089.

South Dakota. Avery Co. v. Peterson, 41 SD 442, 171 NW 204.

Wisconsin. Haueter v. Marty, 150 Wis 490, 137 NW 761. But see Wisconsin Stat. § 270.39.

[82] Pearson v. Adams, 129 Ala 157, 29 S 977.

[83] See § 170, *supra*.

Instructions not excepted to become the law of the case:

Federal. The court is not required to go through all the requests and weed out the good from the bad; the errors and omissions should be pointed out. Silkworth v. United States, 10 F2d 711.

Arkansas. Ward Furn. Mfg. Co. v. Pickle, 174 Ark 463, 295 SW 727 (omitting defense of assumed risk).

Kentucky. Dotson v. Commonwealth, 204 Ky 658, 265 SW 28.

may waive his right to except or object by conduct other than mere failure to object, that is, by conduct showing his intention to abandon the right.[84]

An instruction is regarded as accepted when there is no exception after modification.[85] Where a party fails to except to instructions given, he is precluded, upon review, from complaining of error on the part of the trial court in refusing requests conflicting therewith.[86]

New York. Schweinburg v. Altman, 145 AppDiv 377, 130 NYS 37; Grimm v. Wandell, 140 NYS 391.

South Dakota. Lallier v. Pacific Elev. Co., 25 SD 572, 127 NW 558; State v. Krogh, 47 SD 314, 198 NW 559.

[84] **Federal.** Barnes & Tucker Coal Co. v. Vozar, 141 CCA 579, 227 F 25; Standard Oil Co. v. Sutherland, 159 CCA 403, 247 F 309; Wood v. W. E. Sexton Co., 275 F 660.

Arkansas. Evins v. St. Louis & S. F. R. Co., 104 Ark 79, 147 SW 452.

Connecticut. O'Connor v. Zavaritis, 95 Conn 111, 110 A 878.

Iowa. Joyner v. Interurban Ry. Co., 172 Ia 727, 154 NW 936.

Massachusetts. Rand v. Farquhar, 226 Mass 91, 115 NE 286.

Minnesota. Nelson v. Chicago, M. & St. P. Ry. Co., 139 Minn 52, 165 NW 866.

Montana. Hawley v. Richardson, 60 Mont 118, 198 P 450.

New York. A party desiring fuller instruction on a particular issue after presenting request must except to the refusal of the court so to charge. Robinson v. Insurance Co. of North America, 198 NY 523, 91 NE 373.

North Carolina. State v. Lancaster, 202 NC 204, 162 SE 367.

Oklahoma. Watson v. Doss, 151 Okl 132, 3 P2d 159; Walkenhorst v. State, 38 OklCr 180, 259 P 663; Jarman v. State, 57 OklCr 226, 47 P2d 220.

Pennsylvania. Fern v. Pennsylvania R. Co., 250 Pa 487, 95 A 590.

South Carolina. State v. Rouse, 138 SC 98, 135 SE 641.

South Dakota. Where plaintiff requests that a charge be reduced to writing, but the court proceeds to charge orally, no objection to such procedure being made at the time, the plaintiff excepting at the conclusion of the charge, and where the charge is then transcribed in longhand by the reporter at the court's direction, without objection from plaintiff, and is then delivered to the jury, the plaintiff cannot complain of irregularities, for, if there were any, he will be held to have waived them. Kirby v. Berguin, 15 SD 444, 90 NW 856.

Texas. Taylor v. Lafevers (Tex CivApp), 198 SW 651; Nabors v. Colorado & S. Ry. Co. (TexCivApp), 210 SW 276; Colorado & S. Ry. Co. v. Rowe (TexCivApp), 224 SW 928; Chase Bag Co. v. Longoria (TexCiv App), 45 SW2d 242.

Vermont. H. M. Farnham & Sons v. Wark, 99 Vt 446, 134 A 603.

Washington. Collins v. Terminal Transfer Co., 98 Wash 597, 168 P 174; Pierce County ex rel. Bellingham v. Duffy, 104 Wash 426, 176 P 670.

West Virginia. State v. Huffman, 69 WVa 770, 73 SE 292 (criminal case).

Wyoming. Brown v. State, 37 Wyo 155, 259 P 810.

[85] **Arkansas.** Error is waived by asking a modification of an instruction which does not cover the error. Southern Anthracite Coal Co. v. Bowen, 93 Ark 140, 124 SW 1048.

Minnesota. Torkelson v. Minneapolis & St. L. R. Co., 117 Minn 73, 134 NW 307.

Mississippi. Williams v. State, 95 Miss 671, 49 S 513 (criminal case).

[86] Delmonica Hotel Co. v. Smith, 112 Ia 659, 84 NW 906.

If the defendant fails to object when instructions are given because they are not reduced to writing, he will not later be heard to complain, for his failure constitutes a waiver.[87] A party who fails to object on a certain ground will be held to have waived that objection though he files other objections.[88]

Where an instruction which is erroneous is given by consent of both parties, neither can be heard to complain of another instruction which is open to the same objection.[89] If defendant in a criminal case states when the charge is given to the jury that it is satisfactory, he cannot later object to the instructions.[90] Where a charge is on facts conceded by a party to be true, he cannot complain of the court's action in giving it.[91]

But the failure of the defendant to object to an erroneous instruction on the measure of damages has been held not to waive an exception to the reception of incompetent evidence as to such damages.[92] The failure to except to an instruction concerning issues raised by incompetent evidence is held not to eliminate valid exceptions to the admission of the incompetent evidence on appeal.[93] The failure to object to the general charge is held not to waive the right to request instructions and except to their refusal.[94]

Counsel's temporary absence when the court began his charge is not a waiver to object to fundamental errors.[95] A party does not waive his right for failing to object to court's charge taking away an issue of fact from jury, if counsel insisted throughout trial that the issue should be submitted to jury.[96]

[87] Bailey v. Commonwealth, 214 Ky 703, 283 SW 1041.

[88] Miller v. Bohanan, 181 Ia 1207, 165 NW 317.

[89] **Arkansas.** Chicago, R. I. & P. Ry. Co. v. Smith, 94 Ark 524, 127 SW 715.

Illinois. Boecker v. Naperville, 166 Ill 151, 48 NE 1061.

Maryland. See Weitzel v. List, 161 Md 28, 155 A 425.

Utah. See State v. Durfee, 77 Utah 1, 290 P 962.

[90] Shepard v. United States, 62 F2d 683.

[91] Bedenbaugh v. Southern Ry. Co., 69 SC 1, 48 SE 53.

[92] Smith v. Appleton, 155 AppDiv 520, 140 NYS 565.

[93] United Display Fixture Co. v. S. & W. Bauman, 183 NYS 4.

[94] Rabinowitz v. Smith Co. (Tex CivApp), 190 SW 197. But see Roberts v. Houston Motor Car Co. (TexCivApp), 188 SW 257.

[95] West Texas Transp. Co. v. Hash (TexCivApp), 43 SW2d 152.

[96] Freeman Use of Weinstock v. Miners Sav. Bank, 144 PaSuper 540, 19 A2d 514.

CHAPTER 9

PRACTICAL SUGGESTIONS

Section.
180. Instructing the jury.
181. Preparing and submitting special interrogatories.
182. Taking a special verdict.
183. The verdict and its incidents.
184. Demurring to evidence—Nonsuit—Directing a verdict.
185. Exceptions and bills of exceptions.

§ 180. Instructing the jury.

It is common to say that in both criminal and civil cases, all questions of law are decided by the court, and all questions of fact by the jury. Even where it is held that the jury are the exclusive judges of the law and the facts, the prevailing rule is that it is, nevertheless, the duty of the court to state the law to the jury. There is, obviously, an inconsistency here. If the jury are the exclusive judges of the law, as well as of the facts, it seems little else than an idle ceremony for the court to instruct them as to the law. The inconsistency is supposedly dissipated by ruling that the instructions are advisory merely and not obligatory. But this by no means removes the inconsistency. It is true, however, that instructions delivered by a judge of learning and probity will, in most cases, exert a great influence over the minds of jurors. So it is important to secure a favorable charge, even in states where the jury is the judge of the law as well as of the facts.

In many jurisdictions it is not true in practice that the jury are the exclusive judges of the facts in civil cases, although in theory it is everywhere asserted. A judge who undertakes to comment upon the bearing and weight of evidence cannot avoid some expression of opinion upon the facts. He does influence the jury, even though he may declare that they are the exclusive judges of the facts. The American courts, as a general rule, do not follow this practice, but charge exclusively upon questions of law, leaving the facts entirely to the jury. This is the only practice which can be pursued without overturning the theory that the jury are the exclusive judges of the facts. It is the practice which enables parties to get their exceptions to instructions fully and clearly in the record.

Where the practice of judges commenting on evidence prevails, it is not possible to reduce to writing all the instructions which a party desires the court to give the jury. The most that

can be done, unless the facts are few and simple, is to hand in written specific propositions of law which the party desires shall be stated to the jury as part of the charge of the court. Where the court instructs the jury only upon matters of law, you, as the advocate, in every case, should prepare and submit to the court written requested instructions. This is the safe rule, and is "honored in the observance," no matter how learned and careful the presiding judge may be. It is one thing to know the principles of the law, and another to recall and apply them to the particular case when occasion demands. This is your job as an advocate. You must bring into view the governing principles and array them so that they will fit the facts developed by the evidence. You, it is presumed, have studied the particular case and have ascertained the governing principles. If the presumption does not hold good, your duty has not been faithfully performed. If the presumption is valid, as it ought to be, then the case has been to you one of especial interest and study, arousing and quickening all your faculties, so that no point has been overlooked and no principle suffered to pass unnoticed. Like the specialist, who studies one thing, you are better prepared on the particular case than even the most learned judge who has given the case no special study. No judge has reason to take offense because written proposed instructions covering all points are submitted to him, for in submitting them, you do not impugn the judge's learning or ability, but, in theory at least, however it may be in reality, you simply refresh the memory or excite the attention of the judge. But here, as elsewhere, a plain duty must never be left undone for fear of giving offense. A judge never sees an affront in a courteous performance of duty. But you must not forget that instructing the jury on the law is the duty of the court and not yours.

Requests for instructions should be written, as far as possible, when there is time for deliberate thought, and not during the turmoil and excitement of the trial. They cannot be dashed off at white heat, like the words of an address to the court or jury, for each word should be carefully weighed before finding its place in an instruction. The best time to write a tentative draft of the instructions is while you are preparing for the trial. This will tend to clarify your own ideas, enable you to exercise greater care in your choice of words, and state the legal principles bearing on the case impartially, but with clearness, power, and vigor. At the same time, you will be able to compare the proposed instruction you have prepared with approved instructions and thus avoid error. Due to unforeseen developments during the course of the trial it may be necessary to revise certain of the proposed

instructions, but this can be done much more readily if you have previously prepared a carefully worded tentative draft. A good method of preparing a case for trial is to obtain a copy of approved instructions, given in a similar case already tried and, with these as *suggestions*, determine the legal propositions that will arise in your case.

You should limit your requests for instructions. Submitting to the court a large number of requested instructions tends to confuse the jury rather than to enlighten them. At the same time, it places an unreasonable and unnecessary burden on the court. It was never contemplated that the court should be required to give a vast number of instructions amounting to a lengthy address. A sincere attempt should be made to limit them to a few concise statements of the law applicable to the facts. The vice of requesting too many instructions is well illustrated by an opinion rendered in a court of last resort in which it was said, "The appellant requested the court to give eighty-nine instructions, of which the court gave forty-four and refused forty-five, besides giving twenty-six requested by the appellee. Many of the instructions refused were mere reiterations, in different language, of the rules of law declared in the ones which the court gave. Some of them were erroneous in declaring, in positive language, rules which should have been modified by some qualifying phrase, such as 'in the exercise of ordinary care.' Some of them were couched in the form of an argument that the rules of law declared should be applied to what were assumed to be the facts of this case, and it is possible that some of them declared correct rules of law not covered by the instructions given. But where the issues are no broader than were joined in this case, a request for eighty-nine instructions, covering fifty-six typewritten pages, is almost equivalent to an invitation to commit an error in choosing the ones to be given. And without deciding whether any of the refused instructions should have been given, in addition to the seventy given by the court, we must decline to extend this opinion by analyzing those given in the light of those requested."[1]

[1] Terre Haute, I. & E. Trac. Co. v. Phillips, 191 Ind 374, 132 NE 740.

In a case tried before a learned and experienced judge, defendant's counsel, at the conclusion of the evidence, handed the judge 35 closely typed pages of requested instructions and the judge with show of impatience refused to consider them because of their volume. He instructed the jury in a concise, logical, and complete charge and was sustained on appeal. The reviewing court said: "Appellant assigns 29 separate errors, some upon the court's refusal to give the thirty-three separate propositions of law requested by it. . . . We have examined them, and considered those which present material and pertinent questions on contested issues in the case. The charge given by

The judge, in most states, may alter and amend proposed instructions if he chooses to do so, but he is not under any obligation to undertake the task. If the instructions are not in terms correct, the court commits no error in refusing them. But you should not be influenced so much by the fear that your instructions may not successfully pass the scrutiny of the court as by a just pride in your work. On appeal a large per cent of the reversals are grounded on the trial court's error in instructing or in failing to instruct.

There is another reason why you should prepare instructions with care. A proposition of law, strongly, clearly, and tersely stated is remembered by the jury. A rambling, feeble, and diffuse statement neither arouses attention nor produces conviction. Words, well chosen and well arranged, are powerful in many places, and in few places are they of more force than in an instruction. Jurors are quick to seize upon strong statements, but slow to apprehend loose and prolix propositions.

In writing proposed instructions, you should assume the attitude of the court. What you put into your proposed instructions, you put there for the use of the court. Zealous and hot in argument you may be, but cold and impartial you must be in writing your requested instructions, or else no instruction you prepare will receive the judge's sanction. As has already been suggested, it is best to emulate great generals and carefully plan the campaign before it begins. A hastily drawn instruction may be so inaccurately worded as to find no favor with the judge. If it is accepted, it may be the cause of a new trial or of a reversal.

It certainly is not easy to prepare an instruction. Definition is always difficult, even in simple matters. In complex and tangled questions of law and fact, it is a task that often taxes the mental powers of strong men. Two great virtues in a series of instructions are, perspicuity of arrangement and clearness of definition. Logicians have, again and again, asserted the value of distribution and definition. Where propositions must be briefly stated, and with great accuracy, as in instructions to the jury, definition is of the highest importance. Each instruction asserting a proposition of law must, in a sense at least, define it. What adds to the difficulty of the work is that the

the court is a complete, plain, and direct statement of the rules of law applicable to the case, free from obscurity or argumentation, and it sufficiently advised the jury of every rule of law involved in the determination of the issues of fact submitted to them. This renders it unnecessary to specifically consider the other errors assigned upon rejected instructions submitted by appellant." Pumorlo v. Merrill, 125 Wis 102, 103 NW 464.

definition must be in the concrete and not in the abstract. This is so because it is not enough to state mere abstract rules of law, but the rules stated must be applied to the facts. And here it is obvious and of indisputable importance that you must not only know the rules of law that are applicable to your case, but you must be thoroughly conversant with the facts, not always or necessarily as you had developed them from witnesses in your office before the trial, but as they were developed by both sides during the trial. Without this thorough knowledge and grasp of the facts presented, you cannot intelligently apply the law, no matter how much law you know.

It is seldom safe to copy excerpts from a judicial opinion into instructions. Thoughts may generally be borrowed with safety, but not words. Judicial opinions are written for a purpose very different from that for which instructions are designed. Language not out of place in an opinion is very often out of place in an instruction. Principles are to be extracted from the decided cases, but not the words in which they are expressed. Words are but the clothing, and misfits commonly result from borrowing clothing. Cases, although members of one general class, are seldom so closely alike that what is said in one can be accurately said in all.

It is sometimes difficult to prepare instructions that will not invade the province of the jury by assuming facts or the like. But this danger may generally be avoided by stating them in a conditional form. For example, this is a brief instruction of a somewhat general nature that might be proper in an action for damages for personal injuries caused by the defendant's negligence: "If you believe from the evidence that the defendant was negligent as alleged in the complaint, that such negligence, if any, was the proximate cause of the injury complained of, and that the plaintiff was free from contributory negligence, your verdict should be for the plaintiff." Here invasion of the province of the jury is avoided by the use of the conditional form and the phrase "if any." If an instruction is mandatory, be careful to include in it every essential fact or matter.

Out of the foregoing observations emerge certain concrete principles of law and rules of practice that are recognized and applied by the courts:

1. As a general rule, whatever is said by the court to the jury upon the questions of law or of fact involved in the case may properly be considered as a part of the charge.

2. It is discretionary with the court, in the absence of any statutory regulation, to instruct the jury of its own motion. The instructions need not be reduced to writing, unless required

by statute, except so far as may be necessary to enable counsel to except.

3. Under the statutes of most of the states written instructions may be demanded as matter of right.

4. Where special instructions in writing are requested, the request should be made in time for the court to give the subject due consideration. The court has power to require that the instructions asked be presented before the final arguments to the jury are made or begun.

5. Although the trial court may be required by statute to charge or instruct the jury generally, if specific instructions are desired, they should be duly prepared and presented to the court with a request that they be given.

6. If instructions are required to be in writing, modifications of those asked and given must also be in writing.

7. Instructions should be pertinent to the issues and to the evidence.

8. If there is any evidence fairly tending to support a party's theory of the case, he is entitled to a hypothetical instruction based thereon.

9. Facts in controversy, on which the evidence is conflicting, must not be assumed.

10. The court should not express any opinion on the weight of evidence, nor on the credibility of particular witnesses.

11. Undue prominence should not be given to particular portions of the evidence.

12. It is not error to refuse an instruction unless it is proper in the very terms in which it is requested.

13. Where an instruction is ambiguous, and likely to mislead the jury, it may be refused.

14. An instruction may be refused where it is substantially covered by other instructions.

15. The instructions of the court should be construed together as an entirety. A mere sentence that might seem incorrect if taken by itself will not render the instructions erroneous when properly explained by the context, so that, as a whole, the law applicable to the case is correctly stated.

16. If the jury are unable to agree, they may sometimes be recalled for further instructions; but such instructions should not be given except in open court, and the presence of the parties or their counsel should be obtained if possible.

17. An exception to the instructions, or refusal to instruct, must be taken at the time, or, at latest, before the jury have rendered their verdict, unless a statute or rule of court otherwise provides.

18. The exception should be specific, for if the entire charge is excepted to and any portion thereof is correct, the exception will be unavailing.

§ 181. Preparing and submitting special interrogatories.

In many of the states, statutes provide that interrogatories may be submitted to the jury, requiring them to find specially upon questions of fact. The practice has prevailed in some common law jurisdictions, but, as a general rule, now prevails only in jurisdictions that have adopted a code of civil procedure. The leading purpose of the statutes is to get the controlling facts determined, so that the law may be applied to them by the court. This, however, is not the sole object the statutes were intended to accomplish.

Interrogatories calling upon the jury to find specially upon questions of fact are often useful and effective, but it is not prudent to address them to the jury in every case. Jurors do not view the practice with favor. It is best not to annoy them with a great number of questions, as is sometimes done, even if it were proper. It is in general better to submit a few clearly expressed interrogatories presenting controlling propositions of fact rather than a great number. It is not wise to frame proposed special interrogatories as to arouse a suspicion that they were designed to entrap jurors. This suspicion finds its way into the minds of jurors surprisingly often. If the interrogatories are direct and clear, appear fair on their face, and as though asked only for the purpose of eliciting the facts, the probability is strong that fair and full answers will be returned. But if suspicion is aroused that they were designed as a check or restraint, it is quite probable that the jury will lean strongly against the party submitting the interrogatories.

It is, in some instances, better to take a general verdict with answers to special interrogatories than to depend entirely upon a special verdict. When this course is pursued, it is essential if you have the burden, to be careful to ask no question that may imperil your case. If you have a hard case, or a case resting on technical questions, or a case where the strong is arrayed against the weak, you will do well, as a general rule, to take a special verdict. This is so for the reason that where a general verdict is returned, together with answers to interrogatories, the verdict will prevail, unless there is invincible repugnancy between it and the answers of the jury. It is, indeed, seldom that the answers overcome the general verdict. If you hope to prevail on the answers to special interrogatories, you will, in most cases, be disappointed. In very few cases will the general verdict be

controlled by them; so that one who stands upon them has, at best, an insecure position. Intendments will be made in favor of the general verdict and against the special answers. This is so for the reason that the general verdict is presumed to go to the whole case and award justice upon the law and the evidence, while the answers presumptively cover only isolated questions of fact. Of course, there are cases where the answers are of controlling importance, and in such cases, if there is no reason to anticipate prejudicial answers from the jury, it is well enough to propound special interrogatories.

If it is desired to keep material facts prominently before the jury, it is well to propound special interrogatories. This is expedient in cases where there is reason to apprehend that the closing address may draw the minds of the jury from the controlling facts, for by this means their minds are directed into the proper channel. Where, however, you feel strong on the right and justice of the case and fear only cold legal propositions or technical rules, you should not ask a single interrogatory. The expedient course for your adversaries is the very opposite. There are many cases in which juries have used every effort to evade interrogatories, without returning answers positively false, thus clearly proving their readiness to surrender specific points to what they conceive to be the natural equity or real right of the case. In cases where there is reason to fear that jurors will adopt such a course, the best plan is to demand a special verdict.[2] In such cases the address of the counsel who asks the special verdict should not hint at the effect of the finding, but should be confined to a discussion of the evidence and its probative force. The policy of counsel asking the special verdict is to keep from the jury, as far as lies in his power, a knowledge of the ultimate effect of their decision upon the facts. The policy of opposing counsel, on the other hand, is to inform the jury as fully and as clearly as possible what the effect will be. A special verdict prevents the court from informing the jury what the ultimate result of their conclusions will be, since it dispenses with general instructions. Where, however, special interrogatories are propounded, it is the right, as well as the duty, of the court to give general instructions, so that, where it is resolved to let the case go to the jury without instructions, special interrogatories should not be asked, but a special verdict should be taken.

In cases where special interrogatories can be so framed that an answer must be favorable to the party, they should always be propounded. Thus, if a party sues a municipal corporation

[2] See § 182, *infra*.

for negligently leaving an unguarded excavation in the street, and the evidence shows that the plaintiff knew of the excavation, it would be politic for the defendant to ask two interrogatories: one eliciting the fact of the plaintiff's knowledge; one asking whether it was light or dark; for if the first be answered in favor of the defendant, then an answer to the second, whether it be that it was light or that it was dark, would probably be fatal to the plaintiff, since it would convict him of contributory negligence. It is indeed, true, as a general rule, that interrogatories should be asked by the defendant in cases where negligence is the issue, and where the plaintiff's condition is such as to enlist the sympathies of the jury or the situation of the defendant such as to excite their prejudices.

Interrogatories are often of great use to a master sued by a servant for injuries caused by defective machinery. In such cases the sympathies of the jurors are almost invariably with the servant. In a general verdict, they will affirm that the servant had no notice of the defect. But if required to answer interrogatories properly framed, they will be compelled to state such facts as conclusively show that the plaintiff had knowledge of the defect and yet remained in the master's service. In other cases of this general class, jurors, whose sympathies or prejudices induce them to find for the maimed or injured person, will so strongly find upon the question of notice as to entirely exonerate the master from the charge of negligence. But if nothing more than a general verdict were demanded, this result would not be revealed, so that to exhibit it, special interrogatories are required. In still other negligence cases, jurors will find so strongly upon the question of the defendant's negligence that by proper interrogatories, they will convict the plaintiff of contributory negligence; in their eagerness to benefit the plaintiff, they often so state the facts as to disclose negligence on the part of the defendant so great and apparent that it must have been known to the plaintiff.

Interrogatories to the jury, like questions to a witness, are sometimes so adroitly framed as to seem to require a single indivisible answer. In truth, more than one question is implied and the answer is divisible. Such interrogatories perplex a jury, and frequently mislead them. The safest course is to object to their form before they are submitted to the jury and to demand that they be so framed as to prevent misconception. If this demand is refused, an exception should be taken at once and a bill tendered. If this course is not deemed expedient, then ask the court—and ask in writing—to instruct the jury that one answer may be made to a distinct part of a divisible question, and another answer to another part.

It sometimes happens that interrogatories assume facts, and when this does happen, it is well to ask the court (make the request in writing) to instruct the jury that they are not bound to accept as true the assumptions, and that, to ascertain the truth, they must go to the evidence. It is the right of a party to have interrogatories answered from the evidence, and he may rightfully ask the court to so inform the jury.

Where the answers are indefinite or evasive, the proper course is to ask the court, before the verdict is formally received, to recommit the interrogatories to the jury, with instructions to answer them according to the evidence. A motion for a judgment on the answers, notwithstanding the verdict, will not present the question. That procedure is only effective where the answers are inconsistent with the general verdict.

In many instances, jurors will not be able to carry the specific facts of a complicated case in their minds. Special interrogatories will bring to mind these forgotten facts and secure a just statement of them. For this reason, it is often prudent for a party who desires that specific facts should be remembered to propound interrogatories, even though he has no reason to distrust the motives of the jury.

Another advantage sometimes gained by submitting special interrogatories is the effect of the answers to cure error in the instructions or other irregularities. Of course, they do not always have this effect, and it is comparatively seldom that errors are thus cured. But where they show that the alleged error could not have affected the jury or prejudiced the prevailing party in any way, they will generally cure the error. For instance, where an instruction is not strictly correct, but the answers to special interrogatories show that the facts are against the complaining party on the matter in question.

The following rules of practice have been deduced from the foregoing general considerations:

1. It is generally held in this country, contrary to the old English rule, that the trial court may, in the absence of a statutory provision to the contrary, require the jury to answer special questions or interrogatories in addition to their general verdict.

2. The form and manner of propounding the interrogatories are matters in the trial court's discretion unless otherwise provided by statute.

3. Under the statutes in force in a number of the states, the submission of special questions or interrogatories to the jury, and answers thereto, may be insisted upon by either party as matter of right. In other states, statutes leave the matter in the trial court's discretion.

4. Where the statute provides that the court, at the request of either party "may" submit special questions to the jury, the matter seems to be discretionary, and the refusal to do so has been held not to be erroneous; but where the statute provides that it "shall" be done, the court has no such discretion, but must comply with a proper request, made in due season.

5. Where the submission of special questions is discretionary the court may withdraw them at any time before they are answered; but where the matter is one of right they cannot be withdrawn over the objection of the party at whose request they have been properly submitted.

6. A party desiring the submission of special interrogatories to the jury must make his request and submit his questions to the court in due season. After argument has commenced may be too late.

7. The interrogatories should be material, and should call for answers as to particular facts and not for evidence or conclusions of law. If they violate this rule, the court may properly refuse to submit them to the jury.

8. There is no available error in refusing an interrogatory where another covering the same point is submitted and answered.

9. It is no objection that a question is leading; it is, in fact, better that it should be leading.

10. Where the right to have special questions answered is conditional upon the return of a general verdict by the jury, it is not error to refuse an unconditional request irrespective of whether a verdict is returned.

11. In all proper cases, the jury must answer the interrogatories submitted to them fully, fairly, and without evasion.

12. Objections to interrogatories should be made when they are submitted, or, at least, before the jury retire; otherwise they will be considered as waived.

13. Where answers are uncertain or not responsive to the questions, a motion to have the jury sent back and reanswer them should be made when the verdict is returned. If a question is not answered at all and the jury are discharged without objection, the right to have such question answered is waived.

14. A statute requiring the verdict to be signed by the foreman of the jury applies to the answers to interrogatories.

15. Where the special findings of facts by a jury in answer to interrogatories are, when construed together, irreconcilably in conflict with the general verdict, they will control it; but if they are inconsistent with one another, contradictory, and uncertain, the general verdict will control.

16. All reasonable presumptions will be indulged in favor of the general verdict and nothing will be presumed in favor of the special findings.

17. Where, as in case of several paragraphs of complaint and interrogatories confined to one of them, the special findings do not cover all the issues and are not inconsistent with the general verdict as to other issues, the general verdict may control, notwithstanding inconsistency as to the issues covered by the findings.

18. Where a party is entitled to judgment on the special findings in answer to interrogatories, he should move for judgment thereon, notwithstanding the general verdict; otherwise, no question concerning the right to such judgment can be made on appeal.

§ 182. Taking a special verdict.

It is often advisable to take a special verdict, when allowable, for a special verdict contains only the controlling facts, leaving to the court the ultimate decision of the cause. By this course a responsibility is directly fastened upon jurors and they are deprived of the shelter so often afforded by a general conclusion. When the law and the facts are blended, jurors, as a general rule, are not quite so scrupulous as when they are required to find only upon the facts. General verdicts more readily than special ones supply a refuge for jurors whose minds are influenced by passion or prejudice. But if the verdict is special, they cannot so easily evade the force of the evidence. If there is reason to fear that improper motives may influence a jury, and the evidence is strongly against their prejudices, it is, in general, wise to ask a special verdict.

In cases where the defense is one which a juror is likely to regard as technical, a special verdict should be demanded. For example, where the defense is founded upon the statute of frauds or the statute of limitations or where a discharge in bankruptcy is relied on, and in like cases, it is, as a general rule, expedient to take a special verdict. So, too, where one party is a rich man, or a corporation, and the case is one which is likely to arouse prejudice, a special verdict will often counteract the sinister influence of prejudice. It is, indeed, true, as a general rule, that wherever the case is one strongly appealing to the passions or prejudices of a jury, the better course is to take a special verdict. It is of course, implied that the evidence is favorable to the party who asks a special verdict; for if it is against him, then he had better take the chances of a general verdict.

It is much more hazardous for the party who has the risk of non-persuasion to ask a special verdict than for the adverse party, since it is a well-settled rule that if not all the material facts are found, the party who has the risk will suffer. It is for this reason that it is usually safer for the defendant than for the plaintiff to ask a special verdict. The absence of one material fact may preclude a recovery by the party upon whom the risk rests, while the statement of one controlling fact may secure success for the party not thus burdened. It is manifest, therefore, that the party who has the risk should be very careful in asking a special verdict and extremely vigilant in putting before the jury every material fact. Omission means disaster. On the other hand, the party to whom one material fact will bring success will be very unwise if he does not place that fact in a conspicuous position. It is to be kept in mind, however, that where there is reason to suspect that the jury will find for the adversary, it is best not to allow them to see too clearly the effect the fact will have. Where this is the case, it is better to somewhat conceal the leading fact by close association with facts of less importance. These observations do not apply in states having a statute to the effect that when any controverted essential fact is not brought to the attention of the court by request before the case is submitted to the jury, the issue is deemed submitted for decision to the court.

A special verdict is sometimes a means of preventing defeat where the judge is unfavorable. Although it is true that the jury find only the facts, leaving exclusively to the court the duty of declaring the law, yet the manner of instructing the jury often exhibits to them the opinion of the judge and induces them to surrender their own convictions to his opinion. This is true even where the judge instructs only upon propositions of law and where there are no errors in his instructions; for meaning and desire are often conveyed by manner and emphasis as well as by words. Where the facts are found by the jury, then the judge can do nothing more than apply the law to the facts so found, for in such a case there is no necessity for general instructions. All that the judge can properly do in such a case is to give appropriate instructions as to the frame of the verdict and as to general rules of evidence. In doing this there is little opportunity for intimating his own opinion to the jury.

A special verdict must inquire concerning the controlling propositions of fact and not the evidence which establishes them. It is, too, the inferential, or ultimate, and not the evidentiary facts that must be embodied in the verdict. It is not always easy to discriminate between facts and evidence nor between facts and conclusions, for the line of separation is very

often shadowy and indistinct. If there must be error, it is better to have too much in the verdict than too little; but care must be taken that there are no material inconsistencies, for the party who has the risk of non-persuasion may have his case ruined by inconsistencies and contradictions which neutralize the ultimate facts found in his favor. The nearer a special verdict can be brought to state fully, yet concisely, the material ultimate facts, the nearer it is brought to perfection. If it states mere conclusions and mere evidence without facts, the judgment must be adverse to him who has the risk, or else a venire de novo must be awarded. If it is incomplete and inconsistent on its face, the general rule is that it will be set aside upon the proper motion. The attorney who prepares or proposes a special verdict must bring to his work skill and care.

It is not prudent to intrust to anyone but the court the work of preparing a special verdict. It is a work that calls into exercise skill and care and should not be done, if it can be avoided, under pressure or excitement. The young advocate will be wise if he prepares at least a skeleton of a special verdict in advance of the trial, and the veteran who pursues a like course will not err. It is difficult to marshal and array facts, and the work is one that requires care and thought. In every instance the form of the verdict which it is proposed to submit to the jury ought to be in the hands of the court a reasonable length of time before the case is to be argued to the jury. It is the right of the court to have a reasonable time to inspect the draft and to prepare the form of verdict to be submitted.

A special verdict, when well drawn, is an excellent method of getting the facts into the record in cases where there is reason to believe that an appeal will be necessary. This method often dispenses with a bill of exceptions, and renders it unnecessary to encumber the record with the evidence. Where, however, the conclusions of the jury are not sustained by the evidence or are contrary to the evidence, it is necessary to incorporate the evidence in a bill of exceptions; but this course is only advisable where there is no material evidence supporting the conclusions; if there is a conflict of evidence, the appellate court will not disturb the findings of the jury.

The following are general rules invoked in respect to special verdicts:

1. A special verdict consists of findings of the facts in a case by the jury, leaving the law to be applied to the facts by the court.

2. In the absence of any statutory provision upon the subject, the jury cannot be required to return a special verdict.

3. Where the jury have, by statute, the right to render or a party has the right to demand a special verdict, refusal of the court, upon request of a party, to submit to the jury a form for the verdict is error.

4. It is proper and, indeed, customary for the counsel to prepare a form of special verdict for the jury, subject to the correction of the court.

5. Strictly speaking, a special verdict is never accompanied by a general verdict, but in some jurisdictions the jury may be required to answer interrogatories in connection with their general verdict and in case of an irreconcilable conflict between the answers to interrogatories and the general verdict the former will control.[3]

6. A special verdict should find facts and not evidence; nor should it state conclusions of law.

7. Where a special verdict, otherwise sufficient, contains findings of evidence, conclusions of law, or matters without the issues, such portions will be disregarded by the court in rendering judgment.

8. Nothing can be taken by the court by implication or intendment in favor of a special verdict, and it cannot be aided by the evidence or any other extrinsic matter, excepting that it may be supplemented by undisputed facts.

9. To justify a judgment in favor of the party on whom the burden of the issues rests, the special verdict must find all the facts controverted necessary for him to prove in order to recover.

10. A party deeming himself entitled to judgment on the special verdict should move for judgment thereon; and if his motion is overruled, he should except.

11. Where a defective special verdict is tendered by the jury, the court should either send the jury out to perfect their verdict or grant a venire de novo, upon motion therefor, in a proper case.

§ 183. The verdict and its incidents.

Receiving the verdict is not always a pleasant duty. The moment the twelve jurors file into the box with their verdict the anxiety of the advocate becomes intense. The interval between the time the jurymen take their seats and the announcement of the verdict is a trying one. Many an advocate's face has paled and his heart grown still in that time of dreadful suspense. Receiving the verdict is a duty that tries an advocate as few things try mortals. It is, nevertheless, a duty that must be performed.

[3] See § 181, *supra*.

It is always your duty to be in court when the verdict is delivered. It may sometimes be expedient to poll the jury, since discontented jurors sometimes avail themselves of the opportunity afforded by the poll to withdraw their assent to the verdict. In not a few instances a poll has brought an outspoken dissent. In other cases it may happen that there is some informality in the verdict that should be corrected before the discharge of the jury. In still other cases it may be important to require that answers to interrogatories be made more specific. Sometimes, too, it is essential to secure corrections in computations. It also frequently happens that there are mistakes apparent on the face of the verdict that should be corrected before the jury are discharged. The presence of counsel may be necessary to prevent error in receiving and recording the verdict or in discharging the jury. In short many things demand the personal attendance of counsel.

Promptness in directing attention to apparent errors and informalities in verdicts is essential. After the discharge of the jury, corrections cannot be made, but corrections may often be secured before the jury are discharged. Many objections are available only when made before the discharge of the jury. Motions for a new trial and for a venire de novo should be made without undue delay. The counsel of the successful party should, without unnecessary delay, move for judgment on the verdict. He should see that the judgment is duly recorded. If the case is not an ordinary one, he should prepare the judgment and all necessary entries.

Your duty is not done when the addresses to the jury are concluded. It is your duty to be present and hear the instructions and directions of the court to the jury. It is your duty to see to it that, when the addresses are concluded, no improper papers go to the jury, and that nothing is wrongfully done that may injure the cause of his client. It is not to be forgotten that from the time the cause goes into court until the last step is taken, it is in your charge and requires your undivided and concentrated attention.

The following specific rules of law obtain with respect to the verdict and its incidents:

1. The verdict of the jury should be returned in open court, and the parties and their counsel should, at least, be given an opportunity to be present; but it is the duty of counsel to be in court at the proper time.

2. Where necessary, court may be opened and the verdict received on Sunday.

3. The verdict should be definite and positive in form; but it will not be bad for mere informality where it is sufficient to show what the finding really is upon the issues presented.

4. Where there is nothing to prevent, equivocal language should be taken in the sense most favorable to the verdict, and mere surplusage will be disregarded.

5. The verdict must conform to the issues and be responsive thereto; but where it appears that all questions in the case are really settled, and no injury is done by the failure to find on all the issues, the verdict will be sufficient.

6. A sealed verdict may be returned by agreement of parties, but this does not dispense with the presence of the jury in open court when the verdict is read, unless expressly waived.

7. In most jurisdictions either party has an absolute right to have the jury polled, whether the verdict be oral or sealed, but the examination of each juror must be confined to a single question, namely: "Is this your verdict?"

8. Where a verdict is duly returned, but upon being polled the proper number of jurors do not agree, no valid judgment can be rendered thereon. In such case the jury should either be discharged, or sent back for further deliberation.

9. The jury may amend or change their verdict at any time before it has been recorded or they have been, either in form or in fact, discharged.

10. The jury before being discharged may be required by the court to make their verdict more definite and complete or otherwise amend it, when necessary.

11. Informalities in a verdict may be corrected by the court. Wherever the finding upon the point in issue can be determined, the court will usually mold the verdict into proper form and give it due and legal effect.

12. Objections to the form of a verdict should be made at the time it is returned and before it is recorded.

13. After the verdict has been recorded and the jury discharged, they cannot be reassembled to reconsider or amend their verdict.

14. A quotient verdict or a chance verdict is unauthorized and will be set aside upon a proper showing.

§ 184. Demurring to evidence—Nonsuit—Directing a verdict.

(a) DEMURRING TO EVIDENCE. There are many cases in which one, at least, of the parties feels much safer in the hands of the court than in the hands of the jury; but there are compara-

tively few cases, where issues of fact are joined, which can be taken from the jury. Ordinarily the case must be submitted to the jury. It is, perhaps, wise that the jury system should keep its place in our system of remedial justice. There are, however, cases which a court will try with more impartiality and with better judgment than a jury.

If a party desires to withdraw a case entirely from the jury and get all the evidence into the record, he may do so by demurring to the evidence. By this course a bill of exceptions is dispensed with, and the court applies the law to the facts which the evidence conduces to prove. The case may, by this means, be taken entirely from the jury, except insofar as the damages are concerned; for the damages must be conditionally assessed by the jury before whom the evidence has been delivered, or, in case the court decides adversely to the party who demurs, a new jury may be called to assess them.

A demurrer to the evidence cannot, ordinarily at least, be taken by a party who has the risk of non-persuasion. This must be so on principle, for a demurrer confesses the truth of all the evidence adduced, and consents that all reasonable inferences that a jury might have drawn from it may be drawn by the court; and as it must confess all the evidence and all reasonable inferences, it cannot be employed by one who has the burden of establishing what he alleges. He cannot call upon his adversary to confess that his evidence is trustworthy or that the facts essential to his success are established.

In strictness the demurrer is to the facts which the evidence tends to prove and not to the evidence itself. It reaches the object rather than the means by which it is attained. It follows, therefore, that the facts which the evidence directly or indirectly tends to prove must be taken as admitted. The issue of fact is conclusively ended, and an issue of law merges the whole controversy.

It is evident that a party who demurs to the evidence incurs a great risk, since he confesses all the facts which the evidence directly or indirectly tends to prove. This is so even though there be contradictory evidence; for, of necessity, only evidence tending to prove facts favorable to the party against whom the demurrer is directed can be regarded, all other evidence is withdrawn. This conclusion inevitably results when it is affirmed, as it must be, that it is the facts which the evidence tends to prove and not the evidence, merely, that the demurrer confesses.

Although there is much danger in demurring to the evidence, yet the procedure is sometimes expedient. The danger which the demurring party encounters makes it necessary to proceed with

great caution, and the attorney who employs a demurrer must be very sure that there is an absolute failure of evidence. The course is expedient when the evidence, even though it may prove some cause of action, does not tend to prove that upon which issue is joined.

Jurors who think that a right has been invaded and damages inflicted will not, if they can possibly avoid it, put away a plaintiff without compensation. They will not stop to consider what cause of action is proved; it is enough for them to think that a wrong has been done and an injury suffered. The slightest pretext will serve to carry them against the law, however clearly and strongly it may be stated in the instructions of the court. There is no presumption so violent, nor inference so strained, that they will not make in such a case, for, led by their own notions of justice, they will put aside the law with little hesitation. They will not consider that a party called to answer one cause of action ought not, in fairness or good conscience, be mulcted in damages upon another and different cause. But the court will consider that matter and will not allow a recovery unless the facts confessed establish the cause of action stated in the complaint or declaration. Nor will the court draw any forced or violent inferences, for it will allow weight only to such as are natural and reasonable.

Where there is no evidence tending to prove a material fact essential to a cause of action, and the prejudices and sympathies of the jury are with the plaintiff, it is safe to demur to the evidence. It is, indeed, expedient to demur in such cases, for by this means the evidence is brought into the record, and the court necessarily decides upon its probative force as well as upon the law. We do not mean, of course, that the court will weigh the evidence, for that it will not do. But it will apply to it the just and reasonable rules of inference, rejecting all violent and unnatural processes, and ascertain its just probative force. A jury will not be so conservative. In the very great majority of cases of that class, they will disregard all rules of reason and law and let their prejudices or their passions dictate their verdict. This many jurors will do without a suspicion that there is a tinge of wrong in their course, while others will perversely persist in doing what they cannot well avoid knowing is forbidden by law.

Trial judges are, it is well known, often averse to disturbing verdicts and sometimes suffer verdicts to stand that should be promptly set aside. In some instances this occurs for the reason that a relentless press of business prevents the judge from giving the facts a careful study, and he feels that he ought not, with his inadequate information, set aside the decision of men

he rightfully presumes were impartial triers. In other instances he feels that he ought not to substitute his own judgment for that of the twelve persons adjudged by law to be competent judges of the facts. Doubtless it would be better if verdicts were more often sternly and promptly set aside; but it is manifest that, in most cases, the duty is a very delicate one, and it is, therefore, no marvel that judges are reluctant to exercise the power vested in them. When the case comes to the appellate court there is still greater reluctance to disturb the finding of the jury on the facts. There are obvious reasons for this reluctance, only one of which we need mention, and that is: the verdict comes to the appellate court with the approval of the trial judge, given after the verdict has passed his examination. Where, therefore, there is just reason to believe that there is an absolute want of evidence, it is well to demur to the evidence, since such a course relieves the trial judge from the duty of impliedly rebuking the jury and puts the whole matter in his hands. He may decide without the suspicion of arrogating to himself knowledge or impartiality not possessed by the jury, for the right and the duty of deciding are directly put upon him in the first instance. We hazard the opinion that it would promote justice if the rules respecting demurrers to evidence were relaxed and a more liberal practice established. The ancient rigor has, indeed, been much abated, but it might be still further relaxed with benefit to courts and parties. The reason for the rigorous application of the rule seems to have been that the procedure was thought to be an encroachment upon the province of the jury as the judges of the facts, but it is evident that this reason has very little strength. The judges who displayed their zeal for the rights of the jury by so hedging in the office of a demurrer to the evidence cannot be justly allotted much credit for consistency, for in their charges to the jury they did not scruple to advise them how to decide questions of fact.

While a demurrer to the evidence is sometimes advantageous because it casts the responsibility upon the court and secures a decision putting an end to the controversy, yet the very fact that a ruling on it may conclusively settle the controversy constitutes an element of danger. If a court errs in favor of the demurring party and a reversal is adjudged on appeal, there is no opportunity for a new trial, for the facts remain confessed of record. There is no escape in such a case from an adverse judgment. This consideration will increase the caution of a prudent advocate and deter him from demurring to the evidence, unless he is very confident that his demurrer is well taken.

The party who resolves to demur to the evidence should be very careful in his cross-examination of the witnesses. It is useless in such a case to cross-examine for the purpose of exposing the falsity of a witness's testimony, as the facts his testimony tends to establish will be taken as true, although the falsity of the testimony is apparent on its face. Nor can good be accomplished by inducing him to state facts favorable to the cross-examiner, unless such facts, when elicited, will stand uncontradicted; for, if contradicted, they will be regarded as withdrawn. The probability of doing harm by a cross-examination is infinitely greater than that of doing good. If there is any cross-examination at all, it should be very brief and addressed to immaterial matters. An apparent cross-examination of the briefest character is the best. It should be conducted without any attempt to do more than conceal from the adverse party the intention to demur to the evidence, for the danger of harm is too great to be encountered while there is scarcely a bare possibility of doing any good.

(b) NONSUIT. There are other modes by which a case can be taken from the jury. One is by a motion for a nonsuit.

The practice of granting a compulsory nonsuit is not uniform and varies greatly in different jurisdictions. There are, indeed, some jurisdictions in which the practice is almost unknown. In most jurisdictions the practice of granting a nonsuit at the conclusion of plaintiff's evidence or of directing a verdict at the conclusion of all the evidence is approved in a proper case. The practice of moving for a nonsuit is preferable to that of demurring to the evidence, except in cases where it is desired by the defendant that the judgment shall be conclusive. Where it is desired to prevent subsequent actions and end all litigation, it is better to adopt some other course than that of moving for a compulsory nonsuit, for the general rule is that a judgment as upon a nonsuit does not prevent the plaintiff from suing again on the same cause of action.

A plaintiff may, at the proper time, voluntarily dismiss his case or take what is called a voluntary nonsuit. It is always prudent to adopt this course where the case seems hopeless and there is reason to believe that a second action can be made successful. In many of the states, however, the dismissal will not carry out of court a counterclaim or a set-off. Where there is a defense that is not disposed of by a dismissal, it is exceedingly hazardous to dismiss, for the whole question may be litigated upon the answer or plea. If it is, the judgment is conclusive, barring all further litigation upon the matters concluded by the judgment. It is, as a general rule, the right

of the plaintiff, where there is no counterclaim or set-off, to dismiss any part of his cause of action, except, of course, in cases where it is indivisible.

(c) DIRECTING A VERDICT. A simple, and sometimes very effective, method of taking the case from the jury, is by motion to direct the jury to find for the one party or for the other. Where the plaintiff wholly fails to make out a case, the defendant is entitled to an instruction directing the jury to return a verdict in his favor. If the evidence of the defendant entirely answers and overthrows that of the plaintiff, not leaving him a prima facie case, the former is entitled to an instruction requiring the jury to give him the verdict. On the other hand, if the defendant's evidence wholly fails to meet that of the plaintiff or to establish any affirmative defense, it is the plaintiff's right to have the jury so instructed. Neither party is, however, entitled to such an instruction where there is a conflict of evidence upon a material point. Where there is anything more than a scintilla of evidence creating an issue of fact, it is the rule in most jurisdictions that all questions of fact must be decided by the jury, for the court cannot, in cases where there is a real conflict of evidence, usurp the functions of the jury.

In general, the party who has the risk of non-persuasion cannot successfully ask an instruction that a verdict be returned in his favor, since he must establish, by a fair preponderance of the evidence, all of the facts essential to his cause of action or defense. A defendant, for this reason, usually, but not always by any means, can more safely ask such an instruction than can the plaintiff; for one fact may be enough to destroy the cause of action, while many facts may be necessary to establish it.

Where the court is asked to instruct the jury to return a verdict in favor of the party making the request and the request is denied, harm may result. The jury are apt to conclude that the opinion of the court is strongly against the moving party. It is, therefore, not prudent to make the request except in very clear cases. The request could be made out of the hearing of the jury. Where there is doubt, the safe course is to allow the case to go to the jury in the ordinary way.

The chief difference between the results of a demurrer to the evidence and a motion for a nonsuit or for a direction of a verdict is that in the former the trial ends and a judgment follows a decision on the demurrer; whereas a denial of a nonsuit or motion for a direction of verdict does not terminate the trial, and the case goes on to a submission to the jury and verdict.

General rules relative to demurring to the evidence may be briefly stated as follows:

1. When one party has given all the evidence he has in support of his cause, and rested, the other may, if he is confident that such evidence is insufficient to make a case against him, demur to it, and thus test its legal sufficiency.

2. The demurrer must be to the whole of the evidence adduced by the opposite party and not to any particular part.

3. The demurrer admits not only the existence of the evidence demurred to, but also the facts proved by it, including such facts as the jury might have reasonably inferred therefrom.

4. Upon a demurrer to the evidence, no evidence tending to contradict that demurred to can be considered.

5. The demurrer waives all objections to the admissibility of the evidence made by the party who demurs.

6. Final judgment should be entered upon a demurrer to the evidence, for plaintiff or defendant, according as the demurrer is overruled or sustained.

7. A party, by demurring to the evidence, does not waive his right to test the sufficiency of a pleading or take advantage of any defect therein on motion in arrest of judgment.

Concerning compulsory nonsuit the following rules may be adduced:

1. It has been held that a statute authorizing the granting of a compulsory nonsuit on the defendant's motion, in civil cases, where the plaintiff rests without having made a prima facie case, is constitutional, and the practice is followed in many of the states.

2. The rule generally adopted, although there is some conflict in the authorities, is that if the evidence given by the plaintiff would not authorize the jury to find a verdict for him or if the court would set it aside as contrary to the evidence, a nonsuit should be granted on defendant's motion.

3. Where the plaintiff makes a case sufficient to go to the jury or where the essential facts are controverted, a motion for nonsuit should be denied.

4. A motion for nonsuit cannot be made before the plaintiff has closed his case; but it seems that it may be made either immediately thereafter or after all the evidence is in.

5. The motion for nonsuit should specify the grounds on which it is asked and point out the particulars in which the plaintiff has failed to make his case.

6. Upon motion for nonsuit, as in case of a demurrer to the evidence, the opposite party is entitled to have his evidence

considered as absolutely true and to have the benefit of all legitimate inferences therefrom.

The governing principles concerning voluntary dismissal or nonsuit are as follows:

1. Where a party finds that his evidence is not strong enough to make a case and wishes to save the right to bring another action at some future time under more favorable auspices, he may, before it is too late, dismiss his action without prejudice or submit to a voluntary nonsuit, as it is often called.

2. At common law, and in several of our states, the plaintiff may voluntarily submit to a nonsuit at any time before the jury have rendered their verdict; but in other states it must be done, according to statute, before the jury retire, if not even sooner.

3. In some jurisdictions it is the practice for the court, in case of surprise, or for any other cause which would render further progress of the trial unjust and unfair to a party, to permit a juror to be withdrawn and thus postpone the trial.

The following is a summary of the principles governing directing a verdict:

1. Where there is no dispute as to the facts and no controversy as to the inferences that can be legitimately drawn from them, the question is one of law, and the jury may be directed to return a verdict for plaintiff or defendant, according as either is entitled to recover under the law applicable to the case.

2. It is error for the court to refuse to direct a verdict in a proper case.

3. A plaintiff, as well as a defendant, may take advantage of this practice in a proper case; but no motion by a plaintiff to direct a verdict in his favor will lie until after the defendant's case is closed.

4. The test for determining when a case should be taken from the jury is substantially the same as upon motion for nonsuit. Or, in other words, a verdict should be directed, on proper request, when there is no conflict in the evidence upon any controlling issue and but one reasonable inference can be drawn therefrom, so that under the law the party making the request is entitled to a verdict.

5. Where, however, more than one reasonable inference might be drawn by the jury from the evidence, so that different minds would reach different results, the case should not be taken from the jury.

6. A verdict returned by direction of the court terminates the litigation and prevents a new action for the same cause.

§ 185. Exceptions and bills of exceptions.

Success in the trial court is the object to be attained in every case, if possible, and it is not wise to prepare with a view wholly to success on appeal. But he who neglects to reserve questions for appeal is not much wiser than he who looks only to the appellate court for success. The primary object is always the verdict. There is, however, no reason why one may not stoutly struggle for the verdict, and yet at the same time take measures that may make an appeal availing in case of defeat.

There is no necessity for permitting measures taken with a view to an appeal to prejudice the jury, but the advocate may so conduct his case in this respect as to do serious injury to his client's cause in the minds of the jurors. If objections and exceptions are frequently made and are taken in such a manner as to make it appear that there is no hope except from an appeal, harm is very likely to result. The way to prevent this result is to make as little parade or show as possible in stating objections and reserving exceptions. In general, the true policy is to present the objections calmly. There are, however, some cases where it is better to make the objections persistently and forcibly. In ordinary cases, the counsel must keep his temper and not permit the jurors to perceive that he has been nettled or disturbed by an adverse ruling. But, while the manner should be subdued and deliberate, the objections should be stated, and the statement should go into the record. In no event, should there be a surrender of the right to state objections and to have exceptions noted. This right no court can justly deny. No counsel should permit a denial of this right.

In order that an adverse ruling, made during the progress of the trial, may be available on appeal, four things are ordinarily essential: First, there should be a timely objection, sufficient in form and substance; second, there should be an exception stated at the proper time and in the proper manner; third, there should be a proper motion calling for a review of the adverse ruling; and fourth, the record should show the objection, the exception, and the motion calling it in review. The objection, of course, precedes the ruling; the exception must be taken at the time the ruling is announced. The motion calling it in review must be the appropriate one and made at the proper time; and the final ruling must be put in writing in due form and incorporated in the record. These things are customarily made to appear by a bill of exceptions.

It is well to object and except to every material adverse ruling in all cases that are at all doubtful. Without a proper objection and exception there is no hope for relief on review

or appeal. General exceptions are all that need be stated when an ordinary motion, as for a new trial or the like, is overruled. All that need be done in such a case is to state in general terms that an exception is reserved and see that it is properly entered of record. Motions, of whatever character, should specifically state the grounds upon which they are based. This may not always be required as a rule of law, but it is the safest course to follow. It is always safe to make motions that relate to proceedings on the trial specific, and this is done by addressing them to the particular point or matter and assigning the reasons on which they are founded. In every case where there is doubt the best practice is to state objections specifically, no matter in what form the question arises.

It is necessary, as a general rule, where a ruling is made during the trial, that an exception should be taken at the time the ruling is made, and that another exception should be taken when the motion calling the ruling in review is acted on by the court. Thus, suppose the court admit in evidence, over the defendant's objection, a deed and that a motion for a new trial is subsequently made. In such a case two distinct exceptions are necessary, one at the time the ruling is made admitting the evidence, another at the time the motion for a new trial is denied. Presumptions are made in favor of the trial court, and one assailing its rulings must show a wrong ruling, due objection and exception, a proper motion calling the rulings in review, and an exception to the ruling on the motion.

In some states, the taking of formal exceptions to any ruling, finding, or order has by rule been dispensed with and an exception is deemed taken to every ruling adverse to an appellant.

It is not usual to reduce to writing objections made during the trial, nor to note at the time the exceptions in writing, but the objections must be stated, the exceptions reserved, and time obtained to put them in writing. It must ultimately appear, by the record, that the exception was taken at the time the ruling was made, but this may be made to appear in a bill of exceptions subsequently filed. It is sometimes prudent to take a bill of exceptions at the time the ruling was made, but, as a general rule, all that need be done at that time is to ask leave to reduce the exception to writing and pray time for filing the bill. We are speaking now, be it remembered, of rulings made while the trial is in progress, for where rulings are made on the pleadings, or on motions for a venire de novo, a new trial, or the like, the exception must be taken at the time, and then entered of record in the order-book of the court.

A bill of exceptions is not necessary to exhibit matters which are properly a part of the record of the court. It is not neces-

sary, for instance, where the ruling is upon a demurrer to a pleading. But wherever it is necessary to bring papers, motions, or the like, into the record, when they are not part of the pleadings, it is safest to take a bill of exceptions. It is essential, in most jurisdictions, that evidence and affidavits in support of a motion for a continuance, or for a new trial, should be incorporated in a bill of exceptions; otherwise, they will not, in ordinary cases, be considered on appeal. The safe rule is to bring all affidavits filed in support of motions into the record by a bill of exceptions.

The usual formal commencement of a bill of exceptions is this: "Be it remembered." This recital is followed by a statement of the proceedings of the court. The signature of the judge should be affixed at the close of the bill. In strictness, all evidence, documentary and oral, should be written at full length in the bill in all cases where it is necessary that all the evidence should be exhibited. But this rule has been relaxed in some of the states, and documents may be brought into the record by referring to them and writing the words "here insert." The statute must be strictly followed. It is not safe to attach papers to a bill as exhibits. They should be incorporated into the bill in such a manner as to precede the signature of the judge.

There are matters which must appear in the record proper, and these matters cannot be properly exhibited in the bill of exceptions. What is strictly a part of the record should, as a general rule, appear in the order-book or docket. Where time is given to file a bill of exceptions, it should be shown by an entry in the order-book or docket, and the time the bill is actually filed should be shown.

Except in states where the formal taking of exceptions has been dispensed with, the general rules governing the reservation of exceptions to instructions may be briefly stated as follows:

1. Where a ruling or an instruction of the trial court is objected to, or deemed erroneous, an exception should be taken at the time or within such time as the controlling statute of the particular state may permit.

2. An exception ought, in strictness, to be noted at the time it is taken; but the court may have it noted thereafter, if done before the verdict is received or within the time specially granted by the court by an order made when the exception is stated.

3. Notification by counsel that he reserves the right to except subsequently is not, in itself, a good exception.

4. Exceptions should be distinct and specific.

5. A mere objection, without an exception, to the ruling or action of the court is insufficient to save the question for appeal.

6. The right to a bill of exceptions was given by the statute of Westminster, 2, 13 Edw. 1, Ch. 31, which provides that "when one impleaded before any of the justices alleges an exception, praying they will allow it, and if they will not, if he that alleges the exception writes the same, and requires that the justices will put their seals, the justices shall do so, and if one will not, another shall." This has been adopted substantially, either by express enactment or common practice, in all the states of the union.

