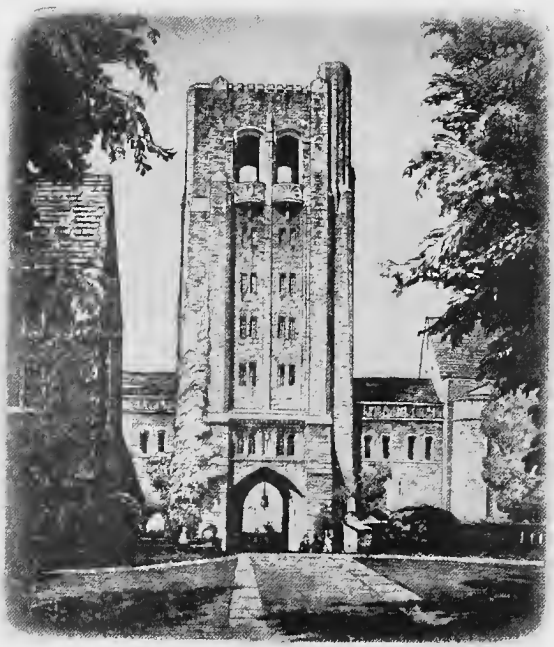

A TREATISE

ON

INSTRUCTIONS TO JURIES

IN

CIVIL AND CRIMINAL CASES

INCLUDING

PROVINCE OF COURT AND JURY

BY

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ST. PAUL, MINN.
KEEFE-DAVIDSON CO.
1902

WEBB PUBLISHING CO. PRESS, ST. PAUL.

PREFACE.

The subject of instructions to juries has heretofore received but meager attention, although it is one of the most important phases of a trial. The subject is essentially a practical one, and an attempt has been made in this work to treat it in the most practical manner. It is believed that the profession will prefer well approved precedents, rather than deductions of the author. Therefore, discussion of theories has been avoided, save those which have received the commendations of the courts; and that the atmosphere of the court room may be more nearly approached, the exact words of the judges are set forth whenever practicable.

Special attention is called to the chapters on the practice in criminal prosecutions, particularly those dealing with cautionary instructions upon "alibi" and "reasonable doubt." The history of the doctrine that the jury may judge both law and fact in criminal cases is exhaustively treated, and the statutory limitations placed upon the judge's power to comment on the evidence are fully worked out.

In connection with every rule or principle stated, exhaustive citations of forms are given. This method has resulted in enormous saving of space for the almost endless and useless repetition of merely formal parts of instructions, and restatement of perfectly familiar propositions of substantive law have thus been avoided. By no other means could the same number of forms be included in a single volume.

DE WITT C. BLASHFIELD.

June 27, 1902.

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INSTRUCTIONS TO JURIES.

CHAPTER I.

DEFINITION AND OFFICE OF INSTRUCTIONS.

§ 1. What are Instructions.
2. Purpose of Instructions.

§ 1. What are instructions.

Instructions may be shortly defined as directions in regard to the law of the case.[1] Statements of rules of law governing the matter in issue or the amount of recovery are instructions.[2] Other definitions are as follows: By the supreme court of Indiana: "An exposition of the principles of the law applicable to the case, or some branch or phase of the case, which the jury are bound to apply in order to render a verdict establishing the rights of the parties in accordance with the facts proven."[3] By Hilliard: "Any decision or declaration by the court, upon the law of the case, made in the progress of the cause, and by which the jury are influenced and the counsel controlled."[4] Not every direction

[1] Lawler v. McPheeters, 73 Ind. 579; Ellis v. People, 159 Ill. 337; Jenkins v. Wilmington & W. R. Co., 110 N. C. 438.

[2] Bradway v. Waddell, 95 Ind. 170; Stanley v. Sutherland, 54 Ind. 339.

[3] Lehman v. Hawks, 121 Ind. 541. The essential idea involved in the term "instruction" "is that it is authoritative as an exposition of the law, which the jury are bound * * * to obey." Bouvier, Law Dict. 310, cited with approval in Dodd v. Moore, 91 Ind. 523.

[4] Hilliard, New Trials (2d Ed.) 255.

or remark addressed by the court to the jury is an instruction.[5] This subject will be treated more in detail in a succeeding chapter in connection with a consideration of the statutory requirement, existing in many states, that instructions must be given in writing.[6] The instructions, taken as a whole, are frequently spoken of as the "charge to the jury."

§ 2. Purpose of instructions.

Instructions to juries serve several distinct purposes. In the first place, their office is to explain to the jury what the issues in the cause are,[7] and to confine them to a determination of such issues, excluding from their consideration all irrelevant matters.[8] This is one of the most vital and necessary functions pertaining to instructions. To have the jury determine for themselves what the issues are under the pleadings would necessarily be productive of great confusion and uncertainty. Jurors have no knowledge of law, and are unfamiliar with the language in which it is expressed. Even judges, whose lives have been devoted to a study of the law, frequently find some difficulty in defining the issues, and it is not to be supposed that persons totally unlearned in the law can accomplish that which those who have made a lifelong study of the subject find difficult of accomplishment. Secondly, the office of instructions is to suggest, so far as necessary, the principles of evidence and their application.[9] A statement of the rules for testing the cred-

[5] McCallister v. Mount, 73 Ind. 559; McCormick v. Ketchum, 48 Wis. 643; Hinckley v. Horazdowsky, 133 Ill. 360.

[6] See post, c. 12, "Necessity of Instructing in Writing."

[7] Souvais v. Leavitt, 50 Mich. 108; Forbes v. Jason, 6 Ill. App. 395.

[8] Newell v. St. Louis B. & I. Co., 5 Mo. App. 253.

[9] Souvais v. Leavitt, 50 Mich. 108. See also, Welch v. Ware, 32 Mich. 77.

ibility of witnesses, and estimating the probative force of the various kinds of evidence, is very essential to a correct conclusion, especially where there is considerable conflict in the evidence, and the evidence is nearly in equilibrium. The third and most important function of instructions is to declare what rules of law will apply to any state of facts which may be found in the case, and to assist the jury in correctly applying these rules to the facts.[10] The fourth office which instructions serve is to show the reviewing court on what theory the trial court decided in cases tried without a jury.[11]

[10] Souvais v. Leavitt, 50 Mich. 108; Sawyer v. Sauer, 10 Kan. 466; State v. Levigne, 17 Nev. 435; First Nat. Bank of Lanark v. Eitemiller, 14 Ill. App. 22; Welch v. Ware, 32 Mich. 77; Baxter v. People, 8 Ill. 368; Hamilton v. Hunt, 14 Ill. 472; Pleasant v. State, 15 Ark. 625; Hasbrouck v. City of Milwaukee, 21 Wis. 219; Keeler v. Stuppe, 86 Ill. 309; Lendberg v. Brotherton Iron Min. Co., 75 Mich. 84.

[11] Harrison v. Bartlett, 51 Mo. 170; Ford v. City of Cameron, 19 Mo. App. 467. See, also, Spurgeon v. West, 23 Mo. App. 42. See, also, post, c. 32.

CHAPTER II.

PROVINCE OF COURT AND JURY.

I. Questions of Law and Fact.

§ 3. Statement of Rule.
4. Illustrations of Rule.
5. Directing Verdict.

II. Construction of Writings.

§ 6. Statement of Rule.
7. Written Contracts.
8. Deeds and Mortgages.
9. Miscellaneous Writings.
10. Exceptions to Rule.
11. Rule Where Parol Evidence is Admitted to Explain Writing.

III. Existence and Interpretation of Laws, Ordinances, and Rules.

§ 12. In General.
13. Laws of Foreign State.
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IV. Oral Contracts and Language.

§ 15. In General.

V. Power of Jury to Judge the Law in Criminal Cases.

§ 16. Introductory Statement.
17. Arguments for and against Exercise of Right.
18. Rule in England Deducible from Decisions and Text Books.
19. Rule at Common Law in America.
20. Same—What Instructions Proper as to Following Charge of Court.
21. Summary of Organic and Statutory Provisions Regulating Practice.

22. Provisions Held to Vest Jury with Right to Disregard Instructions.
23. Same—Propriety or Necessity of Instructing Jury on Law of the Case.
24. Same—Necessity and Manner of Instructing Jury that They are Judges of the Law.
25. Provisions Held not to Vest Jury with Right to Disregard Instructions.
26. Same—Rule in Georgia.
27. Same—Rule in Louisiana.
28. Same—Rule in Massachusetts.

I. Questions of Law and Fact.

§ 3. Statement of rule.

It is the theory of jury trials that the decision of all questions of law arising in the case is a matter exclusively within the province of the court;[1] while, upon the other hand, the determination of all questions of fact is exclusively within the province of the jury.[2] It is error to give an instruc-

[1] People v. Finnegan, 1 Parker, Cr. R. (N. Y.) 147; Phillips v. People, 11 Ill. App. 340; Village of Fairbury v. Rogers, 98 Ill. 554; Pennsylvania Co. v. Conlan, 101 Ill. 93; Tyson v. Rickard, 3 Har. & J. (Md.) 109; People v. Finnegan, 1 Parker, Cr. R. (N. Y.) 147; Duren v. Kee, 41 S. C. 171; Drake v. State, 60 Ala. 62; Matthews v. State, 55 Ala. 65; Thomason v. Odum, 31 Ala. 108; Shaw v. Wallace, 2 Stew. & P. (Ala.) 193; Wright v. Bolling, 27 Ala. 259; Spivey v. State, 26 Ala. 90; Brady v. Clark, 12 Lea (Tenn.) 323; Ahrens v. Cobb, 9 Humph. (Tenn.) 645; Roberts v. Alexander, 5 Lea (Tenn.) 414; McCorry v. King's Heirs, 3 Humph. (Tenn.) 267; George W. Roby Lumber Co. v. Gray, 73 Mich. 356; People v. Ivey, 49 Cal. 56; Whitney v. Cook, 53 Miss. 551; Myrick v. Wells, 52 Miss. 149; Riley v. Watson, 18 Ind. 291; Albert v. Besel, 88 Mo. 150; State v. Mitchell, 98 Mo. 657; State v. Forsythe, 89 Mo. 667; Chicago & E. I. R. Co. v. Stonecipher, 90 Ill. App. 511; State v. Clough, 111 Iowa, 714. In a jury trial, all questions of law arising in the progress of the case, and the law of the whole case after evidence and argument, must be settled and determined by the court alone. Brady v. Clark, 12 Lea (Tenn.) 323. See, also, Hyde v. Town of Swanton, 72 Vt. 242.

[2] Haun v. Rio Grande W. Ry. Co., 22 Utah, 346; Pennsylvania

tion which submits the decision of a question of law to the jury, and a request for such an instruction should, of course, be refused,[3] even though the court is held by judges not required to be learned in the law.[4]

"In instructing the jury as to the law of the case, the judge should distinctly separate questions of law from questions of fact,"[5] and it is error to blend questions of law and fact,

Co. v. Conlan, 101 Ill. 93; Phillips v. People, 11 Ill. App. 340; Muldowney v. Illinois Cent. R. Co., 32 Iowa, 176; Farnan v. Childs, 66 Ill. 544; St. Louis, A. & T. H. R. Co. v. Manly, 58 Ill. 300; Mitchinson v. Cross, 58 Ill. 366; Chesapeake & O. Canal Co. v. Knapp, 9 Pet. (U. S.) 541; Hogan v. Page, 2 Wall. (U. S.) 605; Williams v. Shelden, 61 Mich. 311; Sheahen v. Barry, 27 Mich. 217; Frederick v. Gaston, 1 G. Greene (Iowa) 401; Reel v. Elder, 62 Pa. 308; Steffy v. Carpenter, 37 Pa. 41; Hart v. Borough of Girard, 56 Pa. 23.

[3] Shaw v. Wallace, 2 Stew. & P. (Ala.) 193; Pistole v. Street, 5 Port. (Ala.) 64; Stewart v. Sonneborn, 49 Ala. 178; George W. Roby Lumber Co. v. Gray, 73 Mich. 356; Whitney v. Cook, 53 Miss. 551; Riley v. Watson, 18 Ind. 291; Vedder v. Fellows, 20 N. Y. 126; Cook v. Mackrell, 70 Pa. 12; American Ins. Co. v. Crawford, 7 Ill. App. 29; Beidler v. Fish, 14 Ill. App. 29; International Bank v. Bartalott, 11 Ill. App. 620; Richardson v. Stewart, 2 Serg. & R. (Pa.) 84; Keating v. Orne, 77 Pa. 89; Green v. Hill, 4 Tex. 465; Caledonian Ins. Co. v. Traub, 80 Md. 214; Ragan v. Gaither, 11 Gill & J. (Md.) 472; State v. Rayburn, 31 Mo. App. 385; St. Louis, K. C. & N. Ry. Co. v. Cleary, 77 Mo. 634; Turner v. St. Louis & S. F. Ry. Co., 76 Mo. 261; Morgan v. Durfee, 69 Mo. 469; Erb v. German-American Ins. Co. (Iowa) 83 N. W. 1053; Brown v. Langner, 25 Ind. App. 538; Dominick v. Randolph, 124 Ala. 557; District of Columbia v. Robinson, 180 U. S. 92, affirming 14 App. D. C. 512. An instruction that "the court will sanction any verdict the jury may return" is erroneous, since it leaves too much to the jury. Bockoven v. Board of Sup'rs of Lincoln Tp., 13 S. D. 317. In an action for breach of contract, it is error to instruct the jury to find for the plaintiff, unless they find that defendant had legal cause for his failure to perform. La Porte v. Wallace, 89 Ill. App. 517.

[4] Richardson v. Stewart, 2 Serg. & R. (Pa.) 84; Keating v. Orne, 77 Pa. 89.

[5] Rogers v. Broadnax, 24 Tex. 538.

and submit the whole to the jury.[6] It is proper to refuse and erroneous to give instructions which take away from the jury the decision of any question of fact.[7] It is error for either the court or the jury to invade the other's province.[8] Numerous illustrations and applications of these rules will be found in the succeeding sections of the work.

§ 4. Illustrations of rule.

In determining questions of fact, the jury are necessarily compelled to pass upon the weight and sufficiency of the evidence introduced to prove or disprove the existence of the fact, and it is within their exclusive province to do so.[9]

[6] Potts v. Wright, 82 Pa. 498.

[7] Rogers v. Broadnax, 24 Tex. 538; Reynolds v. Williams, 1 Tex. 311; Clark v. Goddard, 39 Ala. 164; McRae v. Scott, 4 Rand. (Va.) 463; Adams v. Roberts, 2 How. (U. S.) 486; Jewell v. Jewell, 1 How. (U. S.) 219; Myrick v. Wells, 52 Miss. 149; Turner v. Loler, 34 Mo. 461; Borrodaile v. Leek, 9 Barb. (N. Y.) 611; White v. White, 15 N. C. 257; Benson v. Boteler, 2 Gill (Md.) 74; Planters' Bank v. Bank of Alexandria, 10 Gill & J. (Md.) 346; Burtles v. State, 4 Md. 273; Pettingill v. Porter, 8 Allen (Mass.) 1; Van Duzor v. Allen, 90 Ill. 499; Hubner v. Feige, 90 Ill. 208; Landon v. Chicago & G. T. Ry. Co., 92 Ill. App. 216; Houston v. State, 4 G. Greene (Iowa) 437; Salter v. Myers, 5 B. Mon. (Ky.) 281; Baker v. Chatfield, 23 Fla. 540. On a prosecution for perjury, it is proper to instruct the jury that the clerk of court had power to administer the oath, as that is a question of law. State v. Clough, 111 Iowa, 714.

[8] Mawich v. Elsey, 47 Mich. 10; Connor v. Johnson, 59 S. C. 115; Howell v. State (Neb.) 85 N. W. 289. And see, generally, post, c. 2, "Invading Province of Jury."

[9] United States Life Ins. Co. v. Lesser, 126 Ala. 568; Hudson v. Weir, 29 Ala. 294; Cape Girardeau U. M. Co. v. Bruihl, 51 Mo. 144; Haun v. Rio Grande W. Ry. Co., 22 Utah, 346; Welstead v. Levy, 1 Moody & R. 138. And see, generally, post, § 29 et seq., "Invading Province of Jury." Where the case fairly depends upon the sufficiency and weight of the evidence, an instruction that the jury must find for the defendant if they believed the evidence in the case is properly refused. United States Life Ins. Co. v. Lesser, 126

The credibility of the witnesses is exclusively a question for the jury.[10] So the inferences of facts from other facts in evidence are to be drawn by the jury, and not by the court, except when the evidence is uncontradicted, and there is no room for reasonable men to draw different conclusions,[11] and except in cases when there is a presumption of law resulting from the facts proved, in which case the court may instruct the jury as to the inference to be drawn in the event that they find the existence of the requisite facts.[12] The existence of the fact of negligence,[13] identity,[14] in-

Ala. 568. But where the evidence discloses no conflict, and is sufficient to sustain a verdict for the plaintiff, it is not error to instruct the jury to find for the plaintiff if they believe the evidence. Haltom v. Southern Ry. Co. (N. C.) 37 S. E. 262.

[10] Haun v. Rio Grande W. Ry. Co., 22 Utah, 346; State v. Adair, 160 Mo. 391; Howell v. State (Neb.) 85 N. W. 289; Stewart v. Anderson, 111 Iowa, 329; State v. Cushenberry, 157 Mo. 168; State v. Tate, 156 Mo. 119; Com. v. Winkelman, 12 Pa. Super. Ct. 497; Osborn v. State, 125 Ala. 106; Jordan v. State, 81 Ala. 20; State v. Taylor, 57 S. C. 483; Finch v. State, 81 Ala. 41; Strong v. State (Neb.) 84 N. W. 410; State v. Dickey (W. Va.) 37 S. E. 695; Tarbell v. Forbes, 177 Mass. 238; Turner v. Grobe (Tex. Civ. App.) 59 S. W. 583; Gott v. People, 187 Ill. 249; Owen v. Palmour, 111 Ga. 885; Chavarria v. State (Tex. Cr. App.) 63 S. W. 312; H. B. Claflin Co. v. Querns, 15 Pa. Super. Ct. 464; Connecticut Mut. Life Ins. Co. v. Hillmon (C. C. A.) 107 Fed. 834; Southern Mut. Ins. Co. v. Hudson (Ga.) 38 S. E. 964. The competency of a young child to testify is for the court, but the credit to be given to such child's testimony is for the jury. State v. Todd, 110 Iowa, 631.

[11] Brownell v. Fuller, 60 Neb. 558; Izlar v. Manchester & A. R. Co., 57 S. C. 332; Ross v. Citizens' Ins. Co., 7 Mo. App. 575; Howard v. Carpenter, 22 Md. 10.

[12] It is proper for the court to instruct the jury what facts are and what are not sufficient to justify a presumption. Wheeler v. Schroeder, 4 R. I. 383.

[13] Haun v. Rio Grande W. Ry. Co., 22 Utah, 346; Hooper v. Southern Ry. Co., 112 Ga. 96. An instruction that certain specified acts amounted to negligence is erroneous, as the question is

sanity,[15] agency,[16] notice,[17] intent,[18] and the like, is a question for the jury when the evidence is conflicting and an inference of fact is to be drawn.

§ 5. Directing verdict.

The rule that the determination of questions of fact rests exclusively within the province of the jury is subject to the very important qualification that, in certain cases, the court may direct the jury to return a perfunctory verdict in accordance with its direction. The right of the court to direct a verdict rests upon the principle that where, as a matter of law, the evidence is insufficient to support a verdict for one party, no question of fact is presented for the jury, and therefore the court may direct a verdict for the other party.[19] The test of the right to direct a verdict is whether the court would be bound to set aside a verdict as against the evidence if rendered against the party in whose favor the verdict is directed.[20] It is proper to direct

one of fact for the jury. Landon v. Chicago & G. T. Ry. Co., 92 Ill. App. 216. See Hooper v. Southern Ry. Co., 112 Ga. 96, wherein a charge was held not open to the objection that it instructed the jury as to what was or was not negligence.

[14] Tatum v. Com. (Ky.) 59 S. W. 32; State v. Perkins (N. H.) 47 Atl. 268; Miller v. Marks, 20 Mo. App. 369; Begg v. Begg, 56 Wis. 534; State v. Babb, 76 Mo. 504.

[15] State v. Jones, 126 N. C. 1099; State v. Geier, 111 Iowa, 706.

[16] Robinson v. Walton, 58 Mo. 380.

[17] Saltmarsh v. Bower, 22 Ala. 221; Muldrow v. Robison, 58 Mo. 331; Van Hook v. Walton, 28 Tex. 59; Berkshire Woolen Co. v. Proctor, 7 Cush. (Mass.) 417.

[18] Winter v. Norton, 1 Or. 42; Betts v. Francis, 30 N. J. Law, 152; Jones v. Brownfield, 2 Pa. 55; Dumn v. Rothermel, 112 Pa. 272; State v. Hayes, 59 N. H. 450; Lawyer v. Smith, 8 Mich. 411.

[19] Fox v. Spring Lake Iron Co., 89 Mich. 387; Parks v. Ross, 11 How. (U. S.) 362; Schuylkill & D. Imp. Co. v. Munson, 14 Wall. (U. S.) 442.

[20] Pleasants v. Fant, 22 Wall. (U. S.) 116; Joeckel v. Joeckel,

a verdict against the party having the burden of proof, where no evidence has been introduced to support his theory of the case,[21] or, what is practically the same thing, where

56 Wls. 436; Merchants' Nat. Bank v. State Nat. Bank, 10 Wall. (U. S.) 604; Randall v. Baltimore & O. R. Co., 109 U. S. 478; Keyes v. Grant, 118 U. S. 25; Marion County Com'rs v. Clark, 94 U. S. 278; Schuylkill & D. Imp. Co. v. Munson, 14 Wall. (U. S.) 442; Bennett v. Covington, 22 Fed. 816; Stewart v. Sixth Ave. R. Co., 45 Fed. 21; Cole v. Hebb, 7 Gill & J. (Md.) 41; Morris v. Brickley, 1 Har. & G. (Md.) 107; Tyson v. Tyson, 37 Md. 567; Bartelott v. International Bank, 119 Ill. 259; Simmons .v. Chicago & T. R. Co., 110 Ill. 340; Catlett v. St. Louis, I. M. & S. Ry. Co., 57 Ark. 461; Giermann v. St. Paul, M. & M. Ry. Co., 42 Minn. 5; Dawson v. Helmes, 30 Minn. 107; Powell v. Missouri Pac. Ry. Co., 76 Mo. 80; Holland v. Kindregan, 155 Pa. 156; Eister v. Paul, 54 Pa. 196; Bowman v. Eppinger, 1 N. D. 21; Peet v. Dakota F. & M. Ins. Co., 1 S. D. 462; Georgia Pac. Ry. Co. v. Propst, 90 Ala. 1; Lacey v. Porter, 103 Cal. 597; Levitzky v. Canning, 33 Cal. 299; Hathaway v. Judie, 95 Mich. 241; Grand Trunk Ry. Co. v. Nichol, 18 Mich. 170; Faris v. Hoberg, 134 Ind. 269; Dodge v. Gaylord, 53 Ind. 365; Oleson v. Lake Shore & M. S. Ry. Co., 143 Ind. 405; Brooks v. Inhabitants of Somerville, 106 Mass. 271; Reeder v. Dupuy, 96 Iowa, 729; Beckman v. Consolidation Coal Co., 90 Iowa, 252; Davis v. Robinson, 71 Iowa, 618; Hemmens v. Nelson, 138 N. Y. 517; Kelly v. Burroughs, 102 N. Y. 93; Corning v. Troy I. & N. Factory, 44 N. Y. 577; Rich v. Rich, 16 Wend. (N. Y.) 663; Rudd v. Davis, 3 Hill (N. Y.) 287, 7 Hill, 529; Heimerdinger v. Finelite, 11 Misc. Rep. (N. Y.) 111; Montfort v. Hughes, 3 E. D. Smith (N. Y.) 595.

[21] Corwin v. Patch, 4 Cal. 204; Kuhland v. Sedgwick, 17 Cal. 123; Heilbron v. Heinlen, 72 Cal. 376; City of East St. Louis v. O'Flynn, 119 Ill. 200; Pynchon v. Day, 118 Ill. 9; Dondero v. Frumveller, 61 Mich. 440; People v. Montague, 71 Mich. 318; Eister v. Paul, 54 Pa. 196; Groft v. Weakland, 34 Pa. 304; Angier v. Eaton, C. & B. Co., 98 Pa. 594; Morley v. Eastern Express Co., 116 Mass. 97; Allen v. Wheeler, 54 Iowa, 628; Murphy v. Chicago, R. I. & P. R. Co., 45 Iowa, 661; Atkinson v. Blair, 38 Iowa, 156; Martin v. Martin, 118 Ind. 227; Slayton v. Fremont, E. & M. V. R. Co., 40 Neb. 840; Hardin v. Sheuey, 40 Neb. 623; Howard v. Milwaukee & St. P. Ry. Co., 101 U. S. 844; McLeod v. Fourth Nat. Bank of St. Louis, 122 U. S. 528; Alexander v. Harrison, 38 Mo.

there is no evidence of some fact the existence of which is essential to his case.[22] A material variance may amount to a failure of proof, and in such case a verdict may be directed.[23] Where, however, there is not an entire absence of evidence, but, on the contrary, the evidence is conflicting, and the determination of the fact depends upon the weight of the evidence or the credibility of witnesses, the question is for the jury, and it is error to direct a verdict.[24] So. where inferences of fact are to be drawn, the question is for

259; Corby v. Butler, 55 Mo. 398; Hunter v. Stege, 59 N. Y. Super. Ct. 17; MacRitchie v. Johnson, 49 Kan. 321.

[22] Wait v. Agricultural Ins. Co., 13 Hun (N. Y.) 371; Underhill v. New York & H. R. Co., 21 Barb. (N. Y.) 489; Heyne v. Blair, 62 N. Y. 19; Neil v. Thorn, 88 N. Y. 270; Frazer v. Howe, 106 Ill. 563; Alexander v. Cunningham, 111 Ill. 511; Huschle v. Morris, 131 Ill. 587; Harrigan v. Chicago & I. R. Co., 53 Ill. App. 344; Continental Life Ins. Co. v. Rogers, 119 Ill. 474; Noyes v. Rockwood, 56 Vt. 647; Allyn v. Boston & A. R. Co., 105 Mass. 77; Campbell v. Roe, 32 Neb. 345; Schrimpton v. Bertolet, 155 Pa. 638; Jackson v. Ferris (Pa.) 8 Atl. 435; Baird v. Schuylkill R. E. S. R. Co., 154 Pa. 463; Lacey v. Porter, 103 Cal. 597

[23] Tracy v. Ames, 4 Laws 500 (N. Y.); Strahle v. First Nat. Bank of Stanton, 47 Neb. 319; Ferguson v. Tucker, 2 Har. & G. (Md.) 182.

[24] Lever v. Foote, 82 Hun (N. Y.) 393; Bridgeport City Bank v. Empire Stone Dressing Co., 30 Barb. (N. Y.) 421; Moulor v. American Life Ins. Co., 101 U. S. 708; Northern Pac. R. Co. v. Conger, 12 U. S. App. 240; Orleans v. Platt, 99 U. S. 676; Hiatt v. Brooks, 17 Neb. 33; Lent v. Burlington & M. R. R. Co., 11 Neb. 201; Lau v. Fletcher, 104 Mich. 295; Wisner v. Davenport, 5 Mich. 501; People v. Hubbard, 92 Mich. 322; Fitzgerald v. Anderson, 81 Wis. 341; Dirimple v. State Bank, 91 Wis. 601; Chicago, B. & Q. R. Co. v. Payne, 59 Ill. 534; Gallagher v. Kilkeary, 29 Ill. App. 415; H. B. Claflin Co. v. Querns, 15 Pa. Super. Ct. 464; Ramage v. Peterman, 25 Pa. 349; McKnight v. Bell, 168 Pa. 50; Brownfield v. Hughes, 128 Pa. 194; Platt v. Chicago, St. P., M. & O. Ry. Co., 84 Iowa, 694; Orr v. Cedar Rapids & M. C. Ry. Co., 94 Iowa, 423; Colorado C. & I. Co. v. John, 5 Colo. App. 213; McQuown v. Thompson, 5 Colo. App. 466.

the jury, unless the case is such that there is no room for reasonable men to draw different conclusions.[25] In many cases it is held that even a *scintilla* of evidence to support a finding of fact is sufficient to necessitate its submission to the jury;[26] but the better authority is to the effect that, if the evidence is so insufficient to support a verdict for plaintiff that, if returned, it must be set aside, a verdict may be directed for defendant. The question of the existence of any legal evidence (not a *scintilla* merely) upon which a verdict for the party having the burden of proof might be based is a question of law.[27] In some jurisdictions, the practice of directing a verdict is not looked upon with favor, and is very strictly limited.[27a]

[25] Alabama Gold Life Ins. Co. v. Mobile Mut. Ins. Co., 81 Ala. 329; Rich v. Rich, 16 Wend. (N. Y.) 663; Heyne v. Blair, 62 N. Y. 19; Milne v. Walker, 59 Iowa, 186; Teipel v. Hilsendegen, 44 Mich. 461; Stevens v. Pendleton, 85 Mich. 137; Suiter v. Park Nat. Bank, 35 Neb. 372; Knight v. Towles, 6 S. D. 575.

[26] Schuchardt v. Allens, 1 Wall. (U. S.) 359; Hickman v. Jones, 9 Wall. (U. S.) 197; Dwyer v. St. Louis & S. F. R. Co., 52 Fed. 87; Haugen v. Chicago, M. & St. P. Ry. Co., 3 S. D. 394; Fitzwater v. Stout, 16 Pa. 22; Charles v. Patch, 87 Mo. 450; Thompson v. Thompson, 17 B. Mon. (Ky.) 22; Colt v. Sixth Ave. R. Co., 49 N. Y. 671; Little Rock & Ft. S. Ry. Co. v. Henson, 39 Ark. 413; Reynolds v. Williams, 1 Tex. 311; Kelley v. Ryus, 48 Kan. 120; Workingmen's Banking Co. v. Blell, 57 Mo. App. 410. The doctrine announced in these and other like cases is in some states considerably modified, if not overruled, by later cases. See the cases cited supra, this section, and other like cases.

[27] Bartelott v. International Bank, 119 Ill. 259; Schuylkill & D. Imp. Co. v. Munson, 14 Wall. (U. S.) 442; Hathaway v. East Tennessee, V. & G. R. Co., 29 Fed. 489; Catlett v. St. Louis, I. M. & S. Ry. Co., 57 Ark. 461; Illinois Cent. R. Co. v. Boehms, 70 Miss. 11; Holland v. Kindregan, 155 Pa. 156; Patterson v. Dushane, 115 Pa. 334; Howard Express Co. v. Wile, 64 Pa. 201; Bagley v. Bowe, 105 N. Y. 171; Jones v. Chicago & N. Ry. Co., 49 Wis. 352. But compare Denny v. Williams, 5 Allen (Mass.) 1; Carver v. Detroit & S. Plank Road Co., 61 Mich. 584; Halpin v. Third Ave. R. Co., 40 N. Y. Super. Ct. 175; Spiro v. Felton, 73 Fed. 91.

In California it was held that to instruct the jury that plaintiff was entitled to recover was within the constitutional provision against charging on matters of fact, but that the error was harmless, as a verdict for defendant would have been contrary to the evidence. This holding seems to involve both court and jury in an unfortunate dilemma. The court may set aside the verdict as against the evidence. But if successive juries are equally obstinate, and the jury insists on its constitutional prerogative of passing on the facts, and the court sets aside the verdict of the jury as often as it is rendered, a logical deadlock is created, from which there is no escape.[28]

In a criminal case, it is never proper to direct a verdict of guilty;[29] but it is proper to direct a verdict of not guilty where the evidence is insufficient to support a conviction, and it is error to refuse to do so.[30] Where there is some evidence of guilt, the court may, of course, decline to direct

[27a] Keel v. Herbert, 1 Wash. (Va.) 203; Reynolds v. Williams, 1 Tex. 311; Robinson v. Louisville & N. R. Co., 2 Lea (Tenn.) 596; Ayres v. Moulton, 5 Cold. (Tenn.) 154; Jones v. Cherokee Iron Co., 14 Lea (Tenn.) 157; Deshler v. Beers, 32 Ill. 368.

[28] Lavitzky v. Canning, 33 Cal. 299.

[29] State v. Wilson, 62 Kan. 621; United States v. Taylor, 11 Fed. 470; People v. McCord, 76 Mich. 200; Tucker v. State, 57 Ga. 503. But see State v. Beal, 94 Me. 520; People v. Neumann, 85 Mich. 98; People v. Kirsch, 67 Mich. 539; United States v. Anthony, 11 Blatchf. 200, Fed. Cas. No. 14,459.

[30] United States v. Fullerton, 7 Blatchf. 177, Fed. Cas. No. 15,176; State v. Smith, 28 Iowa, 565; People v. Bennett, 49 N. Y. 137; Baker v. State, 31 Ohio St. 314; Com. v. Yost, 197 Pa. 171; State v. Flanagan (W. Va.) 35 S. E. 862; Gann v. State (Tex. Cr. App.) 57 S. W. 837. Contra, People v. Daniels, 105 Cal. 262. "There can be no nonsuit in a criminal case. * * * The proper practice is to ask the court to direct an acquittal." State v. Hyde, 22 Wash. 551. Where the information fails to state a crime, the proper practice is to discharge the jury from further consideration of the case, and not to direct a verdict of not guilty. State v. Dennison, 60 Neb. 157.

an acquittal, and may leave the question to the jury;[31] and whatever the state's evidence may be, the court is not bound to direct an acquittal until the conclusion of all the testimony.[32]

II. CONSTRUCTION OF WRITINGS.

§ 6. Statement of rule.

The construction and legal effect of written instruments is a question of law falling within the exclusive province of the court,[33] and it is the duty of the jury to accept and

[31] State v. Utley, 126 N. C. 997; State v. Costner (N. C.) 37 S. E. 326; Gott v. People, 187 Ill. 249; Com. v. Foster (Ky.) 61 S. W. 271; State v. Hyde, 22 Wash. 551.

[32] Com. v. George, 13 Pa. Super. Ct. 542.

[33] Carlisle v. State (Tex. Cr. App.) 56 S. W. 365; Brown v. Langner, 25 Ind. App. 538; Robbins v. Spencer, 121 Ind. 594; McHenry v. Marr, 39 Md. 510; Osceola Tribe, No. 11, v. Rost, 15 Md. 295; Williams v. Woods, 16 Md. 220; Baltimore & O. R. Co. v. Resley, 14 Md. 424; Hatch v. Pendergast, 15 Md. 251; Solary v. Stultz, 22 Fla. 263; Jordan v. Easter, 2 Ill. App. 73; Gray v. Central R. Co., 11 Hun (N. Y.) 70; Brady v. Cassidy, 104 N. Y. 155; First Nat. Bank of Springfield v. Dana, 79 N. Y. 108; Turner v. Yates, 16 How. (U. S.) 14; Levy v. Gadsby, 3 Cranch (U. S.) 180; Brown v. Moore, 26 S. C. 160; Jones v. Swearingen, 42 S. C. 58; Caldwell v. Dickson, 26 Mo. 60; Carpentier v. Thirston, 24 Cal. 268; Pickerell v. Carson, 8 Iowa, 544; Chandler v. Keiler, 44 Iowa, 371; Daly v. W. W. Kimball Co., 67 Iowa, 132; Lucas v. Snyder, 2 G. Greene (Iowa) 490; Wason v. Rowe, 16 Vt. 525; Thomas' Ex'r v. Thomas, 15 B. Mon. (Ky.) 178; Rogers v. Colt, 21 N. J. Law, 704; Williams v. Waters, 36 Ga. 454; Nash v. Drisco, 51 Me. 417; Smith v. Faulkner, 12 Gray (Mass.) 257; Drew v. Towle, 30 N. H. 531; Burke v. Lee, 76 Va. 386; Van Eman v. Stanchfield, 8 Minn. 518 (Gil. 460); State v. Moy Looke, 7 Or. 54; Tolmie v. Dean, 1 Wash. T. 46; Mowry v. Stogner, 3 S. C. 251; Jones v. Pullen, 66 Ala. 306; Price v. Mazange, 31 Ala. 701; Bernstein v. Humes, 60 Ala. 582; Holman v. Crane, 16 Ala. 571; Bell v. Keepers, 37 Kan. 64; Thompson v. Richards, 14 Mich. 172; Gage v. Meyers, 59 Mich. 300; Stadden v. Hazzard, 34 Mich. 76; Rice v. Crow, 6 Heisk. (Tenn.) 28; Ahrens v. Cobb, 9 Humph.

follow the construction put upon the instrument by the court.[34] Hence, instructions which submit to the jury the construction of writings are erroneous, and should not be given,[35] especially where the court has been requested to construe the writing and direct the jury as to its effect.[36]

(Tenn.) 645; Powell v. Finch, 5 Yerg. (Tenn.) 446; Benson v. Benson, 24 Miss. 625; Randolph v. Govan, 14 Smedes & M. (Miss.) 9; Watson v. Blaine, 12 Serg. & R. (Pa.) 131; Denison's Ex'r v. Wertz, 7 Serg. & R. (Pa.) 372; Howell v. Hanrick (Tex. Civ. App.) 24 S. W. 823; McCormick v. Cheveral, 2 Posey, Unrep. Cas. (Tex.) 146; Soell v. Hadden, 85 Tex. 182; Hunton v. Nichols, 55 Tex. 217; Dwight v. Germania Life Ins. Co., 103 N. Y. 341; Sellars v. Johnson, 65 N. C. 104; Neilson v. Harford, 8 Mees. & W. 806.

[34] Neilson v. Harford, 8 Mees. & W. 823, per Parke, B.

[35] Fairly v. Fairly, 38 Miss. 280; Rice v. Crow, 6 Heisk. (Tenn.) 28; Osceola Tribe, No. 11, v. Rost, 15 Md. 295; Jordan v. Easter, 2 Ill. App. 73; Hatch v. Pendergast, 15 Md. 251; Solary v. Stultz, 22 Fla. 263; Chandler v. Keiler, 44 Iowa, 371; Jones v. Pullen, 66 Ala. 306; Southern Express Co. v. Crook, 44 Ala. 468; Claghorn v. Lingo, 62 Ala. 230; Brown v. Langner, 25 Ind. App. 538, holding that it is error to leave to the jury the question whether or not specifications referred to in a contract were a part thereof. State v. Lefaivre, 53 Mo. 470. "If the meaning of a written paper be disputed, it is the province of the court to construe it, upon application by either party for that purpose; but until the court has decided its true construction, each party has the right to put upon its language such interpretation as the words employed will warrant. Nor is there any limitation upon the power of the court to construe instruments whilst the cause is being tried. It is most convenient to decide such questions in advance of the argument, but, if they arise pending the discussion, the court has the right to settle them by instructions before the jury retire." McHenry v. Marr, 39 Md. 510. The error is harmless, and not ground for reversal, if the jury put the proper construction upon the instrument. Martineau v. Steele, 14 Wis. 273; Brooks v. Standard Fire Ins. Co., 11 Mo. App. 350.

[36] Kendrick v. Cisco, 13 Lea (Tenn.) 247. "It is the right of every suitor to have the opinion of the court on such matters as, by the law of the land, the court is bound to decide, and one of these matters is the construction of written contracts." Denison's Ex'r v. Wertz, 7 Serg. & R. (Pa.) 376.

The reasons in favor of the rule stated are obvious. As was well said in one case, unless the court shall construe written instruments after the meaning of the words in which they are couched has been ascertained by the jury, "there would be no certainty in the law; for a misconstruction by the court is the proper subject, by means of a bill of exceptions, of redress in a court of error; but a misconstruction by the jury cannot be set right at all effectually."[37] So, if the jury were permitted to construe written instruments, no paper would have any certain legal significance, as it would depend upon the peculiar notions of each particular jury under whose supervision it might be brought.[38]

§ 7. Written contracts.

All written contracts, of whatever nature, are to be construed by the court;[39] and if the court erroneously interprets

[37] Neilson v. Harford, 8 Mees. & W. 822, per Parke, B. See, also, to same effect, Denison's Ex'r v. Wertz, 7 Serg. & R. (Pa.) 376.

[38] Cook's Lessee v. Carroll, 6 Md. 104.

[39] Harvey v. Vandegrift, 89 Pa. 346; Bryant v. Hagerty, 87 Pa. 256; Esser v. Linderman, 71 Pa. 76; Van Eman v. Stanchfield, 8 Minn. 518 (Gil. 460); American Ins. Co. v. Butler, 70 Ind. 1; Brown v. Langner, 25 Ind. App. 538; Comer v. Himes, 49 Ind. 482; Robbins v. Spencer, 121 Ind. 600; H. G. Olds Wagon Works v. Coombs, 124 Ind. 62; Symmes v. Brown, 13 Ind. 318; Spalding v. Taylor, 1 Mo. App. 34; Miller v. Dunlap, 22 Mo. App. 97; Comfort v. Ballingal, 134 Mo. 289; Willard v. Sumner, 7 Mo. App. 577; Brooks v. Standard Fire Ins. Co., 11 Mo. App. 349; Long v. McCauley (Tex.) 3 S. W. 689; Hibernia Ins. Co. v. Starr (Tex.) 13 S. W. 1017; Lary v. Young (Tex. Civ. App.) 27 S. W. 908; Linch v. Paris L. & G. Co. (Tex.) 14 S. W. 701; State v. Williams (S. C.) 10 S. E. 876; Slatten v. Konrath, 1 Kan. App. 636; Tompkins v. Gardner & Spry Co., 69 Mich. 58; Wagner v. Egleston, 49 Mich. 218; Kendrick v. Cisco, 13 Lea (Tenn.) 247; Louisville & N. R. Co. v. McKenna, 13 Lea (Tenn.) 280; Knoxville, C. G. & L. R. Co. v. Beeler, 90 Tenn. 549; Roberts v. Alexander, 5 Lea (Tenn.) 412; Estes v. Boothe, 20 Ark. 590; Fairbanks v. Jacobs, 69 Iowa, 265; Vaughn v. Smith, 58 Iowa, 553; Kilbourne v. Jen-

its terms, this will, in general, be a sufficient ground for reversal.[40] "What a contract means is a question of law. It is the court, therefore, that determines the construction of a contract. The court does not state the rules and principles of law by which the jury are to be bound in construing the language which the parties have used, and then direct the jury to apply them at their discretion to the question of construction; nor does it refer to these rules, unless it thinks proper to do so for the purpose of illustrating and explaining its own decision. But it gives to the jury, as matter of law, what the legal construction of the contract is, and this the jury are bound absolutely to take."[41]

"It would be a dangerous principle to establish, where parties have reduced their contracts to writing, and defined the meaning by plain and unequivocal language, to subject their interpretation to the arbitrary and capricious judgment of persons unfamiliar with legal principles and settled rules of construction."[42] It is proper, therefore, to refuse instruc-

nings, 40 Iowa, 473; Andrews v. Tedford, 37 Iowa, 314; Rohrabacher v. Ware, 37 Iowa, 85; Eyser v. Weissgerber, 2 Iowa, 463; Merrill v. Packer, 80 Iowa, 542; Luckhart v. Ogden, 30 Cal. 548; Kidd v. Cromwell, 17 Ala. 648; Taylor v. Kelly, 31 Ala. 59; Sellars v. Johnson, 65 N. C. 104; Emery v. Owings, 6 Gill (Md.) 199; Keefer v. Mattingly, 1 Gill (Md.) 182; Baltimore & O. R. Co. v. Resley, 14 Md. 424; Osceola Tribe, No. 11, v. Rost, 15 Md. 296; Chicago, B. & Q. R. Co. v. Hale, 2 Ill. App. 150; Keeler v. Herr, 157 Ill. 57; Peoria Grape Sugar Co. v. Frazer, 26 Ill. App. 60; Thomas v. Dickinson, 23 Barb. (N. Y.) 431; Brady v. Cassidy, 104 N. Y. 155; Connolly v. Hamill, 3 Hun (N. Y.) 399; Arctic Fire Ins. Co. v. Austin, 69 N. Y. 470; Cohn v. Stewart, 41 Wis. 527; Parker v. Ibbetson, 4 C. B. (N. S.) 346; Neilson v. Harford, 8 Mees. & W. 822.

[40] Stroh v. Hess, 1 Watts & S. (Pa.) 147; American Ins. Co. v. Butler, 70 Ind. 1.

[41] 2 Parsons, Contracts (6th Ed.) 492, approved in Estes v. Boothe, 20 Ark. 590.

[42] Brady v. Cassidy, 104 N. Y. 155.

tions which submit to the jury the determination of the meaning and effect of a written contract,[43] and error to leave the construction of a contract to the jury.[44] The error will not always operate to reverse, however; as, for instance, where the jury construe the contract correctly.[45] So, a submission of the contract to the jury for construction will not operate to reverse where the court would have been obliged to construe it adversely to the complaining party.[46]

§ 8. Deeds and mortgages.

The meaning and legal effect of a deed is a matter for the determination of the court,[47] and a submission to the jury to determine the meaning and effect is erroneous, but,

[43] Peoria Grape Sugar Co. v. Frazer, 26 Ill. App. 60; Baltimore & O. R. Co. v. Resley, 7 Md. 297.

[44] Merrill v. Packer, 80 Iowa, 542; Rohrabacher v. Ware, 37 Iowa, 85; Andrews v. Tedford, 37 Iowa, 314; Tompkins v. Gardner & Spry Co., 69 Mich. 58; Miller v. Dunlap, 22 Mo. App. 97; Spalding v. Taylor, 1 Mo. App. 34.

[45] Comfort v. Ballingal, 134 Mo. 289; Martineau v. Steele, 14 Wis. 273; Roberts v. Alexander, 5 Lea (Tenn.) 412; Knoxville, C. G. & L. R. Co. v. Beeler, 90 Tenn. 548.

[46] Taylor v. Kelly, 31 Ala. 59.

[47] Hodges v. Strong, 10 Vt. 247; Gardner v. Stell, 34 Tex. 561; Eddy v. Chace, 140 Mass. 471; Hancock v. Whybark, 66 Mo. 672; Johnson v. Shively, 9 Or. 333; Rogers v. Carey, 47 Mo. 232; Huth v. Carondelet Marine R. & D. Co., 56 Mo. 207; State v. Delong, 12 Iowa, 453; Whiteford v. Munroe, 17 Md. 135; American Exchange Bank v. Inloes, 7 Md. 380; Humes v. Bernstein, 72 Ala. 546; McCutchen's Adm'rs v. McCutchen, 9 Port. (Ala.) 650; Vincent v. Huff, 8 Serg. & R. (Pa.) 381; St. John v. Bumpstead, 17 Barb. (N. Y.) 100; Venable v. McDonald, 4 Dana (Ky.) 336; Miller v. Shackleford, 4 Dana (Ky.) 264; Symmes v. Brown, 13 Ind. 318; Poage v. Bell, 3 Rand. (Va.) 586; Addington v. Etheridge, 12 Grat. (Va.) 436; Stark v. Barrett, 15 Cal. 361; Seaward v. Malotte, 15 Cal. 304; Dean v. Erskine, 18 N. H. 81; Hurley v. Morgan, 18 N. C. 425; Montag v. Linn, 23 Ill. 551; Smith v. Clayton, 29 N. J. Law, 357; Brown v. Huger, 21 How. (U. S.) 305; Bonney v. Morrill, 52 Me. 252.

if the jury correctly determine its meaning, the error is not ground for reversal.[48] The construction of mortgages is also for the court,[49] and likewise the question whether an instrument is or is not a mortgage.[50] It is erroneous to submit to the determination of the jury the sufficiency of the description in a chattel mortgage.[51]

§ 9. Miscellaneous writings.

It is the province and duty of the court to construe the following writings: Bills of lading,[52] leases,[53] receipts,[54] patents,[55] entries in books of corporations,[56] bonds,[57] judicial opinions,[58] indorsements on negotiable paper,[59] notices of protest,[60] awards,[61] assignments of bonds,[62] assignments for the benefit of creditors,[63] partnership agreements,[64] in-

[48] Morse v. Weymouth, 28 Vt. 824; Woodman v. Chesley, 39 Me. 45.

[49] United States v. Hodge, 6 How. (U. S.) 279; St. John v. Bumpstead, 17 Barb. (N. Y.) 100.

[50] Fairbanks v. Bloomfield, 2 Duer (N. Y.) 349.

[51] Austin v. French, 36 Mich. 200.

[52] Armstrong v. Chicago, St. P. & K. C. Ry. Co., 62 Mo. App. 639.

[53] Dumn v. Rothermel, 112 Pa. 272.

[54] Union Bank v. Heyward, 15 S. C. 296.

[55] Neilson v. Harford, 8 Mees. & W. 806.

[56] Richmond Trading & Mfg. Co. v. Farquar, 8 Blackf. (Ind.) 89.

[57] Butler v. State, 5 Gill & J. (Md.) 511.

[58] Brady v. Clark, 12 Lea (Tenn.) 323.

[59] Sweeny v. Easter, 1 Wall. (U. S.) 166.

[60] Platt v. Drake, 1 Doug. (Mich.) 296.

[61] Moore v. Miller, 4 Serg. & R. (Pa.) 279; Squires v. Anderson, 54 Mo. 197, in which it was held that "whether the arbitrators have authority to act in reference to any particular subject-matter, or whether their award conforms to the directions and powers given them by the submission, and the proper construction to be given to the award when made," are questions for the determination of the court.

[62] De Graaf v. Wyckoff, 13 Daly (N. Y.) 366.