7. The object of a bill of exceptions is to present and get of record all exceptions and matters for review not otherwise appearing of record. It is in form a written statement of such exceptions and matters, signed and sealed by the judge in confirmation of its correctness.

8. Although exceptions should be taken and, as a rule, noted at the time of the ruling complained of, it is not practicable for the court to delay the trial until they can be reduced to writing in the shape of a formal bill. It is, therefore, the general practice for the court to grant time, or the statute provides time, for that purpose, so that bills of exception are ordinarily settled and signed after the trial.

9. The time to be given, unless governed by statutory provision, is within the sound discretion of the trial court, but it should be definite and reasonable.

10. A bill of exceptions cannot be settled and signed in vacation, after the expiration of the term and of the time allowed therefor. But in some states, by statute, a bill may be settled and signed by the trial judge in term time or in vacation.

11. Where it is not signed and filed, or presented to be signed, in time, it will be struck from the record, or, at least, will not be considered as a part thereof on appeal.

12. Where the bill shows on its face that it could not have been presented and signed within the time allowed, it will not be considered as a part of the record, although it contains the general statement that it was presented in time.

13. Where a judge refuses to sign or seal a bill of exceptions, he may be compelled to do so, in a proper case, by mandamus.

14. All matters for review, not required to be otherwise of record, should be embodied in a bill of exceptions.

15. All the facts on which an exception is based must be shown. In other words, enough must appear to show not only the ruling and exception, but also to enable the court to judge whether there is available error.

16. No right to a bill of exceptions in a criminal case existed at common law, but it is now given by statute in most of the states.

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1982

CUMULATIVE SUPPLEMENT

REID'S BRANSON

INSTRUCTIONS TO JURIES

IN CIVIL AND CRIMINAL CASES

CONTAINING SELECTED INSTRUCTIONS AND CITATIONS FROM VARIOUS JURISDICTIONS

By
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Third Edition

Volume 1

THE MICHIE COMPANY
Law Publishers
CHARLOTTESVILLE, VIRGINIA

Place this supplement in the pocket of the corresponding volume of the set and discard previous supplement

PREFACE

This preface is intended to alert readers of these volumes to some of the new features in the 1982 Cumulative Supplement.

Instead of providing verbatim examples of jury charges, this edition of *Reid's Branson* Cumulative Supplement takes an unique and useful approach. Reasons for correct jury instructions are enumerated and examples of incorrect charges and their defects are provided for comparison. Where appropriate, the applicable law of the jurisdiction is briefly stated.

I am most grateful to my Research Assistant, R. Scott McGrew, who devoted countless hours to the preparation of this edition, and whose ideas contributed much to the expanded scope of these volumes.

There are many new section headings and cross-indexing references that should further increase the usefulness of these volumes. In addition, citations to State Reporters are given when available.

James K. Weeks

Syracuse, New York
April 1982

THE LAW OF INSTRUCTIONS TO JURIES

RULES GOVERNING THE GIVING OR REFUSAL OF INSTRUCTIONS

CHAPTER 1

NATURE AND PURPOSE OF INSTRUCTIONS

Section
1. Definition.
2. Office of charge.
3. Law of the case.
4. Necessity of instructions — Duty of court to charge the jury.
5. Discretion of trial court in giving instructions.

§ 1. Definition.

Telling the jury that the court and taxpayers expect a verdict is not an instruction on the law of the case.[13.1]

[13.1] **Alabama.** Orr v. State, 40 AlaApp 45, 111 S2d 627 (1958), affd, 111 S2d 639.

§ 2. Office of charge.

The court's duty in framing its charge is to explain the law applicable to the case as a whole and applicable to all the contingent fact conclusions before the jury. The appropriate exercise of this function requires only that the trial judge determine that a requested instruction, is, in a broad sense, relevant to any issue properly before the jury. It is for the jury in fact finding to assess the applicability of a charge to the merits of the case. That specific charges may rest upon mutually exclusive or incompatible fact determination is irrelevant, so long as the incompatibility is adequately explained to the jury.[14.1]

The rationale for the insistence upon a properly instructed jury seems obvious, for the charge of the trial court, stating some of the elements of the offense involved without reference to others, would have a natural tendency to cause a jury to believe that those elements stated were exclusive.[14.2]

The purpose of instructions is to advise the jurors of the particular questions they are to decide, and to inform them as to the law and how to apply it to the facts as they find the facts from the evidence.[30.1]

The purpose of a charge is to inform the jury as to the law as applied to the facts in the case.[30.2]

[14.1] **Louisiana.** Reeder v. Allstate Ins. Co. (LaApp), 235 S2d 111 (1970).

[14.2] **Michigan.** People v. Price, 21 MichApp 694, 176 NW2d 426 (1970).

[30.1] **Indiana.** Kaplan v. Tilles, Inc., 131 IndApp 390, 171 NE2d 268 (1961).

[30.2] **Georgia.** Thacker v. State, 226 Ga. 170, 173 SE2d 186 (1970).

§ 3. Law of the case.

The jury cannot depart from the theory of law charged by the judge, even though the theory is erroneous.[42.1]

[42.1] **Alabama.** Southern Ry. Co. v. Terry, 268 Ala 510, 109 S2d 919 (1959).

§ 4. Necessity of instructions — Duty of court to charge the jury.

There is no duty on a trial judge to charge upon law which has no applicability to presented facts.[43.1]

The judge did not commit reversible error by instructing the jury immediately before it withdrew to deliberate. It is the general practice in this Commonwealth to instruct the jury at the conclusion of all the evidence and before argument. However, incidents may arise that render it necessary and proper in the interest of justice to give instructions during argument or after the jury has retired for the purpose of considering their verdict.[43.2]

The test of a charge is whether it is correct in law, adapted to the issues and evidence in the case, and sufficient to guide the jury in applying the law correctly to the facts. Although the degree to which reference to the evidence may be called for resides within the sound discretion of the court, the court nonetheless must make sure that the charge adequately instructs the jury on the elements of the offense charged.[44.1]

An instruction is proper which conveys to the jurors the correct principles of law applicable to the evidence submitted to them. A party to a lawsuit is entitled to instructions on its theory of the case when that theory is supported by the pleadings and evidence but, where no prejudice is shown, the refusal to give an instruction is not reversible error.[48 1]

In the case at bar, all the instructions sent to the jury room had been read first in open court. The same jury that convicted defendant on the underlying felony heard evidence on the habitual offender charge. The only problem presented here is that several of the instructions had been read the day before when the jury convicted the defendant on the underlying felony. Those instructions were not reread before being given to the jury when it began deliberations on the habitual offender charge. This Court has held that the habitual offender procedure does not constitute a separate crime or trial; rather, it provides for the imposition of a greater sentence for the crime charged.... Therefore, finding that all of the instructions had been read once in open court to the same jury, and since the habitual offender phase of the trial does not constitute a separate trial, we do not find any error in resubmitting instructions without re-reading them.[48 2]

Under the Ohio Revised Code [§ 2945.10(E)], the trial court is not required to give any instructions in a criminal case before argument. But proper requested instructions must be included in the general charge.[56.1]

The trial court, without request, must instruct on the general principles of law governing the case, but it need not instruct on specific points developed at the trial unless requested.[56.2]

In a murder trial, the judge should charge upon all degrees of homicide unless it is perfectly clear to the judge that there is no evidence to support a particular degree.[56.3]

[F]ailure to instruct jury with regard to defense of good motive required a new trial, notwithstanding defense counsel's failure to request such an instruction.[56.4]

Now there are two plaintiffs in this trial and each is entitled to separate consideration of his or her own case. I shall not repeat my instructions for each plaintiff and unless I tell you otherwise, all instructions apply to each plaintiff.[56.5]

So, Members of the Jury, it is for you to determine the guilt or innocence of each defendant. Each defendant has three cases pending against him. They are tried jointly merely as a matter of convenience and each is entitled to separate consideration of your verdict as to each charge against each defendant. . . .[56.6]

[43.1] **Pennsylvania.** Commonwealth v. Whitten, 216 PaSuper 730, 257 A2d 875 (1969).

[43.2] **Virginia.** Poole v. Commonwealth, 211 Va 262, 176 SE2d 917 (1970).

[44.1] **Connecticut.** State v. Sumner, 178 Conn 163, 422 A2d 299 (1980).

[48.1] **Illinois.** Goodrick v. Bassick Co., 58 IllApp3d 447, 16 IllDec 384, 374 NE2d 1262 (1978).

[48.2] **Indiana.** Haynes v. State, 431 NE2d 83 (Ind 1982).

[56.1] **Ohio.** State v. Barron, 170 OhSt 267, 164 NE2d 409 (1960); State v. Myers, 82 OLA 216, 164 NE2d 585 (1959).

[56.2] **California.** People v. Wade, 53 Cal2d 322, 1 CalRptr 683, 348 P2d 116 (1959).

[56.3] **Alabama.** Miller v. State, 40 AlaApp 533, 119 S2d 197 (1959), cert. den., 270 Ala 739, 119 S2d 201.

[56.4] **Minnesota.** State v. Hembd, — Minn —, 232 NW2d 872 (1975).

[56.5] **Michigan.** Carreras v. Honeggers & Co., 68 MichApp 716, 244 NW2d 10 (1976).

[56.6] **North Carolina.** State v. Abernathy, 295 NC 244, 244 SE2d 373 (1978).

§ 5. Discretion of trial court in giving instructions.

The trial court may exercise sound discretion as to the form and style in which instructions shall be given.[57.1]

The test of a charge is whether it is correct in law, adapted to the issues and evidence in the case, and sufficient to guide the jury in applying the law correctly to the facts. Although the degree to which reference to the evidence may be called for resides within the sound discretion of the court, the court nonetheless must make sure that the charge adequately instructs the jury on the elements of the offense charged.[57.2]

[57.1] **Colorado.** Montgomery Ward & Co. v. Kerns, 172 Colo 59, 470 P2d 34 (1970).

[57.2] **Connecticut.** State v. Sumner, 178 Conn 163, 422 A2d 299 (1980).

CHAPTER 2

PROVINCE OF THE COURT AND THE JURY

Section
10. Relative functions of court and jury.
11. Function of court to outline issues and state theories and contentions of parties.
11A. Speculation of juror as to what absent witness would testify.
12. Function of court to determine legal principles applicable to case.
13. Function of court to interpret papers and documents.
14. Function of court to determine competency and materiality of evidence.
15. Direction of verdict in civil cases.
16A. Effect of both parties moving for directed verdict.
18. Direction of verdict where there is scintilla of evidence.
19. Summing up evidence by court.
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22. Disparaging comments on merits of case.
24. Assumption of facts — Statement of issues and claims.
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37. Credibility of witnesses for jury.
37A. Witnesses — Criteria for credibility.
38. Credibility of witnesses — Corroborating or contradictory evidence.
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40. Credibility of witnesses — Interested witnesses.
40A. "Directly interested" witness — Pecuniary interest in judgment.
41. Credibility of witnesses in criminal cases.
42. Cautionary instructions.
42A. Urging hung jury to redeliberate: "The dynamite charge."
43. Cautioning individual jurors.
45. Coercing jury to reach agreement.
45A Proper inquiry by court of numerical division of jury.
46. Private communications of the judge with the jury during their deliberations.

§ 10. Relative functions of court and jury.

Your duty is to find the facts from the evidence and apply to those facts the law as given to you in these instructions.[3.1]

We take this opportunity to reiterate the principle that the better procedure in a case in which it is a close question whether the standard for granting a directed verdict is met is to allow the matter to go to the jury. If the judge then decides that the jury's verdict cannot stand, a motion for judgment notwithstanding the verdict may be allowed.... This procedure is more efficient than initially allowing a motion for a directed verdict. If the granting of the motion for judgment notwithstanding the verdict is found to be erroneous on appeal, the jury's verdict can be reinstated, while the erroneous granting of the motion for a directed verdict requires a new trial.[15.1]

The conclusion that Indiana can no longer be considered as a jurisdiction permitting the jury in criminal cases to determine the law is fortified by the language in a recent Indiana Supreme Court opinion:

"... the jury is required to accept the law as established."[27.1]

During the course of the case you may observe or feel that you are observing some reaction by the Court with respect to testimony or with respect to some statement made. You should put this entirely out of your mind. The Court has no opinion in this case as to what the facts are. That is your job. That is what you decide, and anything, any statement or any conduct or any inflection or any change in countenance or anything of that nature which you may have observed, or thought you observed during the course of the trial, you should put entirely out of your mind because it has nothing to do with your job in finding the facts in the case. In other words, you are finding the facts based on the testimony, the witnesses that you believe, the exhibits and so on, and not upon any statement or reaction or inflection on the part of the Court.

What I have said here about the realm of fact here, the Court cannot assist you because you are supreme in that realm.[27.2]

Absent a showing to the contrary, juries will be assumed to have followed the instructions of the trial justice.[27.3]

[3.1] **North Carolina.** State v. Haith, 7 NCApp 552, 172 SE2d 912 (1970).

[15.1] **Massachusetts.** Smith v. Ariens Co., 78 Mass 1857, 377 NE2d 954 (1978).

[27.1] **Indiana.** Wells v. State, 239 Ind 415, 158 NE2d 256 (1959).

[27.2] **Michigan.** Phillips v. Grand Trunk Western R. Co., 375 Mich 244, 134 NW2d 201 (1965).

[27.3] **Rhode Island.** Storin v. Masterson, 103 RI 246, 236 A2d 249 (1967).

§ 11. Function of court to outline issues and state theories and contentions of parties.

The defendant L. says and contends by his plea of not guilty that the witnesses for the State, their testimony deserves no weight or credit, should not be believed, that the State has failed to carry the burden cast upon it and failed to prove his guilt beyond a reasonable doubt of any charge; that you should give him the benefit of that doubt and find him not guilty.[29.1]

When such an instruction [diminished capacity] is requested by the defendant, the trial judge's task is quite different from that required for *sua sponte* instructions. By the defendant requesting the instruction, the court knows that the defendant is relying on that defense. Its inquiry then focuses on the sufficiency of such evidence. "It is well settled that if the defendant requests an instruction it must be given if there is any evidence on that issue deserving of any consideration whatsoever. . . ." Even where there is conflicting evidence on this issue, nevertheless the law requires that "[*h*]*owever incredible the testimony of a defendant may be he is entitled to an instruction based upon the hypothesis that it is entirely true.*"[30.1]

The following instruction is erroneous because it took from jury consideration one of the specifications of plaintiff:

You should first determine these disputed issues:

1. Did the defendant fail to exercise ordinary care when it did not notify its employees that the deceased and other workmen of the T. Construction Co. would be working near a crane track in the raw materials building and did not have its crane men in the raw materials building maintain a lookout for the deceased and his fellow workers?

2. Did the defendant fail to exercise ordinary care when it did not notify its employees that the deceased and other workmen of the T. Construction Co. would be working near a crane track in the raw materials building and did not require its crane men in the raw materials building to sound a warning horn or bell or to otherwise notify the deceased and his fellow workers of the approach of a crane?

If you determine that the plaintiff failed to prove by a preponderance of the evidence that the defendant did not use ordinary care in either of the foregoing particulars your verdict must be for the defendant and you can terminate your deliberations.[32.1]

Where there is a conflict in the evidence and inconsistent theories on the cause of the event are advanced, we believe instructions encompassing both theories should be given.[34.1]

. . . [T]he primary purpose of . . . instructions is to define with substantial particularity the factual issues, and clearly to instruct the jurors as to the principles of law which they are to apply in deciding the factual issues involved in the case before them.[38.1]

Thus, a defendant may be charged with committing a single crime in two or more ways and proof of one will uphold the indictment or information. But before the jury can be instructed on and allowed to consider the various ways of committing the crime alleged, there must be sufficient evidence to support the instructions. Moreover the instructions must clearly distinguish the alternative theories and require the necessity for a unanimous verdict on either of the alternatives. When such is the case, the prosecutor need not be forced to elect, for fear that half of the jury will find the defendant guilty on one theory and half on another theory.[39.1]

In prosecution of defendant for assault and battery upon a police officer, the testimony of defendant — that he grabbed officer's nightstick and struck officer to stop unjustified attack by police officer on defendant — entitled the defendant to a charge of self-defense, but the court committed prejudicial error when it failed to make it clear to the jurors that the defendant had no burden of proof on the issue of self-defense and that the defendant was entitled to an acquittal so long as there was any evidence to create reasonable doubt in their minds.[39.2]

[29.1] **North Carolina.** State v. Lee, 277 NC 205, 176 SE2d 765 (1970).

[30.1] **California.** People v. Stevenson, 79 CalApp3d 976, 145 CalRptr 301 (1978).

[32.1] **Ohio.** Baker v. Ohio Ferro-Alloys Corp., 23 OhApp2d 25, 261 NE2d 157 (1970).

[34.1] **Wisconsin.** Aetna Cas. & Sur. Co. v. Osborne McMillan Elevator Co., 26 Wis2d 292, 132 NW2d 510 (1965).

[38.1] **Federal.** United States v. Hill, 417 F2d 279 (1969).

[39.1] **Washington.** State v. Golladay, 78 Wash2d 121, 470 P2d 191 (1970).

[39.2] **Utah.** State v. Torres, 619 P2d 694 (Utah 1980).

§ 11A. Speculation of juror as to what absent witness would testify.

During the course of the case there has been something said by counsel with respect to witnesses who did not appear. As we said at the outset in this case, you decide the case on the basis of the testimony that you hear in the case keeping in mind all the other rules that apply. You should not decide the case on what you think witnesses might have testified to had they been here, or you should not speculate on why witnesses were not here, but you should decide the case based on the testimony that you did hear from the witnesses who were here, and not upon any speculation or surmise.[45.1]

[45.1] **Michigan.** Phillips v. Grand Trunk Western R. Co., 375 Mich 244, 134 NW2d 201 (1965).

§ 12. Function of court to determine legal principles applicable to case.

The following is erroneous as it leaves the jury to determine what law arises on the evidence in the case:

To entitle the wife to the relief the indignities offered by the husband must be such as may be expected seriously to annoy a woman of ordinary sense and temperament, and must be repeated or continued so that it may appear to have been done wilfully and intentionally or at least consciously by the husband to the annoyance of the wife.

Mrs. Turner has testified to certain indignities and two of her children have also. It is up to you to decide the credibility of that testimony and whether or not she has sustained that burden.[46.1]

If the evidence is in conflict as to the existence of a marriage, two procedures have been used to determine whether a marriage exists. The trial judge may hear evidence to determine whether a marriage exists, and his decision will not be disturbed on appeal if there is any evidence to support his finding.

The second procedure is for the trial court to submit to the jury with appropriate instructions the question of whether or not a marriage exists. . . . When conflicting evidence was introduced, the trial judge did not err in allowing the jury to make the factual determination as to whether a marriage existed between the appellant and Allen.[50.1]

"Illinois Pattern Jury Instructions" prepared by the Illinois Supreme Court on Jury Instructions should be used if applicable, unless the court finds that the instruction does not state the law accurately.[56.1]

In criminal cases, the court must, on its own motion, give instructions on the pertinent general principles of law.[56.2]

We consider now the refusal of the first requested instruction. Paragraph four of Instruction 8 to the jury required a finding that defendant, or those aided and abetted by him, in stealing the money were armed with a revolver with intent to kill or maim W. if he resisted the stealing. As stated, the request was that defendant must have known of his principal's intent to use a dangerous weapon and their intent to kill or maim W., if resisted.

Instruction 7 contained the provisions of section 688.1 Codes 1962, 1966 abrogating the distinction between an accessory before the fact and a principal and requiring that all persons concerned in committing an offense, whether they directly commit the act or aid and abet its commission, though not present, be indicted, tried and convicted as principals. The instruction went on to state that guilt of one who aids and abets commission of a crime must be determined upon the facts showing the part he had in it and not upon the degree of another's guilt.

One sufficient answer to the complaint over refusal of defendant's first request is found in the terms of section 711.2 he was charged with violating. Under this statute robbery with aggravation may be committed in any one of three ways: (1) by being "armed with a dangerous weapon, with intent, if resisted, to kill or maim the person robbed; or (2) if, being so armed, he wound or strike the person robbed; or (3) *if he has any confederate aiding or abetting him in such robbery, present and so armed* . . . ." (emphasis added.)[56.3]

Whether there is evidence to support it or not an instruction on lesser offenses must be given.[56.4]

The trial judge charged the jury that if the process server and the defendant were within speaking distance of each other and such action was taken as to convince a reasonable person that personal service was being attempted, service could not be avoided by physically refusing to accept the order; also that refusal of the defendant to accept the order, if he in fact refused to accept it, did not prevent the service from being completed. Such an instruction applies equally to the service of any paper in any case.[56.5]

[46.1] **North Carolina.** Turner v. Turner, 9 NCApp 336, 176 SE2d 24 (1970).
[50.1] **Georgia.** Sheffield v. State, 244 Ga 245, 244 SE2d 869 (1978).
[56.1] **Illinois.** Zeller v. Durham, 33 IllApp2d 273, 179 NE2d 34 (1962).
[56.2] **California.** People v. Jackson, 59 Cal2d 375, 29 CalRptr 505, 379 P2d 937 (1963), overruled in 388 P2d at 44, on other grounds.
[56.3] **Iowa.** State v. Williams, 261 Ia 1133, 155 NW2d 526 (1968).
[56.4] **Florida.** Griffin v. State (Fla.), 202 So2d 602 (1967).
[56.5] **Minnesota.** State v. Olsen, 278 Minn 421, 154 NW2d 825 (1967).

§ 13. Function of court to interpret papers and documents.

In the construction of a contract it must be construed as a whole and the law presumes that the parties understood the import of their contracts and that they had the intention which the contract terms manifest.[60.1]

[60.1] **Nebraska.** Transport Indem. Co. v. Seib, 178 Neb 253, 132 SW2d 871 (1965).

§ 14. Function of court to determine competency and materiality of evidence.

After testifying to his familiarity with "street talk" based on his past experience, a police officer explained to the jury the meaning of the appellant's offer to give him a "one-way" for a "twenty," stating that it was an offer to give him straight sex for twenty dollars. It was not error thereafter to fail to charge on the weight to be given expert testimony, since the witness offered no opinion on any matter which required special skill, training, or expertise to comprehend.[85.1]

It is the observation by the lay witness of irrational or abnormal behavior on the part of a subject that justifies allowing him to give an opinion on the question of sanity. Laymen who comprise the jury are also capable, upon facts related by such a witness, of forming their own opinion as to the subject's sanity, and the facts and circumstances related by the witness, in order to be sufficient to permit the giving of an opinion of insanity, must be such as are reasonably capable of supporting it. A lay witness, merely because he has known a person over a length of time, may not be allowed to testify that in his opinion such person is insane, where the witness had not observed any act or behavior on the part of the subject reasonably capable of supporting that conclusion.[85.2]

[85.1] **Georgia.** Hicks v. State, 145 GaApp 669, 244 SE2d 597 (1978).
[85.2] **Mississippi.** Alexander v. State, — Miss —, 538 S2d 379 (1978).

§ 15. Direction of verdict in civil cases.

The general rule for granting or denying a directed verdict in Kansas pursuant to Kansas Statutes Annotated, § 60-250, is as follows:

"In ruling on a motion for directed verdict pursuant to K.S.A. 60-250, the court is required to resolve all facts and inferences reasonably to be drawn from the evidence in favor of the party against whom the ruling is sought, and where the evidence is such that reasonable minds could reach different conclusions thereon, the motion must be denied and the matter submitted to the jury. The same basic rule governs appellate review of a motion for a directed verdict." [15.1]

A motion for a directed verdict should be granted if a verdict for the opposing party would be set aside as manifestly against the entire evidence viewed most favorably to opposing party.[34.1]

When considering a motion for a directed verdict, the trial judge does not weigh the evidence or pass upon the credibility of witnesses.[34.2]

Rhode Island is the latest state to the growing number of jurisdictions which hold that motions for a directed verdict by both parties do not automatically take the case from the jury.[34.3]

Some courts state the test for granting defendant's motion for a compulsory nonsuit in the alternative:

"the evidence is susceptible of but one construction by reasonable men, ... or the evidence is in such condition that if the jury were to return a verdict in favor of the plaintiff, it would become the duty of the court to set it aside." [34.4]

Only a scintilla of evidence requires reference of the issue to the jury for decision.[34.5]

A plaintiff whose proof rests on oral testimony is not entitled to a directed verdict, even if defendant offers no evidence, since the credibility and weight of plaintiff's evidence is for the jury.[34.6] This rule does not apply if the defendant in his pleadings or in open court admits plaintiff's claim, or by his evidence establishes plaintiff's claim.[34.7]

Defendant's motion for a directed verdict (or a general affirmative charge without hypothesis) should not be granted if there is slight evidence or a reasonable inference of recovery to be drawn therefrom.[34.8]

[15.1] **Kansas.** Guarantee Abstract & Title Co. v. Interstate Fire & Cas. Co., 228 Kan 532, 618 P2d 1195 (1980).

[34.1] **Minnesota.** Hall v. City of Anoka, 256 Minn 134, 97 NW2d 380 (1959).

In this test, the court does weigh the evidence. If the test is whether reasonable minds would agree, the court does not weigh the evidence, but simply views the evidence most favorable to the opposing party without regard to the unfavorable evidence.

[34.2] **Rhode Island.** Gomes v. J & P Realty Co., 89 RI 211, 152 A2d 205 (1959).

[34.3] **Rhode Island.** Spetelunas v. Dubuc, 89 RI 235, 152 A2d 104 (1959).

[34.4] **Montana.** Welch v. Nepstad, 135 Mont 65, 337 P2d 14 (1958). It is submitted that these tests are not identical.

[34.5] **Alabama.** St. Louis-San Francisco Railway Co. v. Colson Lumber Co., 269 Ala 409, 113 S2d 501 (1959).

[34.6] **Missouri.** Daly v. Schaefer (MoApp), 331 SW2d 150 (1960).

[34.7] **Missouri.** Rogers v. Thompson, 364 Mo 605, 265 SW2d 282 (1954).

[34.8] **Alabama.** Copeland v. United Securities Life Ins. Co., 275 Ala 328, 154 S2d 747 (1963).

§ 16A. Effect of both parties moving for directed verdict.

The trial court sits as a jury when both parties have requested directed verdicts at the same time. But this rule does not apply if one party makes his motion after the other party's motion has been denied.[44.1]

When both parties move for a directed verdict, without reservation, the trial judge becomes the trier of issues of fact. But the trial judge may still request the jury's decision on any or all issues of fact, if he so desires.[44.2]

Merely because both parties move for a directed verdict is not a waiver by both to a jury trial.[44.3]

[44.1] **Arkansas.** Aetna Ins. Co. v. Warren, 231 Ark 405, 329 SW2d 536 (1959).

Even if the judge then directs a verdict, it is, of course, not the same as sitting as the jury.

When passing on a motion for a directed verdict the judge does not weigh the evidence, but he does if sitting as the jury.

[44.2] **Montana.** In re Glick's Estate, 136 Mont 176, 346 P2d 987 (1959).

[44.3] **Vermont.** William Feinstein Bros., Inc. v. L. Z. Hotte Granite Co., 123 Vt 167, 184 A2d 540 (1962).

§ 18. Direction of verdict where there is scintilla of evidence.

The scintilla evidence rule is in effect in Alabama. The general affirmative charge should not be given against plaintiff if there is the slightest evidence tending to prove a right of recovery.[80.1]

[80.1] **Alabama.** Walker v. Town of Fruithurst, 272 Ala 141, 130 S2d 12 (1961).

§ 19. Summing up evidence by court.

It is not improper and not reversible error for a trial court judge to comment on the credibility of a witness when the charge to the jury, taken as a whole, reveals no prejudice to the parties, and the jury is told that it was within its sole province to resolve any issues of credibility. For example, it was not error for the court to state in its charge to the jury that the court felt that the victim "testified fairly and truthfully" because the court also stated that " [b]ut that's for you to determine.... [Y]ou may be impressed by it [but it's] for you to determine." Prejudice can not be based on reading isolated excerpts from the charges which must be taken as a whole.[81]

The following instruction has been held to fail to give equal stress to the contentions of the parties and thus constitutes error:

"The state further contends and says that you may make reasonable inferences from the evidence and the evidence in this case tends to show that the assistant chief of police made an investigation, that he went to the home of the registered owner and the evidence tends to show after going to the home of the registered owner, he went directly to the home of the defendant and it was not long after that the officer took out a warrant for the defendant before a magistrate, for defendant's arrest; that the only inference you can draw from such evidence, and the only reasonable inference is that the investigation revealed that the defendant was the operator." [92.1]

[81] **Pennsylvania.** Commonwealth v. Whiting, 420 A2d 662 (PaSuper 1980).

[92.1] **North Carolina.** State v. Billinger, 9 NCApp 573, 176 SE2d 901 (1970).

§ 20. Inferences of fact from the evidence.

The following instruction by the trial court judge:

"In connection with the timely filing within sixty days of the proof of loss, members of the jury, I instruct you that if you find by the greater weight of the evidence that the proof of loss was filed, then I further instruct you that the law of this state further provides that failure to timely file shall not preclude the plaintiff from asserting his claim unless there is a substantial prejudice done the defendant by such untimely filing. *I instruct you that under the law and evidence in this case there is no substantial injury or prejudice to the defendant by the late filing if such were done by the plaintiff,*"

was held *not* to be reversible error for the following reason:

"[Although the] court's charge technically is erroneous, since the statute requires a showing that failure to file timely was for good cause *as well* as a showing that the failure to so file did not substantially harm the party against whom liability is sought. However, the judge in essence relieved plaintiff of the burden of showing good cause and removed the issue of timeliness from the jury's consideration by stating as a matter of law that defendant was not substantially harmed. The court's charge amounted to a *peremptory instruction* on the issue of timeliness, instructing the jury that, if it found that proper proofs of loss were filed, plaintiff's claim was not barred due to lack of timely filing. Such an instruction was favorable to plaintiff and is not grounds for a new trial." [citations omitted].[94.1]

The following instruction, by in effect charging that an inference *in fact* was raised and by further charging that such an "inference" may be enough by itself to justify a conviction, directed a verdict against a defendant and was prejudicial error:

"INSTRUCTION NO. 41. You are instructed that the law in this state is that the burden on the State is to prove that the animal found in defendant's possession was the same animal stolen in the larceny. Once the State has done this, *the unexplained possession of recently stolen property raises an inference of guilt and may be enough by itself to justify conviction for larceny.* It is the duty of the jury to determine from the evidence whether or not possession of the animal has been sufficiently explained."

Note that the proper instruction would look like this:

"Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen." [95.1]

. . .[Y]ou are permitted to draw from the facts which you find have been proven such reasonable and logical inferences as you may find from said proven facts. Of course, an inference is a process of reasoning by which a fact or a proposition sought to be established is deducted as a logical consequence or a state of facts already proved or admitted by the evidence.[96.1]

Although the witness may not have been in a position to ascertain first-hand knowledge of an event, *e.g.*, odor of alcohol on breath of defendant, the trial court judge may nevertheless refer to inferences to be drawn from the facts testified to and express his opinion as to the effect of the evidence, provided that the court's statement(s) have (1) a reasonable basis in the evidence and (2) clearly leave to the jury the decision of the facts regardless of the judge's opinion.[96.2]

The charge to the jury concerning their ability to make reasonable inferences from the evidence does not affect the burden of proof on intent to commit burglary when there is enough evidence to place the issue of intent before the jury. Such an instruction does not make the jury presume from the fact of possession that a theft had occurred.[96.3]

The appellate court said the instruction, "[t]he court instructs the jury that there is a permissible inference of fact that a man intends that which he does, or which is the immediate and necessary consequence of his act" was not error.

Since the use of the word "presumption" was not given, the jury was told they had a choice rather than implied mandatory court rule.

Although discouraging instructions which attempt to define "reasonable doubt," the appellate court found the following instruction on the burden of proof not to be grounds for reversal.

"The Court instructs the jury that if, after considering all the evidence, you have a fixed conviction of the truth of the charge, you are satisfied beyond a reasonable doubt, then it is your duty to convict the Defendant. The doubt which will justify an acquittal must be actual and substantial nor a mere possible doubt, because everything relating to human affairs and depending on oral evidence is open to some possible or imaginary doubt. If you believe from the evidence, beyond a reasonable doubt, that the Defendant is guilty, though you also believe it possible he is not guilty you should convict the Defendant."

The court said trial courts must utilize standard instructions pronounced by the State Supreme Court in criminal cases.[96.4]

If you find that the defendant had exclusive possession of recently stolen property, and there was no reasonable explanation of his possession, you may infer that the defendant obtained possession of the property by burglary or by theft, or by burglary and theft.[11.1]

[94.1] **North Carolina.** Brandon v. Nationwide Mutual Fire Ins. Co., 271 SE2d 380 (NC 1980).

[95.1] **Idaho.** State v. Owens, 101 Idaho 632, 619 P2d 787 (1980).

[96.1] **Pennsylvania.** Commonwealth v. Biancone, — PaSuper —, 375 A2d 743 (1977).

[96.2] **Pennsylvania.** Commonwealth v. Benson, 421 A2d 383 (PaSuper 1980).

[96.3] **Rhode Island.** State v. DiMuccio, 431 A2d 1212 (RI 1981).

[96.4] **West Virginia.** State v. Greenlief, 285 SE2d 391 (WVaApp 1981).

[11.1] **Illinois.** People v. Poe, 48 Ill 2d 506, 272 NE2d 28 (1971).

§ 22. Disparaging comments on merits of case.

Before it can be said that comments made by the trial court judge in instructing the jury are of such prejudicial nature as to require a mistrial, the remarks must be such that they impair the impartiality of the trial. Otherwise, the remarks will not be judicial misconduct.[29.1]

[29.1] **Rhode Island.** State v. Rogers, 420 A2d 1363 (RI 1980).

§ 24. Assumption of facts — Statement of issues and claims.

A court may, without erroneously invading the province of the jury, assume as a fact a matter of common knowledge, or a fact which the court takes judicial notice of, in its instructions to the jury.[71.1]

When there was evidence that there had been a collision between a minibike, which had stopped at an intersection and had then made a right-hand turn, and a tractor trailer, which also had made a right-hand turn at the intersection and in so doing had "side-swiped" the plaintiff riding on the minibike, the following instruction was not error and did not invade the fact finding province of the jury:

"The court has determined, and now instructs you as a matter of law that the circumstances at the time and place of the incident complained of were such that the Defendant, LLOYD LEE JACKSON, had a duty to use reasonable care for ROBERT REARDEN'S safety." [72.1]

[71.1] **Iowa.** State v. Welton, 300 NW2d 157 (Ia 1980).

[72.1] **Florida.** Jackson v. Rearden, 392 S2d 956 (FlaDistApp 1981).

§ 25. Assumption of facts — Established, uncontroverted or admitted facts.

You are instructed that Section 21804 of the Vehicle Code of California . . . provided . . . as follows:

". . . .

"You are further instructed that the driveway from which the automobile driven by J. A. entered Ocean Park Boulevard was a private driveway within the meaning of the provision. . . ."[86.1]

It has been stipulated in this case that the defendant pleaded guilty in the Municipal Court of the City of Sioux City, to a charge of failure to yield the right-of-way. Such evidence may be considered by you as an admission that the defendant did in fact fail to yield the right-of-way. The plea is in no way conclusive. It is an admission against interest and may be explained.[94.1]

[86.1] **California.** Eager v. McDonnell Douglas Corp., 32 CalApp3d 116, 107 CalRptr 819 (1973).

[94.1] **Iowa.** Nassif v. Pipkin (Ia), 178 NW2d 334 (1970).

§ 27. Weight of contradictory evidence for jury in civil cases.

No error was found in the following:

An opinion is what someone thinks about something and the thought may be precisely accurate or totally inaccurate and yet represent the absolute (sic) honest conviction of the person who expressed it. Because of this, opinion evidence is generally considered of inferior or low grade and not entitled to much weight against positive testimony of actual facts.[34.1]

The evidence in this case presented a typical question for decision by a jury. When such conflicts are settled by a jury's verdict, the court should not set aside the verdict for the reason that it might, sitting as a juror, have reached a different conclusion. This ought only to be done where the evidence is clearly insufficient to support a different conclusion.[35.1]

[34.1] **Pennsylvania.** Kuchinic v. McCrory, 439 Pa 314, 266 A2d 723 (1970).

[35.1] **Virginia.** Haynes v. Bekins Van & Storage Co., 211 Va 231, 176 SE2d 342 (1970).

§ 28. Questions of fact and weight of evidence in criminal cases.

It is solely and exclusively for the jury to weigh the evidence and find and determine the facts when they are disputed and this you must do from the evidence alone, or lack of evidence, and having done so apply the law as stated in these instructions.[61.1]

It is shown by the testimony, and undisputed in the record, that at the time the defendant was being held at the police station in Mt. Pleasant on the charge for which he is now on trial, he was requested by Patrolman W. and also by Dr. C. to have blood or urine tests to determine alcoholic content, which requests were refused.

You are instructed that in this case defendant's refusal to submit to any test is a circumstance to be considered by the jury, together with all other facts and circumstances shown by the evidence, in determining the question as to whether the defendant was or was not intoxicated at the time involved in this case.[61.2]

If you are convinced by the evidence in this case beyond a reasonable doubt that the act alleged as the crime with which the defendant is here charged was in fact committed, *and you further find that immediately or soon thereafter the defendant fled from the place where such act is alleged to have been committed, then the flight of the defendant is a circumstance to be considered by the jury, together with the other evidence in the case. It is not sufficient in itself to establish the guilt of the defendant,* but its weight as evidence is a matter for the jury to determine in connection with all the other facts in the case.[61.3]

Evidence has been introduced in this case that at some other time certain witnesses may have said or done something, or may have failed to say or do something, which is consistent with, or inconsistent with, their testimony at the trial. This evidence is to be considered by you only for the purpose of determining the credibility of those witnesses and the weight to be given their testimony and is not to be considered by you for any other purpose.

. . . .

You are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each. In determining what credit is to be given any witness, you may take into account his ability and opportunity to observe, his memory, his manner and appearance while testifying, any interest, bias or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence, and any other factors that bear on believability and weight.[61.4]

You are the sole judges of the credibility of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case.[61.5]

The law makes it your duty to reconcile conflicting evidence, if there be such evidence in this case, so as to make all the witnesses speak the truth and perjury be imputed to none of them. But if there be any evidence in this case in such irreconcilable conflict that this cannot be done, it would be your duty to believe that testimony which is most reasonable and most creditable to you under all the circumstances and the evidence in the case.[63.1]

If the evidence is in conflict as to the existence of a marriage, two procedures have been used to determine whether a marriage exists. The trial judge may hear evidence to determine whether a marriage exists, and his decision will not be disturbed on appeal if there is any evidence to support his finding.

The second procedure is for the trial court to submit to the jury with appropriate instructions the question of whether or not a marriage exists. . . . When conflicting evidence was introduced, the trial judge did not err in allowing the jury to make the factual determination as to whether a marriage existed between the appellant and Allen.[63.2]

The following instruction, by in effect charging that an inference *in fact* was raised and by further charging that such an "inference" may be enough by itself to justify a conviction, directed a verdict against a defendant and was prejudicial error:

"INSTRUCTION NO. 41. You are instructed that the law in this state is that the burden on the State is to prove that the animal found in defendant's possession was the same animal stolen in the larceny. Once the State has done this, *the unexplained possession of recently stolen property raises an inference of guilt and may be enough by itself to justify conviction for larceny.* It is the duty of the jury to determine from the evidence whether or not possession of the animal has been sufficiently explained."

Note that the proper instruction would look like this:

"Possession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which you may reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen."[68 1]

The record shows that the jury was charged to the effect that they could believe any explanation consistent with the innocence of the defendants regarding their possession of stolen property, if possession of stolen property was established. This instruction directed the jury to have regard to the defendants' contention as to how they came to be in possession of the property. There was no request for any particular instruction in this regard. The trial court did not err in not charging further.[70.1]

The Court instructs the jury that in this case what is known in law as an "alibi," that is, that the defendant was at another place at the time the crime charged in the information was committed, is relied upon by the defendant; and the court instructs the jury that such a defense is as proper and legitimate, *if proved,* as any other, and all the evidence bearing upon that point should be carefully considered by the jury, and if, in view of all the evidence, the jury have any reasonable doubt as to whether the defendant was in some other place when the crime was committed, they should give the defendant the benefit of the doubt and find him not guilty.[71.1]

Thus, in order to resolve whether a killing was justified under self-defense principles, or whether it was not justified amounting to voluntary manslaughter, the question becomes whether defendant's belief that he had to use deadly force was reasonable under the circumstances. This is a question to be determined by the trier of fact and his finding will not be set aside on review unless the evidence is so unsatisfactory as to leave a reasonable doubt of defendant's guilt.[72.1]

The court instructs the jury that the testimony of parties aiding, assisting, encouraging, and abetting the crime is admissible; yet their evidence when not corroborated by the testimony of others not implicated in the crime, as to matters material to the issue, should be received with great caution by the jury,

and they should be fully satisfied of its truth before they should convict the defendant on such testimony.[85.1]

An accomplice testifying for the prosecution is generally regarded as an interested witness, and a defendant, upon timely request, is entitled to an instruction that the testimony of the accomplice should be carefully scrutinized. Since an instruction to carefully scrutinize an accomplice's testimony is a subordinate feature of the trial, the trial judge is not required to so charge in the absence of a timely request for the instruction. But when a defendant makes a request in writing and before argument to the jury for an instruction on accomplice testimony, the court should give such instruction. And once the judge undertakes to instruct the jury on such subordinate issue it must do so accurately and completely. The court, however, is not required to give the requested instruction in the exact language of the request, but is only required to give such instruction in substance.

In present case, concerning Clark, the trial judge instructed the jury:

"Now, as to the witness Clark, I instruct you that he is in Law what is known as an accomplice. And our Court has said that a person may be convicted on the unsupported testimony of an accomplice, if that testimony is believed by the Jury. However, in considering the weight and credibility you will give to the testimony of Clark, I instruct you that you should carefully examine his testimony for the purpose of determining what weight and credibility it deserves. You should scrutinize it with care, all to the end that you will determine whether he is truthful or not, because in Law, an accomplice does have an interest and bias in the case and in what your verdict will be.

"So, Members of the Jury, it's dangerous to convict upon the testimony of an accomplice but if you find that he is truthful, then you may, if you are satisfied from the evidence and beyond a reasonable doubt, convict upon his unsupported testimony." [85.2]

The jury does not have to actually know that the defendant is guilty in order to convict, but may convict if it believes him guilty from all the evidence in the case beyond a reasonable doubt.[90.1]

You are the sole judges of the credibility of all the witnesses who have testified in this case, and of the weight to be given to their testimony. A witness is presumed to speak the truth; but this presumption may be repelled by the manner in which he testifies, by the nature of his testimony or by the evidence affecting his character for truth, honesty or integrity or his motives, or by contradictory evidence; and in determining the weight to be given to the testimony of any witness, you have the right to consider the appearance of each witness on the stand, his manner of testifying, his apparent candor or lack of candor, his apparent fairness or lack of fairness, his apparent intelligence or lack of intelligence, his knowledge and means of knowledge on the subject upon which he testifies, together with all the other circumstances appearing in evidence on the trial.[90.2]

[61.1] **Iowa.** State v. Estrella, 257 Ia 462, 133 NW2d 97 (1965).

[61.2] **Iowa.** State v. Holt, 261 Ia 1089, 156 NW2d 884 (1968).

[61.3] **Washington.** State v. Gregory, 79 Wash2d 637, 488 P2d 757 (1971).

[61.4] **Washington.** State v. Morgison, 5 WashApp 248, 486 P2d 1115 (1971).

[61.5] **Illinois.** People v. Heard, 48 Ill2d 356, 270 NE2d 18 (1971).

[63.1] **Georgia.** Buttram v. State, 121 GaApp 186, 173 SE2d 272 (1970).

[63.2] **Georgia.** Sheffield v. State, 241 Ga 245, 244 SE2d 869 (1978).
[68.1] **Idaho.** State v. Owens, 101 Idaho 632, 619 P2d 787 (1980).
[70.1] **Georgia.** Touchstone v. State, 121 GaApp 602, 174 SE2d 450 (1970).
[71.1] **Colorado.** McGregor v. People, 176 Colo 309, 490 P2d 287 (1971).
[72.1] **Illinois.** People v. Smith, 58 IllApp3d 784, 16 IllDec 407, 374 NE2d 1285 (1978).
[85.1] **Kansas.** State v. McLaughlin, 207 Kan 584, 485 P2d 1352 (1971).
[85.2] **North Carolina.** State v. Abernathy, 295 NC 244, 244 SE2d 373 (1978).
[90.1] **Mississippi.** Collins v. State (Miss), 202 S2d 644 (1967).
[90.2] **Montana.** State v. Hart, 625 P2d 21 (Mont 1981).

§ 29. Comments and expressions of opinion on the evidence — In general.

The judge in this case was obviously reading the warrant upon which the defendant was being tried. This cannot be held to be an expression of opinion by the trial judge. This instruction constitutes merely a discharge of the court's duty to declare and explain the law of the case.[96 1]

"Let me interpose this observation before the jury retires. I don't like to intervene here in the course of the trial of the case or interrupt argument of counsel during the trial of the case or suggest any Court disapproval of comments that have been made in the absence of objections being taken, and there was no objection taken to the comment just made by Mr. J. (P's counsel). If I understood it correctly, at least, he invites the jury to draw the inference that because no evidence was introduced here showing this man involved in any other offenses that the fair inference is that he has never been in any trouble. Well, as a matter of law no evidence of other criminal offenses or other convictions would be admissible unless he had undertaken to vindicate himself and taken the stand himself and then he could have been impeached by showing — or an effort to impeach him or detract from his credibility — an effort could have been taken on behalf of the prosecution to show, or ask if he had ever been convicted of a felony, and without going into the details of it, that's the permissible question and answer for the record in the case. But under the circumstances of this trial that opportunity was not afforded the prosecutor and in the absence of taking of the witness stand by the accused himself, the prosecutor could not prejudice his defense by putting in proof of any other offenses had any existed, and I'm not even suggesting that other offenses had been committed, I'm merely pointing out that I don't think that Mr. J.'s invitation to draw the inference, that because there is no evidence of other offenses, that you should imply or infer that therefore this man has a lily white background. Whether he does or not I don't know, it's not before you and it's not for consideration. I'm merely suggesting that the invitation of Mr. J. to infer that he has a good record, that invitation ought to be rejected because there is no evidence on which to sustain it." [96 2]

Although the witness may not have been in a position to ascertain first-hand knowledge of an event, *e.g.,* odor of alcohol on breath of defendant, the trial court judge may nevertheless refer to inferences to be drawn from the facts testified to and express his opinion as to the effect of the evidence, provided that the court's statement(s) have (1) a reasonable basis in the evidence and (2) clearly leave to the jury the decision of the facts regardless of the judge's opinion.[9.1]

The Nebraska Supreme Court has recently aided trial judges in an attempt to clarify the limits on judicial comment while charging the jury.

The court held that (1) It is prejudicial error to submit to the jury an essential issue of fact for which there is no proof; (2) An instruction should not assume as established a disputed issue of fact; and (3) It is the duty of the court on its own motion to instruct as to all issues of fact that are pleaded and upon which there is evidence to support them. The instruction out of which these rules were developed read as follows: "The plaintiff herein as a police officer had a right to be in the street in the performance of his duties as a police officer, but, in this connection, you are instructed that he cannot by virtue of that right be heedless of the rights of others who have a lawful right to use the streets and highways. He had the legal right to assume that his rights in the use of the street would be respected by other users of the street, but one having the right to be in the street may not on that account proceed serenely unconscious of the surrounding circumstances."

These statements in the instruction are without qualification and, in context, constitute prejudicial comments on the evidence and are therefore forbidden. Even assuming there was such evidence, this instruction, by reasonable construction assumes as established a disputed issue of fact and therefore is erroneous.[12.1]

An instruction that "there is considerable conflict in the testimony which cannot be reconciled" is erroneous.[26.1]

Disapproved are instructions which select an item of evidence and then state that a certain conclusion does not follow as a matter of law. An instruction that no indication of liability is made by the court's damages instruction is not this type of disapproved instruction. Nor an instruction that the court is not intimating liability merely because the court submits the case to the jury. These instructions do not isolate an item of evidence. Rather they caution the jury not to make an improper reference from what the *court* has said or done.

Although instructing that plaintiff's injury alone does not warrant a finding that defendant's negligence caused the injury comes close to the condemned type, this instruction has been approved.[26.2]

It is not error to give the following instruction even in light of recent United States Supreme Court decisions: "Now, in this particular case, the defendant did not take the stand. By doing so, the court must charge you at this time that by not taking the stand and testifying in this case, the accused has exercised his constitutional right because, as I told you before, it is the burden of the state to prove him guilty beyond a reasonable doubt. He does not have to prove that he did not commit this offense with which he stands charged." [26.3]

Admission of evidence and telling the jury that it may be considered is not the same as emphasizing that unfavorable inferences may be drawn from failure to testify. Also evidence as to what a defendant did or refused to do or said incident to arrest after constitutional warning is not the same as comment on failure to testify at trial.[26.4]

"At our previous meeting you returned a finding in regard to the value of the wells in the amount of $766. Subsequent thereto the respondents Beier filed a motion requesting that the findings in regard to the wells and equipment be set aside and the commissioners be given additional instructions in that the findings were not consistent with the evidence. On the basis of that motion the

court issues an opinion and order granting the motion to set aside the finding in regard to the wells and reconvening the commissioners for further instructions.

"The court in issuing its opinion found that the only evidence to substantiate the finding of $766 was when Mr. E. testified that when all production was completed the wells and equipment would have a salvage value of $766.

"At the time of the taking the evidence indicated that in regard to the Beiers all production was not completed. In my original instructions regarding the value of the wells, I instructed you as follows: you are instructed that you should approach the valuation of the Beier wells, so called, in the same manner as all other property. What was the fair market value of the wells on the date of taking. You are instructed that you are not to consider what value the Beier well might have to the petitioner but rather what the value of the Beier well was at the marketplace on the date of taking.

"Evidence has been offered by the petitioner that the cost of drilling and equipping the well was $72,361, and on the basis of the Beiers' ownership of 85.24% of such well, that their share of the drilling and equipment amounted to $61,682. At this time I instruct you further that at the time the well was drilled on the Beier property there remained 1,888,654 Mcf of gas on the Beier tract; the Beiers' share being 1,609,919 Mcf of gas. At the date of the taking there remained on the Beier tract 1,470,444 Mcf; the Beiers' share being 1,253,260 Mcf, indicating that the wells and equipment removed from the Beier tract 418,742 Mcf of gas and that the Beiers' share being 356,346 Mcf of gas.

"Therefore, you are instructed that you are to find the value of the wells and equipment based upon this evidence which was presented in this case. You cannot find the value of $766 because all production has not taken place." [26.5]

It is settled that a trial justice invades the province of the jury when he expresses an opinion on credibility or conveys to the jury his impression of the weight that they should give to any of the testimony.[26.6]

[96.1] **North Carolina.** State v. Rennick, 8 NCApp 270, 174 SE2d 122 (1970).

[96.2] **Virginia.** Poole v. Commonwealth, 211 Va. 262, 176 SE2d 917 (1970).

[9.1] **Pennsylvania.** Commonwealth v. Benson, 421 A2d 383 (PaSuper 1980).

[12.1] **Nebraska.** Pensyl v. Gibb, 182 Neb 573, 156 NW2d 27 (1968).

[26.1] **Indiana.** Finster v. Wray, 131 IndApp 303, 164 NE2d 660 (1960). The court held, however, that the error, when considered with other instructions, was not prejudicial.

[26.2] **Illinois.** Perez v. Baltimore & O. R. Co., 24 IllApp2d 204, 164 NE2d 209 (1960).

[26.3] **Connecticut.** State v. Powers, 4 ConnCir 520, 236 A2d 354 (1967).

[26.4] **Iowa.** State v. Holt, 261 Ia 1089, 156 NW2d 884 (1968).

[26.5] **Michigan.** In re Michigan Consolidated Gas Co. v. Muzeck, 8 MichApp 329, 154 NW2d 667 (1967).

[26.6] **Rhode Island.** State v. Goff, 107 RI 331, 267 A2d 686 (1970).

§ 31. Comments and expressions of opinion — Cases of contract and tort.

The following has been held not to constitute an expression of opinion on any of the evidence:

"You see, we are having the same trouble with all of the witnesses. They do not pay attention to the question. They answer another question from the one that is asked. I am not criticizing this man particularly. They all do it. Now,

you didn't pay attention to the question. Answer that question and nothing else. Now, as I see it, counsel didn't ask you what lane you were in at all. He asked you merely about your speed, so you answered another question. Now, he wants to know in that travel, the distance between the time you first saw the DeVries car to the time you got to 71st Street was your speed constant at ten to fifteen, or was it changed." [38.1]

The following instruction constitutes a comment on the testimony requiring reversal:

"The Court instructs the jury for the Plaintiff that malice may be determined by this jury from a preponderance of the evidence, from the defendant, J. R.'s conduct and declaration, and from the zeal and activity of J. R. in pushing the prosecution against J. H. A." [66.1]

[38.1] **Illinois.** Bebb v. Yellow Cab Co., 120 IllApp2d 454, 257 NE2d 164 (1970).

[66.1] **Mississippi.** Allen v. Ritter (Miss), 235 S2d 253 (1970).

§ 32. Comments and expressions of opinion — Criminal cases.

Concerning appellant's claim that the district court erred when it refused to give a cautionary instruction regarding the credibility of informants, such an instruction is required when an informant's testimony is uncorroborated and favored when the testimony is corroborated in critical respects.[6.1]

An instruction is erroneous if it fails to define or indicate to the trier of fact what either constitutes a "culpable mental state" or what culpable mental state will support the crime charged. Therefore, in a criminal case where the defendant was charged with riot, the trial court committed error when it charged the jury that "to constitute a crime there must be the joint operation of an act forbidden by the law coupled with a culpable mental state." [15.1]

A trial judge may express his opinion on the weight of the evidence and the guilt or innocence of the accused, if done "fairly and temperately" and if the ultimate decision is the jury's.[22.1]

It is not improper and not reversible error for a trial court judge to comment on the credibility of a witness when the charge to the jury, taken as a whole, reveals no prejudice to the parties, and the jury is told that it was within its sole province to resolve any issues of credibility. For example, it was not error for the court to state in its charge to the jury that the court felt that the victim "testified fairly and truthfully" because the court also stated that "[b]ut that's for you to determine... [Y]ou may be impressed by it [but it's] for you to determine." Prejudice can not be based on reading isolated excerpts from the charge which must be taken as a whole.[22.2]

Self-defense. Although the following instruction is consistent with the principle that in self-defense defenses a defendant's actions are to be judged from his or her own personal impressions at the moment and not from the vantage point of a detached juror, *i.e.,* the "subjective test":

"It is a defense to the charge of murder that the homicide was justifiable as defined in this instruction.

"Homicide is justifiable when committed in the lawful defense of the slayer when the slayer has reasonable ground to believe that the person slain intends to inflict death or great bodily harm and there is imminent danger of such harm being accomplished.

"In determining whether or not a defendant is justified in using force against another person in defense of her own person, the defendant, as a reasonably and ordinarily cautious and prudent woman, may use that force which, in the same situation, seeing what she sees and knowing what she knows, would under the circumstances have appeared reasonable to her at the time in question, when the court continued in its charge and defined great bodily harm as:

"Great bodily harm" means an injury of a more serious nature than an ordinary striking with the hands or fists. It must be an injury of such nature as to produce severe pain and suffering,"

this was prejudicial error to the defendant and required a reversal because the court interjected its own opinion as to what constituted "great bodily harm," thus making an impermissible comment on the evidence. When the court is defining "great bodily harm" in the context of a self-defense instruction, it should charge that:

"in interpreting the evidence, and in determining whether the defendant had reasonable grounds to fear great bodily harm or imminent death, you should look at the circumstances from the viewpoint of the defendant at the time of the incident, given his or her knowledge at the time of the incident." [22.3]

The following has been held to constitute an expression by the court as to whether a fact is fully or sufficiently proven:

"I am allowing the defendant's motion for nonsuit on that first count and as all the evidence tends to show he did stop there; so the only question before you is whether the defendant is guilty or not guilty of a second count in the bill, which I am consolidating all in one count, that of failing to give certain specified information and failing to render reasonable assistance to injured persons; that is K. M. M., the wife of the witness who testified, Mr. S. M., Mr. S. M. and Mrs. J. D. M., S. M.'s mother-in-law." [76.1]

The mere fact that the testimony of a rape victim is uncorroborated does not per se constitute a reason for distrusting the victim's testimony so as to require a cautionary instruction, especially where the evidence and testimony fails to show any personal enmity between the victim and the defendant. Therefore, in the absence of any disputed evidence that would give reason to distrust the uncorroborated testimony of a rape victim, the following requested instruction was properly refused:

"You are instructed that the charge of Sexual Intercourse Without Consent is easy to make, difficult to prove, and more difficult to disprove, and in considering a case of this kind, it is the duty of the jury to carefully and deliberately consider, compare and weigh all testimony, facts and circumstances bearing on the act complained of, and the utmost care, intelligence and freedom from bias should be exercised by the jury (sic) consideration thereof."

The following instruction, however, that the court chose to give on the issue of consent instead of the defendant's requested charge was held improper as argumentative and a commentary on the evidence:

"There is no clear rule as to how much resistance is required of a woman in order to prove her lack of consent to sexual intercourse with a man who intends to rape her, apparently at all costs. The law does not put her life into even greater jeopardy than it is already in. There is no way a woman in dealing with a man bent on rape can know how much resistance she can give without provoking him into killing her. Continuous resistance to an attempted rape is not required." [81.1]

After the jury had retired and had begun its deliberations the following occurred:

"BY THE COURT: All right, the bailiff advised me that one member of the jury has stated to her that they might want to ask me a question; is that the purpose of the jury coming back in the Courtroom or has the jury reached a verdict?

"BY JURY MEMBER:

No, sir, we want to ask a question.

"BY THE COURT:

All right, sir, what is the question?

"BY JURY MEMBER:

We need an interpretation of premeditation.

"BY THE COURT:

All right, now, the only thing I can say to the jury is what is already covered in the instructions. Now, on the instructions, the word malice aforethought has been used. Is that the same definition that you need?

"BY JURY MEMBER:

Possibly, we were considering premeditation — a length of time.

"BY THE COURT:

Let me go to Jury Instruction S-4, which states: The Court instructs the jury that murder is the wilful, unlawful and felonious killing of a human being with malice aforethought without authority of law by any means or in any manner when done with deliberate design to effect death of the person killed and not in necessary self-defense. Now, that is the definition of murder, and I have looked at the instructions again and premeditation is not used in the instructions. So, the jury is instructed with the phrase malice aforethought.

"BY JURY MEMBER:

Could you give us an interpretation of malice aforethought?

"BY THE COURT:

In what regard, now?

"BY JURY MEMBER:

Is it planned or is it just the thought?

"BY THE COURT:

All right, let me say this. All I can say about malice aforethought is that there is no time limit as long as the malice aforethought existed before the incident occurred, and there is no definition of law of any length of time.

"BY JURY MEMBER:

All right, I think that answers that.

"BY THE COURT:

Does that answer your question?

"BY JURY MEMBER:

Yes, sir.

"BY THE COURT:

All right, if the jury will go and retire, and when you have reached a verdict, knock on this door and the bailiff will so advise me."

It was held that the preceding dialogue neither was an "instruction to the jury so that it was required to be in written form, nor was the dialogue an improper comment by the court on the evidence.

Thus, the province of the jury was not invaded by the court, which had properly instructed the jury on the elements of malice aforethought and manslaughter.[85.1]

Although the trial court erroneously charged the jury on the weight to be given evidence of good character and then, at the insistence of the state and over the objection of defense counsel, recalled the jury and instructed them as follows:

"[T]he state, well, an attorney attracted my attention, the district attorney, to a charge I gave you on good character. It is my duty — that I erroneously gave you that charge and I believe he is probably right.... You are, therefore, instructed to eliminate the charge from your mind and memory; it is not applicable. By this charge I do not imply that the defendant has bad character nor do I imply that he has good character. I am saying to you it is not relevant: Therefore, it should not be taken into consideration,"

this was not error because the trial court judge nevertheless instructed the jury not to consider the issue of character in one way or another.[87.1]

I believe that altogether we heard from eighteen witnesses, some contributed very little, some contributed a great deal, some had no interest in the outcome of this case.[99.1]

[6.1] **Nevada.** Buckley v. State, 600 P2d 227 (Nev 1979).

[15.1] **Colorado.** People v. Bridges, 620 P2d 1 (Colo 1980).

[22.1] **Pennsylvania.** Commonwealth v. Raymond, 412 Pa 194, 194 A2d 150 (1963).

[22.2] **Pennsylvania.** Commonwealth v. Whiting, 420 A2d 662 (PaSuper 1980).

[22.3] **Washington.** State v. Painter, 620 P2d 1001 (Wash 1980).

[76.1] **North Carolina.** State v. Billinger, 9 NCApp 573, 176 SE2d 901 (1970).

[81.1] **Montana.** State v. Pecora, 619 P2d 173 (Mont 1980).

[85.1] **Mississippi.** Carrol v. State, 391 S2d 1000 (Miss 1980)

[87.1] **Georgia.** Carroll v. State, 271 SE2d 650 (GaApp 1980).

[99.1] **Rhode Island.** State v. Goff, 107 RI 331, 267 A2d 686 (1970).

§ 34. Weight of admissions of parties.

An admission of a party to a suit, that is, a plaintiff or defendant, made out of court, is admissible in evidence, not as the equivalent of direct testimony of the declarant in respect to any fact in issue, but because conduct of a party in respect to matters in dispute, whether by act, speech or writing, which is inconsistent with the truth of any of his contentions in this trial, is a fact relevant to the issue involved in any such contention.[42.1]

Appellant first contends that the trial court committed prejudicial error in failing to instruct *sua sponte* that evidence of a defendant's non-tape recorded admissions must be viewed with caution. The rule is firmly established that such an instruction, when called for by the evidence, must be given, even without a request therefor.... An admission is "any statement by an accused relative to the offense charged." [51.1]

[42.1] **Connecticut.** Worden v. Francis, 153 Conn 578, 219 A2d 442 (1966).

[51.1] **California.** People v. Palmer, 80 CalApp3d 239, 145 CalRptr 466 (1978).

§ 35. Weight of expert testimony.

In determining the fair, cash, market value of each of these parcels, you may rely upon certain things; such as, the view of the premises and their surroundings which you have had, the description of the physical characteristics of the property, and the situation in relation to various properties in the neighborhood. The opinions of competent expert witnesses. A consideration of the uses for which the land is adapted and for which it is available, the improvements, if they are such as to increase the market value of the land, the income from the land if the land is devoted to one of the uses to which it could be most advantageously and profitably applied. You may consider the opinions of witnesses, their estimates of value and their methods of arriving at the conclusions expressed but you are not bound by such testimony alone. You are to exercise your judgment, based upon your own knowledge gained from a view of the premises and your experience as freeholders and the evidence introduced in the case.[52.1]

". . . [G]enerally, when a person is charged with a criminal offense and there is no evidence introduced concerning his mental condition, under such circumstances it is to be presumed that the person charged with the crime was of sufficient mental capacity to commit it. We assume under those circumstances, as I just recently indicated, that the man has the mental capacity to commit a crime. The law states that in such cases there is a presumption that a person is sane."

". . . [C]onsider and look at the whole evidence regarding the mental condition of the defendant in making [the] determination [of sanity or insanity]," and that "[t]he burden is upon the Commonwealth to prove that the defendant was legally sane beyond a reasonable doubt . . . as I have already defined for you the meaning of proof beyond a reasonable doubt."

". . . [We] have had some opinion testimony given by psychiatrists, psychologists, and we have heard other evidence as to the mental capacity of the defendant for his acts or conduct" . . . Those who have "given special attention and study to the field of mental infirmities and weaknesses [are] allowed to give [their] opinion as to the mental capacity of a defendant to commit a crime" . . . "It doesn't follow that [they] are to usurp the function or stand in the place of the jury." Experts' opinions are "evidence for your consideration" and "subject to the weight that the jury feels should be given to it."

The judge then told the jury that "in assessing a defendant's mental responsibility for crime, the jury should weigh the fact that a great majority of men are sane and the probability that any particular man is sane." The assessment of mental responsibility for crime is to be made in each case in the light of the evidence introduced, the circumstances that [the jury] have heard. As sole judges of the credibility and weight of all evidence on the issue of insanity, the jury "may believe, but is not compelled to believe, any . . . testimony or opinion given by an expert."

. . . "[I]t has been stated in our judicial decisions that it is for the jury to determine whether or not the fact that a great majority of men are sane and the probability that any particular man is sane may be deemed to outweigh the evidential value of any expert testimony that [a person] is insane" . . . "[I]t is for the jury to determine again on all the evidence and all of the circumstances whether the defendant did or did not lack mental capacity to commit a crime." [52.2]

[52.1] **Michigan.** In re Virginia Park Rehabilitation Project, 44 MichApp 11, 204 NW2d 732 (1972).

[52.2] **Massachusetts.** Commonwealth v. Walker, — Mass —, 350 NE2d 678 (1976).

§ 35A. Expert testimony — When not required.

. . . [I]n cases in which a jury can find of their own lay knowledge that there exists a design defect which exposes users of a product to unreasonable risks of injury, expert testimony that a product is negligently designed is not required. . . . It is within the knowledge of the jury whether unshielded metal protrusions on the handle bar of a snowmobile constitute a defect in design which creates an unreasonable risk of harm.[64.1]

After testifying to his familiarity with "street talk" based on his past experience, a police officer explained to the jury the meaning of the appellant's offer to give him a "one-way" for a "twenty," stating that it was an offer to give him straight sex for twenty dollars. It was not error thereafter to fail to charge on the weight to be given expert testimony, since the witness offered no opinion on any matter which required special skill, training, or expertise to comprehend.[64.2]

[64.1] **Massachusetts.** Smith v. Ariens Co., 78 Mass 1857, 377 NE2d 954 (1978).

[64.2] **Georgia.** Hicks v. State, 145 GaApp 669, 244 SE2d 597 (1978).

§ 36. Weight of circumstantial and negative evidence.

Where direct evidence existed of the accused's guilt, it was held not to be error to give the following instruction even though it did not contain the "hypothesis of innocence" doctrine:

"I instruct you that evidence may be of two kinds, direct or circumstantial. Direct evidence relates directly to factual questions and is produced by witnesses testifying directly from their personal observation. Circumstantial evidence relates to facts and circumstances from which the jury may infer other or connected facts which usually and reasonably followed according to the common experience of mankind.

"Circumstantial evidence may be properly considered by the jury. Its value and weight are to be determined from its character and nature and from its relation to all of the other facts which the jury finds to be otherwise established by the other evidence in the case.

"If, upon consideration of the whole case, you are satisfied beyond a reasonable doubt of the guilt of any defendant, it does not matter whether such certainty has been produced by direct evidence or by circumstantial evidence. The law makes no distinction between circumstantial and direct evidence in the amount of proof required for conviction." [65.1]

Where direct evidence existed of the accused's guilt, it was held not to be error to give the following instruction even though it did not contain the "hypothesis of innocence" doctrine:

"I instruct you that evidence may be of two kinds, direct or circumstantial. Direct evidence relates directly to factual questions and is produced by witnesses testifying directly from their personal observation. Circumstantial evidence relates to facts and circumstances from which the jury may infer other or connected facts which usually and reasonably followed according to the common experience of mankind.

"Circumstantial evidence may be properly considered by the jury. Its value and weight are to be determined from its character and nature and from its relation to all of the other facts which the jury finds to be otherwise established by the other evidence in the case.

"If, upon consideration of the whole case, you are satisfied beyond a reasonable doubt of the guilt of any defendant, it does not matter whether such certainty has been produced by direct evidence or by circumstantial evidence. The law makes no distinction between circumstantial and direct evidence in the amount of proof required for conviction." [69.1]

The following instruction, on identification of defendant by an eye-witness to a crime, was held proper and was held sufficient to enable jury to weigh the evidence:

"You are the judges of the facts, the weight of the evidence and the credibility of the witnesses. In determining such weight or credit you may consider: The interest, if any, which the witness may have in the result of the trial; the relation of the witness to the parties; the bias or prejudice, if any has been apparent; the candor, fairness, intelligence and demeanor of the witness; the ability of the witness to remember and relate past occurrences, and means of observation, and opportunity of knowing the matters about which the witness has testified. From all the facts and circumstances appearing in evidence and coming to your observation during the trial, aided by the knowledge which you each possess in common with other persons, you will reach your conclusions . . . ."

Therefore, it was not error to refuse the following requested instruction, by the defendant, on the weight of identification testimony:

"Testimony tending to prove identity is to be scrutinized with extreme care."

"No class of testimony is more uncertain and less to be relied upon than that of identity."

"The possibility of human error or mistake in the probable likeness and similarity of objects and persons are elements that you must act upon in considering testimony passing upon the credibility that you attach to the witness' testimony, and you must be satisfied beyond a reasonable doubt as to the accuracy of the witness identification in the absence of prior familiarity with him is merely the expression of an opinion by a witness and is to be regarded by the jury in the same light as any other opinion that may be expressed by a witness."

"The identity of the defendant must be proven with that degree of moral certainty that amounts to proof beyond a reasonable doubt so as to preclude the probability of mistake having been made."

"Evidence of identity should be as certain as human recollection under the most favorable circumstances will permit. The two greated (sic) constituents of reliability of such testimony are familiar with the person in question, and freedom from prejudice have been determined, it is the duty of the jury to estimate the capacity of the witness for perception, observation, reflection, memory and reasoning, as revealed by him upon the stand. Certainty of identification may indicate not strength, but weakness of power to identify and weakness of the reliability of the witness."

"The identity of the defendant as the culprit must be shown with such certainty as to preclude any possibility of error. An opinion of the identity of

the defendant, particularly when it depends upon impressions, obtained in haste and excitement, should be treated with utmost caution. If the jury finds that the witness was honestly mistaken in his identification of the defendant, then a reasonable doubt is created as to the guilt of the defendant, and he must be acquitted." [72.1]

[65.1] **Washington.** State v. Favro, 5 WashApp 311, 487 P2d 261 (1971).
[69.1] **Washington.** State v. Favro, 5 WashApp 311, 487 P2d 261 (1971).
[72.1] **Oklahoma.** Roberts v. State, 620 P2d 425 (OklCrimApp 1980).

§ 37. Credibility of witnesses for jury.

Now, here is a flat conflict in the testimony . . . on a material aspect of the case, because if the plaintiff is telling the truth here, if in fact the doctor made an admission of responsibility or a promise to pay bills, it would be evidence of an admission of liability on his part, evidence that he had been negligent. On the other hand, if you think that the plaintiff made up this story, that is, if you believe the doctor's testimony that no such conversation occurred, then you can . . . [weigh] all of the plaintiff's testimony in the light of that conduct. You can consider the probability of whether such a conversation ever took place.[80.1]

A jury is not bound in every case to accept the evidence of a witness as true, although it is not contradicted by other direct evidence, when it is in conflict with reasonable inferences that may be drawn from proven facts and circumstances.[80.2]

You are the sole judges of the credibility of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case.[80 3]

Although it is improper for counsel to comment on the credibility of a witness from personal knowledge or from evidence not on the record, it is within the sound discretion of the trial judge to determine whether the comments were so prejudicial as to require a mistrial or whether the prejudice would be cured by a cautionary instruction to the jury to disregard the comment or statement. However, if the statement is a flagrant one, it requires a mistrial.[80.4]

Whenever there is evidence presented by both the plaintiff and the defendant that each was in his or her own lane of traffic, then the plaintiff does not establish a *prima facie* case of negligence by showing either that the defendant's vehicle skidded on ice or by presenting testimony to the effect that the defendant had crossed the center of the roadway. Thus the trial court properly refused the following charge requested by the plaintiff:

"If you find that Miss Michael violated her duty to drive on the right-hand side of the street as far as possible to the right-hand edge or curb, and that this violation was due to her skidding on ice, you are instructed that being on the wrong side of the street is negligence and that Miss Michael bears the burden of proof to show that she was not to blame."

Whenever there is conflicting testimony, it is exclusively the province of the jury to decide which of the parties' conflicting testimony is entitled to more

credibility. Therefore, the plaintiff is entitled to an instruction that if it believed the plaintiff's testimony that the defendant was on the wrong side of the road then the burden was on the defendant to prove that he/she was not negligent by being there. Contrawise, the defendant was entitled to an instruction that if it believed the defendant's testimony, then the burden was on the plaintiff to prove that the plaintiff was not negligent by being on the wrong side of the road.[80.5]

If you find that any witness stated falsely any material fact in the case you are at liberty to disregard the whole of his testimony if you want to. Whatever you decide of course must be based upon what you have found out in the Court Room and on your view of the premises. You are entitled to consider everything that you observed while on the view in your decision.[7.1]

The trial court charged the jury that if they found the defendant guilty of murder: "The form of your verdict would be, we, the jury, find the defendant guilty, and you would have two things that you could do. You must go further in either case. If you decide the defendant should die, you would say, 'We, the jury, find the defendant guilty and fix his punishment at death,' or, if, for no reason at all but simply because you wish to, you could do otherwise and say, 'We, the jury, find the defendant guilty and fix his punishment at life imprisonment.' " [7.2]

Evidence has been introduced in this case that at some other time certain witnesses may have said or done something, or may have failed to say or do something, which is consistent with, or inconsistent with, their testimony at the trial. This evidence is to be considered by you only for the purpose of determining the credibility of those witnesses and the weight to be given their testimony and is not to be considered by you for any other purpose.

. . . .

You are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each. In determining what credit is to be given any witness, you may take into account his ability and opportunity to observe, his memory, his manner and appearance while testifying, any interest, bias or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence, and any other factors that bear on believability and weight.[7.3]

Where, as in this case, the defendant takes the witness stand, it is your duty to treat his testimony fairly and weigh it carefully just as you do the testimony of other witnesses in the case, remembering, however, that he is the defendant in the case and that he has an interest in the outcome of the case. And where there is testimony that a defendant has been involved in prior criminal convictions, this testimony is admitted only for the purpose of determining what weight or credibility you will give to the testimony of the defendant because, as you can see it has no possible tendency to connect it up with this case. It only goes to the weight and credibility which you will give to the testimony of the defendant in the case.

It is also the function of the jury to determine what weight or credibility you will attach to the testimony of each of the witnesses, taking into consideration the opportunity that the witness has had to know the facts about which he or she seeks to testify here upon the stand, taking into consideration the demeanor of the witness on the stand, the reasonableness of the story that is

told; whether the story is conflicting with other testimony that the same witness has given, or other testimony in the case that you believe to be true, and whether it is corroborated by other testimony that you believe to be true in the case.[7.4]

Now, inconsistencies or discrepancies in the testimony of a witness or between the testimony of witnesses may or may not cause you as Jurors to discredit such testimony. Two or more persons witnessing an incident or transaction may see it or may hear it differently. And among all of us, an innocent misrecollection, like a failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail. And whether the discrepancy results from innocent error or willful falsehood. You will give the testimony of each witness such weight as to credibility as you may think it deserves.[7.5]

As a general proposition, the trial court has discretion in charging the jury, and the instructions will be held proper and non-prejudicial so long as that, considering them in their entirety, they accurately, properly, and fairly state the law as applied to the facts in the case. This discretion extends to refusal of requests and to cautionary instructions as well. For example, when testimony was offered against the defendant by an accomplice that had turned State's evidence. it was held proper and not prejudicial error for the court to refuse to give the following standardized jury instruction on accomplices:

"An accomplice witness is one who testifies that he was involved in the commission of the crime with which the defendant is charged. You should consider with caution testimony of an accomplice *if it is not supported by other evidence,"* [Emphasis supplied]

and instead to give the following instruction relating to the credibility of witnesses in general and not specifically mentioning the need to corroborate accomplice testimony:

"It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use that knowledge and experience which you possess in common with men in general, in regard to the matter about which a witness has testified. You may take into account his ability and opportunity to observe and know the things about which he or she has testified, his memory, manner, and conduct while testifying, any interest he may have in the result of this trial, and the reasonableness of his testimony considered in the light of all the evidence in this case.

"If you find that any witness has willfully testified falsely concerning any material matter, you have a right to distrust the testimony of that witness in other matters, and you may reject all or part of the testimony of that witness, or you may give it such weight as you think it deserves. You should not reject any testimony without cause."[7.6]

When an instruction, which deals with the credibility of an impeached witness by a prior inconsistent statement, tells the jury the purpose for which certain evidence may be considered and limits the jury's consideration of the evidence for such limited purposes, it is not an improper comment on the evidence. Thus, the following instruction was held proper:

"If you find and believe from the evidence that on some former occasion a witness made a statement inconsistent with his testimony in this case, you

may consider such evidence for the purpose of deciding the believability of the witness and the weight to be given to his testimony. However, in deciding the guilt or innocence of the defendant, any prior statement of the witness, *other than the defendant,* must not be considered by you as evidence of the matters contained in the statement except as to those matters admitted by the witness to be true during his testimony in the case." [7.7]

Utah Code Annotated, § 77-31-18 (1979 & Supp. 1981), expressly permits giving a cautionary instruction whenever the prosecution relies on the uncorroborated testimony of an accomplice:

"Conviction on uncorroborated testimony of accomplice — Cautionary instruction. — (1) A conviction may be had on the uncorroborated testimony of an accomplice.

"(2) In the discretion of the court, an instruction to the jury may be given to the effect that such uncorroborated testimony should be viewed with caution, and such an instruction should be given if the trial judge finds the testimony of the accomplice to be self contradictory, uncertain, or improbable." [7.8]

As a general rule, although an instruction by a trial court judge must not deny the jury the right to consider any proper evidence presented to them by way of testimony, in instructing the jury the judge may, nevertheless, authorize them, when considering the testimony of witnesses, to take into account the interest of a witness. For example, the following cautionary instruction as to the care to be exercised in weighing the testimony of a witness has been held proper:

"In weighing the credibility of a witness who is a member of defendant's family, or a friend or associate of the defendant, you should scrutinize his or her testimony with particular care."

Likewise, a trial court in a criminal case may, in the exercise of its discretion, make comment on the evidence presented to the jury, including the credibility of witnesses with prior felony convictions, interests, or those who had given prior inconsistent statements. For example, the following instruction was held proper:

"The state has the right to show any bias or interest toward the defendant on the part of witnesses for the defense. The evidence elicited from these witnesses, by cross-examination, concerning the nature of their relationship with the defendant, indicated long-term friendships with such witnesses as Mr. Torres and Mr. Leary, and their obvious common interest and values. This is relevant evidence which had a direct bearing on the credibility of these witnesses."

Later the court also instructed:

"In this matter of credibility, for example, you may consider the testimony of Mr. Turcio, Sr., in which he conceded, during cross-examination, to having given prior erroneous, inconsistent testimony, at a pretrial hearing. I instruct you that it is all proper for you, as jurors, to determine credibility upon these terms.

"You will recall again, in determining fact from evidence offered to you in court, that it was disclosed that the witnesses, Mr. Turcio, Sr., and Mr. David Leary, had been convicted of a serious crime. A witness is not disqualified because of his conviction of crime; but such conviction may be shown for the purpose of affecting his credibility."

In addition, a charge to the jury that is well-balanced and delivered with particular care and patience by the court will rarely be found reversible error. For example, the following instruction on the credibility of witnesses is a laudatory one:

"In weighing the testimony of a witness, you should consider his appearance on the stand; you should try to size him up; you should have in mind all those little circumstances which point to his truthfulness or untruthfulness; you should consider any possible bias or prejudice he may have, whether for or against the state or the accused; his interest or lack of interest, of whatever sort, in the outcome of the trial . . . you should test the evidence he gives you by your own knowledge of human nature, and of the motives which influence and control human beings." [11.1]

Under proper instructions, the jury judges the weight and credibility of the testimony.[18.1]

. . . [S]hould you find that a witness has testified wilfully, falsely and intentionally to a material fact in the case, then the law says that as to that witness you may disregard entirely that testimony. It is within your discretion. You may do so. It is for you to say.[18.2]

[80.1] **Massachusetts.** Barrette v. Hight, 253 Mass 268, 230 NE2d 808 (1967).

[80.2] **Georgia.** Seaboard Coast Line R. Co. v. Clark, 122 GuApp 237, 176 SE2d 596 (1970).

[80.3] **Illinois.** People v. Heard, 48 Ill2d 356, 270 NE2d 18 (1971).

[80.4] **Delaware.** Joseph v. Monroe, 419 A2d 927 (Del 1980).

[80.5] **Pennsylvania.** Kuhn v. Michael, 423 A2d 735 (PaSuper 1980).

[7.1] **Pennsylvania.** Lobozzo v. Adam Eidemiller, Inc., 437 Pa 360, 263 A2d 432 (1970).

[7.2] **Georgia.** Pass v. State, 227 Ga 730, 182 SE2d 779 (1971).

[7.3] **Washington.** State v. Morgison, 5 WashApp 248, 486 P2d 1115 (1971).

[7.4] **Michigan.** People v. Nash, 61 MichApp 708, 233 NW2d 153 (1975).

[7.5] **Michigan.** People v. Bradley, 62 MichApp 39, 233 NW2d 177 (1975).

[7.6] **Kansas.** State v. Ferguson, 228 Kan 522, 618 P2d 1186 (1980).

[7.7] **Missouri.** State v. Davis, 608 SW2d 437 (MoApp 1981).

[7.8] **Utah.** Utah v. Hallett, 619 P2d 335 (Utah 1980).

[11.1] **Connecticut.** State v. Turcio, 422 A2d 749 (Conn 1980).

[18.1] **Idaho.** State v. Bassett, 86 Idaho 277, 385 P2d 246 (1963).

[18.2] **Alabama.** Buckelew v State, 48 AlaApp 411, 265 S2d 195 (1972).

§ 37A. Witnesses — Criteria for credibility.

. . . In determining whether a witness is to be excluded because of a lack of testimonial qualification three processes are involved: First, it must be determined whether the witness *has observed the incident* about which he proposes to testify and has received some impressions which he seeks to relate in court; second, whether the witness has a recollection of those impressions resulting from his observation which fairly corresponds with or reproduces the original knowledge or observation; and third, whether he is able to communicate this recollection to the tribunal. In the absence of any one of these elements the witness's testimony cannot be believed.[18.3]

Although it is improper for counsel to comment on the credibility of a witness from personal knowledge or from evidence not on the record, it is within the sound discretion of the trial judge to determine whether the comments were so prejudicial as to require a mistrial or whether the prejudice would be cured by a cautionary instruction to the jury to disregard the comment or statement. However, if the statement is a flagrant one, it requires a mistrial.[18.4]

[18.3] **Iowa.** Local Board of Health, Boone County v. Wood, — Ia —, 243 NW2d 862 (1976).

[18.4] **Delaware.** Joseph v. Monroe, 419 A2d 927 (Del 1980).

§ 38. Credibility of witnesses — Corroborating or contradictory evidence.

... [I]t is essentially the duty of a jury to determine whether or not the testimony of one witness corroborates that of another.[25.1]

The Court instructs the jury that there can be no judgment against the estate of a person now deceased which is based upon the uncorroborated testimony of the adverse party.

If you find from a preponderance of all the evidence that Mr. W.'s testimony is not corroborated, then your verdict must be in favor of the defendant.

Corroborating evidence is defined as evidence supplementary to that already given which tends to strengthen or confirm it; it is additional evidence of a different character to the same point.[32.1]

When a prior inconsistent statement is introduced to impeach a witness, the court, upon request, must instruct the jury that it can consider such evidence for the purpose of impeachment only, not as substantive evidence of the facts. Failure to do so, as here, is reversible error.[32.2]

Instructions that specific denials by defendant (exculpatory statements) which are later proved untrue could be considered evidence of defendant's consciousness of guilt is not error and has long been accepted by the court. The trial judge's explanation to the jury that an expert can receive the necessary training and experience in a number of different ways, including everyday experiences, was also held to be proper.[32.3]

A proper instruction on witness immunity should explain the type of immunity granted. In this case, assuming immunity had been granted, there was no error because the instruction given was more favorable to the defendant than a correct instruction would have been.

An instruction concerning the use of prior inconsistent statement to impeach a witness must tell the jury that it is free to disregard all or any part of the witness' testimony.[32.4]

[25.1] **North Carolina.** State v. Dixon, 8 NCApp 37, 173 SE2d 540 (1970).

[32.1] **Virginia.** Whitmer v. Marcum, 214 Va 64, 196 SE2d 907 (1973).

[32.2] **South Carolina.** State v. Warren, 284 SE2d 355 (SC 1981).

[32.3] **Federal.** United States v. McDougald, 650 F2d 532 (4th Cir. 1981).

[32.4] **Maine.** State v. McEachern, 431 A2d 39 (Me 1981).

§ 39. Credibility of witnesses — Demeanor and character of witnesses.

You are the sole judges of the credibility of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case.[34.1]

You are the sole judges of the credibility of all the witnesses who have testified in this case, and of the weight to be given to their testimony. A witness is presumed to speak the truth; but this presumption may be repelled by the

manner in which he testifies, by the nature of his testimony or by the evidence affecting his character for truth, honesty or integrity or his motives, or by contradictory evidence; and in determining the weight to be given to the testimony of any witness, you have the right to consider the appearance of each witness on the stand, his manner of testifying, his apparent candor or lack of candor, his apparent fairness or lack of fairness, his apparent intelligence or lack of intelligence, his knowledge and means of knowledge on the subject upon which he testifies, together with all the other circumstances appearing in evidence on the trial.[34.1] [34.2]

[34.1] **Illinois.** People v. Heard, 48 Ill2d 356, 270 NE2d 18 (1971).

[34.2] **Montana.** State v. Hart, 625 P2d 21 (Mont 1981).

§ 40. Credibility of witnesses — Interested witnesses.

Where, as in this case, the defendant takes the witness stand, it is your duty to treat his testimony fairly and weigh it carefully just as you do the testimony of other witnesses in the case, remembering, however, that he is the defendant in the case and that he has an interest in the outcome of the case. And where there is testimony that a defendant has been involved in prior criminal convictions, this testimony is admitted only for the purpose of determining what weight or credibility you will give to the testimony of the defendant because, as you can see it has no possible tendency to connect it up with this case. It only goes to the weight and credibility which you will give to the testimony of the defendant in the case.

It is also the function of the jury to determine what weight or credibility you will attach to the testimony of each of the witnesses, taking into consideration the opportunity that the witness has had to know the facts about which he or she seeks to testify here upon the stand, taking into consideration the demeanor of the witness on the stand, the reasonableness of the story that is told; whether the story is conflicting with other testimony that the same witness has given, or other testimony in the case that you believe to be true, and whether it is corroborated by other testimony that you believe to be true in the case.[46.1]

Evidence has been introduced in this case that at some other time certain witnesses may have said or done something, or may have failed to say or do something, which is consistent with, or inconsistent with, their testimony at the trial. This evidence is to be considered by you only for the purpose of determining the credibility of those witnesses and the weight to be given their testimony and is not to be considered by you for any other purpose.

. . . .

You are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each. In determining what credit is to be given any witness, you may take into account his ability and opportunity to observe, his memory, his manner and appearance while testifying, any interest, bias or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence, and any other factors that bear on believability and weight.[50.1]

Paid police informants are a special class of witnesses, and in a trial of defendant for aggravated robbery it was held proper for the court to give the

jury a general instruction on witness credibility when testimony of paid police informants was given.[52.1]

As a general rule, although an instruction by a trial court judge must not deny the jury the right to consider any proper evidence presented to them by way of testimony, in instructing the jury the judge may, nevertheless, authorize them, when considering the testimony of witnesses, to take into account the interest of a witness. For example, the following cautionary instruction as to the care to be exercised in weighing the testimony of a witness has been held proper:

"In weighing the credibility of a witness who is a member of defendant's family, or a friend or associate of the defendant, you should scrutinize his or her testimony with particular care."

Likewise, a trial court in a criminal case may, in the exercise of its discretion, make comment on the evidence presented to the jury, including the credibility of witnesses with prior felony convictions, interests, or those who had given prior inconsistent statements. For example, the following instruction was held proper:

"The state has the right to show any bias or interest toward the defendant on the part of witnesses for the defense. The evidence elicited from these witnesses, by cross-examination, concerning the nature of their relationship with the defendant, indicated long-term friendships with such witnesses as Mr. Torres and Mr. Leary, and their obvious common interest and values. This is relevant evidence which had a direct bearing on the credibility of these witnesses."

Later the court also instructed:

"In this matter of credibility, for example, you may consider the testimony of Mr. Turcio, Sr., in which he conceded, during cross-examination, to having given prior erroneous, inconsistent testimony, at a pretrial hearing. I instruct you that it is all proper for you, as jurors, to determine credibility upon these terms.

"You will recall again, in determining fact from evidence offered to you in court, that it was disclosed that the witnesses, Mr. Turcio, Sr., and Mr. David Leary, had been convicted of a serious crime. A witness is not disqualified because of his conviction of crime; but such conviction may be shown for the purpose of affecting his credibility."

In addition, a charge to the jury that is well-balanced and delivered with particular care and patience by the court will rarely be found reversible error. For example, the following instruction on the credibility of witnesses is a laudatory one:

"In weighing the testimony of a witness, you should consider his appearance on the stand; you should try to size him up; you should have in mind all those little circumstances which point to his truthfulness or untruthfulness; you should consider any possible bias or prejudice he may have, whether for or against the state or the accused; his interest or lack of interest, of whatever sort, in the outcome of the trial . . . you should test the evidence he gives you by your own knowledge of human nature, and of the motives which influence and control human beings."[52.2]

An accomplice testifying for the prosecution is generally regarded as an interested witness, and a defendant, upon timely request, is entitled to an

instruction that the testimony of the accomplice should be carefully scrutinized. Since an instruction to carefully scrutinize an accomplice's testimony is a subordinate feature of the trial, the trial judge is not required to so charge in the absence of a timely request for the instruction. But when a defendant makes a request in writing and before argument to the jury for an instruction on accomplice testimony, the court should give such instruction. And once the judge undertakes to instruct the jury on such subordinate issue it must do so accurately and completely. The court, however, is not required to give the requested instruction in the exact language of the request, but is only required to give such instruction in substance.

In present case, concerning Clark, the trial judge instructed the jury:

"Now, as to the witness Clark, I instruct you that he is in Law what is known as an accomplice. And our Court has said that a person may be convicted on the unsupported testimony of an accomplice, if that testimony is believed by the Jury. However, in considering the weight and credibility you will give to the testimony of Clark, I instruct you that you should carefully examine his testimony for the purpose of determining what weight and credibility it deserves. You should scrutinize it with care, all to the end that you will determine whether he is truthful or not, because in Law, an accomplice does have an interest and bias in the case and in what your verdict will be.

"So, Members of the Jury, it's dangerous to convict upon the testimony of an accomplice but if you find that he is truthful, then you may, if you are satisfied from the evidence and beyond a reasonable doubt, convict upon his unsupported testimony." [53.1]

. . . "The fact that an accomplice hopes for or expects mitigation of his own punishment does not disqualify him from testifying." Promises of assistance may affect the credibility of the witness; they do not render the witness incompetent.[53.2]

The following instruction, pertaining to the testimony of an immunized witness, was held proper:

"Certainly you have heard the testimony in this case of those who were alleged to be accomplices, those who have been granted immunity, those who have some privilege or interest. These witnesses are competent to testify, but you should again accept their testimony with caution and evaluate it carefully in determining whether or not their interest or their involvement is sufficient or do [sic] in someway [sic] color their testimony." [53.3]

[46.1] **Michigan.** People v. Nash, 61 MichApp 708, 233 NW2d 153 (1975).

[50.1] **Washington.** State v. Morgison, 5 WashApp 248, 486 P2d 1115 (1971).

[52.1] **Colorado.** People v. Kelderman, 618 P2d 723 (ColoApp 1980).

[52.2] **Connecticut.** State v. Turcio, 422 A2d 749 (Conn 1980).

[53.1] **North Carolina.** State v. Abernathy, 295 NC 244, 244 SE2d 373 (1978).

[53.2] **North Carolina.** State v. Edwards, 37 NCApp 47, 245 SE2d 527 (1978).

[53.3] **Maine.** State v. Troiano, 421 A2d 41 (Me 1980).

§ 40A. "Directly interested" witness — Pecuniary interest in judgment.

In order to disqualify a witness as one "directly interested in the action," the interest in the judgment must be such that a pecuniary gain or loss will come to the witness directly as the immediate result of the judgment. The interest of the witness must be direct, certain and pecuniary.[53.4]

[53.4] **Illinois.** Michalski v. Chicago Title & Trust Co., — Ill —, 365 NE2d 654 (1977).

§ 41. Credibility of witnesses in criminal cases.

The court instructs the jury that the testimony of parties aiding, assisting, encouraging, and abetting the crime is admissible; yet their evidence when not corroborated by the testimony of others not implicated in the crime, as to matters material to the issue, should be received with great caution by the jury, and they should be fully satisfied of its truth before they should convict the defendant on such testimony.[57.1]

A trial court judge properly refused to give the following cautionary instruction because it constituted an improper comment by the court on the evidence and usurped the function of the jury:

"An accomplice is a person who helped commit a crime, or advised or encouraged a person to commit a crime. You must determine whether any witness in this case is an accomplice.

"The evidence of an accomplice *should be received with great caution.*"

"*The testimony of an accomplice ought to be viewed with distrust.* This does not mean that you may arbitrarily disregard such testimony, but you should give to it the weight to which you find it to be entitled after examining it with *care and caution* and in the light of all the evidence in the case." [57.2]

Utah Code Annotated, § 77-31-18 (1979 & Supp. 1981), expressly permits giving a cautionary instruction whenever the prosecution relies on the uncorroborated testimony of an accomplice:

"Conviction on uncorroborated testimony of accomplice — Cautionary instruction. — (1) A conviction may be had on the uncorroborated testimony of an accomplice.

"(2) In the discretion of the court, an instruction to the jury may be given to the effect that such uncorroborated testimony should be viewed with caution, and such an instruction should be given if the trial judge finds the testimony of the accomplice to be self contradictory, uncertain, or improbable." [57.3]

Competency to give testimony depends largely on intelligence and understanding rather than on attaining a certain age. But it is common knowledge that a child of tender years usually does not have the same powers of comprehension and understanding nor the same ability to observe, remember and tell what he or she has seen or heard as an older child or person. In a child of tender years the strength and use of the imagination is frequently out of proportion to the power of the other faculties, and young children may say what is not true not from deceitfulness but simply because they have come to think or believe so by talking or from suggestion or from imagining what has happened. So in determining what if any credit you shall give to the testimony of these children, you should give consideration to all of these matters and should consider their testimony with caution and should weigh it in the light of their tender age, mental capacity, lack of experience, and immaturity. You should guard against being influenced by sympathy for these children of tender age who were called upon to testify.[58.1]

When an instruction, which deals with the credibility of an impeached witness by a prior inconsistent statement, tells the jury the purpose for which certain evidence may be considered and limits the jury's consideration of the

evidence for such limited purposes, it is not an improper comment on the evidence. Thus, the following instruction was held proper:

"If you find and believe from the evidence that on some former occasion a witness made a statement inconsistent with his testimony in this case, you may consider such evidence for the purpose of deciding the believability of the witness and the weight to be given to his testimony. However, in deciding the guilt or innocence of the defendant, any prior statement of the witness, *other than the defendant,* must not be considered by you as evidence of the matters contained in the statement except as to those matters admitted by the witness to be true during his testimony in the case." [64.1]

You are the sole judges of the credibility of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case.[74.1]

Paid police informants are a special class of witnesses, and in a trial of defendant for aggravated robbery it was held proper for the court to give the jury a general instruction on witness credibility when testimony of paid police informants was given.[74.2]

As a general rule, although an instruction by a trial court judge must not deny the jury the right to consider any proper evidence presented to them by way of testimony, in instructing the jury the judge may, nevertheless, authorize them, when considering the testimony of witnesses, to take into account the interest of a witness. For example, the following cautionary instruction as to the care to be exercised in weighing the testimony of a witness has been held proper:

"In weighing the credibility of a witness who is a member of defendant's family, or a friend or associate of the defendant, you should scrutinize his or her testimony with particular care."

Likewise, a trial court in a criminal case may, in the exercise of its discretion, make comment on the evidence presented to the jury, including the credibility of witnesses with prior felony convictions, interests, or those who had given prior inconsistent statements. For example, the following instruction was held proper:

"The state has the right to show any bias or interest toward the defendant on the part of witnesses for the defense. The evidence elicited from these witnesses, by cross-examination, concerning the nature of their relationship with the defendant, indicated long-term friendships with such witnesses as Mr. Torres and Mr. Leary, and their obvious common interest and values. This is relevant evidence which had a direct bearing on the credibility of these witnesses."

Later the court also instructed:

"In this matter of credibility, for example, you may consider the testimony of Mr. Turcio, Sr., in which he conceded, during cross-examination, to having given prior erroneous, inconsistent testimony, at a pretrial hearing. I instruct you that it is all proper for you, as jurors, to determine credibility upon these terms.

"You will recall again, in determining fact from evidence offered to you in court, that it was disclosed that the witnesses, Mr. Turcio, Sr., and Mr. David Leary, had been convicted of a serious crime. A witness is not disqualified because of his conviction of crime; but such conviction may be shown for the purpose of affecting his credibility."

In addition, a charge to the jury that is well-balanced and delivered with particular care and patience by the court will rarely be found reversible error. For example, the following instruction on the credibility of witnesses is a laudatory one:

"In weighing the testimony of a witness, you should consider his appearance on the stand; you should try to size him up; you should have in mind all those little circumstances which point to his truthfulness or untruthfulness; you should consider any possible bias or prejudice he may have, whether for or against the state or the accused; his interest or lack of interest, of whatever sort, in the outcome of the trial . . . you should test the evidence he gives you by your own knowledge of human nature, and of the motives which influence and control human beings." [74.3]

. . . [S]hould you find that a witness has testified wilfully, falsely and intentionally to a material fact in the case, then the law says that as to that witness you may disregard entirely that testimony. It is within your discretion. You may do so. It is for you to say.[76.1]

The defendant has set up an alibi as a defense in this case. An alibi as a defense invokes the impossibility of the prisoner's presence at the scene of the offense at the time of its commission, and the range of the evidence in respect to time and place must be such as reasonably to exclude the possibility of presence. You would consider the question of alibi along with all the other evidence, and if a reasonable doubt be raised by the evidence as a whole, the doubt must be given in favor of innocence.

Gentlemen, I charge you that a witness may be impeached by contradictory statements previously made by him or her as to matters relevant to his or her testimony and to the case. A witness may be impeached by disproving the facts testified to by him or her. When a witness shall be successfully contradicted as to a material matter, his or her credit as to other matters shall be for the jury, but if a witness shall swear wilfully and knowingly falsely, his other testimony shall be disregarded entirely unless corroborated by circumstances or other unimpeached evidence. The credit of a witness is a matter to be determined by the jury under proper instructions of the court.

Gentlemen, if you believe the contentions of the defendant, that is, that he was not at this place, that he had nothing to do with the killing of the Bs., he got the rings from someone else, he had nothing to do with the killing, if you believe his alibi that it was not possible for him to be there, it would be your duty to acquit.[76.2]

An accomplice testifying for the prosecution is generally regarded as an interested witness, and a defendant, upon timely request, is entitled to an instruction that the testimony of the accomplice should be carefully scrutinized. Since an instruction to carefully scrutinize an accomplice's testimony is a subordinate feature of the trial, the trial judge is not required to so charge in the absence of a timely request for the instruction. But when a defendant makes a request in writing and before argument to the jury for an

instruction on accomplice testimony, the court should give such instruction. And once the judge undertakes to instruct the jury on such subordinate issue it must do so accurately and completely. The court, however, is not required to give the requested instruction in the exact language of the request, but is only required to give such instruction in substance.

In present case, concerning Clark, the trial judge instructed the jury:

"Now, as to the witness Clark, I instruct you that he is in Law what is known as an accomplice. And our Court has said that a person may be convicted on the unsupported testimony of an accomplice, if that testimony is believed by the Jury. However, in considering the weight and credibility you will give to the testimony of Clark, I instruct you that you should carefully examine his testimony for the purpose of determining what weight and credibility it deserves. You should scrutinize it with care, all to the end that you will determine whether he is truthful or not, because in Law, an accomplice does have an interest and bias in the case and in what your verdict will be.

"So, Members of the Jury, it's dangerous to convict upon the testimony of an accomplice but if you find that he is truthful, then you may, if you are satisfied from the evidence and beyond a reasonable doubt, convict upon his unsupported testimony."[76.3]

. . . "The fact that an accomplice hopes for or expects mitigation of his own punishment does not disqualify him from testifying." Promises of assistance may affect the credibility of the witness; they do not render the witness incompetent.[76.4]

As a general proposition, the trial court has discretion in charging the jury, and the instructions will be held proper and non-prejudicial so long as that, considering them in their entirety, they accurately, properly, and fairly state the law as applied to the facts in the case. This discretion extends to refusal of requests and to cautionary instructions as well. For example, when testimony was offered against the defendant by an accomplice that had turned State's evidence, it was held proper and not prejudicial error for the court to refuse to give the following standardized jury instruction on accomplices:

"An accomplice witness is one who testifies that he was involved in the commission of the crime with which the defendant is charged. You should consider with caution testimony of an accomplice *if it is not supported by other evidence*," [emphasis supplied] and instead to give the following instruction relating to the credibility of witnesses in general and not specifically mentioning the need to corroborate accomplice testimony:

"It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use that knowledge and experience which you possess in common with men in general, in regard to the matter about which a witness has testified. You may take into account his ability and opportunity to observe and know the things about which he or she has testified, his memory, manner, and conduct while testifying, any interest he may have in the result of this trial, and the reasonableness of his testimony considered in the light of all the evidence in this case.

"If you find that any witness has willfully testified falsely concerning any material matter, you have a right to distrust the testimony of that witness in other matters, and you may reject all or part of the testimony of that witness, or you may give it such weight as you think it deserves. You should not reject any testimony without cause." [76.5]

"If any witness testifying has been impeached, then the jury may disregard his testimony, unless his testimony is corroborated by the testimony [which is] not so impeached." [76 6]

The refusal by the trial judge to give the following instruction offered by the defendant on accomplice credibility was not error if the correct general credibility instruction and the instruction about weighing evidence were given.

An accomplice who turns State's evidence and agrees to cooperate with the State in consideration of leniency or the dismissal of charges, to be realistic, is being bribed regardless of the fact that public policy has proved such action in the interest of effective law enforcement and, therefore, such accomplice's testimony, though not necessarily false, is highly suspect. Such testimony by an accomplice should be highly scrutinized by the jury.

The appellate court, in noting that the wording of the above instruction was similar to language used by the appellate court in another decision, stated: "The mere fact that certain language or expression are used in the opinions of this Court to reach its final conclusion does not make it proper language for instructions to a jury." [77 1]

[57.1] **Kansas.** State v. McLaughlin, 207 Kan 584, 485 P2d 1352 (1971).

[57.2] **Arizona.** State v. Bussdieker, 621 P2d 26 (Ariz 1980).

[57.3] **Utah.** Utah v. Hallett, 619 P2d 335 (Utah 1980).

[58.1] **South Dakota.** State v. Klueber, 81 SD 223, 132 NW2d 847 (1965).

[64.1] **Missouri.** State v. Davis, 608 SW2d 437 (MoApp 1981).

[74.1] **Illinois.** People v. Heard, 48 Ill2d 356, 270 NE2d 18 (1971).

[74.2] **Colorado.** People v. Kelderman, 618 P2d 723 (ColoApp 1980).

[74.3] **Connecticut.** State v. Turcio, 422 A2d 749 (Conn 1980).

[76.1] **Alabama.** Buckelew v. State, 48 AlaApp 411, 265 S2d 195 (1972).

[76.2] **Georgia.** Pass v. State, 227 Ga 730, 182 SE2d 779 (1971).

[76.3] **North Carolina.** State v. Abernathy, 295 NC 244, 244 SE2d 373 (1978).

[76.4] **North Carolina.** State v. Edwards, 37 NCApp 47, 245 SE2d 527 (1978).

[76.5] **Kansas.** State v. Ferguson, 288 Kan 522, 618 P2d 1186 (1980).

[76.6] **Alabama.** Stockord v. State, 391 S2d 1060 (Ala 1980).

[77.1] **Indiana.** Spence v. State, 429 NE2d 214 (Ind 1981).

§ 42. Cautionary instructions.

It was not reversible error for the court, upon discovering the presence of an alternate juror during the beginning of deliberations, to caution the jury to disregard any comments made by the alternate juror during the time that she had been with the deliberating jury. Further, the jury was instructed "that you should not be in any way influenced by her presence or anything that she might have said or done while she's been out in the jury room with you as a juror after you began your deliberations . . . I will instruct you to return to the jury room and continue your deliberations and entirely disregard and remove from your minds insofar as humanly possible any actions, conduct, deliberations or any part whatever that the alternate juror has played in your presence or in the deliberation of the case up to this point, and you can return to the jury room for your final deliberations in the case." [83.1]

This court has previously held that there is no requirement of our law that a trial judge warn the jury against the possible dangers of mistaken identification of an accused as the person committing a crime.[84.1]

It is not improper and not reversible error for a trial court judge to comment on the credibility of a witness when the charge to the jury, taken as a whole,

reveals no prejudice to the parties, and the jury is told that it was within its sole province to resolve any issues of credibility. For example, it was not error for the court to state in its charge to the jury that the court felt that the victim "testified fairly and truthfully" because the court also stated that "[b]ut that's for you to determine ... [Y]ou may be impressed by it [but it's] for you to determine." Prejudice cannot be based on reading isolated excerpts from the charges which must be taken as a whole. [84 2]

Although it is improper for counsel to comment on the credibility of a witness from personal knowledge or from evidence not on the record, it is within the sound discretion of the trial judge to determine whether the comments were so prejudicial as to require a mistrial or whether the prejudice could be cured by a cautionary instruction to the jury to disregard the comment or statement. However, if the statement is a flagrant one, it requires a mistrial.[84 3]

It is not error for a trial court judge to refuse to give a cautionary instruction as to the character of a witness where it is shown that the witness was not an accomplice of the defendant, was fully cross-examined by the attorney for the defendant, and the trial court judge gave a general instruction on the credibility of witnesses and informed them that they had a duty to weigh the testimony in light of the factors contained in the instruction.[84.4]

The court did not give a limiting instruction cautioning the jury not to consider the evidence of the bribery as sufficient to convict the defendant of sexual assault. The instruction would have been appropriate but since the judge was not requested to give it there was no error.[84.5]

Appellant first contends that the trial court committed prejudicial error in failing to instruct *sua sponte* that evidence of a defendant's non-tape recorded admissions must be viewed with caution. The rule is firmly established that such an instruction, when called for by the evidence, must be given, even without a request therefor.... An admission is "any statement by an accused relative to the offense charged." [85 1]

For example, during the defendant's trial for assault and battery and rape the defendant assaulted the court reporter with a pair of scissors. At a later trial for the dangerous assault charge against the reporter, the following testimony was taken from a juror who was present at the previous trial:

"Q Do you recall where you were on that date in your juror duties, where you were located in the court building?

"A Yes, I was in the fifth seat from the back row.

"Q Do you recall where that courtroom was?

"A Yes. It was on this wing on the far side.

"Q At that time in your juror duties, could you tell us what type of proceedings you were involved in?

"A There was a rape case, assault and battery."

The court properly ordered the testimony stricken from the record and instructed the jury to disregard the juror's comment "with regard to what the charges were on the crimes that were involved in the previous trial." [85.2]

Ladies and gentlemen of the jury, you are instructed that you should not consider as evidence any statement of counsel made during this trial, nor any document upon the counsel table unless such statement was made as an admission or stipulation conceding the existence of a fact or facts or such document or documents have been introduced into evidence.[87.1]

It is reversible error for a trial court judge not to give a cautionary instruction when counsel was engaged in a "golden rule argument." [87 2]

Although it is improper for counsel to comment on the credibility of a witness from personal knowledge or from evidence not on the record, it is within the sound discretion of the trial judge to determine whether the comments were so prejudicial as to require a mistrial or whether the prejudice could be cured by a cautionary instruction to the jury to disregard the comment or statement. However, if the statement is a flagrant one, it requires a mistrial.[87 3]

Now, there is some danger inherent in a layman's consideration of a presumption. The existence of a presumption does not relieve the Commonwealth of its primary duty of proving the defendant's guilt, in all grades and degrees of the crime and in respect to each and every component element, including malice, beyond a reasonable doubt. The presumption of malice does not arise until the Commonwealth has made out a prima facie case of felonious homicide, which is the killing of a human creature without justification or excuse of any kind.[88.1]

The following has been held ineffective for its purpose:

Ladies and gentlemen of the jury, in answer to a question the witness made a voluntary statement with reference to what Mr. Brockett said, I want to instruct you to bear in mind what I have already told you. There is no evidence in the case of any insurance, none has been admitted, and you will not consider, discuss, nor speculate whether or not any party is or is not protected in whole or in part by insurance of any kind in this case, unless evidence of insurance is admitted; and none has been admitted up to this time, therefore you will please bear in mind not to consider this matter of insurance. It has nothing to do with the case under the instructions I have given you.[92 1]

Although it is improper for counsel to comment on the credibility of a witness from personal knowledge or from evidence not on the record, it is within the sound discretion of the trial judge to determine whether the comments were so prejudicial as to require a mistrial or whether the prejudice could be cured by a cautionary instruction to the jury to disregard the comment or statement. However, if the statement is a flagrant one, it requires a mistrial.[92.2]

Finally, defendant claims that the trial court should have, *sua sponte,* instructed the jury to disregard the restraints. "In those instances when visible restraints must be imposed the court shall instruct the jury *sua sponte* that such restraints should have no bearing on the determination of the defendant's guilt. However, when the restraints are concealed from the jury's view, this instruction should not be given unless requested by defendant since it might invite initial attention to the restraints and thus create prejudice which would otherwise be avoided." [97 1]

The defendant moved for a mistrial on the grounds that during a recess the jurors saw the defendant while he was shackled in the hallway. When the incident was called to the attention of the trial judge he had each of the jurors brought before him individually and questioned them regarding what they saw. Six of the jurors stated they did not see the defendant in the hallway and five of the jurors stated they saw the defendant but noticed nothing unusual about him. One of the jurors testified he saw the defendant handcuffed but he considered that to be ordinary procedure. The trial judge instructed him to assign no inference of guilt or fault to the defendant, to be governed by the

evidence as heard in the courtroom and to draw no inference adverse to the defendant by virtue of the fact.

In view of the circumstances of this case and the cautionary instructions given by the trial judge, we find no violation of the rule as set forth in *Allen v. State*. . . .[97.2]

Under Connecticut law, Conn. Gen. Stats § 54-84(b) makes it mandatory upon the trial court judge to charge the jury, unless requested otherwise by the defendant, that they, as jurors, can draw no unfavorable inference against a defendant who exercises his constitutional right not to take the stand and to testify in his own behalf. The court has no discretionary power in this matter, and it is reversible error if the trial court judge fails to caution the jury by failing to give an unfavorable inference charge.[97.3]

Members of the Jury: since this Jury was selected, there has been a great deal of publicity, and I must now determine if there is anything you have read, seen or heard that would in your honest opinion prevent you from being a fair and impartial juror to both parties. Both parties simply want to start even. If you have an opinion on any matter material to this case that would require evidence to remove said opinion, then you would not be a suitable juror. On the other hand, if you can set aside anything you have heard and decide this case now solely on the evidence you will hear in this court room, then you are a suitable juror. Now, with that definition, are there any jurors in the box who feel they would be unsuitable to sit as fair and impartial jurors to both parties? (No response.) Likewise, are there any jurors who have been contacted by any one regarding this case since the time of your selection? (No response.) THE COURT: You may proceed.[99.1]

The "Allen" charge is permissible in this circuit, under proper circumstances as long as it makes clear to the jury that each member has a duty conscientiously to adhere to his own honest opinion and it avoids creating the impression that there is anything improper, questionable, or contrary to good conscience for a juror to create a mistrial.[5 1]

The following instructions could not be condemned by the court since they did not amount to an "Allen" charge:

"It is the duty of each juryman, while the jury is deliberating upon their verdict, to give careful consideration to the views his fellow-jurymen may have to present upon the testimony in the case. He should not shut his ears and stubbornly stand upon the position he first takes, regardless of what may be said by the other jurymen. It should be the object of all of you to arrive at a common conclusion and to that end you should deliberate together with calmness. It is your duty to arrive upon a verdict, if that is possible.

"You are instructed, however, that if any one of the jury after having considered all the evidence in this case, and after having consulted with his fellow-jurymen, should entertain a reasonable doubt of the defendant's guilt, then the jury cannot find the defendant guilty."

. . .

"I believe it is my duty to remind you that this trial has, as a matter of course, been attended with large expense to the parties, and that you should make every effort to agree. To aid you in the consideration in the case, I instruct you that although the verdict to which a juror agrees must, of course, be his own

verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellow jurors, yet in order to bring twelve minds to a unanimous result, you must examine the question submitted to you with candor and with a proper regard and deference to the opinions of each other. You should consider that at some time the case must be decided; that you are selected in the same manner and from the same source from which any future jury must be selected; and there is no reason to suppose that this case will ever be submitted to twelve men and women more intelligent, more impartial, or more competent to decide it; or that more and clearer evidence will be produced on the one side or the other, and with this in view, it is your duty to decide the case, if you can conscientiously do so." [7 1]

The so-called "Allen" charge (*Allen v. United States,* 174 U.S. 492) amounted to nothing more than the obvious statement of the desirability of the jury's agreeing if they could do so without surrendering any juror's conscientious convictions, without violating their individual judgments and conscience; that another jury would have no more information and be no more competent than this jury; that jurors should not approach their deliberations with a closed mind. This is not substantially different from the standard charge as to the jury's duty to try to arrive at a verdict without sacrificing their conscientious views and to approach their deliberations with an open mind.[7 2]

It is not necessary that the following be given in one instruction but may be given in several so long as the jury is made aware and clearly advised that all the law is not so embodied in one instruction and that they must be applied as a whole to the evidence in the case.

"Not by these instructions, nor by any ruling made, or any act done, or word said during the trial, intimated or meant to give any intimation or opinion as to what the proof is or what it is not, or what the facts are or what are not facts in the case, or what your verdict should be.

"You are the sole judges of the credibility of the witnesses and of the weight and value of their testimony." [12.1]

The giving of cautionary instruction is largely within the discretion of the trial judge.[14.1]

It is within the judge's discretion whether to caution the jury that they should decide regardless of defendant's race.[14 2]

"Now, in this particular case, the defendant did not take the stand. By doing so, the court must charge you at this time that by not taking the stand and testifying in this case, the accused has exercised his constitutional right because, as I told you before, it is the burden of the state to prove him guilty beyond a reasonable doubt. He does not have to prove that he did not commit this offense with which he stands charged." [14.3]

The law of this state provides that a witness may be interrogated as to his previous conviction of a felony, and evidence of this character is competent as bearing upon the credibility of such witness. The defendant has taken the stand as a witness and it appears without conflict that he has been convicted of a felony. All of the evidence with reference to the previous conviction of a felony should be considered by you only for the purpose of determining the credibility of the witness, and this should be considered by you for no other purpose.[14 4]

The following not erroneous:

Although there is more than one defendant in this action, it does not follow from that alone that if one is liable, both are liable. Each is entitled to a fair consideration of his own defense and is not to be prejudiced by the fact, if it should become a fact, that you find against the other. The instructions cover the case as to each defendant insofar as they are applicable to him, to the same extent as if he were the only defendant in the action and regardless of whether reference is made to the defendant or defendants in singular or plural form, you will decide each defendant's case separately as if each were a separate lawsuit.[14 5]

Error is assigned on the failure to give the requested instruction that "the defendant is entitled to an absolutely fair and impartial trial in this court regardless of his color." The defendant's race, or color, was not a proper matter for comment by the trial judge, and there is no merit in the contention that the judge should have given this requested instruction.[14 6]

The failure to renew a request for an instruction on the limited use of evidence of similar bad acts at the time jury is instructed waives any error.[14.7]

I would like to also at this stage, caution the jury that remarks made by counsel on either side of the case, including their summation of the case, do not constitute evidence in the case, and remarks made by the court do not constitute evidence in the case.

The evidence in the case comes from the witness stand by persons who have testified before you.[14.8]

A trial court judge properly refused to give the following cautionary instruction because it constituted an improper comment by the court on the evidence and usurped the function of the jury:

"An accomplice is a person who helped commit a crime, or advised or encouraged a person to commit a crime. You must determine whether any witness in this case is an accomplice.