[63] Sheldon v. Dodge, 4 Denio (N. Y.) 217.

surance policies,[65] a writ of summons,[66] affidavits,[67] town plats,[68] and documentary evidence.[69] So, public records must be construed by the court, when offered in evidence.[70] When a judicial record is offered in evidence, and admitted and laid before the jury, it is the duty of the court to state to them what it proves, and their duty in respect to the facts so proved.[71] So, it is proper for the trial judge to construe the order of the court in a former cause allowing a certain per cent. of moneys collected.[72] It is also the duty of the court to construe wills, and tell the jury the proper interpretation thereof.[73] So, the court must determine whether or not an instrument is a will.[74]

[64] Kingsbury v. Tharp, 61 Mich. 216.

[65] St. Louis Gaslight Co. v. American Fire Ins. Co., 33 Mo. App. 348; Lapeer Co. Farmers' Mut. Fire Ins. Ass'n v. Doyle, 30 Mich. 159.

[66] Alabama G. S. R. Co. v. Hawk, 72 Ala. 112.

[67] Long v. Rodgers, 19 Ala. 321.

[68] Hanson v. Eastman, 21 Minn. 509.

[69] Beaumont Pasture Co. v. Cleveland (Tex. Civ. App.) 26 S. W. 93; Branch Bank at Mobile v. Boykin, 9 Ala. 320; Turner v. First Nat. Bank of Madison, 78 Ind. 19; Ivey v. Williams, 78 Tex. 685.

[70] State v. Prine, 25 Iowa, 231; State v. Anderson, 30 La. Ann. 557; Sims v. Boynton, 32 Ala. 353; Adams v. Betz, 1 Watts (Pa.) 425; Shook v. Blount, 67 Ala. 301, in which it was held that, where "the defendant relies on a decree of the chancery court to show a release of the plaintiff's cause of action, the court must construe the decree, and determine from its face whether it was intended to operate as a release," and that it was erroneous to submit this question to the jury.

[71] Gallup v. Fox, 64 Conn. 491.

[72] State v. Corbin, 16 S. C. 539.

[73] Green v. Collins, 28 N. C. 139; Magee v. McNeil, 41 Miss. 17; Sullivan v. Honacker, 6 Fla. 372; Sartor v. Sartor, 39 Miss. 760; Roe v. Taylor, 45 Ill. 485; Downing v. Bain, 24 Ga. 372; Willson v. Whitfield, 38 Ga. 269; Underhill v. Vandervoort, 56 N. Y. 242.

[74] Stanley v. Samples, 2 Posey, Unrep. Cas. (Tex.) 126. In this case it was held that "where the terms of an instrument showed it

It is for the court to determine whether letters introduced in evidence constitute a contract,[75] and, if so, to construe it and explain to the jury its legal effect.[76] It cannot be left to the jury to interpret and construe it.[77]

It is a question of law, and not of fact, whether or not a written commission appointing a special policeman entitles him to carry a pistol.[78]

§ 10. Exceptions to rule.

There are some apparent exceptions to the rule stated. Thus, if writings are introduced in evidence for the sole purpose of showing some extrinsic fact, and not as dispositive instruments, the inference to be drawn therefrom is for the jury, and not for the court.[79] When documents are offered in evidence as a foundation of inferences of fact, whether inferences can be drawn is for the jury. The most authentic documents, when offered for such a purpose, become no more than letters or a written correspondence which, when offered to prove a fact, are to be interpreted by a jury.[80] Where a writing is offered in evidence merely to prove some other fact, "it is generally but a link in a chain

to be a will, the court should have so instructed the jury, and it was error to submit to them the question whether it was a will or a deed."

[75] Lea v. Henry, 56 Iowa, 662.

[76] Goddard v. Foster, 17 Wall. (U. S.) 123; Smith v. Faulkner, 12 Gray (Mass.) 251; Battershall v. Stephens, 34 Mich. 68; Luckhart v. Ogden, 30 Cal. 548; Falls Wire Mfg. Co. v. Broderick, 12 Mo. App. 378.

[77] Battershall v. Stephens, 34 Mich. 68.

[78] Carlisle v. State (Tex. Cr. App.) 56 S. W. 365.

[79] Primm v. Haren, 27 Mo. 205; Mantz v. Maguire, 52 Mo. App. 146; McKean v. Wagenblast, 2 Grant Cas. (Pa.) 466; Reynolds v. Richards, 14 Pa. 205; Wilson v. Board Education of Lee's Summit, 63 Mo. 142; Keefer v. Mattingly, 1 Gill (Md.) 182.

[80] Primm v. Haren, 27 Mo. 205.

of evidence, the accompanying evidence being mostly, or altogether, oral. When that occurs, the jury have to pass upon the whole transaction, of which the writing is but a part. The question, then, is not so much what the document means, but what inference shall be drawn from its meaning, and what effect it shall have towards proving the point at issue. The writing and all the concomitant evidence go to the jury together. * * * It [the court] may pronounce what meaning the writing is or is not capable of, and whether it is not relevant to the issue; still the value and effect of such evidence is a question of fact for the jury."[81]

§ 11. Rule where parol evidence is admitted to explain writing.

It happens not infrequently that a writing cannot be construed without resorting to parol evidence of extrinsic facts and circumstances. Some of the terms in which a writing is expressed may be words of science or art, which require the evidence of experts to explain, or the words or terms used may be ambiguous or uncertain, and not to be understood except by reference to and in connection with the surrounding circumstances. In a number of cases it is stated that, where the meaning of a contract is to be ascertained by facts *aliunde* in connection with the written language, very much must be left to the jury,[82] that "an admixture of parol with written evidence draws the whole to the jury,"[83] and that the construction of the writing is a question of fact for the jury.[84] An examination of these cases will show

[81] State v. Patterson, 68 Me. 475.

[82] Sewall v. Henry, 9 Ala. 31; Gardner v. Clark, 17 Barb. (N. Y.) 551; First Nat. Bank of Springfield v. Dana, 79 N. Y. 116.

[83] Sidwell v. Evans, 1 Pen. & W. (Pa.) 386; Watson v. Blaine, 12 Serg. & R. (Pa.) 131; Foster v. Berg, 104 Pa. 328.

[84] Jennings v. Sherwood, 8 Conn. 122; Ginsburg v. Cutler & S.

that the statements set out were *dicta*, and not involved in the decisions made. Even conceding that they were actual holdings, they would be against the great weight of authority, the rule being that, in case parol evidence becomes necessary to a determination of the meaning of words or terms in a written instrument, such evidence must, of course, be addressed to the jury, whose duty it is to determine the meaning of the doubtful words or terms; but the court determines the meaning and effect of the instrument with such light as the verdict may afford on the question submitted to the jury.[85] The court has no right to take from the jury the

Lumber Co., 85 Mich. 439; Harper v. Kean, 11 Serg. & R. (Pa.) 278.

[85] Hutchison v. Bowker, 5 Mees. & W. 540; Neilson v. Harford, 8 Mees. & W. 822; Cunningham v. Washburn, 119 Mass. 227; Smith v. Faulkner, 12 Gray (Mass.) 251; Eaton v. Smith, 20 Pick. (Mass.) 150; Burnham v. Allen, 1 Gray (Mass.) 496; Goddard v. Foster, 17 Wall. (U. S.) 142; Curtis v. Martz, 14 Mich. 505; Coquillard v. Hovey, 23 Neb. 622; Meyer v. Shamp, 51 Neb. 424; H. G. Olds Wagon Works v. Coombs, 124 Ind. 65; Zenor v. Johnson, 107 Ind. 69; Ganson v. Madigan, 15 Wis. 158; State v. Patterson, 68 Me. 473; Long v. McCauley (Tex.) 3 S. W. 689; Silverthorn v. Fowle, 49 N. C. 362; Mowry v. Stogner, 3 Rich. (S. C.) 251; Osceola Tribe, No. 11, v. Rost, 15 Md. 296; Evans v. Negley, 13 Serg. & R. (Pa.) 220; West v. Smith, 101 U. S. 263; Kendrick v. Cisco, 13 Lea (Tenn.) 248; Festerman v. Parker, 32 N. C. 474; Helmholz v. Everingham, 24 Wis. 266; Philibert v. Burch, 4 Mo. App. 470; Gardner v. Clark, 17 Barb. (N. Y.) 538; Etting v. Bank of United States, 11 Wheat. (U. S.) 59. "There is a large class of writings where the meaning of particular words or phrases or characters or abbreviations must be shown by evidence outside the writing, and there may be extrinsic circumstances of one kind or another, affecting its interpretation, which may be shown by oral testimony. Here the same rule virtually applies as before. 'It is often, but inaccurately, said, in cases of the kind named, that the writing itself is to be passed upon and construed by the jury. Strictly, that is not so. They find what the oral testimony shows, and the court declares what the writing means, in the light of the facts found by the jury." State v. Patterson, 68 Me. 474.

determination of the meaning of the doubtful words or terms;[86] but it will be equally erroneous to submit to the jury the construction of the entire contract.[87] The court may pursue two courses, either of which is proper. As was said in one case, "the court may first inform the jury as to the law, or the jury may first inform the court as to the facts, as may be most practicable."[88] In other words, "the facts may be found by a special verdict, and then the court interpret the writing in view of such finding."[89] "Or the case may go to the jury with hypothetical instructions from the court to render a verdict one way if certain facts are found, and another way if the facts are found differently."[90]

[86] Philibert v. Burch, 4 Mo. App. 470. In this case it was held that "where a written instrument is so ambiguous in its terms that it may be considered either a guaranty or a direct undertaking according to the circumstances under which it was given, and the testimony as to these circumstances is conflicting, it is error to give instructions based upon the assumption that the contract was a direct undertaking; but the question of direct undertaking or guaranty should be directly submitted to the jury, on proper instructions."

[87] Mowry v. Stogner, 3 Rich. (S. C.) 251. In this case, which was a proceeding "to recover possession of land, the plaintiffs gave in evidence, as a muniment of their title, a deed of doubtful construction, and defendants were allowed to give parol evidence of the acts and declarations of the parties to the deed, for the purpose of explaining the construction. The plaintiffs requested the presiding judge to charge upon the construction of the deed, which was refused, and he left the question of construction wholly to the jury, as depending upon the parol evidence. Held, that in this there was error, and new trial granted."

[88] State v. Patterson, 68 Me. 474.

[89] State v. Patterson, 68 Me. 474; Hutchison v. Bowker, 5 Mees. & W. 535, 540; Fruin v. Crystal Ry. Co., 89 Mo. 397.

[90] State v. Patterson, 68 Me. 473; Humes v. Bernstein, 72 Ala. 546; Edwards v. Smith, 63 Mo. 119; Taylor v. McNutt, 58 Tex. 71; Helmholz v. Everingham, 24 Wis. 266; Festerman v. Parker, 32 N. C. 474; West v. Smith, 101 U. S. 263; Eaton v. Smith, 20 Pick. (Mass.) 150; Silverthorn v. Fowle, 49 N. C. 362; Long v.

Where the contract is not wholly in writing, but rests partly in parol, and the parol evidence is conflicting, it is for the jury to determine what the contract really was.[91] Whether or not a written contract has been altered by parol is a question for the jury.[92] So, where the meaning of words is affected by a custom or usage of trade, it is for the jury to say in what sense they were used by the parties.[93]

III. Existence and Interpretation of Laws, Ordinances, and Rules.

§ 12. In general.

The existence and proper interpretation of domestic statutes, of whatever nature, is a question of law for the court, and not of fact for the jury;[94] and an instruction which permits the jury to construe the provisions of a statute is erroneous.[95] It is also the province of the court to construe the rules and regulations of a city board of trade,[96] or the by-laws and resolutions of a corporation,[97] or the

McCauley (Tex.) 3 S. W. 692; Zenor v. Johnson, 107 Ind. 69; Coquillard v. Hovey, 23 Neb. 622; Curtis v. Martz, 14 Mich. 506; Cunningham v. Washburn, 119 Mass. 227; Neilson v. Harford, 8 Mees. & W. 822.

[91] Edwards v. Goldsmith, 16 Pa. 48; Bolckow v. Seymour, 17 C. B. (N. S.) 107.

[92] Boyce v. Martin, 46 Mich. 239.

[93] Eaton v. Smith, 20 Pick. (Mass.) 150; Hutchison v. Bowker, 5 Mees. & W. 535.

[94] Gallatin Turnpike Co. v. State, 16 Lea (Tenn.) 36; Carpenter v. People, 8 Barh. (N. Y.) 610; Town of South Ottawa v. Perkins, 94 U. S. 260; Post v. Supervisors, 105 U. S. 667.

[95] Belt v. Marriott, 9 Gill (Md.) 334; Carpenter v. People, 8 Barb. (N. Y.) 603; Goode v. State, 16 Tex. App. 411.

[96] Wright v. Fonda, 44 Mo. App. 634; Higgins v. McCrea, 116 U. S. 671.

[97] Jumper v. Commercial Bank of Columbia, 48 S. C. 430. The reasonableness and validity of a by-law or regulation of a corporation is a question of law for the court to determine, and it

charters of corporations,[98] or the constitution and by-laws of an association,[99] and to determine the existence and terms of a treaty.[100]

§ 13. Laws of foreign state.

While there are some decisions in which it is held or said that evidence to show the existence of foreign laws is to be addressed to the court,[101] the weight of authority is to the effect that evidence to prove the existence of a foreign law is to be addressed to the jury, and that they, and not the court, are to pass on the question of its existence.[102]

is error to submit it to a jury. Neier v. Missouri Pac. Ry. Co., 12 Mo. App. 26; City of St. Louis v. Weber, 44 Mo. 547.

[98] Selma, M. & M. R. Co. v. Anderson, 51 Miss. 829.

[99] Johnson v. Miller, 63 Iowa, 529.

[100] Roberts v. Lucas, 1 Wash. T. 205; Harris v. Doe, 4 Blackf. (Ind.) 369.

[101] Hall v. Costello, 48 N. H. 179; Pickard v. Bailey, 26 N. H. 152; Wilson v. Carson, 12 Md. 75; Monroe v. Douglass, 1 Seld. (N. Y.) 447; Dollfus v. Frosch, 1 Denio (N. Y.) 367; Lincoln v. Battelle, 6 Wend. (N. Y.) 475. See, also, Trasher v. Everhart, 3 Gill & J. (Md.) 234, where it was said: "It is, in general, true that foreign laws are facts which are to be found by the jury; but this general rule is not applicable to a case in which the foreign laws are introduced for the purpose of enabling the court to determine whether a written instrument is evidence. In such case, the evidence always goes, in the first instance, to the court, which, if the evidence be clear and uncontradicted, may and ought to decide what the foreign law is, and, according to its determination on that subject, admit or reject the instrument of writing as evidence to the jury. It is offered to the court to determine a question of law,—the admissibility or inadmissibility of certain evidence to the jury."

[102] Charlotte v. Chouteau, 33 Mo. 194; Wear v. Sanger, 91 Mo. 348; Bank v. Barry, 20 Md. 287; Ingraham v. Hart, 11 Ohio, 255; Raymond v. Ross, 40 Ohio St. 343; Niagara County Bank v. Baker, 15 Ohio St. 83; Alexander v. Pennsylvania Co., 48 Ohio St. 634; Lockwood v. Crawford, 18 Conn. 361; State v. Jackson, 13 N. C. 563; Moore v. Gwynn, 27 N. C. 190; Knapp v. Abell, 10 Allen (Mass.) 485; Ely v. James, 123 Mass. 44.

No court takes judicial notice of the laws of another state or of a foreign country, in the absence of statute providing that this shall be done, and their existence must be proved as a fact.[103] Where the existence of a foreign law has been established, it is the duty of the court to interpret it, and instruct the jury as to its meaning and application.[104] The sister states of the Union are foreign to each other, within the meaning of the rule under consideration.[105]

§ 14. Municipal ordinances.

A city ordinance is to be proved by evidence addressed to the court, and not to the jury.[106] It is the duty of the court, and not of the jury, to construe an ordinance the meaning of which is involved in a pending suit;[107] and it is error to submit to the jury, without construction by the court, an ordinance, the meaning of which is, as to the point in controversy, not perfectly clear.[108]

A valid ordinance stands on the same footing as a stat-

[103] Hooper v. Moore, 50 N. C. 130; Brackett v. Norton, 4 Conn. 517; State v. Whittle, 59 S. C. 297. See, also, Lockwood v. Crawford, 18 Conn. 361.

[104] Moore v. Gwynn, 27 N. C. 191; Inge v. Murphy, 10 Ala. 897; Cobb v. Griffith & Adams S., G. & Transp. Co., 87 Mo. 90; Bank v. Barry, 20 Md. 296; Charlotte v. Chouteau, 33 Mo. 194. Compare Holman v. King, 7 Metc. (Mass.) 384. Though what is the law of another state is a fact to be proved as other facts, it is not a charge on the facts for the court to construe the language of documentary evidence, such as a statute of another state. State v. Whittle, 59 S. C. 297.

[105] See, generally, the cases cited supra, this section.

[106] Roulo v. Valcour, 58 N. H. 347; Hall v. Costello, 48 N. H. 176, 179. See, also, Chicago, R. I. & P. R. Co. v. Jones, 13 Ill. App. 634.

[107] Platt v. Chicago, B. & Q. Ry. Co., 74 Iowa, 127; Washington South. Ry. Co. v. Lacey, 94 Va. 460; Barnes v. City of Mobile, 19 Ala. 707; City of Peoria v. Calhoun, 29 Ill. 317.

[108] Sadler v. Peoples, 105 Fed. 712.

ute. An instruction which leaves it to the jury to determine the application of an ordinance to the circumstances, and its legal effect, is erroneous.[109]

IV. Oral Contracts and Language.

§ 15. In general.

The existence and terms of a contract which rests, if it exists at all, upon verbal communications, is necessarily a question of fact for the determination of the jury,[110] and it is erroneous to take away this question from them.[111] The error is harmless, however, and not ground for reversal, if the jury would have found the same facts as the court found.[112] The function of the jury in this class of cases is not merely to determine the words and expressions used by the parties, but to find the understanding and intention of the parties. "The question * * * is single, and cannot be separated so as to refer one part to the jury and another part to the judge; but in its entirety the question is one of fact."[113] But the court is to construe oral

[109] Pennsylvania Co. v. Frana, 13 Ill. App. 91.

[110] Sines v. Wayne County Poor Superintendents, 55 Mich. 383; Barton v. Gray, 57 Mich. 623; Jenness v. Shaw, 35 Mich. 20; Hughes v. Tanner, 96 Mich. 113; McKenzie v. Sykes, 47 Mich. 294; Walthelm v. Artz, 70 Iowa, 609; McGregor v. Penn, 9 Yerg. (Tenn.) 74; Judge v. Leclaire, 31 Mo. 127; Belt v. Goode, 31 Mo. 128; Farley v. Pettes, 5 Mo. App. 262; Chichester v. Whiteleather, 51 Ill. 259; Smith v. Hutchinson, 83 Mo. 683; Workingmen's Banking Co. v. Blell, 57 Mo. App. 413; Copeland v. Hall, 29 Me. 93; Herbert v. Ford, 33 Me. 93; Houghton v. Houghton, 37 Me. 72; Tobin v. Gregg, 34 Pa. 446; Festerman v. Parker, 32 N. C. 474; Young v. Jeffreys, 20 N. C. 220; Massey v. Belisle, 24 N. C. 170; Smalley v. Hendrickson, 29 N. J. Law, 373; De Ridder v. McKnight, 13 Johns. (N. Y.) 294; Codding v. Wood, 112 Pa. 371; Warnick v. Grosholz, 3 Grant, Cas. (Pa.) 235; Folsom v. Plumer, 43 N. H. 469; Carl v. Knott, 16 Iowa, 379.

[111] Tobin v. Gregg, 34 Pa. 446.

[112] Beebe v. Koshnic, 55 Mich. 604.

[113] McKenzie v. Sykes, 47 Mich. 294. See, also, Herbert v. Ford,

as well as written contracts after a jury has determined that an oral contract existed, and what were the terms orally agreed upon.[114] The effect of a parol agreement when its terms are given and their meaning fixed is as much a question of law as the construction of a written instrument,[115] and it is error to permit the jury to determine the effect of the agreement.[116] The instructions as to the legal effect of an oral contract should be hypothetical in form, based upon assumed facts, the existence of which the jury is to pass upon.[117] The construction of oral words depends largely upon the circumstances under which they were uttered, and hence it may be error to take the question from the jury.[118]

V. Power of Jury to Judge the Law in Criminal Cases.

§ 16. Introductory statement.

Much misconception has existed as to the respective functions of the court and jury in criminal cases. Even at this

33 Me. 90; Copeland v. Hall, 29 Me. 93; Murphy v. Bedford, 18 Mo. App. 279; Fuller v. Bradley, 25 Pa. 120.

[114] Barton v. Gray, 57 Mich. 623; Rhodes v. Chesson, 44 N. C. 336; Diefenback v. Stark, 56 Wis. 462; Short v. Woodward, 13 Gray (Mass.) 86; Wilmarth v. Knight, 7 Gray (Mass.) 294; Codding v. Wood, 112 Pa. 371; De Ridder v. McKnight, 13 Johns. (N. Y.) 294; Smalley v. Hendrickson, 29 N. J. Law, 372; Belt v. Goode, 31 Mo. 128; Judge v. Leclaire, 31 Mo. 127.

[115] Young v. Jeffreys, 20 N. C. 220.

[116] Diefenback v. Stark, 56 Wis. 464.

[117] Barton v. Gray, 57 Mich. 623.

[118] An instruction that the words, "Take this away, and put it where nobody will see it," even though defendant suspected that the package contained offensive articles, would not justify him in disposing of it, because his instructions were not to throw it away, was held erroneous because the construction to be placed on the words depended upon other conversation at the time, and the nature and contents of the package, and was a question for the jury. People v. Van Dusen, 165 N. Y. 33.

late date, the claim is not infrequently urged that the jury, in the trial of criminal cases, are judges of the law in the sense that they may disregard the instructions, and determine the cause according to their own notion of what the law is. This misconception arises from a misconstruction of early English decisions, and the statements of early English text writers, from the speculative arguments of eminent lawyers both of this country and England, and from erroneous *dicta* in our own decisions. It is true that some of our own courts have held that the jury have the right to disregard the instructions, but these decisions have, without exception, been overruled, and the law definitely settled to the contrary by the courts in which they were rendered. In four states, namely, Connecticut, Indiana, Illinois, and Maryland, it is settled that the jury have the legal right to do this by virtue of statutes and constitutional provisions. In all other states it is no longer open to question that the jury are bound by their oath to adopt and follow the instructions as the law of the case.

§ 17. Arguments for and against exercise of right.

The principal argument in favor of the doctrine that the jury have the right to disregard the court's instructions is that this is necessary for the preservation of the liberty of the citizen, and the protection of innocence against the consequences of partiality and undue bias in favor of the prosecution.[119] In affirming the right of juries to disregard the court's instructions, Justice Kent expresses the following views: "It is not likely often to happen that the jury will resist the opinion of the court on the matter of law. That opinion will generally receive its due weight and effect; and in civil cases it can, and always ought to, be ultimately

[119] See State v. Croteau, 23 Vt. 21.

enforced by the power of setting aside the verdict; but in human institutions, the question is not whether every evil contingency can be avoided, but what arrangement will be productive of the least inconvenience. And it appears to be most consistent with the permanent security of the subject that in criminal cases the jury should, after receiving the advice and assistance of the judge as to the law, take into their consideration all the circumstances of the case, and the intention with which the act was done, and to determine upon the whole whether the act done be or be not within the meaning of the law. This distribution of power, by which the court and jury mutually assist and mutually check each other, seems to be the safest, and consequently the wisest, arrangement in respect to the trial of crimes. The constructions of judges on the intention of the party may often be (with the most upright motives) too speculative and refined, and not altogether just in their application to every case. Their rules may have too technical a cast, and become, in their operation, severe and oppressive. To judge accurately of motives and intentions does not require a master's skill in the science of law. It depends more on a knowledge of the passions, and of the springs of human action, and may be the lot of ordinary experience and sagacity."[120] While arguments of this sort might have been urged with a greater semblance of reason during the earlier periods in the history of the common law than at the present date, they were disposed of with scant courtesy even in Lord Mansfield's time, and by no less a judge than himself. In the Dean of St. Asaph's Case he said: "Jealousy of leaving the law to the court, as in other cases, is now, in the present state of things, peurile rant and declamation. The judges are totally independent of the min

[120] People v. Croswell, 3 Johns. Cas. (N. Y.) 376.

isters that may happen to be, and of the king; their temptation is rather to the popularity of the day."[121]

This line of reasoning has also been commented on in one of our own recent decisions, as follows: "When examined in the light of facts, this argument is without weight. This is a 'government of the people, by the people, and for the people.' In this state, the making of constitutions and the enacting of laws is vested in the people. However elected or appointed, our judges are the servants of the people, to administer justice according to law and equity, and it would be sufficient to say that they have never been recreant to the trust imposed upon them. Whenever a rule of law as administered by the courts becomes obnoxious to the people, or they think it detrimental to their best interests, they have only to exercise their power to abolish or modify it to rid themselves of it."[122]

With all due respect to Justice Kent, who was unquestionably one of the ablest jurists this country has produced, it cannot be said that his reasoning carries much conviction with it. He seems to overlook entirely the fact that, if the defendant is prejudiced by the instructions, he has an ample remedy by appeal. He also overlooks numerous other reasons against giving the jury this right. These reasons may be stated as follows: Jurors have no such knowledge of or training in law as would enable them to determine questions of law intelligently.[123] It can hardly be supposed that men drawn each term from other occupations, who

[121] Rex v. Dean of St. Asaph, 3 Term R. 428, and note.

[122] State v. Burpee, 65 Vt. 26.

[123] Rex v. Dean of St. Asaph, 3 Term R. 428, and note; State v. Wright, 53 Me. 339; Pierce v. State, 13 N. H. 570; United States v. Morris, 1 Curt. 23, Fed. Cas. No. 15,815; Townsend v. State, 2 Blackf. (Ind.) 158; Duffy v. People, 26 N. Y. 591; Com. v. Anthes, 5 Gray (Mass.) 235.

make no pretensions to legal knowledge, and who are not responsible, even to impeachment, for their acts, will be more learned, sound, and safe expositors of the principles of law than the judges.[124] In the case of the Dean of St. Asaph, Lord Mansfield said: "Upon the reason of the thing, and the eternal principles of justice, the jury ought not to assume the jurisdiction of law; they do not know—are not presumed to know—anything of the matter; they do not understand the language in which it is conceived, or the meaning of the terms; they have no rule to go by but their passions and wishes."[125]

Another reason which might be urged with even greater force is the uncertainty in the law which would result from permitting the jury to disregard the instructions.[126] The interpretation of the law can have no permanency or uniformity, nor can it become generally known, except through the action of the courts.[127] "The decisions of one jury furnish no rule for the action of another."[128] If the jury are judges of the law, there is no method of determining with certainty what they have held it to be.[129] "This can never be known, therefore can never be established as precedent to guide future juries, even if worth preservation. * * * The worst feature still of all this is that in cases of the

[124] Pierce v. State, 13 N. H. 570.

[125] Rex v. Dean of St. Asaph, 3 Term R. 428, and note.

[126] Rex v. Dean of St. Asaph, 3 Term R. 428, and note; Com. v. Anthes, 5 Gray (Mass.) 185; Pierce v. State, 13 N. H. 570; Parrish v. State, 14 Neb. 63; Hamilton v. People, 29 Mich. 173; Harris v. State, 7 Lea (Tenn.) 538; United States v. Greathouse, 4 Sawy. 457, Fed. Cas. No. 15,254; State v. Wright, 53 Me. 339; United States v. Battiste, 2 Sumn. 240, Fed. Cas. No. 14,545; Pennsylvania v. Bell, Addison (Pa.) 156.

[127] Hamilton v. People, 29 Mich. 173.

[128] Pierce v. State, 13 N. H. 570.

[129] Parrish v. State, 14 Neb. 63.

most intelligent and upright juries, conscious of their want of legal knowledge, the instructions of the court will be followed; but in cases of ignorant and corrupt juries (and such are possible, at least) we are always likely to have the law as given by the court disregarded, and the crude or corrupt conclusions of ignorance or corruption made the standard for decision. The most competent juries to judge of the law will never be likely to assume such responsibility. The most incompetent and corrupt will be the sole practical repositories for the exercise of this high judicial prerogative. No such rule having such results can possibly be sound, either in theory or practice, but can only be evil, and that continually."[130] So it has been said that the old common-law form of oath would seem to indicate that the jury were not judges of the law. By it they are sworn "a true verdict to give according to the evidence." This must mean that they are to decide the facts according to the evidence. If they may decide the law, they may act as to that without the obligation of an oath. The law is not given in evidence.[131] Another reason is that, in case of conviction, the defendant may obtain ample redress on appeal if the court has stated the law incorrectly in the instructions, while, on the other hand, if the jury take the decision of the law into their own hands, and wrongfully acquit the defendant, the state has no redress against their error, because the decision of the jury is final in case of an acquittal.[132] Suppose, however, that the jury, under excitement or popular prejudice, wrongfully convict the defendant. It has been well said

[130] Harris v. State, 7 Lea (Tenn.) 553.

[131] State v. Burpee, 65 Vt. 24.

[132] Rex v. Dean of St. Asaph, 3 Term R. 428, and note; State v. Drawdy, 14 Rich. (S. C.) 90; State v. Jeandell, 5 Har. (Del.) 475; Stettinius v. United States, 5 Cranch, C. C. 573, Fed. Cas. No. 13,387.

that, if the jury are to decide all the law, their decisions can never be reversed, since there are no means of ascertaining their decision upon a question of law so as to bring it into review before an appellate court.[133] To permit the jury to decide the law to be contrary to what they are told in the instructions has also been declared a violation of the federal constitution, and a number of the state courts have also held that it is a violation of the state constitutional provisions.[134] So, it has been urged as a reason against the practice, that, if the jury find the law contrary to the direction of the court, the court is bound to set aside the verdict, and that it is not possible for the jury to have a right to do what the court is bound to undo.[135] In conclusion, it may be stated that such a rule would be contrary to a vast preponderance of judicial authority, both in this country and in England.[136]

[133] Stettinius v. United States, 5 Cranch, C. C. 573, Fed. Cas. No. 13,387; Freeman, J., in Harris v. State, 7 Lea (Tenn.) 556.

[134] United States v. Morris, 1 Curt. 23, Fed. Cas. No. 15,815; Com. v. Anthes, 5 Gray (Mass.) 236; State v. Wright, 53 Me. 329; State v. Burpee, 65 Vt. 30. In this case it was said: "The doctrine that jurors are judges of the law in criminal cases is repugnant to articles 4 and 10 of chapter 1 of the constitution of Vermont, which guaranty to every person within this state 'a certain remedy' for all wrongs, conformably to the laws, and that he shall not be 'deprived of his liberty except by the laws of the land.'" So, in Com. v. Anthes, 5 Gray (Mass.) 236, it was said: "The judiciary department was intended to be permanent and coextensive with the other departments of government, and, as far as practicable, independent of them; and therefore it is not competent for the legislature to take the power of deciding the law from this judiciary department, and vest it in other bodies of men,—juries.—occasionally and temporarily called to attend courts, for the performance of very important duties * * * very different from those of judges, and requiring different qualifications."

[135] Townsend v. State, 2 Blackf. (Ind.) 151.

[136] State v. Wright, 53 Me. 329.

§ 18. Rule in England deducible from decisions and text books.

Notwithstanding the fact that some of the English decisions, especially in cases of criminal libel, have been cited to support the theory that the jury are judges of the law in the sense that they may disregard the instructions of the court, and determine the law to be contrary to what is therein stated, it is believed that there is not a single English decision in which it is so held, though there may possibly be *dicta* in a few decisions which would seem to support the theory. The writer has made what he believes to be an absolutely exhaustive collection of the English cases, and it is submitted that a close examination of these cases will show beyond any possible doubt that the English courts have never held that the jury possess the right to disregard the instructions, but, on the contrary, have uniformly laid down the doctrine that the jury are bound to adopt the instructions of the court as containing a true exposition of the law governing the case, and that they act in violation of their oath if they fail to do so.[137] So far from having the right to disregard the instructions, there are at least two authentic instances where the jury were imprisoned and fined enormous sums for acquitting the defendant in disregard of

[137] Rex v. Dean of St. Asaph, 3 Term R. 428, and note; Rex v. Nutt, 1 Barnard. 306; Rex v. Oneby, 2 Ld. Raym. 1493, 2 Strange, 766; Tutchin's Case, 14 How. State Tr. 1095; Rex v. Wilkes, 4 Burrows, 2527; Rex v. Woodfall, 5 Burrows, 2661; Owen's Case, 18 How. State Tr. 1203; Rex v. Poole, Hardw. 23; Fuller's Case, 14 How. State Tr. 517; Bushell's Case, Vaughan, 135; Hood's Case, J. Kelyng, 50; Lilburne's Case, 4 Cobbett, State Tr. 1269; Wharton's Case, Yel. 24; Rex v. Clerk, 1 Barnard. 304; Sidney's Case, 9 Cobbett, State Tr. 818; Throckmorton's Case, 1 State Tr. 901; Miller's Case, 20 How. State Tr. 870; King v. Withers, 3 Term R. 428; Stockdale's Case, cited in dissenting opinion of Lewis, C. J., in People v. Croswell, 3 Johns. Cas. (N. Y.) 408.

the instructions.[138] And the question of the jury's right in this regard having been raised in a case reviewed before Lord Mansfield, he denied its existence in the most emphatic terms, and declared that he was glad that he was not bound "to subscribe to such an absurdity."[139] On the trial of Colonel Lilburn for treason in 1649, the court refused to permit him to read to the jury from a law book. Being angry at this, he exclaimed: "You that call yourselves judges of the law are no more but Norman intruders, and, in deed and in truth, if the jury please, are no more but cyphers, to pronounce their verdict." Thereupon, Jermin, J., said: "Was there ever such a damnable blasphemous heresy as this, to call the judges of the law cyphers?" He then charged the jury that they were not judges of the law, and that they "ought to take notice of it, that the judges that are sworn, that are twelve in number, they have ever been the judges of the law from the first time that ever we can read or hear that the law was truly expressed in England; and the jury are only judges * * * of matters of fact."[140] In Rex v. Poole[141] Lord Hardwicke denied the right of the jury to disregard the instructions, and said: "The thing that governs greatly in this determination is that the point of law is not to be determined by juries. Juries have a power by law to determine matters of fact only; and it is of the greatest consequence to the law of England and to the subject that these powers of the judge and jury are kept distinct; that the judge determine the law, and the jury the fact; and, if ever they come to be confounded, it will prove the confusion and destruction of

[138] See Wharton's Case, Yel. 24; Throckmorton's Case, 1 State Tr. 901.

[139] Rex v. Dean of St. Asaph, 3 Term R. 428, and note.

[140] Lilburne's Case, 4 Cobbett, State Tr. 1379.

[141] Hardw. 28.

the law of England." All the other English cases cited, though they may not have denied the right of the jury to judge the law in such emphatic terms, nevertheless hold that the jury have no such right.

The next question for consideration is, do the statements of text writers and commentators tend to show that the jury possess such a right? It is believed that this question must be answered in the negative. De Lolme, in his work on the constitution of England, says: "As the main object of the institution of the trial by jury is to guard the accused persons against all decisions whatsoever by men invested with any permanent official authority, it is not only a settled principle that the opinion which the judge delivers has no weight but such as the jury choose to give it, but their verdict must, besides, comprehend the whole matter in trial, and decide as well upon the fact as upon the point of law that may arise out of it; in other words, they must pronounce both on the commission of a certain fact, and on the reason which makes such fact to be contrary to law."[142] This statement is very explicit to the effect that the jury are not bound by the instructions, but is not entitled to much weight, as the author cites no authority in support of his position. The decisions of courts of justice furnish the most certain and authoritative evidence of what the rules of common law are.[143] One of our courts has very properly said, in criticism of De Lolme's statement, that this work, strictly speaking, was only an essay. Its author "must be regarded simply as a learned foreigner, and sometimes showing that want of thoroughness and precision which even a learned man may display when writing on subjects which his previous

[142] De Lolme's Const. Eng. p. 175. Also in State v. Croteau, 23 Vt. 22.

[143] Bl. Comm. 69-73; 1 Kent, Comm. 473.

education had not particularly fitted him to appreciate, and especially when discussing such a subject as the common law of England."[144] The statute of Westminster II. c. 30 (13 Edw. I. [A. D. 1285]), often cited as the groundwork of this alleged right, provides "that the justices assigned to take assizes shall not compel the jurors to say precisely whether it be disseisin or not, so that they do show the truth of the deed, and require aid of the justices. But if they, of their own head, will say that it is disseisin, their verdict shall be admitted at their own peril." The contention has been often made from the words of this statute that the right of the jury to decide the law upon the general issue was vested in them by the English constitution. "This phraseology is most singular, if the statute was intended to submit the law to them. The reasonable construction of it is that, if the jury will undertake to decide the law, they shall be subject to such penalty as may be imposed upon them for exceeding their jurisdiction. * * * Nothing is better settled than that a penalty attached to the performance of an act makes the act itself unlawful."[145] Glanville (liber 13, cc. 20, 21) says that the assize could not determine upon the law connected with disseisin. He states that, if the demandant object to put himself upon the grand assize, he must show some cause why the assize shall not proceed. If the objection be admitted, the assize shall thereby cease, so that the matter shall be verbally pleaded and determined in court, because it is then a question of law, etc. If the assize could not determine questions of law, it would be most groundless assumption to say that they could be determined by the jury, who were to find only collateral facts out of the points of assize. The citation of Glanville is a

144 Pierce v. State, 13 N. H. 546.

145 Pierce v. State, 13 N. H. 536, 544; State v. Burpee, 65 Vt. 12, 13.

strong authority against the right of the jury to decide the law upon the general issue involving law and the facts.[146] Littleton, whose treatise was written between the years 1461 and 1463, says that, if the jurors will take upon themselves the knowledge of the law upon the matter, they may give their verdict generally, as put in their charge.[147] Gilchrist, J., of the New Hampshire supreme court, comments on this passage as follows: "It is to be remembered that Littleton, in the section cited, was not examining the rights or powers of juries. He was discussing matters very different. The passage was introduced in explaining the pleadings in real actions relative to estates upon condition. His remarks are, in brief, that, after an estate tail is determined for default of issue, the donor may enter by force of the condition. But in the pleadings he must vouch a record, or show a writing under seal, proving the condition; but though no writing was ever made of the condition, a man may be aided upon such condition by a verdict taken at large upon an assize of novel disseisin, for as well as the jurors may have connusance of the lease, they also as well may have connusance of the condition which was declared and rehearsed upon the lease. And in all actions where the justices will take the verdict at large, there the manner of the whole entry is put in issue." Then follows the statement quoted: "An extended examination of the rights of juries would have been foreign to the particular matter in hand, and it was necessary for him merely to state the effect of a general verdict relative to estates upon condition."[148] Lord Coke, who wrote nearly two centuries later, says: "Although the jury, if they will take upon them (as Littleton here

[146] Pierce v. State, 13 N. H. 536; State v. Burpee, 65 Vt. 12, 13.

[147] Littleton, Tenures, § 368.

[148] Pierce v. State, 13 N. H. 546, 547.

saith) the knowledge of the law, may give a general verdict, yet it is dangerous for them so to do, for, if they do mistake the law, they run into the danger of an attaint."[149] This clearly denies the right of the jury "to take upon them the knowledge of the law," as Littleton quaintly expresses it, for, if they had this right, they could not "run into the danger of an attaint." It may be further remarked that Coke did not understand Littleton as laying down the limits of the duties of jurors, or as meaning to go any further than to allude to the statute.[150] In Blackstone's Commentaries it is said: "And such public or open verdict may be either general—guilty, or not guilty—or special,—setting forth all the circumstances of the case, and praying the judgment of the court; whether, for instance, on the facts stated, it be murder, manslaughter, or no crime at all. This is where they doubt the matter of law, and therefore choose to leave it to the determination of the court, though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict, if they think proper to so hazard a breach of their oaths; and if their verdict be notoriously wrong, they may be punished, and the verdict set aside by attaint at the suit of the king, but not at the suit of the prisoner."[151]

Although the statute mentioned, and the statements of the commentators herein set forth, have frequently been cited as showing that the jury might disregard the instructions of the court, and determine the law as well as the facts, it is not believed this is the case. On the contrary, they seem to show that the jury might be punished for disobeying the instructions.

[149] Co. Litt. 228a.
[150] Pierce v. State, 13 N. H. 542.
[151] 4 Bl. Comm. 361.

§ 19. Rule at common law in America.

In America, except in jurisdictions where special organic and statutory provisions have been construed as vesting the jury with the right to disregard the instructions,[152] it is well settled that the jury are bound to adopt the instructions as the law of the case, and apply them to the facts, and that they will be guilty of a willful breach of their oaths and a violation of their duty if they disregard the instructions and assume to determine the law to be contrary to what the instructions state it to be. While it is true that there are a few American decisions in which it has either been held or said that the jury are not bound to follow the instructions of the court, these decisions have been overruled, either expressly or impliedly, by subsequent decisions in the same jurisdictions,[153] and there is no longer any doubt existing as to the jury's duty in the premises.[154]

[152] See post, sections 21, 22, of this article.

[153] State v. Snow, 18 Me. 348, overruled in State v. Wright, 53 Me. 343; People v. Croswell, 3 Johns. Cas. (N. Y.) 375 (the court were evenly divided on the question in this case, but subsequent New York cases have uniformly denied the right of the jury to disregard the instructions, as is shown by the cases cited in the following note); Kane v. Com., 89 Pa. St. 522 (all other Pennsylvania decisions take the opposite view); Com. v. Knapp, 10 Pick. (Mass.) 477 (overruled in Com. v. Anthes, 5 Gray [Mass.] 185); Butler v. State, 7 Baxt. (Tenn.) 36 (all other Tennessee cases take the opposite view); State v. Croteau, 23 Vt. 14; State v. Wilkinson, 2 Vt. 480; State v. Meyer, 58 Vt. 463; State v. Freeman, 63 Vt. 496 (the Vermont cases are expressly overruled by the late case of State v. Burpee, 65 Vt. 1, in a well-considered opinion, reviewing all the authorities); Doss v. Com., 1 Grat. (Va.) 557 (overruled in Brown v. Com., 86 Va. 466); United States v. Wilson, Baldw. 78, Fed. Cas. No. 16,730 (all other federal cases maintain the contrary doctrine).

[154] Mobile & O. R. Co. v. Wilson (C. C. A.) 76 Fed. 129; United States v. Keller, 19 Fed. 636; United States v. Morris, 1 Curt. 23, Fed. Cas. No. 15,815; United States v. Shive, Baldw. 510, Fed. Cas.

When the jury find a general verdict, "it is their duty to be governed by the instructions of the court as to all legal questions involved in such verdicts. They have the power to do otherwise, but the exercise of such power cannot be regarded as rightful, although the law has provided no means, in criminal cases, of reviewing their decisions, whether of law or fact, or of ascertaining the grounds upon which their verdicts are based."[155] "But this humane provision in favor of the accused * * * was never designed to abridge the peculiar province of the court in the instructions to the jury on questions of law. Its object was wholly different. The judges of courts are selected with a view to their knowl-

No. 16,278; Stettinius v. United States, 5 Cranch, C. C. 573, Fed. Cas. No. 13,387; United States v. Greathouse, 4 Sawy. 457, Fed. Cas. No. 15,254; State v. Burpee, 65 Vt. 1; Duffy v. People, 26 N. Y. 591; Carpenter v. People, 8 Barh. (N. Y.) 603; Safford v. People, 1 Parker, Cr. Cas. (N. Y.) 474; Com. v. McManus, 143 Pa. 64; Com. v. Goldberg, 4 Pa. Super. Ct. 142; Pennsylvania v. Bells, Addison (Pa.) 159; Harrison v. Com., 123 Pa. 508; State v. Jeandell, 5 Har. (Del.) 475; Batre v. State, 18 Ala. 119; State v. Jones, 5 Ala. 666; Washington v. State, 63 Ala. 135; State v. Rheams, 34 Minn. 18; Hamilton v. People, 29 Mich. 174; People v. Waldvogel, 49 Mich. 337; People v. Mortimer, 48 Mich. 37; Williams v. State, 32 Miss. 390; State v. Wright, 53 Me. 328; State v. Stevens, 53 Me. 548; Lewton v. Hower, 35 Fla. 58; Montee v. Com., 3 J. J. Marsh. (Ky.) 132; Com. v. Garth, 3 Leigh (Va.) 761; Brown v. Com., 86 Va. 466; Dejarnette v. Com., 75 Va. 867; Johnson v. State, 5 Tex. App. 423; Nels v. State, 2 Tex. 280; People v. Anderson, 44 Cal. 70; People v. Ivey, 49 Cal. 56; Sweeney v. State, 35 Ark. 586; Pleasant v. State, 13 Ark. 539; Winkler v. State, 32 Ark. 360; Edwards v. State, 22 Ark. 253; Pierce v. State, 13 N. H. 536; Lord v. State, 16 N. H. 325; Hardy v. State, 7 Mo. 303; Massey v. Tingle, 29 Mo. 437; Hannum v. State, 90 Tenn. 647; Harris v. State, 7 Lea (Tenn.) 554; McGowan v. State, 9 Yerg. (Tenn.) 195; Parrish v. State, 14 Neb. 60; State v. Drawdy, 14 Rich. (S. C.) 90; State v. Jones, 29 S. C. 201; Robbins v. State, 8 Ohio St. 167; Adams v. State, 29 Ohio St. 412; Montgomery v. State, 11 Ohio, 424; State v. Miller, 53 Iowa, 154; State v. Dickey (W. Va.) 37 S. E. 695.

[155] Duffy v. People, 26 N. Y. 593.

edge of the law, and jurors with a view to their practical good sense on matters of fact. * * * It is the duty of the jury, therefore, to regard the law as determined by the court, and this duty is required by the obligations of the juror's oath; and in the proper and conscientious discharge of their duty, a jury cannot, or, in other words, has no right to, determine that the court has erred in its instructions as to the law, and therefore to disregard the law as laid down to them by the court."[156] "The power of the jury to find a general verdict upon the general issue in a criminal case does not imply a right to decide the law of the case. The power is the same in a civil case, and yet it has never been supposed that the power of the jury, in a civil case, to render a general verdict on the general issue, was a right or implied a right to decide the law of the case. The right and the power of the jury, whatever they may be, as to deciding the law of the case, are exactly alike in both classes of cases. In both, the right and the power of the court are the same to set aside the verdict, if against the defendant, on the ground that it was a verdict against law. * * * The most that can be said is that the jury has the power of rendering a general verdict upon the general issue, either according to law or against law, but no one can suppose that they have a right to render a verdict against law."[157] That eminent jurist, Chief Justice Shaw, of Massachusetts, has well said: "The true glory and excellence of the trial by jury is this: That the power of deciding fact and law is wisely divided; that the authority to decide questions of law is placed in a body well qualified, by a suitable course of training, to decide all questions of

[156] Robbins v. State, 8 Ohio St. 167.

[157] Stettinius v. United States, 5 Cranch, C. C. 593, Fed. Cas. No. 13,387.

law; and another body, well qualified for the duty, is charged with deciding all questions of fact, definitely; and whilst each, within its own sphere, performs the duty intrusted to it, such a trial affords the best possible security for a safe administration of justice and the security of public and private rights."[158]

§ 20. Same—What instructions proper as to following charge of court.

In accordance with those views, it is proper to instruct the jury that they are bound to follow the instructions of the court,[159] and the following is a very good form of instruction on the subject: "It is the duty of the jury to receive the law as it is given to them by the court. It is the exclusive province of the court to determine what the law is, and the jury have no right to hold the law to be otherwise in any particular than as given to them by the court."[160] It has been held that where the charge directs the jury that they are judges of the law, and have the right to disregard the instructions of the court, the defendant cannot complain of the error, because it is in his favor.[161] No authority was cited in support of this holding, and in neither case was there any attempt made to state the reasons therefor. On principle, it is believed that the court was in error. It may readily be imagined that under such an instruction the jury might adopt a rule of law more prejudicial than that laid down by the court, in case of widespread popular prejudice against the prisoner.

[158] Com. v. Anthes, 5 Gray (Mass.) 198.

[159] Robbins v. State, 8 Ohio St. 167; Harris v. State, 7 Lea (Tenn.) 553; Dale v. State, 10 Yerg. (Tenn.) 555; State v. Miller, 53 Iowa, 156; Mobile & O. R. Co. v. Wilson (C. C. A.) 76 Fed. 127.

[160] Robbins v. State, 8 Ohio St. 167.

[161] Hannum v. State, 90 Tenn. 647; Harris v. State, 7 Lea (Tenn.) 556.

§ 21. Summary of organic and statutory provisions regulating practice.