"The evidence of an accomplice *should be received with great caution."*

"*The testimony of an accomplice ought to be viewed with distrust.* This does not mean that you may arbitrarily disregard such testimony, but you should give to it the weight to which you find it to be entitled after examining it with *care and caution* and in the light of all the evidence in the case." [14.9]

Once the trial judge deems tapes or transcripts to be admissible into evidence, and such admission occurs, the trial judge should instruct the jury that they are the final arbiters of the evidence's accuracy and reliability. The judge should also instruct the jury that if they decide there is any difference between the tapes and the transcripts, they must rely on the tapes. This instruction minimizes the possibility that the jury will not use their independent judgment and therefore rely too heavily on the importance of the transcripts when making their decision.

Although such a cautionary instruction was not given by the trial judge in this case, on appeal such an omission was not held reversible error due to the particular facts of the case.[14.10]

[83.1] **Georgia.** Duncan v. State, 271 SE2d 878 (GaApp 1980).

[84.1] **Georgia.** Young v. State, 226 Ga 553, 176 SE2d 52 (1970).

[84.2] **Pennsylvania.** Commonwealth v. Whiting, 420 A2d 662 (PaSuper 1980).
[84.3] **Pennsylvania.** Quinlan v. Brown, 419 A2d 1274 (PaSuper 1980).
[84.4] **Nevada.** Potter v. State, 619 P2d 1222 (Nev 1980).
[84.5] **Wisconsin.** State v. Bettinger, 303 NW2d 585 (Wisc 1981).
[85.1] **California.** People v. Palmer, 80 CalApp3d 239, 145 CalRptr 466 (1978).
[85.2] **Arizona.** State v. Mullalley, 127 Ariz 92, 618 P2d 586 (1980).
[87.1] **California.** Richardson v. Employers Liability Assur. Co., 25 CalApp3d 232, 102 CalRptr 547 (1972).
[87.2] **Delaware.** Massey-Ferguson Inc. v. Wells, 421 A2d 1320 (Del 1980).
[87.3] **Delaware.** Joseph v. Monroe, 419 A2d 927 (Del 1980).
[88.1] **Pennsylvania.** Commonwealth v. Brown, 438 Pa 52, 265 A2d 101 (1970).
[92.1] **Texas.** Brockett v. Tice (TexCivApp), 445 SW2d 20 (1969).
[92.2] **Delaware.** Joseph v. Monroe, 419 A2d 927 (Del 1980).
[97.1] **California.** People v. Zatko, 80 CalApp3d 534, 145 CalRptr 643 (1978).
[97.2] **Georgia.** Cowans v. State, 145 GaApp 693, 244 SE2d 624 (1978).
[97.3] **Connecticut.** State v. Anonymous, 36 ConnSupp 583, 421 A2d 872 (1980).
[99.1] **Washington.** Myers v Harter, 76 Wash2d 772, 459 P2d 25 (1969).
[5.1] **Federal.** Posey v United States, 416 F2d 545 (1969).
[7.1] **Wyoming.** Alcala v. State (Wyo), 487 P2d 448 (1971).
[7.2] **New York.** People v. Jackson, 68 AD2d 636, 418 NYS2d 31 (1979).
[12.1] **Iowa.** State v. Estrella, 257 Ia 462, 133 NW2d 97 (1965).
[14.1] **Missouri.** Baccalo v. Nicolosi (Mo), 332 SW2d 854 (1960).
[14.2] **Iowa.** State v. Shephard, 255 Ia 1218, 124 NW2d 712 (1963).
[14.3] **Connecticut.** State v. Powers, 4 ConnCir 520, 236 A2d 354 (1967).
[14.4] **Iowa.** State v. Schatterman (Ia), 171 NW2d 890 (1969).
[14.5] **Illinois.** Bebb v. Yellow Cab Co., 120 IllApp2d 454, 257 NE2d 164 (1970).
[14.6] **Georgia.** Young v. State, 226 Ga. 553, 176 SE2d 52 (1970).
[14.7] **Michigan.** People v. Valoppi, 61 MichApp 470, 233 NW2d 41 (1975).
[14.8] **Michigan.** People v. Styles, 61 MichApp 532, 233 NW2d 70 (1975).
[14.9] **Arizona.** State v. Bussdieker, 621 P2d 26 (Ariz 1980).
[14.10] **Rhode Island.** State v. Ahmadjian, 438 A2d 1070 (RI 1981).

§ 42A. Urging hung jury to redeliberate: "The dynamite charge."

Ladies and gentlemen of the jury, now on the trial of this case, what I have to say to you should in no way influence your decision, either for or against the Commonwealth, or for or against the defendant, but merely point out to you that this trial is expensive, both upon the Commonwealth and the defendant. You twelve people have been chosen to decide this issue, and I know of no better qualified people to make the decision. You realize that this issue must be decided by someone, either now or in the future, perhaps by further deliberation you could re-evaluate your decision and opinion in this case, and also consider the opinion and position of the other jurors. With this in mind, I am now re-submitting this case to you to see if you can reach a verdict. The admonition that I gave you last night is now withdrawn. You can take the instructions and retire to the jury room and see if you can reach a verdict.[14.10]

"I will say this to you . . . I don't want to say anything that might coerce or unduly influence you. . . . [Y]ou are just as qualified as any jury ever will be in Gordon County to make a verdict in this case. . . . I would say that no juror is required to surrender his honest and sincere convictions in any case, but I will let you go back and see if you can make a verdict." (The vote was 10 to 2 and the judge stated also:) "The ten should strive to see it in the light of the two and the two should strive to see it in the light of the ten and make an honest and conscientious effort to reach a verdict. I would say that no juror is required to surrender his honest and sincere convictions in any case."[14.11]

Material that describes or represents sex in various forms is not obscene if its social or literary values or importance outweighs the prurient or the

offensive aspects of it. If the quality of the material has a significant and overbearing social or literary value it may not be found to be obscene merely because it offends community standards or appeals to prurient interests.[14.12]

Note: The above instruction was found to be a sensible analysis based on standards set forth in *Roth v. United States,* 354 U.S. 476, 1 L. Ed. 2d 1498, 77 Sup. Ct. 1304 (1957).

Members of the jury, since we have not heard from you, I assume that you have not yet agreed on your verdict. I presume that you ladies and gentlemen realize what a disagreement means. It means, of course, that another three or four days or more of the time of the Court will have to be consumed in the trial of this action again.

I do not want to force you or coerce you in any way to reach a verdict, but it is your duty to try to reconcile your differences and reach a verdict if it can be done without any surrender of one's conscientious convictions.

You have heard the evidence in this case. A mistrial, of course, would mean another jury would have to be selected to hear the case and the evidence all over again at great costs and expense to our state and your county.

Now, I recognize the fact that there are sometimes reasons why jurors cannot agree, and I want to emphasize the fact that it is your duty to do whatever you can to reason the matter out, if you can, as reasonable men and women, and to reconcile your differences if such is possible without the surrender of conscientious convictions, and to reach a verdict.

With that admonition, I will ask you to please go back and see if you can agree on your verdict in this case. You may continue for deliberations.[14.13]

I was at this point going to call you all out to talk to you. And I would like to say that I know that there has been an awful lot of work put in this case both by the prosecution and by the defense. And I feel that you as jurors are just as capable of deciding this case as the next jury that might hear this case.

So I'm asking you in all sincerity, I'm not trying to pressure you or coerce you in any way to please listen to each other, talk about it, and please try and come to a verdict. If you can't you can't. But please try.[14.14]

As you all know, the purpose of a trial is a search for the truth.

Therefore, if it is at all possible, it is desirable that a jury should reach a verdict, one way or the other.

I am not suggesting that you should agree on a verdict that you do not consider to be a just verdict, but I am suggesting that you attempt to resolve your differences and agree on a proper verdict that is in accordance with your findings of fact and the law as I have explained it to you. . . .

Now I ask you to go back into the jury room and once again review the evidence.

Go over the testimony of each witness sensibly, weigh it very carefully. Discuss it calmly, dispassionately. Listen to the view and arguments of your fellow jurors. This is what I mean by deliberations. . . .

Being under oath you must continue; or you are under oath to deliberate in this court until there are no further deliberations warranted in this case.

That does not mean that every decision must be made by you.

It does not mean that a verdict must be reached.

But it does mean that every effort should be made by you consistent with your conclusions to arrive at a verdict. . . .

If you are unable to reach a verdict by 6:45 P.M., I am going to tell you what I will do.

I am going to send you out to dinner and then to a hotel at 6:45 P.M., because there is no point in coming back here from dinner. It will be late at night.

Tomorrow morning your minds will be free and fresh. You can deliberate some more then. This is a serious case. A verdict should be reached, one way or the other. . . .

I am going to ask you to go back in there now and work until 6:45 P.M.

If there is no verdict reached one way or the other, I am sending you out to dinner and out to a hotel, and you will leave the building until tomorrow morning, when you will come back here and go back to the jury room, and once again see if you can come to a verdict one way or the other.[14.15]

Your verdict here must represent the considered judgment of each juror. In order to return a verdict, it is necessary for each juror to agree thereto. Your verdict must be unanimous. It is your duty as jurors to consult with each other and to deliberate with a view to reaching a verdict if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after impartial consideration of the evidence with your fellow jurors.

In the course of your deliberations do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous, but do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict. You are not partisans, you are judges, judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

So, with that in mind, I want you to go back and I will see in a while longer if you are any closer to a verdict.

You may go back and continue your deliberations at this time.[14.16]

The following instruction was *not* an improper "dynamite charge":

"Now, the court instructs you that a verdict is not a verdict unless and until all twelve jurors agree unanimously as to what your decision shall be; that is, all twelve minds agree on a verdict of guilty or not guilty." [14.17]

[14.10] **Kentucky.** Brannon v. Commonwealth (Ky), 400 SW2d 680 (1966).

[14.11] **Georgia.** American Family Life Assur. Co. v. Welch, 120 Ga 334, 170 SE2d 703 (1969).

[14.12] **Wisconsin.** Court v. State, 51 Wis2d 683, 188 NW2d 475 (1971).

[14.13] **North Carolina.** State v. Williams, 288 NC 680, 220 SE2d 558 (1975).

[14.14] **Michigan.** People v. Lovett, 63 MichApp 657, 234 NW2d 749 (1975).

[14.15] **New York.** People v. Sharff, 45 AppDiv2d 666, 360 NYS2d 671 (1974).

[14.16] **Illinois.** People v. Allen, 47 IllApp3d 900, 8 IllDec 222, 365 NE2d 460 (1977).

[14.17] **North Carolina.** State v. Ward, 272 SE2d 84 (NC 1980).

§ 43. Cautioning individual jurors.

"A trial court may properly discharge its responsibility to avoid mistrials by encouraging jurors to adhere to their oaths and make one final effort to review the evidence and reach a verdict one way or the other. . . .

"Here, although the approach of the Trial Judge may not have been ideal, in essence he simply asked the jurors to exert their best efforts and renew deliberations. No jurors were impermissibly singled out for noncompliance with the majority. None were improperly threatened, nor was it even suggested that the

jury would be forced to continue deliberations indefinitely without any outside communication should agreement still elude them following a renewal of their efforts to reach a verdict." [15 1]

If your recollection of the testimony is different from what somebody says, then you take your own recollection, yours as determined from the evidence.[17.1]

[15.1] **New York.** People v. Jackson, 68 AD2d 636, 418 NYS2d 31 (1979).

[17.1] **North Carolina.** State v. Rennick, 8 NCApp 270, 174 SE2d 122 (1970).

§ 45. Coercing jury to reach agreement.

The trial judge, upon being informed that the jury was deadlocked, called in the jury foreman and inquired of him whether or not the jury desired further instruction. The foreman retired to the jury room to make inquiry of his fellow jurors, and he returned to the courtroom and reported, "all feel that they could come to a verdict if they had some more" instruction. The entire jury then came to the courtroom and asked for re-charge, specifically, on the word "knowingly." The judge gave the re-charge, and a juror expressed lingering doubt about the meaning of the word. After he informed that juror that Mosley could not be convicted unless he knowingly obstructed justice, the judge asked if there were further instruction he could offer and the juror responded negatively. The judge also instructed the jury, at the time of the re-charge, that his business was not to interfere in their deliberations, but only to offer instructional assistance, and that it was their province alone to determine guilt or innocence. Mosley's counsel was present for all of this judicial communication with the jury. Contrary to Mosley's allegations, the trial judge's handling of the re-charge was not coercive of any individual juror, nor was it an interference with jury deliberations. Also, "[w]here the jury, after having been charged by the court, returns into court and requests an instruction upon a specific question, it is not error for the judge to confine his instruction to the specific point suggested by the jury's inquiry." [36 1]

The judge's statement that the case was not a difficult one that would not be a problem at home or in the barbershop, and that the jury could decide in five minutes, was not objected to by the defendant at trial and did not amount to coercion of the jury indicating they should convict. The statement was an effort by the court to encourage the jury to arrive at a verdict by pointing out that there was nothing esoteric about the case or the jury's task; that even in the unfamiliar environment of a courtroom all the jury had to do was to use their common sense and resolve a question of credibility. Since there was only one issue, that of credibility, and the judge conscientiously answered some 25 questions asked by the jury during seven hours of deliberation after the judge's statement, the judgment is affirmed.[36.2]

"Convictions entered on the jury's verdict will not be set aside because, on reflection in tranquility, better charges could have been composed." [36.3]

The following instructions could not be condemned by the court since they did not amount to an "Allen" charge:

"It is the duty of each juryman, while the jury is deliberating upon their verdict, to give careful consideration to the views his fellow-jurymen may have to present upon the testimony in the case. He should not shut his ears and stubbornly stand upon the position he first takes, regardless of what may be

said by the other jurymen. It should be the object of all of you to arrive at a common conclusion and to that end you should deliberate together with calmness. It is your duty to arrive upon a verdict, if that is possible.

"You are instructed, however, that if any one of the jury after having considered all the evidence in this case, and after having consulted with his fellow-jurymen, should entertain a reasonable doubt of the defendant's guilt, then the jury cannot find the defendant guilty."

. . .

"I believe it is my duty to remind you that this trial has, as a matter of course, been attended with large expense to the parties, and that you should make every effort to agree. To aid you in the consideration in the case, I instruct you that although the verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellow jurors, yet in order to bring twelve minds to a unanimous result, you must examine the question submitted to you with candor and with a proper regard and deference to the opinions of each other. You should consider that at some time the case must be decided; that you are selected in the same manner and from the same source from which any future jury must be selected; and there is no reason to suppose that this case will ever be submitted to twelve men and women more intelligent, more impartial, or more competent to decide it; or that more and clearer evidence will be produced on the one side or the other, and with this in view, it is your duty to decide the case, if you can conscientiously do so." [37.1]

The so-called "Allen" charge (*Allen v. United States*, 164 U.S. 492) amounted to nothing more than the obvious statement of the desirability of the jury's agreeing if they could do so without surrendering any juror's conscientious convictions, without violating their individual judgments and conscience; that another jury would have no more information and be no more competent than this jury; that jurors should not approach their deliberations with a closed mind. This is not substantially different from the standard charge as to the jury's duty to try to arrive at a verdict without sacrificing their conscientious views and to approach their deliberations with an open mind.[37.2]

The trial court's charge was not coercive:

"If this trial results in disagreement, another trial will have to ensue, with a consequent loss of time and money, both to the State, plaintiff and defendant.

"It takes time, it takes money to have these trials as you see right here in your pay alone. For jurors it costs more than two hundred dollars a day to run this Court, but that's not the important thing. The important thing is that we resolve this dispute between these people." [38 1]

"A trial court may properly discharge its responsibility to avoid mistrials by encouraging jurors to adhere to their oaths and make one final effort to review the evidence and reach a verdict one way or the other. . . .

"Here, although the approach of the Trial Judge may not have been ideal, in essence he simply asked the jurors to exert their best efforts and renew deliberations. No jurors were impermissibly singled out for noncompliance with the majority. None were improperly threatened, nor was it even suggested that the jury would be forced to continue deliberations indefinitely without any outside communication should agreement still elude them following a renewal of their efforts to reach a verdict." [38 2]

The following supplemental charge was proper as long as there was no evidence that it was given in a threatening or coercive manner:

"All right. You know if y'all don't reach a verdict then first I want to remind you that it's costly to the Defendant, to the State, the Court and of course, all parties. If y'all don't reach a verdict it means that in another month or two another jury is going to have to hear substantially the same evidence and be faced with the same problem of reaching a verdict. So, you are as capable of reaching that verdict as any jury. And I want to ask you to continue your deliberations, try to get together, and reach a verdict based upon the evidence in this case." [38.3]

The following comments to the jury were held proper:

"Ladies and gentlemen, we are going to let you retire to the jury room over on your front right and consider your verdict. Some time later in the afternoon if you do not reach a verdict, then we will let you go to the motel for the night. If you do reach a verdict, of course, we will discharge you until tomorrow. But do not let that affect your judgment one way or the other in the case. Give it full consideration and take such action as you think is proper according to the instructions and the evidence in the case. You can retire now." [38.4]

The following instruction by the trial court was not coercion because the jurors were not misled into thinking that they must reach a verdict by giving up their own personal opinions on the guilt or innocence of the defendant:

"Your verdict has to be unanimous, all twelve of you have to agree on a verdict of guilty or not guilty. That does not mean that you cannot have your own opinion. Discuss your opinion amongst yourselves and try to resolve those opinions if there is a difference of opinion. If there is not then no resolution is necessary." [40.1]

It is error to admonish the jury as follows:

"Well, of course, I recognize and appreciate the fact that you have been out now for better than 15 hours, but in justice to all the parties, the State, and society, and the defendant, I feel, especially in view of the fact that the vote is now 11 to 1, that this case would be disposed of by your verdict, and it is certainly my earnest hope and, likewise my firm belief that this can be accomplished. And, especially, in view of the fact that the vote is 11 to 1, I just can't be convinced that there is no possibility of your agreeing. I certainly have every confidence in our jury system and I've got every confidence in you ladies and gentlemen as jurors in this case, and I am going to ask you again to retire to your jury room and I'm going to ask you to earnestly renew your efforts to come to a verdict in this case. And I will check with you later on again this afternoon. Thank you very much." [47.1]

It is error to admonish the jury as follows:

"Well, I don't want anybody to give up their honest convictions in this case, but it occurs [to me that] somebody is being a little unreasonable, stubborn. I don't see how any jurors — as intelligent as any jurors we could get — and it's a very expensive operation to hold these trials for a week at a time and the jury ought to be able to reach a conclusion based on the evidence and by a preponderance of the evidence. I mean on the evidence from the standpoint of a reasonable doubt. If there is a reasonable doubt you ought to acquit him. If there isn't a reasonable doubt, you ought to convict him. I'm going to let you go back and continue your deliberations. We're not going to declare a mistrial at this stage." [47.2]

Before it can be said that comments made by the trial court judge in instructing the jury are of such prejudicial nature as to require a mistrial, the remarks must be such that they impair the impartiality of the trial. Otherwise, the remarks will not be judicial misconduct.[47 3]

The following instruction was held to be erroneous as appearing to coerce the jury:

"This court expects a verdict in this case. It costs the taxpayers of this county a lot of money to try these cases and another trial would be doubly expensive. Most of the taxpayers make their money the hard way and so the taxpayers of this county expect a verdict, not an exhibition of obstinacy." [50 1]

The following instruction was held not to have coerced the jury to reach an agreement by setting a time limitation upon the jury:

"Now, ladies and gentlemen, the court suggests that you return to the jury room and elect a foreman or a forelady and start to deliberate in this case. If at 4:15 — it is now 3:23 — you have not reached a verdict, the Court will excuse you at that hour until Monday morning at 10:00 o'clock, at which time you will resume your deliberations if you do not reach a verdict today." [50.2]

The following held not to pressure a juror to surrender his independent judgment:

"I would like to say, members of the jury, consistent with my statement made earlier, I will not keep you here beyond 9:00 o'clock, except by your request. If you have not reached a verdict by approximately 9:00 o'clock, I will make inquiry and if you have not and do not want to stay longer, we will recess for the evening and come back tomorrow; . . . ." [50.3]

In this case, the jury was comprised of both women and men, both white and colored. When the jury was told by the court immediately prior to the giving of the "Allen" charge, supra, that it was important to reach a verdict if possible, and that the Court could see, "that you ladies and gentlemen receive lodging for the balance of the night, at some local hotel, in a group, and then you could return and deliberate tomorrow, or you folks continue your deliberations tonight." The instruction as given, if given under different circumstances, would not have been improper, but the giving thereof at the late hour of the night, and without a clearer explanation of how the jury could be kept together overnight at a hotel, we believe, and so hold, renders the instruction objectionable and prejudicial to the defendant's rights. Furthermore, one juror had admitted the jury couldn't agree, but that the jurors were still able to calmly and intelligently discuss the case, even after the long period of more than five hours.[50.4]

.I was at this point going to call you all out to talk to you. And I would like to say that I know that there has been an awful lot of work put in this case both by the prosecution and by the defense. And I feel that you as jurors are just as capable of deciding this case as the next jury that might hear this case.

So I'm asking you in all sincerity, I'm not trying to pressure you or coerce you in any way to please listen to each other, talk about it, and please try and come to a verdict. If you can't you can't. But please try.[50.5]

Members of the jury, since we have not heard from you, I assume that you have not yet agreed on your verdict. I presume that you ladies and gentlemen realize what a disagreement means. It means, of course, that another three or four days or more of the time of the court will have to be consumed in the trial of this action again.

I do not want to force you or coerce you in any way to reach a verdict, but it is your duty to try to reconcile your differences and reach a verdict if it can be done without any surrender of one's conscientious convictions.

You have heard the evidence in this case. A mistrial, of course, would mean another jury would have to be selected to hear the case and the evidence all over again at great cost and expense to our state and your county.

Now, I recognize the fact that there are sometimes reasons why jurors cannot agree, and I want to emphasize the fact that it is your duty to do whatever you can to reason the matter out, if you can, as reasonable men and women, and to reconcile your differences if such is possible without the surrender of conscientious convictions, and to reach a verdict.

With that admonition, I will ask you to please go back and see if you can agree on your verdict in this case. You may continue for deliberations.[50.6]

As you all know, the purpose of a trial is a search for the truth.

Therefore, if it is at all possible, it is desirable that a jury should reach a verdict, one way or the other.

I am not suggesting that you should agree on a verdict that you do not consider to be a just verdict, but I am suggesting that you attempt to resolve your differences and agree on a proper verdict that is in accordance with your findings of fact and the law as I have explained it to you. . . .

Now I ask you to go back into the jury room and once again review the evidence.

Go over the testimony of each witness sensibly, weigh it very carefully. Discuss it calmly, dispassionately. Listen to the view and arguments of your fellow jurors. This is what I mean by deliberations. . . .

Being under oath you must continue; or you are under oath to deliberate in this court until there are no further deliberations warranted in this case.

That does not mean that every decision must be made by you.

It does not mean that a verdict must be reached.

But it does mean that every effort should be made by you consistent with your conclusions to arrive at a verdict. . . .

If you are unable to reach a verdict by 6:45 P.M., I am going to tell you what I will do.

I am going to send you out to dinner and then to a hotel at 6:45 P.M., because there is no point in coming back here from dinner. It will be late at night.

Tomorrow morning your minds will be free and fresh. You can deliberate some more then. This is a serious case. A verdict should be reached, one way or the other. . . .

I am going to ask you to go back in there now and work until 6:45 P.M.

If there is no verdict reached one way or the other, I am sending you out to dinner and out to a hotel, and you will leave the building until tomorrow morning, when you will come back here and go back to the jury room, and once again see if you can come to a verdict one way or the other.[50.7]

[36.1] **Georgia.** Mosley v. State, 145 GaApp 651, 244 SE2d 610 (1978).

[36.2] **New York.** People v. Jackson, 68 AD2d 636, 418 NYS2d 31 (1979).

[36.3] **New York.** People v. Jackson, 68 AD2d 636, 418 NYS2d 31 (1979).

[37.1] **Wyoming.** Alcala v. State (Wyo), 487 P2d 448 (1971).

[37.2] **New York.** People v. Jackson, 68 AD2d 636, 418 NYS2d 31 (1979).

[38.1] **Rhode Island.** Bookbinder v. Rotondo, 109 RI 346, 285 A2d 387 (1972).

[38.2] **New York.** People v. Jackson, 68 AD2d 636, 418 NYS2d 31 (1979).
[38.3] **Alabama.** Lake v. State, 390 S2d 1088 (AlaCrimApp 1980).
[38.4] **Alabama.** Allred v. State, 390 S2d 1109 (AlaCrimApp 1980).
[40.1] **Pennsylvania.** Commonwealth v. Stevenson, 421 A2d 729 (PaSuper 1980).
[47.1] **Nebraska.** State v. Garza, 185 Neb 445, 176 NW2d 664 (1970).
[47.2] **Georgia.** Riggins v. State, 226 Ga 381, 174 SE2d 908 (1970).
[47.3] **Rhode Island.** State v. Rogers, 420 A2d 1363 (RI 1980).
[50.1] **Alabama.** Orr v. State, 40 AlaApp 45, 111 S2d 627 (1958), aff'd., 111 S2d 639. The Appellate Court opinion contains an invaluable collection of examples of coercive instructions.
[50.2] **District of Columbia.** Greenberg v. Giant Food Shopping Center, Inc. (DC App), 158 A2d 476 (1960). The jury returned its verdict at 4:10 p.m.
[50.3] **North Carolina.** State v. Macon, 6 NCApp 245, 170 SE2d 144 (1969).
[50.4] **Florida.** Lee v. State (FlaApp), 239 S2d 136 (1970).
[50.5] **Michigan.** People v. Lovett, 63 MichApp 657, 234 NW2d 749 (1975).
[50.6] **North Carolina.** State v. Williams, 288 NC 680, 220 SE2d 558 (1975).
[50.7] **New York.** People v. Sharff, 45 AppDiv2d 666, 360 NYS2d 671 (1974).

§ 45A. Proper inquiry by court of numerical division of jury.

. . . [T]o avoid future misunderstanding, it is suggested that a court should state the question, affirmatively, negatively, and illustratively, e.g.: "Tell me how you stand numerically — that is, whether you are 6 and 6, 8 to 4, etc., BUT DO NOT TELL ME WHETHER THAT NUMBER IS FOR GUILT OR INNOCENCE. Do you understand my question?" [50.8]

[50.8] **Georgia.** Wilson v. State, 145 GaApp 315, 244 SE2d 355 (1978).

§ 46. Private communications of the judge with the jury during their deliberations.

It is proper, and often necessary, that judges ask questions of witnesses which are designed to obtain a proper understanding and clarification of the witnesses' testimony.[51.1]

After the court had discharged the jury for the night, the jury remaining deadlocked, the trial judge assisted one of the jurors by transporting her to the hospital, where her elderly brother had been taken after he had suddenly become seriously ill. This juror later testified, under oath, that she and the judge had had no discussion whatsoever about the case at bar. The juror also testified that she had been quite distraught and that the judge decided to transport her himself because he believed he could get her to the hospital quicker than could a deputy sheriff, for whom she would have had to wait. While we cannot condone the action of the trial judge, which certainly provokes the appearance of impropriety, we find no abuse of discretion in his refusal to grant a mistrial. Furthermore, as the trial judge did not give testimony as a sworn witness and as the involved juror could and did testify as to the occasion of the judge's assisting her and therefore the judge's testimony as a witness was not likely to have been needed, the judge did not err in failing to disqualify himself. . . .[54.1]

Now, if during the course of this trial any question or any problem should arise which you should communicate to me or the attorneys, you are not to do that, but you are to take it up with the bailiff. And then the bailiff will in turn take it up with me, and I will take it up with counsel and see if we can resolve whatever your problem might conceivably be.

Now, in this case, as counsel has already pointed out to you, we are using a Spanish interpreter for the defendant.

Some of you speak Spanish. If you should disagree with the interpretation that you hear being given, for example, don't make any comment about it.

If you wish, you can tell the bailiff about it. And he will take it up with me, and we will resolve it.

But other than that, any other kind of problem which might come up, tell the bailiff about it. He is the liaison officer between you and the court.

We will then discuss it. I will discuss it and counsel will discuss it and see if we can resolve whatever the problem is.[55]

[51.1] **North Carolina.** State v. Rennick, 8 NCApp 270, 174 SE2d 122 (1970).

[54.1] **Georgia.** Mosley v State, 145 GaApp 315, 244 SE2d 610 (1978).

[55] **California.** People v. Silva, 139 CalRptr 1, — P2d — (1977).

CHAPTER 3

SUBJECT-MATTER

Section

50. Pertinency of instructions to issues and evidence.
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51. Recapitulation of testimony.
52. Theories of case in civil actions.
53. Theories of case in criminal prosecution.
54. Definition of terms in civil cases.
55. Definition of terms in criminal cases.
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Section

64. Circumstantial evidence in criminal cases.
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68. Credibility of witnesses — Interest of witnesses — Falsus in uno, falsus in omnibus.
69. Credibility of witnesses in criminal cases — Interest of witnesses — Falsus in uno, falsus in omnibus.
70. Failure of party to testify in his own behalf or call material witness.
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72. Alibi in criminal cases.
73. Instruction to disregard testimony erroneously received.
74. Argument of counsel.
75. Manner of arriving at verdict.

§ 50. Pertinency of instructions to issues and evidence.

The trial court judge does not abuse his discretion when he reads to the jury a statute, *e.g.*, restatement of torts, which contains all the elements of the act alleged. Further amplification focusing upon particular factual aspects of the case is unnecessary, and the trial court judge also is not obliged to read commentary to the statute as part of the instructions that he gives the jury. In addition, the trial court judge does not abuse his discretion if he decides to explain a particular statutory or restatement provision to the jury without using the exact language of the text.[1 1]

It appears well settled that instructions should contain remarks which address themselves to all elements of the crime; otherwise the instructions are incomplete and may be misleading to members of the jury.[27.1]

[1.1] **Maine.** Knight v. Penobscot Bay Medical Center, 420 A2d 915 (Me 1980).

[27.1] **Michigan.** People v. Price, 21 MichApp 694, 176 NW2d 426 (1970).

§ 50A. Restatement provisions read to jury.

The trial court judge does not abuse his discretion when he reads to the jury a statute, *e.g.*, restatement of torts, which contains all the elements of the act alleged. Further amplification focusing upon particular factual aspects of the case is unnecessary, and the trial court judge also is not obliged to read commentary to the statute as part of the instructions that he gives the jury. In addition, the trial court judge does not abuse his discretion if he decides to explain a particular statutory or restatement provision to the jury without using the exact language of the text.[31.1]

[31.1] **Maine.** Knight v. Penobscot Bay Medical Center, 420 A2d 915 (Me 1980).

§ 51. Recapitulation of testimony.

It is well settled in this jurisdiction that the trial court is not required to state the contentions of the parties, but when it undertakes to state the contentions of one party upon a particular phase of the case, it is incumbent upon the court to give the opposing contentions of the adverse party upon the same aspect; however, it is not required that the statement of such contentions be of equal length.[31.2]

The State says and contends that this is a clear cut case of a person being out on a highway late at night while highly intoxicated. The State says and contends that all the evidence tends to show that the defendant was drinking of alcohol on this occasion and that he did not appear to be under control of his mental or bodily faculties and that as a result he was driving in that condition on the highway and as a result of it he used profane and loud, boisterous language in front of two or more people in the presence of two or more people in a public place, in the police station on that night; and the State says and contends that he is guilty.[32.1]

[31.2] **North Carolina.** Comer v. Cain, 8 NCApp 670, 175 SE2d 337 (1970).

[32.1] **North Carolina.** State v. Rennick, 8 NCApp 270, 174 SE2d 122 (1970).

§ 52. Theories of case in civil actions.

A party is entitled to have his case submitted to the jury upon his theory of the case, but only when there exists substantial admissible evidence in support thereof.[41.1]

A party seeking ... an instruction on imminent peril must present a record containing some evidence that there was affirmative action or voluntary conduct on his part in an effort to avoid the danger, following the unexpected appearance of danger.[41.2]

Each party is entitled to an instruction on his particular theory of the case so long as there is evidence to support the theory.[41.3]

An instruction is proper which conveys to the jurors the correct principles of law applicable to the evidence submitted to them. A party to a lawsuit is entitled to instructions on its theory of the case when that theory is supported by the pleadings and evidence but, where no prejudice is shown, the refusal to give an instruction is not reversible error.[41.4]

Although the trial court judge, in his instruction to the jury on the doctrine of strict liability in tort, defined the term "unreasonably dangerous," the instruction is misleading because it was impossible for the jury to perform their fact-finding function when they were not given the definition of defective. For example, the following instruction deprived the plaintiff of the opportunity to present his theory of recovery before the jury:

"[T]his lawsuit [is based] upon a theory of law known as Manufacturer's Products Liability. . . . [T]he law [is that] . . . one who . . . supplies . . . a product in a defective condition which is unreasonably dangerous to the user . . . is strictly liable for all harm . . . [resulting from] the defect while the product is being used for its intended purpose.

"By being 'unreasonably dangerous' to the user, as that term is used above, means that the product must be shown to be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

"In summary of this instruction, you may find the defendant liable to the plaintiff in this lawsuit if you find from the evidence the following facts to exist:

1. That the defendant Nelson Sales Co., Inc., supplied the underwear which was ultimately worn by the plaintiff at the time of his accident and that such underwear contained a defect which made the product unreasonably dangerous to the user;

2. That such defect existed in the product at the time it left the defendant's control; and

3. That such product was the cause of damages to the plaintiff. In this connection, you are instructed that the mere possibility that it might have caused the injury is not enough."

In addition, the following instruction by the trial court was superfluous, misleading and defense-slanted:

"[T]he mere happening of an accident and injury raises no presumption of defectiveness in the garment involved in the accident, nor does it raise a presumption of the breach by a defendant of its obligations under the theory of Manufacturer's Products Liability." [48.1]

The trial judge is not required to tell the jury the contentions of the parties. But if he does give the contentions of one party, he must also do the same for the other party.[57.1]

[41.1] **California.** Atwood v. Villa, 25 CalApp3d 145, 101 CalRptr 508 (1972).

[41.2] **California.** Skoglie v. Crumley, 26 CalApp3d 294, 103 CalRptr 205 (1972).

[41.3] **California.** McGoldrick v. Porter Cable Tools, 34 CalApp3d 885, 110 CalRptr 481 (1973).

[41.4] **Illinois.** Goodrick v. Bassick Co., 58 IllApp3d 447, 16 IllDec 384, 374 NE2d 1262 (1978).

[48.1] **Oklahoma.** Spencer v. Nelson Sales Co., 620 P2d 477 (OklApp 1980).

[57.1] **North Carolina.** In re Wilson's Will, 258 NC 310, 128 SE2d 601 (1962).

§ 53. Theories of case in criminal prosecution.

A request to instruct on defendant's theory must be granted if the theory is supported by the evidence.[61.1]

When such an instruction [diminished capacity] is requested by the defendant, the trial judge's task is quite different from that required for *sua sponte*

instructions. By the defendant requesting the instruction, the court knows that the defendant is relying on that defense. Its inquiry then focuses on the sufficiency of such evidence. "It is well settled that if the defendant requests an instruction it must be given if there is any evidence on that issue deserving of any consideration whatsoever. . . ." Even where there is conflicting evidence on this issue, nevertheless the law requires that *"[h]owever incredible the testimony of a defendant may be he is entitled to an instruction based upon the hypothesis that it is entirely true."*[65.1]

The test of a charge is whether it is correct in law, adapted to the issues and evidence in the case, and sufficient to guide the jury in applying the law correctly to the facts. Although the degree to which reference to the evidence may be called for resides within the sound discretion of the court, the court nonetheless must make sure that the charge adequately instructs the jury on the elements of the offense charged.[65.2]

In instructing the jury on the elements of the offense of assault and battery, it is not plain error to omit the element of "apparent ability to inflict harm" in the charge. For example, it was held that the essence of the crime is an "unlawful touching," that it would be superfluous to require, in addition, proof of an "apparent ability to unlawfully touch," so that an instruction omitting a charge on "apparent ability" was plain error so as to require reversal even though the defendant failed to object to the instruction.[66 1]

As a general proposition, the trial court has discretion in charging the jury, and the instructions will be held proper and non-prejudicial so long as that, considering them in their entirety, they accurately, properly, and fairly state the law as applied to the facts in the case. This discretion extends to refusal of requests and to cautionary instructions as well. For example, when testimony was offered against the defendant by an accomplice that had turned State's evidence, it was held proper and not prejudicial error for the court to refuse to give the following standardized jury instruction on accomplices:

"An accomplice witness is one who testifies that he was involved in the commission of the crime with which the defendant is charged. You should consider with caution testimony of an accomplice *if it is not supported by other evidence,"* [emphasis supplied] and instead to give the following instruction relating to the credibility of witnesses in general and not specifically mentioning the need to corroborate accomplice testimony:

"It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use that knowledge and experience which you possess in common with men in general, in regard to the matter about which a witness has testified. You may take into account his ability and opportunity to observe and know the things about which he or she has testified, his memory, manner, and conduct while testifying, any interest he may have in the result of this trial, and the reasonableness of his testimony considered in the light of all the evidence in this case.

"If you find that any witness has willfully testified falsely concerning any material matter, you have a right to distrust the testimony of that witness in other matters, and you may reject all or part of the testimony of that witness, or you may give it such weight as you think it deserves. You should not reject any testimony without cause."[69 1]

Entrapment: Defendant contends that the failure of the trial court to give an entrapment instruction denied him a fair trial. He made no request for such an instruction, and that issue was not properly before the court. By way of holding the court said that ordinarily, entrapment requires the instigation of the criminal act by the police. In the instant case there was no evidence that the criminal act was instigated by the police, even though there was evidence of the use of an informer.[75.1]

Burden of proof. In prosecution of defendant for assault and battery upon a police officer, the testimony of defendant — that he grabbed officer's nightstick and struck officer to stop unjustified attack by police officer on defendant — entitled the defendant to a charge of self-defense, but the court committed prejudicial error when it failed to make it clear to the jurors that the defendant had no burden of proof on the issue of self-defense and that the defendant was entitled to an acquittal so long as there was any evidence to create reasonable doubt in their minds.[78.1]

[61.1] **Federal.** Perkins v. United States, 315 F2d 120 (1963).

[65.1] **California.** People v. Stevenson, 79 CalApp3d 976, 145 CalRptr 301 (1978).

[65.2] **Connecticut.** State v. Sumner, 178 Conn 163, 422 A2d 299 (1980).

[66.1] **Wyoming.** Settle v. State, 619 P2d 387 (Wyo 1980).

[69.1] **Kansas.** State v. Ferguson, 288 Kan 522, 618 P2d 1186 (1980).

[75.1] **Minnesota.** State v. Eliason, 279 Minn 70, 155 NW2d 465 (1968).

[78.1] **Utah.** State v Torres, 619 P2d 694 (Utah 1980).

§ 54. Definition of terms in civil cases.

The following instruction was given by the court simply as a definition of fraud; it was not intended to supplant the criteria necessary to prove fraud:

"You are instructed that actual fraud is defined as follows: When a party intentionally or by design misrepresents a material fact or produces a false impression in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage over him, there is a fraud." [79.1]

By the term ratified . . . is meant the approval by act, word, or conduct, with full knowledge of the facts, of the prior act, with the intention of giving validity to such prior act.[79.2]

In connection with Special Issues 8 through 18, inquiring as to the conduct of plaintiff, A. H. P., you are instructed that Article 1142, Penal Code of Texas, states in part as follows:

"Article 1142. *Lawful Violence.* Violence used to the person does not amount to an assault or battery in the following cases:

"4. In preventing or interrupting an intrusion upon the lawful possession of property."

You are further instructed that "in preventing or interrupting an intrusion upon the lawful possession of property" A. H. P. could use reasonable but not excessive force to effect the purposes of this Statute.

By the term, "negligence," as used in Special Issues 8, 10, 13 and 17, is meant that degree of care that an ordinarily prudent person in lawful possession of property would have exercised under the same or similar circumstances in carrying out the purposes of § 4, Article 1142, quoted above.[79.3]

The following was held not to constitute reversible error:

"That negligence on the part of the defendant, no matter how slight it may be, if it is a proximate cause of the accident, is sufficient to impose negligence and liability on the defendant. Negligence on the part of the plaintiff, no matter how slight, if it is a substantial factor in producing the plaintiff's injuries, is sufficient to bar the plaintiff from recovery."

. . .

I use the word "substantial" in connection with the definition of proximate cause, which I have already given to you and I would give it to you over again. When I say substantial, I mean that the negligence of either the defendant or the plaintiff must be a proximate cause of the injury, and an act or omission is a proximate cause of an injury if it was a substantial factor in bringing about the injury, that is, if it had such an effect in producing the injury that reasonable men would regard it as the cause of the injury.[82 1]

The following was held not to constitute reversible error:

"That negligence on the part of the defendant, no matter how slight it may be, if it is a proximate cause of the accident, is sufficient to impose negligence and liability on the defendant. Negligence on the part of the plaintiff, no matter how slight, if it is a substantial factor in producing the plaintiff's injuries, is sufficient to bar the plaintiff from recovery."

. . .

I use the word "substantial" in connection with the definition of proximate cause, which I have already given to you and I would give it to you over again. When I say substantial, I mean that the negligence of either the defendant or the plaintiff must be a proximate cause of the injury, and an act or omission is a proximate cause of an injury if it was a substantial factor in bringing about the injury, that is, if it had such an effect in producing the injury that reasonable men would regard it as the cause of the injury.[88 1]

The following was held not to constitute reversible error:

"That negligence on the part of the defendant, no matter how slight it may be, if it is a proximate cause of the accident, is sufficient to impose negligence and liability on the defendant. Negligence on the part of the plaintiff, no matter how slight, if it is a substantial factor in producing the plaintiff's injuries, is sufficient to bar the plaintiff from recovery."

. . .

I use the word "substantial" in connection with the definition of proximate cause, which I have already given to you and I would give it to you over again. When I say substantial, I mean that the negligence of either the defendant or the plaintiff must be a proximate cause of the injury, and an act or omission is a proximate cause of an injury if it was a substantial factor in bringing about the injury, that is, if it had such an effect in producing the injury that reasonable men would regard it as the cause of the injury.[4.1]

Under the influence of intoxicating liquor within the meaning of the ordinance [§ 21-6-9 of the Ordinances of the city of Toledo] can be defined as "that condition in which a person has consumed sufficient alcohol as to affect his nervous system, brain, or muscles to the extent as to impair to an appreciable degree his ability to operate a motor vehicle in the manner that an ordinary, prudent and cautious man in the full possession of his faculties would drive or operate a similar vehicle." [53 1]

The case record did not require instructions defining "Perilous Position" and "present value." [59 1]

The expressions "common enterprise" and "community of interest" as used in the definition of partnership, are ordinary words and need not be defined.[59 2]

Without a request, it is not error for a court not to define "proximate cause."[59.3]

It is not error to not define "public highway" and "private driveway" in the absence of specific requests.[59 4]

"Act of God" should be avoided. The phrase may cause jurors to believe they have the awesome task of deciding whether an act was caused by God or by man.[59 5]

You are further charged that the phrase "crew member" or "member of the crew" means someone who has a part in the operation of an airplane in its flight. Simply because the airplane of the type involved in this case is not required to have a crew member, this does not mean that it cannot have a crew member as I have defined that term to you.[59.6]

Now, let me tell you what constitutes "substantial performance." While it is difficult to state what the term "substantial performance" or "substantial compliance" as applied to building and construction contracts means, inasmuch as the term is a relative one, and the extent of the nonperformance must be viewed with relation to the full performance promised, it may be stated generally that there is substantial performance of such contract when all the essentials necessary to the full accomplishment of the purposes for which the thing contracted has been constructed or performed with such approximation to complete the performance that the owner obtains substantially what is called for by the contract.

Imperfections in the matters of detail which do not constitute a deviation from the general plan contemplated for the work, do not enter into the substance of a contract and may be compensated in damages; do not prevent the performance as being regarded as substantial performance.[59.7]

Where death occurs as a result of an unusual, unexpected or unforeseen event or events following an intentional act or acts, the death is accidental.

Where death occurs as the natural result of a voluntary act or acts and there is nothing unusual, unexpected or unforeseen which occurs, except the death, the death is not accidental.

An event or events is not unforeseen, unexpected or unusual, as those terms are used in these instructions, if the event or events would normally result from the intentional act or acts.[59.8]

[79.1] **Arizona.** Mobil Oil Co. v. Frisbie, 14 ArizApp 557, 485 P2d 280 (1971).

[79.2] **Texas.** Jamail v. Thomas (Tex CivApp), 481 SW2d 485 (1972).

[79.3] **Texas.** Denton v. Poole (Tex CivApp), 478 SW2d 834 (1972).

[82.1] **New York.** Schmoll v. Luther, 36 AppDiv2d 996, 320 NYS2d 975 (1971).

[88.1] **New York.** Schmoll v. Luther, 36 AppDiv2d 996, 320 NYS2d 975 (1971).

[4.1] **New York.** Schmoll v. Luther, 36 AppDiv2d 996, 320 NYS2d 975 (1971).

[53.1] **Ohio.** City of Toledo v. Starks, 25 OhApp2d 162, 54 OhO2d 339, 267 NE2d 824 (1971).

[59.1] **Texas.** Missouri-Kansas-Texas Ry. Co. v. Montgomery (TexCivApp), 323 SW2d 360 (1959).

[59.2] **Texas.** Cavazos v. Cavazos (TexCivApp), 339 SW2d 224 (1960).

[59.3] **Georgia.** Williams v. Vinson, 104 GaApp 886, 123 SE2d 281 (1961).

[59.4] **North Carolina.** C. C. T. Equipment Co. v. Hertz Corp., 256 NC 277, 123 SE2d 802 (1962).

[59.5] **Pennsylvania.** Goldberg v. R. Grier Miller & Sons, Inc., 408 Pa 1, 182 A2d 759 (1962). Judge Musmanno is at his best in writing this opinion, although a trifle wordy; it includes a short essay on fact, theology, and jurisprudence.

[59.6] **Tennessee.** Curtis v. American Cas. Co. of Reading, Pa , 60 TennApp 204, 445 SW2d 661 (1969).

[59.7] **Michigan.** Gordon v. Great Lakes Bowling Corp., 18 MichApp 358, 171 NW2d 225 (1969).

[59.8] **Washington.** Hayden v. Insurance Co. of North America, 5 Wash App 710, 490 P2d 454 (1971).

§ 55. Definition of terms in criminal cases.

Under indictment charging defendant with assault and interfering with an officer of the Immigration and Naturalization Service, it is enough that the trial court instructed the jury on the definition of assault, a term of art, as the other offenses alleged in the charge involved terms within the common understanding of a juror.[59 9]

In the second Count you must find that he conspired with M. or L. or at least one of them in order to be guilty of the conspiracy. The crime of conspiracy to manufacture is a misdemeanor. Conspiracy is a combination of two or more persons to accomplish a criminal or unlawful act or to do an unlawful act by criminal or unlawful means. Conspiracy is the unlawful combination, and no further overt act is required to constitute conspiracy.

. . .

In the crime of conspiracy, it, of course, requires a specific intent and necessarily involves at least two guilty parties, if you have three, you must find in addition to the Defendant one of the other two is also guilty and a required criminal intent must exist in the mind of the two or more parties to the conspiracy.[60.1]

All persons concerned in the commission of a crime, whether it is a felony or misdemeanor, and whether they directly commit the act constituting the offense or aid and abet in its commission, or not being present have advised and encouraged its commission, are principals in any crime so committed. All persons concerned in the commission of a crime, whether they directly commit the act constituting the offense or aid and abet in its commission, though not present, shall be prosecuted, tried and punished as principals.

. . . .

To constitute a crime, there must be a combination of an act forbidden by law and an intent to do the act. Intent may be inferred from the defendant's voluntary commission of an act forbidden by law, and it is not necessary to establish that the defendant knew his act was a violation of law.[69.1]

The trial judge instructed the jury, in pertinent part, as follows:

"Concerning the charges of murder in Counts I and II of the information, there are two sets of principles of law which may apply, depending on your findings of fact.

"The first is called the felony-murder doctrine which I will define for you and *which only applies if you find that there was a robbery or attempted robbery committed by the defendant.*

"The second set of principles contains all possible doctrines of law that can apply to a murder charge other than the felony-murder doctrine, and I will define these principles for you also.

"Now first, here is the felony-murder doctrine:

"The unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs as a result of the commission or attempt to commit the crime of robbery and where there was in the mind of the perpetrator the specific intent to commit such crime of robbery is murder of the first degree.

"The specific intent to commit robbery and the commission or attempt to commit such crime must be proved beyond a reasonable doubt.

"If you find that the defendant was intoxicated at the time of the alleged offense, you should consider his intoxication in determining whether the defendant had the specific intent to commit robbery." (Italics added.)

The court held that the trial judge correctly instructed on felony murder based on homicides directly resulting from the commission of armed robbery.[13 1]

In the crime charged, . . . there must exist a union or joint operation of act or conduct and criminal intent. To constitute criminal intent it is not necessary that there should exist an intent to violate the law. Where a person intentionally does that which the law declares to be a crime, he is acting with criminal intent, even though he may not know that his act or conduct is unlawful.[13.2]

It is not necessary to explain the meaning of "embezzlement" and "fraudulent misapplication" since their meanings are well understood.[15.1]

"Intent" is a word in common use and thus need not be defined.[15.2]

"Prima facie," should not be used; the charge should say that it is for jury to decide whether the state carried the burden of proof.[15 3]

"Prima facie case" should not be used unless found in an applicable statute.[15.4]

A dangerous weapon is a weapon which, either in its very nature or by reason of the use made of it in [the] case under consideration, is capable, when used against another, of serious bodily injury or even causing death.[15.5]

I charge you, ladies and gentlemen, that the prima facae (sic) evidence as just specified in the Statute, the legal definition is as follows: Prima facae evidence is evidence good and sufficient on its face, such evidence as in the judgment of the law is sufficient to establish a given fact or the group or chain of facts constituting the parties' claim or defense, and which if not rebutted or contradicted will remain sufficient. It is evidence which sufficed for the proof of a particular fact until contradicted and overcome by other evidence. Prima facae evidence is evidence, which standing alone and unexplained would maintain the proposition and warrant the conclusion to support which (sic) is introduced.

Ladies and gentlemen, it is incumbent upon the State to prove beyond a reasonable doubt all of the elements of this offense. The defendant is presumed innocent until proven guilty beyond and to the exclusion of every reasonable doubt.[15.6]

The court must be careful to avoid confusion concerning felony-murder and accomplice accountability. Accomplice accountability for the crime of murder is different from being guilty of the crime of felony murder. The difference is the requirement that a murder must be a forseeable consequence in accomplice accountability: with felony murder, death must be a consequence.

In this case, the judge took care to use the term "murder" and to avoid the term "death." He had previously carefully explained the definition of murder

and told the jury that murder was what they needed to find in fact had occurred and that murder was a reasonably forseeable consequence.[15.7]

The appellate court said the use of the terms "armed" and "unarmed" within the jury instruction was not accurate. Under the state statutory scheme, "aggravated robbery" and "nonagravated robbery" are the more appropriate terms. In this case, there was no error in the use of the terms since the evidence showed there would be no confusion.

An appropriate charging portion of an instruction for "nonaggravated" robbery would be:

"Nonaggravated robbery is defined as the unlawful taking and carrying away of money or goods from the person of another or in his presence, without force or violence but by putting the victim in fear of bodily injury and with intent to steal the property."

An appropriate charging portion of an instruction for "aggravated" robbery would be:

"Aggravated robbery is defined as the unlawful taking and carrying away of money or goods from the person of another, or in his presence, by the use of force or violence on the victim or through the use of a dangerous or deadly weapon or instrumentality, and with the intent to steal such property." [15.8]

[59.9] **Federal.** United States v. Varkonyi, 645 F2d 453 (5th Cir. 1981)

[60.1] **Maryland.** Mason v. State, 12 MdApp 655, 280 A2d 753 (1971).

[69.1] **Arizona.** State v. Beard, 107 Ariz 388, 489 P2d 25 (1971).

[13.1] **California.** People v. Burton, 6 Cal3d 375, 99 CalRptr 1, 491 P2d 793 (1971).

[13.2] **California.** People v. Daniels, 14 Cal3d 857, 537 P2d 1232, 122 Cal Rptr 872 (1975).

[15.1] **Texas.** Seay v. State, 172 Tex Cr 332, 356 SW2d 681 (1961).

[15.2] **Missouri.** State v. Siekermann (Mo), 367 SW2d 643 (1963).

[15.3] **New Jersey.** State v. Ruggiero, 41 NJ 4, 194 A2d 458 (1963).

[15.4] **Iowa.** State v. Kulow, 255 Ia 789, 123 NW2d 872 (1963).

[15.5] **Alaska.** Berfield v. State (Alaska), 458 P2d 1008 (1969).

[15.6] **Florida.** Williams v. State (Fla), 239 S2d 583 (1970).

[15.7] **Maine.** State v. Kimball, 424 A2d 684 (Me 1981).

[15.8] **West Virginia.** State v. Harless, 285 SE2d 461 (WVaApp 1981).

§ 56. Limitation of purpose of evidence.

For example, during the defendant's trial for assault and battery and rape the defendant assaulted the court reporter with a pair of scissors. At a later trial for the dangerous assault charge against the reporter, the following testimony was taken from a juror who was present at the previous trial:

"Q Do you recall where you were on that date in your juror duties, where you were located in the court building?

"A Yes, I was in the fifth seat from the back row.

"Q Do you recall where that courtroom was?

"A Yes. It was on this wing on the far side.

"Q At that time in your juror duties, could you tell us what type of proceedings you were involved in?

"A There was a rape case, assault and battery."

The court properly ordered the testimony stricken from the record and instructed the jury to disregard the juror's comments "with regard to what the charges were on the crimes that were involved in the previous trial." [16.1]

Out of court statements or admissions constitute evidence only against the person making it. Such must not be considered as evidence against a codefendant and must be disregarded by the jury in determining the guilt or innocence of a codefendant.[18.1]

You are instructed that out-of-court statements admitted into evidence to impeach the testimony of H. S. are to be considered solely for the purpose of impeaching his credibility and are not to be considered by you as evidence for any other purpose.[20.1]

A trial justice does not abuse his discretion when he fails, *sua sponte,* to give a limiting instruction at the very moment of impeachment instructing the jury that a prior, inconsistent statement can be considered by them not for its substantive content but only as it reflects on the credibility of a witness although the trial justice is obliged to give such a limiting instruction, the timing of the instruction is left to his or her discretion, and may be given by the trial justice at any time.[20.2]

When the defendant was charged for aggravated robbery of drugs, it was proper to admit into evidence the details of a subsequent drug transaction involving the defendant because the jury was properly cautioned in an instruction that the evidence was to be considered only for the limited purpose of passing on the issues of the intent and motive of the defendant.[34.1]

Generally, evidence of prior bad acts or convictions may not be introduced into evidence. However, there are the two following exceptions whereby such evidence may be introduced, provided the jury receives a limiting instruction as to the purpose of the evidence:

(1) To complete the story of the crime by proving its immediate relationship to other happenings near in time or place, and

(2) To show, by similar acts or incidents, that the act on trial was not inadvertent, accidental, unintentional or without guilty knowledge.[35.1]

Ladies and gentlemen of the jury, any statement made to Officer H. by the previous witness may be considered by you for one purpose only. You may consider it in corroboration of the testimony of the other witnesses, if you find that it does, in fact, corroborate them.[38.1]

In drug cases, evidence of other drug violations is relevant and admissible if it tends to show plan or scheme, disposition to deal in illicit drugs, knowledge of the presence and character of the drug, or presence at and possession of the premises where the drugs are found.

If requested by defense counsel, the trial judge should instruct the jury as to the limited purpose for which the evidence of other crimes is admitted, and warn the jury not to consider it for any other purpose.[38.2]

[16.1] **Arizona.** State v. Mulalley, 127 Ariz 92, 618 P2d 586 (1980).

[18.1] **Alaska.** Sidney v. State (Alaska), 468 P2d 960 (1970).

[20.1] **Kansas.** State v. Potts, 205 Kan 47, 468 P2d 78 (1970).

[20.2] **Rhode Island.** State v. Vargas, 420 A2d 809 (RI 1980).

[34.1] **Colorado.** People v. Kelderman, 618 P2d 723 (ColoApp 1980).

[35.1] **Oregon.** State v. Lee, 49 OrApp 131, 619 P2d 292 (1980).

[38.1] **North Carolina.** State v. Dixon, 8 NCApp 37, 173 SE2d 540 (1970).

[38.2] **North Carolina.** State v. Richardson, 36 NCApp 373, 243 SE2d 918 (1978).

§ 57. Lower grade of offense.

There is only one matter for you to decide, and that is whether or not the People have proven beyond a reasonable doubt that the defendant committed this crime he is accused of in the information, or whether he committed a lesser crime included within that accusation.[41 1]

A defendant is not entitled to a jury instruction on a lesser offense other than that for which he is charged unless there is evidence that the elements of the lesser offense are included within the elements of the greater charged offense.[41 2]

The general rule ... is that the trial court need not, even if requested, instruct the jury on the existence and definition of a lesser and included offense if the evidence was such that the defendant, if guilty at all, was guilty of something beyond the lesser offense.[42 1]

A defendant is not entitled to the trial court judge, *sua sponte,* giving an instruction to the jury on a lesser offense unless: (1) one of the parties has requested an appropriate instruction; (2) it is not possible to commit the greater offense without committing the lesser offense; (3) there is evidence introduced which would justify a conviction on the lesser offense; and (4) the proof is in dispute to such a degree that the jury could find the defendant guilty of the lesser offense but innocent of the greater offense. For example, in a larceny case, the trial court did not err in refusing to instruct the jury on the lesser included offense of larceny in the fourth degree because no evidence was presented on the value of the property stolen, which would have determined the applicable degree of larceny.[42.2]

So when you retire to the juryroom, you will have the right to consider four possible verdicts. If you are convinced beyond a reasonable doubt that the Defendant did, on the date mentioned, break and enter the home of Mr. S with intent to commit the crime of larceny therein, then, of course, the Defendant is guilty and you should bring in a guilty verdict.

Now, if you are not convinced that the Defendant is guilty of the offense in count one, you may consider whether or not you are convinced beyond a reasonable doubt that he did feloniously enter the premises of Mr. S without breaking with intent to commit the crime of larceny therein. If you are not convinced beyond a reasonable doubt that the Defendant committed that offense, you may determine whether or not the Defendant, did on the date mentioned, enter the premises of Mr. S, that is the dwelling-house of Mr. S without permission from the owner.

If, on the other hand, you are not convinced beyond a reasonable doubt that the Defendant committed or is guilty of any one of the three offenses mentioned, then, of course, he would be not guilty, and you should acquit him.[52 1]

In a murder prosecution, if substantial evidence supports a showing of lawful provocation, the judge must instruct on manslaughter, even without defendant's request.[60 1]

A lesser offense instruction should not be given if the defendant is guilty of the offense charged or is innocent.[60.2]

Instructions on included or lesser offenses are required only if there is evidentiary support for these offenses.[60 3]

Possession of an illicit drug is an element of possession with intent to sell or deliver the drug, and the former is a lesser included offense of the latter.

Where there is evidence of defendant's guilt of a lesser degree of the crime included in the bill of indictment, defendant is entitled to have the question submitted to the jury, even when there is no specific prayer for the instruction; and error in failing to do so is not cured by a verdict convicting the defendant of the offense charged, because in such case it cannot be known whether the jury would have convicted of a lesser degree if the different permissible degrees arising on the evidence had been correctly presented in the charge.[60.4]

While in some cases trial judges would be warranted in inquiring whether defense counsel wished to submit instructions on lesser included offenses, trial judges have no duty to give such instructions *sua sponte*.[60 5]

It is error for a trial court to fail to instruct, sua sponte, on the defense theory of excessive force by a police officer in a prosecution for assault on a police officer, and the conviction on the lesser included offense of resisting, delaying or obstructing a police officer in the performance of his duty cannot stand where an instruction on the defense theory of excessive force is not given.[60 6]

[I]n determining whether a charge on a lesser included offense is required, a two-step analysis is to be used. First, the lesser included offense must be included within the proof necessary to establish the offense charged. Secondly, there must be some evidence in the record that if the defendant is guilty, he is guilty of only the lesser offense.[60 7]

The instruction on the *lesser included offense* of deviate sexual conduct was improperly modified by the trial judge due to jury inquiry during deliberation.

By amending the instruction to include "Sexual gratification may or may not include ejaculation" and "Webster defines gratification as a source of gratification or pleasure," the trial judge was in error; the changing of an instruction already given to the jury before their deliberation is improper unless omitted words are added or if the original instruction was incorrect. Here the word inquired of was within the jury's common competence to understand, and the original instruction was not legally insufficient.[60 8]

Failure to instruct on the lesser included offense of a simple robbery case was not necessary where it was evident that one assailant was armed and the statute makes both guilty of aggravated robbery.

The Supreme Court of Kansas found the following separate instruction on reasonable doubt to be proper since it is a correct statement of law and no evidence was shown that it misled the jury.

"As you have been instructed, before you can find the defendants guilty of any offense, you must be satisfied of their guilt beyond a reasonable doubt. Stated another way, if you have a reasonable doubt as to the existence of any of the elements of the offense, you must acquit the defendants.

"By requiring the State to prove their case beyond a reasonable doubt it is not meant that they are required to prove the case to a mathematical or scientific certainty. Few, if any, things in affairs of men are capable of such proof. All that is required is that the proof erase from the minds of the jury, any reasonable doubt as to the guilt of the defendants." [60.9]

It is error to refuse to give the instruction on manslaughter in a second degree murder prosecution; manslaughter is necessarily a lesser included offense and recklessness and intent are not inconsistent mental states.

The following self-defense instruction was held to be a correct statement of the law.

It is a defense to a charge of Murder in the Second Degree that the homicide was justifiable as defined in this Instruction.

Homicide is justifiable when committed in the lawful defense of the slayer when the slayer has reasonable ground to believe that the person slain intends to inflict death or great bodily harm and there is imminent danger of such harm being accomplished.

The slayer may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the slayer at the time.

There was sufficient evidence of intoxication to allow the following instruction on intoxication to be given.

"No act committed by a person while in the state of voluntary intoxication is less criminal by reason of that condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular kind or degree of crime, the fact of intoxication may be taken into consideration in determining such mental state." [60.10]

Trial court must give the instruction on the lesser included offense if evidence is available which would allow the jury to find guilt on such an offense. Second degree murder and manslaughter are lesser included offenses of first degree murder.[60.11]

[41.1] **Michigan.** People v. Minter, 39 MichApp 550, 197 NW2d 916 (1972).

[41.2] **Vermont.** State v. Bourn, 421 A2d 1281 (Vt 1980)

[42.1] **Pennsylvania.** Commonwealth v. Franklin, — PaSuper —, 374 A2d 1360 (1977).

[42.2] **Connecticut.** State v. Lode, 36 ConnSuper 603, 421 A2d 880 (ConnSuper 1980).

[52.1] **Michigan.** People v. Embry, 68 MichApp 667, 243 NW2d 711 (1976).

[60.1] **Missouri.** State v. Haynes (Mo), 329 SW2d 640 (1959).

[60.2] **California.** People v. Piccionelli, 175 CalApp2d 391, 346 P2d 542 (1959).

[60.3] **Missouri.** State v. Washington (Mo), 357 SW2d 92 (1962).

[60.4] **North Carolina.** State v. Cloninger, 37 NCApp 22, 245 SE2d 192 (1978).

[60.5] **Oregon.** State v. Miller, 2 OrApp 353, 467 P2d 683 (1970).

[60.6] **California.** People v. Olguin, 173 CalRptr 663 (CalApp 1981).

[60.7] **Texas.** Royster v. State, 622 SW2d 442 (TexCrimApp 1981).

[60.8] **Indiana.** Jenkins v. State, 424 NE2d 1002 (Ind 1981).

[60.9] **Kansas.** State v. Johnson, 634 P2d 1095 (Kan 1981).

[60.10] **Washington.** State v. Jones, 628 P2d 472 (Wash 1981).

[60.11] **Wyoming.** State v. Selig, 635 P2d 786 (Wyo. 1981).

§ 58. Insanity of accused.

[If you believe] . . . he was suffering from such a diseased and defective condition of the mind that he was incapable of knowing the nature and consequences of his act or if he did know what he was doing that he did not know that it was wrong and that such defect of mind and reason resulted from a diseased mind and was more than a delusion or an excess of passion or anger, you should find the defendant . . . not guilty by reason of insanity. . . .[66.1]

Now let me say further, that in the event that you do find the defendant not guilty by reason of insanity, you are entitled to know his ultimate disposition and in that respect let me read to you a section of the statute which reads in part as follows. . . .[68.1]

... "Generally, when a person is charged with a criminal offense and there is no evidence introduced concerning his mental condition, under such circumstances it is to be presumed that the person charged with the crime was of sufficient mental capacity to commit it. We assume under those circumstances, as I just recently indicated, that the man has the mental capacity to commit a crime. The law states that in such cases there is a presumption that a person is sane."

... "Consider and look at the whole evidence regarding the mental condition of the defendant in making [the] determination [of sanity or insanity]," and that "[t]he burden is upon the Commonwealth to prove that the defendant was legally sane beyond a reasonable doubt ... as I have already defined for you the meaning of proof beyond a reasonable doubt."

... "We have had some opinion testimony given by psychiatrists, psychologists, and we have heard other evidence as to the mental capacity of the defendant for his acts or conduct" ... Those who have "given special attention and study to the field of mental infirmities and weaknesses [are] allowed to give [their] opinion as to the mental capacity of a defendant to commit a crime" .... "It doesn't follow that [they] are to usurp the function or stand in the place of the jury." Experts' opinions are "evidence for your consideration" and "subject to the weight that the jury feels should be given to it."

The judge then told the jury that "in assessing a defendant's mental responsibility for crime, the jury should weigh the fact that a great majority of men are sane and the probability that any particular man is sane." The assessment of mental responsibility for crime is to be made in each case in the light of the evidence introduced, the circumstances that [the jury] have heard. As sole judges of the credibility and weight of all evidence on the issue of insanity, the jury "may believe, but is not compelled to believe, any ... testimony or opinion given by an expert."

... "It has been stated in our judicial decisions that it is for the jury to determine whether or not the fact that a great majority of men are sane and the probability that any particular man is sane may be deemed to outweigh the evidential value of any expert testimony that [a person] is insane" .... "[I]t is for the jury to determine again on all the evidence and all of the circumstances whether the defendant did or did not lack mental capacity to commit a crime." [70.1]

If there is substantial evidence that defendant is relying on the defense of diminished responsibility, the court on its own motion must instruct the jury on this defense.[73.1]

The law states that no person shall be tried, sentenced, or punished for any crime while in a state of idiocy, imbecility, lunacy, or insanity so as to be incapable of understanding the proceedings or making a defense.

Now with respect to insanity, I instruct you as follows, that the statute further reads: "But the person shall not be excused from criminal liability except upon proof that at the time of committing the alleged criminal act he was laboring under such a defect of reason from one of these causes as not to know the nature of his act or that it was wrong."

Now, jurors, I instruct you to consider this issue of insanity under the definition in deciding whether or not the defendant R. F. K. should be excused upon grounds of insanity for conduct which you otherwise would find to constitute

a crime. You must not find him not guilty upon the grounds of insanity unless his insanity qualifies as insanity under that definition.[73.2]

[66.1] **West Virginia.** State v Grimm, — WVa —, 195 SE2d 637 (1973).
[68.1] **Michigan.** People v Plummer, 37 MichApp 657, 195 NW2d 328 (1972).
[70.1] **Massachusetts.** Commonwealth v. Walker, — Mass —, 350 NE2d 678 (1976).
[73.1] **California.** People v. Henderson, 60 Cal2d 459, 35 CalRptr 77, 386 P2d 677 (1963)
[73.2] **Minnesota.** State v. King, 286 Minn 392, 176 NW2d 279 (1970).

§ 59. Reasonable doubt.

The jury was instructed that in case the jury has a *reasonable* doubt whether the defendant's guilt is satisfactorily shown defendant is entitled to an acquittal; that the State has the burden of proving the defendant guilty beyond a reasonable doubt (CALJIC No. 2.90 (3d ed.)). The jury was further instructed that only that degree of proof is necessary which convinces the mind and directs and satisfies the conscience of those who are bound to act conscientiously upon it (CALJIC No. 22 (Rev.)).[74.1]

If you believe from the evidence, beyond a reasonable doubt, that the defendant, in Conecuh County in this State, after giving birth to the child in question, abandoned it in the public road or street, in the night, without clothes or covering, exposed to the elements and such other dangers as might beset it, and that she intended thereby to accomplish the death of the child, she would be guilty of an assault with intent to murder.[77.1]

It is reversible error for a trial court to instruct the jury that the State, in a criminal matter, need not establish guilt to a mathematical certainty, or to a scientific certainty, or beyond all doubt. For example, the following instruction was held improper and constituted reversible error:

"Now, the phrase 'reasonable doubt' means exactly what those words imply. It is a doubt based upon reason arising from an impartial consideration of all the evidence offered to you. It is not a doubt which is merely fanciful. It is not a doubt which is speculative. The test you must use is as follows. If you have a reasonable doubt as to whether the State has proved any one or more of the elements of the crime charged, then you will find the defendant not guilty. However, if you find that the State has proved all of the elements of the offense charged beyond a reasonable doubt, then you will return a verdict of guilty.

Now, it is not an object of this rule of proof to impose upon you the duty of looking [sic] or examining this evidence in any strange, peculiar or extraordinary way. *Nor* is it intended by this rule to impose upon the State an *impossible burden* in establishing its case. It is a matter of common knowledge to all of us that *absolute positive certainty* can almost never be attained. But bear in mind, Members of the Jury, that the State is not required to establish guilt beyond *all* doubt. That is not the State's burden. The State is not required to establish guilt to a *mathematical certainty.* That is not the State's burden. *Neither* is the State required to establish guilt to a *scientific certainty.* The State's burden is fully met when it has established guilt beyond a reasonable doubt." [84.1]

Evidence of good character is never a defense to a criminal act or the commission of a crime, but there has been considerable evidence in this case of good character. You should not disregard that evidence, you should consider that

evidence along with all of the other evidence in the case. It might generate in your mind a reasonable doubt of the guilt of this Defendant.[85 1]

A reasonable doubt may arise out of a consideration of the evidence, from a lack of or insufficiency of the evidence, or it may be engendered by a defendant's statement.[85 2]

A reasonable doubt is not a vague or conjectural doubt. It is not a fanciful doubt. It is not an imaginary doubt. *Neither does it mean the defendant may be innocent. . . .*[86 1]

A defendant in a criminal case is presumed by law to be innocent. The law does not require a defendant to prove his innocence or to produce any evidence. The burden of proving the defendant guilty beyond a reasonable doubt rests upon the state. This burden never shifts. The term "reasonable doubt" means a doubt based upon a reason. It does not mean an imaginary or possible doubt. It is a doubt for which a reason can be given arising from an impartial consideration of the evidence or lack of evidence. It means a doubt that would cause a reasonable man to pause or hesitate when called upon to act upon the most important affairs of life. If, after a consideration of all of the evidence, you are convinced of the guilt of the defendant, then I instruct you that you are satisfied beyond a reasonable doubt.[89 1]

The jury does not have to actually know that the defendant is guilty in order to convict, but may convict if it believes him guilty from all the evidence in the case beyond a reasonable doubt.[95 1]

The following instructions could not be condemned by the court since they did not amount to an "Allen" charge:

"It is the duty of each juryman, while the jury is deliberating upon their verdict, to give careful consideration to the views his fellow-jurymen may have to present upon the testimony in the case. He should not shut his ears and stubbornly stand upon the position he first takes, regardless of what may be said by the other jurymen. It should be the object of all of you to arrive at a common conclusion and to that end you should deliberate together with calmness. It is your duty to arrive upon a verdict, if that is possible.

"You are instructed, however, that if any one of the jury after having considered all the evidence in this case, and after having consulted with his fellow-jurymen, should entertain a reasonable doubt of the defendant's guilt, then the jury cannot find the defendant guilty."

. . .

"I believe it is my duty to remind you that this trial has, as a matter of course, been attended with large expense to the parties, and that you should make every effort to agree. To aid you in the consideration of the case, I instruct you that although the verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellow jurors, yet in order to bring twelve minds to a unanimous result, you must examine the question submitted to you with candor and with a proper regard and deference to the opinions of each other. You should consider that at some time the case must be decided; that you are selected in the same manner and from the same source from which any future jury must be selected; and there is no reason to suppose that this case will ever be submitted to twelve men and women more intelligent, more impartial, or

more competent to decide it; or that more and clearer evidence will be produced on the one side or the other, and with this in view, it is your duty to decide the case, if you can conscientiously do so." [98 1]

If you decide that Mr. J. did do the act, you must consider what the amount is that was taken which, if it is under one hundred dollars, is a misdemeanor, but if it is over one hundred dollars, is a felony. The owner of the store testified it was one hundred and twelve dollars, I think, and eighty-one cents. The state doesn't have to prove beyond a reasonable doubt where (every) nickel that was taken went, or account for it, but it must prove beyond a reasonable doubt that over one hundred dollars was taken by P. and that it was taken with the help and aid of the defendant J.[99.1]

If the evidence in this case has established the guilt of the defendant to a moral certainty in your minds — such a certainty as you would act upon in a matter of the highest importance to yourselves — then you are convinced beyond a reasonable doubt; but if, upon a full and fair consideration of all the evidence in the case, or the lack of evidence, your minds still waiver and do not settle down to an abiding conviction of guilt of the defendant, then you are not satisfied beyond a reasonable doubt.[10 1]

While a charge that a reasonable doubt is a doubt which a juror could give a reason for entertaining is not approved, it is not reversible error.[16.1]

Trial courts should not define "reasonable doubt."[16 2]

Reasonable doubt as a concept may be explained to jurors as equitable to a judgment as to whether or not they would hesitate to undertake an important business or personal undertaking.[16 3]

[74.1] **California.** People v. LeBlanc, 23 CalApp3d 902, 100 CalRptr 493 (1972).

[77.1] **Alabama.** Albright v. State, 50 AlaApp 480, 280 S2d 186 (1973).

[84.1] **New Hampshire.** State v Aubert, 421 A2d 124 (NH 1980).

[85.1] **Alabama.** Hinkle v. State, 50 AlaApp 215, 278 S2d 218 (1973).

[85.2] **Georgia.** Daniels v. State. 230 Ga 126, 195 SE2d 900 (1973).

[86.1] **Georgia.** Bruster v. State, 228 Ga 651, 187 SE2d 297 (1972).

[89.1] **Arizona.** State v. Parra, 10 ArizApp 427, 459 P2d 344 (1969).

[95.1] **Mississippi.** Collins v. State (Miss), 202 So2d 644 (1967).

[98.1] **Wyoming.** Alcala v. State (Wyo), 487 P2d 448 (1971).

[99.1] **Minnesota.** State v. Jordan, 272 Minn 84, 136 NW2d 601 (1965).

[10.1] **Iowa.** State v. Estrella, 257 Ia 462, 133 NW2d 97 (1965).

[16.1] **Federal.** United States v. Eury, 268 F2d 517 (1959).

[16.2] **Oklahoma.** Bell v. State (OklCr), 381 P2d 167 (1963).

[16.3] **New Hampshire.** State v. Hutton, 108 NH 279, 235 A2d 117 (1967).

§ 60. Good character as generating reasonable doubt of guilt.

Evidence of good character is never a defense to a criminal act or the commission of a crime, but there has been considerable evidence in this case of good character. You should not disregard that evidence, you should consider that evidence along with all of the other evidence in the case. It might generate in your mind a reasonable doubt of the guilt of this Defendant.[17 1]

Although the trial court erroneously charged the jury on the weight to be given evidence of good character and then, at the insistence of the state and over the objection of defense counsel, recalled the jury and instructed them as follows:

"[T]he state, well, an attorney attracted my attention, the district attorney, to a charge I gave you on good character. It is my duty . . . that I erroneously

gave you that charge and I believe he is probably right. . . . You are, therefore, instructed to eliminate the charge from your mind and memory; it is not applicable. By this charge I do not imply that the defendant has bad character nor do I imply that he has good character. I am saying to you it is not relevant: Therefore, it should not be taken into consideration."
this was not error because the trial court judge nevertheless instructed the jury not to consider the issue of character in one way or another.[27.1]

Defendant is entitled to an instruction that character evidence alone may be sufficient to raise a reasonable doubt as to guilt.[27 2]

[17.1] **Alabama.** Hinkle v. State, 50 AlaApp 215, 278 S2d 218 (1973).

[27.1] **Georgia.** Carroll v. State, 271 SE2d 650 (GaApp 1980).

[27.2] **Pennsylvania.** Commonwealth v. Scott, 436 A2d 607 (Pa 1981).

§ 61. Burden of proof in civil cases.

If causes other than the defendant's negligence might have produced the harmful consequences, the plaintiff is required to exclude all such other causes by the fair preponderance of the evidence. The plaintiff has failed to sustain the burden of proof if on the whole evidence the question of the defendant's negligence is left to conjecture. Stated another way, the plaintiff has the burden of proving that there was greater probability that the consequences which followed the treatment were caused by the defendant rather than proceeding from any other cause.[28 1]

By way of summary, ladies and gentlemen, with regard to the second issue, did the defendant breach the Birmingham contract, as alleged in the complaint? The court instructs you that if you find from the evidence and by its greater weight, the burden being upon the plaintiff in this issue to so satisfy you, that the defendant, N. failed to pay the invoices submitted to them in accordance with the paragraphs of the contract that I have previously read to you, and that the defendant's delays or refusals to make these payments were not reasonable delays, and that there was no bona fide dispute in existence as to the amounts due at that time or as to the percentage of the work completed, and if you further find from the evidence and by its greater weight that the plaintiff had not at that time previously breached the contract, then and in that event the court instructs you it would be your duty to answer the first issue "yes". On the other hand, if you fail to so find, or if after considering all of the evidence, you are unable to say where the truth lies or if you find the evidence evenly balanced, then and in any of these events it would be your duty to answer the second issue "no". If, however, the work had not progressed to the point required to permit the submission of the invoices and to require payment thereof, or if you find that under the circumstances the delays in payment, if any, were reasonable, that is, that the defendant had reason to believe that the work had not progressed and was not progressing according to the contract and that the plaintiff was not under the terms of the contract entitled to submit or to have the submitted invoices paid, at the time of their submission in accordance with the provisions of the contract, then it would be your duty to answer the second issue "no".[28.2]

Alibi as a defense must be established to the reasonable satisfaction of the jury and must be such as reasonably to exclude the possibility of the presence

of the defendant at the scene of the offense at the time of its commission.[28.3]

Now, because Mr. V. has died and cannot testify, you must presume that he was in the exercise of ordinary care for his safety at and before the time of the occurrence, unless you find the presumption is overcome by the evidence. In deciding whether the presumption is overcome, you must weigh the presumption with all the evidence. If, after so weighing, you are unable to decide that the presumption has been overcome, then you must find that Mr. V. was not negligent.[33.1]

If the plaintiff is suffering from a loss of memory that makes it impossible for him to recall events at or about the time of an accident, the plaintiff is not held to as high a degree of proof as would be a plaintiff who can himself describe the occurrence. The rule even as applied to amnesiacs does not, however, shift the burden of proof or eliminate the need for plaintiffs to introduce evidence of a prima facie case. The jury must rest its findings on some evidence to establish negligence and also the absence of contributory negligence. The danger is, of course, that amnesia is easily feigned. The dangers may be ameliorated. Plaintiff has the burden of proof on the issue of amnesia as on other issues. A jury should be instructed that before the lesser burden of persuasion is applied, because of the danger of shamming, they must be satisfied that the evidence of amnesia is clear and convincing, supported by the objective nature and extent of any other physical injuries sustained, and that the amnesia was clearly a result of the accident.[45.1]

Defendant has the burden of proving the allegations of his counterclaim by a preponderance of the evidence.

By a preponderance of the evidence is meant such evidence as, when weighed with that opposed to it, has more convincing force and from which it results that the greater probability of truth lies therein. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue preponderates, that is, has the greater convincing force, then your finding upon that issue must be against the party who had the burden of proving it.[54.1]

Now, ladies and gentlemen of the jury, if you should find that the conduct of the husband was such as would cause his wife to leave, if she was treated with such indignities or abusement that would make it justifiable then, of course, you would answer this issue "yes", but if you find that, from the evidence and the greater weight thereof, that the husband, in this instance Mr. B. did no act nor mistreated his wife to the extent that she was justified in leaving, then you would answer that issue "no." [54.2]

The court instructs the jury for the defendant that if you find after considering all of the evidence in this case that the evidence is evenly balanced for the defendant and for the plaintiff, then it is your sworn duty to find for the defendant.[67.1]

In the charge of the court in instructing the jury as to the liability of plaintiff in considering the counterclaim in which defendants sought judgment against plaintiff, the trial court erred in charging that if the evidence was equally balanced it would be the jury's "duty to return a verdict in favor of the defendant[s]." The burden of proof by the defendants on their counterclaim remained with the defendants, and particularly so, after the main action was no longer pending in the case.[67.2]

I instruct you that, in order to warrant recovery, the plaintiff has the burden of proving every element necessary to constitute the contract of service and his wrongful discharge. That is to say, the employee must submit evidence that he had a contract; that he was performing it; that he was ready, willing and able to complete the contract but was precluded from doing so by premature (wrongful) cancellation of his contract. In this case, it is conceded that the plaintiff has a three-year contract and he was discharged after two years. On the other hand the defendant has the burden of proving by a preponderance of the evidence justification for the discharge. The law will not assume that an employee has been derelict in his duty from the fact that he has been discharged; and when such an employee is a school superintendent claiming damages for the wrongful discharge, the burden rests upon the employer to prove substantial non-compliance with the school laws of the state, the regulations or bylaws of the state department of education, or the bylaws of the district, that is, the Skagway Board policy manual. Whether defendants have met that burden is for you, alone, to decide.[67 3]

[28.1] **Massachusetts.** Barrette v. Hight, 253 Mass 268, 230 NE2d 808 (1967).

[28.2] **North Carolina.** Meares v. Nixon Constr. Co., 7 NCApp 614, 173 SE2d 593 (1970).

[28.3] **Georgia.** Sneed v. Caldwell, 229 Ga. 507, 192 SE2d 263 (1972).

[33.1] **Michigan.** Vanden Berg v. Grand Rapids Gravel Co., 42 MichApp 722, 202 NW2d 694 (1972).

[45.1] **New York.** Schechter v. Klanfer, 28 NY2d 228, 321 NYS2d 99, 269 NE2d 812 (1971).

[54.1] **Idaho.** Big Butte Ranch, Inc. v. Grasmick, 91 Idaho 6, 415 P2d 48 (1966).

[54.2] **North Carolina.** Banks v. Banks, 8 NCApp 69, 173 SE2d 631 (1970).

[67.1] **Mississippi.** Simms v. Best (Miss), 227 So2d 118 (1969)

[67.2] **Georgia.** Jenkins v. Lampkin, 145 GaApp 746, 244 SE2d 895 (1978).

[67.3] **Alaska.** Skagway City School Board v. Davis (Alaska), 543 P2d 218 (1975).

§ 61A. Instructions — Rules governing presumption of due care in issue of contributory negligence.

Now the law says that where death occurs there is a presumption that a person who died exercised due care, reasonable care. That is not too applicable here because in this case both persons died — Mr. T. and Mrs. W. Now those so-called [presumptions] are a Mexican standoff. You have to look at the facts and circumstances to determine all of these items.

. . .

The logic of the proposition that the presumption of due care applies only on the issue if contributory negligence speaks for itself. "Negligence as it is commonly understood is conduct which creates an undue risk of harm to others. Contributory negligence is conduct which involves an undue risk of harm to the actor himself. Negligence requires a duty, an obligation of conduct to another person. Contributory negligence involves no duty. . . ." Since the presumption of due care is predicated upon "the instinct of self-preservation" and "has for its motive the fear of pain or death," it is highly relevant to the issue of contributory negligence, which involves the actor's protection of himself, but has no relevance to the question of primary negligence, which involves a duty to others.[68.1]

[68.1] **Maryland.** Todd v Weikle, 36 MdApp 663, 373 A2d 104 (1977)

§ 62. Burden of proof and presumption of innocence in criminal cases.

In order for you to convict the defendant of the offense charged in the information, the State must prove by evidence before you beyond a reasonable doubt each and all of the following: 1. . . . . 2. . . . .3. That the defendant at said time was over eighteen years of age. 4. . . . . 5. . . . . ; but, if any one or more of the foregoing matters are not thus shown by the evidence before you beyond a reasonable doubt, then the offense charged in the information has not been made out and you should acquit him.[69.1]

[I]f the state has failed to so satisfy you of those facts beyond a reasonable doubt, it would be your duty to return a verdict of not guilty.

[B]ut if the state has failed to so satisfy you of those facts beyond a reasonable doubt, it would be your duty to return a verdict of not guilty.[69 2]

The Court charges the jury that the defendant is presumed to be innocent and this presumption is to be regarded as a matter of evidence by the jury to the benefit of which the accused is entitled, and, as a matter of evidence, this presumption of innocence attends the defendant until his guilt, is by the evidence, proven beyond a reasonable doubt.[69 3]

You have been told by counsel that the defendant is innocent until proven guilty beyond a reasonable doubt. I advise you that that is not a correct or precise statement of the law. The defendant in this case, as in any criminal case in Maryland, is presumed to be innocent until proven guilty beyond a reasonable doubt. He is not clothed in innocence, but he is clothed in the presumption of innocence.[69 4]

This Defendant entered into this trial clothed with a presumption of innocence, which attends her as a matter of law throughout the trial and until such time that presumption is overcome by competent, legal evidence, and she is proven guilty beyond a reasonable doubt.[69.5]

"The State has a burden to prove that the defendant is guilty by what is known as 'beyond a reasonable doubt.' Now, you have heard the evidence, and it has been of two types — what we call 'real' evidence and what we call 'circumstantial' evidence. The burden that the State has — to show that the defendant is guilty beyond a reasonable doubt — applies to both kinds of evidence. The burden on the State remains to prove that all of the circumstances shown by all the kinds of evidence that you have heard are either inconsistent with or exclude every reasonable hypothesis of the defendant being innocent." [69.6]

The following instruction on felony murder is valid.

"The essential elements of the offense of murder in the first degree-felony murder, each of which the government must prove beyond a reasonable doubt are, one, that the defendant inflicted an injury or injuries on the deceased from which the deceased died, and two, that the defendant did so while perpetrating or attempting to perpetrate the offense of robbery." [69.7]

The court properly refused to give the following requested statement: "I charge you that in your deliberations on punishment, you are not to return a sentence of death if you determine that the defendant . . . was not the responsible party who pulled the trigger on the weapon which killed the victim."

The issue of who actually fired the gun is a factor to be considered, not a mandatory bar on the jury's imposition of the death penalty.

The appellate court held the trial judge properly refused to give the jury an instruction placing burden of proof on the state to show an enumerated aggravating circumstance and the lack of mitigating circumstances. The appellate court held that the statute does not impose any such burdens of proof with respect to mitigating circumstances.[69.8]

Before the defendant is entitled to an instruction on the issue of entrapment, there must be sufficient evidence to raise such a defense. Mere inducement is not sufficient to raise an entrapment defense under substantive law. Therefore, no error is shown in refusing to give the instruction.[69 9]

Under an indictment charging defendants with conspiracy to *make and construct* a destructive device, the trial court improperly instructed the jury on *possession* of a destructive device. Where the government presented no evidence of the offense charged in the indictment, the conviction cannot stand.[69.10]

It is error to instruct as follows where defendant faces two counts:

"Under the evidence in this case and the instructions which have been given to you, if you find beyond a reasonable doubt that the defendant committed the acts charged in the information, then you will find the defendant guilty. If you fail to find beyond a reasonable doubt that the acts charged in the information were committed, then you will find the defendant not guilty." [71 1]

The jury was instructed that in case the jury has a *reasonable* doubt whether the defendant's guilt is satisfactorily shown defendant is entitled to an acquittal; that the State has the burden of proving the defendant guilty beyond a reasonable doubt (CALJIC No. 290 (3d ed.)). The jury was further instructed that only that degree of proof is necessary which convinces the mind and directs and satisfies the conscience of those who are bound to act conscientiously upon it (CALJIC No. 22 (Rev.)).[71 2]

The Court charges the jury that the defendant is presumed to be innocent and this presumption is to be regarded as a matter of evidence by the jury to the benefit of which the accused is entitled, and, as a matter of evidence, this presumption of innocence attends the defendant until his guilt is, by the evidence, proven beyond a reasonable doubt.[75.1]

You have been told by counsel that the defendant is innocent until proven guilty beyond a reasonable doubt. I advise you that that is not a correct or precise statement of the law. The defendant in this case, as in any criminal case in Maryland, is presumed to be innocent until proven guilty beyond a reasonable doubt. He is not clothed in innocence, but he is clothed in the presumption of innocence.[75.2]

This Defendant entered into this trial clothed with a presumption of innocence, which attends her as a matter of law throughout the trial and until such time that presumption is overcome by competent, legal evidence, and she is proven guilty beyond a reasonable doubt.[75.3]

A defendant in a criminal case is presumed by law to be innocent. The law does not require a defendant to prove his innocence or to produce any evidence.

The burden of proving the defendant guilty beyond a reasonable doubt rests upon the state. The burden never shifts throughout the trial.[77 1]

It is error for a court to charge as follows on an instruction involving self-defense:

"Now it is said, in the matter of self-defense which I have mentioned, that we are bound to look at the testimony from the standpoint of the defendant. It must be seen through his eyes if reasonably viewed. This is the People's request. Self-defense in proper cases is the right of every person, but it will not justify an attempt to take human life unless you are satisfied beyond a reasonable doubt from testimony that an assault in fact was about to be made upon the defendant's wife by the deceased. The term assault as here used means an attempt or offer on the part of the deceased, with force and violence, to inflict a bodily hurt upon another." [82.1]

Although the following instruction is consistent with the principle that in self-defense defenses a defendant's actions are to be judged from his or her own personal impressions at the moment and not from the vantage point of a detached juror, *i.e.* the "subjective test":

"It is a defense to the charge of murder that the homicide was justifiable as defined in this instruction.

"Homicide is justifiable when committed in the lawful defense of the slayer when the slayer has reasonable ground to believe that the person slain intends to inflict death or great bodily harm and there is imminent danger of such harm being accomplished.

"In determining whether or not a defendant is justified in using force against another person in defense of her own person, the defendant, as a reasonably and ordinarily cautious and prudent woman, may use that force which, in the same situation, seeing what she sees and knowing what she knows, would under the circumstances have appeared reasonable to her at the time in question,"

when the court continued in its charge and defined great bodily harm as:

"Great bodily harm" means an injury of a more serious nature than an ordinary striking with the hands or fists. It must be an injury of such nature as to produce severe pain and suffering."

This was prejudicial error to the defendant and required a reversal because the court interjected its own opinion as to what constituted "great bodily harm," thus making an impermissible comment on the evidence. When the court is defining "great bodily harm" in the context of self-defense instruction, it should charge that: "in interpreting the evidence, and in determining whether the defendant had reasonable grounds to fear great bodily harm or imminent death, you should look at the circumstances from the viewpoint of the defendant at the time of the incident, given his or her knowledge at the time of the incident."[82.2]

It is necessary for conviction that the State prove beyond a reasonable doubt that the defendant, D.D.A., was not acting in self-defense and there is no burden on the defendant to prove that he was acting in self-defense; and if the evidence in this case does not establish beyond a reasonable doubt that the defendant was not acting in self-defense, then you should find the defendant not guilty of manslaughter.[84 1]

The Court instructs the Jury for the State that you do not have to know that the defendant is guilty of the crime charged in the indictment before you would be warranted in convicting him; all that the law requires is that you must believe from the evidence, beyond a reasonable doubt, that he is guilty of the crime charged, and if you so believe, then it would be your sworn duty to find the defendant guilty as charged.[84 2]

Once a defendant affirmatively raises the issue of self-defense, it is then incumbent upon the State to prove beyond a reasonable doubt, that defendant was not acting in self-defense, as well as all other elements of the offense.[84.3]

In a case dealing with conviction for knowingly receiving, concealing and facilitating transportation and concealment of marihuana known to have been imported contrary to law, an instruction allowing presumption of illegal importation from proof of possession of marihuana established by 21 U.S.C. § 176a was a denial of due process.[84.4]

If you find that the People have not established each and every element of its case as charged by them by evidence beyond a reasonable doubt, then your verdict would be not guilty. I will repeat. If you should find that the alibi is sustained by the defendant, of course then he could not be at the scene of the crime, and your verdict then would be not guilty. If you find he has not sustained the alibi, you must still go on and determine whether the prosecutor has proved each and every other element of the case, as I have outlined to you, by evidence beyond a reasonable doubt.[92 1]

The accused does not have to prove his claim that he was elsewhere. It is sufficient if on considering all the evidence there arises in your mind a reasonable doubt as to his presence at the scene of the crime when it was committed. If you do conclude that there is such a doubt, the accused is entitled to a verdict of not guilty .... I tell you again that there is no burden on this accused to prove himself innocent of the crime charged, but it is the state's burden to prove him guilty beyond a reasonable doubt. And that burden rests upon the state throughout the entire trial.[92 2]

[69.1] **Iowa.** State v. McConnell (Ia), 178 NW2d 386 (1970).
[69.2] **North Carolina.** State v. Newsome, 7 NCApp 525, 172 SE2d 909 (1970).
[69.3] **Alabama.** Taylor v. State, 49 AlaApp 433, 272 S2d 905 (1973).
[69.4] **Maryland.** Mills v. State, 12 MdApp 449, 279 A2d 473 (1971).
[69.5] **Alabama.** Henderson v. State, 49 AlaApp 275, 270 S2d 822 (1972).
[69.6] **Maryland.** Dove v. State, 423 A2d 597 (MdSpecApp 1980).
[69.7] **District of Columbia.** Ruth v. United States, 438 A2d 1256 (DCApp 1981).
[69.8] **Louisiana.** State v. Sonnier, 402 S2d 650 (La 1981).
[69.9] **Mississippi.** Tribbett v. State, 394 S2d 878 (Miss 1981).
[69.10] **Arizona.** United States v. Jones, 647 F2d 696 (6th Cir 1981).
[71.1] **Arizona.** State v. Parra, 10 ArizApp 427, 459 P2d 344 (1969).
[71.2] **California.** People v. LeBlanc, 23 CalApp3d 902, 100 CalRptr 493 (1972).
[75 1] **Alabama.** Taylor v. State, 49 AlaApp 433, 272 S2d 905 (1973).
[75.2] **Maryland.** Mills v State, 12 MdApp 449, 279 A2d 473 (1971).
[75.3] **Alabama.** Henderson v. State, 49 AlaApp 275, 270 S2d 822 (1972).
[77 1] **Arizona.** State v. Mays, 105 Ariz 47, 459 P2d 307 (1969).
[82 1] **Michigan.** People v. Burkard, 374 Mich 430, 132 NW2d 106 (1965).
[82.2] **Washington.** State v. Painter, 620 P2d 1001 (Wash 1980).
[84.1] **Nebraska.** State v. Archbold, 178 Neb 433, 133 NW2d 601 (1965) .
[84.2] **Mississippi.** Wilson v State (Miss), 234 S2d 303 (1970).
[84.3] **Illinois.** People v. Smith, 58 IllApp3d 784, 16 IllDec 407, 374 NE2d 1285 (1978).
[84.4] **Federal.** United States v. Tunnell, 650 F2d 1124 (9th Cir 1981).
[92 1] **Michigan.** People v. Nawrocki, 376 Mich 252, 136 NW2d 922 (1965).
[92.2] **Connecticut.** State v. Bennett, 172 Conn 324, 374 A2d 247 (1977).

§ 62A. Self-defense good faith requirement.

In determining whether the alleged conduct of the defendant was committed in necessary defense of his person and in determining whether that amount of force or violence used was reasonable and apparently necessary for said purpose, you should consider all the acts and conduct of the defendant and

D.T.Mc. at the time in question; the means, nature and extent of any force or violence, or threats of force or violence used or made by D.T.Mc. toward the defendant, and all the facts and circumstances surrounding the occurrence, as shown by the evidence, bearing upon the question whether the conduct of the defendant was reasonably and apparently necessary, in good faith, to defend his person or whether the defendant was acting in a spirit of ill will or retaliation.[93.1]

The question of the existence of such danger, the necesssity or apparent necessity, as well as the amount of force necessary to employ to resist the attack, can only be determined from the standpoint of the defendant at the time, and under all the existing circumstances as it may have reasonably appeared to him at the time. Ordinarily, one exercising the right of self-defense is required to act upon the instant, and without time to deliberate and investigate and, under such circumstances, the danger which exists only in appearance is as real and imminent as if it were actual.[93.2]

Although the following instruction is consistent with the principle that in self-defense defenses a defendant's actions are to be judged from his or her own personal impressions at the moment and not from the vantage point of a detached juror, *i.e.* the "subjective test":

"It is a defense to the charge of murder that the homicide was justifiable as defined in this instruction.

"Homicide is justifiable when committed in the lawful defense of the slayer when the slayer has reasonable ground to believe that the person slain intends to inflict death or great bodily harm and there is imminent danger of such harm being accomplished.

"In determining whether or not a defendnat is justified in using force against another person in defense of her own person, the defendant, as a reasonably and ordinarily cautious and prudent woman, may use that force which, in the same situation, seeing what she sees and knowing what she knows, would under the circumstances have appeared reasonable to her at the time in question,"

when the court continued in its charge and defined great bodily harm as:

" 'Great bodily harm' means an injury of a more serious nature than an ordinary striking with the hands or fists. It must be an injury of such nature as to produce severe pain and suffering."

This was prejudicial error to the defendant and required a reversal because the court interjected its own opinion as to what constituted "great bodily harm," thus making an impermissible comment on the evidence. When the court is defining "great bodily harm" in the context of a self-defense instruction, it should charge that: "in interpreting the evidence, and in determining whether the defendant had reasonable grounds to fear great bodily harm or imminent death, you should look at the circumstances from the viewpoint of the defendant at the time of the incident, given his or her knowledge at the time of the incident.[93.3]

[93.1] **Nebraska.** State v. Archbold, 178 Neb 433, 133 NW2d 601 (1965).

[93.2] **Indiana.** Blair v. State, — IndApp3d —, 364 NE2d 793 (1977).

[93.3] **Washington.** State v. Painter, 620 P2d 1001 (Wash 1980).

§ 62B. Burden of proof by clear and convincing evidence.

You now come to the point, if you have decided some false statements that were defamatory and some actual damage to C., and you come to this last big hurdle, to wit: the plaintiff must satisfy you by clear and convincing evidence that Mr. K. either knew that some of the statements in the broadcasts or all of them were false or had serious doubts as to their truth. And, if you are unable to find that on clear and convincing evidence, no matter how hard you have worked over those matters that I have talked about at first, you will have to come in with verdicts for the defendants.

You are obliged to be satisfied on clear and convincing evidence that Mr. K. knew some statements were false or had serious doubts as to their truth himself; not that he ought to have known, not that he ought to have had serious doubts, but that he did have serious doubts, on clear and convincing evidence, which I will now address myself to.

This is what the Supreme Judicial Court says is clear and convincing evidence for a jury: ". . . a degree of belief greater than the usually imposed burden of proof by a fair preponderance of the evidence, but less than the burden of proof beyond a reasonable doubt imposed in a criminal trial."

The Court also says:

"There must be sufficient clear and convincing evidence that the defendant in fact entertained serious doubts as to the truth of his publication. The test is entirely subjective. That a reasonably prudent person should have entertained serious doubts is not sufficient."

"In order to negate the privilege" — that is to say, the First Amendment privilege, the freedom of the press — "the jury must find on clear and convincing evidence that such doubts were in fact entertained by the defendant himself. The jury may of course reach such a conclusion on the basis of inferences drawn from objective evidence, since it would perhaps be rare for a defendant to admit to himself having had serious doubts."

Now, plainly, from what the Court says, what you have here is some ground of proof higher than a fair preponderance of the evidence but lower than beyond a reasonable doubt, and the best I could suggest to you, I think, in trying to apply this burden of proof against the plaintiff is: ten of you are going to have to be satisfied that it is highly probable on evidence that is clear to you that Mr. K. personally seriously doubted the truth of some or all of the statements made in the broadcasts.

The word "convincing" after the word "clear" — "clear and convincing" — suggests to me that there should not be too much room for argument among reasonable men and women under the standard of clear and convincing proof; and I think, if I said more on this, I would create more error than perhaps I already have.

But let me leave it with you that it plainly is a burden that is higher than just more probable than not. It plainly is a burden that is less than beyond a reasonable doubt, but there is no doubt that it is a greater burden than simply more probable than not.[93.4]

[93.4] **Massachusetts.** Callahan v. Westinghouse Broadcasting Co., Inc., — Mass —, 363 NE2d 240 (1977).

§ 64. Circumstantial evidence in criminal cases.

If you are convinced by the evidence in this case beyond a reasonable doubt that the act alleged as the crime with which the defendant is here charged was in fact committed, *and you further find that immediately or soon thereafter the defendant fled from the place where such act is alleged to have been committed, then the flight of the defendant is a circumstance to be considered by the jury, together with other evidence in the case. It is not sufficient in itself to establish the guilt of the defendant,* but its weight as evidence is a matter for the jury to determine in connection with all the other facts in the case.[99 1]

Although the instant case involved circumstantial evidence, the trial judge chose to omit a charge on that subject. A charge on circumstantial evidence is required only when the case is wholly dependent thereon. Hence, due to the trial judge's omission to make a thorough charge we are therefore required to determine whether the evidence in this case against the defendant is wholly circumstantial.

The victim testified that during the rape her attacker spoke to her on several occasions. She further testified that she had known the defendant prior to the rape and heard him speak on many occasions and that she recognized the voice of her attacker as being that of the defendant. She was unable to see her attacker because a sheet had been wrapped over her head and around her neck.

Wigmore in his treatise on evidence has stated there is no substantial distinction to be made between direct and opinion evidence, nor any valid reason therefor. Georgia defines direct evidence as: "that which immediately points to the question at issue." . . . [D]irect evidence comes from an eye witness or one who speaks directly of his own knowledge, which knowledge he perceives through his senses, especially sight and hearing. The evidence showing the identity of a witness is normally classified as direct. However, in Georgia we have a line of cases which under the peculiar circumstances thereof have led to the description of identity evidence as being of the opinion type. Other cases have indicated, although have not so stated, that this is not necessarily true, especially where the witness is testifying of his own knowledge.

Defendant argues that since identity is a matter of opinion that the evidence given was not direct but was circumstantial and therefore the entire evidence presented against the defendant was circumstantial in nature. Because we are not empowered to modify the language contained in opinions of the Supreme Court, we will make no effort to determine whether under the facts of this case the evidence given was opinion as opposed to direct. Instead, what we do find is that it was not circumstantial evidence within the definition embodied in the Code, which is: "Indirect or circumstantial evidence is that which only tends to establish the issue by proof of various facts, sustaining by their consistency the hypothesis claimed."

In short, between the categories of direct and circumstantial evidence, we think the evidence given in this case would fall within the broad scope of direct evidence since it was based on the witness' prior knowledge with regard to the defendant and was based on the perception of her senses, in this case, her hearing. We therefore find, after much difficulty, that the trial judge did not err in failing to include a charge on circumstantial evidence in his instructions to the jury.[8.1]

Circumstantial evidence is defined as being proof of facts and circumstances from which another fact may be presumed or inferred.[9 1]

It is shown by the testimony, and undisputed in the record, that at the time the defendant was being held at the police station in Mt. Pleasant on the charge for which he is now on trial, he was requested by Patrolman W. and also by Dr. C. to have blood or urine tests to determine alcoholic content, which requests were refused.

You are instructed that in this case defendant's refusal to submit to any test is a circumstance to be considered by the jury, together with all other facts and circumstances shown by the evidence, in determining the question as to whether the defendant was or was not intoxicated at the time involved in this case.[12.1]

Circumstantial evidence is legal evidence and a crime or any fact to be proved may be proved by such evidence. A well connected chain of circumstances is as conclusive, in proving a crime or fact, as is positive evidence. Its value is dependent upon its conclusive nature and tendency.

Circumstantial evidence is governed by the following rules:

1. The circumstances themselves must be proved beyond a reasonable doubt;
2. The circumstances must be consistent with guilt and inconsistent with innocence;
3. The circumstances must be of such a conclusive nature and tendency that you are convinced beyond a reasonable doubt of defendant's guilt.

If the circumstances are susceptible of two equally reasonable constructions, one indicating guilt and the other innocence, you must accept the construction indicating innocence.

Circumstances which, standing alone, are insufficient to prove or disprove any fact may be considered by you in weighing direct and positive testimony.[12.2]

A charge on circumstantial evidence is required only when the evidence of the main fact that is essential to the guilt or innocence of the defendant is purely and entirely circumstantial in nature.[12.3]

It is not necessary to charge on circumstantial evidence if there is direct evidence upon which the jury could find the accused guilty or not guilty.[14.1]

Failure of the trial court to charge on circumstantial evidence without request is not error, if the conviction does not depend wholly on circumstantial evidence.[14.2]

It is not error to not charge on circumstantial evidence if the state relies on direct evidence and not circumstantial evidence primarily,[14 3] where as in the present case the State's case against the defendant was not dependent entirely upon circumstantial evidence, it was not error to fail to charge on circumstantial evidence.[14.4]

An instruction on the weight of evidence is not necessary if the judge properly instructs on the standards of reasonable doubt.[14.5]

If the state substantially or wholly relies on circumstantial evidence, the trial court on its own motion must instruct on the effect of circumstantial evidence.[14.6]

[99.1] **Washington.** State v. Gregory, 79 Wash2d 637, 488 P2d 757 (1971).
[8.1] **Georgia.** Cowans v. State, 145 GaApp 693, 244 SE2d 624 (1978).
[9.1] **Nebraska.** State v. Carr, 182 Neb 308, 154 NW2d 526 (1967).
[12.1] **Iowa.** State v. Holt, 261 Ia 1089, 156 NW2d 884 (1968).
[12.2] **Florida.** Willcox v State (Fla App), 258 S2d 298 (1972).
[12.3] **Texas.** Faulk v. State, 608 SW2d 625 (TexCrimApp 1980).
[14.1] **Tennessee.** Birdsell v. State, 205 Tenn 631, 330 SW2d 1 (1959).
[14.2] **Georgia.** Bobo v. State, 101 GaApp 48, 112 SE2d 679 (1960).
[14.3] **Florida.** Flint v. State (Fla App), 117 S2d 552 (1960).
[14.4] **Georgia.** Walker v. State, 226 Ga 292, 174 SE2d 440 (1970).
[14.5] **Federal.** United States v. Whiting, 311 F2d 191 (1962).
[14.6] **California.** People v. Masters, 219 CalApp2d 672, 33 CalRptr 383 (1963).

§ 66. Inferences from flight.

If you are convinced by the evidence in this case beyond a reasonable doubt that the act alleged as the crime with which the defendant is here charged was in fact committed, *and you further find that immediately or soon thereafter the defendant fled from the place where such act is alleged to have been committed, then the flight of the defendant is a circumstance to be considered by the jury, together with the other evidence in the case. It is not sufficient in itself to establish the guilt of the defendant,* but its weight as evidence is a matter for the jury to determine in connection with all the other facts in the case.[18 1]

The Court charges you that the flight of a person from the scene of an offense is not substantive proof or substantive evidence of guilt. In other words, it may not, it is not a circumstance sufficient in itself to establish guilt, as it may be quite as consistent with innocence of the defendant.[26.1]

[18.1] **Washington.** State v. Gregory, 79 Wash2d 637, 488 P2d 757 (1971).
[26.1] **Michigan.** People v. Jones, 1 MichApp 633, 137 NW2d 748 (1965).

§ 66A. Inferences from failure to testify.

Where appellant claimed it was error for judge to give the following instruction since it did not include a statement that "no inference of guilt may be drawn from or sinister meaning be attached to failure of defendant to testify." *Held:* Recent United States Supreme Court decisions forbid comment by judge or counsel on failure of an accused to testify. They do not require favorable charging by judge. In absence of a statutory provision exactly on point, there is no inherent constitutional right running in favor of appellant's contention.

"Now, in this particular case, the defendant did not take the stand. By doing so, the court must charge you at this time that by not taking the stand and testifying in this case, the accused has exercised his constitutional right because, as I told you before, it is the burden of the state to prove him guilty beyond a reasonable doubt. He does not have to prove that he did not commit this offense with which he stands charged." [26 2]

[26.2] **Connecticut.** State v. Powers, 4 ConnCir 520, 236 A2d 354 (1967). See also § 42, *supra.*

§ 67. Confessions in criminal cases.

A confession should not be given any consideration by you unless you unanimously find that the confession was voluntarily made and that the defendant in making it was first informed of his constitutional right to remain silent if he wished and that he was entitled to the benefit of advice from a lawyer at all times. A confession even if admittedly true cannot be used to prove guilt unless it was voluntarily made.

A confession made under inducement may be considered by you. By inducement is meant promises to do a favor for the accused, such as for instance not prosecuting some person for a crime. If you believe such promise was made in this case, you should scrutinize the confession with great care and caution so as to void any possible chance that one should be convicted on evidence of a confession which is not true.[28.1]

Confessions are deemed to be *prima facie* involuntary and the burden rests on the state to show that they were made voluntarily and not the product of any coercion. Although the Arizona Revised Statutes Annotated, § 13-3988 (1977 & Supp. 1981), provides that:

"A. In any criminal prosecution brought by the state, a confession shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and *shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances,*" and although the court could have used a standardized instruction on voluntariness contained in Arizona Revised Statutes Annotated, § 13-3988(A) (1977 & Supp. 1981), the failure to give such an instruction was not prejudicial error, and the following instruction on voluntariness was held proper and not prejudicial to the defendant:

"You must not consider any statements made by the defendant to a law enforcement officer unless you determine beyond a reasonable doubt that the defendant made the statements voluntarily.

The defendant's statement is not voluntary whenever a law enforcement officer used any sort of violence or threats or any promise of immunity or benefit." [28.2]

The trial court errs by failing to instruct that the jury determines first whether a confession was voluntarily made, and second, if it was voluntary, was it true.[38.1]

The final determination of the voluntariness of a confession is for the jury.[38.3]

[28.1] **Washington.** State v. Toliver, 5 WashApp 321, 487 P2d 264 (1971).

[28.2] **Arizona.** State v. Brooks, 127 ArizApp 130, 618 P2d 624 (1980).

[38.1] **Arizona.** State v. Pulliam, 87 Ariz 216, 349 P2d 781 (1960).

[38.2] Reserved.

[38.3] **Hawaii.** State v. Shon, 47 Haw 158, 385 P2d 830 (1963).

§ 68. Credibility of witnesses — Interest of witnesses — Falsus in uno, falsus in omnibus.

If you should believe from the testimony in this case that any witness or witnesses has or have wilfully and intentionally testified falsely to any material matters or facts in this case, intending by such false testimony to mislead and deceive as to the truth in the case, you may under such belief disregard the whole or any part of the testimony of such witness or witnesses if, in your opinion, you are justified in so doing.[48.1]

[48.1] **Indiana.** Banks v. State, 261 Ind 426, 351 NE2d 4 (1976).

§ 69. Credibility of witnesses in criminal cases — Interest of witnesses — Falsus in uno, falsus in omnibus.

It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use that knowledge and experience which you possess in common with men in general, in regard to the matter about which a witness has testified. You may take into account his ability and opportunity to observe and know the things about which he or she has testified, his memory, manner and conduct while testifying, any interest he may have in the result of this trial, and the reasonableness of his testimony, considered in the light of all the evidence in this case.[66.1]

Paid police informants are a special class of witnesses, and in a trial of defendant for aggravated robbery it was held proper for the court to give the jury a general instruction on witness credibility when testimony of paid police informants was given.[66.2]

"If any witness testifying has been impeached, then the jury may disregard his testimony, unless his testimony is corroborated by the testimony [which is] not so impeached." [67.1]

As a general proposition, the trial court has discretion in charging the jury, and the instructions will be held proper and non-prejudicial so long as that, considering them in their entirety, they accurately, properly, and fairly state the law as applied to the facts in the case. This discretion extends to refusal of requests and to cautionary instructions as well. For example, when testimony was offered against the defendant by an accomplice that had turned State's evidence, it was held proper and not prejudicial error for the court to refuse to give the following standardized jury instruction on accomplices:

"An accomplice witness is one who testifies that he was involved in the commission of the crime with which the defendant is charged. You should consider with caution testimony of an accomplice *if it is not supported by other evidence,*" [emphasis supplied] and instead to give the following instruction relating to the credibility of witnesses in general and not specifically mentioning the need to corroborate accomplice testimony:

"It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use that knowledge and experience which you possess in common with men in general, in regard to the matter about which a witness has testified. You may take into account his ability and opportunity to observe and know the things about which he or she has testified,

his memory, manner, and conduct while testifying, any interest he may have in the result of this trial, and the reasonableness of his testimony considered in the light of all the evidence in this case.

"If you find that any witness has willfully testified falsely concerning any material matter, you have a right to distrust the testimony of that witness in other matters, and you may reject all or part of the testimony of that witness, or you may give it such weight as you think it deserves. You should not reject any testimony without cause." [68 1]

Utah Code Annotated, § 77-31-18 (1979 & Supp. 1981), expressly permits giving a cautionary instruction whenever the prosecution relies on the uncorroborated testimony of an accomplice:

"Conviction on uncorroborated testimony of accomplice — Cautionary instruction. — (1) A conviction may be had on the uncorroborated testimony of an accomplice.

(2) In the discretion of the court, an instruction to the jury may be given to the effect that such uncorroborated testimony should be viewed with caution, and such an instruction should be given if the trial judge finds the testimony of the accomplice to be self contradictory, uncertain, or improbable." [92 1]

Although it is better practice to give a cautionary instruction on the testimony of an accomplice, it is not reversible error to fail to do so unless the instruction was requested.[3 1]

A judge is well advised to instruct the jury to scrutinize with special care the testimony of accomplices. But failure to so caution is ground for reversal only if it has resulted in substantial prejudice.[3 2]

An accomplice testifying for the prosecution is generally regarded as an interested witness, and a defendant, upon timely request, is entitled to an instruction that the testimony of the accomplice should be carefully scrutinized. Since an instruction to carefully scrutinize an accomplice's testimony is a subordinate feature of the trial, the trial judge is not required to so charge in the absence of a timely request for the instruction. But when a defendant makes a request in writing and before argument to the jury for an instruction on accomplice testimony, the court should give such instruction. And once the judge undertakes to instruct the jury on such subordinate issue it must do so accurately and completely. The court, however, is not required to give the requested instruction in the exact language of the request, but is only required to give such instruction in substance.

In present case, concerning Clark, the trial judge instructed the jury:

"Now, as to the witness Clark, I instruct you that he is in Law what is known as an accomplice. And our Court has said that a person may be convicted on the unsupported testimony of an accomplice, if that testimony is believed by the Jury. However, in considering the weight and credibility you will give to the testimony of Clark, I instruct you that you should carefully examine his testimony for the purpose of determining what weight and credibility it deserves. You should scrutinize it with care, all to the end that you will determine whether he is truthful or not, because in Law, an accomplice does have an interest and bias in the case and in what your verdict will be.

"So, Members of the Jury, it's dangerous to convict upon the testimony of an accomplice but if you find that he is truthful, then you may, if you are satisfied from the evidence and beyond a reasonable doubt, convict upon his unsupported testimony." [3.3]

... "The fact that an accomplice hopes for or expects mitigation of his own punishment does not disqualify him from testifying." Promises of assistance may affect the credibility of the witness; they do not render the witness incompetent.[3.4]

Now, you may find that a witness is interested in the outcome of this trial. In deciding whether you will believe or disbelieve the testimony of any such witness, you may take his interest into account. If after doing so you believe his testimony in whole or in part, you should then treat what you believe the same as any other believable evidence in the case. Defendant argues that since the female prosecutor and the male defendant were the only important witnesses in the case, "this charge has the effect of making the jury scrutinize and hold the male defendant's testimony up to a higher standard to determine whether he was telling the truth. The use of the masculine pronoun 'his' could also have led the jury to believe that the judge was expressing his opinion that the testimony of the male defendant should be more carefully scrutinized than that of other witnesses." [3.5]

[66.1] **Kansas.** State v. Parrish, 205 Kan 33, 468 P2d 150 (1970).

[66.2] **Colorado.** People v. Kelderman, 618 P2d 723 (ColoApp 1980).

[67.1] **Alabama.** Stockord v. State, 391 S2d 1060 (Ala 1980).