In seven states an attempt has been made to regulate the practice by constitutional or statutory provisions, which are as follows: Connecticut: "The court shall state its opinion to the jury upon all questions of law arising in the trial of a criminal cause, and submit to their consideration both the law and the facts, without any direction how to find their verdict."[162] Georgia: "The jury in all criminal cases shall be the judges of the law and the facts."[163] Illinois: "Juries in all criminal cases shall be judges of the law and the facts."[164] Indiana: "In all criminal cases whatever, the jury shall have the right to determine the law and the facts."[165] "In charging the jury, he [the judge] must state to them all matters of law which are necessary for their information in giving their verdict. If he present the facts of the case, he must inform the jury that they are the exclusive judges of all questions of fact, and that they have a right also to determine the law."[166] Louisiana: "The jury in all criminal cases shall be the judges of the law and of the facts on the question of guilt or innocence, having been charged as to the law applicable to the case by the presiding judge."[167] "The jury is always at liberty to give a general verdict by pronouncing on the law and on the facts, in the case submitted to them. Therefore, the law permitting either party to submit specially the facts in the case to the jury, and so depriving them of the right of giving a general

[162] Gen. St. Conn. 1888, § 1630.
[163] Const. art. 1, § 2, par. 1; Pen. Code, § 1033.
[164] Starr & C. Ann. St. (1896) p. 1403, par. 616.
[165] Const. Ind. art. 1, § 64.
[166] Rev. St. 1881, § 1823, subd. 5.
[167] Const. art. 179.

verdict in the suit, is abrogated."[168] Maryland: "In the trial of all criminal cases, the jury shall be the judges of law, as well as of fact."[169] Massachusetts: "In all trials for criminal offenses it shall be the duty of the jury to try, according to established forms and principles of law, all causes which shall be committed to them, and, after having received the instructions of the court, to decide at their discretion, by a general verdict, both the facts and the law involved in the issue, or to find a special verdict, at their election; but it shall be the duty of the court to superintend the course of the trials, to decide upon the admission and rejection of evidence, and upon all questions of law raised during the trials, and upon all collateral and incidental proceedings, and also to charge the jury and to allow bills of exception."[170]

§ 22. Provisions held to vest jury with right to disregard instructions.

In construing these provisions, the courts of three states have held, without any hesitation, that the jury have the right in criminal cases to disregard the instructions, and determine the law to be contrary to what is stated in the instructions. This, it may be stated, is the well-settled law of these states, supported by an unbroken line of decisions to that effect.[171] In one of these decisions it is said that the constitutional provision making juries judges of the law as well as the facts "is merely declaratory, and has not

[168] Garland's Rev. Code Prac. 1901, § 520.

[169] Const. art. 15, § 5.

[170] Rev. Laws 1902, C. 219,, § 13.

[171] Illinois: Spies v. People, 122 Ill. 1; Wohlford v. People, 148 Ill. 296; Davison v. People, 90 Ill. 223; Mullinix v. People, 76 Ill. 211; Schnier v. People, 23 Ill. 25.

Indiana: Williams v. State, 10 Ind. 503; McDonald v. State, 63 Ind. 544; Clem v. State, 42 Ind. 420; McCarthy v. State, 56 Ind. 203;

altered the pre-existing law regulating the powers of the court and jury in criminal cases." On this point the court is in error, for it has been shown that at common law the jury has no right to disregard the court's instructions.[172] In another state, where there is special legislation on the subject, it is also probable that the jury may disregard the instructions of the court.[173] Even in these states, the limitations of the jury's rights and powers are not defined with absolute certainty. It is definitely settled, however, that the instructions of the court as to the law of the case are merely advisory, and without binding force on the jury, and that the jury are free to reject them, and determine what the law is for themselves,[174] and that, in giving instructions, the court does not intend to bind their consciences, but merely "to enlighten their judgments."[175] Nevertheless, it is held in one of these states that it is unquestionably the duty of the jury to give careful and respectful consideration to the instructions of the court,[176] especially if they are in doubt as to what the law of the case may be,[177] and that they

Walker v. State, 136 Ind. 663; Fowler v. State, 85 Ind. 538; Bird v. State, 107 Ind. 154.

Maryland: Forwood v. State, 49 Md. 531; Franklin v. State, 12 Md. 236; Wheeler v. State, 42 Md. 563; Beard v. State, 71 Md. 275.

172 Franklin v. State, 12 Md. 236. See, also, ante, §§ 18, 19.

173 See State v. Buckley, 40 Conn. 247. See, also, State v. Thomas, 47 Conn. 546. But see State v. McKee, 73 Conn. 18, 49 L. R. A. 542, wherein it was held that the jury in a criminal case are not the judges of the constitutionality of the statute upon which the complaint is based.

174 McDonald v. State, 63 Ind. 544; Williams v. State, 10 Ind. 503; Bird v. State, 107 Ind. 154; Keiser v. State, 83 Ind. 236; Nuzum v. State, 88 Ind. 599; Powers v. State, 87 Ind. 144; Beard v. State, 71 Md. 275; Wheeler v. State, 42 Md. 563; Spies v. People, 122 Ill. 1.

175 Bissot v. State, 53 Ind. 408; Hudelson v. State, 94 Ind. 429; Beard v. State, 71 Md. 275.

176 McDonald v. State, 63 Ind. 544; Keiser v. State, 83 Ind. 236.

177 Bird v. State, 107 Ind. 154.

should not disregard the instructions without proper reason.[178] In another state it is said that the jury should not disregard the instructions unless they are prepared to state on their oaths that they are better judges of the law than the court.[179] The jury are not bound by decisions of the supreme court, and may decide the law to be different from that enunciated by such decisions.[180] They may also determine whether the facts stated in an indictment constitute a public offense, but have no right to determine the sufficiency in form of the indictment, or that it was not properly found and returned.[181] So, in one state it is held that a provision making the jury judges of the law gives them no right to determine the constitutionality of a statute, and that it is proper for the court to prevent counsel from arguing that question before the jury.[182] In another, the right of the jury to declare a statute unconstitutional seems to be recognized.[183] And in another, the decisions, though very difficult to understand, also seem to maintain this right. In the first of these cases, the trial court, after telling the jury that they were the judges of the law as well as the facts, instructed them as follows: "But the jury are the judges of the law under the same obligations that attach

[178] Blaker v. State, 130 Ind. 203.

[179] Davison v. People, 90 Ill. 221, 223; Mullinix v. People, 76 Ill. 211; Spies v. People, 122 Ill. 1.

[180] Fowler v. State, 85 Ind. 538; Keiser v. State, 83 Ind. 236. In this case it was said: "The decisions of the supreme court are no more binding upon juries in such cases than the charge of the judge trying the cause. Both may well aid the jury in determining the law applicable to the case, but neither source of information is legally binding upon them, if they choose to determine the law for themselves."

[181] Hudelson v. State, 94 Ind. 426; Dally v. State, 10 Ind. 536.

[182] Franklin v. State, 12 Md. 236.

[183] Lynch v. State, 9 Ind. 541.

to the judge on the bench. They are not authorized to say that that is not law which is the law of the state. The supreme court has decided that section to be constitutional. * * * Will you say it is unconstitutional, when they say it is constitutional? The next case to be tried may be a civil case, the law applicable to which may have been decided by the same supreme court; you would not suffer your private views and interests to influence you to disregard the law thus decided. * * * If you decide that to be unconstitutional which the supreme court holds to be constitutional, you will disturb the foundations of law. But after all, you are the judges of the law, and if, on your consciences, you can say this section is unconstitutional, then you ought to acquit the accused." The reviewing court saw no error in this very contradictory instruction, and in concluding their opinion said: "The jury could not have understood that they were bound by the opinion of the court as in civil cases, for at the close they were distinctly told that they were the judges of the law, and that, if they conscientiously believed that the act was unconstitutional, they ought to acquit the accused. We do not advise a new trial." From this quotation it would seem that the reviewing court considered that the jury had the right to declare a statute unstitutional.[184] In a subsequent case, the trial court gave a similar instruction, which was, in substance, as follows: That the jury were the judges of the law and fact, and had the right to declare a statute unconstitutional if they so considered it, but that they were as much bound by the law as the judge on the bench, and that it was not to be presumed that they would be guilty of such an absurdity as to declare a statute unconstitutional which the court had declared constitutional. Counsel contended that the supreme court

[184] State v. Buckley, 40 Conn. 247.

had never held the statute constitutional, and that the court misled the jury and prevented them from freely exercising their right to judge for themselves of the validity of the statute. The reviewing court brushed aside the objection by saying that the court had in fact decided the question as to the validity of the statute, and declined to grant a new trial.[185] If the jury are judges of the law in the broad sense that they may decide the law to be directly contrary to what the court has told them in the instructions, it is hardly an extension of this right to hold them entitled to pass on the constitutionality of a statute, and the court which holds that the jury may disregard the instructions of the trial judge, but cannot pass on the constitutionality of a statute, seems to the writer to be guilty of an inconsistency.

§ 23. Same—Propriety or necessity of instructing jury on law of the case.

Statutes or constitutional provisions making the jury judges of the law as well as of the fact in criminal cases do not prevent the giving of advisory instructions, for, though the jury are the judges of the law, they are unlearned, and the court has the ultimate power of setting aside their verdict if they should misapply the law, to the injury of the accused.[186] The practice of instructing the jury, notwithstanding the fact that they may disregard the instructions, "is founded on the soundest practical reason and good sense. For though the juries are made judges of the law, they are unlearned, and not infrequently composed, in part at least, of persons wholly uninstructed as to the laws under which they live. When sworn upon the panel, it be-

185 State v. Thomas, 47 Conn. 546.

186 Beard v. State, 71 Md. 275; Forwood v. State, 49 Md. 531; Wheeler v. State, 42 Md. 563.

comes their duty to decide the case according to the established rules of law of the state, and not according to any capricious rules of their own. * * * To enable them to accomplish that object, no proper light should be withheld from them."[187] There is, however, some conflict of opinion as to whether the court is obliged to instruct the jury when requested. In one jurisdiction it seems to be well settled that the court need not give any instructions, whether requested by counsel or jury.[188] In one case it was said: "It is impossible that the legislature contemplated giving the right to parties in criminal cases to have instructions upon the law and the legal effect of the evidence, and exceptions to such rulings, in the face of the constitutional provision under which juries are at liberty to treat such instructions with utter disregard, and to find their verdict in direct opposition to them."[189] And in another it was said: "Both before and since the constitutional declaration upon the subject, it was and has been the practice of judges in some parts of the state to decline to give instructions to the jury in criminal cases under any circumstances, while in other parts of the state it has been the practice for the judges to give advisory instructions when requested so to do. It seems to have been regarded as entirely a matter of discretion with the judge, there being no positive duty requiring him to pursue the one course or the other."[190] In another jurisdiction it is held to be the duty of the judge to instruct the jury as to the law, notwithstanding the provision making them judges of the law. "To the end that the jury may be correctly informed as to the law applicable to his case,

[187] Beard v. State, 71 Md. 275.

[188] Broll v. State, 45 Md. 356; Swann v. State, 64 Md. 423; Franklin v. State, 12 Md. 246.

[189] Broll v. State, 45 Md. 360.

[190] Beard v. State, 71 Md. 275.

and that he may not be erroneously convicted, a defendant on trial, charged with crime, has the right to insist that the court shall instruct the jury on all legal questions necessary to enable them to reach a true verdict."[191] In another jurisdiction, where juries are by statute made judges of the law, it is customary to give the jury instructions on the law of the case.[192] There seems to be no case, however, in which the necessity of giving instructions, with or without request, has been directly decided.

Notwithstanding the fact that the jury are not bound to follow the instructions of the court, the defendant is entitled to correct instructions, if any are given, and is entitled to except to erroneous instructions.[193] If the jury have manifestly followed an erroneous instruction, to the injury of the defendant, the judgment should be reversed.[194]

§ 24. Same—Necessity and manner of instructing jury that they are judges of the law.

In one jurisdiction, it is not only proper for the court to instruct the jury that they are judges of the law as well as of the facts,[195] but it is the duty of the court, under statutory provisions, to do so,[196] and a refusal of an instruction to this effect,[197] or the giving of an instruction that the jurors must be governed by the instructions, constitutes reversible error.[198] In other jurisdictions, where juries are

[191] Parker v. State, 136 Ind. 284.

[192] See Spies v. People, 122 Ill. 252; Mullinix v. People, 76 Ill. 211; Schnier v. People, 23 Ill. 17.

[193] Beard v. State, 71 Md. 275.

[194] Swann v. State, 64 Md. 423; Clem v. State, 42 Ind. 420; Hudelson v. State, 94 Ind. 429.

[195] Fowler v. State, 85 Ind. 538; Walker v. State, 136 Ind. 666; Powers v. State, 87 Ind. 144.

[196] Hudelson v. State, 94 Ind. 429.

[197] McCarthy v. State, 56 Ind. 203.

[198] McDonald v. State, 63 Ind. 544.

judges of the law as well as of the facts, it is customary to instruct them that they are not bound by the court's instructions;[199] and it would undoubtedly be better practice, and perhaps the duty of the court, to so instruct the jury, whether there is any statutory requirement to that effect or not, and though no requests for such instructions were made. On this head, the following instructions have been approved: "That the instructions by the court are advisory merely, and that, if they [the jury] differed with the court as to the law, they may follow their own convictions, and disregard the instructions of the court;"[200] that "you are the judges of the law as well as the facts. Upon the facts of the case * * * it is your exclusive province to decide upon them; ours is to instruct you in regard to the law; and while I shall endeavor to give you a plain, clear, and impartial statement of the law, * * * you are to also remember that it is not intended thereby to thus bind your consciences, but to enlighten your judgments, if so be you should so regard it."[201] In connection with these instructions, it is customary in one jurisdiction to caution the jury not to disregard the instructions without good reason;[202] and, in another, that the jury should not disregard the instructions unless they can say on oath that they are better judges of the law than the court.[203] In the first-mentioned jurisdiction, the following instructions have been approved: "If, however, you have

[199] See Mullinix v. People, 76 Ill. 211; Davison v. People, 90 Ill. 221; Spies v. People, 122 Ill. 1; Wheeler v. State, 42 Md. 563; Swann v. State, 64 Md. 423.

[200] Bird v. State, 107 Ind. 154.

[201] Bissot v. State, 53 Ind. 408.

[202] Blaker v. State, 130 Ind. 203; Bird v. State, 107 Ind. 154; Kelser v. State, 83 Ind. 236.

[203] Mullinix v. People, 76 Ill. 211; Fisher v. People, 23 Ill. 283; Davison v. People, 90 Ill. 221; Spies v. People, 122 Ill. 1.

no well-defined opinion or convictions as to what the law is relating to any particular matter or matters at issue in the case, then, in determining what it is, you should give the instructions of the court respectful consideration."[204] "Notwithstanding you have the legal right to disagree with the court as to what the law is, still you should weigh the instructions given you in the case as you weigh the evidence, and disregard neither without proper reason."[205] So, in the last-mentioned jurisdiction, the following instructions have been approved: "It is the duty of the jury to accept and act upon the law as laid down to you by the court, unless you can say upon your oaths that you are better judges of the law than the court; and if you can say upon your oaths that you are better judges of the law than the court, then you are at liberty so to act."[206] "'If they [the jury] can say upon their oaths that they know the law better than the court itself, they have the right to do so;' * * * but that, 'before saying this, * * * it is their duty to reflect whether, from their study and experience, they are better qualified to judge of the law than the court.'"[207]

§ 25. Provisions held not to vest jury with right to disregard instructions.

In three jurisdictions, where there are special statutory or organic provisions on the subject, it is now definitely settled that the jury are bound to follow the instructions of the court, but in two of them this conclusion was not reached without considerable hesitation. It is interesting to note that in one of these two jurisdictions the provisions governing the subject are the same in substance as those of the

[204] Bird v. State, 107 Ind. 154.
[205] Blaker v. State, 130 Ind. 203.
[206] Davison v. People, 90 Ill. 231.
[207] Spies v. People, 122 Ill. 1.

three jurisdictions where the jury are allowed full liberty to disregard the instructions, and determine the law for themselves.

§ 26. Same—Rule in Georgia.

In construing the statutory provision, all the earlier decisions in Georgia affirm, in the most unmistakable terms, the right of the jury to disregard the instructions, and determine the law for themselves.[208] In one case it was said that, if it was the misfortune of the jury "to differ conscientiously from the court, it is not only their right, but their duty, to find a verdict according to the opinion which they entertain of the law. And instead of being guilty of perjury in doing so, they are guilty of perjury if they do not, for, in this case, their finding is not their verdict."[209] So, in another case it was held objectionable to tell the jury that they should not differ from the court on slight and trivial grounds, but should be "clearly satisfied" that it was wrong before they did so.[210] From a reference to the last section, it will be seen that the rights of the jury in this regard were guarded even more jealously than they now are in two jurisdictions where the courts hold that the jury have the right to disregard the instructions. In those jurisdictions, instructions similar to the one under consideration are considered not only proper, but highly commendable. It seems that the last decision upholding the right of the jury to disregard the court's instructions were handed down in 1862.[211]

[208] McDaniel v. State, 80 Ga. 853; Keener v. State, 18 Ga. 194; Dickens v. State, 30 Ga. 383; Golden v. State, 25 Ga. 527; McGuffie v. State, 17 Ga. 497; McPherson v. State, 22 Ga. 478. See, also, dictum in Holder v. State, 5 Ga. 441.

[209] McDaniel v. State, 30 Ga. 853.

[210] Golden v. State, 25 Ga. 527.

[211] Dickens v. State, 30 Ga. 383; McDaniel v. State, 30 Ga. 853.

Thereafter the decisions, the first of which was made in 1871, laid down the contrary doctrine, without any reference to the rule of the earlier decisions, and it is now well settled that the instructions given by the court are the law of the case, to be adopted by the jury and applied to the facts, without reference to what their own opinions of the law may be.[212] The provision on this subject, which was merely statutory until 1877, was incorporated into the constitution during that year. In commenting on this it was said, in a recent decision: "The constitution of 1877 * * * simply re-enacts, in identical language, the provisions of the Code thereon. It emphasizes it by inserting it in the constitution; but it put it there subject to the construction which had been put on the same words in the Code."[213]

However much the practice of permitting juries to disregard the court's instructions is to be deprecated, it seems to the writer that a provision that "the jury in all criminal cases shall be the judges of the law and the facts,"[214] clearly and unmistakably confers on the jury the right to determine the law independently, and in disregard of the court's instructions, and that a contrary construction furnishes an excellent example of judicial legislation. These provisions should be considered in the light of surrounding circumstances. It must be borne in mind that a widespread, but erroneous, idea existed that at common law the jury were not bound to follow the instructions of the court in criminal cases. The object of legislation, therefore, was to put an end to this uncertainty. If the legislature had intended that

[212] Anderson v. State, 42 Ga. 9; Hill v. State, 64 Ga. 470; Malone v. State, 66 Ga. 539; Danforth v. State, 75 Ga. 614; Hunt v. State, 81 Ga. 140; Robinson v. State, 66 Ga. 517; Ridenhour v. State, 75 Ga. 382.

[213] Hill v. State, 64 Ga. 470.

[214] Const. Ga. art. 1, § 2, par. 1; Code Ga. 1882, § 5018.

the jury should be judges of the facts only, it is only reasonable to suppose that the words "of the law" would have been omitted from the statute. If it was intended by the statute that the jury should be judges of the facts only, the use of these words could only produce doubt and confusion. The writer is convinced that the early decisions have placed the proper construction on these statutes.

§ 27. Same—Rule in Louisiana.

In Louisiana, the court is required by statute to instruct the jury as to the law applicable to the case.[215] There are also provisions, both constitutional and statutory, on the power of the jury to judge the law.[216] In construing these latter provisions, there is much conflict of opinion as to their proper meaning. The first two decisions in which the question was passed upon are difficult to construe, and have been cited by the supreme court of this state, both in support of the proposition that the jury ought, as a general rule, to follow the instructions, but is under no compulsion to do so,[217] and also to support the proposition that, while the jury has the power to disregard the instructions, yet in so doing it would violate its oath and duty.[218] In the first of these two decisions, the court refused to reverse for a refusal to instruct the jury that they "are the judges of the law as well as the facts"; that the "judge is to explain the law, and they are bound to listen to and weigh such explanation with due care and attention, although not bound to admit it as con-

[215] State v. Tally, 23 La. Ann. 677; State v. Tisdale, 41 La. Ann. 338.

[216] See ante, § 21.

[217] State v. Tally, 23 La. Ann. 677, citing State v. Ballerio, 11 La. Ann. 81, and State v. Scott, 12 La. Ann. 386.

[218] State v. Matthews, 38 La. Ann. 795, citing the two cases mentioned in the preceding note.

clusive of the law should they differ in opinion from the judge," saying: "The question is whether, after a sound and strictly legal charge, the court so far erred in refusing to add the above instructions as to authorize us to set aside the verdict. We think not."[219] In the second decision, the judgment was reversed because the court instructed that "the jury are not the judges of the law and fact in a criminal case, but must take the law as laid down by the court." This instruction was characterized as absolutely erroneous, and in the syllabus the court said that it was safe, as a general rule, to regard the court's exposition of the law as conclusive, but that they are not bound to do so, and in extreme cases may disregard the court's instructions.[220] In the next case decided, the trial judge declined to instruct the jury "that, in finding a verdict, they were the judges of the law and facts," and gave the following instructions: The jury "were the sole judges of the facts proved. It was their duty to apply the law as laid down by the court. That the jury had the power, but not the right, to disregard the charge of the judge." The reviewing court cited the two preceding decisions, and reversed the decision, saying: "It, doubtless, would be a safe rule for the jury to take the law from the judge as their guide, but they are not bound to do so."[221] Relying on this decision, the judgment in the next case was reversed because the trial judge refused to instruct that the jury were the judges of both the law and the facts.[222] Then follows a decision in which it was held that the jury ought, as a rule, to follow the instructions, but are not bound to do so.[223] This decision was handed down in 1871. Since

219 State v. Ballerlo, 11 La. Ann. 81.
220 State v. Scott, 11 La. Ann. 429.
221 State v. Jurche, 17 La. Ann. 71.
222 State v. Saliba, 18 La. Ann. 35.
223 State v. Tally, 23 La. Ann. 677.

that time, the court has veered around to the opposite view. In a recent case it was said: "Whatever views may formerly have been entertained upon this subject, it is now the settled jurisprudence of the state that 'the jury is bound to accept and apply the law as laid down by the judge, and that, while it has the power to disregard it, yet in so doing it would violate its oath and duty.' "[224] This view is sustained by all the recent decisions.[225] Notwithstanding the fact that it is now considered the duty of the jury to adopt the instructions of the court as the law of the case, it is nevertheless held to be the duty of the trial judge to instruct the jury that they are judges of the law and the facts, and reversible error for him to refuse such an instruction.[226] But it is also held that, after giving such an instruction, the court must explain the modified sense in which they are so;[227] that is to say, they should be directed to take and apply the law as laid down by the court.[228] This judicial juggling commends itself to reason in an equal degree with the old nursery jingle, in which a mother gave her daughter permission to go swimming on condition that she did not go near the water.

In charging the jury in accordance with the view now prevailing, it has been held proper to give the jury the following instruction: "The constitution of this state makes jurors the judges of the law as well as of the facts in criminal cases;

[224] State v. Desforges, 47 La. Ann. 1167.

[225] State v. Tisdale, 41 La. Ann. 341; State v. Callahan, 47 La. Ann. 444; State v. Johnson, 30 La. Ann. 904, 905; State v. Matthews, 38 La. Ann. 795; State v. Cole, 38 La. Ann. 846; State v. Ford, 37 La. Ann. 465; State v. Vinson, 37 La. Ann. 792.

[226] State v. Vinson, 37 La. Ann. 792.

[227] State v. Ford, 37 La. Ann. 444; State v. Johnson, 30 La. Ann. 905; State v. Tisdale, 41 La. Ann. 338.

[228] State v. Ford, 37 La. Ann. 444.

but while this is so, I charge you that it is your sworn duty to follow the law given to you by the court. * * * The very moment you feel that the law expounded in this charge is the law of this case, your oaths compel you to apply it to the facts, and, though you have the physical power to disregard it, you cannot do so without violating your oaths. In taking the law from the court, you incur no responsibility; in disregarding it, your error is without remedy. But, on the other hand, misstatements of the law by the court to the prejudice of these accused may be excepted to by their counsel, and its correctness passed upon by a higher tribunal. Your oath binds you to rest your verdict on the law and the evidence."[229]

§ 28. Same—Rule in Massachusetts.

In one case decided before the enactment of the present statute regulating the question, there are expressions to the effect that the jury have the right to disregard the court's instructions, and determine the law according to their own ideas,[230] but this view was repudiated in the first decision made after the enactment of the statute. In this case it was said that, at common law, the jury had no such right, and the court held that this right was not and could not be conferred by the statute.[231] This holding has been adhered to in subsequent decisions,[232] and it has been held proper to instruct the jury that it is their duty to take the law from the court, and to conform their judgment and decision to its

229 State v. Ford, 37 La. Ann. 465.

230 Com. v. Knapp, 10 Pick. (Mass.) 495.

231 Com. v. Anthes, 5 Gray (Mass.) 202.

232 Com. v. Anthes, 12 Gray (Mass.) 29; Com. v. Rock, 10 Gray (Mass.) 4; Com. v. Marzynski, 149 Mass. 68.

instructions, so far as they understood them, in applying the law to the facts to be found by them.[233]

[233] Com. v. Anthes, 12 Gray (Mass.) 29.

CHAPTER III.

ASSUMPTION OF FACTS IN INSTRUCTIONS.

§ 29. Assumption of Disputed Facts.
30. Improper Assumption of Facts in Dispute Illustrated.
31. Instructions Held not to Assume Disputed Facts.
32. Assumptions in Opposition to Evidence.
33. Assumption of Facts not Supported by Any Evidence.
34. Assuming Nonexistence of Fact in Absence of Evidence.
35. Assuming Facts by Way of Illustration.
36. Assumption of Admitted Facts.
37. Assumption of Facts Supported by Strong and Uncontradicted Evidence.

§ 29. Assumption of disputed facts.

It being the exclusive province of the jury to determine the existence or nonexistence of the facts, it follows that it is an invasion of the province of the jury, and therefore erroneous, for the court in its instructions to assume the existence or nonexistence of material facts which are in issue between the parties, and as to which the evidence is conflicting,[1] and it makes no difference in the application of the rule

[1] Wadsworth v. Dunnam, 98 Ala. 610; Henderson v. Marx, 57 Ala. 169; Territory v. Kay (Ariz.) 21 Pac. 152; Cox v. State (Ark.) 60 S. W. 27; Montgomery's Adm'r v. Erwin, 24 Ark. 540; Little Rock & F. S. Ry. Co. v. Barker, 33 Ark. 350; People v. Buster, 53 Cal. 612; Llewellyn Steam Condenser Mfg. Co. v. Malter, 76 Cal. 242; Downing v. Brown, 3 Colo. 571; Weil v. Nevitt, 18 Colo. 10; Huber v. Feuber, 10 MacArthur (D. C.) 484; Ashmead v. Wilson, 22 Fla. 255; McDonald v. Beall, 55 Ga. 288; Southwestern Railroad v. Singleton, 67 Ga. 307; Allmendinger v. McHle, 189 Ill. 308; Hellyer v. People, 186 Ill. 550; Bradley v. Coolbaugh, 91 Ill. 148; Meyer v. Meyer, 86 Ill. App. 417; Harley v. Weiner, 58 Ill. App. 340; Dady v. Condit, 188 Ill. 234, reversing 87 Ill. App. 250; Mohr v. Kinnane,

whether one fact or several are assumed.[2] Any assumption, either direct or indirect, will be error.[3] Where the evi-

85 Ill. App. 447; Noblesville & E. G. R. Co. v. Gause, 76 Ind. 142; Carter v. Pomeroy, 30 Ind. 438; Russ v. Steamboat War Eagle, 14 Iowa, 363; Case v. Burrows, 52 Iowa, 146; Baltimore C. Ry. Co. v. State, 91 Md. 506; Clifton v. Litchfield, 106 Mass. 34; Emmons v. Alvord, 177 Mass. 466; Chadwick v. Butler, 28 Mich. 349; Weyburn v. Kipp, 63 Mich. 79; Schwartz v. Germania Life Ins. Co., 21 Minn. 215; French v. Sale, 63 Miss. 386; Dunlap v. Hearn, 37 Miss. 471; Ellerbee v. State (Miss.) 30 So. 57; St. Louis, K. & N. W. R. Co. v. St. Louis Union Stock Yards Co., 120 Mo. 541; State v. Gann, 72 Mo. 374; Day v. Citizens' Ry. Co., 81 Mo. App. 471; Andrews v. Broughton, 84 Mo. App. 640; Mattingly v. Lewisohn, 13 Mont. 508; Kipp v. Van Blarcom, 24 N. J. Law, 854; Pryor v. Portsmouth Cattle Co., 6 N. M. 44; Vroman v. Rogers, 5 N. Y. Supp. 426; Watson v. Gray, 4 Keyes (N. Y.) 385; Lawson v. Metropolitan St. Ry. Co., 166 N. Y. 589, affirming 40 App. Div. 307; Paine v. Kohl, 14 Neb. 580; Metz v. State, 46 Neb. 547; State v. Duffy, 6 Nev. 138; Gaudette v. Travis, 11 Nev. 149; Fleming v. Wilmington & W. R. Co., 115 N. C. 676; Weybright v. Fleming, 40 Ohio St. 52; State v. Whitney, 7 Or. 386; Potts v. Jones, 140 Pa. 48; Greenfield v. East Harrisburg P. Ry. Co., 178 Pa. 194; Hayes v. Pennsylvania R. Co., 195 Pa. 184; Com. v. Light, 195 Pa. 220; Wilson v. Atlanta & C. A. Ry. Co., 16 S. C. 591; Wood v. Steinau, 9 S. D. 110; Roper v. Stone, Cooke (Tenn.) 497; Willis v. Hudson, 72 Tex. 598; Missouri, K. & T. Ry. Co. v. Brown (Tex. Civ. App.) 39 S. W. 326; Turner v. Grobe (Tex. Civ. App.) 59 S. W. 583; Luckie v. Schneider (Tex. Civ. App.) 57 S. W. 690; Houston v. Com., 87 Va. 257; Harrison v. Farmers' Bank, 4 W. Va. 393; Parkersburg Nat. Bank v. Als, 5 W. Va. 50; Owen v. Long, 97 Wis. 78, Hempton v. State (Wis.) 86 N. W. 596; Adams v. Roberts, 2 How. (U. S.) 486; Knickerbocker Life Ins. Co. v. Foley, 105 U. S. 350; Marti v. American Smelting & Refining Co. (Utah) 63 Pac. 184; Kirk v. Territory, 10 Okla. 46; L. I. Aaron Co. v. Hirschfeld, 89 Ill. App. 205; Hayes v. Wagner, 89 Ill. App. 390; Taylor v. Territory (Ariz.) 64 Pac. 423; Commonwealth v. Hazlett, 16 Pa. Super Ct. 534; Judd v. Isenhart, 93 Ill. App. 520; Henderson County v. Dixon (Ky.) 63 S. W. 756; St. Louis S. W. Ry. Co. v. Smith (Tex. Civ. App.) 63 S. W. 1064; Walker v. Nix (Tex. Civ. App.) 64 S. W. 73.

[2] Morrison v. Hammond's Lessee, 27 Md. 604.

[3] People v. Williams, 17 Cal. 142.

dence is conflicting upon a vital question, the jury should be left to find the facts without any interference by the court.[4] The instructions should be so drawn as to state the law upon a supposed state of facts to be found by the jury.[5] No matter how slight the evidence is, the court cannot assume the existence of facts, if there is any room for a contrary finding.[6] Even if the evidence is so slight that the court would approve and sustain a finding against the existence of the fact, it is not error to submit the question to the jury.[7] This rule is, of course, subject to the qualification that the court may direct a verdict where the evidence would not sustain a contrary finding.[8] It follows that instructions which assume as proved matters as to which the evidence is conflicting may and should always be refused.[9]

[4] Bradley v. Coolbaugh, 91 Ill. 148.

[5] Sherman v. Dutch, 16 Ill. 283.

[6] Clark v. McGraw, 14 Mich. 139; Lewis v. Rice, 61 Mich. 97; Miller v. Mutual Ben. Life Ins. Co., 31 Iowa, 216; Stevens v. Snyder, 8 Ill. App. 362.

[7] Blackledge v. Clark, 24 N. C. 394.

[8] See ante, § 5, "Directing Verdict." See, also, Wright v. City of Fort Howard, 60 Wis. 123.

[9] Liner v. State, 124 Ala. 1; Poe v. State, 87 Ala. 65; Griell v. Lomax, 94 Ala. 641; Patrick Red Sandstone Co. v. Skoman, 1 Colo. App. 323; Simpson v. Post, 40 Conn. 321; Daniels v. State, 2 Pennewill (Del.) 586; Straus v. Minzesheimer, 78 Ill. 492; Lafayette, M. & B. R. Co. v. Murdock, 68 Ind. 137; Sample v. Randz (Iowa) 84 N. W. 683; Stier v. City of Oskaloosa, 41 Iowa, 353; Connors v. Chingren, 111 Iowa, 437; Metropolitan St. Ry. Co. v. McClure, 58 Kan. 109; Moore v. Wilcox, 4 Dana (Ky.) 534; State v. Barnes, 48 La. Ann. 460; Munroe v. Woodruff, 17 Md. 159; Brooks v. Inhabitants of Somerville, 106 Mass. 271; Foley v. Riverside S. & C. Co., 85 Mich. 7; Lake Superior & M. R. Co. v. Greve, 17 Minn. 322 (Gil. 299); Worley v. Hicks (Mo.) 61 S. W. 818; People v. Bonds, 1 Nev. 33; Vroman v. Rogers, 5 N. Y. Supp. 426; Chaffin v. Lawrance, 50 N. C. 179; Bradley v. Ohio River & C. Ry. Co., 126 N. C. 735; Penn-

Although it has been said that instructions which assume material facts are erroneous unless given in connection with another, which leaves it to the jury to determine whether the assumed facts are true,[10] there are decisions holding that an improper assumption of a fact is not cured by other instructions submitting the question of its existence to the jury.[11] The improper assumption of facts in an instruction is not necessarily ground for reversal, as the error may have been invited by the party complaining,[12] or the error may have been harmless.[13] Thus, the assumption of a controverted fact in the charge, when by such assumption a proposition favorable to the complaining party is emphasized and

sylvania R. Co. v. McTighe, 46 Pa. 316; Watts v. Blalock, 17 S. C. 162; Arneson v. Spawn, 2 S. D. 269; White v. Van Horn, 159 U. S. 3.

[10] State v. Hecox, 83 Mo. 531; State v. West, 157 Mo. 309.

[11] Cahoon v. Marshall, 25 Cal. 201; Bressler v. Schwertferger, 15 Ill. App. 294. "An instruction which assumes that plaintiff has proven damages is * * * necessarily prejudicial to the defendant," and the error is not cured by another portion of the charge, which "tells the jury that they are the judges of the facts and the credibility of the witnesses." Marti v. American Smelting & Refining Co. (Utah) 63 Pac. 184.

[12] As to invited error in instructions, see post, c. 32, "Appellate Review of Instructions." Where a requested instruction has been refused, the party making the request cannot object to an instruction substantially similar, that it assumes facts of which there is no evidence. Philadelphia, W. & B. R. Co. v. Howard, 13 How. (U. S.) 307 See, also, Auburn Bolt & Nut Works v. Shultz, 143 Pa. 256, in which it was held that, if an instruction is asked, based on the assumption that a certain fact is before the jury, the party presenting it cannot afterwards object that there was no evidence in the case justifying the submission of the question.

[13] Bradley v. Lee, 38 Cal. 362; City of Chicago v. Moore, 139 Ill. 201; Ricards v. Wedemeyer, 75 Md. 10; Hardy v. Graham, 63 Mo. App. 40. And see, generally, post, c. 32, "Appellate Review." Ordinarily, however, the error will be presumed to be prejudicial unless it affirmatively appears otherwise. See, post, c. 32, "Appellate Review." And see, generally, the cases cited supra, this section.

made more prominent, is not a ground for reversal.[14] But where the charge is so worded as to assume the existence of a material controverted fact involved in the issue, regarding which the evidence is conflicting, and the verdict is in accordance with such assumption, a new trial should be granted.[15]

§ 30. Improper assumption of facts in dispute illustrated.

The improper assumption of facts in the instructions to the jury is a most fruitful source of reversal. The error is one into which counsel in requesting, and courts in giving, instructions, are prone to fall through inadvertence, rather than intention, for the rule against such assumptions is elementary and familiar. The question usually arises as one of construction upon the language used in the instructions. For this reason, it is thought not improper to give a considerable number of illustrations of instructions attacked as erroneous because of this vice. It will be seen that the rule is enforced somewhat strictly.

Where, in a prosecution for receiving stolen goods, it appears that the goods were carried in a buggy, over which defendants had control, to the place of sale, and the issue of fact most seriously controverted is as to whether defendants assisted in taking the goods to the buggy, a statement in an instruction that if, "at any time between the time they took these goods to the buggy," etc., assumes as a fact that defendants took them there, and is reversible error.[16] An instruction "that, if they [the jury] find from all the evidence * * * that the goods sold in this case were sold on the credit of the defendant, then the plaintiff is entitled

[14] Fort Worth Pub. Co. v. Hitson, 80 Tex. 216.

[15] Boaz v. Schneider, 69 Tex. 128; L. I. Aaron Co. v. Hirschfeld, 89 Ill. App. 205.

[16] Com. v. Light, 195 Pa. 220.

to recover," is erroneous, in assuming that the goods were sold.[17] Where it is a question in issue whether or not the plaintiff sustained any damage from the wrong complained of, an instruction containing the language, "that, in estimating the measure of damages in this case," etc., and "that they must find for the plaintiff, and the only question in this case is the amount of damages which they ought, under the evidence, to allow the plaintiff," and that "in arriving at the verdict, and the amount of damages you should give plaintiff in this case," etc., assumes that some damages have been sustained by plaintiff.[18] An instruction that "the plaintiff, under the evidence in this case, is entitled to recover at least nominal damages, and such further sum as you may believe, from the preponderance of the evidence and the facts and circumstances in evidence, was the difference between the price which the defendant agreed to sell for and the market value of the premises at a certain date," assumes that some further sum than nominal damages was shown by a preponderance of the evidence.[19] An instruction that, "if the jury shall believe from the evidence that the damage to the * * * [property] of the plaintiff was occasioned by fire communicated from the engines of, or by the agent or agents of, the defendant, * * * then * * *," assumes that damage was done to plaintiff's property.[20] In trespass for as-

[17] Cropper v. Pittman, 13 Md. 190.

[18] Dady v. Condit, 188 Ill. 234, reversing 87 Ill. App. 250. An instruction which assumes that plaintiff has proven damages invades the province of the jury, and is necessarily prejudicial to the defendant. Marti v. American Smelting & Refining Co. (Utah) 63 Pac. 184. In an action for assault and battery, where the defense was a denial, an instruction that the jury, "in arriving at the compensatory damages," etc., was held erroneous, as assuming that compensatory damages were to be awarded. Judd v. Isenhart, 93 Ill. App. 520.

[19] Dady v. Condit, 188 Ill. 234.

[20] Baltimore & S. R. Co. v. Woodruff, 4 Md. 242.

sault and battery, an instruction which assumes as a fact that violence was used is erroneous, as assuming the main fact in issue, and is a clear invasion of the province of the jury.[21] In a proceeding for forcible entry and detainer, instructions "that defendant had, and had proved that he had, undisputed possession [of the premises] between two and three years," are erroneous, as assuming the fact as determined.[22] In an action for a balance due on a sale of goods, where defendant set up a breach of warranty of value, and that a portion of the goods only were delivered, which were invoiced by him at a certain amount, an instruction that the measure of damages was the difference between the amount warranted and the invoice is an improper assumption of controverted facts.[23] In an action for commissions for effecting a sale of land, a request for an instruction which assumes that a definite price was fixed at the time of plaintiff's employment is properly refused, where the evidence is conflicting upon that point.[24]

Courts, sometimes, from facts which they leave to the jury to find, make certain deductions, which amount to an unwarranted assumption. In an action for personal injuries, an instruction assuming that a child fifteen years old was of "tender years and imperfect discretion" was held erroneous. Whether or not he was of "tender years," etc., should have been submitted to the jury, and the facts of his age, capacity, experience, and knowledge of the particular danger passed on by it.[25] An instruction: "To constitute a delivery, it is not necessary that the deed should be placed in

[21] Mohr v. Kinnane, 85 Ill. App. 447.

[22] Wall v. Goodenough, 16 Ill. 415.

[23] Smith v. Dukes, 5 Minn. 373 (Gil. 301).

[24] Sample v. Rand (Iowa) 84 N. W. 683.

[25] Day v. Citizens' Ry. Co., 81 Mo. App. 471. Compare Schmidt v. St. Louis R. Co. (Mo.) 63 S. W. 834; Bertram v. People's Ry. Co., 154 Mo. 639.

the grantees' hands, but it is necessary that it should be and was put into the control of the grantees, and that the grantees accepted the same. That would be a delivery. If you believe from the evidence that the grantor placed said deed or instrument in a trunk in the house where she and grantee had access to, and told grantee that she could get said deed or instrument at any time she desired, and have it recorded, if she wanted to, then that would be a delivery,"—is erroneous, since, whether such facts constitute a delivery depends upon the intent of the grantor, and such instruction assumes that the intent existed.[26] In an action for personal injuries caused by a locomotive, an instruction that, "if the jury believe the evidence, the plaintiff could have extricated himself from any danger after he saw the engine," is properly refused, as being an inference to be made by the jury from all the evidence.[27]

Instructions are erroneous which submit to the jury the question of the existence of a chain of facts, but are so framed that they assume the existence of one link in the chain. An instruction that, "if the jury find that the plaintiffs did the work * * * under the provisions of the contract, * * * offered in evidence by the defendant," assumes the existence and execution of the contract.[28] An instruction that, if the defendant received certain notes in controversy before their maturity, and "without notice of the conditions attached to them," etc., though open to criticism, as telling the jury that there were conditions attached to the transfer of the notes, is not ground for reversal, if other parts of the charge make the matter perfectly clear.[29] A request for an instruction that the defendant railway company was

[26] Walker v. Nix (Tex. Civ. App.) 64 S. W. 73.
[27] McQuay v. Richmond & D. R. Co., 109 N. C. 585.
[28] Baltimore & O. R. Co. v. Resley, 7 Md. 297.
[29] Turner v. Grobe (Tex. Civ. App.) 59 S. W. 583.

not responsible for the negligence of the city's flagman is properly refused because it assumes that the flagman was an employe of the city, instead of leaving that fact to be found by the jury. The *onus* of proving such fact resting upon the party making the request, the clearness of the proof does not make such assumption proper.[30] An instruction "that the plaintiff is entitled to recover such sum as the jury shall believe, from the evidence, to be the value of the materials belonging to him, and used by the defendants in the new arch," assumes that such materials were so used.[31] On an indictment for murder, an instruction that "the theory of the defense is that defendant is not guilty, but that the injury or wound which the deceased woman received was caused by her being struck by a train of cars," assumes as a fact that the deceased woman received a wound which caused her death.[32]

Another class of instructions direct the jury as to their verdict in case they should find that the injury complained of resulted, or did not result, from a specified fact. Such instructions are erroneous, as assuming the existence of the specified fact, though in many cases the court probably has no thought of making such an assumption. Thus, an instruction that, "if the jury believe * * * the injury to the plaintiff occurred by reason of the neglect of the employes of the defendant to obey the signal of the semaphore, * * *" assumes as a fact the neglect of the defendant's employes to obey such signal.[33] An instruction "that he [the plaintiff] is entitled to recover in this action all damages proved to have been sustained by him on account of the trespasses committed by defendant on plaintiff's premises, as alleged in the declaration," assumes the com-

[30] Baltimore Consolidated Ry. Co. v. State, 91 Md. 506.
[31] Denmead v. Coburn, 15 Md. 29.
[32] Hellyer v. People, 186 Ill. 550.
[33] Illinois Cent. R. Co. v. Zang, 10 Ill. App. 594.

mission of the trespass.[34] An instruction that, "if the plaintiff has sustained no injury by reason of the alleged trespass, still he is entitled to a verdict for nominal damages," is erroneous for assuming that a trespass was committed.[35]

§ 31. Instructions held not to assume disputed facts.

An instruction which states in hypothetical form the facts which the evidence tends to prove is not obnoxious to the rule against improper assumptions of fact.[36] Where the propositions in an instruction are all made to rest upon what the jury shall believe from the evidence, or when it states a hypothetical case, which, if the jury believe from the evidence existed, they may consider, it will not be liable to the objection that it assumes there is evidence of the fact.[37] It is

[34] Small v. Brainard, 44 Ill. 355.

[35] Steele v. Davis, 75 Ind. 191.

[36] Morgan v. Wattles, 69 Ind. 260; Jones v. Edwards, 57 Miss. 28; State v. Thompson, 19 Iowa, 299; Paul v. Meek, 6 Ala. 753; Ham v. Delaware & H. Canal Co., 142 Pa. 617; Ladd v. Pigott, 114 Ill. 647; Galveston, H. & S. A. Ry. Co. v. Waldo (Tex. Civ. App.) 32 S. W. 783; O'Connell v. St. Louis, C. & W. Ry. Co., 106 Mo. 482; Hannibal & St. J. R. Co. v. Martin, 111 Ill. 219; Missouri Pac. Ry. Co. v. Lehmberg, 75 Tex. 61; Austin & N. W. Ry. Co. v. Beatty, 73 Tex. 592; Sioux City & P. R. Co. v. Smith, 22 Neb. 775; Seaboard Mfg. Co. v. Woodson, 94 Ala. 143; Jackson v. Burnham, 20 Colo. 532; Fulton v. Maccracken, 18 Md. 528; Klutts v. St. Louis, I. M. & S. Ry. Co., 75 Mo. 642; City of Logansport v. Justice, 74 Ind. 378.

[37] Ladd v. Pigott, 114 Ill. 647. See, also, Triolo v. Foster (Tex. Civ. App.) 57 S. W. 698. An instruction in an action involving accounts between parties that, if a remittance by plaintiff to defendant was not a loan, but to make good an overdrawn account, there could be no recovery for such item, does not assume any fact. Ryder v. Jacobs, 196 Pa. 386. In an action for injury at a railway crossing, an instruction "that as to whether or not defendant blew off steam from its engine at said railroad crossing, and by reason thereof frightened the horse that the wife of plaintiff was driving, is a question of fact to be determined by the jury from the evidence before them; and if you find that the defendant company blew off steam

therefore not objectionable, as assuming facts, to instruct that, "if the jury believe from the evidence * * * that both of the defendants concurred in laying hands on him * * *;"[38] and an instruction that, if the defendant did certain acts specified, they should infer a fraudulent intent, is not objectionable as assuming that these acts are established.[39] Instructions stating legal principles in the abstract, though applicable to the evidence in the case, cannot be objected to as assuming the existence of facts not proven.[40] So it is not trenching upon the province of the jury to say that evidence has been given tending to establish a fact,[41] or to use the words, "as you may find,"[42] or to tell the jury that the plaintiff "claimed" that a certain fact was shown by the evidence,[43] or to state that one of the parties "claimed" certain facts to have been shown,[44] or to state matters of common knowledge.[45] An instruction that, in estimating plaintiff's damages, the jury might take into consideration physi-

from its engine at said crossing, and thereby frightened the horse then being driven on such crossing by plaintiff's wife, and the agents or employes of defendant knew of the presence of plaintiff's wife on said track, then you will further consider whether or not the blowing off of steam was negligence, and whether same frightened said horse,"—is not objectionable as assuming "as a fact that the horse was just being driven upon the crossing when the steam escaped, etc." San Antonio & A. P. Ry. Co. v. Belt (Tex. Civ. App.) 59 S. W. 607.

[38] Mullin v. Spangenberg, 112 Ill. 140.

[39] State v. Thompson, 19 Iowa, 299.

[40] Taylor v. Territory (Ariz.) 64 Pac. 423.

[41] State v. Watkins, 11 Nev. 30; Graham v. Nowlin, 54 Ind. 389.

[42] Bronnenburg v. Charman, 80 Ind. 475, in which case the court instructed: "You may find for the plaintiff for any amount which you may find was collected and not paid over, * * * or you may find for the whole amount collected and not paid over, after deducting such amount as you may find was consumed by fire."

[43] Carraher v. San Francisco Bridge Co., 81 Cal. 98.

[44] Hawley v. Chicago, B. & Q. Ry. Co., 71 Iowa, 717.