[68.1] **Kansas.** State v. Ferguson, 288 Kan 522, 618 P2d 1186 (1980).

[92.1] **Utah.** Utah v. Hallett, 619 P2d 335 (Utah 1980).

[3.1] **Nebraska.** State v. Brown, 174 Neb 393, 118 NW2d 332 (1962); State v. Henry, 174 Neb 432, 118 NW2d 335 (1962).

[3.2] **Federal.** United States v. Cianchetti, 315 F2d 584 (1963).

[3.3] **North Carolina.** State v. Abernathy, 295 NC 244, 244 SE2d 373 (1978).

[3.4] **North Carolina.** State v. Edwards, 37 NCApp 47, 245 SE2d 527 (1978).

[3.5] **North Carolina.** State v Poole, 289 NC 47, 220 SE2d 320 (1975).

§ 70. Failure of party to testify in his own behalf or call material witness.

Members of the jury, I charge you if you find that a party to this action had a material witness or evidence available to him which he would naturally be expected to produce in court and which was not available to the adverse party, then you may infer if you think it reasonable and fair for you to do so, that such evidence if produced would have been unfavorable to the party failing to produce it.[7.1]

In this case the defendants called no witnesses. All that means is that you base your conclusions on the testimony that you heard. . . .

. . .

... Any defendant has a perfect right to conclude it isn't necessary to call his own witnesses after the plaintiff has called witnesses to testify. . . .

So that all it means here is that you base your conclusions on the testimony you heard. It doesn't make any difference whether they were called by the plaintiff or the defendant. In this case, none were called by the defendants.[8.1]

If a party fails to call a witness, then, pursuant to the *Secondino* rule in Connecticut, an adverse party is entitled to request from the trial judge an instruction which would permit the jury to draw an inference that the testimony of the witness would have been unfavorable to the party's cause, provided that there is evidence before the jury that (1) the witness is available, and that

(2) the witness not called was one the party naturally would have produced during the course of the trial. For example, the following charge is a correct adverse inference instruction:

"In the course of the argument of this case, attention was called to the failure to call certain witnesses who it was claimed might by their testimony have thrown light upon the situation before you. Where a party fails to call to the stand a witness who is within his power to produce and who would naturally have been produced by him, you are entitled to infer that had he testified, that testimony would have been unfavorable to the party failing to call him, and to consider that fact in arriving at your decision.

"However, requirements for such an inference that he could furnish material evidence, is that the witness must be available, and he must be a witness whom the party would naturally call. It is a witness who would naturally be produced by a party which is one known to that party and by reason of his relationship to that party or to the issues or both, could reasonably be expected to have peculiar or superior information which was material to the case which a favorable party would produce but hasn't, the failure of a party to call a person as a witness who is available, and you must find all these elements present in the record, to both parties, and who does not stand in such a relationship to the party in question or to the issues, so that the party would naturally be expected to produce him if his testimony was favorable affords no basis for unfavorable inference.

"The plaintiff, Keys, testified that he spoke with Mr. Mercier, a used car salesman at Coppola two days after purchasing the car, and claims that Mr. Mercier is a witness whom Coppola Ford would naturally be expected to call because of his relationship with Coppola Ford and the fact that the plaintiff driver spoke with him regarding the functioning of the Ford, not necessarily about the brakes in this case because on this occasion he complained of noises in the motor and the transmission; so I charge you that since Coppola did not call Mercier to testify, you may infer that the reason he was not called was because his testimony would have been unfavorable to defendant.

"It is not enough for defendant, Coppola, that plaintiff could have produced Mr. Mercier by subpoena. He was a witness whom the defendant, Coppola, would normally have called." [12.1]

In New Jersey, the better practice is to inform the judge and opposing counsel that a request will be made for such an instruction. This gives the opposing party an opportunity to either call the witness or give reasons for failure to call.[19.1]

"The requirements of the absent material witness instruction should be narrowly construed to be applicable only to those cases where the failure to call a witness leads to a reasonable conclusion that the party is unwilling to allow the jury to have the full truth." [From Ballard v. Lumbermens Mutual Casualty Co., 33 Wis2d 601 at 615, 616, 148 NW2d 65 at 73 (1967).] [19.2]

The trial judge erred in giving the preliminary instruction of defendant's failure to testify over the defendant's objection to it being read. The appellate court said the giving of the instruction over defendant's objection was in error because it undermined the Fifth Amendment principle of the right to remain silent by causing speculation among jurors' as to defendant's silence.[19.3]

The lower court's instruction given to the jury at prosecution's request stated, in essence, that the defendant's unexplained failure to present a supposed alibi witness would infer that said witness would not corroborate the testimony before the jury. This was held to be improper where the appellate court found no evidence to permit such an inference. There was no evidence that said witness was physically available as a witness to either the prosecution *or* the defense, much less that only the defendant could know of the whereabouts of the witness.

Since the lower court refused to instruct that the witness was unavailable to either side, the jury could have assumed that only the defendant knew of the witness' whereabouts.[19.4]

In order for a trial judge to properly give a missing witness instruction, the judge must know: (1) the witness' testimony will be likely to elucidate the transaction at issue; and (2) the witness is peculiarly available to the party who failed to call him. If there is proof that one of the parties has attempted but failed to locate the witness, the instruction is not appropriate.[19.5]

[7.1] **North Dakota.** Kuntz v. Stelmachuk (ND), 136 NW2d 810 (1965).

[8.1] **Maryland.** Lunsford v. Board of Educ. of Prince George's County, — MdApp —, 374 A2d 1162 (1977).

[12.1] **Connecticut.** Nichols v. Coppola Motors Inc., 178 Conn 335, 422 A2d 260 (1980).

[19.1] **New Jersey.** State v. Clawans, 38 NJ 162, 183 A2d 77 (1962).

[19.2] **Wisconsin.** Victorson v. Milwaukee & Suburban Transport Co., 70 Wis2d 336, 234 NW2d 332 (1975)

[19.3] **Indiana.** Lee v. State, 424 NE2d 1011 (Ind 1981)

[19.4] **Maine.** State v. Whitman, 429 A2d 203 (Me 1981).

[19.5] **District of Columbia.** Harris v. United States, 430 A2d 536 (DCApp 1981)

§ 71. Failure of defendant in criminal case to testify or call witness or produce evidence.

In the absence of statutory provisions directly on point, there is no inherent constitutional right running in favor of a defendant which would require a judge to charge the jury with a favorable instruction, such as "no inference of guilt may be drawn from or sinister meaning be attached to defendant's failure to testify." It is sufficient to instruct as follows: Now, in this particular case, the defendant did not take the stand. By doing so, the court must charge you at this time that by not taking the stand and testifying in this case, the accused has exercised his constitutional right because, as I told you before, it is the burden of the state to prove him guilty beyond a reasonable doubt. He does not have to prove that he did not commit this offense with which he stands charged.[20.1]

You are to draw no conclusions or inferences from the fact that the defendant has not testified in this case, and you are entitled to draw no conclusion or inferences as to his reasons in that regard.[20.2]

Therefore, you must be very careful not to allow his silence to influence your decision in any way.[20.3]

It is reversible error for a trial court to refuse to give the requested instruction (on defendant's refusal to testify) at the punishment stage of the trial in a bifurcated action even if the trial court had so instructed the jury during the guilty-or-innocent stage.[20.4]

[20.1] **Connecticut.** State v. Powers, 4 ConnCir 520, 236 A2d 354 (1967).

[20.2] **Nebraska.** State v. Kennedy, 189 Neb 423, 203 NW2d 106 (1972).

[20.3] **North Carolina.** State v. Phifer, 17 NCApp 101, 193 SE2d 413 (1972).

[20.4] **Texas.** Brown v. State, 617 SW2d 234 (TexCrimApp 1981).

§ 71A. Failure of prosecution in criminal case to call witness or produce evidence.

Defendant's second claim of error is in the refusal of his requested instruction that the state's failure to call as witnesses three police officers who testified before the grand jury, and the minutes of such testimony were attached to the indictment, justified an inference their testimony, if given at the trial, would have been detrimental to the state.

The showing that the three officers not called at the trial were on vacation, together with the fact their testimony would have been only cumulative, furnished a plausible explanation for absence of their testimony.[30.1]

[30.1] **Iowa.** State v. Williams, 261 Ia 1133, 155 NW2d 526 (1968).

§ 72. Alibi in criminal cases.

The court instructs the jury that in this case what is known in law as an "alibi," that is, that the defendant was at another place at the time the crime charged in the information was committed, is relied upon by the defendant; and the court instructs the jury that such a defense is as proper and legitimate, *if proved,* as any other, and all the evidence bearing upon that point should be carefully considered by the jury, and if, in view of all the evidence, the jury have any reasonable doubt as to whether the defendant was in some other place when the crime was committed, they should give the defendant the benefit of the doubt and find him not guilty.[31.1]

Alibi is not a defense within any accurate meaning of the word "defense" but is a mere fact which may be used to call into question the identity of one person charged or the entire basis of the prosecution.[31.2]

An accused, who relies on an alibi, does not have the burden of proving it. It is incumbent upon the State to satisfy the jury beyond a reasonable doubt on the whole evidence that such accused is guilty. If the evidence of alibi, in connection with all the other testimony in the case, leaves the jury with a reasonable doubt of the guilt of the accused, the State fails to carry the burden of proof imposed on it by law, and the accused is entitled to an acquittal.[33.1]

[A]libi as a defense should be established to the reasonable satisfaction of the jury but not necessarily beyond a reasonable doubt.[33 2]

Alibi as a defense, involves the impossibility of the accused's presence at the scene of the offense at the time of its commission; and the range of the evidence in respect to time and place must be shown as reasonable to exclude the possibility of the accused's presence. The court instructs you that the evidence presented to prove alibi, considered alone or with all the other evidence, need only be sufficient to create a reasonable doubt of the defendant's guilt.[33.3]

The defendant is *not* entitled to a separate jury instruction on the alibi defense so long as adequate and proper instructions were given on (1) the elements of the crime charged and on (2) the burden of the prosecution to prove the guilt of the defendant beyond a reasonable doubt.[33.4]

The burden is on the defendant to establish his alibi, not beyond a reasonable doubt but to the reasonable satisfaction of the jury that the defendant was elsewhere when the alleged crime was committed. If you believe that the defendant has established, to your reasonable satisfaction the defense of alibi, it would be your duty to acquit the defendant.[44 1]

Alibi as a defense should be established to the reasonable satisfaction of the jury. . . .[44 2]

The burden is on the defendant to establish his alibi, not beyond a reasonable doubt but to the reasonable satisfaction of the jury that the defendant was elsewhere when the alleged crime was committed. If you believe that the defendant has established, to your reasonable satisfaction the defense of alibi, it would be your duty to acquit the defendant.[45 1]

The accused does not have to prove his claim that he was elsewhere. It is sufficient if on considering all the evidence there arises in your mind a reasonable doubt as to his presence at the scene of the crime when it was committed. If you do conclude that there is such a doubt, the accused is entitled to a verdict of not guilty . . . I tell you again that there is no burden on this accused to prove himself innocent of the crime charged, but it is the state's burden to prove him guilty beyond a reasonable doubt. And that burden rests upon the state throughout the entire trial.[45 2]

Alibi is not a defense within any accurate meaning of the word "defense" but is a mere fact which may be used to call into question the identity of one person charged or the entire basis of the prosecution.[46.1]

The Pennsylvania Supreme Court has recently announced a new ruling on alibi instructions. The rule seems to be that the trial judge must *omit* any reference to the defendant's burden of proving his alibi. Instead the judge is simply to instruct the jury to consider the alibi evidence along with all the other evidence in determining if the state has proven all the essential elements of the crime. Alibi evidence, either alone or with other evidence, may be sufficient to raise a reasonable doubt.[47.1]

It is not error to refuse to give an alibi instruction, if the defendant's alibi evidence fails to cover a material part of the time within which the crime must have been committed.[47.2]

It is erroneous to charge that the defendant has the burden by a preponderance of the evidence to prove the defense of alibi. An alibi is not an affirmative defense, but a denial of any connection with the crime. So if the proof of alibi, either by itself or with other facts in the case, raises a reasonable doubt of defendant's guilt, he must be acquitted.[47.3]

It is not error to fail to give an alibi instruction for defendant if he fails to request it.[47.4]

It is not error to fail to instruct on alibi, if no request is made.[47 5]

[31.1] **Colorado.** McGregor v. People, 176 Colo 309, 490 P2d 287 (1971).

[31.2] **North Carolina.** State v. Cook, 280 NC 642, 187 SE2d 104 (1972).

[33.1] **North Carolina.** State v. Hunt, 283 NC 617, 197 SE2d 513 (1973).

[33.2] **Georgia.** Holcomb v. State, 128 GaApp 238, 196 SE2d 330 (1973).

[33.3] **Georgia.** White v. State, 231 Ga 290, 201 SE2d 436 (1973).

[33.4] **Kansas.** State v. Dailey, 228 Kan 566, 618 P2d 833 (1980).

[44.1] **Georgia.** Morrison v. State, 126 GaApp 1, 189 SE2d 864 (1972).

[44.2] **Georgia.** Trimble v. State, 229 Ga 399, 191 SE2d 857 (1972).

[45.1] **Georgia.** Morrison v. State, 126 GaApp 1, 189 SE2d 864 (1972).
[45.2] **Connecticut.** State v. Bennett, 172 Conn 324, 374 A2d 247 (1977).
[46.1] **North Carolina.** State v. Cook, 280 NC 642, 187 SE2d 104 (1972).
[47.1] **Pennsylvania.** Commonwealth v. Bonomo, 396 Pa 222, 151 A2d 441 (1959).
[47.2] **Illinois.** People v. Ashley, 18 Ill2d 272, 164 NE2d 70 (1960).
[47.3] **Delaware.** Halko v. State, 54 Del 180, 175 A2d 42 (1961).
[47.4] **Federal.** United States v. Strone, 311 F2d 277 (1962).
[47.5] **Missouri.** State v. Westfall (Mo), 367 SW2d 593 (1963).

§ 73. Instruction to disregard testimony erroneously received.

Just to clarify a point, the Court will state to the jury that the statement made in the plaintiff's final statement, in which he referred to the fact that twenty-five thousand dollars would care for Mrs. Mc. for a certain period of time, is not a factor that the jury should consider, and I so instruct you that any consideration of what an award would do to Mrs. Mc. is of no consequence to this jury, and you should disregard it.[49.1]

Plaintiff's counsel in his argument to you made some reference to the Revenue Fund of Northfield being contributed to, I think, by a municipal enterprise in the Village of Northfield — I believe it was the liquor store — and I instruct you that this is not a valid factor for you to consider in this case, and it is not material at all as to how the Revenue Fund in Northfield is supported, and as a matter of fact it is not of any concern to you as to how the money is paid if a verdict is rendered.[49.2]

The following instruction given in a mandatory form requires a jury, if they believe a witness has testified falsely to any material testimonial matter, to disregard his entire testimony. Florida has rejected this form and ascribes to a permissive form.

"Should you find a witness has testified falsely, either willfully or intentionally, to some material matter in this case, his or her testimony in other respects may, in your discretion, be disregarded unless it is corroborated to your satisfaction by all of the evidence or by other proof. The rule also applies, but with less force to the statements of a witness which, although not intentionally false, are in fact untrue, especially where they involve matters of judgment and skill. It is not enough that the witness is merely mistaken or that through defective memory he or she departs from the truth." [49.3]

Members of the jury, as you recall just immediately before the adjournment, I advised you that there was a statement made by M. that you should disregard and I was going to strike it from the evidence. I want you to refrain in your consideration of this evidence from considering that statement for any purpose. I have excluded the evidence; I found that it should not have come in and that it should be stricken from the record.[49.4]

Ladies and gentlemen of the jury, there was an objection to a volunteered statement of the witness relating to words uttered by the defendant at the time of his arrest. That objection was sustained. Those words were stricken from the record, and you are instructed to disregard them.[49.5]

Members of the jury, you may recall when the Assistant State Attorney inquired with reference to the particular offense, it was objected to on the ground that it was not within the scope of cross examination. In other words, that there had been no direct examination relating to the offense. The Court will take the position that unless the testimony relates to the offense, it's

wholly immaterial and should be stricken. For that reason, the witness having testified to nothing relating to this particular offense with which he is charged, his testimony will be stricken and you are directed to disregard his testimony in arriving at your verdict.[51 1]

For example, during the defendant's trial for assault and battery and rape the defendant assaulted the court reporter with a pair of scissors. At a later trial for the dangerous assault charge against the reporter, the following testimony was taken from a juror who was present at the previous trial:

"Q Do you recall where you were on that date in your juror duties, where you were located in the court building?

"A Yes, I was in the fifth seat from the back row.

"Q Do you recall where that courtroom was?

"A Yes. It was on this wing on the far side.

"Q At that time in your juror duties, could you tell us what type of proceedings you were involved in?

"A There was a rape case, assault and battery."

The court properly ordered the testimony stricken from the record and instructed the jury to disregard the juror's comments "with regard to what the charges were on the crimes that were involved in the previous trial." [53.1]

The jury should be clearly directed to disregard testimony which is later determined to have been inadmissible.[63 1]

When a witness has testified from other than first-hand knowledge, a court need not declare a mistrial and may properly caution the jury by instructing them "to ignore officer C's impressions about things that he didn't see." [63 2]

[49.1] **Minnesota.** McCorkell v. City of Northfield, 272 Minn 24, 136 NW2d 840 (1965).

[49.2] **Minnesota.** McCorkell v. City of Northfield, 272 Minn 24, 136 NW2d 840 (1965).

[49.3] **Florida.** Anthony v. Douglas (Fla), 201 S2d 917 (1967).

[49.4] **Alaska.** Sidney v. State (Alaska), 468 P2d 960 (1970).

[49.5] **Illinois.** People v. Phillips, 126 IllApp2d 179, 261 NE2d 469 (1970).

[51.1] **Florida.** Harris v. State (FlaApp), 236 S2d 135 (1970).

[53.1] **Arizona.** State v. Mulalley, 127 Ariz 92, 618 P2d 586 (1980).

[63.1] **Virginia.** Eubank v. Spencer, 203 Va 923, 128 SE2d 299 (1962).

[63.2] **Pennsylvania.** Kelly v. Buckley, 421 A2d 759 (PaSuper 1980).

§ 74. Argument of counsel.

Ladies and gentlemen of the jury, you are instructed that you should not consider as evidence any statement of counsel made during this trial, nor any document upon the counsel table unless such statement was made as an admission or stipulation conceding the existence of a fact or facts or such document or documents have been introduced into evidence.[64 1]

If counsel upon either side during the course of trial or during the heat of argument have made any statements not warranted by the evidence, you should wholly disregard such statements in arriving at your verdict.[65.1]

Now, ladies and gentlemen, the statements and arguments of counsel are not evidence. They are only intended to assist you in understanding the evidence and the contentions of the parties. Reference was made, for instance, in the argument of the District Attorney to a certain book and a certain character of some thirty years ago, one Dillinger. That was mentioned solely for the purpose of illustrating that on occasion informers do come from former associates of persons charged with crime, that and nothing more.[65.2]

During the closing argument of the prosecutor, the following occurred:

"MR. SLATE: I believe I will object to the statement by counsel that, 'The law as you see it is slanted to protect the defendant.'

"THE COURT: Ladies and gentlemen, that is a matter of opinion among attorneys. The law must be considered the rule that we abide by regardless whether it favors one or the other, but since it is an opinion only and is not binding on you, I will overrule the objection.

"MR. SLATE: We except."

The court held that the comments of counsel did not require a mistrial because any prejudice that resulted was cured by the court's cautionary instructions.[70.1]

[64.1] **California.** Richardson v. Employers Liability Assur. Co., 25 CalApp3d 232, 102 CalRptr 547 (1972).

[65.1] **North Dakota.** Larson v. Meyer (ND), 135 NW2d 145 (1965).

[65.2] **Federal.** Turner v. United States, 416 F2d 815 (1969).

[70.1] **Alabama.** Storie v. State, 390 S2d 1179 (AlaCrimApp 1980).

§ 75. Manner of arriving at verdict.

Your verdict here must represent the considered judgment of each juror. In order to return a verdict, it is necessary for each juror to agree thereto. Your verdict must be unanimous. It is your duty as jurors to consult with each other and to deliberate with a view to reaching a verdict if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after impartial consideration of the evidence with your fellow jurors.

In the course of your deliberations do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous, but do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict. You are not partisans, you are judges, judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

So, with that in mind, I want you to go back and I will see in a while longer if you are any closer to a verdict.

You may go back and continue your deliberations at this time.[87.1]

Although improper to inquire into the extent of a deadlocked jury's numerical division, it is not improper for the judge to give an otherwise proper supplementary instruction when information concerning the numerical deadlock is received by the judge unsolicited. Thus, the following supplemental charge, delivered after the jury foreman disclosed a numerical split to the trial justice, was not improper:

"Now, in a large proportion of cases, and perhaps strictly speaking, in most all cases, absolute certainty of all twelve cannot be attained or expected. However, you must examine the question with candor and frankness and with proper regard and deference to the opinion of others. When you were first brought into this courtroom last Tuesday, you were told what was to be expected of you. You were asked whether you would fairly and impartially listen to all of the testimony that would be presented and you took and [sic] oath that you would honestly consider everything that was presented here and

give your honest decision regardless of any partiality or any other outside interest.

"I'm going to appeal to you to go back to the jury room and be frank with each other. Be willing to listen to each other, and try hard to arrive at a decision which is important to both the State and to this Defendant. If after further deliberation it becomes apparent that you cannot reach a unanimous verdict, then I will call you down and I will handle the matter as I am required to do under the law.

"Sheriff, take the Jury, please." [92.1]

[87.1] **Illinois.** People v. Allen, 47 IllApp3d 900, 8 IllDec 222, 365 NE2d 460 (1977).

[92.1] **Rhode Island.** State v. Rogers, 420 A2d 1363 (RI 1980).

CHAPTER 4

FORM AND ARRANGEMENT

Section
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§ 90. Form and arrangement in general.

As a specialist Dr. H. owed Mrs. B. the duty to use the care and skill commonly possessed and used by similar specialists in like circumstances and that the jury might infer that, among Dr. D.'s duties, was the administering by him of such treatment as Dr. H. might direct, and that the extent of Dr. H.'s possible liability would be for negligence in examining Mrs. B., in his diagnosis, and in the direction for treatment given to the house officer. He (the judge) was not obliged to specify, as requested, with more particularity phases of Dr. H.'s activities which might have been negligently performed.[5.1]

When cases are consolidated for trial, it is within the judge's discretion whether to instruct the jury in one connected series of instructions or two complete sets of instructions.[7.1]

The particular sequence in which instructions are read — for example, all of plaintiff's, then all of defendant's — is within the trial judge's discretion.[7.2]

In a medical malpractice case, if standard medical practice permits physicians to confer upon nurses in certain medical situations the exercise of independent judgment, nurses in those situations must be accorded the potential benefits to be derived from standard jury instructions concerning errors in judgment by physicians and selection by physicians of alternative methods of treatment if such methods are available. To hold otherwise would impose upon nurses a standard of care exceeding that applicable to the medical profession, hardly a fair result.[7.3]

If the evidence in a medical malpractice case established that the failure of a nurse to consult the attending physician under the circumstances presented in the case at bench was not in accord with the standard of care of the nursing profession, plaintiffs could have requested an instruction concerning the duty to refer to a specialist. The failure of the trial court to modify this standard instruction to make it applicable, or to develop its own instruction on this point, is no ground of error in the absence of a party's request for such an instruction.[7.4]

[5.1] **Massachusetts.** Barrette v. Hight, 253 Mass 268, 230 NE2d 808 (1967).
[7.1] **Illinois.** Cross v. Blood, 22 IllApp2d 496, 161 NE2d 349 (1959).
[7.2] **Missouri.** Shepard v. Harris (Mo), 329 SW2d 1 (1959).
[7.3] **California.** Fraijo v. Hartland Hospital, 99 CalApp3d 344, 160 CalRptr 246 (1979).
[7.4] **California.** Fraijo v. Hartland Hospital, 99 CalApp3d 344, 160 CalRptr 246 (1979).

§ 91. Written and oral instructions.

The following statement by the court to the jury was held to be an oral direction or cautionary remark, and thus it was not an "instruction" to the jury and there was no need to reduce it to writing and to submit it to the jury:

"Ladies and gentlemen of the Jury, it's my determination that after hearing evidence for two days that a view of the premises involved would not be inappropriate and therefore I am going to rule that you be allowed to view the house in question. However, I want to do this with some very strict guidelines, within some strict guidelines.

"You will be taken to the, to the home in a van, with a chauffeur driver. Eleven of you can go with that driver. I'm going to order the Bailiff to accompany you to the home. The Bailiff will take the twelfth juror to the home.

"I will allow any of the parties, Mr. and Mrs. Schuette or Mr. and Mrs. McDowell, to go in their own separate vehicles. I will not allow the attorneys to accompany either the Jury, the parties or the Bailiff.

"When you get to the home I want you to remember the caution that we have given you before. Do not discuss this case among yourselves or with anyone. If any of the parties, the Bailiff, the driver, if anyone, or a member of your own Jury, attempts to emphasize some portion of the house or to point something out to you, I want to know about it immediately.

"You are to go to the home, view the home, and then return to the jury room; you are to do no more, no less.

"Now, I hope we understand one another." [28.1]

After the jury had retired and had begun its deliberations the following occurred:

"BY THE COURT:

All right, the bailiff advised me that one member of the jury has stated to her that they might want to ask me a question; is that the purpose of the jury coming back in the Courtroom or has the jury reached a verdict?

"BY JURY MEMBER:

No, sir, we want to ask a question.

"BY THE COURT:

All right, sir, what is the question?

"BY JURY MEMBER:
We need an interpretation of premeditation.
"BY THE COURT:
All right, now, the only thing I can say to the jury is what is already covered in the instructions. Now, on the instructions, the word malice aforethought has been used. Is that the same definition that you need?
"BY JURY MEMBER:
Possibly, we were considering premeditation — a length of time.
"BY THE COURT:
Let me go to Jury Instruction S-4, which states: The Court instructs the jury that murder is the wilful, unlawful and felonious killing of a human being with malice aforethought without authority of law by any means or in any manner when done with deliberate design to effect death of the person killed and not in necessary self-defense. Now, that is the definition of murder, and I have looked at the instructions again and premeditation is not used in the instructions. So, the jury is instructed with the phrase malice aforethought.
"BY JURY MEMBER:
Could you give us an interpretation of malice aforethought?
"BY THE COURT:
In what regard, now?
"BY JURY MEMBER:
Is it planned or is it just the thought?
"BY THE COURT:
All right, let me say this. All I can say about malice aforethought is that there is no time limit as long as the malice aforethought existed before the incident occurred, and there is no definition of law of any length of time.
"BY JURY MEMBER:
All right, I think that answers that.
"BY THE COURT:
Does that answer your question?
"BY JURY MEMBER:
Yes, sir.
"BY THE COURT:
All right, if the jury will go and retire, and when you have reached a verdict, knock on this door and the bailiff will so advise me."

It was held that the preceding dialogue neither was an "instruction" to the jury so that it was required to be in written form, nor was the dialogue an improper comment by the court on the evidence.

Thus, the province of the jury was not invaded by the court, which had properly instructed the jury on the elements of malice aforethought and manslaughter.[36.1]

Typewritten instructions, with parts stricken out by drawing through them with ink, are not misleading, although the jury could still read what was stricken.[39.1]

[28.1] **Missouri.** McDowell v. Schuette, 610 SW2d 29 (MoApp 1981).

[36.1] **Mississippi.** Carrol v. State, 391 S2d 1000 (Miss 1980).

[39.1] **Tennessee.** Tomlin v. State, 207 Tenn 281, 339 SW2d 10 (1960).

§ 94. Clearness of expression.

A charge containing two distinct propositions, conflicting one with the other, is calculated to leave the jury in such a confused condition of mind that the jury cannot render an intelligible verdict and requires the grant of a new trial.[57.1]
Following held unclear with respect to malice and likely to confuse:

Now, the intentional killing, to raise the presumption of malice and unlawfulness, does not mean a specific intent to kill someone, but it means an intentional assault with a deadly weapon inflicting wounds thereby causing death of the deceased.[63 1]

The following instruction has been held confusing to the jury:

The Court instructs the jury for the Plaintiff, that the law in Mississippi is that the question of malice is to be determined by the jury, unless only one conclusion may reasonably by (sic) drawn from the evidence. The Defendants' improper purpose usually is proved by circumstantial evidence.[78.1]

The following instruction was confusing, but not reversible error:

"If the evidence establishes beyond a reasonable doubt that at the time of the commission of the alleged offense the defendant acted as if he was conscious, you should find he was conscious.

"However, if the evidence raises a reasonable doubt that he was in fact conscious, you should find he was then unconscious." [85.1]

The following instruction on the definition of an accomplice:

"A person who is an accomplice in the commission of a crime is guilty of that crime.

"A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of a crime, he or she aids another person in planning or committing the crime. The word 'aid' means all assistance whether given by words, acts, encouragement, support or presence," was not error, even though the instruction could have been more artfully redrawn to have read:

"A person is an accomplice in the commission of a crime if he or she aids another person in planning or committing the crime, with knowledge that it will promote or facilitate the commission of a crime. The word 'aid' means all assistance, whether given by words, acts, encouragement, support or presence." [86.1]

Specific and isolated language in a court's instruction will not make a court's instruction improper and misleading as long as the total instruction, when taken as a whole, adequately advises the jury on the issue in question.[86.2]

Excerpts from a law treatise should not be used since these treatises are not written for the layman. Instructions must be in concise language understandable to all.[90.1]

"... in determining the legal sufficiency of an instruction, [a court] should not be hypertechnical in requiring grammatical perfection, the use of certain words or phrases, or any particular arrangement or form of language, but that [a court] should be concerned with the meaning of the instruction (read with all others given in the case) to a jury of ordinarily intelligent laymen, crediting them with common sense and an ordinary understanding of the English language . . . ." [90.2]

This helpful and interesting comment about a proximate cause instruction was made by Justice Musmanno, speaking for the Supreme Court of Pennsylvania:

"If this portion of the charge had been delivered in Greek instead of English, it could hardly have been any more enigmatic and mystifying to the jury. The Trial Court here was probably endeavoring to make its charge airtight and waterproof against the possibility of an appeal, but we would like to point out that the purpose of a charge is to enlighten the jury on their duties and responsibilities and not to assure an appellate court that the Judge has met his responsibilities. When judges charge with an eye on the appellate court instead of the jury, they are apt to miss the jury as well as the appellate court."[90.3]

A charge should be given, as far as possible, in language which the average layman could understand thoroughly.[90.4]

Charges to juries should not be scholarly jurisprudential essays, intended primarily to convince the appellate court that the subject in controversy was appropriately treated. They should be simple directions to guide the jury along the thoroughfare of a correct factual decision. They should instruct with the simplicity of directional markers along the highways.[90.5]

An example to aid the jury is proper if the judge clearly informs the jury that the example is illustrative only.[90.6]

Even though instructions are noticeably over-balanced against plaintiff, if the evidence is undisputed that defendant created the condition and recognized the risk, rules concerning superior knowledge had no tendency to confuse or mislead the jury in assessing damages.[90.7]

After having given general instructions on the subject of right of way when two vehicles approach or enter an intersection at approximately the same time, the trial judge stated that a vehicle on a through highway has the right of way over one on an intersecting highway. "There is no testimony in this case concerning which was the thru and which the intersection or intersecting highway or whether they were of equal importance. Therefore the question of right of way is entirely for you to determine from all the evidence which you have heard." Appellant claimed this statement confused jury by implying it might decide the issue of right of way on basis of appellee being on a thru highway. *Held,* case was tried on premise that intersections are uncontrolled. Judge immediately ruled out any consideration of a right of way arising from fact that one of the roads may have been so designated.[90.8]

As long as instructions are not a misstatement of the controlling legal principle involved in a particular case the fact that they are not explicit on the point in issue is not misleading.[90.9]

Reasonable doubt as a concept may be explained to jurors as equitable to a judgment as to whether or not they would hesitate to undertake an important business or personal undertaking. Such a statement correctly conveys the concept of reasonable doubt to the jury.[90.10]

Where an injured person lived 3 ½ days after an accident and was conscious a substantial portion of that time a jury is properly instructed that damages are awarded only for conscious pain by the following charge even though it does not expressly use the term "conscious": "In determining the amount of . . . damages, you may consider the . . . mental and physical pain as the Plaintiff has experienced."

So long as the charge is phrased in terms connoting experiential reality the jury hearing it would consider only the pain actually experienced.[90.11]

The following instruction is erroneous because it took from jury consideration one of the specifications of plaintiff and it lacks clarity:

You should first determine these disputed issues:

1. Did the defendant fail to exercise ordinary care when it did not notify its employees that the deceased and other workmen of the T. Construction Co. would be working near a crane track in the raw materials building and did not have its crane men in the raw materials building maintain a lookout for the deceased and his fellow workers?

2. Did the defendant fail to exercise ordinary care when it did not notify its employees that the deceased and other workmen of the T. Construction Co. would be working near a crane track in the raw materials building and did not require its crane men in the raw materials building to sound a warning horn or bell or to otherwise notify the deceased and his fellow workers of the approach of a crane?

If you determine that the plaintiff failed to prove by a preponderance of the evidence that the defendant did not use ordinary care in either of the foregoing particulars your verdict must be for the defendant and you can terminate your deliberations.[90 12]

[57.1] **Georgia.** Srochi v. Kamensky, 121 GaApp 518, 174 SE2d 263 (1970).

[63.1] **North Carolina.** State v. Currie, 7 NCApp 439, 173 SE2d 49 (1970).

[78.1] **Mississippi.** Allen v. Ritter (Miss), 235 S2d 253 (1970).

[85.1] **California.** People v. Maxey, 28 CalApp3d 190, 104 CalRptr 466 (1972).

[86.1] **Washington.** State v. Rotunno, 621 P2d 191 (WashApp 1980).

[86.2] **Maine.** State v. Troiano, 421 A2d 41 (Me 1980).

[90.1] **Oklahoma.** Page v. Hardy (Okl), 334 P2d 782 (1959).

[90.2] **Missouri.** Gould v. M. F. A. Mut. Ins. Co. (MoApp), 331 SW2d 663 (1960).

[90.3] **Pennsylvania.** Chadwick v. Popadick, 399 Pa 88, 159 A2d 907 (1960).

[90.4] **Delaware.** Alber v. Wise, 53 Del 126, 166 A2d 141 (1960).

[90.5] **Pennsylvania.** Commonwealth v. Collazo, 407 Pa 494, 180 A2d 903 (1962).

[90.6] **Pennsylvania.** Doerflinger v. Davis, 412 Pa 401, 194 A2d 897 (1963).

[90.7] **Nebraska.** Hansen v. First Westside Bank, 182 Neb 664, 156 NW2d 790 (1968).

[90 8] **Pennsylvania.** Amati v. Williams, 211 PaSuper 398, 236 A2d 551 (1967).

[90.9] **Minnesota.** Hemming v. Ald, Inc., 279 Minn 38, 155 NW2d 384 (1967).

[90.10] **New Hampshire.** State v. Hutton, 108 NH 279, 235 A2d 117 (1967).

[90.11] **South Dakota.** Plank v. Heirigs, 83 SD 173, 156 NW2d 193 (1968).

[90.12] **Ohio.** Baker v. Ohio Ferro-Alloys Corp., 23 OhApp2d 25, 261 NE2d 157 (1970).

§ 95. Repetition of instructions in civil cases.

As a specialist Dr. H. owed Mrs. B. the duty to use the care and skill commonly possessed and used by similar specialists in like circumstances, that the jury might infer that, among Dr. D.'s duty was the administering by him of such treatment as Dr. H. might direct, and that the extent of Dr. H.'s possible liability would be for negligence in examining Mrs. B., in his diagnosis, and in the direction for treatment given to the house officer. He (the judge) was not obliged to specify, as requested, with more particularity phases of Dr. H.'s activities which might have been negligently performed. This is all that is required in the charge.[92 1]

A defendant is not entitled to more than one charge on contributory negligence.[7.1]

In a case in which plaintiff's contributory negligence was in issue, the trial judge erred in giving eight peremptory instructions for the defendant and at least twelve instructions that the plaintiff could not recover unless she was in the exercise of due care. The court's remarks about the tactics of attorneys tendering excessive instructions are worth repeating:

Attorneys often tender an excessive number of instructions, repeating the same proposition over and over, not with the honest design of informing the jury of the law, but with the thought of enforcing upon the minds of the jury the importance of their various contentions and arguments.

. . .

Instructions are to be given in clear and intelligent language and inform the jury what the issues are, the principles of law applicable to be observed, and the facts material to be proven to justify their verdict. The preparation of jury instructions is the duty of the parties but in the final analysis when they are read by the trial judge, they become the court's instructions and it is elementary that this is not an adversary proceeding.[7.2]

This case was an appeal from a decision in favor of defendant, plaintiff's employer, in a truck collision case. Plaintiff's requested instruction as to the duty of defendant to provide plaintiff with safe working conditions was rejected by the court as repetitious. The high court sustained this finding, stating that the judge has the discretion to refuse a proposed instruction as repetitious if the subject matter has been adequately covered in previous instructions.[7.3]

The following instruction held not repetitious:

. . . the jury was informed that they had been instructed on the subject of the measure of damages in this action because it is my duty to instruct you as to all the law that may become pertinent in your deliberations. I, of course, do not know whether you will need the instructions on damages, and the fact that they have been given to you must not be considered as intimating any view of my own on the issue of liability or as to which party is entitled to your verdict.[7.4]

[92.1] **Massachusetts.** Barrette v. Hight, 253 Mass 268, 230 NE2d 808 (1967).

[7.1] **Florida.** Shaw v. Congress Bldg., Inc. (FlaApp), 113 S2d 245 (1959).

[7.2] **Illinois.** Smith v. City of Rock Island, 22 IllApp2d 389, 161 NE2d 369 (1959).

[7.3] **Montana.** DeWar v. Great Northern Ry. Co., 150 Mont 367, 435 P2d 887 (1967).

[7.4] **Alaska.** Maxwell v. Olsen (Alaska), 468 P2d 48 (1970).

§ 96. Repetition of instructions in criminal cases.

Instructions Nos. 13 and 15 are objected to because they are duplicative. Instruction No. 13 stated: "The court instructs the jury that to constitute the offense of rape it is not necessary that the defendant have an emission." Instruction No. 15 quoted the statutory definition of rape including the following language: ". . . sexual intercourse occurs when there is any penetration of the female sexual organ by the male organ." Defendant contends that instruction No. 15 was improper because having been given instruction No. 13, it was duplicative and explanatory of No. 15 and therefore confusing to the jury. We fail to see where there could be any confusion.[9.1]

Recharging or reinstructing the jury is perfectly proper and generally within the sound discretion of the trial court so long as the recharge is full and accurate and has no tendency either to mislead the jury or to unduly emphasize some aspects of the case.[9 2]

Instructions requested may be refused if to include them would have made the charge unnecessarily lengthy, repetitious and confusing.[18.1]

There was no error in this second and more narrow instruction on premeditation given after a jury request for further instruction:

Now the premeditation is an essential element of the one crime, first-degree murder, and it must be proved in order to find a person guilty of first-degree murder — it is one of the elements that must be proved — and that premeditation is as follows: "Premeditation means to consider, plan, or prepare for, or determine to commit the act referred to prior to its commission." I will reread that "Premeditation means to consider, plan, or prepare for, or determine to commit the act referred to prior to its commission."[18.2]

In the case at bar, all the instructions sent to the jury room had been read first in open court. The same jury that convicted defendant on the underlying felony heard evidence on the habitual offender charge. The only problem presented here is that several of the instructions had been read the day before when the jury convicted the defendant on the underlying felony. Those instructions were not reread before being given to the jury when it began deliberations on the habitual offender charge. This Court has held that the habitual offender procedure does not constitute a separate crime or trial; rather, it provides for the imposition of a greater sentence for the crime charged.... Therefore, finding that all of the instructions had been read once in open court to the same jury, and since the habitual offender phase of the trial does not constitute a separate trial, we do not find any error in resubmitting instructions without re-reading them.[18.3]

In a trial for murder and assault with a dangerous weapon, with a lesser included offense, there is no need to give two instructions concerning the defense of self-defense so long as it is clear that the same burden of proof applies to the state in both. The instruction on murder also applied to the lesser included offense, therefore, two separate instructions were not needed. The following instruction was therefore valid.

"[Y]ou may not find the defendant guilty ... unless the State proves each of the following elements beyond a reasonable doubt:

....

"[I]f you find that the defendant murdered John Granata and that the element of premeditation and deliberation has been proved to have existed for more than a barely appreciable length of time or existed for more than a moment, the State will have proved first degree murder. If you find that the defendant murdered John Granata and that the element of premeditation and deliberation has proved to be instantaneous or of momentary existence, the State will have proved murder in the second degree. If you find that the State has failed to prove that the defendant murdered John Granata, you must return a verdict of not guilty of murder.

"In the event that the jury concludes that the State has failed to prove either degree of murder, beyond a reasonable doubt, you will give consideration to whether the State has proved the defendant guilty of assault with a dangerous weapon.

. . . .

"[I]f you conclude that there has been no sustaining of the burden of proof so far as Count 1 is concerned, charging the defendant with murder, you will consider whether there has been an assault with a dangerous weapon. If the State has failed to prove an assault with a dangerous weapon, of course then on Count 1 you will return a verdict of not guilty.

. . . .

"The jury received clear instructions indicating that defendant had to be found not guilty of the count 1 charges if the state failed to establish its burden in regard to the claims of self-defense and accident. They were aware that the assault-with-a-dangerous-weapon charge was a lesser-included offense under count 1 and that the state had to refute the above claims beyond a reasonable doubt before they could find defendant guilty of this charge." [18.4]

Although the instruction on the crime of robbery did not contain the element of intent and was thus incomplete, the appellate court said the other instructions given were sufficient to cure the defect.

The trial court's refusal to instruct on unlawful assault as a lesser included offense was proper where a lesser included offense "must be such that it is impossible to commit the greater offense without first committing the lesser offense." In this case, an intent to injure is not relevant to the crime of robbery.

The trial court's refusal to instruct the jury that "the State must prove that the defendant must not have been so drunk, or otherwise incapacitated, as to have been incapable of formulating an intent to steal" was not error in that voluntary drunkenness is not ordinarily an excuse for a crime.[18.5]

[9.1] **Illinois.** People v. Jordan, 121 IllApp2d 388, 257 NE2d 536 (1970).

[9.2] **Georgia.** Bryant v. State, 271 SE2d 904 (GaApp 1980).

[18.1] **Illinois.** People v. Neukom, 16 Ill2d 340, 158 NE2d 53 (1959).

[18.2] **Minnesota.** State v. King, 286 Minn 392, 176 NW2d 279 (1970).

[18.3] **Indiana.** Haynes v State, 431 NE2d 83 (Ind 1982).

[18.4] **Rhode Island.** State v. Cipriano, 430 A2d 1258 (RI 1981).

[18.5] **West Virginia.** State v. Vance, 285 SE2d 437 (WVaApp 1981).

§ 97. Limitation on number of instructions.

In action for wrongful death and property damage resulting from automobile collision, where issues were relatively simple, the defendant was not prejudiced in being limited to ten instructions.[27.1]

Some kind of a record seems to have been established in a case where 582 requests were made by one party! The trial judge refused to pass upon the requested instructions. His action was upheld on appeal.[27 2]

[27.1] **Illinois.** Romines v. Ill. Motor Freight. Inc., 21 IllApp2d 380, 158 NE2d 97 (1959).

[27.2] **Massachusetts.** Commonwealth v. Greenberg, 339 Mass 557, 160 NE2d 181 (1959).

§ 98. Reference to pleadings for issues.

After presenting the parties' contentions, a trial court may tell the jury "you may refer to (the pleadings) as often as you desire to find the issues and contentions." [40.1]

[40.1] **Georgia.** Fidelity & Casualty Co. of N. Y. v. Mangum, 102 GaApp 311, 116 SE2d 326 (1960).

§ 99. Reference to indictment or information.

. . . [T]he principle is established that a trial court may instruct the jury that if they find that all the material allegations of the indictment or affidavit are proven beyond a reasonable doubt that they "should" convict the defendants. However, such an instruction would be erroneous where the court failed to set forth all the material allegations which the State must prove before a conviction can be obtained that or where the court failed to instruct the jury that they were the judges of the law as well as the fact.[46 1]

[46.1] **Indiana.** Loftis v. State, 256 Ind 417, 25 IndDec 477, 269 NE2d 746 (1971).

§ 100. Reference to other instructions.

Although the trial court erroneously charged the jury on the weight to be given evidence of good character and then, at the insistence of the state and over the objection of defense counsel, recalled the jury and instructed them as follows:

"[T]he state, well, an attorney attracted my attention, the district attorney, to a charge I gave you on good character. It is my duty . . . that I erroneously gave you that charge and I believe he is probably right . . . . You are, therefore, instructed to eliminate the charge from your mind and memory; it is not applicable. By this charge I do not imply that the defendant has bad character nor do I imply that he has good character. I am saying to you it is not relevant: Therefore, it should not be taken into consideration." This was not error because the trial court judge nevertheless instructed the jury not to consider the issue of character in one way or another.[49 1]

An instruction incorporating by reference other instructions is not a mere abstract statement of law. However, if the referred-to instructions are incorrect, the incorporating instruction also becomes erroneous.[57.1]

The doctrine of sudden emergency like that of unavoidable accident is an ultimate conclusion of fact, and for either or both to be given there must be sufficient facts relating to the application of these doctrines. If a factual situation exists which leads one to the conclusion of sudden emergency, it may follow that an unavoidable accident may result. Yet, an unavoidable accident can occur without a sudden emergency.[57 2]

[49.1] **Georgia.** Carroll v. State, 271 SE2d 650 (GaApp 1980).

[57.1] **Missouri.** Feldman v. Lewis (MoApp), 338 SW2d 364 (1960).

[57 2] **Florida.** Scott v. Barfield (Fla), 202 S2d 591 (1967).

§ 101. Reading from statutes or ordinances.

In connection with Special Issues 8 through 18, inquiring as to the conduct of plaintiff, A. H. P., you are instructed that Article 1142, Penal Code of Texas, states in part as follows:

"Article 1142. *Lawful Violence.* Violence used to the person does not amount to an assault or battery in the following cases:

"4. In preventing or interrupting an intrusion upon the lawful possession of property."

You are further instructed that "in preventing or interrupting an intrusion upon the lawful possession of property" A. H. P. could use reasonable but not excessive force to effect the purposes of this Statute.

By the term, "negligence," as used in Special Issues 8, 10, 13 and 17, is meant that degree of care that an ordinarily prudent person in lawful possession of property would have exercised under the same or similar circumstances in carrying out the purposes of § 4, Article 1142, quoted above.[58 1]

The trial court judge does not abuse his discretion when he reads to the jury a statute, *e.g.,* restatement of torts, which contains all the elements of the act alleged. Further amplification focusing upon particular factual aspects of the case is unnecessary, and the trial court judge also is not obliged to read commentary to the statute as part of the instructions that he gives the jury. In addition, the trial court judge does not abuse his discretion if he decides to explain a particular statutory or restatement provision to the jury without using the exact language of the text.[58 2]

Instruction which defined first and second-degree murder in the language of the statute was not error, even though some of the language was inapplicable to the facts of the case.[59 1]

You are instructed that Section 21804 of the Vehicle Code of California . . . provided . . . as follows:

". . . .

"You are further instructed that the driveway from which the automobile driven by J. A. entered Ocean Park Boulevard was a private driveway within the meaning of the provision. . . ." [64 1]

It was not improper for the court to read to the jury provisions from the Maryland Transportation Code Annotated, § 21-902 (1977), which defined "driving while intoxicated" and "driving while ability impaired by alcohol," because the court subsequently explained to the jury the definitions in general terms and further instructed the jury that a violation of the statute by the driver, although evidence of negligence, was not enough to enable the plaintiff to recover unless also shown that the negligence was a proximate cause of the injuries. Although not improper to read to the jury statutory definitions of intoxication, a verdict can be supported only if there is some evidence of the driver's condition, consumption of alcohol by the driver, or some observable conditions of intoxication.[65.1]

Where a code section is not applicable, it is error to instruct on it.[80.1]

Reading statutes is seldom reversible error if the jury is told that it must find the facts and then apply the statutes to the facts.[87 1]

A court is not required to use the exact language of a statute, so long as the given instruction gives the substance and meaning of the statute.[87.2]

[58.1] **Texas.** Denton v. Poole (TexCivApp), 478 SW2d 834 (1972).

[58.2] **Maine.** Knight v. Penobscot Bay Medical Center, 420 A2d 915 (Me 1980).

[59.1] **California.** People v. Welch, 8 Cal3d 106, 104 CalRptr 217, 501 P2d 225 (1972).

[64.1] **California.** Eagar v McDonnell Douglas Corp., 32 CalApp3d 116, 107 CalRptr 819 (1973).

[65.1] **Maryland.** Fouche v. Masters, 420 A2d 1279 (MdApp 1980).

[80.1] **California.** Shamblin v. Polich, 32 CalApp3d 756, 108 CalRptr 410 (1973).

[87.1] **Minnesota.** Templin v. Crestliner, Inc., 263 Minn 149, 116 NW2d 178 (1962).

[87.2] **Georgia.** Fennell v. State, 218 Ga 418, 128 SE2d 43 (1962).

§ 102. Quotations from decisions.

Using language from an appellate court opinion does not assure that the instruction is a correct instruction to the jury.[96.1]

The reading of excerpts from previous opinions is not approved, but this alone does not justify a reversal.[96.2]

[96.1] **Alabama.** Knight v. State, 273 Ala 480, 142 S2d 899 (1962).

[96.2] **Maryland.** Lipphard v Hanes, 232 Md 405, 194 A2d 93 (1963).

§ 103. Misleading instructions.

It is not error when certain instructions of the court to the jury respecting attorney's fees which were objected to at trial were after objection clarified for the jury and no further objection was made.[97.1]

The following instruction on the definition of an accomplice:

"A person who is an accomplice in the commission of a crime is guilty of that crime.

"A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of a crime, he or she aids another person in planning or committing the crime. The word 'aid' means all assistance whether given by words, acts, encouragement, support or presence," was not error, even though the instruction could have been more artfully redrawn to have read:

"A person is an accomplice in the commission of a crime if he or she aids another person in planning or committing the crime, with knowledge that it will promote or facilitate the commission of a crime. The word 'aid' means all assistance, whether given by words, acts, encouragement, support or presence." [97.2]

As long as instructions are not a misstatement of the controlling legal principle involved in a particular case the fact that they are not explicit on the point in issue is not misleading.[97.3]

The following instruction held likely to confuse and mislead juries in ordinary negligence actions:

You are instructed, however, that merely because an accident occurred to plaintiff that this will not, of itself, make the defendant liable.[1.1]

An instruction is erroneous if it fails to define or indicate to the trier of fact either what constitutes a "culpable mental state" or what culpable mental state will support the crime charged. Therefore, in a criminal case where the defendant was charged with riot, the trial court committed error when it charged the jury that "to constitute a crime there must be the joint operation of an act forbidden by the law coupled with a culpable mental state."[1.2]

For a portion of a charge to the jury to constitute reversible error, the appellate court will consider the charge, or a series of charges, as an entirety, and then will ask whether it is reasonably probable that the jury, after hearing all the charge, were misled.[1.3]

Although the trial court judge, in his instruction to the jury on the doctrine of strict liability in tort, defined the term "unreasonably dangerous," the instruction is misleading because it was impossible for the jury to perform their fact-finding function when they were not given the definition of defective. For example, the following instruction deprived the plaintiff of the opportunity to present his theory of recovery before the jury:

"[T]his lawsuit [is based] upon a theory of law known as Manufacturer's Products Liability. . . . [T]he law [is that] . . . one who . . . supplies . . . a product in a defective condition which is unreasonably dangerous to the user . . . is strictly liable for all harm . . . [resulting from] the defect while the product is being used for its intended purpose.

"By being 'unreasonably dangerous' to the user, as that term is used above, means that the product must be shown to be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

"In summary of this instruction, you may find the defendant liable to the plaintiff in this lawsuit if you find from the evidence the following facts to exist:

1. That the defendant Nelson Sales Co., Inc., supplied the underwear which was ultimately worn by the plaintiff at the time of his accident and that such underwear contained a defect which made the product unreasonably dangerous to the user;

2. That such defect existed in the product at the time it left the defendant's control; and

3. That such product was the cause of damages to the plaintiff. In this connection, you are instructed that the mere possibility that it might have caused the injury is not enough."

In addition, the following instruction by the trial court was superfluous, misleading and defense-slanted:

"[T]he mere happening of an accident and injury raises no presumption of defectiveness in the garment involved in the accident, nor does it raise a presumption of the breach by a defendant of its obligations under the theory of Manufacturer's Products Liability."[6 1]

We are of the opinion that the trial court's giving final instructions 1 and 9 on two separate theories, namely, negligence and wanton or willful misconduct, was bound to mislead the jury and leave them in doubt as to whether to decide the case on the theory of negligence or the theory of wanton or willful misconduct, and was reversible error.[7 1]

But to give the jury these two sets of rules in conjunction without explaining or distinguishing between them was, in the circumstances of this case, to load the charge strongly in favor of the defendant.[15.1]

Typewritten instructions, with parts stricken out by drawing through them with ink, are not misleading, although the jury could still read what was stricken.[24.1]

A misleading instruction does not constitute error; the remedy is to request an explanatory charge.[24.2]

Even though instructions are noticeably over-balanced against the plaintiff so long as no part of the evidence is *emphasized* directly or indirectly it is not prejudicial error. (Emphasis supplied).[24 3]

The instruction as given by the trial court, that "a pedestrian must exercise ordinary care at all times in crossing a street, whether crossing at a crosswalk or at any other point on the street," while technically correct, could well have misled the jury into concluding that no greater diligence or caution was required of the plaintiff in exercising ordinary care while crossing in the middle of a block than would be required of her when crossing at a pedestrian crossing. The court therefore erred in not relating the degree of caution to the circumstances.[24.4]

[97.1] **Georgia.** Magyer v. Brown, 116 GaApp 498, 157 SE2d 825 (1967).
[97.2] **Washington.** State v. Rotunno, 621 P2d 191 (WashApp 1980).
[97.3] **Minnesota.** Hemming v. Ald, Inc., 279 Minn 38, 155 NW2d 384 (1967).
[1.1] **Alaska.** Maxwell v. Olsen (Alaska), 468 P2d 48 (1970).
[1.2] **Colorado.** People v Bridges, 620 P2d 1 (Colo 1980).
[1.3] **Connecticut.** State v. Anonymous, 36 ConnSuper 583, 421 A2d 872 (1980).
[6.1] **Oklahoma.** Spencer v. Nelson Sales Co., 620 P2d 477 (OklApp 1980).
[7.1] **Indiana.** Britton v. Garrison, 147 IndApp 264, 259 NE2d 417 (1970).
[15.1] **Georgia.** Flowers v Slash Pine Elec. Membership Corp., 122 GaApp 254, 176 SE2d 542 (1970).
[24.1] **Tennessee.** Tomlin v. State, 207 Tenn 281, 339 SW2d 10 (1960).
[24.2] **Alabama.** Thompson v. Magic City Trucking Service, 275 Ala 291, 154 S2d 306 (1963).
[24.3] **Nebraska.** Hansen v First Westside Bank, 182 Neb 664, 156 NW2d 790 (1968).
[24.4] **North Dakota.** Glatt v. Feist (ND), 156 NW2d 819 (1968).

§ 104. Contradictory instructions.

If the judge gives conflicting instructions, it is presumed that the jury may have followed the erroneous one.[32.1]

The following instruction on assault:

"As to each count in which a defendant is charged with directly committing a crime if you are satisfied beyond a reasonable doubt that the defendant named in the count was a prisoner confined to a state prison and while so, intentionally caused bodily harm to an officer or an inmate respectively, as charged, of such prison without the consent of that person, then you should find the defendant guilty of battery by a prisoner as to that count," was not conflicting or contradictory to the following instruction on self-defense:

"If you find that a defendant did intentionally cause bodily harm to an officer or inmate as charged in the information but that he did so under such circumstances that under the law of self defense as it has been explained to you, such use of force was privileged, then you must find the defendant not guilty, giving him the benefit of any reasonable doubt as to whether his conduct was privileged under the law of self defense. In other words, before you can find a defendant guilty of an offense charged, you must be satisfied beyond a reasonable doubt from the evidence in this case that any use of force by him against the person named in the charge if such force was so used was not privileged under the law of self defense as that has been defined for you," even though the jury is first told that they can find the defendant guilty but then are told that they cannot, and even though the instruction could have been more artfully drawn.[64.1]

[32.1] **Michigan.** Iwrey v. Fowler, 367 Mich 311, 116 NW2d 722 (1962).
[64.1] **Wisconsin.** State v. Staples, 99 WisApp 364, 299 NW2d 270 (1980).

§ 105. Undue prominence to particular features in civil cases.

All instructions should be typed on the same typewriter; larger type should not be used purposefully. But it is not prejudicial error if the same typewriter was not available to type all the instructions.[84.1]

[84.1] **Missouri.** Newman v. St. Louis-San Francisco Ry. Co. (Mo), 369 SW2d 583 (1963).

§ 107. Undue prominence in criminal cases.

The mere fact that the testimony of a rape victim is uncorroborated does not per se constitute a reason for distrusting the victim's testimony so as to require a cautionary instruction, especially where the evidence and testimony fails to show any personal enmity between the victim and the defendant. Therefore, in the absence of any disputed evidence that would give reason to distrust the uncorroborated testimony of a rape victim, the following requested instruction was properly refused:

"You are instructed that the charge of Sexual Intercourse Without Consent is easy to make, difficult to prove, and more difficult to disprove, and in considering a case of this kind, it is the duty of the jury to carefully and deliberately consider, compare and weigh all testimony, facts and circumstances bearing on the act complained of, and the utmost care, intelligence and freedom from bias should be exercised by the jury (sic) consideration thereof."

The following instruction, however, that the court chose to give on the issue of consent instead of the defendant's requested charge was held improper as argumentative and a commentary on the evidence:

"There is no clear rule as to how much resistance is required of a woman in order to prove her lack of consent to sexual intercourse with a man who intends to rape her, apparently at all costs. The law does not put her life into even greater jeopardy than it is already in. There is no way a woman in dealing with a man bent on rape can know how must resistance she can give without provoking him into killing her. Continuous resistance to an attempted rape is not required."[17.1]

The trial judge must not in his charge overemphasize the contentions of one side while minimizing the contentions of the other side.[25.1]

[17.1] **Montana.** State v. Pecora, 619 P2d 173 (Mont 1980).

[25.1] **Pennsylvania.** Commonwealth v. Evans, 190 PaSuper 179, 154 A2d 57 (1959).

§ 108. Argumentative instructions in civil cases.

The Court instructs the jury for the defendants that you must return a verdict for the defendants unless the plaintiffs have proven to the satisfaction of a jury by a preponderance of the evidence that the aforenamed defendant, A. C., was negligent in the operation of his tractor immediately preceding the accident.[26.1]

[26.1] **Mississippi.** Elsworth v. Glindmeyer (Miss), 234 S2d 312 (1970).

§ 109. Argumentative instructions in criminal cases.

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[54.1] **Montana.** State v. Pecora, 619 P2d 173 (Mont 1980).

§ 111. Special verdicts, interrogatories, and findings — Preparation, form, and submission.

Ohio Statutes peculiarly permit interrogatories to accompany special verdicts (Ohio R. C., § 2315.16, eff. Oct. 4, 1955). In a special verdict, the jury must find "upon each determinative issue" (Ohio R. C., § 2315.14). "Determinative issue" means the ultimate issues, not limited to questions of fact alone, so that their determination will settle the controversy, leaving nothing for the judge to do but enter judgment. Examples of determinative issues: negligence, contributory negligence, assumption of risk, proximate causation, and the amount of damages.

Interrogatories are confined to findings "upon particular material allegations contained in the pleadings controverted by an adverse party" (Ohio R. C., § 2315.16). Interrogatories involve findings on controlling questions of fact, or findings on evidentiary matters. Examples: Was Mr. _____ driving at an excessive speed considering the weather and road conditions? Did Mr. _____ fail to keep a reasonable lookout ahead?

Instructions under the new special verdict statutes should be similar to those given in a general verdict case, with adaptations indicated by the new statutes.

"The purpose and manner of use of the special verdict should be explained to the jury. The pleadings should be outlined, the issues as presented by the

pleadings should be stated and explained, and the meaning of the various legal terms incident to the particular case should be carefully defined. Naturally, the 'burden of proof,' 'preponderance of the evidence,' 'the credibility of witnesses,' and 'the functions and duties of the jury and the number of jurors required to return a verdict,' etc., should be covered. And in a negligence action 'negligence,' 'contributory negligence,' 'proximate cause,' etc., should be defined; also 'assumption of risk,' where it is in the case and is expressly relied on as a defense." [98.1]

It is proper for the trial court to instruct the jury in special verdict cases that it could give them no information as to the effect of their answers.[98.2]

Special question on whether defendant was negligent is improper since it is at best a mixed question of law and fact.[98.3]

[98.1] **Ohio.** Miller v. McAllister, 169 OhSt 487, 160 NE2d 231 (1959).

[98.2] **Wisconsin.** Vanderbloemen v. Suchosky, 7 Wis2d 367, 97 NW2d 183 (1959). Baker v. Northwestern Nat. Cas. Co., 26 Wis2d 306, 132 NW2d 493 (1965)

[98.3] **Michigan.** Baker v. Saginaw City Lines, Inc., 366 Mich 180, 113 NW2d 912 (1962).

CHAPTER 5

PERTINENCY

Section

115. Necessity that instructions should be pertinent in civil cases.
116. Pertinency of instructions in criminal prosecutions.
117. Pertinency to pleadings in civil cases
119. Pertinency to evidence admitted in civil cases.
120. Pertinency to evidence admitted in criminal prosecutions.
121. Abstract instructions in civil cases.
122. Abstract instructions in criminal prosecutions.
123. Ignoring issues in civil cases.
124. Ignoring evidence in civil cases.
125. Ignoring issues and evidence in criminal prosecutions
126. Directing verdict if jury believes certain evidence or finds certain facts — Formula instructions.
126A. Reformation by instruction.

§ 115. Necessity that instructions should be pertinent in civil cases.

Where a judge instructed the jury on the Fellow Servant Doctrine by charging: "Except in case of railroad companies, the master shall not be liable to one servant for injuries arising from the negligence or misconduct of other servants about the same business."

Appellant claimed he was employed by his father and not the defendant, which made the above instruction erroneous. *Held:* Where a distinct issue is presented in the pleadings, it is proper for the trial judge to instruct the jury on the law relating thereto, provided the charge is supported by some evidence, even though very slight. Here the existence of check drawn on defendant's account and payable to plaintiff, although far from conclusive, was sufficient to justify the instruction given.[1.1]

Regarding the determination of negligence the jury might consider customary use of safer design by other manufacturers upon the question of whether Ford failed to exercise the skill of an expert in designing the tractor involved. Instruction 29 stated the jury might consider the evidence, if any, of customary use and practices of other manufacturers of similar products and the incorporation of available safety products into the Ford tractor.

Proper instructions should be read and considered as a whole and the above if thus read shows no signs of impropriety.[1.2]

Part of a charge was objected to because it was addressed to the issue of plaintiff's contributory negligence and the circumstances under which her negligence might be one of the proximate causes of the collision between the automobiles. It was held not to be prejudicial error since it was not within the pleadings and proof.[1 3]

A party seeking . . . an instruction on imminent peril must present a record containing some evidence that there was affirmative action or voluntary conduct on his part in an effort to avoid the danger, following the unexpected appearance of danger.[1.4]

Each party is entitled to an instruction on his particular theory of the case so long as there is evidence to support the theory.[1 5]

The test of a charge is whether it is correct in law, adapted to the issues and evidence in the case, and sufficient to guide the jury in applying the law correctly to the facts. Although the degree to which reference to the evidence may be called for resides within the sound discretion of the court, the court nonetheless must make sure that the charge adequately instructs the jury on the elements of the offense charged.[4 1]

Pertinency to pleadings alone is not enough. Regardless of issues formed by the pleadings, it is improper to give an instruction not supported by the evidence.[11.1]

A charge is tested by the parties' claims of proof and not by the evidence.[11.2]

It is reversible error to instruct on issues not raised by the pleadings or applicable to the evidence, if the effect is to mislead the jury.[11 3]

Prejudicial error is not committed simply because an instruction is not within the pleadings and proof.[11.4]

[1.1] **Georgia.** Lacy v. Ferrence, 117 GaApp 139, 159 SE2d 479 (1968).

[1.2] **Iowa.** Bengford v. Carlem Corp. (Ia), 156 NW2d 855 (1968).

[1.3] **North Carolina.** Jenkins v. Gaines, 272 NC 81, 157 SE2d 669 (1967).

[1.4] **California.** Skoglie v. Crumley, 26 CalApp3d 294, 103 CalRptr 205 (1972).

[1.5] **California.** McGoldrick v. Porter Cable Tools, 34 CalApp3d 885, 110 CalRptr 481 (1973).

[4.1] **Connecticut.** State v. Sumner, 178 Conn 163, 422 A2d 299 (1980).

[11.1] **Kentucky.** Powell v. C. Hazen's Store, Inc. (KyApp), 322 SW2d 483 (1959).

[11.2] **Connecticut.** Franks v. Lockwood, 146 Conn 273, 150 A2d 215 (1959).

[11.3] **Nebraska.** Watson Bros. Transportation Co. v. Jacobson, 168 Neb 862, 97 NW2d 521 (1959).

[11.4] **Washington.** Owens v. Anderson, 58 Wash2d 448, 364 P2d 14 (1961).

§ 116. Pertinency of instructions in criminal prosecutions.

The court properly refused to give the following requested statement: "I charge you that in your deliberations on punishment, you are not to return a sentence of death if you determine that the defendant . . . was not the responsible party who pulled the trigger on the weapon which killed the victim." The issue of who actually fired the gun is a factor to be considered, not a mandatory bar on the jury's imposition of the death penalty.

The appellate court held the trial judge properly refused to give the jury an instruction placing burden of proof on the state to show an enumerated aggravating circumstance and the lack of mitigating circumstances. The appellate court held that the statute does not impose any such burdens of proof with respect to mitigating circumstances.[13.1]

[13.1] **Louisiana.** State v. Sonnier, 402 S2d 650 (La 1981).

§ 117. Pertinency to pleadings in civil cases.

An "abstract instruction" is one which either broadens the issue beyond the scope of the pleadings or beyond the scope of the evidence, but is not prejudicial unless all the circumstances surrounding the giving of the instruction show that it misled the jury.

Thus, for example, the following instruction was held not to be an "abstract instruction" and *not* misleading merely because there was some evidence introduced that the dog of the defendant was not involved in all the incidents of damage:

"If one or more of several dogs owned by different persons participated in damaging any livestock, the owners of the respective dogs shall be jointly and severally liable under this section. The owners of dogs jointly or severally liable under this section have a right of contribution among themselves. The right exists only in favor of an owner who has paid more than his pro rata share, determined by dividing the total damage by the number of dogs involved, of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share." [19 1]

The plaintiff alleges in his complaint that, by reason of her injuries . . . she has sustained special and general damages in the sum of one hundred thousand dollars. . . . The allegations in the complaint are not evidence. They reflect the claim that the plaintiff makes.[23 1]

If you return a verdict for the plaintiff, you may increase or reduce the amount you find fair and just by reason of any aggravating or mitigating circumstances attending the act, neglect or default which caused the death of E.[52.1]

[19.1] **Oregon.** Columbia Co. v. Randall, 620 P2d 937 (OrApp 1980).

[23.1] **Federal.** Weeks v. Latter-Day Saints Hosp., 418 F2d 1035 (1969).

[52.1] **Arizona.** Southern Pacific Co. v. Barnes, 3 ArizApp 483, 415 P2d 579 (1966).

§ 119. Pertinency to evidence admitted in civil cases.

It is error to instruct as follows without clear justification for the matter contained:

"Members of the Jury, the Court will now instruct you as to the rules of law which you will apply to the evidence in reaching your decision in this case, so we are coming now to your place to function as a citizen in this case and important function it is. This is the only voice that really a private citizen ever has in a federal court. You don't have any choice. You don't have any right to vote for the person who presides over the Federal Court or any of its officials, but you do have a chance now to decide what kind of government you want in your area of the State and I am here to see that that kind of government that you do want is enforced, so if you want good government it is an opportuntity in these cases where you sit as jurors to express yourself in that way and if you want chaos and if you want anarchy, if you want people to observe the laws that they like to observe and to ignore the others, vote your preference in these cases where you sit as jurors, because as I say this is the only time you ever have an

opportunity to express any views you may have on the subject of what kind of government you want." [67 1]

An "abstract instruction" is one which either broadens the issue beyond the scope of the pleadings or beyond the scope of the evidence, but is not prejudicial unless all the circumstances surrounding the giving of the instruction show that it misled the jury.

Thus, for example, the following instruction was held not to be an "abstract instruction" and *not* misleading merely because there was some evidence introduced that the dog of the defendant was not involved in all the incidents of damage:

"If one or more of several dogs owned by different persons participate in damaging any livestock, the owners of the respective dogs shall be jointly and severally liable under this section. The owners of dogs jointly or severally liable under this section have a right of contribution among themselves. The right exists only in favor of an owner who has paid more than his pro rata share, determined by dividing the total damage by the number of dogs involved, of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share." [86 1]

Even though an instruction is not supported by the evidence, it is not reversible error unless the instruction would probably mislead the jury.[5 1]

In determining whether the evidence supports an instruction, the court uses the same test in determining if the evidence is sufficient to justify the verdict, i.e., is there any substantial evidence, contradicted or not, to justify the instruction? [5.2]

A requested charge on contributory negligence should be denied if the evidence would have sustained the granting of a directed verdict or a summary judgment on this issue.[5.3]

Instructions should be confined to the issues raised by the pleadings and the facts developed by the evidence.[5.4]

It is prejudicial error to submit an issue to the jury if there is no substantial evidence supporting the issue; the danger is that giving the instruction may indicate to the jury that the court must have thought there was some supporting evidence.[5.5]

This case was an appeal from a decision in favor of defendant, plaintiff's employer, in a truck collision case. Plaintiff excepted to the court's refusal to give his tendered instruction stating that there was no evidence of contributory negligence on his part, and that therefore any finding of negligence on the part of the defendant would result in full recovery for plaintiff. The Supreme Court upheld the refusal to instruct, noting that the plaintiff had admitted a traffic violation, and that this evidence was properly submitted to the jury on the issue of contributory negligence, along with other evidence on the same point.[5 6]

The following instruction is erroneous as not in conformance with the facts:

There was in force in the state of Illinois at the time of the occurrence in question a certain statute which provides:

All construction work upon bridges or highways within the state of Illinois shall be so performed and conducted that two-way traffic will be maintained when such is safe and practical, and when not safe and practical, or when any portion of the highway is obstructed, one-way traffic shall be maintained,

unless the authorized agency in charge of said construction directs the road be closed to all traffic.

If you decide that a party violated the statute on the occasion in question, then you may consider that fact together with all the other facts and circumstances in evidence in determining whether or not a party was negligent before and at the time of the occurrence.[5 7]

Instructions to the jury, informing that any damage award would not be subject to federal income tax liability, are permitted or not depending upon the amount of income being compensated for. Where extremely high income is involved, there is a danger of injustice to the defendant if the tax effects of the award are ignored. This danger outweighs the injustice to the plaintiff from reducing an award of damages to allow for a tax element. Generally, an instruction as to the effect of income taxes on an award of damages is proper when there has been proof of extremely high prospective income. For example, it was held that proof of prospective income to the plaintiffs in the amount of $20,000 per annum was not an extremely high annual income to warrant an instruction on the effect of income taxes. Note that no specific figure, however, was given as one that would "trigger" the need to instruct on income tax.[5.8]

[67.1] **Federal.** United States v. Hill, 417 F2d 279 (1969).

[86.1] **Oregon.** Columbia Co. v. Randall, 620 P2d 937 (OrApp 1980).

[5.1] **California.** Finney v. Neuman, 186 CalApp2d 463, 9 CalRptr 331 (1960).

[5.2] **California.** Cooke v. Stevens, 191 CalApp2d 457, 12 CalRptr 828 (1961).

[5.3] **Florida.** Sneed v. City of West Palm Beach (FlaApp), 128 S2d 166 (1961).

[5.4] **Federal.** Bethel v. Thornbrough, 311 F2d 201 (1962)

[5.5] **Washington.** Albin v. National Bank of Commerce, 60 Wash2d 745, 375 P2d 487 (1962).

[5.6] **Montana.** DeWar v. Great Northern Ry. Co., 150 Mont 367, 435 P2d 887 (1967).

[5.7] **Illinois.** Tylitzki v. Triple X Service, Inc., 126 IllApp2d 144, 261 NE2d 533 (1970).

[5.8] **Washington.** Boeke v. Int'l Paint Co (Cal), 620 P2d 103 (WashApp 1980).

§ 120. Pertinency to evidence admitted in criminal prosecutions.

There must, of course, be a threshold determination by the trial court that there is sufficient evidence of intoxication to require the giving of diminished capacity instructions. "It has been held that merely showing that the defendant consumed some alcohol prior to commission of the crime without showing the effect of the alcohol on him is not sufficient to warrant an instruction on diminished capacity [even when requested by the defendant]." . . . It has even been held that "[t]he fact that a defendant has been drinking, without evidence that he became intoxicated thereby, provides no basis for an instruction on intoxication." [7.1]

[7.1] **California.** People v. Stevenson, 79 CalApp3d 976, 145 CalRptr 301 (1978).

§ 121. Abstract instructions in civil cases.

The fact, however, that a given charge is abstract is not available as reversible error unless it affirmatively appears from the record that the charge worked injury to the complaining party; such party's remedy being to request an explanatory charge.[40.1]

An "abstract instruction" is one which either broadens the issue beyond the scope of the pleadings or beyond the scope of the evidence, but is not prejudicial unless all the circumstances surrounding the giving of the instruction show that it misled the jury.

Thus, for example, the following instruction was held not to be an "abstract instruction" and *not* misleading merely because there was some evidence introduced that the dog of the defendant was not involved in all the incidents of damage:

"If one or more of several dogs owned by different persons participate in damaging any livestock, the owners of the respective dogs shall be jointly and severally liable under this section. The owners of dogs jointly or severally liable under this section have a right of contribution among themselves. The right exists only in favor of an owner who has paid more than his pro rata share, determined by dividing the total damage by the number of dogs involved, of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share." [40.2]

[40.1] **Alabama.** Knabe v. State, 285 Ala 321, 231 S2d 887 (1970).

[40.2] **Oregon.** Columbia Co. v. Randall, 620 P2d 937 (OrApp 1980).

§ 122. Abstract instructions in criminal prosecutions.

The following instruction while not reversible error is abstract and should not be requested in the future:

The Court instructs the Jury for the State that you do not have to know that the defendant is guilty of the crime charged in the indictment before you would be warranted in convicting him; all that the law requires is that you must believe from the evidence, beyond a reasonable doubt, that he is guilty of the crime charged, and if you so believe, then it would be your sworn duty to find the defendant guilty as charged.[46.1]

Propositions of law applicable to any case, even though correct, should not be given unless applied to the issues of the case before the trial court.[56.1]

Ordinarily it is not proper to state an abstract rule of law in an instruction because no one knows exactly how a jury will apply the instruction to the case. But merely giving an abstract instruction is not reversible error. If all the instructions read together properly present the law of the case, the abstract instruction is not misleading.[56.2]

The test for insanity in Oklahoma is whether the appellant knew right from wrong and could appreciate the wrongfulness of his acts at the time of the commission. For example, in the following instruction:

"You are instructed that the term 'insanity' as used in this case means a perverted and deranged condition of the mental faculties which render a person incapable of distinguishing between right and wrong, and incapable of understanding the nature and consequences of the particular act,"

although the court used the phrase "a deranged or perverted condition," this was not misleading to the jury when construed in conjunction with the court's other instruction on insanity, which was:

"The defendant has interposed as one of his defenses the plea of insanity.

"In this connection you are instructed that under the law of this state an act done by a person in a state of insanity cannot be punished as a public offense,

and the following persons are incapable of committing crimes, that is to say, lunatics, insane persons and all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that at the time of committing the act charged against them they were incapable of knowing its wrongfulness.

"The law presumes every person to be sane and able to distinguish right from wrong as applied to any particular act, and to understand the nature and consequences of such act, until a reasonable doubt of his sanity is raised by competent evidence, and it is an essential ingredient of a crime that a person, to be guilty of such crime, must have at the time of its commission, sufficient mental capacity and reason to enable him to distinguish between right and wrong as applied to the particular act that he is then about to do. It is not every derangement of the mind that will excuse one from punishment for the commission of crime. Although one may be in a diseased or unsound condition of mind brought on by any condition or produced by any cause, if at the time he commits the crime he knows and understands it is wrong and criminal to commit such act, and has sufficient mind to apply that knowledge to his own acts, and to know that if he does commit such act he will do wrong and subject himself to punishment, then and in that event such diseased or unsound condition of mind is not sufficient to excuse him from criminal liability.

"When the plea of insanity is interposed, the burden of the proof is on the defendant, unless the evidence on the part of the State is sufficient for that purpose, to introduce sufficient evidence to raise in the minds of the jury a reasonable doubt of the defendant's sanity. It is not required that the defendant shall prove his insanity to the satisfaction of the jury beyond a reasonable doubt, or by a preponderance of the evidence. It is sufficient if only he introduces sufficient evidence to raise in the minds of the jury a reasonable doubt of his sanity, and when this is done the burden of proof is on the state to prove the sanity of the defendant by competent evidence, beyond a reasonable doubt, before the jury would be justified in convicting the defendant.

"You are therefore instructed that if, after considering all the evidence in this case, you believe beyond a reasonable doubt that at the time he fired the fatal shots that took the life of the deceased, the defendant knew the nature and consequences of his act and knew that it was wrong to shoot said Sharon Mae Kelley and was able to distinguish between right and wrong as applied to said act, then and in that event you would not be justified in acquitting him by reason of insanity. On the contrary, if, after considering all the evidence in the case, you entertain a reasonable doubt as to whether the defendant was mentally competent to understand the nature and consequences of his act, and to distinguish between right and wrong as applied to said act, and to know that it was wrong to shoot the deceased, then and in that event it is your duty to resolve that doubt in his favor and acquit him on the ground of insanity, and state that fact in your verdict." [56.3]

[46.1] **Mississippi.** McGill v. State (Miss), 235 S2d 451 (1970).

[56.1] **Maine.** State v. Benson, 155 Me 115, 151 A2d 266 (1959).

[56.2] **Missouri.** State v. Brown (Mo), 332 SW2d 904 (1960).

[56.3] **Oklahoma.** Maghe v. State, 620 P2d 433 (OklCrimApp 1980).

§ 123. Ignoring issues in civil cases.

The trial court properly refused an instruction, requested by the plaintiff, on negligence and proximate cause because before trial the plaintiff had elected to employ solely the theory of strict liability, and both parties proceeded on that basis during the course of the trial.[61 1]

It is the law of the State of Michigan that one who voluntarily places himself or remains, places himself in or remains in a position which he knows, or with the reasonable exercise of care should have known is dangerous cannot recover for any resulting injury.[66 1]

You are instructed further that if you find that the defendant Wisconsin Public Service Company had exclusive control of the reactor involved in this accident, and if you further find that the accident is of a type that ordinarily would not have occurred had the defendant . . . exercised ordinary care, then you may infer from the accident itself, and the surrounding circumstances, that there was negligence on the part of the defendant . . . , unless said defendant has offered you an explanation of the accident which is satisfactory to you.[73.1]

Also, with respect to your answer to Question No. 2 inquiring as to the negligence of the defendant, you are instructed that if you find the defendant had the right to control the repair work on the coping stone, and if you further find that the accident claimed is of a type or kind that ordinarily would not have occurred had the defendant exercised ordinary care, then you may infer from the accident itself and the surrounding circumstances that there was negligence on the part of the defendant, unless the defendant has offered you an explanation of the accident which is satisfactory to you.[73.2]

The Colorado comparative negligence statute, Colorado Revised Statutes, § 13-21-111(1) (1973 & Supp. 1981), eliminates the fourth element of the *res ipsa loquitur* doctrine — requirement that the plaintiff be free from contributory negligence — and modifies the second element of the *res ipsa* doctrine — the requirement that there be a finding that it is more likely than not that the defendant's negligence was the cause of the accident rather than any conduct on the part of the plaintiff. Therefore, "whenever a court can reasonably find that the event is of the kind which ordinarily would not occur in the absence of someone's negligence and that defendant's inferred negligence was, more probably than not, a cause of the injury, the doctrine of *res ipsa loquitur* applies even though plaintiff's negligent acts or omissions may also have contributed to the injury. Once the trial court rules that the doctrine is applicable, the jury must then compare any evidence of negligence of the plaintiff with the inferred negligence of the defendant and decide what percentage of negligence is attributable to each party." [73 3]

Adverse possession includes five elements. It must be hostile or adverse; actual; visible, notorious and exclusive; continuous; and under claim of ownership. The party asserting adverse possession as a bar to legal title has the burden of proving that the foregoing elements have existed for a period of twenty years or more. In addition, he must prove, by clear and unequivocal evidence, the location of the boundaries he claims. Such boundaries must be definitely established at the inception, during the continuance, and at the completion of the period of adverse possession.[83 1]

To involve the doctrine of *res ipsa loquitur,* three essential elements must be met: (1) the instrumentality must be under the control or management of the defendant; (2) the circumstances according to common knowledge and experience, must create a clear inference that the accident would not have happened if the defendant had not been negligent; and (3) the plaintiff's injury must have resulted from the accident.[88 1]

[61.1] **Washington.** Arnold v Laird, 621 P2d 138 (Wash 1980).

[66.1] **Michigan.** Milauckas v Meyer, 1 MichApp 500, 136 NW2d 746 (1965).

[73.1] **Wisconsin.** Mixis v. Wisconsin Pub. Serv. Co., 26 Wis2d 488, 132 NW2d 769 (1965).

[73.2] **Wisconsin.** Goebel v. General Bldg. Serv. Co., 26 Wis2d 129, 131 NW2d 852, at 855 (1965).

[73.3] **Colorado.** Montgomery Elevator Co. v Gordon, 619 P2d 66 (Colo 1980).

[83 1] **Illinois.** Patient v Stief, 49 IllApp3d 99, 363 NE2d 927 (1977).

[88.1] **Kentucky.** Helton v. Forest Park Baptist Church, 589 SW2d 217 (KyApp 1979)

§ 124. Ignoring evidence in civil cases.

Now, members of the jury, in the course of his argument to you Mr. Mc. made reference to the nonproduction of certain testimony by Mr. M. relative to analysis of the stains on the dress. Now, under our law where a party has control of certain evidence, in this case the dress, it is the rule that the failure to produce evidence which might have to do with analysis of the dress and its contents can lead to an inference against the party who does not produce such evidence; and it was proper for Mr. Mc. in his argument to comment on that; and the Court was wrong in its instructions to you in stating that Mr. Mc. was not entitled to so comment.[89.1]

[89.1] **Wisconsin.** Kink v. Combs, 28 Wis2d 65, 135 NW2d 789 (1965).

§ 125. Ignoring issues and evidence in criminal prosecutions.

When the evidence reflects that two or more persons jointly engaged in the commission of a crime, an instruction on complicity is appropriate the Supreme Court held.[9 1]

The Supreme Court held when the evidence reflects that two or more persons jointly engaged in the commission of a crime, an instruction on complicity is appropriate.[9.2]

The instruction, "the court instructs the jury that self-defense is not a defense to the crime charged in the indictment in this case, and self-defense should not be considered by you in determining your verdict," was properly given since there was no possible reasonable *inference* allowing a finding of self-defense.

There can be no pleading of self-defense if a person provokes a difficulty, aims his weapon in advance and *intends,* if necessary, to use his weapon and overcome his adversary. By doing so, he becomes the aggressor and deprives himself of the right of *self-defense.* The right of self-defense is thus nonapplicable unless the aggressor abandons his attack and flees.[9 3]

It is reversible error for a court to deny a requested instruction in a criminal trial as long as there is evidence produced at trial which, if believed by the jury, would support a defense claimed by the defendant. For example, when there

was testimony in a homicide case that the shooting of the victim could have been accidental, it was reversible error for the court to deny charging the jury as follows:

"If you believe that the gun went off accidentally, then you are instructed that you must return a verdict of not guilty." [23 1]

Where a timely and proper objection is made to a charge that fails to apply the law of the parties to the facts of the case, and where the evidence does not support submitting the case to the jury on the theory that the defendant was the sole actor, then it is reversible error for the court to fail to apply the law of the parties to the facts of the case, notwithstanding the fact that the court includes in its instructions a charge in the abstract on the law of the parties. For example, it was error to refuse the following instruction:

"A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, or by the conduct of another for which he is criminally responsible, or both. Each party to an offense may be charged with the commission of the offense.

"Mere presence alone will not make a person a party to an offense. A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he aids the other person to commit the offense.

"Therefore, if you believe from the evidence beyond a reasonable doubt that the Defendant, CHARLES J. RASMUSSEN, either by his own conduct knowingly and intentionally delivered more than one-fourth ounce of marijuana to M. L. FIFE on February ____, 1977 in Dallas County, Texas, or acting with intent to promote or assist the commission of the offense aided LEIF KJEHL RASMUSSEN to commit the offense charged, as defined above, and that the said LEIF KJEHL RASMUSSEN did on February ____, 1977 deliver more than one-fourth ounce of marijuana to M. L. FIFE in Dallas County, Texas, you will find the Defendant guilty.

"If you do not so believe, or if you have a reasonable doubt thereof, you will find the Defendant not guilty." The court erred in refusing the defendant's requested instruction and in submitting instead the following instruction to the jury:

"Therefore, if you believe from the evidence beyond a reasonable doubt that the defendant, Charles James Rasmussen, did, in Dallas County, Texas, on or about the 11th day of February, 1977, knowingly or intentionally deliver to M. L. Fife marijuana in a quantity greater than one-fourth of an ounce, you will find the defendant guilty as charged in the indictment.

"If you do not believe, or if you have a reasonable doubt thereof, that, at the time and place alleged, the defendant knowingly or intentionally delivered marijuana to M. L. Fife, you will find the defendant not guilty.

"All persons are parties to an offense who are guilty of acting together in the commission of an offense. A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.

"A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense.

"Each party to an offense may be charged with the commission of the offense.

"Mere presence alone at the time and the place of the commission of an offense, if any was committed, does not constitute one criminally responsible as a party to the offense." [23.2]

[9.1] **Colorado.** People v. Calvaresi, 600 P2d 57 (Colo 1979).

[9.2] **Colorado.** People v. Calvaresi, 600 P2d 57 (Colo 1979).

[9.3] **Mississippi.** Parker v. State, 401 S2d 1282 (Miss 1981).

[23.1] **New Hampshire.** State v Aubert, 421 A2d 124 (NH 1980).

[23.2] **Texas.** Rasmussen v State, 608 SW2d 205 (TexCrimApp 1980).

§ 126. Directing verdict if jury believes certain evidence or finds certain facts — Formula instructions.

The Supreme Court of Utah has warned against the use of formula instructions because they may omit essential elements and because they tend to be argumentative.[33.1]

[33.1] **Utah.** Ivie v. Richardson, 9 Utah2d 5, 336 P2d 781 (1959).

§ 126A. Reformation by instruction.

There are some instances where it is perfectly proper for a trial court judge to "reform" an earlier, erroneous verdict without resubmitting the issue of reformation to the jury. This is possible so long as the earlier verdict was not "fatally defective," *e.g.,* reformation by instruction will be permitted if the error involved awarding damages to plaintiff "X" instead of plaintiff "Y" when the error was caused by initially submitting the issue of damages to the jury in a confusing way. For example, in a complicated breach of contract case involving multiple parties, and where it would have been impractical to require jury members to go through corporate accounts and checkbooks, the following instruction, which reformed an earlier verdict when it was apparent that the plaintiff who was awarded the damages was not the plaintiff who had suffered the loss, was held well within the discretion of the trial court to give and proper:

"The Court: Members of the jury, as previously told by the Court, the matter of liability is not an issue in this case. We are dealing with the issue of damages.

"Now there are two Plaintiffs in this proceeding, Ronald W. Pickett and Clifton Building Corporation.

"Now the Court is going to instruct you that at this stage there, and it has been agreed by counsel representing the Plaintiffs, Ronald W. Pickett and Clifton Building Corporation that the verdict should be in the name of Clifton Building Corporation, so the verdict, which you rendered in this case, will go in favor of that Plaintiff, it having been concluded that they were the, or that corporation was the one who sustained any loss that you find to have been sustained as a result of the evidence which had been admitted here today." [34]

[34] **Maryland.** Sergeant Co. v. Clifton Bldg Corp., 423 A2d 257 (MdSpecApp 1980).

CHAPTER 6

CONSTRUCTION AND EFFECT

Section
135. Interpretation — In general
136. Construction of charge as an entirety in civil cases.
137 Construction of charge as an entirety in criminal cases.
138. Cure of erroneous instruction by correct instruction in civil cases.
139 Cure of erroneous instruction by correct instruction in criminal cases.
140. Cure of ambiguous instruction by another instruction.
141. Cure by withdrawal of erroneous instruction

§ 135. Interpretation — In general.

In determining whether a party has sustained the burden of proof placed upon him by these instructions, you are not limited to the evidence introduced by such party. Either party is entitled to the benefit of any evidence tending to establish his contentions.[2.1]

An instruction which impliedly refers to evidence adduced during the course of trial is proper if its clear intent is obvious from preceding instruction or instructions. For example, the following instruction was held proper on basis that it was contained in a seven-sentence paragraph instruction within which five of the seven sentences contained such cautionary words as "plaintiff must show," "plaintiff must prove," and "plaintiff claims."

The plaintiff would have you believe that the blow Mr. S. sustained on his head, causing him to lie there for an indefinite period of time — and you will recall his neck was severely flexed and cramped — actuated or increased the carotid sinus reflex which set up a chain of reactions causing the heart to stop.[5.1]

Whether the language of the challenged instruction as given by the trial justice invaded the province of the jury is to be determined by how it would have been understood by an ordinarily intelligent lay person sitting with a jury when delivered by the court.[8.1]

[2.1] **Nebraska.** Hansen v. Strohschein, 178 Neb 367, 133 NW2d 598 (1965).

[5.1] **Michigan.** Schreiner v. American Cas. Co., 1 MichApp 43, 134 NW2d 383 (1965).

[8.1] **Rhode Island.** State v. Goff, 107 RI 331, 267 A2d 686 (1970).

§ 136. Construction of charge as an entirety in civil cases.

All of the court's instructions to the jury are to be read and considered as a whole in determining whether all the necessary law has been correctly stated to the jury.[9.1]

Error is not to be read into the charge of a trial judge by isolating small segments of it. It is not to be considered piecemeal, but with an eye on its general content.[10.1]

The propriety of a trial justice's supplementary instruction is determined by looking at all of the charges as a whole and by looking at the totality of circumstances. For example, an accidental and unsolicited disclosure to a trial judge of the jury's numerical split was held to not make the judge's supple-

mentary instructions prejudicial and improper because their effect had to be considered in conjunction with all the other charges and in the totality of circumstances surrounding the giving of the instruction.[10 2]

Even though a statute makes criminal the commission of several acts, joined in the definition by *conjunctives,* a jury instruction is taken in its entirety or is taken by looking at the entire series so that an instruction is nevertheless proper if the several acts are stated as *alternative* acts and then is followed by a supplementary instruction because the defendant is guilty if the evidence is sufficient with respect to any *one* of the acts charged.[25.1]

Specific and isolated language in a court's instruction will not make a court's instruction improper and misleading as long as the total instruction, when taken as a whole, adequately advises the jury on the issue in question.[26 1]

A trial court judge is not required to accept and use jury instructions verbatim as submitted to the court by counsel, and he is free to rephrase or modify the instructions submitted to him, provided that the substance of the requested instructions is adequately, accurately, and fairly presented to the jury.[27 1]

Proper instructions should be read and considered as a whole.[28 1]

This case was an appeal from a decision in favor of defendant, plaintiff's employer, in a truck collision case. There were numerous instructions that were excepted to, but the high court sustained all of them, saying that the charge, read as a whole, submitted the case fairly and fully to the jury.[28 2]

We recognize the rule that in the consideration of erroneous charges, this court must look to the charge in its entirety.[28 3]

This court, in reviewing appellants' alleged error, must look not only to the particular instruction complained of, but must also review all the instructions given to the jury.[28.4]

[9.1] **Colorado.** Montgomery Ward & Co. v. Kerns, 172 Colo 59, 470 P2d 34 (1970).

[10.1] **Vermont.** Forcier v. Grand Union Stores, Inc., 128 Vt 389, 264 A2d 796 (1970).

[10.2] **Rhode Island.** State v. Rogers, 420 A2d 1363 (RI 1980).

[25.1] **Connecticut.** State v. Lode, 36 ConnSuper 603, 421 A2d 880 (1980).

[26.1] **Maine.** State v. Troiano, 421 A2d 41 (Me 1980).

[27.1] **Pennsylvania.** Commonwealth v. Parks, 421 A2d 1135 (PaSuper 1980).

[28.1] **Iowa.** Bengford v. Carlem Corp. (Ia), 156 NW2d 855 (1968).

[28.2] **Montana.** DeWar v. Great Northern Ry. Co., 150 Mont 367, 435 P2d 887 (1967).

[28.3] **Georgia.** Srochi v. Kamensky, 121 GaApp 518, 174 SE2d 263 (1970).

[28.4] **Indiana.** Lloyd v. Weimert, 146 IndApp 666, 21 IndDec 230, 257 NE2d 851 (1970).

§ 137. Construction of charge as an entirety in criminal cases.

Separately numbered instructions are all parts of a single charge and must be considered as a whole.[29.1]

It must be made abundantly clear that a shooting must have been with the intent to kill, wound, or maim, in order to exclude the idea of an accidental shooting. The following type of instruction satisfies this requirement.

"That the defendant so shot L. H. with either the intent to kill, or the intent to wound, or the intent to maim L. H." [29.2]

When subject matter of a requested instruction has been adequately covered in other instructions it is not error to refuse a proffered instruction.[29.3]

A charge to the jury must be evaluated by a reading and consideration thereof in its entirety.[29.4]

The correctness of a charge is not to be determined from mere isolated statements extracted from it, without reference to their connection with what precedes, as well as that which follows.[29.5]

It will be construed contextually, and isolated portions will not be held prejudicial when the charge as a whole is correct.[29.6]

I charge you that if you believe, and believe beyond a reasonable doubt, that the defendant, A.E.N., did in this County in the State of Georgia commit the offense of murder by unlawfully and with malice aforethought kill and murder one L.C., a human being, by shooting him with a .38 caliber pistol, thereby inflicting upon the said L.C. mortal wounds from which he died, contrary to the laws of said State, and good order, peace and dignity thereof, then you would be authorized to convict the defendant of the offense of murder as charged in this bill of indictment.[29.7]

It is not improper and not reversible error for a trial court judge to comment on the credibility of a witness when the charge to the jury, taken as a whole, reveals no prejudice to the parties, and the jury is told that it was within its sole province to resolve any issues of credibility. For example, it was not error for the court to state in its charge to the jury that the court felt that the victim "testified fairly and truthfully" because the court also stated that "[b]ut that's for you to determine ... [Y]ou may be impressed by it [but it's] for you to determine." Prejudice cannot be based on reading isolated excerpts from the charges which must be taken as a whole.[29.8]

For a portion of a charge to the jury to constitute reversible error, the appellate court will consider the charge, or a series of charges, as an entirety, and then will ask whether it is reasonably probable that the jury, after hearing all the charges, were misled.[29 9]

Any prejudice to the defendant was properly cured when, after a police officer witness testified that the fingerprint card was used "when we fingerprint[ed] people in jail," the court promptly gave a cautionary instruction that the fingerprint bureau is located in the jail, that people are fingerprinted for other reasons besides arrest, and that the jury was forbidden from speculating as to the reason for the fingerprinting of the defendant.[30.1]

The following instruction on the definition of an accomplice:

"A person who is an accomplice in the commission of a crime is guilty of that crime.

"A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of a crime, he or she aids another person in planning or committing the crime. The word 'aid' means all assistance whether given by words, acts, encouragement, support or presence," was not error, even though the instruction could have been more artfully redrawn to have read:

"A person is an accomplice in the commission of a crime if he or she aids another person in planning or committing the crime, with knowledge that it will promote or facilitate the commission of a crime. The word 'aid' means all assistance, whether given by words, acts, encouragement, support or presence." [30 2]

A jury charge which instructed:

"Now, with respect to the verdict, it must be unanimous, the Jury's verdict must be unanimous to be valid" was held not erroneous because this charge was given after a previous charge which instructed:

"Your verdict has to be unanimous. . . . That does not mean that you cannot have your own opinion. Discuss your opinion amongst yourselves and try to resolve those opinions if there is a difference of opinion. . . ." so that the charge to the jury, when taken as a whole, did not mislead the jurors into thinking that they must forsake their individual opinions as to guilt or innocence in order to arrive at a unanimous verdict.[34.1]

Specific and isolated language in a court's instruction will not make a court's instruction improper and misleading as long as the total instruction, when taken as a whole, adequately advises the jury on the issue in question.[40.1]

As a general proposition, the trial court has discretion in charging the jury, and the instructions will be held proper and non-prejudicial so long as that, considering them in their entirety, they accurately, properly, and fairly state the law as applied to the facts in the case. This discretion extends to refusal of requests and to cautionary instructions as well. For example, when testimony was offered against the defendant by an accomplice that had turned State's evidence, it was held proper and not prejudicial error for the court to refuse to give the following standardized jury instruction on accomplices:

"An accomplice witness is one who testifies that he was involved in the commission of the crime with which the defendant is charged. You should consider with caution testimony of an accomplice *if it is not supported by other evidence,*" [emphasis supplied] and instead to give the following instruction relating to the credibility of witnesses in general and not specifically mentioning the need to corroborate accomplice testimony:

"It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use that knowledge and experience which you possess in common with men in general, in regard to the matter about which a witness has testified. You may take into account his ability and opportunity to observe and know the things about which he or she has testified, his memory, manner, and conduct while testifying, any interest he may have in the result of this trial, and the reasonableness of his testimony considered in the light of all the evidence in this case.

"If you find that any witness has willfully testified falsely concerning any material matter, you have a right to distrust the testimony of that witness in other matters, and you may reject all or part of the testimony of that witness, or you may give it such weight as you think it deserves. You should not reject any testimony without cause." [47.1]

[29.1] **Missouri.** State v. Lee (Mo), 404 SW2d 740 (1966).

[29.2] **Nebraska.** State v. Moss, 182 Neb 502, 155 NW2d 435 (1968).

[29.3] **Alaska.** Merrill v. Faltin (Alaska), 430 P2d 913 (1967).

[29.4] **Pennsylvania.** Commonwealth v. Toney, 439 Pa 173, 266 A2d 732 (1970).

[29.5] **Maine.** State v. Small (Me), 267 A2d 912 (1970).

[29.6] **North Carolina.** State v. Lee, 277 NC 205, 176 SE2d 765 (1970).

[29.7] **Georgia.** Nunnally v. State, — Ga —, 221 SE2d 547 (1975).

[29.8] **Pennsylvania.** Commonwealth v. Whiting, 420 A2d 662 (PaSuper 1980).

[29.9] **Connecticut.** State v. Anonymous, 36 ConnSupp 583, 421 A2d 872 (1980).

[30.1] **Nevada.** Owens v. State, 620 P2d 1236 (Nev 1980).

[30.2] **Washington.** State v. Rotunno, 621 P2d 191 (WashApp 1980).

[34.1] **Pennsylvania.** Commonwealth v. Stevenson, 421 A2d 729 (PaSuper 1980).

[40.1] **Maine.** State v. Troiano, 421 A2d 41 (Me 1980)

[47.1] **Kansas.** State v. Ferguson, 288 Kan 522, 618 P2d 1186 (1980).

§ 138. Cure of erroneous instruction by correct instruction in civil cases.

It is prejudicial error for the trial court to grant a charge that does not take into account all the presented testimony. For example, the following charge was found to be prejudicial error because the charge related only to the question of parking on the highway, and did not deal with the situation, for which there was testimony, of stopping on the roadway in order to let someone by or to momentarily allow traffic to pass:

"Three, the Pennsylvania Motor Vehicle Code prohibits any person from stopping a motor vehicle on a roadway without leaving a clear and unobstructed width remaining for the free passage of vehicles coming in the opposite direction; affirmed."

There should have been included additional commentary by the court drawing the jury's attention to the fact that stopping along the side of the roadway would be proper and not negligent if done for a proper purpose and under proper circumstances.[59 1]

If an erroneous and a correct instruction are given on a material matter, a new trial must be granted. The jury does not know which one is correct and the court does not know which one the jury followed.[71 1]

[59.1] **Pennsylvania.** Kuhn v. Michael, 423 A2d 735 (PaSuper 1980).

[71.1] **North Carolina.** In re Shute's Will, 251 NC 697, 111 SE2d 851 (1960).

§ 139. Cure of erroneous instruction by correct instruction in criminal cases.

Although the trial court erroneously charged the jury on the weight to be given evidence of good character and then, at the insistence of the state and over the objection of defense counsel, recalled the jury and instructed them as follows:

"[T]he state, well, an attorney attracted my attention, the district attorney, to a charge I gave you on good character. It is my duty . . . that I erroneously gave you that charge and I believe he is probably right . . . . You are, therefore, instructed to eliminate the charge from your mind and memory; it is not applicable. By this charge I do not imply that the defendant has bad character nor do I imply that he has good character. I am saying to you it is not relevant: Therefore, it should not be taken into consideration,"

this was not error because the trial court judge nevertheless instructed the jury not to consider the issue of character in one way or another.[73 1]

An instruction that if the jury cannot agree on defendant's insanity, then the presumption of sanity prevails is not cured by a correct instruction on the defendant's burden of proof of insanity.[87.1]

Although a correct written charge does not cure a defect in the oral charge, the whole charge construed together may cure the defect.[87.2]

Members of the jury, after you retired, or just as you retired, I had a conference with the attorneys and it did appear that in one place during the course

of my instructions to you that I may have used a term which you could misinterpret. During my restatement of the evidence, or my summary of the evidence, I used at one point that the evidence of the State tended to show that the defendant had sexual relations with the State's witness, against her will. I also used the term "and that before the rape." I did not in any way mean to indicate to you that I felt that there was a rape in the case, but only that the State's evidence tended to show that before the sexual relation is against the will of the witness, then certain things happened, and I wanted to make sure that you fully understood that I was not in any way attempting to suggest to you that there was a rape, but only that the State's evidence tended to show that there was sexual relations against the will of the State's witness, only if you believe the State's evidence would you so find.[87.3]

Even though a statute makes criminal the commission of several acts, joined in the definition by *conjunctives*, a jury instruction is taken in its entirety or is taken by looking at the entire series so that an instruction is nevertheless proper if the several acts are stated as *alternative* acts and then is followed by a supplementary instruction because the defendant is guilty if the evidence is sufficient with respect to any *one* of the acts charged.[87.4]

The instruction on the *lesser included offense* of deviate sexual conduct was improperly modified by the trial judge due to jury inquiry during deliberation.

By amending the instruction to include "Sexual gratification may or may not include ejaculation" and "Webster defines gratification as a source of gratification or pleasure," the trial judge was in error; the changing of an instruction already given to the jury before their deliberation is improper unless omitted words are added or if the original instruction was incorrect. Here the word inquired of was within the jury's common competence to understand, and the original instruction was not legally insufficient.[87.5]

Charging a jury on an old law, which required a mandatory death penalty and had been found unconstitutional and repealed prior to the trial, was in error. The error was not cured by a proper instruction in penalty; the law declared by the judge must be current and correct.

The instruction given to the jury at the penalty stage was not erroneous if the court refused to instruct the jury that if they failed to reach unanimity the court would be required to impose life imprisonment. Defendant was not entitled to have jury so instructed because this part of the statute is addressed to the trial court only and need not be divulged to the jury.[87.6]

[73.1] **Georgia.** Carroll v. State, 271 SE2d 650 (GaApp. 1980).

[87.1] **Rhode Island.** State v. Harris, 89 RI 202, 152 A2d 106 (1959).

[87.2] **Alabama.** Wright v. State, 269 Ala 131, 111 S2d 596 (1959).

[87.3] **North Carolina.** State v. Poole, — NC —, 220 SE2d 320 (1975).

[87.4] **Connecticut.** State v. Lode, 36 ConnSuper, 421 A2d 880 (1980).

[87.5] **Indiana.** Jenkins v. State, 424 NE2d 1002 (Ind 1981).

[87.6] **South Carolina.** State v. Adams, 283 SE2d 582 (SC 1981).

§ 140. Cure of ambiguous instruction by another instruction.

Refusal of a requested instruction will be error only if the requested instruction "clearly and directly" called the attention of the trial court judge to its error. Refusal of a requested instruction is not error when the requested instruction itself is erroneous. Thus, in a malpractice action, the following

instruction given by the trial court judge was not so "clearly erroneous" as to constitute error:

"It is claimed by the defendants and denied by the plaintiff that the plaintiff did not file her complaint within two years from the date that her cause of action arose. In this connection, I instruct you that the statutory law of the State of Oregon provides that a cause of action for medical malpractice arises when the injury is first discovered or in the exercise of reasonable care should have been discovered, and a complaint for that injury must be filed within two years from that date. *An injury is discovered when a reasonably prudent person associates her symptoms with a serious or permanent condition and at the same time perceives that the defendants played some role in causing or inducing that condition."*

This was especially so in light of the fact that the requested instruction of the plaintiff was itself erroneous:

"Each of the defendants claim as an affirmative defense that plaintiff did not file her action against them within the time limited by law in the State of Oregon. Under the law, an action to recover damages for injuries to the person arising from any medical operation, shall be commenced within two years from date when the injury is first discovered or in the exercise of reasonable care, should have been discovered. Plaintiff claims that she did not and could not in the exercise of reasonable care, have discovered the cause, nature and extent of her injury more than two years before she filed her lawsuit.

"In determining whether this case was filed within the period of limitations, there are certain undisputed facts which you shall consider. First, there is no question but that plaintiff's surgery was performed on October 22, 1975, and if any negligence occurred on the part of any of the defendants, it was on that date. Secondly, there's no question but that plaintiff's action for damages was filed on November 3, 1977.

"In determining whether or not, under the evidence, plaintiff was aware of her injury more than two years before November 3, 1977. [*sic*] In connection with this issue, you are instructed that under the meaning of this statute, *the word 'injury' refers to not only 'discovery of the injury' but also, 'discovery of the negligence' which lead [sic] to the injury.* In order for plaintiff to be barred from maintaining this action, it is not only necessary that she knew she suffered an injury to her body before November 3, 1975, but also, that she knew of the true cause of her injury and the true nature of the negligence of one or more of the defendants, which lead *[sic]* to this injury, sometime before November 3, 1975. The other basis for barring plaintiff's right to maintain the action is if under the evidence, plaintiff, in the exercise of reasonable care, should have discovered the true cause of her injury and the true nature of the negligence of one or more of the defendants. If you find that under the evidence plaintiff did not know these things before November 3, 1975 and could not have discovered them, in the exercise of reasonable care between October 22 and November 3, 1975, then she is not barred from maintaining this action." [89.1]

Even though a statute makes criminal the commission of several acts, joined in the definition by *conjunctives,* a jury instruction is taken in its entirety or is taken by looking at the entire series so that an instruction is nevertheless proper if the several acts are stated as *alternative* acts and then is followed by a supplementary instruction because the defendant is guilty if the evidence is sufficient with respect to any *one* of the acts charged.[89.2]

[89.1] **Oregon.** Sculace v. Rogers, 619 P2d 1316 (OrApp 1980).

[89.2] **Connecticut.** State v. Lode, 36 ConnSuper 603, 421 A2d 880 (1980).

§ 141. Cure by withdrawal of erroneous instruction.

Although the trial court erroneously charged the jury on the weight to be given evidence of good character and then, at the insistence of the state and over the objection of defense counsel, recalled the jury and instructed them as follows:

"[T]he state, well, an attorney attracted my attention, the district attorney, to a charge I gave you on good character. It is my duty . . . that I erroneously gave you that charge and I believe he is probably right. . . . You are, therefore, instructed to eliminate the charge from your mind and memory; it is not applicable. By this charge I do not imply that the defendant has bad character nor do I imply that he has good character. I am saying to you it is not relevant: Therefore, it should not be taken into consideration,"

this was not error because the trial court judge nevertheless instructed the jury not to consider the issue of character in one way or another.[91 1]

[91.1] **Georgia.** Carroll v. State, 271 SE2d 650 (GaApp 1980).

CHAPTER 7

REQUESTS

Section

150. Duty to make timely request and tender proper instructions in civil cases.
151. Duty to make timely request and tender proper instructions in criminal cases.
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§ 150. Duty to make timely request and tender proper instructions in civil cases.

The trial court did not err, in the absence of a proper request, in failing to define for the jury what is meant by "unique and special economic value to the owner of the property taken and damaged." [1 1]

Requests to charge must be timely and properly submitted in writing.[1.2]

The judge must charge the jury on every substantial and essential feature of a case. However, if a subordinate feature is desired by a party to be presented specifically to the jury, then the party must request such an instruction.[2.1]

No exception was taken at trial to the portion of the charge attacked in enumeration seven. This presents nothing for review.[43.1]

Pennsylvania court rules and statutes require requests to be made "before the close of the argument to the jury." A request made *after* the arguments, but

before the court's charge, is still made before the close of the argument to the jury. Besides, the trial judge may, within his discretion, waive the requirement.[60 1]

Despite the criticism of the "but for" language used in the standard proximate cause jury instruction, the trial judge is allowed to exercise his or her discretion in selecting a preference between the standard proximate cause instruction or the legal cause instruction.[60 2]

[1.1] **Georgia.** Bowers v. Fulton County, 122 GaApp 45, 176 SE2d 219 (1970).
[1.2] **Georgia.** Slaughter v. Linder, 122 GaApp 144, 176 SE2d 450 (1970).
[2.1] **North Carolina.** State Highway Comm v. Fry, 6 NCApp 370, 170 SE2d 91 (1969)
[43.1] **Georgia.** McChargue v. Black Grading Contractors, Inc., 122 GaApp 1, 176 SE2d 212 (1970).
[60.1] **Pennsylvania.** Shula v. Warren, 395 Pa 428, 150 A2d 341 (1959).
[60.2] **California.** Frayo v. Hartland Hospital, 99 CalApp3d 344, 160 CalRptr 246 (1979).

§ 151. Duty to make timely request and tender proper instructions in criminal cases.

An accomplice testifying for the prosecution is generally regarded as an interested witness, and a defendant, upon timely request, is entitled to an instruction that the testimony of the accomplice should be carefully scrutinized. Since an instruction to carefully scrutinize an accomplice's testimony is a subordinate feature of the trial, the trial judge is not required to so charge in the absence of a timely request for the instruction. But when a defendant makes a request in writing and before argument to the jury for an instruction on accomplice testimony, the court should give such instruction. And once the judge undertakes to instruct the jury on such subordinate issue it must do so accurately and completely. The court, however, is not required to give the requested instruction in the exact language of the request, but is only required to give such instruction in substance.

In present case, concerning Clark, the trial judge instructed the jury:

"Now, as to the witness Clark, I instruct you that he is in Law what is known as an accomplice. And our Court has said that a person may be convicted on the unsupported testimony of an accomplice, if that testimony is believed by the Jury. However, in considering the weight and credibility you will give to the testimony of Clark, I instruct you that you should carefully examine his testimony for the purpose of determining what weight and credibility it deserves. You should scrutinize it with care, all to the end that you will determine whether he is truthful or not, because in Law, an accomplice does have an interest and bias in the case and in what your verdict will be.

"So, Members of the Jury, it's dangerous to convict upon the testimony of an accomplice but if you find that he is truthful, then you may, if you are satisfied from the evidence and beyond a reasonable doubt, convict upon his unsupported testimony." [57.1]

The defendant made no written request for instructions on any particular phase of the case. The court properly charged that the defendant was presumed to be innocent and that "(t)he burden of proof is upon the State to satisfy you on the evidence and beyond a reasonable doubt of the defendant's guilt." Thus, the court properly required that in order to convict, the State must prove the defendant guilty from the evidence and beyond a reasonable doubt. We hold that no error is made to appear in the charge of the court to the jury.[61.1]

In the case at bar, the record shows that defendant neither offered nor requested an instruction to the effect that he could be found guilty of assault, a lesser offense. The question was initially raised by C. in his assignments of error. It came too late. By failing to offer or request such an instruction he waived any right he may have had to it.[61.2]

These assignments present no question for the court's determination, for they do not set out that portion of the charge which defendant contends is an erroneous statement of the law.[61 3]

Defendant did not object to this instruction in the trial court and, therefore, it is not necessary to consider the question here.[61 4]

Hence the general rule applies that objections to the charge in stating the contentions of the parties must be called to the court's attention in apt time to afford opportunity for correction. Otherwise an exception thereto will not be considered on appeal.[61 5]

A trial court is not under a duty to give an instruction on the issue of sanity, *sua sponte,* where no jury instruction on insanity was requested, and where there never was a request for a "not guilty by reason of insanity" form of verdict, even though defendant testified in a "bizarre" manner, *e.g.* defendant, in a perjury trial, testified that he gave the alleged perjured testimony because he was "obeying an edict of Christ." Therefore, the defendant did not present sufficient evidence to cause a reasonable doubt as to the defendant's sanity so as to shift the burden of proof on the State to prove sanity beyond a reasonable doubt.[62 1]

As long as the trial court has given counsel adequate opportunity to make requests for instructions and to take exception to the trial court's charge, counsel cannot complain on appeal that his client was prejudiced by an instruction of the trial court because counsel's failure to take exception or request a charge at the time of trial deprived the trial court of its opportunity to grant effective relief.[63 1]

An omission to charge on a particular point cannot be assigned as error where no instruction on the point has been requested.[72 1]

Following a determination by the trial court judge that the complainant-victim, a child five years of age, was capable of and understood her duty to tell the truth, the trial court properly refused the defendant's requested instruction to the effect that the jury should scrutinize and analyze the victim's testimony with great care if it found her testimony to be uncorroborated because the essence of this request was covered by other instructions given to the jury by the trial court judge.[72.2]

A trial court judge properly refused to give the following cautionary instruction because it constituted an improper comment by the court on the evidence and usurped the function of the jury:

"An accomplice is a person who helped commit a crime, or advised or encouraged a person to commit a crime. You must determine whether any witness in this case is an accomplice.

"The evidence of an accomplice *should be received with great caution."*

"The testimony of an accomplice ought to be viewed with distrust. This does not mean that you may arbitrarily disregard such testimony, but you should give to it the weight to which you find it to be entitled after examining it with *care and caution* and in the light of all the evidence in the case." [73.1]

As a general proposition, the trial court has discretion in charging the jury, and the instructions will be held proper and non-prejudicial so long as that, considering them in their entirety, they accurately, properly, and fairly state the law as applied to the facts in the case. This discretion extends to refusal of requests and to cautionary instructions as well. For example, when testimony was offered against the defendant by an accomplice that had turned State's evidence, it was held proper and not prejudicial error for the court to refuse to give the following standardized jury instruction on accomplices:

"An accomplice witness is one who testifies that he was involved in the commission of the crime with which the defendant is charged. You should consider with caution testimony of an accomplice *if it is not supported by other evidence,*" [emphasis supplied] and instead to give the following instruction relating to the credibility of witnesses in general and not specifically mentioning the need to corroborate accomplice testimony:

"It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use that knowledge and experience which you possess in common with men in general, in regard to the matter about which a witness has testified. You may take into account his ability and opportunity to observe and know the things about which he or she has testified, his memory, manner, and conduct while testifying, any interest he may have in the result of this trial, and the reasonableness of his testimony considered in the light of all the evidence in this case.

"If you find that any witness has willfully testified falsely concerning any material matter, you have a right to distrust the testimony of that witness in other matters, and you may reject all or part of the testimony of that witness, or you may give it such weight as you think it deserves. You should not reject any testimony without cause." [73.2]

Utah Code Annotated, § 77-31-18 (1979 & Supp. 1981), expressly permits giving a cautionary instruction whenever the prosecution relies on the uncorroborated testimony of an accomplice:

"Conviction on uncorroborated testimony of accomplice — Cautionary instruction.—(1) A conviction may be had on the uncorroborated testimony of an accomplice.