[45] Harris v. Shebek, 151 Ill. 287.

cal injuries, if any, resulting from the injury, does not assume that the injuries complained of in the declaration were inflicted.[46] So, an instruction to find such sum as will compensate for the injury, if any, does not assume the injury.[47] An instruction that defendant "had no right to do" certain specified things does not assume that he did them, or take the question of fact from the jury.[48] An instruction that a husband had the right to give personalty to his wife, without any writing evidencing the gift, and that such a gift would be valid as against the heirs, does not improperly assume that the gift was in fact made.[49] An instruction that a servant "did not accept risks which grew out of any defects in the road which rendered it more hazardous than reasonable, unless he had knowledge of the defects," does not assume the existence of defects.[50] In an action against an agent and others by the principal for fraud and conspiracy, if an instruction that, "if plaintiff's agent acted in entire good faith, and the job was put up on him, instead of on plaintiff, then plaintiff has no claim against this party," is objected to as containing an assumption, attention should be called to the specific ground, as that objection would not be likely to occur to any one without notice.[51] An instruction that "it is important that you determine whether the alleged assault, or assault and battery, made upon W. [the deceased] by defendant, either alone or in company with others, was an unlawful or a lawful act," does not assume that such assault was proved.[52] Where an answer sets up payment as a consequence

[46] Evans v. City of Joplin, 84 Mo. App. 296.
[47] Western Union Tel. Co. v. Linn (Tex. Civ. App.) 23 S. W. 895.
[48] Timm v. Bear, 29 Wis. 254.
[49] Hopper v. Hopper, 84 Mo. App. 117.
[50] Taylor, B. & H. Ry. Co. v. Taylor, 79 Tex. 104.
[51] Emmons v. Alvord, 177 Mass. 466.
[52] Patterson v. State, 70 Ind. 341.

of certain transactions between plaintiff and defendant, an instruction which speaks of "payment of the note sued on by plaintiff to defendants, as alleged in their answer," is not misleading as assuming a payment in money.[53] An instruction containing the statement that "plaintiffs, by their reply, give us a history of the transaction," need not further state that such history is plaintiff's version of the facts and does not assume that the history is true.[54] "In an action for wages, an instruction which tells the jury to 'find in favor of the plaintiff such amount as they may believe * * * to be the reasonable value of such services' " does not assume that the services were of some value.[55] An instruction that "it is incumbent on the defendants, under the contract alleged in plaintiff's declaration, to show an offer to perform, or some sufficient excuse for nonperformance, on their part, in order to excuse themselves from liability to pay damages, if the evidence shows that the plaintiffs were ready and willing to perform their part of the contract," does not assume the existence of the contract.[56] Where the evidence was that the defendant struck the deceased on the head with a heavy club, causing death within a few hours, an instruction that, "if the defendant, in the heat of passion, and without design to cause death, by 'means and use of a dangerous weapon, to-wit, a wooden club,' feloniously killed the deceased, and that the killing was not justifiable or excusable, they will find him guilty of manslaughter in the third degree, is not objectionable as assuming that the club was a dangerous weapon."[57]

[53] Semple v. Crouch, 8 Mo. App. 593.
[54] De St. Aubin v. Field (Colo.) 62 Pac. 199.
[55] Blackman v. Cowan, 11 Mo. App. 589.
[56] Bird v. Forceman, 62 Ill. 212.
[57] State v. Grayor, 16 Mo. App. 558, 89 Mo. 600.

§ 32. Assumptions in opposition to evidence.

It is, of course, erroneous to assume as established a fact or state of facts in direct opposition to the evidence.[58] A request for an instruction, in an action of ejectment, that a deed to a certain person under a certain name is a transfer of rights to a person having the same surname, but whom the evidence shows to be a different person, is properly refused.[58a]

§ 33. Assumption of facts not supported by any evidence.

Where there is absolutely no evidence in the case upon which a finding of certain facts could be based, it is, of course, erroneous for the court to assume in the instructions the existence of such facts,[59] and such error will generally furnish sufficient ground for reversal.[60] Requests for in-

[58] Bowman v. Roberts, 58 Miss. 126; McCown v. Shrimpf, 21 Tex. 22; Texas Land & Loan Co. v. Watson, 3 Tex. Civ. App. 233; Moffatt v. Conklin, 35 Mo. 453; Leslie v. Smith, 32 Mich. 64.

[58a] Worley v. Hicks (Mo.) 61 S. W. 818.

[59] Kidd v. State, 83 Ala. 58; Little Rock & Ft. S. Ry. Co. v. Wells, 61 Ark. 354; People v. Strong, 30 Cal. 151; People v. Lee Chuck, 74 Cal. 30; Cain v. Cain, 1 B. Mon. (Ky.) 213; Gerren v. Hannibal & St. J. R. Co., 60 Mo. 405; Chouteau v. Searcy, 8 Mo. 733; Hood v. Olin, 68 Mich. 165; Brower v. Edson, 47 Mich. 91; Turner v. O'Brien, 11 Neb. 108; Newton Wagon Co. v. Diers, 10 Neb. 284; Perkins v. Attaway, 14 Ga. 27; Musselman v. East Brandywine & W. R. Co. (Pa.) 32 Leg. Int. 404; Kelly v. Eby, 141 Pa. 176; Chicago W. D. Ry. Co. v. Mills, 91 Ill. 39; Pease v. Catlin, 1 Ill. App. 88; Russell v. Minteer, 83 Ill. 150; Hill v. Childress, 10 Yerg. (Tenn.) 515; Moore v. State, 65 Ind. 382; Railway Passenger Assur. Co. v. Burwell, 44 Ind. 460; Texas Land & Loan Co. v. Watson (Tex. Civ. App.) 22 S. W. 873; Holtzclaw v. State, 26 Tex. 682; Jones v. Randolph, 104 U. S. 108; Ward v. United States, 14 Wall. (U. S.) 28; Howes v. Carver, 3 Iowa, 257; State v. Harrington, 12 Nev. 125; Schoenberg v. Voigt, 36 Mich. 310; Hart v. Firzlaff, 67 Mich. 514; Flanders v. Stark, 37 N. H. 424; Hill v. Spear, 50 N. H. 253.

[60] Kidd v. State, 83 Ala. 58; Musselman v. East Brandywine & W.

structions affected with this vice should, of course, be refused.[61] Thus, an instruction assuming that an admission has been made by the prosecution, which has not in fact been made, is erroneous.[62] So, where there is no evidence before the court that any witness had sworn falsely, but the main witness for plaintiff, before his final dismissal as a witness, asks leave to make a retraction and correction of part of his testimony, it is error to give in charge to the jury the maxim, *Falsus in uno, falsus in omnibus.*[63] An instruction assuming the existence of a partnership between the parties, and stating the law of partnership, is erroneous, where there is no evidence of such partnership;[64] and where there was no testimony of grossly unskilled advice given by counsel (unless the failure to recover constituted such evidence), a charge "that, if the claimants made this claim under the advice of counsel, which was wrong and grossly unskillful," etc., this was held erroneous, as charging upon a supposed state of facts which did not exist.[65]

§ 34. Assuming nonexistence of fact in absence of evidence.

Where there is no evidence tending to prove a matter in

R. Co. (Pa.) 32 Leg. Int. 404; Kelly v. Eby, 141 Pa. 176; Hill v. Childress, 10 Yerg. (Tenn.) 515; Flanders v. Stark, 37 N. H. 424; Newton Wagon Co. v. Diers, 10 Neb. 284; Bowie v. Spaids, 26 Neb. 635.

61 Washington & G. R. Co. v. Gladmon, 15 Wall. (U. S.) 401; Dorsey v. State, 1 Tex. App. 33; Flanagan v. Boggess, 46 Tex. 330; People v. Cotta, 49 Cal. 166; Mascheck v. St. Louis R. Co., 3 Mo. App. 600; Chicago W. D. Ry. Co. v. Mills, 91 Ill. 39; Chicago Anderson Pressed Brick Co. v. Reinnelger, 140 Ill. 334; Chase v. Horton, 143 Mass. 118; Rushmore v. Hall, 12 Abb. Pr. 420; Lebanon Mut. Ins. Co. v. Losch, 109 Pa. 100; Harper v. Philadelphia Traction Co., 175 Pa. 129; Crawford v. Roberts, 50 Cal. 235.

62 People v. Cotta, 49 Cal. 166.

63 Kay v. Noll, 20 Neb. 380.

64 Freeman v. Exchange Bank, 59 Ill. App. 197.

65 Perkins v. Attaway, 14 Ga. 27.

issue, the court may assume that the fact has not been proved, and should direct the jury that there is no evidence to prove it.[66]

§ 35. Assuming facts by way of illustration.

It is not a violation of the rule against the assumption of facts in instructions for the court to assume facts merely in order to illustrate the application of a proposition of law pertinent to the case.[67] This is a common practice, and no intelligent juror can be misled by such illustrations.[68]

Where assumed facts are used to illustrate a proposition of law, error cannot be assigned simply because the facts assumed conform to a theory of the case urged by the opposite party.[69] And in a criminal case the court may illustrate its instructions to the jury by an hypothesis unfavorable to the prisoner, provided the evidence justifies it, and need not say anything of an opposite state of facts, if there be no evidence of these facts before the jury.[70] Where assumed facts are used by way of illustration, it should be impressed

[66] State v. Banks, 48 Ind. 197; Fripp v. Williams, Birnie & Co., 14 S. C. 510; State v. Cardwell, 44 N. C. 245; McCombs v. North Carolina R. Co., 67 N. C. 193; Wells v. Clements, 48 N. C. 168; Redman v. Roberts, 23 N. C. 479; Willis v. Branch, 94 N. C. 142; Horan v. Long, 11 Tex. 230; Underwood v. American Mortgage Co., 97 Ga. 238; People v. Sternberg, 111 Cal. 3, 11; Sharp v. Parks, 48 Ill. 511.

[67] Melledge v. Boston Iron Co., 5 Cush. (Mass.) 180; Central Railroad & Banking Co. v. Smith, 80 Ga. 526; State v. Obregon, 10 La. Ann. 799; Pressley v. State, 19 Ga. 192; People v. Williams, 59 Cal. 674; Gage v. Payne, Wright (Ohio) 678; Masters v. Town of Warren, 27 Conn. 293; Gullikson v. Gjorud, 82 Mich. 503; Long v. Township of Milford, 137 Pa. 122; Stephen v. State, 11 Ga. 225; People v. Campbell, 30 Cal. 312; McConnell v. State, 67 Ga. 635; Bundy v. McKnight, 48 Ind. 503.

[68] Masters v. Town of Warren, 27 Conn. 300.

[69] Long v. Township of Milford, 137 Pa. 122.

[70] Pressley v. State, 19 Ga. 192.

upon the minds of the jury that such facts have not been proven in the case,[71] and in such case it is proper to refer the jury to the testimony, and direct them to examine it for themselves, and to remind them that they are the exclusive judges of the facts.[72] So it has been said that, where the court assumes the facts by way of illustration, this should be done by remarks of a general character, in order not to induce a particular verdict.[73]

In instructing the jury relative to the weight of positive and negative testimony, it has been held that the court may properly instruct "that the existence of a fact testified to by one witness positively was rather to be believed than that it did not exist because of many witnesses testifying that they did not see or know of its having transpired, although they had the same opportunity for observation."[74] But it has been held in an action against a city to recover for an injury received from a defect in a culvert that an instruction "that positive evidence is entitled to more weight than negative evidence; and that, if twelve men were in a room where there was a clock, and one of them should swear he heard the clock strike, and the eleven should swear they did not hear it strike, then the jury, in such a case, should give a judgment for one against the eleven; and if H. and G. swear they saw a hole in the culvert in question, and twice as many witnesses, equally as credible, say they did not see holes in the culvert, then positive evidence should be taken by the jury,"—is objectionable, and not apt as an illustration, because it omits the element of the reasonableness

[71] Bundy v. McKnight, 48 Ind. 503; Masters v. Town of Warren, 27 Conn. 300; Long v. Township of Milford, 137 Pa. 122.

[72] Stephen v. State, 11 Ga. 225.

[73] State v. Obregon, 10 La. Ann. 799.

[74] McConnell v. State, 67 Ga. 635. See, also, post, c. 25, "Cautionary Instructions."

of the fact testified to.[75] So, the court may illustrate a case by an analogy; as, for instance, where the analogy was between a wife's authority to buy necessaries on her husband's credit, and the power to purchase supplies by one who is hired to run a hotel.[76]

Where, in charging the jury, the court correctly states the law governing the case, but exception is taken to an illustration used by the court explanatory of a legal principle, the reviewing court will not narrowly view the illustration, if satisfied that, whether right or wrong, it was not calculated to mislead, and did not in fact mislead, the jury.[77]

An illustration, not founded upon testimony, may be given in connection with correct principles of law, unless it misleads.[78] The court is not required to hypothetically illustrate in the language of the request. It may give the law as requested, leaving out all suppositive illustrations of the legal principles, if it sees fit to do so.[79]

§ 36. Assumption of admitted facts.

It is the province of the jury to determine the existence or nonexistence of disputed facts, but it would be absurd to allow or require them to pass upon facts as to which there is no dispute, and which are admitted by the parties. Accordingly, instructions are held to be erroneous which treat as in issue and submit to the jury facts which are admitted by the pleadings,[80] or upon the trial.[81] The existence of

[75] City of Greenville v. Henry, 78 Ill. 150.

[76] Beecher v. Venn, 35 Mich. 466.

[77] Wilson v. State, 33 Ga. 207. To same effect, see Masters v. Town of Warren, 27 Conn. 300.

[78] State v. Alverez, 7 La. Ann. 284; Parker v. Glenn, 72 Ga. 638.

[79] Whitley v. State, 66 Ga. 659. See, also, Whitcomb v. Town of Fairlee, 43 Vt. 671.

[80] Orth v. Clutz's Adm'r, 18 B. Mon. (Ky.) 223.

[81] Blaul v. Tharp, 83 Iowa, 665.

facts which are admitted by the pleadings may be properly assumed in the instructions.[82] It is also proper to assume the existence of facts which are treated by the parties during the trial as conceded facts, whether put in issue by the pleadings or not.[83] "What all parties to a litigation treat and assume as a fact during the entire progress of the trial before the court, the court, without error, may assume for convenience in drafting its instructions to the jury."[84] So,

[82] Wiley v. Keokuk, 6 Kan. 94; Wiley v. Man-a-to-wah, 6 Kan. 111; Brown v. Emerson, 66 Mo. App. 63.

[83] State v. Rash, 34 N. C. 382; State v. Williams, 47 N. C. 194; Pope v. Kansas City Cable Ry. Co., 99 Mo. 400; Taylor v. Scherpe & Koken Architectural Iron Co., 133 Mo. 349; McManus v. Woolverton, 19 N. Y. Supp. 545; St. Louis, J. & S. R. Co. v. Kirby, 104 Ill. 345; Martin v. People, 13 Ill. 341; Louisville, E. & St. L. C. R. Co. v. Utz, 133 Ind. 265; Wood v. Porter, 56 Iowa, 161; McKenna v. Hoy, 76 Iowa, 322; Walker v. Wootten, 18 Ga. 119; Johnson v. State, 30 Ga. 426; Cooper v. Denver & R. G. R. Co., 11 Utah, 46; Bragg v. Bletz, 7 D. C. 105; People v. Hobson, 17 Cal. 424; People v. Phillips, 70 Cal. 61; Waters' Lessee v. Riggin, 19 Md. 536; Fahey v. State, 27 Tex. App. 146; Hedgepeth v. Robertson, 18 Tex. 858; Burt v. Long, 106 Mich. 210; Wright v. Towle, 67 Mich. 255; Mooney v. York Iron Co., 82 Mich. 263; Kramer v. Gustin, 53 Mich. 291; Madden v. Blythe, 7 Port. (Ala.) 258; Thompson v. Johnson (Tex. Civ. App.) 58 S. W. 1030. A charge which states that plaintiff brings the action as the successor of a receiver who died, and that plaintiff stands in the place of such receiver, is not a charge upon the facts, where the facts stated are admitted or adjudicated. Pickett v. Fidelity & Casualty Co. (S. C.) 38 S. E. 160. By the plea of not guilty, the defendant puts in issue every material allegation of the indictment, and, before the jury can rightfully find him guilty, the people are bound to establish, by competent evidence, his guilt beyond all reasonable doubt. It is the province of the jury to determine the weight of the evidence in the case, and what admissions, if any, have been made by defendant, and the effect thereof, and an instruction that it is admitted by the defendant, etc., is error. Hellyer v. People, 186 Ill. 550.

[84] Taylor v. Scherpe & Koken Architectural Iron Co., 133 Mo. 349. See, also, Martin v. People, 13 Ill. 341; Hanrahan v. People, 91 Ill. 142.

in an action for personal injuries, the court may assume that plaintiff suffered some pain and injury, where the cause was tried on the theory that she did suffer some injury, but that defendant was not liable because of defendant's contributory negligence.[85] If a party, by his own admissions, shows facts upon which the court is asked to make a ruling against him, it may assume such facts to be true, because he cannot contradict them.[86] Thus, it is not error to charge that an illegal act has been committed by the defendant, when the answer admits facts that show that he committed acts which are illegal.[87] "So, where a prisoner indicted for murder does not pretend that, if guilty of the homicide, he is guilty of anything but murder, but relies in his defense solely upon the ground that he was not guilty of the homicide," the court may properly assume that the homicide was murder.[88] Where the fact of employment is in issue by the pleadings, but such fact is admitted by the opposite party, the court may properly instruct the jury that the employment is an established fact.[89] Where, on a trial for assault with intent to murder by shooting, the defense was insanity, and defendant "admitted the shooting as charged, and that it was done under circumstances that would have constituted murder if the defense set up is not good," it was not error to instruct that, "if the defendant was not insane at the time of the shooting, then you ought to find him guilty."[90] A party cannot complain of the assumption of facts by the

[85] Hamilton v. Great Falls St. Ry. Co., 17 Mont. 334.

[86] Waters' Lessee v. Riggin, 19 Md. 536; Finnell v. Walker, 48 Ill. App. 331.

[87] Wiley v. Keokuk, 6 Kan. 94.

[88] State v. Rash, 34 N. C. 382.

[89] Louisville, E. & St. L. C. R. Co. v. Utz, 133 Ind. 265; Cooper v. Denver & R. G. R. Co., 11 Utah, 46.

[90] People v. Hobson, 17 Cal. 424.

court, if the court has fallen into the error at the invitation of the party complaining, and through adopting the language of an instruction requested by him.[91] If the instructions assume that certain facts are admitted by both parties, they will be sustained on appeal, in the absence of anything in the record to show the contrary.[92] So, where all the facts are agreed upon by counsel, it is not an invasion of the province of the jury to assume the existence of such facts,[93] and an instruction assuming that such facts are still in issue may properly be refused.[94]

§ 37. Assumption of facts supported by strong and uncontradicted evidence.

According to a large number of decisions, there is no error in assuming the existence of facts, or stating that they have been proved, where the evidence in support of them is strong and conclusive, and there is no evidence in conflict therewith.[95] According to others, such an assumption is harm-

[91] City of Chicago v. Moore, 139 Ill. 201.

[92] Hinds v. Harbou, 58 Ind. 121; Drinkout v. Eagle Machine Works, 90 Ind. 423; Weekes v. Cottingham, 58 Ga. 559; Walsh v. Aetna Life Ins. Co., 30 Iowa, 133.

[93] State v. Pritchard, 16 Nev. 101.

[94] Stewart v. Nelson, 79 Mo. 522.

[95] Alabama: Drennen v. Smith, 115 Ala. 396; Gillespie v. Battle, 15 Ala. 276; Henderson v. Mabry, 13 Ala. 713; Marx v. Leinkauff, 93 Ala. 453; Williams v. Shackelford, 16 Ala. 318; Nelms v. Williams, 18 Ala. 650.

California: People v. Phillips, 70 Cal. 61; Watson v. Damon, 54 Cal. 278; People v. Messersmith, 61 Cal. 246.

Georgia: Jones v. State, 65 Ga. 621.

Illinois: Cook County v. Harms, 108 Ill. 151; Garretson v. Becker, 52 Ill. App. 255; City of Paxton v. Frew, 52 Ill. App. 393.

Indiana: Home Ins. Co. v. Marple, 1 Ind. App. 411; Smith v. State, 28 Ind. 321; Chicago, St. L. & P. R. Co. v. Spilker, 134 Ind. 380.

less error, and not a ground for reversal.[96] It has been said to be better for the court, in charging the jury in a criminal case, to avoid assuming any material fact as proved, no matter how clearly such fact seems to be established;[97] but as a general rule, where the evidence of a fact is positive, and not disputed or questioned, it is to be taken as an established

Iowa: Hughes v. Monty, 24 Iowa, 499; State v. Meshek, 61 Iowa, 316; Thorp v. Craig, 10 Iowa, 461.

Kansas: State v. Mortimer, 20 Kan. 93; State v. Herold, 9 Kan. 194.

Kentucky: Thompson v. Brannin, 19 Ky. Law Rep. 454.

Michigan: Gillett v. Knowles, 97 Mich. 77; McDonnell v. Ford, 87 Mich. 198; Wisner v. Davenport, 5 Mich. 501.

Minnesota: Alden v. City of Minneapolis, 24 Minn. 254.

Missouri: Carroll v. Missouri Pac. Ry. Co., 88 Mo. 248; Herriman v. Chicago & A. R. Co., 27 Mo. App. 435; State v. Moore, 101 Mo. 316.

Montana: Hogan v. Shuart, 11 Mont. 498.

Nebraska: Gran v. Houston, 45 Neb. 813; Camp v. Pollock, 45 Neb. 771.

Nevada: Menzies v. Kennedy, 9 Nev. 152.

Pennsylvania: Com. v. Mudgett, 174 Pa. 211.

South Carolina: Williams v. Connor, 14 S. C. 621.

Texas: Houston & T. C. R. Co. v. Berling, 4 Tex. Civ. App. 544; Missouri, K. & T. Ry. Co. v. Rogers (Tex. Civ. App.) 40 S. W. 849; Reynolds v. Weinman (Tex. Civ. App.) 40 S. W. 560; Western Union Tel. Co. v. Cooper (Tex.) 20 S. W. 47; Trinity & S. Ry. Co. v. Lane, 79 Tex. 643; Blum v. Schram, 58 Tex. 524.

Washington: Edwards v. Territory, 1 Wash. 195.

Wisconsin: Engmann v. Immel, 59 Wis. 249.

United States: Wiborg v. United States, 163 U. S. 632.

[96] Turpin's Heirs v. McKee's Ex'rs, 7 Dana (Ky.) 305; Heirn v. McCaughan, 32 Miss. 17; Cook v. Whitfield, 41 Miss. 541; Lamar v. Williams, 39 Miss. 342; Mattingly v. Lewisohn, 13 Mont. 508; Fields v. Wabash, St. L. & P. Ry. Co., 80 Mo. 206; Barr v. Armstrong, 56 Mo. 577; Caldwell v. Stephens, 57 Mo. 589; Walker v. City of Kansas, 99 Mo. 647; Gerke v. Fancher, 158 Ill. 375; City of Lanark v. Dougherty, 45 Ill. App. 266; Fullen v. Coss, 82 Ind. 548; Koerner v. State, 98 Ind. 7; Astley v. Capron, 89 Ind. 167; Farquhar v. Toney, 5 Humph. (Tenn.) 502.

[97] People v. Dick, 32 Cal. 213.

fact, and the charge of the court should proceed upon that basis.[98] So, it has been held that, if a fact is shown by undisputed testimony, the court should treat the fact as established, and refuse to instruct as to the necessity of proof of such fact,[99] and that it is error to submit such fact to the jury as being in dispute,[100] because this would tend to confuse and mislead the jury.[101] "The rule which forbids the judge to charge upon the weight of evidence does not require or authorize him to assume as doubtful that which is clear and indisputable, or to assume hypotheses at variance with

[98] International & G. N. R. Co. v. Stewart, 57 Tex. 166. See, also, Kelly v. Rowane, 33 Mo. App. 440. Where the age of plaintiff is not a contradicted fact, the court may assume that he is an old or young man, as the case may be, in an action for personal injuries. Bertram v. People's Ry. Co., 154 Mo. 639. Where the exact age of a child, for whose death an action is brought, is not material, and her age is not in dispute, the court may assume that she is a young girl, or of a certain age. Schmidt v. St. Louis R. Co. (Mo.) 63 S. W. 834. But an instruction assuming that a child fifteen years old was "of tender years, and imperfect discretion," was held erroneous. Day v. Citizens' Ry. Co., 81 Mo. App. 471.

[99] Muir v. Miller, 82 Iowa, 700; Wright v. Hardy, 22 Wis. 334.

[100] Texas & P. Ry. Co. v. Moore, 8 Tex. Civ. App. 289; McFall v. McKeesport & Y. Ice Co., 123 Pa. 253; Com. v. Ruddle, 142 Pa. 144; Hauk v. Brownell, 120 Ill. 161; Wintz v. Morrison, 17 Tex. 372; Pennsylvania Mining Co. v. Brady, 16 Mich. 332; Lange v. Perley, 47 Mich. 352; Bonner v. Green, 6 Tex. Civ. App. 100; Seligman v. Ten Eyck's Estate, 49 Mich. 109; Richardson v. Coddington, 45 Mich. 338; Township of Medina v. Perkins, 48 Mich. 70; Hunt v. Supreme Council, O. C. F., 64 Mich. 671; Chadwick v. Butler, 28 Mich. 349; Gibbons v. Wisconsin Valley R. Co., 62 Wis. 546; Marks v. Robinson, 82 Ala. 69; White v. Stillman, 25 N. Y. 541; Goodman v. Simonds, 20 How. (U. S.) 359. Bellefontaine Ry. Co. v. Snyder, 24 Ohio St. 670, where it was held not improper to refuse instructions assuming the existence of material facts in issue, although they were clearly proven by the evidence.

[101] Wintz v. Morrison, 17 Tex. 372; Township of Medina v. Perkins, 48 Mich. 70.

the certain fact."[102] So, it has been held that, if all the evidence on both sides tends to establish a fact, it should not be left to the jury as an open question.[103] On such a state of proof, a charge which in effect tells the jury that it is competent for them to find either way—for or against the existence of the fact so proved—assumes that there is evidence in the case tending as well to disprove such fact as to prove it.[104]

Where an injury is of such a nature that pain and anguish necessarily follow its infliction, an instruction may assume that there was such pain and mental anguish.[105] If an instruction assumes the existence of facts, it will be presumed correct on appeal, if the record shows no conflict in the evidence as to the fact assumed.[106] Where the fact depends upon inferences to be drawn from other facts in evidence, it is improper for the court to draw the inference and assume the fact, although there is no conflict in the evidence, as it is the exclusive province of the jury to determine what inferences shall be drawn.[107] So, where the credibility of witnesses is involved, the court should not take the question from the jury by assuming the fact in the instructions.[108] The

[102] Wintz v. Morrison, 17 Tex. 387. See, also, State v. Tettaton, 159 Mo. 354.

[103] Gavigan v. Evans, 45 Mich. 597; Druse v. Wheeler, 26 Mich. 189; Douglass v. Geiler, 32 Kan. 499; Crossman v. Lurman, 57 App. Div. (N. Y.) 393.

[104] Druse v. Wheeler, 26 Mich. 189.

[105] Dunn v. Northeast Electric Ry. Co., 81 Mo. App. 42.

[106] People v. Lee Sare Bo, 72 Cal. 623; Patcheli v. Jaqua, 6 Ind. App. 70.

[107] Schulz v. Schulz, 113 Mich. 502. But it is not error for the court to assume, in an instruction, the existence of a collateral fact, established by uncontradicted evidence, which tends to prove one of the constituent elements of a crime. Welsh v. State, 60 Neb. 101.

[108] Saar v. Fuller, 71 Iowa, 427. See, also, ante, §§ 3-5, "Questions of Law and Fact." An instruction assuming the existence of a ma-

mere fact that the evidence tending to prove a fact is uncontradicted will not always justify the court in assuming the existence of such fact.[109] A fact that must be proved affirmatively is not established by the absence of evidence to the contrary.[110] No harm is done by submitting undisputed facts to the jury.[111]

terial fact, though based upon the uncontradicted testimony of the plaintiff, is erroneous, since the credibility of an interested witness is for the jury. Turner v. Grobe (Tex. Civ. App.) 59 S. W. 583.

[109] People v. Webster, 111 Cal. 381; Jonas v. Field, 83 Ala. 449; Charleston Ins. & Trust Co. v. Corner, 2 Gill (Md.) 411; Byers v. Wallace, 87 Tex. 503; Rhodes v. Lowry, 54 Ala. 4; Saar v. Fuller, 71 Iowa, 427; Merchants' Exchange Nat. Bank v. Wallach, 20 Misc. Rep. (N. Y.) 309. This principle was well illustrated in the following case: On a prosecution for rape, the testimony of the prosecuting witness that she was under the age of consent was uncontradicted. The refusal of the trial judge to assume that she was under the age of consent in his instructions was sustained on appeal, for the following reasons: "A jury in a criminal case is not bound to believe the uncontradicted statement of a witness. * * * The conduct of this witness when upon the stand may have shown her to have been lying. Her appearance may have shown her to have been of mature years. The inherent improbabilities of her testimony may have placed it beyond the pale of belief. Would such uncontradicted testimony be conclusive if the witness, by her appearance, was shown to be wrinkled and gray with age?" People v. Webster, 111 Cal. 381. In another case, where only one person testified to the value of certain property, it was held that it could not be assumed that his estimate was correct, though his testimony was uncontradicted. American Oak Extract Co. v. Ryan, 112 Ala. 337.

[110] Byers v. Wallace, 87 Tex. 503.

[111] Atchison, T. & S. F. Ry. Co. v. Cuniffe (Tex. Civ. App.) 57 S. W. 692.

CHAPTER IV

CHARGING WITH RESPECT TO MATTERS OF FACT, OR COMMENTING ON WEIGHT OF EVIDENCE.

§ 38. Jurisdictions Where Practice Permissible.
39. Same—Rule in Michigan and New Hampshire.
40. Same—Federal Practice as Affected by State Practice.
41. Same—How Strong an Expression of Opinion is Permissible.
42. Same—Necessity of Expressing Opinion.
43. Same—Necessity of Instructing that Opinion is Merely Advisory.
44. Same—Effect of Erroneous Opinion.
45. Same—When Expression of Opinion is Ground for Reversal.
46. Jurisdictions Where Practice is Prohibited.
47. Same—Instructions Held to Violate Prohibition.
48. Same—Instructions Held not to Violate Prohibition.
49. Same—Curing Error by Other Instructions.
50. Same—Violation of Rule Otherwise than by Express Instructions.
51. Same—Indicating Opinion by Questions Asked the Jury.

§ 38. Jurisdictions where practice permissible.

In the majority of the states, statutes or constitutional provisions exist expressly prohibiting the court from charging juries with respect to matters of fact, or commenting on the evidence.[1] But at common law, and in jurisdictions where no such statutory or constitutional provisions exist, it is proper and usual for the trial judge, in charging the jury, to comment on the evidence, and state what it does or does not conduce to prove, or to express his opinion as to the weight of the evidence, or any part of it,[2] but, in so doing,

1 See post, § 55 et seq.

2 Hale, Hist. Com. Law, 147; Fisher's Case, 1 Cobbett, State Tr.

the jury must be made aware of their right and duty to decide the facts on their own responsibility. The ultimate decision of the facts must be fairly left to the jury,—the

395; Solarte v. Melville, 7 Barn. & C. 435; Petty v. Anderson, 3 Bing. 170; Belcher v. Prittie, 4 Moore & S. 295, 10 Bing. 408; Foster v. Steele, 5 Scott, 28; Attorney General v. Good, 1 McClel. & Y. 285; Pennell v. Dawson, 18 C. B. 355; Davidson v. Stanley, 2 Man. & G. 721; Calmady v. Rowe, 6 C. B. 892; Colledge's Case, 8 Cobbett, State Tr. 550; Sutton v. Sadler, 3 C. B. (N. S.) 87; Vanarsdale v. Hax (C. C. A.) 107 Fed. 878; Aerheart v. St. Louis, I. M. & S. Ry. Co. (C. C. A.) 99 Fed. 907; Illinois Cent. R. Co. v. Davidson (C. C. A.) 76 Fed. 517; Chicago, R. I. & P. Ry. Co. v. Stahley (C. C. A.) 62 Fed. 363; Mitchell v. Harmony, 13 How. (U. S.) 130; Consequa v. Willings, 1 Pet. C. C. 225, Fed. Cas. No. 3,128; Simmons v. United States, 142 U. S. 148; Rucker v. Wheeler, 127 U. S. 91; Watts v. Southern Bell Telephone & Telegraph Co., 66 Fed. 453; St. Louis, I. M. & S. Ry. Co. v. Phillips (C. C. A.) 66 Fed. 35; Aetna Life Ins. Co. v. Ward, 140 U. S. 76; Pinkerton v. Ledoux, 129 U. S. 346; McLanahan v. Universal Ins. Co., 1 Pet. (U. S.) 182; Russell v. Ely, 2 Black (U. S.) 575; Foley v. Loughran, 60 N. J. Law, 464; Smith v. State, 41 N. J. Law, 374; Engle v. State 50 N. J. Law, 272; Castner v. Sliker, 33 N. J. Law, 507; Hager v. Hager, 38 Barb. (N. Y.) 92; Allis v. Leonard, 58 N. Y. 288; Massoth v. Delaware & H. Canal Co., 64 N. Y. 524; Althorf v. Wolfe, 2 Hilt. 344, 22 N. Y. 355; Graham v. Cammann, 2 Caines (N. Y.) 168; Bruce v. Westervelt, 2 E. D Smith (N. Y.) 440; Hurlburt v. Hurlburt, 128 N. Y. 420; Griffith v. Utica & M. R. Co., 63 Hun (N. Y.) 626; Durkee v. Marshall, 7 Wend. (N. Y.) 312; Hunt v. Bennett, 4 E. D. Smith (N. Y.) 647; Jackson v. Packard, 6 Wend. (N. Y.) 415; Stephens v. People, 4 Parker, Cr. R. (N. Y.) 396; Ames v. Cannon River Mfg. Co., 27 Minn. 248; First Nat. Bank of Decorah v. Holan, 63 Minn. 525; Com. v. Zuern, 16 Pa. Super. Ct. 588; Didier v. Pennsylvania Co., 146 Pa. 582; Follmer v. McGinley, 146 Pa. 517; Shoolin v. Com., 106 Pa. 369; Williams v. Carr, 1 Rawle (Pa.) 420; Speer v. Rowley, 32 Leg. Int. (Pa.) 100; Burr v. Sim, 4 Whart. (Pa.) 150; Cathcart v. Com., 37 Pa. 108; Bitner v. Bitner, 65 Pa. 347; Hamet v. Dundass, 4 Pa. 178; Porter v. Seiler, 23 Pa. 424; Springer v. Stiver, 16 Pa. Super. Ct. 184; Long v. Ramsay, 1 Serg. & R. (Pa.) 72; Lohman v. McManus, 23 Pa. Co. Ct. R. 497, 9 Pa. Dist. R. 223; Sailor v. Hertzogg, 10 Pa. 296; Com. v. Warner, 13 Pa. Super. Ct. 461; Leibig v. Steiner, 94 Pa. 466; Com. v. Winkelman, 12 Pa. Super. Ct. 497; Setchel v. Keigwin, 57 Conn. 478; Comstock's Appeal, 55 Conn. 214; First Baptist Church v. Rouse, 21

expression of opinion must stop short of a binding direction,[3]—and they must be impressed with the feeling that the responsibility of their verdict rests on them alone, and not

Conn. 167; Occum Co. v. A. & W. Sprague Mfg. Co., 34 Conn. 538; State v. Lynott, 5 R. I. 295; Sawyer v. Phaley, 33 Vt. 69; Yale v. Seely, 15 Vt. 221; Stevens v. Talcott, 11 Vt. 25; Missisquoi Bank v. Evarts, 45 Vt. 296; Pettingill v. Elkins, 50 Vt. 431; Rowell v. Fuller, 59 Vt. 688; People v. Lee, 2 Utah, 441; Goldsworthy v. Town of Linden, 75 Wis. 24; Ketchum v. Ebert, 33 Wis. 611; Massuere v. Dickens, 70 Wis. 91; Benedict v. State, 14 Wis. 459; Abram's Lessee v. Will, 6 Ohio, 164; Bossert v. State, Wright (Ohio) 113. Where the credibility of the plaintiff was important, it is proper for the trial judge to call the attention of the jury to inconsistencies in his testimony. Brinton v. Walker, 15 Pa. Super. Ct. 449.

[3] Stevens v. Talcott, 11 Vt. 25; State v. Lynott, 5 R. I. 295; Sawyer v. Phaley, 33 Vt. 69; Aerheart v. St. Louis, I. M. & S. Ry. Co. (C. C. A.) 99 Fed. 907; Illinois Cent. R. Co. v. Davidson (C. C. A.) 76 Fed. 517; Herrick v. Quigley, 101 Fed. 187, 41 C. C. A. 294; Foley v. Loughran, 60 N. J. Law, 464; Vanarsdale v. Hax (C. C. A.) 107 Fed. 878; Chicago, R. I. & P. Ry. Co. v. Stahley (C. C. A.) 62 Fed. 363; Rucker v. Wheeler, 127 U. S. 91; Watts v. Southern Bell Telephone & Telegraph Co., 66 Fed. 453; Atchison, T. & S. F. R. Co. v. Howard (C. C. A.) 49 Fed. 206; Sorenson v. Northern Pac. R. Co., 36 Fed. 166; Eastern Transportation Line v. Hope, 95 U. S. 297; Haines v. McLaughlin, 135 U. S. 584; Garrard v. Reynolds' Lessee, 4 How. (U. S.) 123; Dean v. Hewit, 5 Wend. (N. Y.) 257; Nolton v. Moses, 3 Barb. (N. Y.) 31; Bulkeley v. Keteltas, 4 Sandf. (N. Y.) 450; Massuere v. Dickens, 70 Wis. 91; Ketchum v. Ebert, 33 Wis. 611; Fisher's Case, 1 Cobbett, State Tr. 395; Brembridge v. Osborne, 1 Starkie, 374; Pennell v. Dawson, 18 C. B. 355; Belcher v. Prittie, 4 Moore & S. 295; Foster v. Steele, 5 Scott, 28; Comstock's Appeal, 55 Conn. 214; Com. v. Zuern, 16 Pa. Super. Ct. 588; Cathcart v. Com., 37 Pa. 108; Com. v. Winkelman, 12 Pa. Super. Ct. 497; Pool v. White, 175 Pa. 459; Com. v. Warner, 13 Pa. Super. Ct. 461; First Nat. Bank of Decorah v. Holan, 63 Minn. 525; Fowler v. Colton, 1 Pin. (Wis.) 331; Springer v. Stiver, 16 Pa. Super. Ct. 184. See, also, post, § 50, "How Strong an Opinion may be Expressed." Where a railroad company is sued for injuries to plaintiff inflicted at a crossing, and the engineer is accused of heartless or grossly negligent conduct, and testifies, the court may state that the reply of a witness seemed to be that of a "manly man." Simmons v. Pennsylvania R. Co. (Pa.) 48 Atl. 1070.

on the court.[4] If the court states his opinion to the jury on the facts, it should be stated as opinion merely, and not as a positive direction, and it should be impressed upon the jury that they are to decide the facts upon their own views of the evidence, and that the judge only interposes his opinion in order to aid them in cases of difficulty, or to inspire them with confidence in cases of doubt.[5] "The line which separates the two provinces must not be overlooked by the court. Care must be taken that the jury is not misled into the belief that they are alike bound by the views expressed upon the evidence and the instructions given as to the law. They must distinctly understand that what is said as to the facts is only advisory, and in nowise intended to fetter the exercise finally of their own independent judgment. Within these limitations, it is the right and duty of the court to aid them by recalling the testimony to their recollection, by collating its details, by suggesting grounds of preference where there is contradiction, by directing their attention to the most important facts, by eliminating the true points of inquiry, by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts, and their combined effect, stripped of every consideration which might otherwise mislead or confuse them. * * * Constituted as juries are, it is frequently impossible for them to discharge their function wisely and well without this aid."[6] The judge is the best adviser the jury can have.[7]

§ 39. Same—Rule in Michigan and New Hampshire.

In Michigan there is some conflict of authority as to

[4] Holder v. State, 5 Ga. 444.
[5] New York Firemen Ins. Co. v. Walden, 12 Johns. (N. Y.) 519.
[6] Nudd v. Burrows, 91 U. S. 439.
[7] Com. v. Zuern, 16 Pa. Super. Ct. 588.

whether the trial court has a right to express an opinion on the weight of the evidence. In the earliest decision on this question, it was held that the parties had no right to demand instructions intimating an opinion on the evidence. As the trial court, even where he has the right to express an opinion on the evidence, cannot be required to do so, this decision is of little authority to sustain the position that the court has not the right to express an opinion if he chooses to do so.[8] In the next decision on this question there is a *dictum* to the effect that the judge may express an opinion as to the credibility of witnesses if he expressly direct the jury to decide the question for themselves, without reference to his views.[9] This decision was followed by another, upholding a refusal to instruct as to what weight should be given to the evidence, on the ground that such an instruction would constitute a usurpation of the province of the jury.[10] The next decision in point of time enunciated the doctrine that it was error to intimate an opinion on the credibility of a witness, and that the judgment of the jury must in no degree be subordinate to the judge's opinion of the facts.[11] The next three decisions hold that it is erroneous for the court to express any opinion on the weight of the evidence or the credibility of witnesses.[12] The latest decision seems to recognize the correctness of what was said in the first, but says that the rule must not be extended to cases where the instruction implies a duty on the part of the jury to yield their judgment to that of the judge.[13] This, it is believed, is an ex-

[8] Perrott v. Shearer, 17 Mich. 48.

[9] Sheahan v. Barry, 27 Mich. 217.

[10] Blackwood v. Brown, 32 Mich. 104.

[11] Mawich v. Elsey, 47 Mich. 10.

[12] People v. Lyons, 49 Mich. 78; Wessels v. Beeman, 87 Mich. 481; Letts v. Letts, 91 Mich. 596.

[13] Blumeno v. Grand Rapids & I. R. Co., 101 Mich. 325.

haustive collection of the Michigan cases, and the weight of authority seems to be against the trial court's right to express an opinion as to the credibility of the witnesses or the weight of the evidence.

In New Hampshire it is said in some of the earlier decisions that it is not the ordinary practice for the court to express an opinion in regard to the weight of the evidence.[14] In another early decision it appeared that the trial judge had expressed an opinion on the evidence which was clearly favorable to the party complaining, and the judgment was affirmed. The reviewing court said: "If the verdict had been for the plaintiff, and the exception were by the defendant, it would deserve consideration whether this bearing upon the motives of the party who caused the publication might not have had its effect upon the verdict."[15] So, in a late decision, the court said that the practice of expressing an opinion on the weight of the evidence had become obsolete,[16] and decisions subsequent to this contain expressions which seem to bear out this view.[17] It has nevertheless been held that it is not irregular for the trial judge to make such suggestions in relation to the facts as they may suppose will be useful to the jury, the matter being left to them for decision.[18] Accordingly, it was held not improper for the court to suggest to the jury that they could judge better of the credit to be given to a witness by his appearance on the stand than by any other circumstances.[19]

[14] Haven v. Richardson, 5 N. H. 126; Cook v. Brown, 34 N. H. 460.

[15] McDougall v. Shirley, 18 N. H. 109.

[16] State v. Pike, 49 N. H. 399, 416.

[17] See Aldrich v. Wright, 53 N. H. 398; Orr v. Quimby, 54 N. H. 632.

[18] Cook v. Brown, 34 N. H. 460; Flanders v. Colby, 28 N. H. 34; Patterson v. Colebrook, 9 Fost. (N. H.) 94.

[19] Flanders v. Colby, 28 N. H. 34.

§ 40. Same—Federal practice as affected by state practice.

The right of judges of the federal courts to comment on the evidence, and express opinions as to matters of fact in causes tried before them, is not affected by statutes of states in which they are holding court, forbidding this practice. These statutes can in no wise control the court's discretion in this regard.[20] In construing the act of congress declaring "that the practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts * * * shall conform, as near as may be," to the same things "existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held,"[21] the supreme court of the United States held that this act did not apply to instructions to the jury, and in enumerating the evils which this statute was intended to remedy said: "The personal administration by the judge of his duties while sitting upon the bench was not complained of. No one objected, or sought a remedy in that direction. * * * The personal conduct and administration of the judge in the discharge of his separate functions is, in our judgment, neither practice, pleading, nor a form nor mode of proceeding, within the meaning of those terms as found in the context."[22] So, the right of federal judges to express an opinion on the facts is not affected by organic provisions of states in which they are sitting, prohibiting the practice. Organic provisions have no more effect on this right than statutes.[23]

[20] Nudd v. Burrows, 91 U. S. 440; Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545. See, also, Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291.

[21] Act Cong. June 1, 1872 (17 St. at Large, p. 197, § 5).

[22] Nudd v. Burrows, 91 U. S. 441.

[23] St. Louis, I. M. & S. Ry. Co. v. Vickers, 122 U. S. 360.

§ 41. Same—How strong an expression of opinion is permissible.

There is no fixed rule determining how strong an expression of opinion the court may make in regard to the truth or weight of the testimony,[24] and very strong expressions of opinion have been upheld, the view being taken that considerable latitude must be left with the trial court in commenting on the evidence.[25] Probably the only limitation on this right is that the court should not give a binding instruction to find one way or the other;[26] or a direction so

[24] State v. Roger, 7 La. Ann. 382.

[25] Doyle v. Boston & A. R. Co. (C. C. A.) 82 Fed. 869; Com. v. Doughty, 139 Pa. 383; Sailor v. Hertzogg, 10 Pa. 296; Fredericks v. Northern Cent. R. Co., 157 Pa. 103; Johnston v. Com., 85 Pa. 54; Leihig v. Steiner, 94 Pa. 472; Davidson v. Stanley, 2 Man. & G. 721; Belcher v. Prittie, 4 Moore & S. 295; Foster v. Steele, 5 Scott, 28; Calmady v. Rowe, 6 C. B. 861; Doe d. Strickland v. Strickland, 8 C. B. 743; Duberley v. Gunning, 4 Term R. 651; Sawyer v. Phaley, 33 Vt. 69; Rex v. Burdett, 4 Barn. & Ald. 167. In Benedict v. Everard, 73 Conn. 157, an instruction was held not prejudicial to the defendant upon an objection that it ridiculed his evidence.

[26] Pennell v. Dawson, 18 C. B. 355; Massoth v. Delaware & H. Canal Co., 64 N. Y. 524; Sailor v. Hertzogg, 10 Pa. 296; Johnston v. Com., 85 Pa. 54. Compare Burke v. Maxwell's Adm'rs, 81 Pa. 139, where it was held error for the judge to tell the jury that, if he were in the jury box, he would find against the plaintiff, even though this statement was qualified by saying that they are not bound by his views of the evidence; overruling Rutland Mfg. Co. v. Quinlan, 1 Wkly. Notes Cas. (Pa.) 456. An instruction by the court "that, in his opinion, it was the duty of the jury to convict the defendant," is misleading, and ground for a new trial. Breese v. United States (C. C. A.) 108 Fed. 804, reversing 106 Fed. 680. Compare Johnston v. Com., 85 Pa. 60. An instruction that, if the jury find on the issues in favor of plaintiff, "the court will accept a reasonable and fair verdict as a proper settlement of the controversy

positive as to prevent them from exercising their own judgment.[27] Error cannot be assigned, though the opinion of the judge may have great influence upon the verdict,[28] and is unfavorable to the party complaining.[29]

§ 42. • Same—Necessity of expressing opinion.

Even in jurisdictions where the court is permitted to comment on the evidence, and express an opinion on the weight and effect thereof, it is under no obligation to do so, even on request.[30] Whether the court shall express an opinion to the jury on the weight of the evidence is always a matter

between the parties," while objectionable in that the jury have nothing to do with the question whether the court will or will not accept their verdict, does not take from the jury their power to pass upon the facts in the case under the instructions of the court. Herrick v. Quigley, 41 C. C. A. 294, 101 Fed. 187.

[27] New York Firemen Ins. Co. v. Walden, 12 Johns. (N. Y.) 513; People v. Quin, 1 Parker, Cr. Cas. (N. Y.) 340.

[28] Sawyer v. Phaley, 33 Vt. 69.

[29] Hurlburt v. Hurlburt, 128 N. Y. 420; Follmer v. McGinley, 146 Pa. 517.

[30] Smith v. Carrington, 4 Cranch (U. S.) 62; United States v. Burnham, 1 Mason, 57, Fed. Cas. No. 14,690; Crane v. Morris, 6 Pet. (U. S.) 598; Consequa v. Willings, Pet. C. C. 225, Fed. Cas. No. 3,128; Burdell v. Denig, 92 U. S. 716; Marine Ins. Co. of Alexandria v. Young, 5 Cranch (U. S.) 187; Van Ness v. Pacard, 2 Pet. (U. S.) 137; Brickill v. City of Baltimore (C. C. A.) 60 Fed. 98; Cohen v. Pemberton, 53 Conn. 235; Shank v. State, 25 Ind. 208; George v. Stubbs, 26 Me. 243; Bruch v. Carter, 32 N. J. Law, 565; Burling v. Gunther, 12 Daly (N. Y.) 6; Bryce v. Meyer (N. Y.) Daily Reg., Sept. 18, 1883; Moore v. Meacham, 10 N. Y. 207; Clark v. Partridge, 2 Pa. 13; Thomas v. Thomas, 21 Pa. 315; Lorain v. Hall, 33 Pa. 270; Linderman v. Sheldon, 7 Phila. (Pa.) 168; Philadelphia & T. R. Co. v. Hagan, 47 Pa. 244; Haldeman v. Martin, 10 Pa. 369; Brainard v. Burton, 5 Vt. 97; Vincent v. Stinehour, 7 Vt. 62; Stevens v. Talcott, 11 Vt. 25; Doon v. Ravey, 49 Vt. 293.

of discretion, and the court may exercise it or not, according as it deems best.[31]

§ 43. Same—Necessity of instructing that opinion is merely advisory.

In order to preserve a just balance between the distinct powers of the court and the jury, and that the parties may enjoy an unimpaired vigor, their constitutional right of having the law decided by the court, and of having the fact decided by the jury, every charge should distinguish clearly between the law and the fact, so that the jury cannot misunderstand their rights or their duty, nor mistake the opinion of the judge upon matters of fact for his direction in point of law. It is of vital importance that this distinction be kept steadily in view.[32] The question then arises, how shall the charge be drafted in order that the jury shall be sufficiently impressed with this distinction? It is customary,[33] and undoubtedly the better practice, to tell the jury expressly that they are to decide all questions of fact on their own responsibility, and that they are not bound by the opinion of the court, which is advisory only; and causes have been reversed for failure to direct the jury that they are not bound by the opinion of the court on questions of fact.[34]

[31] Stevens v. Talcott, 11 Vt. 25; Bruch v. Carter, 32 N. J. Law, 565; Breese v. United States (C. C. A.) 106 Fed. 680.