(2) In the discretion of the court, an instruction to the jury may be given to the effect that such uncorroborated testimony should be viewed with caution, and such an instruction should be given if the trial judge finds the testimony of the accomplice to be self contradictory, uncertain, or improbable." [73.3]

Appellant first contends that the trial court committed prejudicial error in failing to instruct *sua sponte* that evidence of a defendant's non-tape recorded admissions must be viewed with caution. The rule is firmly established that such an instruction, when called for by the evidence, must be given, even without a request therefor. . . . An admission is "any statement by an accused relative to the offense charged." [75 1]

A charge on circumstantial evidence is required only when the evidence of the main fact that is essential to the guilt or innocence of the defendant is purely and entirely circumstantial in nature.[79 1]

It is not error to fail to charge on an alibi defense when there has been no timely request made for it and when the only basis for the alibi defense consists of the defendant's unsworn statement.[81 1]

The defendant is *not* entitled to a separate jury instruction on the alibi defense so long as adequate and proper instructions were given on (1) the elements of the crime charged and on (2) the burden of the prosecution to prove the guilt of the defendant beyond a reasonable doubt.[81 2]

Generally, evidence of prior bad acts or convictions may not be introduced into evidence. However, there are the two following exceptions whereby such evidence may be introduced, provided the jury receives a limiting instruction as to the purpose of the evidence:

(1) To complete the story of the crime by proving its immediate relationship to other happenings near in time or place, and

(2) To show, by similar acts or incidents, that the act on trial was not inadvertent, accidental, unintentional or without guilty knowledge.[88 1]

Defendant contended that the failure of the trial court to give an entrapment instruction denied him a fair trial. He made no request for such an instruction, and that issue was not properly before the court. By way of holding the court said that ordinarily, entrapment requires the instigation of the criminal act by the police. In the instant case there was no evidence that the criminal act was instigated by the police, even though there was evidence of the use of an informer.[89.1]

A defendant is not entitled to the trial court judge, *sua sponte,* giving an instruction to the jury on a lesser offense unless: (1) one of the parties has requested an appropriate instruction; (2) it is not possible to commit the greater offense without committing the lesser offense; (3) there is evidence introduced which would justify a conviction on the lesser offense; and (4) the proof is in dispute to such a degree that the jury could find the defendant guilty of the lesser offense but innocent of the greater offense. For example, in a larceny case, the trial court did not err in refusing to instruct the jury on the lesser included offense of larceny in the fourth degree because no evidence was presented on the value of the property stolen, which would have determined the applicable degree of larceny.[94 1]

The due process clause of the United States Constitution requires that a lesser included offense should be charged by the trial court judge whenever "there is a rational basis in the evidence presented for a verdict acquitting the defendant of the offense charged and convicting him of the [lesser] included offense." For example, it was error for the court not to charge the jury at the trial of a defendant charged with burglary on the elements of the lesser included offense of criminal trespass.[95.1]

A defendant is entitled to a jury instruction on a lesser included offense whenever there is any evidence introduced which would justify a reasonable juror in concluding that the defendant committed the lesser included offense although not the greater charged offense. For example, it was held that a defendant, who was charged with first-degree assault, was entitled to a jury instruction on the lesser-included offense of simple assault when there was testimony by the defendant that he drove his car rapidly at police officers not to hit or injure them, but to spray them with slush, and that he swerved onto the embankment and away from them in a reflex action when he saw one of the officers draw his weapon.[95 2]

Finally, defendant claims that the trial court should have, *sua sponte,* instructed the jury to disregard the restraints. "In those instances when visible

restraints must be imposed the court shall instruct the jury *sua sponte* that such restraints should have no bearing on the determination of the defendant's guilt. However, when the restraints are concealed from the jury's view, this instruction should not be given unless requested by defendant since it might invite initial attention to the restraints and thus create prejudice which would otherwise be avoided." [97.1]

For example, when the defendant requested the trial court to give the following instruction:

"Where a person commits an act without being conscious thereof, such act is not criminal even though, if committed by a person who was conscious, it would be a crime.

"This rule of law applies only to cases of the unconsciousness of a person of sound mind, in which there is no functioning of the conscious mind," and that instruction was so given by the court without the objection of the defendant, the defendant cannot claim on appeal that the instruction, as requested and given, improperly limited the defendant in his defense to one theory and excluded others.[13.1]

The defendant must, and not the trial judge *sua sponte*, request instructions limiting the application of evidence to a particular purpose.[15 1]

[F]ailure to instruct jury with regard to defense of good motive required a new trial, notwithstanding defense counsel's failure to request such an instruction.[15.2]

When such an instruction [diminished capacity] is requested by the defendant, the trial judge's task is quite different from that required for *sua sponte* instructions. By the defendant requesting the instruction, the court knows that the defendant is relying on that defense. Its inquiry then focuses on the sufficiency of such evidence. "It is well settled that if the defendant requests an instruction it must be given if there is any evidence on that issue deserving of any consideration whatsoever. . . ." Even where there is conflicting evidence on this issue, nevertheless the law requires that *"[h]owever incredible the testimony of a defendant may be he is entitled to an instruction based upon the hypothesis that it is entirely true."* [15 3]

The failure to renew a request for an instruction on the limited use of evidence of similar bad acts at the time jury is instructed waives any error.[15.4]

A trial justice does not abuse his discretion when he lacks, *sua sponte,* to give a limiting instruction at the very moment of impeachment instructing the jury that a prior, inconsistent statement can be considered by them not for its substantive content but only as it reflects on the credibility of a witness. Although the trial justice is obliged to give such a limiting instruction, the timing of the instruction is left to his or her discretion, and may be given by the trial justice at any time.[15.5]

[57.1] **North Carolina.** State v. Abernathy, 295 NC 244, 244 SE2d 373 (1978).

[61.1] **North Carolina.** State v. Britt, 8 NCApp 262, 174 SE2d 69 (1970).

[61.2] **Virginia.** Chittum v. Commonwealth, 211 Va 12, 174 SE2d 779 (1970).

[61.3] **North Carolina.** State v. Benton, 276 NC 641, 174 SE2d 793 (1970).

[61.4] **Illinois.** People v. Mallett, 45 Ill2d 388, 259 NE2d 241 (1970).

[61.5] **North Carolina.** State v. Lee, 277 NC 205, 176 SE2d 765 (1970).

[62.1] **Arizona.** State v. Cannon, 618 P2d 641 (ArizApp 1980).

[63.1] **Maryland.** Dove v. State, 423 A2d 597 (MdSpecApp 1980).

72.1 **Idaho.** State v. Gee, 93 Idaho 636, 470 P2d 296 (1970).
72.2 **Maine.** State v Bussey, 423 A2d 244 (Me 1980).
73.1 **Arizona.** State v. Bussdieker, 621 P2d 26 (Ariz 1980).
73.2 **Kansas.** State v. Ferguson, 288 Kan 522, 618 P2d 1186 (1980).
73.3 **Utah.** Utah v. Hallett, 619 P2d 335 (Utah 1980).
75.1 **California.** People v. Palmer, 80 CalApp3d 239, 145 CalRptr 466 (1978)
79.1 **Texas.** Faulk v. State, 608 SW2d 625 (TexCrimApp 1980).
81.1 **Georgia.** Smith v State, 271 SE2d 654 (GaApp 1980).
81.2 **Kansas.** State v. Dailey, 228 Kan 566, 618 P2d 833 (1980).
88.1 **Oregon.** State v. Lee, 49 OrApp 131, 619 P2d 292 (1980).
89.1 **Minnesota.** State v. Eliason, 279 Minn 70, 155 NW2d 465 (1968).
94.1 **Connecticut.** State v. Lode, 36 ConnSuper 603, 421 A2d 880 (ConnSuper 1980).
95.1 **Delaware.** Gates v. State, 424 A2d 18 (Del 1980).
95.2 **Washington.** State v. Jimerson, 27 WashApp 415, 618 P2d 1027 (1980).
97 1 **California.** People v. Zatko, 80 CalApp3d 534, 145 CalRptr 643 (1978).
13.1 **Wyoming.** Settle v. State, 619 P2d 387 (Wyo 1980).
15.1 **Arizona.** State v. Haley, 87 Ariz 29, 347 P2d 692 (1960).
15 2 **Minnesota.** State v. Hembd, — Minn —, 232 NW2d 872 (1975).
15.3 **California.** People v. Stevenson, 79 CalApp3d 976, 145 CalRptr 301 (1978).
15.4 **Michigan.** People v. Valoppi, 61 MichApp 470, 233 NW2d 41 (1975).
15.5 **Rhode Island.** State v. Vargas, 420 A2d 809 (RI 1980).

§ 152. Requests for further or more specific instructions in civil cases.

Refusal of a requested instruction will be error only if the requested instruction "clearly and directly" called the attention of the trial court judge to its error. Refusal of a requested instruction is not error when the requested instruction itself is erroneous. Thus, in a malpractice action, the following instruction given by the trial court judge was not so "clearly erroneous" as to constitute error:

"It is claimed by the defendants and denied by the plaintiff that the plaintiff did not file her complaint within two years from the date that her cause of action arose. In this connection, I instruct you that the statutory law of the State of Oregon provides that a cause of action for medical malpractice arises when the injury is first discovered or in the exercise of reasonable care should have been discovered, and a complaint for that injury must be filed within two years from that date. *An injury is discovered when a reasonably prudent person associates her symptoms with a serious or permanent condition and at the same time perceives that the defendants played some role in causing or inducing that condition.*"

This was especially so in light of the fact that the requested instruction of the plaintiff was itself erroneous:

"Each of the defendants claim as an affirmative defense that plaintiff did not file her action against them within the time limited by law in the State of Oregon. Under the law, an action to recover damages for injuries to the person arising from any medical operation, shall be commenced within two years from date when the injury is first discovered or in the exercise of reasonable care, should have been discovered. Plaintiff claims that she did not and could not in the exercise of reasonable care, have discovered the cause, nature and extent of her injury more than two years before she filed her lawsuit.

"In determining whether this case was filed within the period of limitations, there are certain undisputed facts which you shall consider. First, there is no question but that plaintiff's surgery was performed on October 22, 1975, and if any negligence occurred on the part of any of the defendants, it was on that

date. Secondly, there's no question but that plaintiff's action for damages was filed on November 3, 1977.

"In determining whether or not, under the evidence, plaintiff was aware of her injury more than two years before November 3, 1977. *[sic]* In connection with this issue, you are instructed that under the meaning of this statute, *the word 'injury' refers to not only 'discovery of the injury' but also, 'discovery of the negligence' which lead [sic] to the injury.* In order for plaintiff to be barred from maintaining this action, it is not only necessary that she knew she suffered an injury to her body before November 3, 1975, but also, that she knew of the true cause of her injury and the true nature of the negligence of one or more of the defendants, which lead *[sic]* to this injury, sometime before November 3, 1975. The other basis for barring plaintiff's right to maintain the action is if under the evidence, plaintiff, in the exercise of reasonable care, should have discovered the true cause of her injury and the true nature of the negligence of one or more of the defendants. If you find that under the evidence plaintiff did not know these things before November 3, 1975 and could not have discovered them, in the exercise of reasonable care between October 22 and November 3, 1975, then she is not barred from maintaining this action." [16.1]

During the trial of the defendant for manslaughter by automobile, the court gave the following instruction:

"You may also consider the manner of driving, to wit, you have heard descriptions of how the Pacer was being operated, and you may consider its course southerly on the Belair Road. You may consider the testimony of such witnesses as Judith Gloria and Wayne Dircks, who were in cars that encountered the Pacer prior to the accident between the Pacer and the 1970 LeMans, driven by Constance Linn," which defense counsel excepted to, but then saved until after the jury had retired, which was:

"[Defense counsel]: I would take exception to the Court's instruction relating to Judith Mae Gloria and Constance Linn and any others to the effect that they testified as to how Mr. Morrow's car was being driven prior to the accident, and they did not testify that the automobile was Mr. Morrow's and were barely able to identify the automobile, at all, and, therefore, I request an instruction to the effect that they were unable to identify Mr. Morrow's automobile as the automobile which was involved in the accident, and, therefore, the jury cannot conclude from their testimony that the same automobile they saw was Mr. Morrow's automobile."

On appeal, it was held that defense counsel could not complain of any errors in the court's original instruction because by "saving" his objection and requested instruction and not making it part of the record, defense counsel had deprived the trial court of the opportunity to correct the erroneous instruction.[16.2]

Although misdirection may be error, nondirection, in the absence of a request, is never error.[23 1]

If a party believes an instruction is ambiguous, he must submit a clarifying instruction. But this rule does not apply if the questioned instruction "is erroneous as a matter of law." [23 2]

[16.1] **Oregon.** Sculace v. Rogers, 619 P2d 1316 (OrApp 1980).

[16.2] **Maryland.** Morrow v. State, 423 A2d 251 (MdSpecApp 1980).

[23.1] **Washington.** State v. Myers, 53 Wash2d 446, 334 P2d 536 (1959).

[23.2] **Missouri.** Bramson v Henley (Mo), 353 SW2d 609 (1962). It is not clear what is meant by "a matter of law" Are not all erroneous instructions "erroneous as a matter of law"?

§ 153. Requests for further or more specific instructions in criminal cases.

For example, when the defendant requested the trial court to give the following instruction:

"Where a person commits an act without being conscious thereof, such act is not criminal even though, if committed by a person who was conscious, it would be a crime.

"This rule of law applies only to cases of the unconsciousness of a person of sound mind, in which there is no functioning of the conscious mind," and that instruction was so given by the court without the objection of the defendant, the defendant cannot claim on appeal that the instruction, as requested and given, improperly limited the defendant in his defense to one theory and excluded others.[27.1]

In instructing the jury on the elements of the offense of assault and battery, it is not plain error to omit the element of "apparent ability to inflict harm" in the charge. For example, it was held that the essence of the crime is an "unlawful touching," that it would be superfluous to require, in addition, proof of an "apparent ability to unlawfully touch," so that an instruction omitting a charge on "apparent ability" was plain error so as to require reversal even though the defendant failed to object to the instruction.[27.2]

Normally if defendant's counsel fails to request additional instructions, a conviction will not be reversed. But the court will reverse if the trial court's failure to instruct upon some material issue deprived defendant of his substantial rights.[41.1]

The instruction on the *lesser included offense* of deviate sexual conduct was improperly modified by the trial judge due to jury inquiry during deliberation.

By amending the instruction to include "Sexual gratification may or may not include ejaculation" and "Webster defines gratification as a source of gratification or pleasure," the trial judge was in error; the changing of an instruction already given to the jury before their deliberation is improper unless omitted words are added or if the original instruction was incorrect. Here the word inquired of was within the jury's common competence to understand, and the original instruction was not legally insufficient.[41.2]

[27.1] **Wyoming.** Settle v. State, 619 P2d 387 (Wyo 1980).

[27.2] **Wyoming.** Settle v. State, 619 P2d 387 (Wyo 1980).

[41.1] **Oklahoma.** Beeler v. State (OklCr), 334 P2d 799 (1959).

[41.2] **Indiana.** Jenkins v. State, 424 NE2d 1002 (Ind 1981).

§ 153A. Request for instruction granted — Estoppel.

A defendant in a criminal case may not assert prejudicial error based on an instruction that he drafted, which was given to the jury on his request. Thus, a defendant was not permitted to assert that the following charge to the jury,

which instructed them on the inference raised by the possession of stolen goods but failed to instruct them on the prosecutor's burden of proof, was prejudicial:

"You are instructed that recent, unexplained, and exclusive possession of stolen goods from a theft or burglary will support the inference that the person in possession of the goods is guilty of the theft or burglary and that such an inference can be sufficient in and of itself to sustain a conviction for burglary or theft. But you may draw that inference, and convict the defendant of burglary or theft based upon that inference, only if you decide that recent, unexplained, and exclusive possession of the goods by the defendant has been established by the evidence beyond a reasonable doubt.

" 'Unexplained' for the purpose of this instruction means that there is no explanation derived from the evidence in the case or furnished by the defendant which raises a reasonable doubt as to his guilt." [41.2]

When a defendant requests an instruction from the trial court, and that instruction thereafter is given, the defendant is estopped from predicating error on the instruction as given.[41.3]

[41.2] **Colorado.** People v. Szloboda, 620 P2d 36 (ColoApp 1980).

[41.3] **Kansas.** State v. Patchett, 621 P2d 1011 (Kan 1980).

§ 154. Formal requisites of requests.

An Oklahoma statute provides that an excepting party to a refused instruction is not required to file a bill of exceptions, "but it shall be sufficient to write at the close of each instruction 'Refused and excepted to' . . . which shall be signed by the judge" (Okl. Stat. 1961, tit. 12, § 578).

But the Oklahoma Supreme Court has held that the requirement of a written instruction and refusal is not mandatory as to fundamental issues raised by the pleadings and evidence, since on these issues the trial judge must instruct on his own initiative without request.[54.1]

A party who claims the benefit of a statute must file a written request to charge on the statute.[54.2]

Requests for instructions should be in writing and presented before the closing arguments.[54.3]

[54.1] **Oklahoma.** Oklahoma Transp. Co. v. Green (Okl), 344 P2d 660 (1959). In this case, the court considered the issue of sudden emergency a fundamental issue.

[54.2] **Connecticut.** Domenick v. Wilbert Burial Vault Co., 149 Conn 381, 180 A2d 290 (1962).

[54.3] **Massachusetts.** Potter v. John Bean Division of Food Machinery & Chem. Corp., 344 Mass 420, 182 NE2d 834 (1962).

§ 155. Necessity of clear expression in requested instruction.

The written requests must be legal, apt, and precisely adjusted to some principle involved in the case.[55.1]

[55.1] **Georgia.** Slaughter v. Linder, 122 GaApp 144, 176 SE2d 450 (1970).

§ 156. Modification of requested instructions.

The Supreme Court of Georgia takes an extreme view of the correctness of a requested instruction. The trial judge must grant only requests that are perfect as submitted. And by "perfect," the court means letter perfect. In this request the word "invitee" was spelled "inditee," clearly a typographical error. The Georgia Supreme Court held that the trial court did not err in refusing to give the instruction.[88 1]

The court need not charge in the exact language requested, so long as the requested subject-matter is fully and correctly covered by the instruction given.[88 2]

The trial judge is not bound to instruct the jury in the language of requested instruction, but an instruction which in substance states requested ruling is sufficient.[88.3]

Refusal to give requested instructions in language of requests is not error where court charges the principles involved.[88 4]

The trial court need not rewrite, modify or change requested instructions, and refusal of tendered instructions is not error unless they are proper precisely as tendered.[88.5]

The trial court is not required to use the language asked for by counsel in request to charge if the jury is correctly informed.[88 6]

The trial court is not required to charge in the specific language of the request, so long as the charge is sufficiently clear and comprehensive as to be understood by the jury.[88 7]

It is not error to refuse to give an instruction containing unfilled blanks.[88.8]

It is not error if the court does not use the precise language of the request.[88.9]

A trial judge is not required to use the exact language or phraseology of a point requested by counsel so long as the judge chooses a form and manner of expression that adequately and without confusing the jury covers the contents and substance of the requested point.[88.10]

[88.1] **Georgia.** Downs v. Powell, 215 Ga 62, 108 SE2d 715 (1959).

[88.2] **New Jersey.** Rynar v. Lincoln Transit Co., 129 NJL 525, 30 A2d 406 (1943); State v. Ellrich, 10 NJ 146, 89 A2d 685 (1952); Plant v. River Road Service Co., 5 NJSuperCt 290, 68 A2d 876 (1949); Kurkjian v. Wolpin, 5 NJSuperCt 429, 69 A2d 340 (1949).

[88.3] **Massachusetts.** Ball v. Forbes, 314 Mass 200, 49 NE2d 898 (1943); Russell v. Berger, 314 Mass 500, 50 NE2d 642 (1943).

[88.4] **New Hampshire.** Manseau v. Boston & M. R. R., 96 NH 7, 69 A2d 613 (1949).

[88.5] **Indiana.** Fetter v. Powers, 118 IndApp 367, 78 NE2d 555 (1948).

[88.6] **Maryland.** Feinglos v. Weiner, 181 Md 38, 28 A2d 577 (1942).

[88.7] **Rhode Island.** Templeton v. Bateman, 90 RI 481, 159 A2d 609 (1960).

[88.8] **California.** Mapes v. Yowell, 54 Cal2d 231, 5 CalRptr 159, 352 P2d 527 (1960).

[88.9] **Connecticut.** Danzell v. Smith, 150 Conn 35, 184 A2d 53 (1962).

[88.10] **Pennsylvania.** McGowan v. Devonshire Hall Apts., 420 A2d 514 (PaSuper 1980).

§ 157. Refusal for errors in request.

The following comment by the trial court judge was held not to be prejudicial or improper:

"In this case as in any case the lawyers have a right to request certain written requested charges. That has been done in this case. Of course, I think about 20 were requested, but I am going to read two charges to you. I will tell you that these are correct statements of the law and should be considered by you consistent with what I have told you thus far." [89.1]

A request to charge must be "perfect in form," "entirely correct and accurate." [10.1]

"A written request to charge must be correct or even perfect." [10.2]

Refusal of a requested instruction will be error only if the requested instruction "clearly and directly" called the attention of the trial court judge to its error. Refusal of a requested instruction is not error when the requested instruction itself is erroneous. Thus, in a malpractice action, the following instruction given by the trial court judge was not so "clearly erroneous" as to constitute error:

"It is claimed by the defendants and denied by the plaintiff that the plaintiff did not file her complaint within two years from the date that her cause of action arose. In this connection, I instruct you that the statutory law of the State of Oregon provides that a cause of action for medical malpractice arises when the injury is first discovered or in the exercise of reasonable care should have been discovered, and a complaint for that injury must be filed within two years from that date. *An injury is discovered when a reasonably prudent person associates her symptoms with a serious or permanent condition and at the same time perceives that the defendants played some role in causing or inducing that condition."*

This was especially so in light of the fact that the requested instruction of the plaintiff was itself erroneous:

"Each of the defendants claim as an affirmative defense that plaintiff did not file her action against them within the time limited by law in the State of Oregon. Under the law, an action to recover damages for injuries to the person arising from any medical operation, shall be commenced within two years from date when the injury is first discovered or in the exercise of reasonable care, should have been discovered. Plaintiff claims that she did not and could not in the exercise of reasonable care, have discovered the cause, nature and extent of her injury more than two years before she filed her lawsuit.

"In determining whether this case was filed within the period of limitations, there are certain undisputed facts which you shall consider. First, there is no question but that plaintiff's surgery was performed on October 22, 1975, and if any negligence occurred on the part of any of the defendants, it was on that date. Secondly, there's no question but that plaintiff's action for damages was filed on November 3, 1977.

"In determining whether or not, under the evidence, plaintiff was aware of her injury more than two years before November 3, 1977. *[sic]* In connection with this issue, you are instructed that under the meaning of this statute, *the word 'injury' refers to not only 'discovery of the injury' but also, 'discovery of the negligence' which lead [sic] to the injury.* In order for plaintiff to be barred from maintaining this action, it is not only necessary that she knew she suffered an injury to her body before November 3, 1975, but also, that she knew of the true cause of her injury and the true nature of the negligence of one or more of the defendants, which lead *[sic]* to this injury, sometime before November 3, 1975. The other basis for barring plaintiff's right to maintain the action is if under the evidence, plaintiff, in the exercise of reasonable care, should have discovered the true cause of her injury and the true nature of the negligence of one or more of the defendants. If you find that under the evidence plaintiff did not know these things before November 3, 1975 and could not have

discovered them, in the exercise of reasonable care between October 22 and November 3, 1975, then she is not barred from maintaining this action." [10.3]

[9.9.1] **Alabama.** Jones v. State, 392 S2d 1270 (AlaCrimApp 1980).

[10.1] **Georgia.** Atlantic Metallic Casket Co. v. Hollingsworth, 107 GaApp 594, 131 SE2d 61 (1963); Wells v. Metropolitan Life Ins. Co., 107 GaApp 826, 131 SE2d 634 (1963).

[10.2] **Georgia.** Durand v. Reeves, 219 Ga 182, 132 SE2d 71 (1963).

[10.3] **Oregon.** Sculace v. Rogers, 619 P2d 1316 (OrApp 1980).

§ 158. Refused instructions in civil cases substantially covered by other instructions given.

The court in its charge defined the term and instructed the jury as to what constitutes gross negligence, and instructed them that unless they found that the defendant was grossly negligent it would be their duty to return a verdict in favor of the defendant; that they would consider only such gross negligence as they found to have been the proximate cause of the plaintiff's injury and damages; and that, if they found gross negligence but found that it did not contribute to the damages, their verdict should be for the defendant.[11.1]

The measure of the right of the property owner is reasonable ingress and egress under all the circumstances. If you find, from a consideration of the evidence that the proposed access at the locations indicated are reasonable under all circumstances as shown by the evidence, then plaintiff is not entitled to damages for loss of access. On the other hand, if you find from a preponderance of the evidence that the means of ingress and egress have been substantially interfered with; that is, is not reasonable under all the circumstances, then if you so find, the plaintiff is entitled to damages it may have sustained for a loss of access. But you are instructed that this element of damage is not an independent element of damage. Evidence relative thereto has been offered and received for your consideration in determining the amount of damages the owner may have sustained as "consequential damages" as set forth and explained in these instructions.

A refusal of a later instruction requested by appellant *held* not error because the matter was substantially covered by the above instruction. Refusal of instructions substantially covered by charge given is not error, especially if the charge is an accurate statement of the law.[11.2]

The trial court is under no obligation to defer to the specific requests of the parties in determining the content of the charge to the jury where the substance of the requests has already been covered in other instructions.[11.3]

The trial court did not err in refusing to give appellants' tendered instruction when its subject matter was substantially covered by other instructions which were given.[11.4]

Ground 17 of the enumerations of error complains of the failure to give a request to charge. The record reveals that the trial judge charged the jury in substantially the same language as that requested and hence no harmful error was committed.[11.5]

It is not prejudicial error to refuse an instruction where the theory of the rejected instruction is covered by other instructions given by the trial court.[11.6]

A trial court judge is not required to accept and use jury instructions verbatim as submitted to the court by counsel, and he is free to rephrase or

modify the instructions submitted to him, provided that the substance of the requested instructions are adequately, accurately, and fairly presented to the jury.[16.1]

Refusal to give a requested instruction is not erroneous if the instruction is substantially given in another instruction.[25.1]

It is proper to refuse to give requested instructions already covered by given instructions.[25.2]

An instruction requested by plaintiffs, over objection by defendant on the subject of an implied warranty of a "good and workmanlike installation" though not dealing with such implied warranty as warranty but as a subsidiary issue to an action for breach of contract for satisfactory installation with its own implied warranty was redundant.[25.3]

[11.1] **Georgia.** French v. Stephens, 117 GaApp 61, 159 SE2d 484 (1967).

[11.2] **Nebraska.** Deremer v. State, 182 Neb 586, 156 NW2d 6 (1968).

[11.3] **Federal.** Joseph T. Ryerson & Son, Inc. v. H. A. Crane & Bro., Inc., 417 F2d 1263 (1969).

[11.4] **Indiana.** Rocoff v. Lancella, 145 IndApp 440, 251 NE2d 582 (1969).

[11.5] **Georgia.** Srochi v. Kamensky, 121 GaApp 518, 174 SE2d 263 (1970).

[11.6] **Washington.** Myers v. Ravenna Motors, Inc., 2 WashApp 613, 468 P2d 1012 (1970).

[16.1] **Pennsylvania.** Commonwealth v. Parks, 421 A2d 1135 (PaSuper 1980).

[25.1] **Ohio.** Hardy v. Crabbe, 114 OhApp 218, 181 NE2d 483 (1961)

[25.2] **Hawaii.** In re Mew Len Ching's Estate, 46 Haw 127, 376 P2d 125 (1962).

[25.3] **Georgia.** Parker Heating Co. v. Rock Springs Manor, Inc., 116 GaApp 495, 157 SE2d 818 (1967).

§ 158A. Refusal of voir dire questions.

It is not reversible error for the court to refuse to ask prospective jurors certain questions during their *voir dire* where it is shown that the court, when giving instructions to the jury before deliberation, adequately and correctly instructed the jury on the matter contained in the proposed *voir dire* question. For example, it was not reversible error for the court to refuse the following two questions:

(1) "If you were chosen as a juror, and at the conclusion of the case, after discussion and deliberation with your fellow jurors you felt differently than they about what the verdict should be, would you be able to hold your view if you thought you were right or would you simply give in to the majority?"

(2) "If you and fellow jurors, after hearing all the testimony, the arguments of counsel, and the Court instructions, and after full deliberation unanimously reached a verdict, would you be able to stand up in the jury box in open court and announce what the verdict was?" [25.4]

[25.4] **Pennsylvania.** Commonwealth v. Bright, 420 A2d 714 (PaSuper 1980).

§ 159. Refused instructions in criminal cases substantially covered by other instructions given.

. . . [I]t is error for a trial judge to refuse to give instructions requested which correctly state the law on issues presented unless the points are adequately covered by the instructions given.[26.1]

The trial court need not charge the jury in the exact words requested by the defendants but is free to use language of its own choice where the general charge adequately covers the issues.[26 2]

The failure to give requested instructions in the exact language requested, where the charge given substantially covers the same principle, is no longer a ground for new trial.[26 3]

. . . [A] court may refuse to give requested instructions if the propositions therein stated are adequately covered by other instructions actually given by the court.[26 4]

Where a charge, on a single issue, ran for over two pages in the transcript, it was not error for the trial court judge to refuse to give a requested instruction because the jury was otherwise, in the remainder of the instructions, properly instructed in accordance with the applicable state law.[26 5]

The following comment by the trial court judge was held not to be prejudicial or improper:

"In this case as in any case the lawyers have a right to request certain written requested charges. That has been done in this case. Of course, I think about 20 were requested, but I am going to read two charges to you. I will tell you that these are correct statements of the law and should be considered by you consistent with what I have told you thus far." [26 6]

The defendant is *not* entitled to a separate jury instruction on the alibi defense so long as adequate and proper instructions were given on (1) the elements of the crime charged and on (2) the burden of the prosecution to prove the guilt of the defendant beyond a reasonable doubt.[26 7]

Following a determination by the trial court judge that the complainant-victim, a child five years of age, was capable of and understood her duty to tell the truth, the trial court properly refused the defendant's requested instruction to the effect that the jury should scrutinize and analyze the victim's testimony with great care if it found her testimony to be uncorroborated because the essence of this request was covered by other instructions given to the jury by the trial court judge.[26.8]

A trial court judge is not required to accept and use jury instructions verbatim as submitted to the court by counsel, and he is free to rephrase or modify the instructions submitted to him, provided that the substance of the requested instructions are adequately, accurately, and fairly presented to the jury.[29.1]

As a general proposition, the trial court has discretion in charging the jury, and the instructions will be held proper and non-prejudicial so long as that, considering them in their entirety, they accurately, properly, and fairly state the law as applied to the facts in the case. This discretion extends to refusal of requests and to cautionary instructions as well. For example, when testimony was offered against the defendant by an accomplice that had turned State's evidence, it was held proper and not prejudicial error for the court to refuse to give the following standardized jury instruction on accomplices:

"A accomplice witness is one who testifies that he was involved in the commission of the crime with which the defendant is charged. You should consider with caution testimony of an accomplice *if it is not supported by other evidence,"* [Emphasis supplied] and instead to give the following instruction relating to the credibility of witnesses in general and not specifically mentioning the need to corroborate accomplice testimony:

"It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use that knowledge and experience which you possess in common with men in general, in regard to the matter about which a witness has testified. You may take into account his ability and opportunity to observe and know the things about which he or she has testified, his memory, manner, and conduct while testifying, any interest he may have in the result of this trial, and the reasonableness of his testimony considered in the light of all the evidence in this case.

"If you find that any witness has willfully testified falsely concerning any material matter, you have a right to distrust the testimony of that witness in other matters, and you may reject all or part of the testimony of that witness, or you may give it such weight as you think it deserves. You should not reject any testimony without cause." [35.1]

The trial judge is not required to grant requested instructions if he has adequately covered in his charge the points requested.[39.1]

When subject matter of a requested instruction has been adequately covered in other instructions it is not error to refuse a proffered instruction.[39.2]

[26.1] **Hawaii.** Gibo v. City and County of Honolulu, 51 Haw 299, 459 P2d 198 (1969).

[26.2] **Federal.** Posey v. United States, 416 F2d 545 (1969).

[26.3] **Georgia.** Young v. State, 226 Ga. 553, 176 SE2d 52 (1970).

[26.4] **Indiana.** Southern Ind. Gas & Elec. Co. v. Riley, — Ind —, 37 IndDec 738, 299 NE2d 173 (1973).

[26.5] **Maine.** State v. Troiano, 421 A2d 41 (Me 1980).

[26.6] **Alabama.** Jones v. State, 392 S2d 1270 (AlaCrimApp 1980).

[26.7] **Kansas.** State v. Dailey, 228 Kan 566, 618 P2d 833 (1980).

[26.8] **Maine.** State v. Bussey, 423 A2d 244 (Me 1980).

[29.1] **Pennsylvania.** Commonwealth v. Parks, 421 A2d 1135 (PaSuper 1980).

[35.1] **Kansas.** State v. Ferguson, 288 Kan 522, 618 P2d 1186 (1980).

[39.1] **Pennsylvania.** Commonwealth v. Nelson, 396 Pa 359, 152 A2d 913 (1959).

[39.2] **Alaska.** Merrill v. Faltin (Alaska), 430 P2d 913 (1967).

§ 161. Requests for special verdict or findings on interrogatories by jury.

Defendant's request for a special verdict at the conclusion of plaintiff's argument was held to be timely under Ohio Revised Code (§ 2315.15) which is silent as to the time when the request must be made.[53.1]

[53.1] **Ohio.** Decker v. Standard Oil Co., 109 OhApp 339, 165 NE2d 693 (1959).

CHAPTER 8

PRESERVATION OF ERROR FOR REVIEW

Section
170. In general.
171. Timeliness of objections and exceptions.
172. Clearness of statement of grounds of objection or exception.
173. Particularity in statement of grounds of objection or exception.
174. General objections and exceptions to entire charge.
175. Waiver of objections and exceptions.

§ 170. In general.

The doctrine of fundamental error is to be resorted to in criminal cases only for the protection of those whose innocence appears indisputable, or open to such question that it would shock the conscience to permit the conviction to stand.[1.1]

However that may be, the claimed error is not for our consideration since the record discloses that this part of the charge stood without challenge unexcepted to by the defendant. The charge as made thus became the law of the case and may not now be challenged.[2 1]

A party may not complain of omissions in the charge unless he has called to the attention of the Court these omissions of which he complains prior to the jury's retirement for purposes of deliberations; by his inaction, the party is deemed to have waived any objection and if such a grievance is raised for the first time on appeal, it comes too late. An exception to this rule is made only where the error complained of is so highly prejudicial and so taints the proceeding as virtually to deprive the aggrieved party of a fair trial.[2.2]

Defendant alleges on appeal that the trial judge did not give proper instructions to the jury. However, no objections to the instructions were made at trial. In the absence of a miscarriage of justice, this Court will not consider this alleged error when raised for the first time on appeal.[6 1]

Where the trial court gives an instruction which is incomplete, but correct as far as it goes, such error in the charge is an error of omission and it is complaining counsel's duty to request the trial court to charge further in order to eliminate any possible confusion of the jury which may result from such deficiency. Unless counsel has requested the court to supply the omission, the error is not reviewable on appeal. However, where the trial court gives an erroneous statement of law in a charge, not induced by the complaining party, such an error is an error of commission and it may be reviewed on appeal without that party's having objected to the charge.[6.2]

Under the circumstances, appellant's request for the instruction amounts to an inducement by appellant to the court to make the charge complained of, foreclosing appellate review of the assigned error.[18.1]

Where a request to charge is made to the court and the request is refused, in all matters on appeal relating to refusal to give such request the request shall be considered as a whole and not by its separate parts.[28 1]

The written requests must be legal, apt, and precisely adjusted to some principle involved in the case.[28 2]

A party cannot claim as erroneous an instruction he himself requested.[32.1]

A party requesting an instruction cannot on appeal complain that the instruction should not have been given.[32 2]

A party cannot complain about a given instruction he requested.[32 3]

Failure to object to an erroneous instruction is not fatal if there is "plain error" [N.J.R.R. 1:5-3 (c)]. But the rule of plain error is rarely applied and only if it is clear that the error has produced a failure of substantial justice.[32.4]

Tendering a correct instruction is not enough to preserve error to an erroneous instruction. If the court fails to instruct when it should, tendering a correct instruction would be sufficient.[32.5]

A party cannot object to an instruction given at his request.[32.6]

A trial court's charge, despite fundamental error, becomes the law of the case, unless the error is revealed by objection, exception, or a motion for a new trial.[32.7]

It is error to instruct as follows even though no request made for a charge on lesser included offenses be included as the charge given is clearly improper:

There are only two possible verdicts as to each defendant. You may find the defendant, naming them individually, guilty of armed robbery or not guilty. There are no included offenses.[32 7 1]

Normally, a party cannot complain about an instruction given at his request. But this rule will not apply if it deprives an accused of his constitutional right to due process.[32 8]

A requested instruction is sufficient to inform the trial judge of the omission and preserve the error for appeal.[32 9]

A request to charge, which is refused, must be in writing to preserve the error for review (Georgia Code, § 70-207).[32.10]

Instructions will not be reviewed on appeal if proper objection is not made at the trial level, unless the appellate court thinks that a miscarriage of justice may occur.[32.11]

Notwithstanding fact that appellant did not object an instruction making malice an element of an assault and battery charge was held to be sufficiently prejudicial to call for reversal.[32 12]

An appellate court will not consider an alleged error of failing to instruct if at the trial no request is made and no objection made to court's failure to charge.[32.13]

The party who requested a given instruction cannot object since any error would be invited by that party.[32 14]

Failure of the trial judge to instruct the jury upon the decisive issues is fundamental error; this error will be reviewed even if no exception was taken.[32.15]

An instruction given without objection and exception becomes the law of the case and is binding on the parties and a court of review.[32 16]

Technical objections to the trial court's instructions raised for the first time on appeal will not be considered on appeal.[32.17]

The general rule has always been that if no exception to the charge is taken at time of trial, the issue cannot be raised on appeal unless the error is basic and fundamental.[32.18]

We have often ruled that matters not objected to at trial will not be considered by this court on appeal. The trial court must be given an opportunity to correct asserted errors before we will listen to the plea that injustice has been done.[32.19]

There is presently no requirement in this state that the court instruct in the exact language of a request, even though the request may be correct as an abstract principle of law which is directly applicable to a material issue.[32.20]

[1.1] **New Mexico.** State v. Rodriquez, 81 NM 503, 469 P2d 148 (1970).

[2.1] **Vermont.** Forcier v. Grand Union Stores, Inc., 128 Vt 389, 264 A2d 796 (1970).

[2.2] **Maine.** State v. Small (Me), 267 A2d 912 (1970).

[6.1] **Michigan.** People v. King, 22 MichApp 590, 177 NW2d 689 (1970).

[6.2] **Ohio.** Carrothers v. Hunter, 23 OhSt2d 99, 262 NE2d 867 (1970).

[18.1] **Ohio.** Hasapes v. Drake, 24 OhSt2d 1, 262 NE2d 870 (1970).

[28.1] **Georgia.** Bowers v. Fulton County, 122 GaApp 45, 176 SE2d 219 (1970).

[28.2] **Georgia.** Slaughter v. Linder, 122 GaApp 144, 176 SE2d 450 (1970).

[32.1] **New Mexico.** State v. Justus, 65 NM 195, 334 P2d 1104 (1959).

[32.2] **Ohio.** Slade v. Rookwood Oil Terminals, Inc., 109 OhApp 99, 159 NE2d 776 (1959).

[32.3] **Alabama.** Berness v. State, 40 AlaApp 198, 113 S2d 178 (1958).

[32.4] **New Jersey.** Cross v. Robert E. Lamb, Inc., 60 NJSuper 53, 158 A2d 359 (1959). In this case, the erroneous instruction placed upon the defendant the burden of proving that a third party's negligence proximately caused the accident. But the court refused to apply the plain error rule because other instructions correctly placed the burden upon the plaintiff to prove defendant's negligence caused the accident and because the evidence showed defendant was at least concurrently negligent.

[32.5] **New Mexico.** Beal v. Southern Union Gas Co., 66 NM 424, 349 P2d 337 (1960). The court interpreted New Mexico Rule of Civil Procedure 51(g).

[32.6] **Connecticut.** Perkins v. Corkey, 147 Conn 248, 159 A2d 166 (1960).

[32.7] **Minnesota.** State v. Bradac, 257 Minn 467, 102 NW2d 34 (1960).

[32.7.1] **Michigan.** People v. Lemmons, 384 Mich 1, 178 NW2d 496 (1970).

[32.8] **Illinois.** People v. Bender, 20 Ill2d 45, 169 NE2d 328 (1960).

[32.9] **Texas.** Malone v. State (TexCr), 339 SW2d 666 (1960).

[32.10] **Georgia.** Foster v. Ramsey, 102 GaApp 523, 116 SE2d 617 (1960).

[32.11] **Alaska.** Reiten v. Hendricks (Alaska), 370 P2d 166 (1962).

[32.12] **Alaska.** Merrill v. Faltin (Alaska), 430 P2d 913 (1967).

[32.13] **Maryland.** Wilhelm v. State Traffic Safety Comm., 230 Md 91, 185 A2d 715 (1962).

[32.14] **Iowa.** Tilghman v. Chicago & N. W. Ry. Co., 253 Ia 1339, 115 NW2d 165 (1962).

[32.15] **Oklahoma.** Britton v. Groom (Okl), 373 P2d 1012 (1962).

[32.16] **Virginia.** Shamblee v. Virginia Transit Co., 204 Va 591, 132 SE2d 712 (1963).

[32.17] **Kansas.** State v. Potts, 205 Kan 47, 468 P2d 78 (1970).

[32.18] **Pennsylvania.** Geesey v. Albee Pennsylvania Homes, Inc., 211 PaSuper 215, 235 A2d 176 (1967).

[32.19] **Arizona.** State v. Mays, 105 Ariz 47, 459 P2d 307 (1969).

[32.20] **Georgia.** Seagraves v. ABCO Mfg. Co., 121 GaApp 224, 173 SE2d 416 (1970).

§ 171. Timeliness of objections and exceptions.

If you find from a fair preponderance of all the evidence in this case that under all the circumstances as shown by the evidence, the defendant, in operating his automobile at the time of, and prior to, the collision in question, used the same degree of care that an ordinarily prudent person would have used under the same or similar circumstances, but that he did nevertheless collide with plaintiff's vehicle, then your verdict may be in favor of the defendant, and against the plaintiff.

In such an instruction the court held that Indiana Supreme Court Rule 1-7 requires that there is no error in giving same unless they are objected to at the time the instructions are given.[33.1]

No party may complain of the giving or failure to give an instruction to the jury, unless he objects thereto before the jury returns its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Appellate Practice Act of 1965 (Ga. L. 1965, p. 18), as amended (Ga. Law 1966, p. 493).[33.2]

The general rule has always been that if no exception to the charge is taken at time of trial, the issue cannot be raised on appeal unless the error is basic and fundamental.[33.3]

Complaints as to the court's charges in enumeration of error numbers, 6, 7 and 8 will not be considered as the condemnee made no objection to such charges in the lower court as required by law.[33.4]

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 the verdict, stating

specifically 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.[34 1]

No party may assign as error the giving of or the refusal to give an instruction unless, before the arguments to the jury are begun, he objects thereto by stating distinctly the matter to which he objects and the grounds of his objection.[36 1]

Normally, alleged erroneous instructions cannot be raised for the first time on appeal. This requirement is sound and practical since it gives the trial judge an opportunity to make corrections before the jury retires. One agreed exception is that only when there is plain error affecting substantial rights will there be appellate review of instructions not timely objected to in the trial court.[45.1]

When a defendant requests a manslaughter instruction and there is reasonable ground for such an instruction to be found in the evidence, it would be reversible error not to give it.[45 2]

The plaintiff's counsel excepted to a refusal on the part of the trial judge to give a requested instruction. The refusal to instruct was sustained, for the request for the instruction was made after the jury had left the court room and was thus not timely. Further, the request was made orally, and not in writing, as required.[45.3]

The defendant on appeal avers that, while there was no requested instruction, indeed no request submitted at all, with regard to an instruction on manslaughter, the judge was nonetheless duty bound to submit such instruction. Defendant contends that this duty is binding in the absence of an affirmative waiver on the defendant's part. It was held on appeal that there is no duty on the part of the judge to submit instructions on a lesser degree of homicide absent a request, but that had there been a request and reasonable grounds for same, failure to give the instruction would have been reversible error.[45 4]

Only such exceptions to the charge as appear in the record on appeal can be made the basis for appellate relief.[45 5]

[33.1] **Indiana.** Preuss v. McWilliams, 141 IndApp 602, 230 NE2d 789 (1967).

[33.2] **Georgia.** Biddinger v. Fletcher, 116 GaApp 532, 157 SE2d 764 (1967).

[33.3] **Pennsylvania.** Geesey v. Albee Pennsylvania Homes, Inc., 211 PaSuper 215, 235 A2d 176 (1967).

[33.4] **Georgia.** Bowers v. Fulton County, 122 GaApp 45, 176 SE2d 219 (1970).

[34.1] **Michigan.** People v. Stanek, 61 MichApp 573, 233 NW2d 89 (1975).

[36.1] **West Virginia.** Ellison v. Wood & Bush Co., 153 WVa 506, 170 SE2d 321 (1969).

[45 1] **District of Columbia.** Love v. United States (DCApp), 138 A2d 666 (1958).

[45.2] **Wisconsin.** Green v. State, 38 Wis2d 361, 156 NW2d 477 (1968).

[45.3] **Wisconsin.** Hunter v. Kuether, 38 Wis2d 140, 156 NW2d 353 (1968).

[45 4] **Wisconsin.** Green v State, 38 Wis2d 361, 156 NW2d 477 (1968).

[45.5] **North Carolina.** State v. Newsome, 7 NCApp 525, 172 SE2d 909 (1970).

§ 172. Clearness of statement of grounds of objection or exception.

Under the Georgia Appellate Practice Act of 1965 a party objecting to instructions must raise his objections before verdict. The objecting party must distinctly state the grounds of his objections.[46 1]

[I]t is necessary that an appellant make proper objection to a charge as given or to a request refused and state the grounds therefor before the jury returns its verdict. The mere exception to a failure to give a numbered request to charge fails to meet this requirement.[46 2]

Saying "I do not believe that is the law," although giving reasons, is not a proper exception to an instruction.[52.1]

It is next contended that a new trial should be granted because of alleged error in the refusal to give three of the requested instructions to the jury. One of these requests concerned the duties of the driver of a rear vehicle when faced with a sudden stop by the lead vehicle; and another the right of a motorist to continue on his course while momentarily blinded by the lights of an oncoming vehicle, or finds himself confronted with a sudden condition which could not have been foreseen. The third was a request to charge Section 46-484 of the 1962 Code of Laws, which requires that motorist when stopping or parking his car upon a roadway with an adjacent curb must have his right-hand wheels parallel to and within eighteen inches of the right-hand curb. It has held that these instructions as given afforded the proper test for the jury.[52.2]

[46.1] **Georgia.** DuFour v. Martin, 117 GaApp 160, 159 SE2d 450 (1968).

[46.2] **Georgia.** Reeves v. Morgan, 121 GaApp 481, 174 SE2d 460 (1970).

[52.1] **Alabama.** United Ins. Co. v. Ray, 275 Ala 411, 155 S2d 514 (1963).

[52.2] **South Carolina.** Brave v. Blakely, 250 SC 253, 157 SE2d 726 (1967).

§ 173. Particularity in statement of grounds of objection or exception.

An exception must point out some specific part of the charge as erroneous, and that an exception to a portion of a charge embracing a number of propositions is insufficient if any of the propositions are correct.[53.1]

When a defendant requests a manslaughter instruction and there is reasonable ground for such an instruction to be found in the evidence, it would be reversible error not to give it.[53 2]

The objecting party must state distinctly the matter to which he objects and the grounds of the objection.[76.1]

Failure to except to a claimed erroneous charge precludes review on appeal.[76.2]

An appellate court will not consider a claimed error in the charge if the charge was not excepted to.[76.3]

Since no grounds were specified in the objections or exceptions to alleged erroneous instructions, nothing is presented for review.[76.4]

It is not necessary to give reasons for an exception if the judge indicates that he understands why the exception is taken.[76 5]

Telling jury that the court and taxpayers expect a verdict is not an instruction on the law of the case. Hence the rule that exceptions to instructions be specific does not apply. It is sufficient merely to say, "I reserve an exception to your honor's statements." [76.6]

A mere objection without a request for further or amended instructions does not properly preserve the issue for review.[76 8]

To reserve an exception to part of the court's oral charge, the exceptor must recite what the court said or the substance.[76.9]

An assignment of error that the instructions were misleading, illegal, erroneous, and prejudicial is too general to preserve the matter for appellate review.[76.10]

Merely to inform the court that the doctrine of contributory negligence is not in the case and that the court erred on the doctrine of comparative negligence

is, we think, insufficient in particularity to inform the court that he had omitted the rule on diminution of damages.[76 11]

The only grounds of objection to the refusal made by plaintiff was that each of the requested instructions was "pertinent" and "applicable." Refusals to charge are only reviewable when the complaining party makes objection prior to the jury's return of the verdict "stating distinctly the matter to which he objects and the grounds of his objection." [76 12]

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 the verdict, stating specifically 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.[76.13]

[53.1] **North Carolina.** Jenkins v. Gaines, 272 NC 81, 157 SE2d 669 (1967).

[53.2] **Wisconsin.** Green v. State, 38 Wis2d 361, 156 NW2d 477 (1968).

[76.1] **New Jersey.** Citro v. Stevens Institute of Technology, 55 NJSuper 295, 150 A2d 678 (1959).

[76.2] **Rhode Island.** Hirschmann v. Sun-Dial Optical Co., 89 RI 31, 150 A2d 293 (1959).

[76.3] **Connecticut.** Newton v. Barnett, 146 Conn 344, 150 A2d 821 (1959).

[76.4] **South Dakota.** Lang v. Burns, 77 SD 626, 97 NW2d 863 (1959).

[76.5] **Washington.** McGovern v. Greyhound Corp., 53 Wash2d 773, 337 P2d 290 (1959).

[76.6] **Alabama.** Orr v. State, 40 AlaApp 45, 111 S2d 627 (1958), aff'd, 111 S2d 639.

[76.7] Reserved

[76.8] **Hawaii.** Kealoha v. Tanka, 45 Haw 457, 370 P2d 468 (1962).

[76 9] **Alabama.** Alabama Power Co. v. Smith, 273 Ala 509, 142 S2d 228 (1962).

[76.10] **Missouri.** State v. Davis (Mo), 367 SW2d 517 (1963).

[76.11] **Georgia.** Seagraves v. ABCO Mfg. Co., 121 GaApp 224, 173 SE2d 416 (1970).

[76.12] **Georgia.** McChargue v. Black Grading Contractors, Inc., 122 GaApp 1, 176 SE2d 212 (1970).

[76.13] **Michigan.** People v. Stanek, 61 MichApp 573, 233 NW2d 89 (1975).

§ 174. General objections and exceptions to entire charge.

An exception must point out some specific part of the charge as erroneous, and that an exception to a portion of a charge embracing a number of propositions is insufficient if any of the propositions are correct.[77 1]

While the plaintiff made a distinct objection to the refusal to charge his requests, the ground asserted was a mere general objection which failed to point out with any degree of particularity why the requests were pertinent and is insufficient to entitle the objection to review.[77.2]

A general exception to an entire charge will not be considered. It fails to present to the trial judge an opportunity to fairly pass upon the exception. An example of such an exception is: "To the charge as a whole on the ground that it amounts to directing a verdict for the state because every portion of the charge and its entirety states only the legal grounds favorable to the state." [82.1]

A general exception is effective if the charge fails to give to the jury the proper conception of the fundamental law involved.[82 2]

[77.1] **North Carolina.** Jenkins v. Gaines, 272 NC 81, 157 SE2d 669 (1967).

[77.2] **Georgia.** McChargue v. Black Grading Contractors, Inc., 122 GaApp 1, 176 SE2d 212 (1970).

[82.1] **Vermont.** State v. Haskins, 120 Vt 288, 139 A2d 827 (1957).

[82.2] **Pennsylvania.** Eisert v. Jones, 399 Pa 204, 159 A2d 723 (1960).

§ 175. Waiver of objections and exceptions.

Evidence the city was sanding intersections the morning of plaintiff's fall is no proof the sidewalk in question was in a dangerous condition because of ice and snow made rough and uneven through artificial means. Nor does it prove actual knowledge on the part of the city. In fact, the court instructed the jury defendant had no actual knowledge of the alleged condition and plaintiff necessarily relied on constructive notice. No objection was taken and this instruction is now the law of the case.[83.1]

A defendant waives any claim of error in the instructions other than those stated.[96.1]

An instruction not excepted to becomes the law of the case.[96.2]

General objections to instructions given or refused are not enough to preserve error for review. Moreover, error is waived as to any instruction not assigned as error in the motion for a new trial.[96.3]

Although a reviewing court does not approve the language used in an instruction, if no exception was taken, the instruction became the law of the case.[96.4]

Failure to object to a given instruction on a particular subject is not a waiver of error for refusing to give a tendered instruction correctly stating the law.[96.5]

Rulings on the giving or refusing of requested written instructions may be reviewed on appeal without a motion for a new trial (Ala. Code 1940, tit. 7, § 818).[96.6]

If a party assigns error to a group of unrelated charges, but one charge at least was proper, the court will not consider the rest of the charges.[96.7]

The general rule has always been that if no exception to the charge is taken at time of trial, the issue cannot be raised on appeal unless the error is basic and fundamental.[96.8]

Plaintiff requested an instruction stating that, if the injury was caused by other than the workman's employer, the workman has an option to either accept workman's compensation or pursue a remedy against the injurer. The instruction was not given, and plaintiff objected to evidence submitted to show workmen's compensation coverage. The appellate court held that the requested instruction, seeking admission of the very evidence to which plaintiff was objecting, was a waiver of the right to successfully object.[97]

[83.1] **Iowa.** Hovden v. City of Decorah, 261 Ia 624, 155 NW2d 534 (1968).

[96.1] **New Mexico.** State v. Justus, 65 NM 195, 334 P2d 1104 (1959).

[96.2] **Rhode Island.** Shine v. Wujick, 89 RI 22, 150 A2d 1 (1959).

[96.3] **Washington.** McGovern v. Greyhound Corp., 53 Wash2d 773, 337 P2d 290 (1959).

[96.4] **Illinois.** People v. Neukom, 16 Ill2d 340, 158 NE2d 53 (1959).

[96.5] **Indiana.** Lee v. Dickerson, 131 IndApp 422, 171 NE2d 698 (1961).

[96.6] **Alabama.** Mobile City Lines, Inc. v. Proctor, 272 Ala 217, 130 S2d 388 (1961).

[96.7] **Alabama.** Callahan v. Booth, 275 Ala 275, 154 S2d 32 (1963).

[96.8] **Pennsylvania.** Geesey v. Albee Pennsylvania Homes, Inc., 211 PaSuper 215, 235 A2d 176 (1967).

[97] **Arizona.** Miller v. Schafer, 102 Ariz 457, 432 P2d 585 (1967).

CHAPTER 9

PRACTICAL SUGGESTIONS

Section
180. Instructing the jury.

§ 180. Instructing the jury.

Ladies and gentlemen of the jury, I have asked that you be brought back, because I don't think you had more than turned the door handle when both attorneys and myself realized there were a couple of things I failed to give to you. One was a ruling that I made during the course of argument, and I think I should give you instructions on it. I instruct you, that if you find for the plaintiff, you may not award any damages under the Death Act. There can be no recovery to the plaintiff beyond the time that the deceased would have reached the age of 21 years. So that damages, if you find for the plaintiff, would be limited only to that amount. It would also be, of course, pecuniary damages which the parents, Mr. and Mrs. W., have suffered by reason of this loss.[1 1]

The trial judge, upon being informed that the jury was deadlocked, called in the jury foreman and inquired of him whether or not the jury desired further instruction. The foreman retired to the jury room to make inquiry of his fellow jurors, and he returned to the courtroom and reported, "all feel that they could come to a verdict if they had some more" instruction. The entire jury then came to the courtroom and asked for re-charge, specifically, on the word "knowingly." The judge gave the re-charge, and a juror expressed lingering doubt about the meaning of the word. After he informed that juror that Mosley could not be convicted unless he knowingly obstructed justice, the judge asked if there were further instruction he could offer and the juror responded negatively. The judge also instructed the jury, at the time of the re-charge, that his business was not to interfere in their deliberations, but only to offer instructional assistance, and that it was their province alone to determine guilt or innocence. Mosley's counsel was present for all of this judicial communication with the jury. Contrary to Mosley's allegations, the trial judge's handling of the re-charge was not coercive of any individual juror, nor was it an interference with jury deliberations. Also, "[w]here the jury, after having been charged by the court, returns into court and requests an instruction upon a specific question, it is not error for the judge to confine his instruction to the specific point suggested by the jury's inquiry." [1,2]

. . .[T]o avoid future misunderstanding, it is suggested that a court should state the question, affirmatively, negatively, and illustratively, e.g.: "Tell me how you stand numerically — that is, whether you are 6 and 6, 8 to 4, etc., BUT DO NOT TELL ME WHETHER THAT NUMBER IS FOR GUILT OR INNOCENCE. Do you understand my question?" [1 3]

We take this opportunity to reiterate the principle that the better procedure in a case in which it is a close question whether the standard for granting a directed verdict is met is to allow the matter to go to the jury. If the judge then decides that the jury's verdict cannot stand, a motion for judgment notwithstanding the verdict may be allowed. . . . This procedure is more efficient than initially allowing a motion for a directed verdict. If the granting of the motion for judgment notwithstanding the verdict is found to be erroneous

on appeal, the jury's verdict can be reinstated, while the erroneous granting of the motion for a directed verdict requires a new trial.[4]

[1.1] **Michigan.** Wilson v. Modern Mobile Homes, Inc., 376 Mich 342, 137 NW2d 144 (1965).

[1.2] **Georgia.** Mosley v. State, 145 GaApp 651, 244 SE2d 610 (1978).

[1.3] **Georgia.** Wilson v. State, 145 GaApp 315, 244 SE2d 355 (1978).

[4] **Massachusetts.** Smith v. Ariens Co., 78 Mass 1857, 377 NE2d 954 (1978).

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