[32] New York Firemen Ins. Co. v. Walden, 12 Johns. (N. Y.) 513.

[33] Rucker v. Wheeler, 127 U. S. 85; Haines v. McLaughlin, 135 U. S. 584; Illinois Cent. R. Co. v. Davidson (C. C. A.) 76 Fed. 517; Sorenson v. Northern Pac. R. Co., 36 Fed. 166; Garrard v. Reynolds' Lessee, 4 How. (U. S.) 123; Sawyer v. Phaley, 33 Vt. 69; Sindram v. People, 88 N. Y. 203; Hoffman v. New York Cent. & H. R. R. Co. 46 N. Y. Super. Ct. 526; Yale v. Seely, 15 Vt. 221; Bonner v. Herrick, 99 Pa. 225.

[34] Anderson v. Avis (C. C. A.) 62 Fed. 227. Where the court indicates to the jury his view of the facts, he should also charge the

Nevertheless, if the language of the charge is such that the jury cannot reasonably infer that the statements in the charge in reference to matters of fact are more than a mere opinion of the judge, to be adopted and applied according as it agrees with the jury's own views, a failure to tell the jury that they are not bound by the court's opinion is not assignable as error.[35] In one case it was held that the court might state its opinion on a fact without telling the jury they were not bound thereby, and that, if a party feared that it might have undue influence on the jury, he should request a charge that the jury are exclusive judges of such facts.[36]

§ 44. Same—Effect of erroneous opinion.

If the charge is such that the jury clearly understand that they are to use their own judgment in determining the facts, and are in no wise bound by the opinion of the court on the facts, there is no ground for reversal, even though the opinion expressed by the court is erroneous.[37] Even if entire accuracy in the statement of facts may not be obtained, yet if the case is left fully and clearly to the jury, under instructions not calculated to mislead, there is no available error.[38]

jury that they are the exclusive judges of the facts, and are not bound by the court's views. Vanarsdale v. Hax (C. C. A.) 107 Fed. 878.

[35] Hansen v. Boyd, 161 U. S. 405; First Baptist Church v. Rouse, 21 Conn. 166; Hunt v. Bennett, 4 E. D. Smith (N. Y.) 647; Ketchum v. Ebert, 33 Wis. 611.

[36] Ames v. Cannon River Mfg. Co., 27 Minn. 245.

[37] Long v. Ramsay, 1 Serg. & R. (Pa.) 72; Oyster v. Longnecker, 16 Pa. 269; Knapp v. Griffin, 140 Pa. 604. Cf. Clapp v. Bromagham, 9 Cow. (N. Y.) 530.

[38] Leibig v. Steiner, 94 Pa. 472; Repsher v. Wattson, 17 Pa. 365; Bitner v. Bitner, 65 Pa. 347.

§ 45. Same—When expression of opinion is ground for reversal.

If the expression of opinion on the facts amounts to a binding charge, this will usually be a sufficient ground for reversal;[39] and the cause will also be reversed where the court's remarks are such as are likely to mislead.[40] So, when the effect of an instruction is to take from the jury all testimony except that of a particular witness, and to leave to the jury the construction of a paper properly for the court, the error is not cured by telling the jury that the whole testimony is for it to pass upon.[41]

§ 46. Jurisdictions where practice is prohibited.

In by far the greater number of states of the Union (twenty-seven), the trial courts are not permitted to comment on the evidence, or express an opinion as to its weight,[42]

[39] Burdick v. People, 58 Barb. (N. Y.) 51; Moran v. McClearns, 4 Lans. (N. Y.) 288; Schanck v. Morris, 2 Sweeny (N. Y.) 464; Sailor v. Hertzogg, 10 Pa. 296. See, also, ante, §§ 47, 50.

[40] Connelly v. Walker, 45 Pa. 449; Burke v. Maxwell's Adm'rs, 81 Pa. 139. Generally, as as misleading instructions, see post, §§ 71-78.

[41] Heydrick v. Hutchinson, 165 Pa. 208.

[42] Alabama: Gafford v. State, 125 Ala. 1; Tubb v. Madding; Minor, 130; Boyd v. McIvor, 11 Ala. 822; Higginbotham v. Higginbotham, 106 Ala. 314; Steele v. State, 83 Ala. 20.

Arkansas: Cameron v. Vandergriff, 53 Ark. 381; State v. Roper, 8 Ark. 491; Shinn v. Tucker, 37 Ark. 580; Keith v. State, 49 Ark. 439.

California: People v. Verenseneckockockhoff, 129 Cal. 497; People v. Cowgill, 93 Cal. 596; Miller v. Stewart, 24 Cal. 504; People v. Barry, 31 Cal. 357; Battersby v. Abbott, 9 Cal. 565; People v. Grimes, 132 Cal. 30; People v. O'Brien, 130 Cal. 1.

Florida: Baker v. Chatfield, 23 Fla. 540; Ferguson v. Porter, 3 Fla. 27; Williams v. Dickenson, 28 Fla. 90; Adams v. State, 28 Fla. 511.

Georgia: Bourquin v. Bourquin, 110 Ga. 440; Ryder v. State, 100 Ga. 528; De Saulles v. Leake, 56 Ga. 365; Jessup v. Gragg, 12 Ga. 261; Phillips v. Williams, 39 Ga. 597; Florida, C. & P. R. Co. v. Lucas, 110 Ga. 121.

such practice being expressly prohibited by statutory or constitutional provisions.[43] In these jurisdictions, a judge must

Illinois: Rice & Bullen Malting Co. v. International Bank, 185 Ill. 422, affirming 86 Ill. App. 136; Humphreys v. Collier, 1 Ill. 297; New York, C. & St. L. R. Co. v. Blumenthal, 160 Ill. 40; Frame v. Badger, 79 Ill. 441; Lake Shore & M. S. Ry. Co. v. Taylor, 46 Ill. App. 506; Chicago & A. R. Co. v. Robinson, 106 Ill. 142; Clark v. Smith, 87 Ill. App. 409.

Indiana: Chamness v. Chamness, 53 Ind. 301; Ohio & M. Ry. Co. v. Pearcy, 128 Ind. 197; Wood v. Deutchman, 75 Ind. 148; Fassnacht v. Emsing Gagen Co., 18 Ind. App. 80; Fulwider v. Ingels, 87 Ind. 414.

Iowa: Carroll v. Chicago, St. P., M. & O. Ry. Co. (Iowa) 84 N. W. 1035; Nimon v. Reed, 79 Iowa, 524; Leiber v. Chicago, M. & St. P. Ry. Co., 84 Iowa, 97; State v. Dorland, 103 Iowa, 168; Houston v. State, 4 G. Greene, 437; State v. Carter (Iowa) 83 N. W. 715.

Kansas: State v. Potter, 16 Kan. 80; Cavender v. Roberson, 33 Kan. 627; Lorie v. Adams, 51 Kan. 692; City of Junction City v. Blades, 1 Kan. App. 85.

Kentucky: Carter's Ex'rs v. Carter, 10 B. Mon. 327; Brady v. Com., 11 Bush, 285; Hurt v. Miller, 3 A. K. Marsh. 337.

Louisiana: Riviere v. McCormick, 14 La. Ann. 139; State v. Hahn, 38 La. Ann. 169; State v. Jackson, 35 La. Ann. 769; State v. Smith, 11 La. Ann. 633. Prior to 1852, at which time a statute prohibiting trial courts from charging as to matters of fact was enacted, an instruction on the weight of the evidence was permissible. See State v. Green, 7 La. Ann. 518; State v. Roger, 7 La. Ann. 382.

Maine: State v. Benner, 64 Me. 267. This decision is under a comparatively recent statute. The practice of charging on the weight of the evidence was formerly permissible. Stephenson v. Thayer, 63 Me. 143; State v. Reed, 62 Me. 129; Gilbert v. Woodbury, 22 Me. 246; Hayden v. Bartlett, 35 Me. 203.

Maryland: Mason v. Poulson, 40 Md. 355; Chipman v. Stansbury, 16 Md. 154; Miller v. Miller, 41 Md. 623.

Massachusetts: Com. v. Briant, 142 Mass. 463; Com. v. Larrabee, 99 Mass. 413; Com. v. Foran, 110 Mass. 179. These decisions are under Gen. St. Mass. c. 115, § 5. Prior to the enactment of that statute it was customary in this state to comment on the evidence and charge on the weight thereof. Com. v. Child, 10 Pick. 252;

[43] See the codes and statutes of the various states, and the cases cited in the preceding note.

carefully avoid expressing an opinion on the facts, leaving it to the jury to draw their own conclusions, entirely unbiased

Buckminster v. Perry, 4 Mass. 594; Mansfield v. Corbin, 4 Cush. 213; Davis v. Jenney, 1 Metc. 221; Eddy v. Gray, 4 Allen, 435.

Mississippi: Whitney v. Cook, 53 Miss. 551; Daniel v. Daniel, 4 So. 95; Wesley v. State, 37 Miss. 327; Kearney v. State, 68 Miss. 233.

Missouri: Granby Mining & Smelting Co. v. Davis, 156 Mo. 422; Hayden v. Parsons, 70 Mo. App. 493; Chouquette v. Barada, 28 Mo. 491; State v. Hundley, 46 Mo. 414; Labeaume v. Dodier, 1 Mo. 618; Milligan v. Chicago, B. & Q. R. Co., 79 Mo. App. 393; State v. Smith, 53 Mo. 267.

Montana: State v. Mahoney, 24 Mont. 281; Knowles v. Nixon, 17 Mont. 473; State v. Sullivan, 9 Mont. 174.

Nebraska: Smith v. Meyers, 52 Neb. 70; Village of Culbertson v. Holliday, 50 Neb. 229; Murphey v. Virgin, 47 Neb. 692.

Nevada: State v. Ah Tong, 7 Nev. 148; State v. Tickel, 13 Nev. 502.

North Carolina: State v. Edwards, 126 N. C. 1051; Reed v. Shenck, 13 N. C. 415; Weisenfield v. McLean, 96 N. C. 248; Wells v. Clements, 48 N. C. 168; State v. Brewer, 98 N. C. 607.

North Dakota: Territory v. O'Hare, 1 N. D. 30.

Oklahoma: Kirk v. Territory, 10 Okla. 46.

Oregon: Meyer v. Thompson, 16 Or. 194; State v. Daly, 16 Or. 240.

South Carolina: State v. Whittle, 59 S. C. 297; Woody v. Dean, 24 S. C. 504; State v. Godfrey, 60 S. C. 498; State v. Smalls, 24 S. C. 591; Polson v. Ingram, 22 S. C. 545; State v. Caddon, 30 S. C. 609. These cases were decided since Const. S. C. 1868, art. 4, § 26, went into effect. Prior to this time a charge on the weight of the evidence was permissible. See Verdier v. Verdier, 8 Rich. Law, 135; State v. Smith, 12 Rich. Law, 430; Devlin v. Killcrease, 2 McMul. 428; State v. Bennet, 2 Treadw. Const. 692.

Tennessee: Earp v. Edgington (Tenn.) 64 S. W. 40; Citizens' St. Ry. Co. v. Burke, 98 Tenn. 650; Fitzpatrick v. Fain, 3 Cold. 15; Roper v. Stone, Cooke, 499; S. E. Jones & Son v. Cherokee Iron Co., 14 Lea, 157.

Texas: Meadows v. Truesdale (Tex. Civ. App.) 56 S. W. 932; Barton v. Stroud-Gibson Grocer Co. (Tex. Civ. App.) 40 S. W. 1050; Butler v. State, 3 Tex. App. 48; Kildow v. Irick (Tex. Civ. App.) 33 S. W. 315; Pharr v. State, 7 Tex. App. 472; Stooksbury v. Swan, 85 Tex. 563; Johnson v. Brown, 51 Tex. 65; Texas & P. Ry. Co. v. Dur-

by any impression which the testimony may make upon the mind of the judge. He must not in any way indicate his opinion of the facts to the jury.[44] The charge is perfectly unexceptionable only when the judge confines himself to the duty of setting forth the law applicable to the case, without either expressing or intimating any opinion as to the weight of the evidence, or the credibility of statements made by parties or other witnesses.[45] The court cannot legally indicate his opinion, either expressly or impliedly, intentionally or otherwise, as to the credibility of the witnesses, or as to the truth of any fact in issue, and the subject of the evidence. The whole matter of finding the facts of the case must be left entirely to the jury, without suggestions or leadings by the court.[46]

§ 47. Same—Instructions held to violate prohibition.

Counsel in drafting requests for instructions, and courts in giving them, are prone to violate the rule against commenting on the evidence, or expressing an opinion upon its weight. The cases are almost innumerable in which this

rett (Tex. Civ. App.) 63 S. W. 904; City of Dallas v. Beeman, 23 Tex. Civ. App. 315; Galveston, H. & S. A. Ry. Co. v. English (Tex. Civ. App.) 59 S. W. 626; Fulcher v. White (Tex. Civ. App.) 59 S. W. 628; City of San Antonio v. Porter (Tex. Civ. App.) 59 S. W. 922.

Virginia: Ross v. Gill, 1 Wash. 88; Tyler v. Chesapeake & O. R. Co., 88 Va. 389; McDowell's Ex'r v. Crawford, 11 Grat. 378; McKinley v. Ensell, 2 Grat. 333; McRae v. Scott, 4 Rand. 463.

Washington: Leonard v. Territory, 2 Wash. T. 381; Bardwell v. Ziegler, 3 Wash. 34.

West Virginia: State v. Hurst, 11 W. Va. 75; State v. Greer, 22 W. Va. 801.

Wisconsin: Hempton v. State, 86 N. W. 596. See, also, cases cited to more specific propositions in the succeeding sections of this article.

[44] State v. Addy, 28 S. C. 4.

[45] Ross v. State, 29 Tex. 500.

[46] State v. Williams, 31 S. C. 238.

question has been passed upon. The error is usually committed through inadvertence, and most often arises as a question of construction of the language used in the instructions. For this reason it has been thought proper to set out the substance of a large number of instructions which have been condemned as invading the province of the jury. These instructions are so diverse in their nature as to render any classification impossible, and the reader will therefore pardon the unavoidable absence of catch lines for a considerable body of text.

It is improper for the court to announce to the jury what is the better evidence in the case, or what the jury may so regard;[47] or to intimate that the jury should give greater

[47] Chicago & A. R. Co. v. Robinson, 106 Ill. 142; State v. Elkins, 63 Mo. 159; Toledo, W. & W. Ry. Co. v. Brooks, 81 Ill. 245; Millner v. Eglin, 64 Ind. 197; Works v. Stevens, 76 Ind. 181. In this last case, an instruction that, "all other things being equal, evidence of witnesses, given in the presence of the court and jury, is entitled to greater weight than that of witnesses whose depositions have been taken and read in evidence," was held erroneous. So, in McHard v. Ives, 5 Ill. App. 400, "an instruction telling the jury that, in determining what consideration induced the defendant to sign the note, they are to give greater weight to a letter written by the plaintiff to the defendant just after the signing than the memory of defendant at that time," was held erroneous. An instruction that, though error is sometimes committed from a reliance on circumstantial evidence, yet this species of evidence, in the opinion of all those who are most conversant with the administration of justice, is not only proper and necessary, but it is sometimes even more satisfactory than the testimony of a single individual, who swears that he has seen a fact committed, and that even persons professing to have been eye witnesses of the fact may speak falsely, is obviously a charge to the jury as to the relative value of direct and circumstantial evidence, and is within the prohibition of the constitution of the state of California. People v. O'Brien, 130 Cal. 1. A party should not ask for instructions relating to the weight to be given circumstantial evidence introduced by his adversary. Such a request comes under the general rule that it is dangerous to single out

weight to the testimony of one witness than to that of another;[48] or to state that evidence offered by one party is entitled to more weight than that offered by the other;[49] or to require the jury to give more credit to one class of testimony than another;[50] or to instruct that designated testimony is entitled to great weight;[51] or is weighty and strong;[52] or to state that designated evidence is weak or of little value;[53] or insufficient;[54] or to instruct that, although parol proof of the verbal admissions of a party often affords satisfactory evidence, yet, as a general rule, statements of witnesses as to verbal admissions of a party should be received with great caution, as that kind of evidence is

a particular line of evidence, and to instruct as to its weight. Carroll v. Chicago, St. P., M. & O. Ry. Co. (Iowa) 84 N. W. 1035.

[48] Bynum v. Southern Pump & Pipe Co., 63 Ala. 462; Delvee v. Boardman, 20 Iowa, 446, in which an instruction that, if the jury find the testimony of the plaintiff to be the only positive evidence in support of material allegations, and that it is contradicted in all material points by an unimpeached witness, they must find for defendant, was held erroneous.

[49] Lyon v. George, 44 Md. 295.

[50] Kirk v. Territory, 10 Okla. 46. It is improper to instruct the jury that positive testimony is entitled to greater weight than negative testimony, where the witnesses are equal in credibility and opportunity to know the facts, as the weight of such testimony is exclusively for the jury. Milligan v. Chicago, B. & Q. R. Co., 79 Mo. App. 393. See, also, Metropolitan R. Co. v. Martin, 15 App. D. C. 552.

[51] Ryder v. State, 100 Ga. 528; Williams v. Dickenson, 28 Fla. 90; State v. Hundley, 46 Mo. 414; Smith v. Meyers, 52 Neb. 70; State v. Gleim, 17 Mont. 17; Steele v. State, 83 Ala. 20; Bourquin v. Bourquin, 110 Ga. 440.

[52] Cecil v. Johnson, 11 B. Mon. (Ky.) 35; Earp v. Edgington (Tenn.) 64 S. W. 40.

[53] Mauro v. Platt, 62 Ill. 450; Wannack v. City of Macon, 53 Ga. 162; West v. Black, 65 Ga. 647.

[54] Johnson v. People, 94 Ill. 505; Farmers' & Merchants' Bank v. Harris, 2 Humph. (Tenn.) 311.

subject to much imperfection and mistake;[55] or to instruct directly or by intimation that evidence is entitled to little weight;[56] or to tell the jury to consider any particular statement of a witness as a mistake, and to give full credence to the remainder of his testimony;[57] or to state that, while there is some evidence to go to the jury, it is a bare *scintilla,* leaving the matter not proved;[58] or to state that the evidence shows certain facts;[59] or that certain evidence *prima facie* establishes a fact;[60] or to intimate that a fact has or has not been established;[61] or to assume the existence of a material fact;[62] or to state that the testimony of defendant and one

[55] Kauffman v. Maier, 94 Cal. 269.

[56] State v. Hundley, 46 Mo. 414; Knowles v. Nixon, 17 Mont. 473. It is proper to refuse to comment adversely upon the testimony of a witness. Granby Mining & Smelting Co. v. Davis, 156 Mo. 422.

[57] Citizens' St. Ry. Co. v. Burke, 98 Tenn. 650.

[58] Boing v. Raleigh & Gaston R. Co., 87 N. C. 360.

[59] People v. Casey, 65 Cal. 260; Fitzpatrick v. Fain, 3 Cold. (Tenn.) 15; Leiber v. Chicago, M. & St. P. Ry. Co., 84 Iowa, 97; Kinney v. North Carolina R. Co., 122 N. C. 961. In a criminal prosecution, an instruction that the proof shows beyond all controversy that certain facts have been established is erroneous, though defendant has introduced no evidence. State v. Carter (Iowa) 83 N. W. 715. All fact issues arising in a criminal case must be determined by the jury, who are the sole judges of the credibility of all witnesses, and who cannot be compelled to credit the testimony of any witness, whether controverted or not, and it is therefore improper for the court to take from the consideration of the jury material allegations concerning which there is no controversy in the testimony. State v. Bige (Iowa) 84 N. W. 518.

[60] Hartshorn v. Byrne, 147 Ill. 418.

[61] Lorie v. Adams, 51 Kan. 692; Rushin v. Shields, 11 Ga. 636; Suddeth v. State, 112 Ga. 407; Anniston City Land Co. v. Edmondson (Ala.) 30 So. 61; Short v. Kelly (Tex. Civ. App.) 62 S. W. 944. It is error to express an opinion as to what has been proved, and to state that a controverted fact has been proved by undisputed evidence. Florida, C. & P. R. Co. v. Lucas, 110 Ga. 121.

[62] Halsey v. Bell (Tex. Civ. App.) 62 S. W. 1088; Martin v. Leslie, 93 Ill. App. 44; Ellerbee v. State (Miss.) 30 So. 57. See, also, ante,

of the witnesses was evenly balanced;[63] or to give an instruction which assumes to determine a question of intention;[64] or to express an opinion of the legal value of a fact testified to;[65] or to instruct that certain evidence is good and effectual in law to maintain the issue on behalf of the party producing it;[66] or to state what the evidence tends to show;[67] or to state that matters alleged in the declaration are disproved by the evidence;[68] or that a fact is conclusively proven.[69]

It is also error to instruct that, "if you think there is some evidence in favor of the plaintiff's side of the case, whether it be little or great, it is your duty to find in her favor";[70] that "slight circumstances will carry" conviction of the existence of fraud;[71] that the jury must put upon any part of the testimony a construction favorable to the defendant, if reasonable;[72] or to state that plaintiff is "entitled" to compensatory damages;[73] or that "full weight" should be

§ 29 et seq., "Assumption of Facts." An instruction, in an action by a traveler against a city, which assumes "that plaintiff was wanting either in ability, skill, or care," is upon the weight of evidence. City of San Antonio v. Porter (Tex. Civ. App.) 59 S. W. 922.

[63] Canada v. Curry, 73 Ind. 246.

[64] Oliver v. State, 17 Ala. 587; Barton v. Stroud-Gibson Grocer Co. (Tex. Civ. App.) 40 S. W. 1050.

[65] State v. Swayze, 30 La. Ann. 1323.

[66] Keel v. Herbert, 1 Wash. (Va.) 203.

[67] City of Junction City v. Blades, 1 Kan. App. 85. See, also, State v. Donovan, 61 Iowa, 369; Missouri Pac. Ry. Co. v. Christman, 65 Tex. 369. See Seeley v. State (Tex. Cr. App.) 63 S. W. 309.

[68] James v. Brooks, 6 Heisk. (Tenn.) 150.

[69] Bardwell v. Ziegler, 3 Wash. St. 34.

[70] Bunting v. Saltz, 84 Cal. 168.

[71] Higginbotham v. Campbell, 85 Ga. 638, in which it was said that it would be correct to charge that "slight circumstances may be sufficient to carry * * *."

[72] Smith v. State, 88 Ala. 23.

[73] Browning v. Jones, 52 Ill. App. 597.

given designated testimony, instead of "the weight to which, in their opinion, such testimony is justly entitled";[74] that the jury might convict the defendant if they found there was any evidence in certain circumstances, singled out or otherwise, which they thought corroborated a witness who was an accomplice;[75] that "you will determine from the evidence whether there was or was not a confession under such a warning, as before defined, and voluntarily and freely made, as before instructed. If you so find, you will convict defendant";[76] that, under the evidence in the case, the jury cannot convict the defendants of murder in the second degree, there being some evidence to establish their crime, though contradicted by other evidence;[77] that, unless the jury disbelieved the testimony of the defendant, the weight of testimony tended to prove that his act was not criminal;[78] that "this is a case in which you have to rely upon just such evidence as can be obtained, on account of the death of persons who might know facts; you are left to a limited source for evidence";[79] to state that a decision read by counsel from a volume of reports was so much like the case at bar in its facts and in the law it declares that it seemed unnecessary to say anything further on the subject;[80] that, from the facts proven, plaintiffs were entitled to recover;[81] to state that certain testimony was immaterial;[82] that the testimony of a party to the suit might not be sufficient to warrant a finding upon it, if it appeared

74 Davis v. Hays, 89 Ala. 563.
75 Dickenson v. State (Tex. Cr. App.) 63 S. W. 328.
76 McVeigh v. State (Tex. Cr. App.) 62 S. W. 757.
77 State v. Potter, 16 Kan. 80.
78 People v. Cowgill, 93 Cal. 596.
79 McVicker v. Conkle, 96 Ga. 584.
80 Moore v. Robinson, 62 Ala. 537.
81 Ayres v. Moulton, 5 Cold. (Tenn.) 154.
82 Jessup v. Gragg, 12 Ga. 261.

that he could have brought other testimony to the fact;[83] or that the fact that defendant did not disprove circumstances, if the jury believe he has the means of disproving them if false, lends additional weight to such as are proved;[84] to state that certain evidence of a fact is a suspicious circumstance against defendant;[85] that "the guilt of the defendant rests upon what is known as 'circumstantial evidence'";[86] that the jury cannot find for plaintiff because there is no good or valid consideration for the promise or undertaking alleged in his declaration proved;[87] that, "if you find that defendant testified," etc., and "if you find that his actions speak louder than words thus testified to";[88] that the evidence preponderates in favor of one side of the case;[89] that certain *indicia* of fraud raise a "violent presumption";[90] that, "if you [the jury] believe * * *, that would be a strong circumstance to show";[91] or that a fact is a strong and almost irresistible circumstance;[92] or that certain evidence is conclusive;[93] or is short, clear, and to the point, and leaves not much room for doubt;[94] or discuss defendant's testimony in such a manner as to give the jury the impression

[83] Baines v. Ullmann, 71 Tex. 529.
[84] Leonard v. Territory, 2 Wash. T. 381.
[85] Massey v. State, 1 Tex. App. 564.
[86] State v. Duffy, 6 Nev. 138.
[87] Ferguson v. Porter, 3 Fla. 27.
[88] Wilkinson v. Searcy, 76 Ala. 176.
[89] Thompson v. Thompson, 17 B. Mon. (Ky.) 28.
[90] Shealy v. Edwards, 75 Ala. 411.
[91] Phillips v. Williams, 39 Ga. 602. An instruction that a certain fact in evidence is a "strong circumstance" showing a particular intention invades the province of the jury, and is erroneous. Clark v. Smith, 87 Ill. App. 409.
[92] Marr v. Marr, 5 Sneed (Tenn.) 385.
[93] Burkham v. Mastin, 54 Ala. 122.
[94] State v. Asberry, 37 La. Ann. 124.

that the court thought it was of little value;[95] or to state that one kind of evidence cannot outweigh another kind;[96] that circumstantial evidence, when fully and conclusively made out, is sufficient to sustain a conviction;[97] that upon all the evidence, if believed, plaintiff is not entitled to recover;[98] that, if the jury believe the evidence, they must find for a party named;[99] that, from the whole testimony before them, the demand of the plaintiffs was not barred by the statute of limitations;[100] that certain evidence is strong evidence to disprove;[101] to state that the judge had heard no evidence of an agreement that would operate as an estoppel to the plaintiff;[102] that, "no damages having been alleged, and no damages having been proved, they could not render a verdict for damages";[103] that certain evidence shows negligence,[104] as, for instance, that certain acts of the plaintiff were "all that the law required of her, so far as diligence

[95] State v. Wyse, 32 S. C. 45.

[96] Bowie v. Maddox, 29 Ga. 285.

[97] Horton v. State (Tex. App.) 19 S. W. 899. See, also, chapter 29, "Cautionary Instructions on Circumstantial Evidence."

[98] Sherrill v. Western Union Tel. Co., 116 N. C. 655.

[99] Smith v. Collins, 94 Ala. 394; Gibson v. Snow Hardware Co., 94 Ala. 346.

[100] Fisher's Ex'r v. Duncan, 1 Hen. & M. (Va.) 563.

[101] Jenkins v. Tobin, 31 Ark. 307.

[102] Howard v. Wofford, 16 S. C. 148.

[103] Levi v. Legg, 23 S. C. 282.

[104] New York, C. & St. L. R. Co. v. Blumenthal, 160 Ill. 40; Galveston, H. & S. A. Ry. Co. v. Knippa (Tex. Civ. App.) 27 S. W. 730; Costley v. Galveston City Ry. Co., 70 Tex. 112; San Antonio & A. P. Ry. Co. v. Long, 4 Tex. Civ. App. 497; William Graver Tank Works v. McGee, 58 Ill. App. 250; Blair v. Mound City Ry. Co., 31 Mo. App. 224. An instruction declaring it negligence per se for the complainant, with knowledge of the dangerous condition of a street, to drive along it, if she ought reasonably to have avoided it, is properly refused. City of San Antonio v. Porter (Tex. Civ. App.) 59 S. W. 922.

on her part in getting off the car is concerned," and that, under such circumstance, the starting of the car was an "act of negligence";[105] or to state that there is a conflict in the evidence, when that is denied;[106] or to state that the evidence did not show what plaintiff claimed it did;[107] or to tell the jury that, upon a given state of facts, they can have no reasonable doubt;[108] or to tell the jury that certain facts are not fraudulent if there was any controversy as to the existence of the facts;[109] to state that a party was a fair purchaser for a valuable consideration;[110] that, "if you disbelieve all the evidence for the state, and believe every word of evidence for the defense, I charge you that the defendant is guilty; but of course you can look to all the evidence, and make up your verdict on it";[111] that the jury must discard from their consideration any part or the whole of the testimony of any witness that they may regard as improbable or untrue;[112] to characterize a sale alleged to have been made as a "so-called sale";[113] to state that certain evidence, if believed by the jury, "is not sufficient to authorize them to find a due presentation of the claim" sued on;[114] that is the jury believe from the evidence of a particular witness that all his knowledge of a fact testified about by him is derived from the

105 Blair v. Mound City Ry. Co., 31 Mo. App. 224.

106 Black v. Thornton, 30 Ga. 361; Raoul v. Newman, 59 Ga. 412. Compare People v. Flynn, 73 Cal. 511, where it was held that "the mere statement by the court in its instructions that there is a conflict in the evidence in certain respects is not an expression of opinion upon the weight of the evidence."

107 Southern Life Ins. Co v. Wilkinson, 53 Ga. 548.

108 Wilcox v. State, 3 Heisk. (Tenn.) 110.

109 Cleveland v. Empire Mills, 6 Tex. Civ. App. 479.

110 Fowler v. Lee, 4 Munf. (Va.) 373.

111 White v. State, 56 Ga. 385.

112 Bishop v. State, 43 Tex. 391.

113 Kuhlenbeck v. Hotz, 53 Ill. App. 675.

114 Frazier's Ex'r v. Praytor, 36 Ala. 691.

books of the party calling him, and if they find that the testimony of such witness is all the evidence on that subject, then there is no evidence before them as to that fact.[115]

The following cases also illustrate the rule against charging on the weight of the evidence: In an action against a railroad company for damages caused by fire, an instruction that the volume of sparks emitted, and other fires caused by the railroad company, might be considered by the jury, has been held to be on the weight of the evidence, and an invasion of the province of the jury.[116] In a suit involving boundaries, in which an order of survey had been made, and the report of the surveyor submitted in evidence, there being conflicting evidence, it was held error, as charging upon the weight of the evidence, to instruct the jury that the surveyor's report must be taken as correct and true until it is shown to be erroneous, and that the burden of proof is upon the defendant to show that this report is erroneous.[117] An instruction that certain articles constituting a museum had no general market value is on the weight of the evidence; the evidence as to the nature of the articles and the manner of their collection and preparation tending to show that they were all such specimens as might have a market value.[118] In an action against a railroad company for damages for injuries inflicted in a collision, the court instructed the jury that, "when it is shown by the proof that an injury was received by reason of and as the direct

115 Wolcott v. Heath, 78 Ill. 433.

116 Galveston, H. & S. A. Ry. Co. v. Knippa (Tex. Civ. App.) 27 S. W. 730. The correctness of this holding is questionable. In Texas, the province of the jury seems to be guarded more jealously than in any other state of the Union, and the rulings of its courts go to the very verge of the law in maintaining the prerogative of the jury.

117 Kerlicks v. Meyer, 84 Tex. 158.

118 Yoakum v. Dunn, 1 Tex. Civ. App. 524.

result of an unusual occurrence, then the law presumes the occurrence so causing the injury to have happened by reason of negligence, unless it further appears by the proof that such unusual occurrence was not the result of negligence, but, on the contrary, was caused by some circumstance or cause which the exercise of the greatest care and prudence could not have prevented." This charge was held clearly violative of the rule.[119] Where a suit was brought because of the premature issue of an execution, it was held error to charge "that the issuance of an execution immediately upon the rendition of a judgment, upon the filing of a proper affidavit, without waiting for the lapse of ten days, is summary, and might be rendered exceedingly harsh and oppressive," as calculated to lead the jury to believe that the court thought a great wrong had been done.[120] In a suit for the value of horses alleged to have been purchased by B., it was proved, among other things, that the horses were purchased for the use of the Overland Mail Line, and the court instructed the jury that, under the evidence, B. was to be considered the sole proprietor of that line. This was held a violation of the rule prohibiting charges as to matters of fact.[121] Where an agent took a deed for land in settlement of an account without authority from his principals, having no knowledge as to the value of the land or other important facts, it was held error to charge the jury that the deed, when sent them, furnished full knowledge of the facts, and that the receipt of it was all that was required to put them in posesssion of the facts.[122] Instructions containing directions or advice in respect of inferences of fact to be drawn by the jury from the evidence are properly refused.[123] An instruction defining the term "preponderance of the evidence" as meaning not necessarily the greater number of witnesses is er-

[119] Texas Cent. Ry. Co. v. Burnett, 80 Tex. 536.
[120] Clifford v. Lee (Tex. Civ. App.) 23 S. W. 843.
[121] Pico v. Stevens, 18 Cal. 376.
[122] Meyer v. Smith, 3 Tex. Civ. App. 37.
[123] State v. Mahoney, 24 Mont. 281.

roneous, being upon the weight of the evidence.[124] An instruction that it was the defendant's duty to use ordinary care to furnish for its employes a suitably lighted switch yard, and that, if the injury was caused by a failure to exercise such care in that respect, the jury should find for the plaintiff, is erroneous, as such charge can only mean one of two things, viz.: Either that it was the legal duty of appellant to use ordinary care to have its yard suitably lighted, regardless of whether or not said yard would be reasonably safe without such light, or that, in the opinion of the court, said yard would not be reasonably safe unless same was suitably lighted. Under either of these interpretations, the charge is obviously upon the weight of the evidence.[125] Other illustrations are set out in the notes.[126]

[124] Dallas Cotton Mills v. Ashley (Tex. Civ. App.) 63 S. W. 160; St. Louis S. W. Ry. Co. v. Smith (Tex. Civ. App.) 63 S. W. 1064.

[125] Galveston, H. & S. A. Ry. Co. v. English (Tex. Civ. App.) 59 S. W. 626.

[126] On an indictment for murder, an instruction that, if the defendant inflicted the wound, and if such wound caused death, the case was murder, was held erroneous because it applied a principle of law to the facts of the case, although it did not express a direct opinion. Wall v. State, 112 Ga. 336. An instruction that the mere silence of the defendant at the time of being arrested should not be considered as a circumstance against him is properly refused, being on the weight of the evidence. Clark v. State (Tex. Cr. App.) 59 S. W. 887. An instruction "that the indictment in the case is for murder in the first degree, and that the state's contention in the case is that the offense is either murder in the first degree or nothing, and that the verdict should be a verdict of acquittal, or for murder in the first degree, and that the state's contention in this respect is correct," is upon the effect of the evidence, and, if not requested by either party in writing, is in violation of the statutes of the state of Alabama. Gafford v. State, 125 Ala. 1. An instruction, in an action for damages caused by a prairie fire set by the defendant, that "fire is a dangerous element, and a degree of care is required, in making use of it, corresponding to the danger, and that

§ 48. Same—Instructions held not to violate prohibition.

The following instructions have been objected to as being on the weight of the evidence, and held not objectionable on that ground: Instructions limiting the effect of evidence which was competent for some purposes, but not for others;[127] instructions stating there is no evidence as to a particular fact or issue, when such is the case[128] (and it has been held that it is the duty of the court to tell the jury that there is no evidence if there is none[129]); instructions stating that certain evidence objected to is admissible, nothing else being said which would lead the jury to believe that the court thought such evidence controlled the case;[130] in-

a man has the right to start a fire on his own premises, providing the circumstances are such as show that the act may be done with reasonable safety to the property of others," violates a statute which forbids the court to charge or comment on the weight of the evidence. Meadows v. Truesdell (Tex. Civ. App.) 56 S. W. 932. An instruction, "You are further instructed that, if you find and believe from the evidence that plaintiff was deaf or hard of hearing at the time of the accident complained of, then, and in that event, you are instructed that such deafness, or partial deafness, would require greater vigilance of plaintiff in the exercise of his eyesight in approaching said crossing," is properly refused as being a discussion of, and comment upon, the evidence, and, in effect, a charge upon the weight of the evidence. Texas & P. Ry. Co. v. Durrett (Tex. Civ. App.) 63 S. W. 904. An instruction that a city council, by receiving and filing the report of a city engineer, did not ratify the acts of the engineer set forth in the report, is on the weight of the evidence, and should be refused. City of Dallas v. Beeman, 23 Tex. Civ. App. 315.

[127] Jacobs v. Totty, 76 Tex. 343; Bruno v. State (Tex. Cr. App.) 58 S. W. 85; Messer v. State (Tex. Cr. App.) 63 S. W. 643; Jasper v. State (Tex. Cr. App.) 61 S. W. 392.

[128] People v. Welch, 49 Cal. 174; People v. King, 27 Cal. 507; Reed v. Shenck, 13 N. C. 415; King v. King, 155 Mo. 406.

[129] Wells v. Clements, 48 N. C. 168.

[130] Carroll v. Roberts, 23 Ga. 492. See, also, State v. Munson, 76 Mo. 109, in which it was held that an instruction that "all the

structions declaring the law applicable to a given state of facts,[131] or reciting the facts as claimed to have been proved, and giving the law thereon, without giving or intimating any opinion as to whether such facts have or have not been proved;[132] instructions stating that, if the jury believe certain facts to have been proved, they should find a stated verdict;[133] instructions assuming facts which are admitted by both parties,[134] or facts which are supported by convincing evidence, and not controverted[135] (in one case it is said that

evidence produced and admitted in the case is legal evidence; whether it is credible, or worthy of credit, is a matter for the jury to determine, from all the facts and circumstances in proof," was clearly not a comment on the weight of the evidence.

[131] Yarborough v. State, 86 Ga. 396. An instruction, in an action by a servant against a master for personal injuries, that the jury should find that plaintiff was not guilty of contributory negligence, and if certain facts, alleged to show negligence on the part of defendant, had happened, and if the defendant was guilty of negligence, as explained in other instructions, then the jury should find such actual damages as would compensate plaintiff, merely applies the law to the very facts of the case, and is not upon the weight of the evidence. Houston & T. C. Ry. Co. v. White, 23 Tex. Civ. App. 280. Instructions declaring the law upon a hypothetical state of facts do not violate statutory or constitutional provisions forbidding a charge on matters of fact. State v. Whittle, 59 S. C. 297; Phoenix Ins. Co. v. Neal, 23 Tex. Civ. App. 427; Waters-Pierce Oil Co. v. Davis (Tex. Civ. App.) 60 S. W. 453; Jones v. Hiers, 57 S. C. 427.

[132] Pritchett v. Overman, 3 G. Greene (Iowa) 531; State v. Smith, 11 La. Ann. 633; Andrews v. Parker, 48 Tex. 94. The court may recite in its charge the facts established by uncontroverted evidence, if it does so in such a manner that the recital cannot have any possible influence upon the jury in determining the issue of fact submitted to them. Halsell v. Neal, 23 Tex. Civ. App. 26.

[133] State v. Mitchell, 41 La. Ann. 1073; Thompson v. Johnson (Tex. Civ. App.) 58 S. W. 1030.

[134] State v. Angel, 29 N. C. 27; San Antonio & A. P. Ry. Co. v. Ilse (Tex. Civ. App.) 59 S. W. 564.

[135] Hogan v. Shuart, 11 Mont. 498; Marshall v. Morris, 16 Ga. 368; Denham v. Trinity County Lumber Co., 73 Tex. 78; People v. Lee

the rule which forbids a judge to charge on the weight of the evidence does not require or authorize him to assume as doubtful that which is clear and indisputable,[136] and in another that, if the presiding judge inadvertently assumes as uncontroverted matters in evidence upon which either party proposes to raise an issue to the jury, it is the duty of counsel to call the attention of the judge to the fact[137]); instructions assuming the nonexistence of evidence which was excluded or not offered;[138] instructions telling the jury that the evidence is open to two constructions, but which do not intimate which construction is the correct one;[139] instruction that, if the evidence is not reconcilable, the jury should decide what witnesses were the most credible;[140] instructions to find for plaintiff if the jury found that certain facts existed, and to find for defendant if they found that such facts did not exist;[141] instructions stating the purpose for which certain evidence was admitted[142] (but not what it tends to prove, without submitting at the same time the

Sare Bo, 72 Cal. 623; McLellon v. Wheeler, 70 Me. 285. See, also, McGhee v. Wells, 57 S. C. 280.

136 Wintz v. Morrison, 17 Tex. 372.

137 Harvey v. Dodge, 73 Me. 316.

138 Territory v. Gay, 2 Dak. 125.

139 Wyley v. Stanford, 22 Ga. 385.

140 Rideus v. State, 41 Tex. 199.

141 Ryan v. Los Angeles Ice & Cold Storage Co., 112 Cal. 244. See, also, Messer v. State (Tex. Cr. App.) 63 S. W. 643. An instruction that, if the jury believe from the evidence certain facts, a prima facie case of negligence is made out against the defendant, and that, if the jury believe certain other facts, this prima facie case is rebutted, is not open to the objection that it is on the weight of the evidence. It may be observed, however, that this was an action against a railroad company, and a different rule seems to prevail in such actions in Texas than that applied in other actions. Texas & P. Ry. Co. v. Rice (Tex. Civ. App.) 59 S. W. 833.

142 Davis v. Gerber, 69 Mich. 246; Howerton v. Holt, 23 Tex. 57.

question of its credibility[143]); instructions directing the jury to the real issue, when the argument of counsel is such as to distract their minds therefrom;[144] instructions calling the jury's attention to questions of fact by way of interrogatories addressed to them upon matters important for their consideration in arriving at a correct conclusion upon the main question;[145] instructions summing up or recapitulating the evidence, though this is prohibited in some states by organic or statutory provision.[146] The court's discretion in this regard is not affected by statutes or constitutional provisions prohibiting the trial judge from commenting on the evidence, and expressing an opinion as to its weight.[147] So, in these

[143] Davis v. Gerber, 69 Mich. 246.

[144] State v. West, 43 La. Ann. 1006.

[145] State v. Day, 79 Me. 125.

[146] Hiott v. Pierson, 35 S. C. 611, 14 S. E. 853; State v. Summers, 19 S. C. 95; York v. Maine Cent. R. Co., 84 Me. 128; State v. Glover, 27 S. C. 602; State v. Dawkins, 32 S. C. 17. See ante, § 38 et seq.

[147] Hiott v. Pierson, 35 S. C. 611, 14 S. E. 853; Com. v. Barry, 9 Allen (Mass.) 276; State v. Freeman, 100 N. C. 429. In Com. v. Barry, supra, it was said: "The prohibition must be regarded as a restraint only on the expression of an opinion by the court on the question whether a particular fact or series of facts involved in the issue of a case is or is not established by the evidence. In other words, it is to be construed so as to prevent courts from interfering with the province of juries by any statement of their own judgment or conclusion upon matters of fact. This construction effectually accomplishes the great object of guarding against any bias or undue influence which might be created in the minds of jurors, if the weight of the opinion of the court should be permitted to be thrown into the scale in deciding upon issues of fact; but further than this the legislature did not intend to go. The statute was not designed to deprive the court of all power to deal with the facts proved. On the contrary, the last clause of the section very clearly contemplates that the duty of the court may not be fully discharged by a mere statement of the law. By providing that the court may also state the testimony, the manifest purpose of the legislature

jurisdictions, it is not erroneous for the trial judge to repeat the uncontradicted testimony of witnesses, and point out the inquiries suggested thereby;[148] or to call the jury's attention to the evidence in the case, and state his recollection of what has or has not been testified to, submitting the whole matter to their consideration and judgment;[149] or to analyze, compare, and explain the evidence;[150] or to read extracts from the evidence of a witness at the request of the jury, the parties being present, and not objecting.[151] So, in these jurisdictions, it has been held that a misstatement of the evidence in summing up is not an expression of opinion, and that it is the duty of counsel to call the judge's attention to his error, in order that it may be corrected.[152] It has also been held that a simple enumeration of circumstances, though leading to an irresistible conclusion of fact, cannot be considered as an expression of opinion on such fact.[153]

So, the following instructions have been held not on the weight of the evidence: Instructions that there was "some evidence tending to show" a certain fact;[154] instructions lim-

was to recognize and affirm the power and authority of the court, to be exercised according to its discretion, to sum up the evidence, to state its legal effect and bearing on the issues, and to indicate its proper application under the rules of law."

[148] State v. Glover, 27 S. C. 602.

[149] Eddy v. Gray, 4 Allen (Mass.) 435.

[150] Hamlin v. Treat, 87 Me. 210.

[151] Green v. State, 43 Ga. 368.

[152] Grows v. Maine Cent. R. Co., 69 Me. 412.

[153] State v. Noblett, 47 N. C. 418.

[154] Michie v. Cochran, 93 Va. 641; People v. Flannelly, 128 Cal. 83. An instruction in a criminal case stating, "Here is evidence that the homicide was committed within the corporate limits, * * * and there is other evidence of it, to which I will call your attention," etc., is not a violation of a statute forbidding the court to express an opinion as to whether a fact is fully or sufficiently

iting the amount of the verdict to the amount claimed in the petition;[155] a statement by the judge, on refusing a request, that "I do not regard this request as being in accordance with the evidence,—it is upon a state of facts which the evidence does not warrant;"[156] an instruction that the testimony of a witness, if true, will establish a specified fact, leaving the jury to decide upon his credibility;[157] informing the jury that there is some evidence in the case of a circumstantial nature;[158] a statement that "plaintiff brings evidence to show";[159] an instruction that, "if the jury believe from the evidence that the defendants did certain things, * * *" then the defendants are liable for all damages sustained;[160] an instruction cautioning the jury not to let a certain circumstance prevent their looking to the whole evidence in making up their verdict;[161] an instruction in a murder case that evidence to establish an alibi, like any other evidence, may be open to special observation, as persons may perhaps fabricate it with greater hopes of success or less fear of punishment than most other kinds of evidence, does not tell the jury that in the instant case they are to attach less weight to the evidence of alibi than to other evidence.[161a]

The following cases are also illustrative of instructions which have been held not to violate the rule against charging

proved. State v. Edwards, 126 N. C. 1051. There is no objection to a charge declaring that evidence has been offered tending to prove a certain material fact in the case, if it is disclosed by the record that the statement is true beyond any possible question. People v. Flannelly, 128 Cal. 83.

[155] Oglesby v. Missouri Pac. Ry. Co. (Mo.) 37 S. W. 829.

[156] Pillsbury v. Sweet, 80 Me. 392.

[157] Sneed v. Creath, 8 N. C. 309.

[158] People v. Wong Ah Foo, 69 Cal. 180.

[159] Central R. Co. v. Freeman, 75 Ga. 331.

[160] Lagrone v. Timmerman, 46 S. C. 372.

[161] Anderson v. Matindale, 61 Tex. 188.

[161a] People v. Wong Ah Foo, 69 Cal. 180.

on the weight of the evidence: Where a party has, by the introduction of title papers in evidence, shown a connected claim of valid transfers to land from and under the sovereignty of the soil down to himself, except one link in the chain, which was supplied by undisputed heirship from one in whom the title had vested, an instruction that such party has shown title to the land is not a charge on the weight of evidence, but a proper charge upon the legal effect of uncontradicted testimony.[162] In an action against a sheriff for seizure of oxen, where the defense was a waiver by the plaintiff of the statute right of exemption, the presiding justice instructed the jury: "If the plaintiff gave his consent, and said to the officer, 'There, all that property in that yard, comprising these oxen and those cows, are mine, and you can take the oxen or any of the rest of them you see fit,' * * * that would be a waiver; the action cannot be maintained," followed by a statement of the plaintiff's denial of this, and of his version of the matter, and, "if this is all he said, you would come to the conclusion, probably, that there was not any consent." This was held not a decision by the judge of any question of fact within the province of the jury.[163] At the trial of an action brought by the assignee of a bankrupt for the conversion of goods conveyed by the bankrupt to the defendants by a mortgage alleged to be a fraudulent preference, the judge instructed the jury that if the defendants knew or had reasonable cause to believe that the bankrupt was insolvent, and, with that knowledge, took nearly all his property to secure themselves, knowing that the law required that his property should be divided equally among his creditors, these facts would go far towards supporting the inference that they had reasonable cause to believe that

[162] Teal v. Terrell, 58 Tex. 257.

[163] Fogg v. Littlefield, 68 Me. 52.

the bankrupt intended the mortgage as a preference. It was held that this instruction was not a charge with respect to matters of fact, within the statutory prohibition.[164] On a prosecution for grand larceny, the court instructed the jury that, if satisfied beyond a reasonable doubt "that defendant killed or had the calf killed by the witnesses, and that she then cut out the brand and cut off the ears of the calf, and burned up the ears and part of the hide so cut out, this would be a circumstance to be considered by you, indicating that the defendant was not the owner of the calf, and of her knowledge that she was not the owner." It was held that the word "indicating," as used in the instruction, would be understood by the jury as tending to show a certain result, and that the language of the instruction is not in violation of the constitutional provision prohibiting the court from charging the jury with respect to matters of fact.[165] On a trial for murder, where it appeared that defendant and deceased had married sisters, and an attempt to justify the killing was based on the fact that deceased had tried to get defendant's wife to desert him, the court charged that, "if you believe from the evidence that the deceased (H.) either persuaded the wife of the prisoner to leave his bed and board, or afforded her shelter or protection (if she quit him of her own accord), in neither case would such fact excuse the killing." This was held not an intimation of opinion as to what had been proved by the evidence.[166] An illustration not referring to the facts of the case at bar is not erroneous.[167] An instruction not intended as a comment on the facts, but merely for the purpose of stating the

[164] Forbes v. Howe, 102 Mass. 427.
[165] State v. Loveless, 17 Nev. 424.
[166] State v. Dennison, 44 La. Ann. 135.
[167] State v. Godfrey, 60 S. C. 493.

issues or contentions of the respective parties, is not erroneous.[168] An instruction that a certain fact exists is not erroneous, although the fact is disputed, where the context shows that the statement was made as the contention of one of the parties.[169] An instruction that, "unless the evidence established beyond a reasonable doubt that the defendant filed a false claim with intent to defraud, * * * they [the jury] must acquit; that it was not enough to prove that the claim was false, but the state must further prove beyond a reasonable doubt that the defendant filed it with the intention of defrauding, * * * and, if the state has not so proved that fact, they must acquit; but that the intention with which the act charged was done * * * might be inferred from all the facts and circumstances proved in the cause,"—was not erroneous.[170]

§ 49. Same—Curing error by other instructions.

Where the court comments on the evidence, or intimates or expresses an opinion as to its weight and sufficiency, the error in so doing is not cured by the giving of further instructions that the jury are the sole judges of the weight of the evidence and the credibility of the witnesses,[171] and are not bound by any opinion which the court may have ex-

[168] Westbury v. Simmons, 57 S. C. 467; Sherman, S. & S. Ry. Co. v. Bell (Tex. Civ. App.) 58 S. W. 147; Gilchrist v. Hartley, 198 Pa. 132.

[169] West v. Banigan, 51 App. Div. (N. Y.) 328.

[170] Ferris v. State, 156 Ind. 224. See, also, Aston v. State (Tex. Cr. App.) 61 S. W. 307.

[171] People v. Lyons, 49 Mich. 78; Territory v. O'Hare, 1 N. D. 30; Shorb v. Kinzie, 100 Ind. 429; State v. Dick, 60 N. C. 440; State v. White, 15 S. C. 393; People v. Chew Sing Wing, 88 Cal. 288; People v. Kindleberger, 100 Cal. 367; State v. Ah Tong, 7 Nev. 148. Contra, White v. Territory, 1 Wash. St. 279; Humphreys v. Collier, Breese (Ill.) 299.

pressed on the evidence,[172] or that the court cannot express any opinion on the facts.[173] Such an instruction is not sufficient to do away with the effect of the previously expressed opinion,[174] and it makes no difference whether the instruction is given at the same time with the expression of opinion,[175] or in a subsequent part of the charge;[176] and it is likewise immaterial that repeated statements are made that the jury are the exclusive judges of the weight of the evidence and the credibility of the witnesses.[177] It has accordingly been held that the error in instructing the jury that the testimony of a witness is entitled to little weight is not cured by an instruction that the jury are the sole judges of the weight of a witness' testimony.[178] And where the court made an argumentative comparison of the relative credibility of the principal witnesses for the defense and the principal witnesses for the prosecution, their testimony being vital and in direct conflict, and in so doing disparaged the credibility of witnesses for the defense, and conveyed to the jury in plain terms that the court entertained strong suspicions of the witnesses for the defense, it was held reversible error, notwithstanding the court repeatedly told the jury that they were the exclusive judges of the weight of the evidence and the credibility of the witnesses.[179] Nevertheless, the fact that the court, at the time of giving the instruction complained of, explained fully that the jury were

[172] People v. Chew Sing Wing, 88 Cal. 268.

[173] State v. White, 15 S. C. 393; People v. Kindleberger, 100 Cal. 367.

[174] State v. White, 16 S. C. 393.

[175] Shorb v. Kinzie, 100 Ind. 429.

[176] People v. Kindleberger, 100 Cal. 367.

[177] Territory v. O'Hare, 1 N. D. 30.

[178] People v. Lyons, 49 Mich. 78.

[179] Territory v. O'Hare, 1 N. D. 30.

the judges of the facts, ought to go a long way in supporting an instruction where the error is not clear, but is only arrived at by a nice construction of language incautiously used.[180]

§ 50. Same—Violation of rule otherwise than by express instructions.

To work a reversal of the cause, it is not necessary that the opinion or intimation of opinion as to the credibility of the witnesses, or the weight and effect of the evidence, be given to the jury by express instructions. Of course, if the court expresses an opinion during the conduct of the trial, but not in the presence or hearing of the jury, there can be no ground of complaint.[181] So, an opinion expressed by the court during the progress of the trial, which does not appear to have been given in charge to the jury, or to have been in any way connected with a refusal to charge, or with the admission or rejection of testimony, has been held not a subject of appellate review.[182] It has also been held that, if the admissibility of certain evidence depends upon the establishment of some necessary preliminary facts, it is not improper for the judge, in passing on such question, to announce, for the guidance and benefit of counsel, the reasons which controlled him in the admission or rejection of the evidence; that this necessarily involves the expression of an opinion upon the evidence already introduced, and that such opinion cannot be assigned for error. This rule is well illustrated by a case in which the admissibility of certain evidence depended on the preliminary proof of a promise by one of the parties. In deciding that the evidence was ad-

[180] See People v. Carey (Mich.) 84 N. W. 1087.
[181] Phillips v. Beene, 16 Ala. 720.
[182] Phillips v. Beene, 16 Ala. 720.

missible, the court said "that, as the case then stood, a *prima facie* promise had been proven," and this remark was assigned as error. The reviewing court said that, "while the expression of the learned judge that, as the case then stood, a *prima facie* promise had been proven, might be the subject of criticism if presented to the jury as a formal instruction, we think it meant no more, as used, than that evidence had been given tending to show the promise, sufficient to lay the foundation for the introduction of the proposed testimony."[183] Unless expression of opinion is rendered necessary in ruling on the admissibility of evidence, such expression of opinion, whether addressed to the jury or to counsel, or whether given as an instruction or not, will, in general, be a ground for reversal.[184] The right to a decision on the facts by a jury uninfluenced and unbiased by the opinion of the judge * * * cannot be lawfully denied, by the simple evasion of looking at the counsel instead of at the jury, or of foisting the opinion into a ruling upon testimony.[185] The influence of the trial judge with the jury is necessarily great because of his authoritative position, and by words or actions he may materially prejudice the rights of a party. By words or conduct he may, on the one hand, support the character or testimony of a witness, or, on the other, may destroy the same, in the estimation of the jury, and thus his personal influence is exerted to the unfair advantage of one of the parties, with a corresponding detriment to the cause of the others.[186] The trial court has no more right to volunteer before the jury

[183] Reed v. Clark, 47 Cal. 200.

[184] State v. Harkin, 7 Nev. 377; Fuhrman v. City of Huntsville, 54 Ala. 263; McMinn v. Whelan, 27 Cal. 300; State v. Dick, 60 N. C. 440; Andreas v. Ketcham, 77 Ill. 377.

[185] State v. Harkin, 7 Nev. 383.

[186] McMinn v. Whelan, 27 Cal. 320.

his opinion upon a material fact in controversy, while deciding a question of law on the trial, than he has to charge the jury in respect to such fact. If he express an opinion, it is a wrong, requiring redress as imperatively in case of a mere inadvertence as in the case of a willful evasion of the law.[187] The following cases aptly illustrate the principle enunciated: The trial court, during the course of the trial of a civil case, said: "This was a civil suit, but that, if the jury considered the evidence, * * * they would find the case decidedly criminal." For this remark, the judgment was reversed.[188] So a remark of the judge vouching for the respectability of a witness whose character was called into question during the course of the trial was also held reversible error, the testimony of such witness being material.[189] In another case, the court, in declining defendant's request to withdraw certain confessions, told the state's attorney he might withdraw them if he liked, but he declined to do so. The reviewing court said: "This seems to us to be an expression of opinion, on the part of the judge, that the case was sufficiently proved without the aid of the confessions," and the judgment was reversed.[190] So, where the defense to a suit to recover the price of a map was that the view of the defendant's residence therein was not correct, and defendant's counsel asked the judge if he would know the view shown on the map to be the view of defendant's residence, to which he replied that he did not know that he would, this was held reversible error.[191]

[187] State v. Harkin, 7 Nev. 377.

[188] Furhman v. City of Huntsville, 54 Ala. 263.

[189] McMinn v. Whelan, 27 Cal. 300.

[190] State v. Dick, 60 N. C. 440.

[191] Andreas v. Ketcham, 77 Ill. 377.

§ 51. Same—Indicating opinion by questions asked the jury.

To violate the rule against charging on the weight of the evidence, it is not necessary that the instruction take the form of a direct and categorical statement. An opinion on a question of fact may be as plainly expressed by questions asked the jury as by a direct statement, and the mischief which the rule is intended to prohibit will be the same in both cases.[192] Thus, if the judge, in charging the jury, asks, "Is that the way an honest man would act? * * * Do honest people act so?" this amounts to an expression of opinion on the facts, and is erroneous.[193]

[192] State v. Norton, 28 S. C. 572; Friedrich v. Territory, 2 Wash. St. 358; State v. Jenkins, 21 S. C. 595; State v. Addy, 28 S. C. 4.

[193] State v. Jenkins, 21 S. C. 595.

CHAPTER V

SUMMING UP THE EVIDENCE.

§ 52. The Practice Defined and Described.
53. Where Practice Permissible.
54. Where Practice not Permissible.
55. Necessity of Summing up Evidence.
56. Method of Summing up—Whether Necessary to State All the Evidence.
57. Same—Whether Necessary to Give Precise Language of Witness.
58. Same—Whether Necessary to Give in Order in Which Evidence was Admitted.
59. Same—Miscellaneous.
60. Effect of Misstating Evidence and Method of Preserving Error for Review.

§ 52. The practice defined and described.

At common law it was the unquestionable right of the trial judge to sum up or recapitulate the evidence adduced in the trial of the cause before him, and, as will be subsequently shown, it was also permissible for him to comment on the evidence and express his opinion as to the credibility of the witnesses, or as to the weight and effect of the evidence or any part thereof.[1] The practice of summing up is alluded to in Blackstone's Commentaries, and is thus described: "When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel, and all others, sums up the whole to the jury; omitting all superfluous circumstances, observing wherein the main question and principle issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary

[1] See post, art. 3, of this chapter.

for their direction, and giving them his opinion in matters of law arising upon that evidence."[2] In support of the practice, the following reasons have been urged: "The great reliance, indeed, for truth in the verdict of a jury, is on the intelligence, integrity, and independence of the jurors; but while they are deemed competent to that end, experience and the knowledge of mankind produce the conviction that, unused as they are to judicial inquiries, often depending upon artificial reasoning, they are more competent when aided by the more extensive knowledge and more perfect experience of a judge, versed in human affairs, accustomed to consider, discuss, and digest masses of complicated evidence, to separate the material from the immaterial parts, and to combine the former so as to display the full force of each and all its parts."[3] In this connection, a few words of caution to the practitioner may not be out of place. The term "summing up the evidence" is often inaccurately used, both by bench and bar, as inclusive both of a statement and recapitulation of the evidence, and of an expression of opinion as to the credibility of the witnesses, and as to the weight and effect of the evidence. As will be shown hereafter, courts are, by statutes or constitutional provisions, expressly forbidden in a majority of jurisdictions to express any opinion as to the credibility of witnesses, and as to the weight and effect of the evidence. Nevertheless, in many of these jurisdictions the right to state and recapitulate the evidence remains unaffected. It will therefore be seen that the use of the term "summing up the evidence" to express these two separate and distinct functions is very misleading, and the writer has been careful to limit its use to the function ascribed to it by Blackstone.

[2] 3 Bl. Comm. 375.
[3] State v. Lipsey, 14 N. C. 485.

§ 53. Where practice permissible.

As already stated, it was and still is the practice in England for the trial judge to sum up and recapitulate the evidence, and in the United States the practice is also permissible, both in jurisdictions where the court may express his opinion on the facts,[4] and in jurisdictions where he is prohibited from so doing by statutory or organic provisions, unless such provisions also expressly or impliedly forbid summing up the evidence.[5] The rights of the court in this regard are original and inherent, and cannot be taken away except by statutory or constitutional provision;[6] and it is held that provisions which prohibit the court from expressing an opinion on the weight of the evidence do not affect

[4] Mitchell v. Harmony, 13 How. (U. S.) 130; Starr v. United States, 153 U. S. 614; Tracy v. Swartwout, 10 Pet. (U. S.) 80; McLanahan v. Universal Ins. Co., 1 Pet. (U. S.) 170; Games v. Stiles, 14 Pet. (U. S.) 322; People v. Fanning, 131 N. Y. 663; People v. Fanshawe, 65 Hun (N. Y.) 77; State v. Rose, 47 Minn. 47; Com. v. McManus, 143 Pa. 64; Hannon v. State, 70 Wis. 448; Morgan v. State, 48 Ohio St. 371; First Baptist Church in Stamford v. Rouse, 21 Conn. 167; Donnelly v. State, 26 N. J. Law, 480; District of Columbia v. Robinson, 180 U. S. 92, affirming 14 App. D. C. 512.

[5] Hamlin v. Treat, 87 Me. 310; Bellew v. Ahrburg, 23 Kan. 287; Rose v. Otis, 5 Colo. App. 472; City & Suburban Ry. Co. v. Findley, 76 Ga. 311; Whitlow v. State, 74 Ga. 819; Bray v. State, 69 Ga. 765; Wright v. Central Railroad & Banking Co., 16 Ga. 46.

[6] State v. Lipsey, 14 N. C. 485. The only cases found against this doctrine are to be found in Indiana, but, inasmuch as there is a conflict of authority in that state, they are of small value. None of these decisions seem to be based on any statutory authority. The earlier decisions affirm the trial judge's right to sum up the evidence. Barker v. State, 48 Ind. 163; Driskill v. State, 7 Ind. 338. But two decisions of comparatively recent date hold this practice erroneous: Killian v. Eigenmann, 57 Ind. 480; Cunningham v. State, 65 Ind. 377. In the last decision containing any reference to this question there is a dictum that the court may sum up the evidence. Pittsburgh, C. & St. L. Ry. Co. v. Sponier, 85 Ind. 165.

the right of the trial judge to sum up the evidence.[7] Special authority is found for the practice in some jurisdictions, in constitutional or statutory provisions, the usual language of which is that the trial judge "may state the testimony and declare the law,"[8] and in one state it is provided that the court "may also state the evidence when the same is disputed."[9] These provisions, it has been held, are not repugnant to other provisions prohibiting the court from charging on the weight of the evidence, or, in the usual language of the statutes and constitutions, charging juries "with respect to matters of fact."[10] Where the same statute or constitution contains both provisions, it is held that, while the court cannot state his opinion as to the weight of the evidence, his right to sum up the evidence after the manner of the common-law practice remains unaffected, and that the provision permitting him to sum up is merely declaratory and in affirmation of his common-law right.[11] As was said in one case: "By providing that the court may also state the testimony, the manifest purpose of the legislature was to recognize and

[7] Shiels v. Stark, 14 Ga. 429. And see, generally, post, art. 3, of this chapter.

[8] State v. Duffy, 6 Nev. 138; State v. Smith, 10 Nev. 106; Atchison v. State, 13 Lea (Tenn.) 279; Case v. Williams, 2 Cold. (Tenn.) 239; Hughes v. State, 8 Humph. (Tenn.) 75; Ayres v. Moulton, 5 Cold. (Tenn.) 154; Ivey v. Hodges, 4 Humph. (Tenn.) 154; Lannum v. Brooks' Lessee, 4 Hayw. (Tenn.) 121; Com. v. Barry, 9 Allen (Mass.) 278; Miller v. Stewart, 24 Cal. 502; Morris v. Lachman, 68 Cal. 109; People v. Doyell, 48 Cal. 85; Bailey v. Poole, 35 N. C. 404; State v. Nohlett, 47 N. C. 418; State v. Boyle, 104 N. C. 819; State v. Lipsey, 14 N. C. 485.

[9] Code Ala. 1886, § 2754. In construing this statute it has been held that it is not in limitation or restraint of the court's original and inherent power to state the admitted facts to the jury. Tidwell v. State, 70 Ala. 33.

[10] Com. v. Barry, 9 Allen (Mass.) 278; People v. Dick, 34 Cal. 663.

[11] Com. v. Barry, 9 Allen (Mass.) 278; State v. Lipsey, 14 N. C. 485.

affirm the power and authority of the court, to be exercised according to its discretion, to sum up the evidence, to state its legal effect and bearing on the issues, and to indicate its proper application under the rules of law."[12]

§ 54. Where practice not permissible.

Until a very recent date it was the practice in South Carolina for the judge to sum up the evidence.[13] This practice was held to be authorized by a constitutional provision that judges shall not charge juries with respect to matters of "fact, *but may state the testimony and declare the law.*"[14] (The italics are the author's.) But in 1895 this provision was amended by striking out the first part of the italicized clause, and, as amended, declared that "judges shall not charge juries in respect to matters of fact, but shall declare the law."[15] In construing this amended provision, the courts have held, and very properly it is believed, that the framers of the new constitution, by omitting the words "but may state the testimony," intended to abrogate the practice of summing up the evidence, and that it is no longer permissible.[16] In construing this provision for the first time, the reviewing court said: "The prohibition, 'judges shall not charge juries in respect to matters of fact,' now stands alone in section 26, unqualified by the permission to 'state the testimony,' which permission has been stricken out by

[12] Com. v. Barry, 9 Allen (Mass.) 278.

[13] Walker v. Laney, 27 S. C. 150; State v. Green, 5 Rich. (S. C.) 65; Richards v. Munro, 30 S. C. 284; State v. Moorman, 27 S. C. 22; Moore v. Columbia & G. R. Co., 38 S. C. 1; Massey v. Wallace, 32 S. C. 149; Benedict v. Rose, 16 S. C. 630; Woody v. Dean, 24 S. C. 505; Davis v. Elmore, 40 S. C. 533.

[14] Const. S. C. 1895, art. 5, § 26.

[15] Const. S. C. 1895, art. 5, § 26.

[16] Norris v. Clinkscales, 47 S. C. 488; State v. Stello, 49 S. C. 488; Burnett v. Crawford, 50 S. C. 161.

amendment; and any direct reference to the testimony in charging a jury, any expression as to what is in evidence, any remark that would amount to a stating of the testimony, in whole or in part, is absolutely prohibited." But as it would be impossible to declare the law applicable to a case on trial without connecting the legal principles involved with some state of facts, actual or hypothetical, "it was the intention of the framers of the new constitution, in amending" the provision, "that the trial judge, in charging the law of the case, should lay before the jury that law as applicable to a supposed state of facts, but that in so doing he should carefully avoid repeating the evidence on the facts at issue, making no statement of the testimony, either in whole or in part."[17] An instruction: "Does C. testify that his father never paid any rent on the land, and that he had it in exclusive possession? Does B. testify that G. used the land as his own, worked it, fenced it, ditched it, cleaned it, built barns and stables, and the other tenants out of possession allowed him to go on doing that for twenty years and upwards? They cannot now come into court and ask that he be disturbed,"—is in "violation of article 5, § 26, of the constitution."[18]

The Arkansas constitutional provision declares that "judges shall not charge juries with regard to matters of fact, but shall declare the law." This provision is identical with that of the

[17] Norris v. Clinkscales, 47 S. C. 488.

[18] Burnett v. Crawford, 50 S. C. 168. Asking the jury whether a witness has testified to certain facts which have in fact been testified to by the witness is a violation of the constitution of South Carolina, providing that "judges shall not charge juries in respect to matters of fact, but shall declare the law." State v. Stello, 49 S. C. 488. But a statement of facts in hypothetical form for the purpose of declaring the law applicable to the case, the evidence not being recited, is not a violation of the amended constitutional provision. Jenkins v. Charleston St. Ry. Co., 58 S. C. 373.

amended constitution of South Carolina;[19] and it has been said that the provision in effect prohibits the trial judge from summing up as at common law.[20]

In Texas, a statute prohibits the court from summing up the evidence in criminal cases,[21] and this prohibition is rigidly enforced by the courts.[22]

In Mississippi, the statute provides that "the judge * * * shall not sum up or comment on the testimony;"[23] and an instruction that, if the jury believe the testimony of a designated witness (setting out what the testimony was), they might find for plaintiff, was held erroneous for stating what that testimony was, that being a matter to be determined entirely by the jury.[24]

In Louisiana it was formerly proper for the court to sum up the evidence,[25] but, as regards criminal cases, the rule has been changed by a statute, passed in 1853, which provided, among other things, that the court "shall abstain from stating or recapitulating the evidence so as to influence their [the jury's] decision on the facts. He shall not state or repeat to the jury the testimony of any witness, nor shall he give any opinion as to what facts have been proved or disproved."[26]

In Michigan, under a statute requiring the court to instruct only as to the law of the case, it is error to state and review the evidence.[27]

[19] Const. Ark. art. 7, § 23.

[20] Fitzpatrick v. State, 37 Ark. 238.

[21] Code Crim. Proc. Tex. art. 715.

[22] Hannah v. State, 1 Tex. App. 579; Porter v. State, 1 Tex. App. 396; Gibbs v. State, 1 Tex. App. 13.

[23] Ann. Code Miss. 1892, § 732.

[24] Southern R. Co. v. Kendrick, 40 Miss. 374.

[25] State v. Chandler, 5 La. Ann. 489; State v. Green, 7 La. Ann. 518.

[26] State v. Asberry, 37 La. Ann. 125.

[27] Comp. Laws Mich. § 10,243; Renaud v. City of Bay City, 124

In Oregon there is a statute prohibiting the trial court from presenting the facts of a case to the jury.[28]

§ 55. Necessity of summing up evidence.

At common law, the trial judge was at liberty to comment on the evidence and state his opinion as to the weight of the evidence, or any part thereof; but this was a matter entirely in his discretion, and he could not be required to do so.[29] In respect to summing up the evidence, the same rule applied. He might sum up the evidence if he saw fit to do so, or refuse to sum up if this course seemed best to him. As was said in one case: "It cannot be traced or ascertained * * * that any rule of the common law exists that makes it imperative on a judge to repeat the evidence to the jury. * * * If, on the trial of a cause, the witnesses are numerous, the evidence complicated, and the main question or principal issue obscured by various and conflicting testimony, he may, in his discretion, sum up the whole to the jury, that they may apply it properly, and have their attention directed to the essential points in controversy. No judge would ever refuse to impart such assistance when

Mich. 29, holding, in an action against the city for injuries from a defective sidewalk, that an instruction that "in this case there are some funny things. * * * City officers * * * swear that the walk was perfectly safe, and go right along and repair it, * * * and almost immediately rebuild it," was erroneous. But compare People v. Carey (Mich.) 84 N. W. 1087.

[28] Hill's Ann. Laws Or. § 200. Where the court charges that there is evidence on behalf of the plaintiff of a fact alleged by the plaintiff, and the court also charges that there is evidence on the part of the defendant to the contrary, the court is merely attempting to call the attention of the jury to the theories of the respective parties, and there is no violation of the statute which forbids the court from presenting the facts of the case to the jury. Smitson v. Southern Pac. Co., 37 Or. 74.

[29] See post, art. 3, this chapter.

it was requested by a jury, nor would he withhold it in any case wherein the nature of the evidence or the conduct of the cause led him to believe that his aid would enable them to discharge their constitutional functions with more correctness or facility; but it must, of necessity, depend on the circumstances of each case, whether the judge believes that his aid would be of any efficacy,—whether the case be not so plain and intelligible as to render his interference unnecessary, or the evidence so equally balanced as to make it unsafe. All these considerations the law has wisely confided to the sound discretion of the judge."[30] In states where the trial judge still has authority to sum up the evidence, he is not bound to do so, on or without request, unless there is some statutory or constitutional provision which makes it his imperative duty to do so;[31] but in one jurisdiction the statute provides that the court "shall state, in a plain and correct manner, the evidence given in the case, and declare and explain the law arising thereon."[32] In construing this statute, the decisions have not been altogether harmonious. In an early decision it was said that "no implication can arise from this law that he must charge the jury, but, if he does charge them, he must do it according to the rule there laid down," and a refusal of a request to sum up the evidence was sustained.[33] In another case, where a request had been made that the evidence be summed up, the judgment was reversed because the court did not do so. It is somewhat difficult to determine from the language of the opinion

[30] State v. Morris, 10 N. C. 390.

[31] Lowe v. Minneapolis St. Ry. Co., 37 Minn. 283; Wright v. Central Railroad & Banking Co., 16 Ga. 46; Morgan v. State, 48 Ohio St. 371; Lannum v. Brooks' Lessee, 4 Hayw. (Tenn.) 121; Ivey v. Hodges, 4 Humph (Tenn.) 154.

[32] Code N. C. § 413.

[33] State v. Morris, 10 N. C. 391.

whether the court considered it erroneous not to sum up when requested, or whether it considered a failure to do so would have been erroneous, even though no request had been made.[34] A subsequent decision (in which special stress was laid on the fact that, in the case just mentioned, a request had been made) holds that, in the absence of a request, the court need not eliminate the material facts on both sides, and apply the principles of law to them.[35] So it has been held that a failure of the judge to recite the testimony in his charge to the jury is not assignable as error, where it was expressly agreed by counsel on both sides that it need not be recapitulated.[36]

§ 56. Method of summing up—Whether necessary to state all the evidence.

In summing up, the court is not bound to state all the evidence that has been brought out during the course of the trial;[37] but, so far as he attempts to sum up the evidence, he must do so accurately and impartially.[38] Neither is the court bound, in summing up, to notice every position discussed by counsel. If anything deemed material be omitted, counsel can call the court's attention to it, and pray an instruction.[39] The minuteness with which a trial judge, in his charge to the jury, shall state the evidence, is to a large

[34] State v. Boyle, 104 N. C. 800.

[35] State v. Brady, 107 N. C. 822.

[36] Wiseman v. Penland, 79 N. C. 197.

[37] Borham v. Davis, 146 Pa. 72; State v. Morris, 10 N. C. 388; Boon v. Murphy, 108 N. C. 187; State v. Lipsey, 14 N. C. 485; State v. Haney, 19 N. C. 390; State v. Ussery, 118 N. C. 1177; Kaminitsky v. Northeastern R. Co., 25 S. C. 53; Allis v. United States, 155 U. S. 124; People v. McGonegal, 62 Hun (N. Y.) 622; Com. v. Warner, 13 Pa. Super. Ct. 461.

[38] Com. v. Warner, 13 Pa. Super. Ct. 461.

[39] Simpson v. Blount, 14 N. C. 34.

extent discretionary with him,[40] and the court's duty is properly performed when he directs the jury's attention to the principal questions they are called upon to try, and explains the law applicable thereto.[41] It is the duty of a judge, when he sums up, to collate the evidence and bring it together in one view on each side, with such remarks and illustrations as may properly direct the attention of the jury to the merits of the case. It is also his duty to bring to the notice of the jury principles of law or facts which have an important bearing on the case.[42] He must present the facts on both sides in such a manner that they will have their fullest legitimate operation.[43] As was said in one case, there is no known "rule that compels a court to recapitulate all the items of the evidence, nor even all bearing upon a single question."[44] "The real point of controversy often and generally depends on a very small portion of the testimony introduced. In the course of a trial, points made upon prolix and complicated documents, or after the most wearisome examination of witnesses, are abandoned, sometimes expressly, but oftener tacitly, because not sufficiently raised by the proof adduced, or answered by fuller proof on the other side. * * * To advert to everything that has thus occurred during the trial, though not pressed by the party, though yielded by him, immaterial or absurd, would be a harmful consumption of time, obscure the truth, and confound the minds of the jurors."[45] It is undoubtedly the better practice, in recapitulating the evidence, to divest it of all im-

[40] Fowler v. Smith, 153 Pa. 639; Borham v. Davis, 146 Pa. 72; State v. Morris, 10 N. C. 388.

[41] State v. Haney, 19 N. C. 390; Boon v. Murphy, 108 N. C. 187.

[42] Bailey v. Poole, 35 N. C. 404.

[43] State v. Moses, 13 N. C. 452.

[44] Allis v. United States, 155 U. S. 124.

[45] State v. Lipsey, 14 N. C. 485.

material circumstances.[46] Of course, if the charge was such a plain departure from impartiality in collating the evidence as of itself to convey to the jury an impression of the judge's opinion, the reviewing court would set aside the verdict.[47] Strong points on either side should not be omitted or slurred over.[48] While it has been held not a ground for reversal that the judge stated the facts on one side with more fullness, clearness, and emphasis than he did on the other,[49] it is not just to present the proof prominently on one side and omit the countervailing evidence on the other side entirely.[50] If a judge, in his charge, presents only the inferences that can be drawn on one side, arrayed *in solido,* so as to constitute an imposing argument to the jury without summing up on the other side, the judgment should be reversed.[51]

§ 57. Same—Whether necessary to give precise language of witness.

In stating the evidence it is not necessary to give the exact language of a witness. A statement of the substance of his testimony will suffice.[52] It has been said, however, in one jurisdiction, that if the court undertakes, in a criminal case, to give a part of the testimony, it is safer to recite the witness' language as taken down by the shorthand reporter, or in the judge's notes;[53] but in this jurisdiction it was held

[46] State v. Moses, 13 N. C. 452.
[47] State v. Lipsey, 14 N. C. 485.
[48] Borham v. Davis, 146 Pa. 72.
[49] McPherson v. McPherson, 21 S. C. 273.
[50] Wright v. Central Railroad & Banking Co., 16 Ga. 46. See, also, L. I. Aaron Co. v. Hirschfeld, 89 Ill. App. 205.
[51] State v. Moses, 13 N. C. 452.
[52] Strawn v. Shank, 110 Pa. 259; Krepps v. Carlisle, 157 Pa. 358; State v. Moses, 13 N. C. 452; People v. Doyell, 48 Cal. 85.
[53] People v. Doyell, 48 Cal. 85.

not erroneous for the judge, in stating the testimony, to read another person's memorandum, instead of stating the testimony from his own recollection, or reading it from a memorandum made by himself.[54] It has been held that, where a trial has lasted for several days, a refusal to state the evidence on a certain point, the court having offered to read parts of the testimony, was not erroneous, since the court could not be expected to remember all the testimony.[55]

§ 58. Same—Whether necessary to give in order in which evidence was admitted.

While the court may read or recite the evidence in the order in which it was given,[56] it is not necessary that this be done. He may place the evidence before the jury in the order in which it relates to the propositions which it is adduced to support or contradict,[57] by pointing out the questions of fact which arise, and by calling the attention of the jury to the evidence applicable to such questions.[58] He may eliminate the controverted facts, arrange the testimony in its bearing on their different aspects, and instruct the jury as to the law applicable thereto, in such manner as will enable them to see and comprehend the matters which are essential to an intelligent and impartial verdict.[59] The words of each witness need not be stated separately. The witnesses may be grouped, and the substance of the testimony of a group of witnesses given, if it is fairly done.[60] In addition to stating the testimony of a witness, the court may state all the cir-

[54] People v. Boggs, 20 Cal. 432.
[55] Myer v. Brooklyn City R. Co., 10 Misc. Rep. (N. Y.) 11.
[56] State v. Addy, 28 S. C. 13.
[57] State v. Boyle, 104 N. C. 800; State v. White, 15 S. C. 392; State v. Jones, 97 N. C. 469; State v. James, 31 S. C. 235.
[58] State v. Summers, 19 S. C. 94.
[59] State v. Boyle, 104 N. C. 800.
[60] Maynard v. Tyler, 168 Mass. 107.

cumstances attendant upon the examination to show how they are contradictory, and how reconcilable, and then to submit a reasonable inference which may be drawn.[61] He may make suggestions, fairly warranted by the evidence, to show the jury how it might be reconciled in some parts, and the difficulty of doing so in others.[62]

§ 59. Same—Miscellaneous.

The right to state the evidence includes the right to state that there is no evidence as to particular facts (if there is, in fact, none);[63] and it has also been held to include the right to state that there is some evidence.[64] The court may state the theories which the evidence for both prosecution and defense respectively tends to prove,[65] or the claims of the parties regarding the evidence. This is so far from being erroneous that it is regarded as the duty of the court to state the claims of both parties upon all questions of fact that arise in a case, in order that the jury may clearly understand them,[66] and that the court may explain properly

[61] State v. Moses, 13 N. C. 452.

[62] Com. v. McMauus, 143 Pa. 64.

[63] People v. Dick, 34 Cal. 663. In Lutton v. Town of Vernon, 62 Conn. 1, a suit for death by wrongful act, the trial judge, in reviewing evidence on the question of contributory negligence, said: "But what was the occasion for stopping at this point neither of the unfortunate victims is here to explain to us, and there is no evidence, probably, that can ever be obtained to explain it." The reviewing court held that all that was meant by this language, and all that the jury could have fairly understood from it, was that no living witness could probably be produced on the point at issue, and that the instruction could not be understood as meaning that there was no circumstantial evidence in the case on this point, where the instruction is based upon the existence of this evidence.

[64] Harington v. Neely, 7 Baxt. (Tenn.) 442.

[65] Hawes v. State, 88 Ala. 37; State v. Smith, 49 Conn. 388.

[66] Dexter v. McCready, 54 Conn. 174; Mimms v. State, 16 Ohio St. 221.

the law applicable to the case.[67] Where the court has stated hypothetically the alleged facts constituting the theory of one of the parties, and given the law applicable to that theory, it is the duty of the court, if the evidence so authorizes, to state the alleged facts constituting the theory of the other party, and state the law applicable thereto, but this duty does not devolve on the court if the latter party's theory is unsupported by any evidence.[68] The right to state the evidence also authorizes the trial judge to state the testimony of any witness at the request of the jury,[69] and it has been held that, after so doing, he may refuse to allow counsel to give his version of it after he had argued the case.[70] The court is not required to recapitulate the testimony adduced during the trial a second time, although one of the parties request that it be done.[71]

§ 60. Effect of misstating evidence and method of preserving error for review.

An inaccurate statement of the facts by the trial judge, which might have had an important bearing on the jury's view of the case,[72] or an erroneous statement of the evidence upon the pivotal fact in the case, will be a ground for reversal.[73] The fact that the mistake was made through inadvertence makes no difference, of course, and the cause will be reversed, though the evidence had been correctly stated

[67] Mimms v. State, 16 Ohio St. 221.

[68] Banks v. State, 89 Ga. 75.

[69] State v. Smith, 10 Nev. 106; People v. Ybarra, 17 Cal. 166; Atchison v. State, 13 Lea (Tenn.) 279.

[70] Atchison v. State, 13 Lea (Tenn.) 279.

[71] Aston v. Craigmiles, 70 N. C. 316.

[72] Collins v. Leafey, 23 Wkly. Notes Cas. (Pa.) 264; American Oak Extract Co. v. Ryan, 104 Ala. 267.

[73] Steinbrunner v. Pittsburgh & W. Ry. Co., 146 Pa. 504.

in that portion of the charge immediately preceding.[74] Nevertheless, for a misstatement of the evidence to be a ground for reversal, it must be a misstatement of some substantial part of the testimony, and it must also be calculated to mislead the jury.[75] Unless the jury were likely to be misled to the prejudice of one of the parties, the judgment will not be reversed,[76] and, according to some decisions, it is necessary to suggest correction at once, and not silently reserve it for future exception, in order to preserve for review error in a reeapitulation of the evidence,[77] and that the court's attention be called to the misstatement at the time, and a request made that it be corrected.[78]

[74] Steinbrunner v. Pittsburgh & W. Ry. Co., 146 Pa. 504.

[75] Bellew v. Ahrburg, 23 Kan. 287.

[76] People v. Boggs, 20 Cal. 432; Knapp v. Griffin, 140 Pa. 604; Texas & P. Ry. Co. v. Gentry, 163 U. S. 353; People v. Caldwell, 107 Mich 374; Bellew v. Ahrburg, 23 Kan. 287.

[77] Muetze v. Tuteur, 77 Wis. 236; State v. Davis, 27 S. C. 609; Rumph v. Hiott, 35 S. C. 444.

[78] Arnstein v. Haulenbeek, 16 Daly (N. Y.) 382; Muetze v. Tuteur, 77 Wis. 236; Braunsdorf v. Fellner, 76 Wis. 1; State v. Davis, 27 S. C. 609; Knapp v. Griffin, 140 Pa. 604.

CHAPTER VI.

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I. General Considerations Applicable in Drafting Instructions.

§ 61. Necessity of covering whole case.

It is not necessary that every instruction should have embodied in it every fact or element essential to sustain the action, or that it should negative matters of defense. A single instruction need not cover the entire case.[1] "It is not required that the entire law of the case shall be stated in a single instruction, and it is, therefore, not improper to state the law, as applicable to particular questions, or particular parts of the case, in separate instructions; and if there is no conflict in the law as stated in different instructions, and all the instructions, considered as a series, present the law applicable to the case fully and accurately, it is sufficient."[2] Yet everything that is essential to the expression of a single rule should be expressed in a single instruction.[3] So, an

[1] Village of Sheridan v. Hibbard, 119 Ill. 307; Swan v. Lullman, 12 Mo. App. 584; Colee v. State, 75 Ind. 511; Greever v. Bank of Grabam (Va.) 39 S. E. 159. In a criminal case it is not necessary "to state in connection with each legal proposition * * * that it must appear that the offense was committed in the county" named in the indictment. Keys v. State, 112 Ga. 392.

[2] Chicago & E. I. R. Co. v. Hines, 132 Ill. 161. An instruction stating "a complete, accurate, and pertinent proposition" is not erroneous because it fails to embrace another proposition which would be appropriate in that connection. Lucas v. State, 110 Ga. 756.

[3] Worden v. Humeston & S. Ry. Co., 72 Iowa, 201; Thomas v. Babb, 45 Mo. 384. See, also, Chicago & A. R. Co. v. McDonnell, 91 Ill. App. 488.

instruction intended to cover the whole case, and upon which, if met by the evidence, the jury are told to find in a certain way, should include all the elements necessarily involved in the case, and within the evidence.[4] An instruction may properly refer to other instructions given, in order to avoid repetition;[5] and even in the absence of express reference, it is the rule that instructions will be considered and construed as a whole.[6]

§ 62. Adhering to well-settled precedents.

It is always safer to couch the charge in language universally adopted and approved than to undertake to give a new version in more doubtful language.[7] The trial judge should adhere strictly to the old and well-settled formulas of the law, for then he is certain to be right "beyond a reasonable doubt." Any departure from the beaten track will inevitably lead to doubt and uncertainty.[8]

§ 63. Style, spirit, and arrangement.

The trial judge is necessarily vested with a large discretion as to the style and form of the charge.[9] The style and

[4] McAleer v. State, 46 Neb. 116; Bowie v. Spaids, 26 Neb. 635; Nelson v. Johansen, 18 Neb. 180; McNulta v. Jenkins, 91 Ill. App. 309; Boothe v. Loy, 83 Mo. App. 601; Ward v. Ward, 47 W. Va. 766.

[5] State v. Haines, 160 Mo. 555; McElya v. Hill, 105 Tenn. 319. See Beals v. Cone, 27 Colo. 473, wherein it was held that the language used sufficiently indicated that three instructions were to be taken together in arriving at the meaning of the court.

[6] See post, c. 32, "Appellate Review of Instructions."

[7] Turner v. State, 4 Lea (Tenn.) 206; Lawless v. State, 4 Lea (Tenn.) 173; Smith v. State, 2 Leg. R. (Tenn.) 56; State v. Murray, 91 Mo. 95; State v. Kilgore, 70 Mo. 557; State v. Stein, 79 Mo. 330.

[8] Lawless v. State, 4 Lea (Tenn.) 179.

[9] Continental Imp. Co. v. Stead, 95 U. S. 166; Mawich v. Elsey, 47 Mich. 10. A charge which deals largely in superlatives, while objectionable, is not a ground for reversal, if not calculated to mislead. McFarland v. Wofford, 16 Tex. 602. The charge is legally sufficient if it is correct in substance, and commits fairly to the jury

spirit of a charge are not open to criticism by the reviewing court, if the charge be correct, and not liable to mislead the jury;[10] and an instruction which is correct as applied to the merits of the controversy will not be declared erroneous because it was inartificially drawn.[11] Instructions given in the language of the statute are usually held sufficient.[12] So far as practicable, instructions should be given in a concrete form, grouping together facts which there is evidence to prove, and telling the jury the legal effect of those facts, if they find them to exist. This form of instruction is preferable to one dealing in generalities.[13]

It is the better practice to bring together all the instructions bearing on the same question, whether given on the request of either party, or on the court's own motion, in order that the jury may not be misled;[14] but a mere lack of orderly and logical arrangement of the propositions of

the determination of the disputed facts. Carman v. Central R. Co. of New Jersey, 195 Pa. 440; Fessenden v. Doane, 188 Ill. 228, affirming 89 Ill. App. 229. "An instruction with the words 'not guilty,' printed in letters larger than the remainder of the instruction," should have been refused. Elwood v. Chicago City Ry. Co., 90 Ill. App. 397. While the practice of underscoring instructions is subject to criticism, and display type or italics should not be employed to call the attention of the jury to any fact which may be contested, the use of display type in merely ordinary and general instructions, which do not involve special facts, will not be cause for reversal. Hagenow v. People, 188 Ill. 545.

[10] Keator v. People, 32 Mich. 484; Elliott v. Van Buren, 33 Mich. 49.

[11] Sherer v. Rischert, 23 Mo. App. 275.

[12] Mt. Olive & S. Coal Co. v. Rademacher, 190 Ill. 538, affirming 92 Ill App. 442; Sommer v. Carbon Hill Coal Co. (C. C. A.) 107 Fed. 230.

[13] Zimmerman v. Hannibal & St. J. R. Co., 71 Mo. 476; Gaffney v. St. Paul City Ry. Co., 81 Minn. 459.

[14] Harrington v. People, 90 Ill. App. 456, holding that it is not error for the court to refuse to read last the instructions given at the request of the defendant.

law involved in the charge is not assignable as error, if the jury are fully informed as to the rules of law by which they are to be guided.[15] It is not a ground of reversal that a more orderly arrangement might have been adopted.[16]

§ 64. Verbal inaccuracies.

Mere verbal inaccuracies in instructions which are not likely to mislead will not operate as a ground for reversal.[17] The instructions will be construed according to their essential meaning.[18] Thus, the use of the word "plaintiff" for "defendant," and the omission of "if" in another place, have been held errors not calculated to mislead.[19] So, "where the

[15] Atchison, T. & S. F. R. Co. v. Calvert, 52 Kan. 547.

[16] Gulf, C. & S. F. Ry. Co. v. Dunlap (Tex. Civ. App.) 26 S. W. 655.

[17] Green v. Lewis, 13 Ill. 642; Nichols v. Mercer, 44 Ill. 250; McKenzie v. Remington, 79 Ill. 388; People v. Carroll, 92 Cal. 568; Lucas Market Sav. Bank v. Goldsoll, 8 Mo. App. 596; Davidson v. Kolb, 95 Mich. 469; O'Callaghan v. Bode, 84 Cal. 489; City of Atlanta v. Champe, 66 Ga. 659; Smedis v. Brooklyn & R. B. R. Co., 88 N. Y. 13; Galpin v. Wilson, 40 Iowa, 90; Huffman v. State, 95 Ga. 469; Chicago & N. W. Ry. Co. v. Whitton's Adm'r, 13 Wall. (U. S.) 270. An instruction "that every delegation of authority, or creation of an agency, unless the extent of the authority or agency be expressly limited, carries with it the power to do all those things which are necessary, proper, and usual to be done in order to effectuate the purpose of the agency, and embraces all the approximate means necessary to accomplish the desired ends," is not erroneous because it inadvertently uses the word "approximate" instead of the word "appropriate," especially as the party complaining of the instruction was benefited, rather than otherwise, by a substitution of the word "approximate." River View Land Co. v. Dance, 98 Va 239.

[18] Galpin v. Wilson, 40 Iowa, 90. In Green v. Lewis, 13 Ill. 642, it was said that when it appears that the jury were not misled by an inaccuracy in some wording of an instruction otherwise proper, there can be no error; that jurors are not in the habit of taking dictionaries with them in retiring to consider their verdict to detect inaccuracies of expression.

[19] Nichols v. Mercer, 44 Ill. 250. See, also McKenzie v. Reming-

court correctly instructs the jury, at the request of the defendant, that facts against the defendant must be proved beyond a reasonable doubt, a mistake or misprint in repetition of the same instruction upon the court's own motion, in substituting the word 'evidence' for the word 'defendant,'" was held not calculated to do any injury.[20] In an action to recover damages for death caused by the negligence of defendant, the use of the word "plaintiff" instead of the word "decedent" is not reversible error, it being apparent that the use of the word "plaintiff" was through inadvertence, and that it could not have misled the jury.[21] And it has been held that, though putting one out of a schoolhouse for misbehavior is not an arrest, where the misbehavior amounted to a penal offense, it was merely a verbal inaccuracy for the court to denominate the expulsion as an "arrest," and instruct the jury that a private person could arrest one committing an offense in his presence.[22] So, an inadvertent mention of the prosecuting witness as owner of stolen goods is not reversible error.[23] It is not error to refer to the defendant in a criminal case as the "prisoner."[24]

§ 65. Qualifications or limitations of general rules.

Where the court lays down a general rule of law, it is not improper to notice exceptions to the general rule, or such

ton, 79 Ill. 388, in which it was held that a clerical mistake in using the word "plaintiff" instead of "defendant" in instructions, which is so palpable as to correct itself, will be no ground for a reversal. To the same effect, see Lucas Market Sav. Bank v. Goldsoll, 8 Mo. App. 596.

20 People v. Carroll, 92 Cal. 568.

21 O'Callaghan v. Bode, 84 Cal. 489.

22 Huffman v. State, 95 Ga. 469.

23 Wilson v. State, 66 Ga. 591.

24 Dinsmore v. State (Neb.) 85 N. W. 445.

circumstances as will prevent its operation;[25] but usually, if a party desires that the exceptions to a general rule of law be stated in an instruction to a jury, he should ask the court to state them.[26] Nevertheless, it has been held that, if it is manifest that the jury erred for want of an instruction stating qualifications of a general rule, the judgment should be reversed.[27] And where the court assumes to state to the jury the exceptions to a general rule, and omits an important exception to which the evidence is applicable, the charge is erroneous, and a ground for reversal.[28] In stating the exceptions to a general rule it has been held not error that they were given in paragraphs separated from the one limited.[29]

§ 66. Presenting in form of questions.

There is no error in presenting some of the facts in the form of questions. It is well calculated to present to the jury the precise points in controversy.[30]

II. Directness and Certainty Required.

§ 67. General rules.

Instructions should be direct, accurate, and certain,[31] and this is especially true when the evidence upon material is-

[25] Van Valkenburg v. Huff, 1 Nev. 142.

[26] Wells v. Morrison, 91 Ind. 51; White v. Thomas, 12 Ohio St. 317.

[27] White v. Thomas, 12 Ohio St. 317.

[28] Wells v. Morrison, 91 Ind. 51.

[29] International & G. N. Ry. Co. v. Brazzil, 78 Tex. 314.

[30] McLain v. Com., 99 Pa. 86.

[31] Cothran v. Moore, 1 Ala. 423; Salomon v. State, 28 Ala. 83; Perkins v. Davis, 2 Mont. 474; Salomon v. Cress, 22 Or. 177; Chicago, B. & Q. R. Co. v. Dougherty, 110 Ill. 521; Aikin v. Weckerly, 19 Mich. 482; Hyde v. Shank, 77 Mich. 517; Loeb v. Weis, 64 Ind. 285; Prather v. Naylor's Adm'r, 1 B. Mon. (Ky.) 246; Hammond's Lessee v. Inloes, 4 Md. 138; Given v. Charron, 15 Md. 502; Cahn v. Reid, 18 Mo. App. 115; Trinity & S. Ry. Co. v. Schofield, 72 Tex. 496; Welsh v. State, 11 Tex. 368; Gaffney v. St. Paul City Ry. Co., 81 Minn. 459.

sues is conflicting,[32] and the evidence is evenly balanced.[33] Instructions lacking in these requirements may and should be refused;[34] and the giving of instructions which are lacking in clearness and accuracy, and which may have misled the jury, will be cause for reversal,[35] where the evidence is very conflicting upon material points.[36] As a general rule, confused and misleading instructions should be refused, and, if given, are ground for reversal unless it is apparent that the jury was not, in fact, misled.[37] On the other hand,

[32] City of Mendota v. Fay, 1 Ill. App. 418; St. Louis Coal R. Co. v. Moore, 14 Ill. App. 510; Kranz v. Thieben, 15 Ill. App. 482; State v. Bailey, 60 N. C. 137.

[33] American Ins. Co. v. Crawford, 89 Ill. 62; Norfleet v. Sigman, 41 Miss. 631.

[34] Todd v. Fambro, 62 Ga. 665; Union Bank v. Call, 5 Fla. 409; Smith v. Collins, 94 Ala. 394; Baltimore & O. R. Co. v. Lafferty, 2 W. Va. 104; Large v. Orvis, 20 Wis. 696; Hocum v. Weitherick, 22 Minn. 152; Adams v. State, 29 Ohio St. 412.

[35] City of Crete v. Childs, 11 Neb. 252; Meyer v. Midland Pac. R. Co., 2 Neb. 319; Smith v. Overby, 30 Ga. 241; Gilmore v. McNeil, 45 Me. 599; Pendleton St. R. Co. v. Stallmann, 22 Ohio St. 1; Washington Mut. Ins. Co. v. Merchants' & Manufacturers' Mut. Ins. Co., 5 Ohio St. 459; Chicago, R. I. & P. Ry. Co. v. Harmon, 12 Ill. App. 54.

[36] Chicago, R. I. & P. Ry. Co. v. Harmon, 12 Ill. App. 54.

[37] Morton v. O'Connor, 85 Ill. App. 273; State v. Simas, 25 Nev. 432; A. J. Anderson Electric Co. v. Cleburne Water, Ice & Lighting Co., 23 Tex. Civ. App. 328; Breese v. United States (C. C. A.) 108 Fed. 804, reversing 106 Fed. 680; Littleton v. State (Ala.) 29 So. 390; Wilson v. State (Ala.) 29 So. 569; People v. Kelly, 132 Cal. 430; Horton v. Com. (Va.) 38 S. E. 184; State v. Morrison (W. Va.) 38 S. E. 481; People v. Findley, 132 Cal. 301; Deserant v. Cerillos Coal R. Co., 178 U. S. 409, reversing 9 N. M. 495; Louisville & N. R. Co. v. Sandlin, 125 Ala. 585; Tichenor v. Newman, 186 Ill. 264; Renner v. Thornburg, 111 Iowa, 515; Halsell v. Neal, 23 Tex. Civ. App. 26; Sullivan v. Collins, 107 Wis. 291; Mims v. State (Fla.) 27 So. 865; Shenkenberger v. State, 154 Ind. 630; State v. Kornstett, 62 Kan. 221; People v. Smith, 162 N. Y. 520, reversing 37 App. Div. 280; Reid v. State (Tex. Cr. App.) 57 S. W. 662; Arkadelphia Lumber Co. v. Asman, 68 Ark. 526; Stocks v. Scott, 188 Ill. 266, affirming 89

the fact that an instruction is not as explicit as it might be will not operate to reverse, where it is not misleading or prejudicial, and is supported by the evidence.[38] The instructions should be accurate and clear,[39] easy of interpretation, and not likely to mislead.[40] They should be made up of clear and distinct legal principles, and should be free of redundant verbiage and other confusing elements. [41] It is preferable that the instructions be few in number, plain, and forcible, and so drafted that there can be no doubt as to their meaning.[42] The charge should be conceived in terms as direct, distinct, and explicit as the circumstances will permit, and should be framed, as far as practicable, in popular language. If the instruction is clear, and can be

Ill. App. 615; Shilling v. Braniff, 25 Ind. App. 676; Fruit Dispatch Co. v. Russo (Mich.) 84 N. W. 308; O'Brien v. Northwestern Imp. & Boom Co., 82 Minn. 136; Gulf, C. & S. F. Ry. Co. v. Miller, 24 Tex. Civ. App. 430; Texas Cent. Ry. Co. v. Hicks, 24 Tex. Civ. App. 400; Capitol Freehold Land & Inv. Co. v. Pecos & N. T. Ry. Co. (Tex. Civ. App.) 60 S. W. 286; Edmondson v. Anniston City Land Co. (Ala.) 29 So. 596; Miller v. Dumon (Wash.) 64 Pac. 804; Fant v. Wright (Tex. Civ. App.) 61 S. W. 514; Liverpool & L. & G. Ins. Co. v. Joy (Tex. Civ. App.) 62 S. W. 546; North Chicago St. R. Co. v. Hutchinson, 191 Ill. 104, affirming 92 Ill. App. 567; Hart v. Com., 22 Ky. Law Rep. 1183; Hoffmann v. Cockrell, 112 Iowa, 141; Taylor, B. & H. R. Co. v. Warner (Tex. Civ. App.) 60 S. W. 442.

[38] Warson v. McElroy, 33 Mo. App. 553; Dunbar v. Briggs, 13 Neb. 332; Mutual Hail Ins. Co. v. Wilde, 8 Neb. 427.

[39] Volk v. Roche, 70 Ill. 297; Cushman v. Cogswell, 86 Ill. 62; Wabash R. Co. v. Henks, 91 Ill. 406; Forman v. Ambler, 2 Dana (Ky.) 110; Aikin v. Weckerly, 19 Mich. 482; Staten v. State, 1 George (Miss.) 619; Parmlee v. Adolph, 28 Ohio St. 13; People v. Ramirez, 13 Cal. 173; Peterson v. State, 74 Ala. 34; Hughes v. Anderson, 68 Ala. 280; Gibbs v. State, 1 Tex. App. 13; Anderson v. State, 3 Heisk. (Tenn.) 86; Lancaster v. State, 3 Cold. (Tenn.) 339; George v. Smith, 51 N. C. 273; Otto v. Bent, 48 Mo. 23.

[40] Peterson v. State, 74 Ala. 34.

[41] Hughes v. Anderson, 68 Ala. 280.

[42] Talbot's Ex'r v. Mearns, 21 Mo. 427.

readily understood by laymen acting as jurors, the circumstance that a subtle criticism, technically just, can be leveled against it, will not affect a reviewing court.[43] The fact that the law is accurately stated on one side will not cure errors in instructions given for the other party.[44]

III. Argumentative Insturctions.

§ 68. Argumentative instructions condemned.

While there are a few decisions which maintain that it is within the sound discretion of the court to give argumentative instructions,[45] and one case in which the court said that, however much it might deprecate the practice of giving argumentative instructions, yet they could not see that it was a violation of law, [46] the practice of giving argumentative instructions is very generally considered improper, the view being taken that instructions should not be in the form of arguments addressed to the jury, but concise propositions of law applicable to the facts of the case as developed by the evidence.[47] Instructions should not be drawn out at great length for the purpose of injecting into them a condensed argument or speech.[48] The charge to the jury in a criminal case should contain no argument whatever upon the

[43] Chappell v. Allen, 38 Mo. 213; Aikin v. Weckerly, 19 Mich. 482.

[44] Illinois Cent. R. Co. v. Maffit, 67 Ill. 431; Village of Warren v. Wright, 3 Ill. App. 420.

[45] Bray v. Ely, 105 Ala. 553; Karr v. State, 106 Ala. 1.

[46] Cesure v. State, 1 Tex. App. 19.

[47] Ludwig v. Sager, 84 Ill. 99; Merritt v. Merritt, 20 Ill. 80; Chapman v. Cawrey, 50 Ill. 512; Fuller v. Gray, 124 Ala. 388.

[48] Merrick v. Wallace, 19 Ill. 486; Chicago, B. & Q. R. Co. v. Griffin, 68 Ill. 499; Weyrich v. People, 89 Ill. 90; People v. Crawford, 48 Mich. 498; People v. Hull, 86 Mich. 449; Chittenden v. Evans, 48 Ill. 52; Thompson v. Force, 65 Ill. 370; Keeler v. Stuppe, 86 Ill. 309; Bray v. Ely, 105 Ala. 553; Mutual Benefit Life Ins. Co. v. French, 2 Cin. R. (Ohio) 321; Bates v. Benninger, 2 Cin. R. (Ohio) 568.

facts. Not only is it for the jury to judge what facts are established, but the jury must draw its own conclusions from the facts, uninfluenced by any impression which may have been made by the testimony upon the mind of the judge. His convictions should neither be declared nor intimated.[49] Although the court may properly give a requested instruction, yet, if it partakes of the nature of an argument, it is not error to refuse it. The practice of fighting battles over again in the instructions needs no encouragement, but should be checked, as tending to confuse the jury, and protract the trial.[50] In speaking of requests for instructions subject to this vice, it was said: "It seems as if this objectionable practice has arisen from two purposes on the part of those who adopt it: First, a determination to lose the cause before the jury, and, next, to reverse the result. The first always succeeds; the other rarely."[51] From what has been said, it is clear that the court may always properly refuse an instruction which is argumentative.[52]

[49] Hayes v. State, 58 Ga. 36.

[50] State v. Turner, 19 Iowa, 149.

[51] Bates v. Benninger, 2 Cin. R. (Ohio) 568.

[52] Smith v. Collins, 94 Ala. 394; Adams v. Thornton, 82 Ala. 260; McQueen v. State, 103 Ala. 12; Brantley v. State, 91 Ala. 47; Wisdom v. Reeves, 110 Ala. 418; Brassell v. State, 91 Ala. 45; Mitchell v. State, 94 Ala. 68; East Tennessee, V. & G. R. Co. v. Thompson, 94 Ala. 636; Potter v. State, 92 Ala. 37; Little v. State, 89 Ala. 99; Chatham v. State, 92 Ala. 47; Steiner v. Ellis (Ala.) 7 So. 803; Birmingham Union Ry. Co. v. Hale, 90 Ala. 8; Birmingham Mineral R. Co. v. Wilmer, 97 Ala. 165; Steed v. Knowles, 97 Ala. 573; Frost v. State, 124 Ala. 71; Gilmore v. State, 126 Ala. 20; Pearson v. Adams (Ala.) 29 So. 977; Ragland v. State, 125 Ala. 12; Alabama G. S. R. Co. v. Richie, 99 Ala. 346; Fowler v. State, 100 Ala. 96; Horn v. State, 102 Ala. 144; Jefferson v. State, 110 Ala. 89; Trufant v. White, 99 Ala. 526; Andrews v. Tucker (Ala.) 29 So. 34; Murphy v. State, 55 Ala. 252; Barker v. State, 126 Ala. 83; Cooper v. State, 88 Ala. 107; Bodine v. State (Ala.) 29 So. 926; Riddle v. Webb, 110 Ala. 599; Harkness v. State (Ala.) 20 So. 73; City of Birmingham v.

§ 69. What are argumentative instructions—Illustrations.

The following instructions have been held argumentative: That "an opprobrious epithet conveying the idea of a lack of chastity would to a wanton cause no pain, while, applied to a pure and gentle wife, no tongue can tell the anguish, the shame, the sense of humiliation it would bring."[53] That, "in this case, there is no complaint that any of the crew on the train were incompetent or unfit for the positions they occupied; and the jury cannot consider any testimony, or any arguments of counsel, bearing on that matter."[54] That "it is as much their [the jury's] duty as jurors to acquit the defendant, if from the evidence they have a reasonable doubt of his guilt, as it would be to convict him if they believe, to a moral certainty, that he is guilty."[55] That, "when a plaintiff comes into court and undertakes to sustain his case by oral admissions * * * by his adversary after the lawsuit has been commenced, such testimony should be received with great caution, because of the improbability that a party * * * would make statements prejudicial to his own case, and because of the frailty of memory * * *

Starr, 112 Ala. 98; Cooper v. State, 88 Ala. 107; Georgia Pac. Ry. Co. v. Propst, 90 Ala. 1; Bolling v. State, 54 Ark. 588; People v. McNamara, 94 Cal. 509; Miles v. State, 93 Ga. 117; Beck v. State, 76 Ga. 452; Cleveland v. State, 86 Ala. 1; Thompson v. Force, 65 Ill. 370; Pyle v. Pyle, 158 Ill. 289, 41 N. E. 999; American Bible Soc. v. Price, 115 Ill. 623; State v. Orr, 64 Mo. 339; Flannery v. St. Louis, I. M. & S. Ry. Co., 44 Mo. App. 396; Mutual Benefit Life Ins. Co. v. French, 2 Cin. R. (Ohio) 321; Wieting v. Town of Millston, 77 Wis. 523; McDonald v. International & G. N. Ry. Co., 86 Tex. 1; Gulf, C. & S. F. Ry. Co. v. Harriett, 80 Tex. 73; Mitchell v. Mitchell, 80 Tex. 101; City of Bonham v. Crider (Tex. Civ. App.) 27 S. W. 419; Reem v. St. Paul City Ry. Co., 82 Minn. 98; Wyman v. Whicher (Mass.) 60 N. E. 612; Chapman v. State (Neb.) 86 N. W. 907.

[53] Hanna v. Hanna, 3 Tex. Civ. App. 51.

[54] Georgia Pac. Ry. Co. v. Propst, 90 Ala. 1.

[55] Cooper v. State, 88 Ala. 107.

of witnesses, * * * and their liability to misunderstand what was really said."[56] "That defendant is authorized, under the statute, to testify in his own behalf, and the jury have a right to give full credit to his statements."[57] That "the jury may look upon the affidavit upon which the warrant for defendant's arrest was issued, which showed that the prosecutor came to town and swore to it the second day after the alleged assault, as throwing light on whether or not they believed he was struck with an ax, as alleged."[58] That "positive fraud or undue influence is hard to prove; is generally done by proving facts and circumstances to which the jury may look to infer fraud or undue influence."[59] That "if two witnesses testify about a transaction, and one of the said witnesses was immediately at the scene of the transaction, and the other witness was some distance off, then the jury may look to this in determining which witness they will believe."[60] That, "although the presumption is that the written request was received * * * if it was delivered to the mail, * * * that presumption is rebutted by the evidence of the defendants that they did not receive the request, unless the jury shall refuse to believe that evidence," and, "if the defendants have sworn that they did not receive a written request, * * * the fact that such a request * * * was placed in the post office or mail * * * is not of itself sufficient to show that the defendants did receive it, unless the jury believe that what they have so sworn to is not worthy of credit."[61] That, "in determining the question as to whether the slanderous words

[56] Riddle v. Webb, 110 Ala. 599.
[57] Horn v. State, 102 Ala. 144.
[58] Little v. State, 89 Ala. 99.
[59] Johnson v. Armstrong, 97 Ala. 731.
[60] Jones v. Alabama Mineral R. Co., 107 Ala. 400.
[61] Steiner v. Ellis (Ala.) 7 So. 803.

charged were spoken about or concerning the plaintiff, it is proper for you to consider whether, at this time, when these words were alleged to have been spoken, L. knew the person of the plaintiff or not, and, if he did not know the person of the plaintiff at this time, how could he have referred to her? And how could he have pointed her out as the subject of his accusation?"[62] That in ejectment an admission by a former owner of the land in controversy that title was in a certain person and plaintiffs would not authorize the finding that he admitted the land belonged to plaintiffs.[63] So, in an action for injuries caused by a defective sidewalk, an instruction on the subject of contributory negligence, that the jury should take into consideration "the familiarity of the plaintiff with the sidewalk, and the time of day and condition of the weather at the time he was injured," is argumentative.[64] Where the question in issue was whether the plaintiff, by design, drove off the bank of the highway, in order to recover of the town, and a witness testified to parts of a conversation she had overheard between her husband and the plaintiff, it was held that an instruction that, in order to make this evidence, "the jury must be satisfied that it had referenee to this transaction," was not objectionable as being argumentative.[65] Other cases illustrating argumentative instructions are cited in the notes.[66]

[62] Morris v. Lachman, 68 Cal. 112.

[63] Wisdom v. Reeves, 110 Ala. 418.

[64] City of Bonham v. Crider (Tex. Civ. App.) 27 S. W. 419.

[65] Whitcomb v. Town of Fairlee, 43 Vt. 671.

[66] Instructions held argumentative: See Fuller v. Gray, 124 Ala. 388; Cowie v. City of Seattle, 22 Wash. 659; Frost v. State, 124 Ala. 71; Gilmore v. State. 126 Ala. 20; Andrews v. Tucker (Ala.) 29 So. 34; Reem v. St. Paul City Ry. Co., 82 Minn. 98; Wyman v. Whicher (Mass.) 60 N. E. 612; Barker v. State, 126 Ala. 83; Bodine v. State (Ala.) 29 So. 926. Instructions held not argumentative: Com. v. Brubaker, 13 Pa. Super. Ct. 14.

§ 70. As ground for reversal.

Although there are a number of decisions in which judgments have been reversed because of argumentative instructions coupled with other errors,[67] and others in which a judgment has been reversed merely because of argumentative instructions,[68] it has been held in the majority of cases that argumentative instructions are not sufficient ground for reversal. Thus, it has been held in a number of cases that if the instructions, although argumentative, correctly state the law, when taken as a whole, the judgment should not be reversed;[69] and, according to other decisions, the giving of argumentative instructions is not ground for reversal unless they were likely to injure the party complaining.[70] So, some decisions hold that, though an instruction is argumentative and liable to mislead, the judgment should not be reversed if the charges assert correct propositions of law, and the party aggrieved does not ask the modification or qualification necessary to prevent the apprehended misleading tendency.[71]

IV. Ambiguous Instructions.

§ 71. General rules.

Instructions should be drawn in plain and unambiguous language.[72] When susceptible of two meanings, they are

[67] Young v. Merkel, 163 Pa. 513; Ludwig v. Sager, 84 Ill. 99; Cowie v. City of Seattle, 22 Wash. 659.

[68] Chisum v. Chesnutt (Tex. Civ. App.) 36 S. W. 760; Lee v. Yandell, 69 Tex. 34; Gulf, C. & S. F. Ry. Co. v. Harriett, 80 Tex. 73.

[69] Hurley v. State, 29 Ark. 17; Karr v. State, 106 Ala. 1; Bray v. Ely, 105 Ala. 553; Baldwin v. State, 111 Ala. 11.

[70] McQueen v. State, 94 Ala. 50; Jones v. State, 65 Ga. 621; Trufant v. White, 99 Ala. 526; Payne v. Crawford, 102 Ala. 388.

[71] Wilhoyte v. Udell (Ala.) 9 So. 550; Birmingham Fire Brick Works v. Allen, 86 Ala. 185.

[72] Young v. Ridenbaugh, 67 Mo. 574.

misleading,[73] and requests for such instructions should be refused.[74] The giving of ambiguous instructions, if calculated to mislead the jury, will be a good ground for reversal.[75] An instruction given in language which is capable of two interpretations, the one correct in point of law, and the other incorrect, which may have misled them, to the prejudice of the complaining party, amounts to a misdirection, and the judgment should be reversed for this error.[76] But if it be apparent that an instruction, though ambiguous, did not mislead the jury to the prejudice of the complaining party, it will not be ground for reversal.[77] In determining whether the jury might reasonably have been misled by an ambiguous instruction, the instructions should be construed as a whole.[78] So, in one case, it has been

[73] Medlin v. Brooks, 9 Mo. 106; Gordon v. City of Richmond, 83 Va. 436; Chicago, B. & Q. R. Co. v. Housh, 12 Ill. App. 88; Comstock v. Smith, 26 Mich. 306; Dodge v. Brown, 22 Mich. 446; Virginia Cent. R. Co. v. Sanger, 15 Grat. (Va.) 230; Gas Co. v. Wheeling, 8 W. Va. 371; Marquette, H. & O. R. Co. v. Marcott, 41 Mich. 433; Furgeson v. Brown, 1 Mo. App. Rep'r, 458; Legg v. Johnson, 23 Mo. App. 590.

[74] Wood v. White, 6 Mo. App. 592; Dunn v. Dunnaker, 87 Mo. 597; United States v. Jones, 8 Pet. (U. S.) 399; Baltimore & O. R. Co. v. Thompson, 10 Md. 76; Loeb v. Weis, 64 Ind. 285; Brewer v. Watson, 71 Ala. 299; Henry v. Davis, 7 W. Va. 715; Ross v. Ross, 20 Ala. 105; Rolston v. Langdon, 26 Ala. 660; Duckworth's Ex'rs v. Butler, 31 Ala. 164; Miller v. Florer, 19 Ohio St. 356; Robbins v. Harrison, 31 Ala. 160; Kaw Brick Co. v. Hogsett, 82 Mo. App. 546.

[75] Adams v. Reeves, 68 N. C. 134; Fain v. Cornett, 25 Ga. 184; People v. Maxwell, 24 Cal. 14; Gougar v. Morse, 66 Fed. 702; State v. McGinnis, 5 Nev. 337; Belt v. Goode, 31 Mo. 128.

[76] Frederick v. Ballard, 16 Neb. 559; McCracken v. Webb, 36 Iowa, 551; Aetna Ins. Co. v. Reed, 33 Ohio St. 283; Ocean Steamship Co. v. McAlpin, 69 Ga. 440.

[77] Burbridge v. Kansas City Cable R. Co., 36 Mo. App. 669. See Reid v. State (Tex. Cr. App.) 57 S. W. 662; Railroad Co. v. Hambleton, 40 Ohio St. 496.

[78] Sweeney v. Merrill, 38 Kan. 217. See, also, Rice v. Olin, 79 Pa. 391; Fisher v. People, 20 Mich. 135. See, also, People v. Alsemi, 85 Cal. 434.

held that, if the charge is merely ambiguous, the party who is dissatisfied should ask the court to explain it before the jury leaves the bar, and, if he do not, he will be deemed to have waived the objection.[79] Where instructions are ambiguous or susceptible of different interpretations, and the attention of the court is called thereto, no matter at what stage of the trial, if before the jury have acted thereon, it at once becomes the duty of the court to remove the ambiguity, and to make its meaning plain.[80] An instruction on insanity or nuncupative wills, when the only question is the authorship of a mutilation, is ambiguous.[81]

V. Vague, Obscure, or Involved Instructions.

§ 72. In general.

Instructions given the jury should not be vague, obscure, or involved. They should not be so worded as to leave the jury to conjecture their meaning, for otherwise the jury might be misled.[82] Error cannot be predicated of the refusal of instructions which are subject to this vice.[83] The

[79] Schuylkill & D. Imp. Co. v. Munson, 14 Wall. (U. S.) 442. See, also, Railroad Co. v. Hambleton, 40 Ohio St. 496.

[80] Baltimore & O. R. Co. v. Boyd, 67 Md. 32.

[81] Tucker v. Whitehead, 59 Miss. 594.

[82] State v. Laurie, 1 Mo. App. 371; City of Freeport v. Isbell, 83 Ill. 440; Preston v. State, 25 Miss. 383; Archer v. Sinclair, 49 Miss. 343; State v. Jones, 20 W. Va. 764; Wilson v. Dickel, 7 App. Div. (N. Y.) 175; Henry v. Sansom, 2 Tex. Civ. App. 150.

[83] Central R. Co. v. Haslett, 74 Ga. 59; Cumberland Coal & Iron Co. v. Scally, 27 Md. 589; McKinney v. Snyder, 78 Pa. 497; Gas Co. v. Wheeling, 8 W. Va. 320; State v. Robinson, 20 W. Va. 713; State v. Cain, 20 W. Va. 679; Roth v. Smith, 54 Ill. 431; Street v. State, 67 Ala. 87; Tillman v. Chadwick, 37 Ala. 317; Miller v. Garrett, 35 Ala. 96; Hayward v. Knapp, 23 Minn. 430; People v. Best, 39 Cal. 690; Levasser v. Washburn, 11 Grat. (Va.) 572; Sparks v. Mack, 31 Ark. 666; Tucker v. Whitehead, 59 Miss. 594; State v. Lacombe, 12 La. Ann. 195; Union Pac. Ry. Co. v. O'Brien, 161 U. S. 451; Hunter v. Randall, 69 Me. 183; Perry v. Dubuque S. W. Ry. Co., 36 Iowa, 102;

following are good examples of instructions objectionable for the defects mentioned: That "the party dealing with an agent is bound to know, at his peril, what the power of an agent is, and to understand its legal effect."[84] Where an indictment charges an assault with intent to commit rape, an instruction that, if the jury believe from the evidence that the defendant is guilty of "an attempt," as charged in the indictment, their verdict should be guilty, is too vague, and may well be misleading.[85] An instruction "that a pistol is not concealed unless it is hid from the ordinary observation of those who are in a position to see it if it were not concealed."[86] An instruction that "any fact in favor of a defendant is sufficiently established when proven by a preponderance of evidence; and even though, as to such fact, the jury have some doubt, if it has been proven by a preponderance of evidence, they must acquit."[87] An instruction that "you will assess to the plaintiffs such damages as, from all the evidence in this case, you shall find he has sustained by reason of the illegal taking and detention of the personal property."[88]

If an instruction is so obscure and confused that it is calculated to mislead the jury, it will be ground for reversal.[89] On the other hand, although an instruction be

People v. Carroll, 92 Cal. 568; Preisker v. People, 47 Ill. 382; Greer v. St. Louis, I. M. & S. Ry. Co., 80 Mo. 555; Colquhoun v. Wells, Fargo & Co., 21 Nev. 459.

[84] Colquhoun v. Wells, Fargo & Co., 21 Nev. 459.

[85] Preisker v. People, 47 Ill. 382.

[86] Street v. State, 67 Ala. 87.

[87] People v. Carroll, 92 Cal. 568.

[88] Morehead v. Adams, 18 Neb. 569.

[89] Haskin v. Haskin, 41 Ill. 197; Morehead v. Adams, 18 Neb. 569; Thomas v. State, 67 Ga. 767; Com. v. Drum, 58 Pa. 9; Murray v. Com., 79 Pa. 312; Gordon v. City of Richmond, 83 Va. 436; Union Stock Yards & Transit Co. v. Monaghan, 13 Ill. App. 148; Baltimore

vague and obscure, it will not be ground for reversal if it has no tendency to mislead.[90] And according to some decisions, the giving of a charge, though tending to confuse and mislead the jury, is not available error. The party apprehending injury from it must protect himself by asking explanatory charges.[91]

VI. Contradictory and Inconsistent Instructions.

§ 73. Instructions subject to this vice condemned.

Instructions as a whole must be consistent, and not misleading.[92] It is erroneous to give instructions which are contradictory and irreconcilable.[93] The refusal of such in-

& O. R. Co. v. Boyd, 67 Md. 32; Kalamazoo Nat. Bank v. Sides (Tex. Civ. App.) 28 S. W. 918; James v. Missouri Pac. Ry. Co., 107 Mo. 480; Chattanooga, R. & C. R. Co. v. Owen, 90 Ga. 265.

[90] Palmore v. State, 29 Ark. 248; Denton v. Jackson, 106 Ill. 433.

[91] Whilden v. Merchants' & Planters' Nat. Bank, 64 Ala. 1; O'Donnell v. Rodiger, 76 Ala. 222.

[92] Hoben v. Burlington & Missouri River R. Co., 20 Iowa, 562.

[93] Kraus v. Haas, 6 Tex. Civ. App. 665; Henschen v. O'Bannon, 56 Mo. 289; Mississippi Cent. R. Co. v. Miller, 40 Miss. 45; Otto v. Bent, 48 Mo. 23; House v. Fultz, 13 Smedes & M. (Miss.) 39; Cunningham v. State, 56 Miss. 269; Kelley v. Cable Co., 7 Mont. 70; Comstock v. Smith, 26 Mich. 306; Lake Shore & M. S. R. Co. v. Miller, 25 Mich. 274; Tate v. Parrish, 7 T. B. Mon. (Ky.) 325; Hart v. Chicago, R. I. & P. R. Co., 56 Iowa, 166; Pumphrey v. Walker, 75 Iowa, 408; Anderson v. Oscamp (Ind, App.) 35 N. E. 707; Bluedorn v. Missouri Pac. Ry. Co., 108 Mo. 439; Stevenson v. Hancock, 72 Mo. 612; Price v. Hannibal & St. J. R. Co., 77 Mo. 508; Quinn v. Donovan, 85 Ill. 196; Chicago, B. & Q. R. Co. v. Payne, 49 Ill. 499; Chapman v. Copeland, 55 Miss. 476; McMechen v. McMechen, 17 W. Va. 683; Konold v. Rio Grande Western Ry. Co., 21 Utah, 379; Lemasters v. Southern Pac. Co., 131 Cal. 105; Deserant v. Cerillos Coal R. Co., 178 U. S. 409, reversing 9 N. M. 495; Groff v. Hansel, 33 Md. 161; Baltimore & O. R. Co. v. Lafferty, 2 W. Va. 104; McLean County Bank v. Mitchell, 88 Ill. 52; Straat v. Hayward, 37 Mo. App. 585; Seymour v. Seymour, 67 Mo. 303; Ramsey v. National Contracting Co., 49 App. Div. (N. Y.) 11; Blume v. State, 154 Ind. 343.

structions is proper, whether they be contradictory to those previously granted at the same party's request, or to those given at the request of the opposite party.[94] Where the instructions set up for the jury contradictory rules for their guidance, which are unexplained, and following either of which would or might lead to different results, then the instructions are inherently defective and calculated to confuse and mislead the jury.[95] "It is the right of every party to insist that the law applicable to his case shall be fairly and distinctly stated in the instructions, and it is not sufficient that a part of the instructions contain a correct exposition of the law, if it is incorrectly announced in others."[96] Instructions should be so framed that they will not only state the law correctly, but will not, by reason of even apparent contradictions and inconsistencies, confuse and mislead the jury.[97]

§ 74. Instructions held bad as being contradictory.

In this connection it is thought not improper to give instances of instructions which have been held inconsistent and contradictory. Where the issue is whether defendant has been absent from and residing out of the state, within the

[94] Cumberland Coal & Iron Co. v. Tilghman, 13 Md. 74; Straat v. Hayward, 37 Mo. App. 585; Baltimore & O. R. Co. v. Lafferty, 2 W. Va. 104; St. Louis, K. & N. W. R. Co. v. Knapp, Stout & Co. Company, 160 Mo. 396. But see Fessenden v. Doane, 89 Ill. App. 229, affirmed 188 Ill. 228, wherein it was held not to be error that the instructions given at the request of the defendant were inconsistent with those given at the request of the plaintiff, upon the ground that each party is entitled to instructions presenting the law applicable to the evidence supporting his theory of the case. It seems that there should be no difficulty in doing this without giving inconsistent and contradictory instructions.

[95] Pendleton Street R. Co. v. Stallmann, 22 Ohio St. 1.

[96] Chicago, B. & Q. R. Co. v. Payne, 49 Ill. 499.

[97] Hoben v. Burlington & Missouri River R. Co., 20 Iowa, 562.

meaning of the statute of limitations, an instruction which informs the jury that, if defendant resides out of the state, his intention was immaterial, contradicts another instruction that, if the jury are in doubt as to residence, they may consider his intention.[98] An instruction, in an action for personal injuries, that in assessing damages the jury should consider the interest which the sum awarded would produce annually, is inconsistent with an instruction that plaintiff could not be awarded, as damages, a sum that would, by way of interest, earn an equivalent to plaintiff's annual losses.[99] So, in an action for malicious prosecution, an instruction that, if one, actuated by a real sincere design to bring about a reformation of manners, in pursuing that design, willfully inflicts a wrong not warranted by law, such wrong is malicious, is contradictory. In other words, the instruction says that if one designs to do right and designs to do wrong his act is malicious.[100] And where two instructions are given, one declaring that knowledge of the plaintiff, at the time of the purchase, of the intent of the party from whom he bought to defraud his creditors, would render the sale void, and the other declaring that the plaintiff ought to recover unless he bought the goods with the intent to defraud the creditors of the vendor of the goods, such instructions are clearly repugnant.[101] An instruction that "it is a rule universally observed that men in business, social, and ordinary affairs of life, as well as in the commission of crime, act from motive," and that, if the jury believe that the defendant had no motive for the commission of the crime, it is for them to say whether the absence of motive "is not a persuasive circumstance in favor of the defendant's plea of unsoundness of mind," is

[98] Mooar v. Harvey, 125 Mass. 574.
[99] Ramsey v. National Contracting Co., 49 App. Div. (N. Y.) 11.
[100] Whitfield v. Westbrook, 40 Miss. 311.
[101] Frederick v. Allgaier, 88 Mo. 598.

self-contradictory.[102] In a prosecution for illegal sale of liquor, an instruction that, though the jury believe that one drank whisky in defendant's store, as charged in the indictment, yet, if they believe that such person drank the whisky without the knowledge or consent of the defendant, they would find the defendant not guilty, is absurd, where the indictment charges that the liquor was drank with the knowledge and consent of defendant.[103] In a contest over a strip of land between adjoining landowners, growing out of a dispute as to the true line dividing the two tracts, in which the defendant relied upon the statute of limitations, the court, at the request of plaintiff, instructed the jury that, if defendant occupied the land up to his fence, because he believed it to be the true line, without intent to claim to the fence if it should not be the line, then an element of adverse possession was wanting. This instruction was held contradictory.[104] Where the court charged that the defendant was not liable for an accident causing death, unless its negligence was willful and wanton, and also charged that, if the defendant failed to keep a proper lookout in order to prevent a collision, and by reason of such negligence the deceased was killed, the verdict should be for the plaintiff, the two instructions were directly contradictory, and therefore erroneous.[105]

§ 75. Instructions held not contradictory.

On the other hand, the following instructions have been held not contradictory: In an action to recover for goods sold to an infant, an instruction that says, when a person arrives at mature age and is of sound mind, he is presumed

102 Blume v. State, 154 Ind. 343.
103 May v. State, 35 Tex. 650.
104 Grim v. Murphy, 110 Ill. 271.
105 Lemasters v. Southern Pac. Co., 131 Cal. 105.

to know the law, does not contradict an instruction that an infant, to ratify his contract after he becomes of age, must know that he is not bound by an alleged contract made during infancy.[106] In an action on a contract, an instruction that the burden of proof is not on defendant is not inconsistent with an instruction that the burden of proving the contract is on plaintiffs, and that they must establish its existence by a preponderance of evidence.[107] Where a cause of action alleged involves a violation of an ordinance, an instruction that such ordinance "existed at the time of the accident," and also that "this ordinance would not bind the defendant * * * unless it had been published," is not conflicting or misleading, as both stating that the ordinance existed and did not exist.[108] In an action for death by wrongful act, an instruction that it was the duty of the deceased to exercise the care and prudence of an ordinarily careful and prudent person of his age (ten years) and intelligence is not inconsistent with an instruction that, if the deceased saw and heard, or by looking and listening could have seen and heard, defendant's engine approaching, then the plaintiff could not recover.[110] An instruction on self-defense given by the court is not inconsistent with an instruction on self-defense given at the request of the accused, where the only difference between them is that one contains a definition of "reasonable doubt," and the other does not.[111] Other cases are cited in the notes.[112]

[106] Ogborn v. Hoffman, 52 Ind. 439.

[107] Rieger v. Swan, 1 Misc. Rep. (N. Y.) 484.

[108] Larkin v. Burlington, C. R. & N. Ry. Co., 91 Iowa, 654.

[110] Schmitt v. Missouri Pac. Ry. Co., 160 Mo. 43.

[111] State v. Moore, 156 Mo. 204.

[112] Instructions held not inconsistent or contradictory: Trabing v. California Nav. & Imp. Co. (Cal.) 65 Pac. 478; Feary v. Metropoli-

§ 76. Incorrect instructions not cured by inconsistent correct instructions.

Inconsistent instructions being misleading and erroneous, it is obvious that error committed in giving an incorrect instruction is not cured or rendered harmless by the giving of a correct instruction upon the same point, but inconsistent with it.[113] In such a case it is impossible to say which

tan Street Ry. Co., 162 Mo. 75; Barrett v. McCrummen, 128 N. C. 81; State v. Moore, 156 Mo. 204.

[113] Illinois: Kankakee Stone & Lime Co. v. City of Kankakee, 128 Ill. 173; Illinois Linen Co. v. Hough, 91 Ill. 63; Wabash, St. L. & P. Ry. Co. v. Shacklet, 105 Ill. 364; Counselman v. Collins, 35 Ill. App. 68.

Indiana: Heyl v. State, 109 Ind. 589, 593; McDougal v. State, 88 Ind. 24, 28; McEntire v. Brown, 28 Ind. 347; Pittsburgh, C., C. & St. L. Ry. Co. v. Noftsger, 148 Ind. 101.

Iowa: State v. Keasling, 74 Iowa, 528.

Kentucky: Clay's Heirs v. Miller, 3 T. B. Mon. 146; Ferguson v. Fox's Adm'r, 1 Metc. 83.

Mississippi: Mississippi Cent. R. Co. v. Miller, 40 Miss. 45; Southern R. Co. v. Kendrick, 40 Miss. 374; Herndon v. Henderson, 41 Miss. 584.

Missouri: Jones v. Talbot, 4 Mo. 279; Safety Fund Nat. Bank v. Westlake, 21 Mo. App. 565; Hickam v. Griffin, 6 Mo. 37; George v. Wabash Western Ry. Co., 40 Mo. App. 433; Flynn v. Union Bridge Co., 42 Mo. App. 529; Goetz v. Hannibal & St. J. R. Co., 50 Mo. 472; Welch v. Hannibal & St. J. Ry. Co., 20 Mo. App. 477; State v. Clevenger, 25 Mo. App. 653; Fink v. Algermissen, 25 Mo. App. 186; State v. Nauert, 2 Mo. App. 295.

Nebraska: Thompson v. State (Neb.) 85 N. W. 62; McCleneghan v. Omaha & R. V. R. Co., 25 Neb. 523; Wasson v. Palmer, 13 Neb. 376; Fitzgerald v. Meyer, 25 Neb. 77; Ballard v. State, 19 Neb. 610; School Dist. of Chadron v. Foster, 31 Neb. 501; Howell v. State (Neb.) 85 N. W. 289. See Dobson v. State (Neb.) 85 N. W. 843.

Pennsylvania: Gearing v. Lacher, 146 Pa. 397; Catasauqua Mfg. Co. v. Hopkins, 141 Pa. 30.

Tennessee: Bruce v. Beall, 99 Tenn. 303.

Texas: Baker v. Ashe, 80 Tex. 356.

Vermont: State v. Fitzgerald, 72 Vt. 142.

Wisconsin: Imhoff v. Chicago & M. Ry. Co., 20 Wis. 344.

instruction the jury followed. The only remedy for an error of this sort is by an express withdrawal of the erroneous instructions, in addition to the giving of other instructions which are correct.[114] An erroneous instruction should be withdrawn or corrected by a qualification referring expressly to it.[115] An instruction attempting to cover the whole case, but which omits an essential element, is erroneous, and such error is not cured by another instruction covering the omitted point.[116]

§ 77. Reason for rule against contradictory instructions.

The reason why inconsistent and contradictory instructions should not be given is that they are misleading, as the jury have no means of telling which are correct and which incorrect.[117] So, where it is sought to review the verdict, it is impossible to tell which of the inconsistent instructions the jury adopted and followed. One of such instructions must be erroneous, and *non constat* they may have followed that one.[118] The most serious objection to the giving of con-

[114] Imhoff v. Chicago & M. Ry. Co., 20 Wis. 344; Baker v. Ashe, 80 Tex. 361; Heyl v. State, 109 Ind. 589; McCole v. Loehr, 79 Ind. 432; Jones v. Talbot, 4 Mo. 279; Lufkins v. Collins, 2 Idaho, 136; State v. Fitzgerald, 72 Vt. 142.

[115] Baker v. Ashe, 80 Tex. 356.

[116] Dobson v. State (Neb.) 85 N. W. 843. But see Parsons v. State (Neb.) 85 N. W. 65.

[117] McCole v. Loehr, 79 Ind. 430.

[118] Arkansas: St. Louis, I. M. & S. Ry. Co. v. Beecher, 65 Ark. 64.

California: Chidester v. Consolidated People's Ditch Co., 53 Cal. 56; McCreery v. Everding, 44 Cal. 246; People v. Campbell, 30 Cal. 312; Black v. Sprague, 54 Cal. 266; Haight v. Vallet, 89 Cal. 249; Sappenfield v. Main Street & A. B. R. Co., 91 Cal. 48; Brown v. McAllister, 39 Cal. 573.

Colorado: Clare v. People, 9 Colo. 122; City of Boulder v. Niles, 9 Colo. 421.

Illinois: Quinn v. Donovan, 85 Ill. 196; Leyenberger v. Paul, 12 Ill. App. 635; Wilbur v. Wilbur, 129 Ill. 392.

tradictory instructions is that the jury is left free to follow either instruction, as their personal wishes or private feelings may dictate.[119]

§ 78. As ground for reversal.

The general rule is that the giving of contradictory instructions on a material point is error requiring a reversal of the judgment.[120] And it has been held that a judgment of

Iowa: Hawes v. Burlington, C. R. & N. Ry. Co., 64 Iowa, 315; State v. Keasling, 74 Iowa, 528; Conway v. Illinois Cent. R. Co., 50 Iowa, 465.

Indiana: McCole v. Loehr, 79 Ind. 430; Fowler v. Wallace, 131 Ind. 347.

Missouri: Henschen v. O'Bannon, 56 Mo. 289; State v. Herrell, 97 Mo. 105.

Montana: Keene v. Welsh, 8 Mont. 305.

Nebraska: Wasson v. Palmer, 13 Neb. 376; Ballard v. State, 19 Neb. 610; School Dist. of Chadron v. Foster, 31 Neb. 501.

West Virginia: McMechen v. McMechen, 17 W. Va. 683.

[119] Baker v. Ashe, 80 Tex. 356.

[120] California: Black v. Sprague, 54 Cal. 266; In re Estate of Cunningham, 52 Cal. 465; People v. Campbell, 30 Cal. 312; Chidester v. Consolidated People's Ditch Co., 53 Cal. 56; Haight v. Vallet, 89 Cal. 249; Brown v. McAllister, 39 Cal. 573; Clark v. McElvy, 11 Cal. 154; People v. Higgins (Cal.) 12 Pac. 301; People v. Elliott, 90 Cal. 586; Aguirre v. Alexander, 58 Cal. 21; Harrison v. Spring Valley Hydraulic Gold Co., 65 Cal. 376.

Colorado: City of Denver v. Capelli, 4 Colo. 25; City of Boulder v. Niles, 9 Colo. 421.

Idaho: Holt v. Spokane & P. Ry. Co., 35 Pac. 39.

Illinois: Knowlton v. Fritz, 5 Ill. App. 217; Illinois Linen Co. v. Hough, 91 Ill. 63; City of Litchfield v. Ward, 32 Ill. App. 392.

Indiana: Wenning v. Teeple, 144 Ind. 189; Summerlot v. Hamilton, 121 Ind. 87; Smith v. Rodecap, 5 Ind. App. 78; State v. Sutton, 99 Ind. 300; Somers v. Pumphrey, 24 Ind. 231; Kirland v. State, 43 Ind. 146.

Iowa: Moore v. Des Moines & Ft. D. Ry. Co., 69 Iowa, 491; State v. Hartzell, 58 Iowa, 520; Vanslyck v. Mills, 34 Iowa, 375; Davis v. Strohm, 17 Iowa, 421; State v. Shelton, 64 Iowa, 333; Hawes v. Burlington, C. R. & N. Ry. Co., 64 Iowa, 315.

conviction will be reversed, even though the appellate court may be satisfied from the evidence that the jury ought to have found defendant guilty.[121] While there is one decision in which it is held that, in order for a conflict between instructions to be a ground for reversal, it must appear that such conflict may have injured the party complaining,[122] and another, where it was said that, if two contradictory instructions are given, a new trial will ordinarily be granted, unless it plainly appears that the jury have not been misled thereby,[123] the general rule is that the fact that other instructions, to some extent, lay down the law correctly, is not material. It cannot be determined by which instruction the

Kentucky: Hawkins v. Robinson, 3 T. B. Mon. 143.

Minnesota: McCormick v. Kelly, 28 Minn. 135.

Mississippi: Solomon v. City Compress Co., 69 Miss. 319.

Missouri: Carder v. Primm, 1 Mo. App. Rep'r, 167; Buel v. St. Louis Transfer Co., 45 Mo. 562; Otto v. Bent, 48 Mo. 23; Wood v. Steamboat Fleetwood, 19 Mo. 529; Frank v. Grand Tower & C. Ry. Co., 57 Mo. App. 181; Union Bank of Trenton v. First Nat. Bank of Milan, 64 Mo. App. 253; Spillane v. Missouri Pac. Ry. Co., 111 Mo. 555; Martinowsky v. City of Hannibal, 35 Mo. App. 70; Pond v. Wyman, 15 Mo. 175; Hickman v. Link, 116 Mo. 123; Jones v. Chicago, B. & K. C. Ry. Co., 59 Mo. App. 137.

Montana: Territory v. Owings, 3 Mont. 137; Keene v. Welsh, 8 Mont. 305; Kelley v. Cable Co., 7 Mont. 70.

Nebraska: School Dist. of Chadron v. Foster, 31 Neb. 501.

Pennsylvania: Sellers v. Stevenson, 163 Pa. 262; Wolf v. Wolf, 158 Pa. 621; Selin v. Snyder, 11 Serg. & R. 319.

Texas: Gulf, C. & S. F. Ry. Co. v. White (Tex. Civ. App.) 32 S. W. 322; San Antonio & A. P. Ry. Co. v. Robinson, 73 Tex. 277.

Vermont: Bovee v. Town of Danville, 53 Vt. 183; Alexander v. Blodgett, 44 Vt. 476.

Wisconsin: Sears v. Loy, 19 Wis. 96.

United States: Bank of Metropolis v. New England Bank, 6 How. 212.

[121] People v. Valencia, 43 Cal. 552.

[122] Nuckolls v. Gaut, 12 Colo. 361. This decision is not in accord with the cases cited in support of the proposition hereinbefore stated.

[123] Union Pac. Ry. Co. v. Milliken, 8 Kan. 647.

jury was governed, and the possibility that error may have intervened is enough to warrant a reversal.[124] Where instructions given at the request of plaintiff and of defendant are conflicting, the rendition of a verdict in conformity with either of the instructions necessarily implies a disregard of principles prescribed by the other, and the court cannot refuse to reverse if the record does not show that no injury resulted from the contradictory instructions.[125] It has been said that the rule may not apply where it is clear to the court that the erroneous instructions did not mislead the jury,[126] and that circumstances might possibly occur where inconsistent instructions might not mislead the jury; the court, however, cautiously abstained from going into details on this question.[127] This view is not supported by the weight of authority, and it has been well said in one case that it will not do to hope or conjecture that a false rule will do no evil, because a correct one was also given.[128]

The rule that a judgment must be reversed where instructions on a material point are contradictory is not an absolute and unqualified rule.[129] Thus, if one of the contradictory instructions which is erroneous is in favor of the party complaining, the cause, for obvious reasons, will not be reversed because of the giving of such contradictory instruc-

[124] City of Boulder v. Niles, 9 Colo. 421.

[125] Adams v. Capron, 21 Md. 187.

[126] Imhoff v. Chicago & M. Ry. Co., 20 Wis. 362. If an improper instruction, given at the request of a party, conflicts with other correct instructions, given by the court of its own motion, but does not mislead the jury, as shown by the fact that the jury find for the other party, under the instructions given by the court on its own motion, it is no cause for reversal. Farmers' & Traders' Nat. Bank v. Woodell, 38 Or. 294.

[127] Bovee v. Town of Danville, 53 Vt. 183.

[128] Catawissa R. Co. v. Armstrong, 49 Pa. 193.

[129] Lobdell v. Hall, 3 Nev. 507.

tions.[130] Where an instruction given at the request of a party is erroneous, and is inconsistent with all the other instructions, such party cannot allege error.[131]

VII. Predicating Instructions on Belief from Evidence.

§ 79. In general.

Jurors are required to base their verdict on facts which have been shown by the evidence adduced during the course of the trial, and cannot take into consideration any personal knowledge they may have of anything connected with the case. It is therefore customary to preface the instructions with the words, "If you believe from the evidence," or words of the same purport, and the omission of such words renders the instructions erroneous.[132] The jury should be permitted to believe nothing unless that belief be occasioned by the evidence. Their minds should always be directed to that, and to that only, as the grounds of their belief.[133] It will not be sufficient to preface an instruction with the words "If you believe,"[134] and an instruction defective in this regard may properly be refused, especially when its substance has already been given in another instruction.[135] It is, of course, erroneous to base an instruction on a belief from "the evi-

[130] Williams v. Southern Pac. R. Co., 110 Cal. 457; St. Joseph & D. C. R. Co. v. Grover, 11 Kan. 302; Carroll v. People, 136 Ill. 456.

[131] Reardon v. Missouri Pac. Ry. Co., 114 Mo. 384.

[132] Fame Ins. Co. v. Mann, 4 Ill. App. 485; Holliday v. Burgess, 34 Ill. 193; Horne v. Walton, 117 Ill. 130; Graff v. People, 134 Ill. 380; Salomon v. Webster, 4 Colo. 353; Ingols v. Plimpton, 10 Colo. 535; McPherson v. St. Louis, I. M. & S. Ry. Co., 97 Mo. 253.

[133] Ewing v. Runkle, 20 Ill. 448; Fame Ins. Co. v. Mann, 4 Ill. App. 485.

[134] Ewing v. Runkle, 20 Ill. 448; Fame Ins. Co. v. Mann, 4 Ill. App. 485; Salomon v. Webster, 4 Colo. 353; Graff v. People, 134 Ill. 380. But see Blumhardt v. Rohr, 70 Md. 328.

[135] Horne v. Walton, 117 Ill. 130; Pfirshing v. Heitner, 91 Ill. App. 407.

dence and the instructions,"[136] or "from the evidence and circumstances proven in the case,"[137] or to preface an instruction with the words, "If they believed, under the charge";[138] and it is likewise improper to direct the jury to find for one of the parties "if * * * they are inclined to believe * * *," since jurors are to decide cases according to their convictions of the truth of the matter found by their verdict, and not their mere inclinations.[139] The failure of the trial court to repeat, in every clause of an instruction, that the jury must find from the evidence, is not reversible error.[140] The introductory sentence in an instruction, "If the jury believe from the evidence that," qualifies the residue of the instruction, and submits to the jury for its finding every fact therein stated.[141] A jury of intelligent men will not be misled if such qualification is omitted in the remaining portion of the instruction.[142] The fact that an instruction, in its first part, omits the words "from the evidence" after the words "if you believe," will not work a reversal if the instruction, in its concluding clause, uses the words, "and if you further believe from the evidence," as the jury cannot be misled.[143] So, "where a jury are instructed, if certain facts are true, provided they further believe, from the evidence, certain other facts exist, * * * a jury of ordinary intelligence would surely conclude that they must believe the facts first enumerated, from the evi-

[136] Kranz v. Thieben, 15 Ill. App. 482.
[137] Greer v. Com. (Ky.) 63 S. W. 443.
[138] Munden v. State, 37 Tex. 353.
[139] Cox v. People, 109 Ill. 459.
[140] Wear v. Duke, 23 Ill. App. 322; State v. Davis, 27 S. C. 609; Powers v. Com. (Ky.) 61 S. W. 735.
[141] Wills v. Cape Girardeau S. W. R. Co., 44 Mo. App. 51.
[142] Gizler v. Witzel, 82 Ill. 322; Powers v. Com. (Ky.) 61 S. W. 735.
[143] Belden v. Woodmancee, 81 Ill. 25.

dence, as well as those last mentioned."[144] While the words "If you see or believe from the evidence" are more commonly used, it will not be error for the court to preface its instructions with the words, "If the evidence shows you."[145] If an instruction is based on admitted facts, it is not necessary to preface it with the words, "If you believe from the evidence."[146]

According to some decisions, a failure to base the instructions on a belief from the evidence is not such an error as will call for a reversal of the judgment,[147] and in another it was held that the judgment should not be reversed therefor unless it appears that the jury were misled.[148]

VIII. Necessity of Hypothesizing Facts.

§ 80. In general.

Instructions should almost invariably be hypothetical in form; that is to say, the instructions should be so drawn as to state the law upon a supposed state of facts, to be found by the jury. They should not assume the facts as determined.[149] This rule is especially applicable where the evi-

[144] Toledo, W. & W. Ry. Co. v. Ingraham, 77 Ill. 309.

[145] Silberberg v. Pearson, 75 Tex. 287.

[146] Schmidt v. Pfau, 114 Ill. 494.

[147] State v. Umfried, 76 Mo. 404; McPherson v. St. Louis, I. M. & S. Ry. Co., 97 Mo. 253.

[148] Holliday v. Burgess, 34 Ill. 193.

[149] People v. Levison, 16 Cal. 98; St. Louis, I. M. & S. Ry. Co. v. Vincent, 36 Ark. 451; State Bank v. McGuire, 14 Ark. 530; Stillwell v. Gray, 17 Ark. 473; Eames v. Blackhart, 12 Ill. 195; Wall v. Goodenough, 16 Ill. 415; Sherman v. Dutch, 16 Ill. 283; Strong v. State (Neb.) 84 N. W. 410. An instruction may be given which applies the law to the hypothetical state of facts, if the jury believe from the evidence that the facts contained in the hypothesis exist, and it is error to refuse an instruction based upon such hypothetical statement. Sims v. Southern Ry. Co., 59 S. C. 246.

dence is conflicting.[150] The proper method of drafting instructions is to tell the jury that, if the facts are so and so, then certain consequences will follow.[151] It has been held not erroneous to refuse a requested instruction which may have been meant to be hypothetical, but which the court understood to be positive.[152] The fact that an instruction was not hypothetical in form will not be a ground for reversal if no prejudice could have resulted.[153] So it has been held in some cases that, where the facts are clear and undisputed, the court may charge upon them directly, and without hypothesis.[154] So it has been held that a defendant may suc-

[150] Devereux v. Champion Cotton Press Co., 17 S. C. 72; Gurney v. Smithsen, 7 Bosw. (N. Y.) 396; Pennsylvania R. Co. v. McTighe, 46 Pa. 316; Chambers v. People, 105 Ill. 409; Carlisle v. Hill, 16 Ala. 398; Watson v. Musick, 2 Mo. 29; Linville v. Welch, 29 Mo. 203; Delaware, L. & W. R. Co. v. Smith, 1 Walk. (Pa.) 83; Bartley v. Williams, 66 Pa. 329; Britt v. Aylett, 11 Ark. 475; American Oak Extract Co. v. Ryan, 112 Ala. 337; Gowen v. Kehoe, 71 Ill. 66; Hopkinson v. People, 18 Ill. 264; Buckln v. Thompson, 1 J. J. Marsh. (Ky.) 226; Stout v. Cloud, 5 Litt. (Ky.) 207; Chiles v. Booth, 3 Dana (Ky.) 566; Smith's Heirs v. Roberson, 5 J. J. Marsh. (Ky.) 636; Dallam v. Handley, 2 A. K. Marsh. (Ky.) 418; Bartling v. Behrends, 20 Neb. 211; Bushnell v. Crooke Mining & Smelting Co., 12 Colo. 247; Southern Ins. & Trust Co. v. Lewis, 42 Ga. 587; Wilson v. Williams' Heirs, 52 Miss. 487; Dodge v. Brown, 22 Mich. 446; Doughty v. Hope, 3 Denio (N. Y.) 594; Chapman v. Erie Ry. Co., 55 N. Y. 579; Baltimore & O. R. Co. v. Skeels, 3 W. Va. 556; Oliver v. Sterling, 20 Ohio St. 391; Sweitzer v. Hummel, 3 Serg. & R. (Pa.) 228.

[151] Baltimore & O. R. Co. v. Skeels, 3 W. Va. 556; State Bank v. McGuire, 14 Ark. 530; Gowen v. Kehoe, 71 Ill. 66.

[152] Dodge v. Brown, 22 Mich. 446.

[153] Southern Ins. & Trust Co. v. Lewis, 42 Ga. 587. Where the only testimony upon the point at issue between the parties is the testimony of the parties, and the testimony of the two parties is in direct contradiction, the court may charge that, if the jury believe the testimony of the defendant, plaintiff cannot recover. Laviolette v. Alberts (Mich.) 85 N. W. 249.

[154] Williams v. Shackelford, 16 Ala. 318; Henderson v. Mabry, 13

cessfully move the court for peremptory instructions, where he does so on plaintiff's evidence alone, and admits every fact that plaintiff's evidence conduces to prove.[155] Nevertheless, it has been said that, although circumstances are sometimes conclusive, in the absence of opposing proof, they are not generally conclusive, and that it should always be left to the jury to determine whether those circumstances are established.[156]

Where an instruction to the jury in a case embraces a hypothetical statement of the facts of the case, or of the facts which bear on any issue in the case, and the jury are told that, if they believe the facts as stated to be true, they are authorized to find in a particular way, the statement should be complete, and embrace all of the material facts pertinent to the particular issue which the evidence tends to prove.[157] Where, upon a certain hypothesis, the jury are authorized to find for plaintiff, the hypothetical statement must embrace all the facts essential to plaintiff's right of recovery. An instruction that a plaintiff is entitled to recover upon the finding of certain facts withdraws from the jury the finding of any other fact that would defeat such a verdict.[158] And where the jury are told in one instruction that, if they find certain facts to exist, they will find for plaintiff, one of the facts necessary to a recovery being omitted, the error is not

Ala. 713; Chiles v. Booth, 3 Dana (Ky.) 566; Nelms v. Williams, 18 Ala. 650. See, also, § 37, "Assumption of Facts Supported by Strong and Uncontradicted Evidence."

[155] Dallam v. Handley, 2 A. K. Marsh. (Ky.) 418.

[156] People v. Levison, 16 Cal. 98.

[157] Dean v. Tucker, 58 Miss. 487; New Orleans, J. & G. N. R. Co. v. Statham, 42 Miss. 607; Runge v. Brown, 23 Neb. 818; Gilbert v. Merriam & Roberson Saddlery Co., 26 Neb. 194; Bowie v. Spaids, 26 Neb. 635; First Nat. Bank of Warsaw v. Currie, 44 Mo. 91.

[158] Adams v. Capron, 21 Md. 187.

cured by the giving of another instruction that plaintiff cannot recover unless the fact omitted in the previous charge is proved. The two instructions are contradictory.[159] In an action of detinue for a slave, if the evidence tends to show that the slave was purchased by the defendant in his own name, but with the funds and for the use of the plaintiff, and that the defendant afterwards, as plaintiff's agent, managed and controlled the slave, it will be error to instruct the jury that, if the defendant purchased the slave, and took the legal title to himself, and afterwards held possession, they must find for him, without stating, also, that it was necessary that the possession of defendant should have been accompanied by a claim of property in himself, and for a period sufficient to bar the plaintiff's title by the statute of limitations.[160] It has been held, however, in one case, that if an instruction be so drawn as to predicate the right of recovery of a portion only of the facts constituting the cause of action, it will nevertheless be held sufficient if, in view of all the evidence, the court can say that the other essential facts necessarily follow in case those supposed be found.[161]

IX. Length and Number of Instructions.

§ 81. Instructions should be short and few.

Instructions should always be clear, accurate, and concise statements of the law as applicable to the facts of the case,[162] and should use plain and simple language.[163] It is necessary to any effect that instructions may have on the minds

[159] Baker v. Ashe, 80 Tex. 356.
[160] Fairly v. Fairly, 9 George (Miss.) 280.
[161] Moore v. Missouri Pac. Ry. Co., 73 Mo. 438.
[162] Adams v. Smith, 58 Ill. 418.
[163] Parrish v. State, 14 Neb. 60.

of jurors that the instructions should be as few and short and pointed as may consist with the object of giving clear ideas to the jury of the main points of law governing the case as applied to the facts.[164] "A few plain propositions embracing the law upon the facts of the case are greatly preferred in every case to a long string of instructions running into each other, and involved in intricacies requiring as much elucidation as the facts in the case themselves."[165] The failure to use as concise and perspicuous language as possible is not error if the jury are not misled.[166] The practice of requesting long and numerous instructions, or giving them, is universally condemned as a reprehensible one,[167] and courts are very severe in their strictures upon instructions which are drawn out to a great length, and are intended to convey an argument,[168] and for the soundest rea-

[164] Hanger v. Evins, 38 Ark. 338; Parrish v. State, 14 Neb. 60; Murphy v. Chicago, R. I. & P. R. Co., 38 Iowa, 539; People v. Gibson, 17 Cal. 283; People v. Ah Fung, 17 Cal. 377.

[165] State v. Ward, 19 Nev. 297; State v. Mix, 15 Mo. 159; State v. Floyd, 15 Mo. 355.

[166] Renner v. Thornburg, 111 Iowa, 515. But see Sidway v. Missouri Land & Live Stock Co., 163 Mo. 342, wherein it was held that the giving of instructions which, when printed, covered nine and one-half pages, was ground for reversal, as the necessary effect was not to instruct, but to confuse and mislead, and make the verdict mere guesswork.

[167] State v. Ward, 19 Nev. 297; State v. Mix, 15 Mo. 159; Parrish v. State, 14 Neb. 62; Adams v. Smith, 58 Ill. 418; Chicago & A. R. Co. v. Kelly, 25 Ill. App. 19; Crawshaw v. Sumner, 56 Mo. 521; Flynn v. St. Louis & S. F. Ry. Co., 43 Mo. App. 424; Doan v. St. Louis, K. & N. W. Ry. Co., 43 Mo. App. 450; Mutual Benefit Life Ins. Co. v. French, 2 Cin. R. (Ohio) 321; Ingram v. State, 62 Miss. 142; Roe v. Taylor, 45 Ill. 485; Brant v. Gallup, 111 Ill. 487; Hanger v. Evins, 38 Ark. 334; Steamboat Blue Wing v. Buckner, 12 B. Mon. (Ky.) 246; Mabry v. State, 71 Miss. 716; Haney v. Caldwell, 43 Ark. 184; Sweeney v. State, 35 Ark. 585; Cumberland Coal & Iron Co. v. Scally, 27 Md. 603; Clarke v. Edwards, 44 Miss. 778.

[168] Merritt v. Merritt, 20 Ill. 65; Roe v. Taylor, 45 Ill. 485.

sons. The giving of a great number of instructions does not enlighten the minds of the jury on the issues submitted to them, but rather tends to introduce confusion.[169] A few short instructions embodying the law of the case will always be better understood, and will have more effect upon the triors of fact, than a long list of instructions loaded with words generally so involved that it tends to confuse rather than to conduct the jury to a proper conclusion.[170] The almost invariable effect of a multitude of instructions is to introduce error into the record, and to confuse, rather than enlighten, the minds of the jury.[171] In one case it was said that long and numerous requests for instructions were generally made with the real, if not avowed, purpose of getting error into the record, and entangling the court into some technical contradiction that might be used in a higher court.[172]

§ 82. Requests for long and numerous instructions.

Although it is improper to give instructions which are unnecessarily long and numerous, the mere fact that long and numerous instructions have been requested does not authorize the court to leave the jury uninstructed.[173] In one case it was said: "The remedy for this evil is for the several district judges to take the 'lengthy and numerous in-

[169] Adams v. Smith, 58 Ill. 418; Hanger v. Evins, 38 Ark. 338; Chicago & A. R. Co. v. Kelly, 25 Ill. App. 19; Desberger v. Harrington, 28 Mo. App. 636; Norton v. St. Louis & H. Ry. Co., 40 Mo. App. 646; State v. Ott, 49 Mo. 326; Rockford Ins. Co. v. Nelson, 75 Ill. 548; Citizens' Gaslight & Heating Co. v. O'Brien, 19 Ill. App. 234; Haney v. Caldwell, 43 Ark. 184.

[170] State v. Floyd, 15 Mo. 355.

[171] Adams v. Smith, 58 Ill. 418; Deering v. Collins, 38 Mo. App. 73.

[172] Citizens' Gaslight & Heating Co. v. O'Brien, 19 Ill. App. 234.

[173] Chicago West Division Ry. Co. v. Haviland, 12 Ill. App. 561; Andrews v. Runyon, 65 Cal. 629; Lowry v. Beckner, 5 B. Mon. (Ky.) 41; Mabry v. State, 71 Miss. 716; McCaleb v. Smith, 22 Iowa, 244.

structions' asked by counsel, and embody the law contained in them, and applicable to the case, in a concise, perspicuous charge."[174] When instructions asked are too lengthy and numerous, the court may properly refuse the requested instructions, and give instructions of its own;[175] but when this is done, all the principles of law embraced in the instructions asked which should be given must be embraced in the instructions given by the court.[176] So, when the instructions asked are too numerous, the court may give as many of them as the party asking them is reasonably entitled to.[177] Courts have just as much right to limit the instructions to a proper number as they have to confine argument within the proper limit.[178] It was said in one case, however, that the

[174] McCaleb v. Smith, 22 Iowa, 244.

[175] Hanger v. Evins, 38 Ark. 338; Citizens' Gaslight & Heating Co. v. O'Brien, 19 Ill. App. 231; Chicago West Division Ry. Co. v. Haviland, 12 Ill. App. 561; Moriarty v. State, 62 Miss. 661; Lowry v. Beckner, 5 B. Mon. (Ky.) 41; Gelvin v. Kansas City, St. J. & C. B. Ry. Co., 21 Mo. App. 273; Flynn v. St. Louis & S. F. Ry. Co., 43 Mo. App. 424; State v. Ott, 49 Mo. 326; Crawshaw v. Sumner, 56 Mo. 517.

[176] Lowry v. Beckner, 5 B. Mon. (Ky.) 41.

[177] Chicago West Division Ry. Co. v. Haviland, 12 Ill. App. 561; Dunn v. People, 109 Ill. 635; Mabry v. State, 71 Miss. 716.

[178] Mabry v. State, 71 Miss. 716; Chicago & A. R. Co. v. Kelly, 25 Ill. App. 19, in which it was said that "the law designs that instructions shall be so accurate and appropriate as to aid the jury in reaching a proper verdict. It was not designed that a party, by asking an unreasonable number, might compel the court either to pass upon them without due consideration, or suspend the trial until such consideration could be had. To prevent abuse of this right, and perversion of the law, the court may, in its discretion, place a limit upon the number it will consider, as it may upon the number and length of addresses to the jury, and upon the number of witnesses to be heard, and the extent of their examination upon each branch of the case, and as it may, in general, make such rules and limitations as are necessary to the proper and orderly dispatch of business. What that limit shall be must depend upon circumstances. It should not be unreasonable nor without due notice. We cannot say the discretion was improperly exercised in the present instance."

practice of refusing to give instructions, or even to read them, because they were unnecessarily lengthy and numerous, would be a most dangerous one, and ought not to receive the sanction of an appellate tribunal.[179]

In one jurisdiction there are many cases containing expressions from which it might be inferred that the court would be justified in refusing to give any instructions when the requests for instructions are too lengthy and numerous. An examination of these decisions shows, however, that the jury were nevertheless sufficiently instructed on all the points necessary to a proper determination of the case.[180]

[179] McCaleb v. Smith, 22 Iowa, 244.

[180] Norton v. St. Louis & H. Ry. Co., 40 Mo. App. 642; Desberger v. Harrington, 28 Mo. App. 636; Renshaw v. Fireman's Ins. Co., 33 Mo. App. 394; Kinney v. City of Springfield, 35 Mo. App. 97; City of Hannibal v. Richards, 35 Mo. App. 15; McAllister v. Barnes, 35 Mo. App. 668; Doan v. St. Louis, K. & N. W. Ry. Co., 43 Mo. App. 450.

CHAPTER VII.

RELATION OF INSTRUCTIONS TO PLEADINGS AND EVIDENCE.

I. Conformity to Pleadings and Evidence.

§ 83. General Rule.

II. Limiting Instructions to Issues Raised by Pleadings.

§ 84. In Civil Cases.
85. In Criminal Cases.

III. Relation of Instructions to Evidence.

§ 86. Necessity of Basing on Evidence.
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89. Same—Withdrawn or Excluded Evidence.
90. Same—Sufficiency of Evidence to Support Instructions.
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92. Necessity of Concrete Application to Facts of Case.

I. Conformity to Pleadings and Evidence.

§ 83. General rule.

Instructions should be predicated upon the pleadings and the evidence in the case.[1] An instruction which is merely a statement of an abstract principle of law which, under the

[1] Raysdon v. Trumbo, 52 Mo. 35; Budd v. Hoffheimer, 52 Mo. 297; Givens v. Van Studdiford, 4 Mo. App. 499; Herron v. Cole, 25 Neb. 692; Dorsey v. McGee, 30 Neb. 657; Frederick v. Kinzer, 17 Neb. 366; East St. Louis Packing & Provision Co. v. Hightower, 92 Ill. 139; George v. Swafford, 75 Iowa, 491; Texas & P. Ry. Co. v. Scruggs, 23 Tex. Civ. App. 712; Louisville & N. R. Co. v. Mattingly, 22 Ky. Law Rep. 489; Kirk v. Territory, 10 Okl. 46; Swift & Co. v. Holoubek, 60 Neb. 784.

pleadings and evidence, can have no application to the case, should not be given, and may be properly refused.[2] The reason for the rule is that instructions not applicable to the case, although abstractly correct, are apt to mislead the jury.[3] The giving of instructions not warranted by the pleadings and evidence is erroneous.[4] An instruction, though correct

[2] Thomas v. State, 126 Ala. 4; Greer v. Com. (Ky.) 63 S. W. 443; Johnston v. Hirschberg, 85 Ill. App. 47; Long v. Hunter, 58 S. C. 152; Fisher v. Central Lead Co., 156 Mo. 479; Holmes v. Ashtabula Rapid Transit Co., 10 Ohio Cir. Dec. 638; Bondurant v. State, 125 Ala. 31; Smith v. Bank of New England (N. H.) 46 Atl. 230; Brunette v. Town of Gagen, 106 Wis. 618; State v. Goff (Kan. App.) 61 Pac. 680, 62 Kan. 104; People v. Hartman, 130 Cal. 487; Bodine v. State (Ala.) 29 So. 926; Birmingham Mineral R. Co. v. Tennessee Coal, Iron & R. Co. (Ala.) 28 So. 679; Farmers' Banking Co. v. Key, 112 Ga. 301; Lyons v. Carter, 84 Mo. App. 483.

[3] Collins v. City of Janesville, 107 Wis. 436; Holmes v. Ashtabula Rapid Transit Co., 10 Ohio Cir. Dec. 638.

[4] Sargent v. Linden Min. Co., 55 Cal. 204; Esterly v. Van Slyke, 21 Neb. 611; Gibbs v. Wall, 10 Colo. 153; Schrader v. Hoover, 87 Iowa, 654; Fisk v. Chicago, M. & St. P. Ry. Co., 74 Iowa, 424; Schier v. Dankwardt, 88 Iowa, 750; Storms v. White, 23 Mo. App. 31; Home Bank v. Towson, 2 Mo. App. Rep'r, 914; Haynes v. Town of Trenton, 108 Mo. 123; Partridge v. Gildermeister, 6 Bosw. (N. Y.) 57; Johnson v. Bell, 74 N. C. 355; Chicago & A. R. Co. v. Bragonier, 119 Ill. 51; Chicago & A. R. Co. v. Robinson, 106 Ill. 142; Snow v. Penobscot River Ice Co., 77 Me. 55; Rapp v. Kester, 125 Ind. 79; Dallas Rapid Transit Ry. Co. v. Campbell (Tex. Civ. App.) 26 S. W. 884; Ballew v. State (Tex. Cr. App.) 34 S. W. 616; Western Home Ins. Co. v. Thorpe, 40 Kan. 255; Wilcox v. Chicago, M. & St. P. R. Co., 24 Minn. 269; State v. Kissock, 111 Iowa, 690; Chamberlain Banking House v. Woolsey, 60 Neb. 516; City Council of Augusta v. Owens, 111 Ga. 464; Wabash R. Co. v. Stewart, 87 Ill. App. 446; Van Bergen v. Eulberg, 111 Iowa, 139; People v. Tapia, 131 Cal. 647; Matheson v. Kuhn (Colo. App.) 63 Pac. 125; First Nat. Bank of Arkansas City v. Skinner (Kan. App.) 62 Pac. 705; Pryor v. Metropolitan Street Ry. Co., 85 Mo. App. 367; Duck v. St. Louis & S. W. Ry. Co. (Tex. Civ. App.) 63 S. W. 891; Stacy v. Greenwade (Tex. Civ. App.) 63 S. W. 1059; Western Union Telegraph Co. v. Burgess (Tex. Civ. App.) 60 S. W. 1023; Scott v. Chicago G. W. Ry. Co. (Iowa) 85 N. W. 631; McCann v. Ullman, 109 Wis. 574. It is error to submit issues

in law, should be refused unless there is a basis for it in the facts of the case, and the evidence or the pleadings make the instruction pertinent;[5] and it is the province of the court

raised by pleas to which demurrers have been sustained in the absence of an amendment. Trout v. McQueen (Tex. Civ. App.) 62 S. W. 928; Galveston H. & S. A. Ry. Co. v. Herring (Tex. Civ. App.) 36 S. W. 129; Sioux City & P. R. Co. v. Walker, 49 Iowa, 273; Whitsett v. Chicago, R. I. & P. Ry. Co., 67 Iowa, 150; Pettibone v. Smith, 37 Mich. 579; Comstock v. Norton, 36 Mich. 278; Kenney v. Hannibal & St. J. R. Co., 70 Mo. 252; Dunbier v. Day, 12 Neb. 596; Sweet v. Excelsior Electric Co. (N. J. Err. & App.) 31 Atl. 721; Love v. Wyatt, 19 Tex. 312; Hartford Fire Ins. Co. v. Josey, 6 Tex. Civ. App. 290; Texas & P. Ry. Co. v. French, 86 Tex. 96.

[5] Cutter v. Fanning, 2 Iowa, 580; Gover v. Dill, 3 Iowa, 337; State v. Gibbons, 10 Iowa, 117; Borland v. Chicago, M. & St. P. Ry. Co., 78 Iowa, 94; Johnson v. Worthy, 17 Ga. 420; McMillan v. Baxley, 112 N. C. 578; Missouri Pac. Ry. Co. v. Mitchell, 75 Tex. 77; Breneman v. Kilgore (Tex. Civ. App.) 35 S. W. 202; Gulf, C. & S. F. Ry. Co. v. Kizziah, 4 Tex. Civ. App. 356; Atlas Nat. Bank v. Holm (C. C. A.) 71 Fed. 489; Louisville, N. A. & C. Ry. Co. v. Shires, 108 Ill. 617; Phillips v. Cornell, 133 Mass. 546; Drake v. Curtis, 1 Cush. (Mass.) 395; Schafer v. Gilmer, 13 Nev. 330; Schissler v. Cheshire, 7 Nev. 427; Stewart v. Southard, 17 Ohio, 402; Covert v. Irwin, 3 Serg. & R. (Pa.) 283; Henry C. Hart Mfg. Co. v. Mann's Boudoir Car Co., 65 Mich. 564; Bender v. Dungan, 99 Mo. 126; St. Louis, K. C. & N. Ry. Co. v. Cleary, 77 Mo. 634; Omaha Loan & Trust Co. v. Douglas County (Neb.) 86 N. W. 936; Snell v. United States, 16 App. D. C. 501; Porter v. White, 128 N. C. 42; Thomas v. State, 126 Ala. 4; Bishop v. Com., 22 Ky. Law Rep. 760; Hide & Leather Nat. Bank v. Alexander, 184 Ill. 416, affirming 82 Ill. App. 484; City Council of Augusta v. Owens, 111 Ga. 464; Long v. Hunter, 58 S. C. 152; Nevada Co. v. Farnsworth, 42 C. C. A. 504, 102 Fed. 573; Louisville & N. R. Co. v. Mattingly, 22 Ky. Law Rep. 489; City of Dallas v. Beeman, 23 Tex. Civ. App. 315, 55 S. W. 762; Pearson v. Adams (Ala.) 29 So. 977; Sample v. Rand, 112 Iowa, 616; Ten Eyck v. Witheck, 55 App. Div. (N. Y.) 165; Gibson v. German-American Town Mut. Ins. Co., 85 Mo. App. 41; Kaw Brick Co. v. Hogsett, 82 Mo. App. 546; McGar v. National & Providence Worsted Mills (R. I.) 47 Atl. 1092; Houston & T. C. R. Co. v. George (Tex. Civ. App.) 60 S. W. 313; De Donato v. Morrison, 160 Mo. 581; Abernathy v. Southern Rock Island Plow Co. (Tex. Civ. App.) 62 S. W. 786. On a petition in ejectment in the ordinary form, based on tax deeds which are void on their face,

to determine whether there is foundation in the evidence for any particular instruction.[6] Where a prayer or prayers neither point nor refer to the pleadings, the question as to whether the prayer should be granted depends, not upon the state of the pleadings, but upon the evidence to which alone they refer.[7] Where an instruction is outside of the case made by the pleadings and evidence, or submits issues not raised thereby, this will be a ground for reversal unless it is clear that the jury were not misled.[8] An instruction to disregard an element of the case made by the pleadings, but which the evidence wholly fails to establish, should be given if requested;[9] but on the other hand, a requested instruction that there is no evidence to sustain a particular allegation or theory should be refused where there is in fact competent evidence in support of such allegation.[10] Where, in the progress of the trial, all the issues raised by the pleadings have been eliminated save one, it is not error for the court to withdraw from the consideration of the jury all questions

and therefore excluded, an instruction asked by the plaintiff that, although unable to recover the land, he may be permitted to recover the taxes paid by him, is properly refused, no other evidence than the tax deeds having been offered by him. Bender v. Dungan, 99 Mo. 126; Mecartney v. Smith (Kan. App.) 62 Pac. 540. It is not error to refuse an instruction as to a defense not made in the answer. Hill v. Ludden & Bates Southern Music House, 113 Ga. 320.

[6] State v. Gibbons, 10 Iowa, 117.

[7] Birney v. New York & W. Printing Telegraph Co., 18 Md. 341.

[8] Love v. Wyatt, 19 Tex. 312; People's Building, Loan & Sav. Ass'n v. Elliott (Tex. Civ. App.) 33 S. W. 545; Mason v. Southern Ry. Co., 58 S. C. 70; Edwards v. St. Louis, K. & S. Ry. Co., 79 Mo. App. 257; Reed v. Com., 98 Va. 817.

[9] Chicago Bridge & Iron Co. v. Hayes, 91 Ill. App. 269; Lange & Wiegand (Mich.) 85 N. W. 109.

[10] Cederson v. Oregon Railroad & Navigation Co., 38 Or. 343; Liner v. State, 124 Ala. 1. See, also, People v. Lem Deo, 132 Cal. 199; Cowell v. Phoenix Ins. Co., 126 N. C. 684; State v. Horton Land & Lumber Co., 161 Mo. 664.

presented by the pleadings save that one.[11] The following cases are illustrative of instructions which depart from the pleadings and evidence: An instruction that, "if you further find from all the evidence that said car, placed and left where you may find from the evidence it was placed and left, was an object apt to frighten horses of ordinary gentleness, * * * then you would be warranted in finding that defendant was guilty of negligence," it not being alleged that the car, placed as it was, was apt to frighten horses of ordinary gentleness.[12] An instruction that it was a breach of duty for conductors of defendant railroad company to compel passengers, by force, to alight from the train while in motion, where a claim of physical force was abandoned by plaintiff, and the evidence did not disclose the use of force by any one.[13] An instruction on the effect of an implied warranty, where an express warranty is alleged and proved, and where there is nothing to show an implied warranty.[14] An instruction submitting the issue whether plaintiff was a passenger, where this was not claimed by the pleadings or shown by the evidence.[15] An instruction, in an action for personal injuries, that, to entitle plaintiff to recover, it must be shown by a preponderance of the evidence that plaintiff's injuries resulted from the wrongful acts of defendant's servants, committed while acting within the scope of their authority, there being no claim that the acts complained of were within the scope of the servant's authority, nor any evidence

[11] Scholtz v. Northwestern Mut. Life Ins. Co., 40 C. C. A. 556, 100 Fed. 573.

[12] Fisk v. Chicago, M. & St. P. Ry. Co., 74 Iowa, 424.

[13] Missouri, K. & T. Ry. Co. v. Meyers (Tex. Civ. App.) 35 S. W. 421.

[14] Gibbs v. Wall, 10 Colo. 153.

[15] Missouri, K. & T. Ry. Co. v. Rodgers (Tex. Civ. App.) 35 S. W. 412.

to show it.[16] An instruction, in an action for medical services, that, if plaintiff was called in to attend defendant, by defendant's regular physician, and rendered services at such request, defendant would be liable therefor, no such claim having been made by the pleadings, nor any evidence offered in support of it.[17] In an action against a railroad company to recover for injuries received at a crossing, the court may and should refuse an instruction that the absence of a flagman from the crossing does not constitute wanton or willful misconduct, where it is not claimed that defendant's conduct is wanton or willful.[18] Numerous other cases illustrative of the proposition under consideration are cited below in the notes.[19]

II. Limiting Instructions to Issues Raised by Pleadings.

§ 84. In civil cases.

Much diversity of opinion exists as to whether the in-

[16] Mackin v. People's Street Ry. & E. L. & P. Co., 45 Mo. App. 82.

[17] Schrader v. Hoover, 87 Iowa, 654.

[18] Louisville, N. A. & C. Ry. Co. v. Shires, 108 Ill. 617.

[19] Other illustrations of rule: Hudson v. Northern Pac. Ry. Co., 107 Wis. 620; Southern R. Co. v. Ferguson, 105 Tenn. 552; Ft. Worth & D. C. Ry Co. v. Peterson, 24 Tex. Civ. App. 548; Armour v. Brazeau, 191 Ill. 117; Dixon v. New England R. Co. (Mass.) 60 N. E. 581; Denton v. McInnis, 85 Mo. App. 542; Billups v. Utah Canal E. & E. Co. (Ariz.) 63 Pac. 713; Fant v. Wright (Tex. Civ. App.) 61 S. W. 514; People v. Tapia, 131 Cal. 647; McBaine v. Johnson, 155 Mo. 191; Porter v. White, 128 N. C. 42; Horgan v. Brady, 155 Mo. 659; Martin v. Eastman, 109 Wis. 286; Dallas Rapid Transit Ry. Co. v. Campbell (Tex. Civ. App.) 26 S. W. 884; Galveston, H. & S. A. Ry. Co. v. Sweeney, 6 Tex. Civ. App. 173. In an action to recover moneys paid to defendants by plaintiff to purchase the stock of mining corporations on margin, it is not error to read to the jury the whole of that section of the constitution of the state which not only provides that money paid on a margin contract may be recovered, but also prohibits lotteries and gift enterprises, as such reading cannot be prejudicial to the defendants. Parker v. Otis, 130 Cal. 322.

structions must in all cases, and under all circumstances, be so drafted that they will be strictly within the issues made by the pleadings, irrespective of any evidence which, though incompetent under the pleadings, was erroneously admitted. In many cases it is broadly stated that the instructions must be confined strictly to the issues made by the pleadings, but none of them disclose whether evidence, incompetent under the pleadings, to which such instructions might be applicable, had been admitted.[20] These decisions, therefore, are of very

[20] Williams v. Southern Pac. R. Co., 110 Cal. 457; Thompson v. Lee, 8 Cal. 275; Marriner v. Dennison, 78 Cal. 202; Holt v. Pearson, 12 Utah, 63; Dallas & O. C. Elevated Ry. Co. v. Harvey (Tex. Civ. App.) 27 S. W. 423; Gulf, C. & S. F. Ry. Co. v. Younger, 10 Tex. Civ. App. 141; Stringer v. Singleterry (Tex. Civ. App.) 23 S. W. 1117; Houston & T. C. Ry. Co. v. Gilmore, 62 Tex. 391; Equitable Life Ins. Co. v. Hazlewood, 75 Tex. 338; Edwards v. Campbell (Tex. Civ. App.) 33 S. W. 761; Galveston, H. & S. A. Ry. Co. v. Sweeney, 6 Tex. Civ. App. 173; Waters-Pierce Oil Co. v. Cook, 6 Tex. Civ. App. 573; Wade v. Hardy, 75 Mo. 394; Fairgrieve v. City of Moberly, 29 Mo. App. 142; Rothschild v. Frensdorf, 21 Mo. App. 318; Doysher v. Adams, 16 Ky. Law Rep. 582; Brown v. Walker (Miss.) 11 So. 724; Kane v. New York, N. H. & H. R. Co., 132 N. Y. 160; Austin v. Moe, 68 Wis. 458; Denman v. Johnston, 85 Mich. 387; Webster v. O'Shee, 13 Neb. 428; Morrow v. St. Paul City Ry. Co., 65 Minn. 382; Bean v. Bunker, 68 Vt. 72; Northern Pac. R. Co. v. Babcock, 154 U. S. 190; Pawson's Adm'rs v. Donnell, 1 Gill & J. (Md.) 1; Pearson v. Dryden, 28 Or. 350; Baldwin v. Walker, 21 Conn. 184; Jackson v. Ackroyd, 15 Colo, 583; Howe Machine Co. v. Reber, 66 Ind. 498; Union Cent. Life Ins. Co. v. Huyck, 5 Ind. App. 474; Lindley v. Sullivan, 133 Ind. 588; Lake Erie & W. R. Co. v. Zieharth, 6 Ind. App. 228; Mosher v. Rogers, 117 Ill. 446; Johnson v. Johnson, 114 Ill. 611; Shackelton v. Lawrence, 65 Ill. 175; Leach v. Nichols, 55 Ill. 273; Hambright v. Stover, 31 Ga. 300; Farmers' & Merchants' Bank of Ainsworth v. Upham, 37 Neb. 417; Wigton v. Smith, 46 Neb. 461; Marx v. Schwartz, 14 Or. 177; Williams v. Southern Pac. R. Co., 110 Cal. 457; Hooker v. Johnson, 10 Fla. 198; Porter v. Ferguson, 4 Fla. 102; Benton v. Chicago, R. I. & P. R. Co., 55 Iowa, 496; Anderson v. Roberts, 112 Iowa, 749; Storrs v. Emerson, 72 Iowa, 390; Bernhard v. Washington Life Ins. Co., 40 Iowa, 442; Martinez v. Runkle, 57 N. J. Law, 111; Wright v. Fonda, 44 Mo. App. 634;

little assistance, if any, in determining what instructions may be given, when incompetent evidence has been improperly admitted. To this extent, the courts are agreed: That if evidence not admissible under the pleadings is admitted over objections made at the proper time, it will be erroneous to give instructions based on such evidence.[21] The reasons for this rule are so obvious that it is impossible that there could be any conflict of opinion about its propriety. There are also numerous decisions in cases where incompetent evidence was admitted, and instructions applicable thereto given, holding that the giving of such instructions was erroneous. These cases do not disclose whether timely objections to the admission of the evidence were made or not, and there is no way of determining whether the instructions

Ferneau v. Whitford, 39 Mo. App. 311; Melvin v. St. Louis & S. F. Ry. Co., 89 Mo. 106; Edwards v. St. Louis, K. & S. Ry. Co., 79 Mo. App. 257; Smith v. Bank of New England (N. H.) 46 Atl. 230; Rotan Grocery Co. v. Martin (Tex. Civ. App.) 57 S. W. 706; St. Louis & S. F. R. Co. v. Blinn (Kan. App.) 62 Pac. 427; Peebles v. Graham, 128 N. C. 218; Geer v. Durham Water Co., 127 N. C. 349; Schmidt v. Balling, 91 Ill. App. 388. An instruction in general terms that, if the contract was procured by fraud, the jury should find a general verdict for one of the parties, invites the jury to explore a field unbounded by the pleadings, and permits them, unguided by the principles by which fraud is determined, to find its existence and pertinency to the case upon mere conjecture, and such instruction is erroneous. Wells v. Houston, 23 Tex. Civ. App. 629. It is not error to refuse an instruction based upon an issue not presented by the pleadings. Nevada Co. v. Farnsworth, 42 C. C. A. 504, 102 Fed. 573. An instruction on the theory of confession and avoidance requested by the defendant is properly refused where the only answer was a general denial. Omohundro v. Emerson, 80 Mo. App. 313. An instruction as to contributory negligence is properly refused where such defense was not pleaded. Louisville & N. R. Co. v. Mattingly, 22 Ky. Law Rep. 489.

[21] Illinois Cent. R. Co. v. McKee, 43 Ill. 119; Weaver v. Hendrick, 30 Mo. 502; Harding v. Wright, 119 Mo. 1; Willits v. Chicago, B. & K. C. Ry. Co., 80 Iowa, 531; Dickerson v. Johnson, 24 Ark. 251; Shrimpton & Sons v. Dworsky, 2 Misc. Rep. (N. Y.) 123.

would have been considered erroneous, in case the evidence was not objected to.[22] There are, however, a number of decisions in which it has been held that instructions based on evidence outside of the issues raised by the pleadings are erroneous, and should not be given, even though no objection was taken to the admission of the evidence,[23] and in others the same rule is laid down, though in different language. These decisions declare that the instructions must be neither broader nor more narrow than the pleadings,[24] that the case made by the pleadings alone furnishes a basis for recovery, and that the issues cannot be changed by instructions,[25] and that there can be no evidence on which to base them, if that evidence overthrows the pleadings of the party who introduces it.[26] In one of these cases the court

[22] McCready v. Phillips, 44 Neb. 790; Buchtel v. Evans, 21 Or. 309; Woodward v. Oregon Ry. & Nav. Co., 18 Or. 289; Richmond Railway & Electric Co. v. Bowles, 92 Va. 738; Matson v. Frazer, 48 Mo. App. 302; Roberts v. Richardson, 39 Iowa, 290; Atchison, T. & S. F. R. Co. v. Miller, 39 Kan. 419; Moffatt v. Conklin, 35 Mo. 453; Camp v. Heelan, 43 Mo. 591; Iron Mountain Bank v. Murdock, 62 Mo. 73; Cleveland, P. & E. R. Co. v. Nixon, 21 Ohio Cir. Ct. R. 736; Finck v. Schaubacher, 34 Misc. Rep. (N. Y.) 547.

[23] Coos Bay R. Co. v. Siglin, 26 Or. 387; McKinney v. Fort, 10 Tex. 220; Safety Fund Nat. Bank of Fitchburg v. Westlake, 21 Mo. App. 565; Texas & P. Ry. Co. v. Durrett, 24 Tex. Civ. App. 103; Paretti v. Rebenack, 81 Mo. App. 494. See, also, Dingee v. Unrue's Adm'x, 98 Va. 247. The fact that evidence not admissible under the pleadings is admitted without objection will not warrant instructions based thereon, unless the pleadings are amended so as to conform to the evidence. Kirby v. Wabash Ry. Co., 85 Mo. App. 345.

[24] George v. Wabash Western Ry. Co., 40 Mo. App. 434; Waddingham v. Hulett, 92 Mo. 528; Iron Mountain Bank v. Murdock, 62 Mo. 70; Crews v. Lackland, 67 Mo. 621.

[25] Glass v. Gelvin, 80 Mo. 297; Iron Mountain Bank v. Murdock, 62 Mo. 73; Frederick v. Kinzer, 17 Neb. 366; Christian v. Connecticut Mut. Life Ins. Co., 143 Mo. 460; Wright v. Fonda, 44 Mo. App. 634.

[26] Capital Bank v. Armstrong, 62 Mo. 65.

said that the issues to be raised in a cause must be raised by the pleadings, and cannot be enlarged either by the evidence or the instructions, nor, indeed, by both combined.[27]

According to a considerable number of decisions, if evidence incompetent under the pleadings is admitted without objection at the time, the court, in charging the jury, is not confined to that part of the evidence which was properly admitted, but may instruct the jury on the legal effect of the incompetent evidence.[28] A variance between the pleadings and evidence may be waived so as to authorize an instruction broader than the issues waived by the pleadings.[29] Where the precise issues raised by the pleadings are disregarded by both parties, and a defense raised not covered by the pleadings, it is error for the court to instruct the jury that they cannot consider such defense.[30]

Where one party introduces evidence against the objection of the other, he cannot complain that an instruction based on such evidence is outside the issues made by the pleadings.[31] And in a suit on a note in which the issue is whether defendant indorsed it, it cannot be objected by defendant that the court instructed on the rights of a *bona fide* holder of an altered instrument, where a converse instruction on the same subject was given at defendant's request.[32] The reviewing court cannot consider an objection to instruc-

[27] Christian v. Connecticut Mut. Life Ins. Co., 143 Mo. 460.

[28] Collins v. Collins, 46 Iowa, 60; Georgia R. Co. v. Lawrence, 74 Ga. 534; Ocean Steamship Co. v. Williams, 69 Ga. 252; Georgia Railroad & Banking Co. v. Oaks, 52 Ga. 410; Central R. Co. v. Hubbard, 86 Ga. 623; Scott v. Sheakly, 3 Watts (Pa.) 50; Qualy v. Johnson, 80 Minn. 408. See, also, Chafee v. City of Aiken, 57 S. C. 507.

[29] Boyce v. California Stage Co., 25 Cal. 460.

[30] Brusie v. Peck Bros. & Co., 135 N. Y. 622.

[31] Bowen v. Carolina, C. G. & C. Ry. Co., 34 S. C. 217.

[32] Iron Mountain Bank v. Armstrong, 92 Mo. 265.

tions on the ground that they relate to an issue not in the case, if the party objecting has asked instructions on that issue.[33] It is the duty of the court to charge the jury in accordance with the interpretation of the pleadings acted upon by the parties.[34] So it has been held that where the plaintiff seeks to recover on a contract which the answer denies, and the answer sets up a different contract, and alleges noncompliance by plaintiff, and the cause is tried on the theory of a contract as set up in the answer, it is erroneous to instruct the jury on the theory of a contract as alleged in the complaint.[35] These decisions certainly seem to take the common-sense view of the question. In criticising the decisions maintaining the contrary view, Judge Thompson, in his works on Trials, has well said: "This view ignores a principle which obtains in almost every situation in a civil trial, that the court is to disregard at every stage of the trial those errors or irregularities which it is competent for the party to waive, and which the party against whom they are committed does not object to at the time. The object of pleadings being merely to notify the opposite party of the ground of action or defense, if the party comes into court, it is not perceived why he may not waive the notice as in every other case, although the pleading may not advise him of the case or defense which is actually tendered in the evidence. * * * The sound view is believed to be that the instructions have no connection with the pleadings, except through the evidence."[36] It goes without saying that the doctrine cannot be extended to cases where the evidence is so widely variant from the pleadings that the facts thereby established constitute a cause of action or defense different

[33] Hahn v. Miller, 60 Iowa, 96.
[34] Blum v. Whitworth, 66 Tex. 350.
[35] Fox v. Utter, 6 Wash. 299.
[36] 2 Thompson, Trials, § 2310.

from the one set up in the pleadings, for even the most liberal statute relating to amendments would not permit a pleading to be so amended as to state a cause of action or defense entirely different from the one alleged in the original pleading.[37]

"Where there are defective counts in the declaration, it is error in the court to refuse to instruct the jury to disregard them."[38]

§ 85. In criminal cases.

In criminal prosecutions, instructions are erroneous and ground for reversal which justify the jury in convicting the defendant of an offense other than that charged in the indictment, or which enables the jury to find the defendant guilty of the offense charged on a ground not set forth in the indictment.[39] And where a defendant is being tried for murder in the second degree, it is improper to charge the jury on the law relating to murder in the first degree.[40] Judge Thompson says: "The indictment which he is required to answer sustains a different office from that of the declaration or complaint in a civil action. It is something more than a mere notice to him of what he is called upon to defend. It is a

[37] See Comegys v. American Lumber Co., 8 Wash. 661; Savannah, F. & W. Ry. Co. v. Tiedeman, 39 Fla. 196; Whitman v. Keith, 18 Ohio St. 134.

[38] Chicago & A. R. Co. v. Eselin, 86 Ill. App. 94. An instruction that the plaintiff must prove each and every material allegation in the declaration, or some count thereof, before he is entitled to recover, is erroneous where the declaration contains defective counts. Chicago & A. R. Co. v. Eselin, 86 Ill. App. 94.

[39] Bacchus v. State, 18 Tex. App. 15; Coney v. State, 43 Tex. 414; Mason v. State, 7 Tex. App. 623; People v. Mulkey, 65 Cal. 501. See, also, generally, Pena v. State (Tex. Cr. App.) 63 S. W. 311, wherein an instruction was held not to depart from the indictment.

[40] State v. Walton, 74 Mo. 270.

solemn accusation against him, made by an inquisitorial body, charging him with a crime or misdemeanor."[41]

III. Relation of Instructions to Evidence.

§ 86. Necessity of basing on evidence.

Instructions to the jury should be applicable to and limited to the evidence adduced in the cause. It is erroneous to give instructions based on a state of facts which there is no evidence tending to prove,[42] or which the undisputed evidence

[41] 2 Thompson, Trials, § 2313.

[42] Thomas v. State, 126 Ala. 4; People v. Kelly, 133 Cal. 1; People v. Findley, 132 Cal. 301; Lemasters v. Southern Pac. Co., 131 Cal. 105; Maxwell v. Prichard, 113 Ga. 598; Suddeth v. State, 112 Ga. 407; Atkinson v. State, 112 Ga. 402; Central of Georgia Ry. Co. v. Bernstein, 113 Ga. 175; Fred W. Wolf Co. v. Bills, 87 Ill. App. 617; Rodgers v. Johnson, 87 Ill. App. 457; Cicero & P. St. Ry. Co. v. Richter, 85 Ill. App. 591; Morrill v. Lindemann, 86 Ill. App. 75; Farlow v. Town of Camp Point, 186 Ill. 256, 57 N. E. 781; Shilling v. Braniff, 25 Ind. App. 676; State v. Swallum, 111 Iowa, 37; Anderson v. Roberts, 112 Iowa, 749; State v. Kissock, 111 Iowa, 690; Montgomery v. Com. (Ky.) 63 S. W. 747; Stovall v. Com. (Ky.) 62 S. W. 536; Hines v. Com. (Ky.) 62 S. W. 732; Slingerland v. Keyser (Mich.) 86 N. W. 390, 8 Detroit Leg. News, 206; Donald v. State, 21 Ohio Cir. Ct. R. 124, 11 Ohio Cir. Dec. 483; Kirk v. Territory, 10 Okla. 46; Ellerbee v. State (Miss.) 30 So. 57; Thompson v. State (Neb.) 85 N. W. 62; Chamberlain Banking House v. Woolsey, 60 Neb. 516; Strong v. State (Neb.) 84 N. W. 410; Swift & Co. v. Holoubek, 60 Neb. 784; Campbell v. Cayey (Sup.) 69 N. Y. Supp. 859; Emison v. Ouyhee Ditch Co., 37 Or. 577; Bockoven v. Board of Sup'rs, Lincoln Tp., Clark County, 13 S. D. 317, 83 N. W. 335; Thompson Sav. Bank v. Gregory (Tex. Civ. App.) 59 S. W. 622; Dorsey Printing Co. v. Gainesville Cotton Seed Oil Mill & Gin Co. (Tex. Civ. App.) 61 S. W. 556; Mahan v. Com. (Ky.) 56 S. W. 529; Ellers v. State (Tex. Cr. App.) 55 S. W. 813; Bell v. State (Tex. Cr. App.) 56 S. W. 913; Martinez v. State (Tex. Cr. App.) 57 S. W. 838; Rotan Grocery Co. v. Martin (Tex. Civ. App.) 57 S. W. 706; Felker v. Douglass (Tex. Civ. App.) 57 S. W. 323; International & G. N. R. Co. v. Branch (Tex. Civ. App.) 56 S. W. 542; Western Union Tel. Co. v. Tobin (Tex. Civ. App.) 56 S. W. 540; Hudson v.

shows does not exist,[43] and it makes no difference that such instructions contain correct statements of the law.[44] When

Northern Pac. Co., 107 Wis. 620; Eggett v. Allen, 106 Wls. 633, 82 N. W. 556; Conrad v. Kelley, 106 Wis. 252, 82 N. W. 141; Hartford Deposit Co. v. Calkins, 186 Ill. 104; Central of Georgia Ry. Co. v. Windham, 126 Ala. 552; Wisdom v. Reeves, 110 Ala. 418; Crane v. State, 111 Ala. 45; Stewart v. Russell, 38 Ala. 619; Battles v. Tallman, 96 Ala. 403; Cooke v. Cook, 100 Ala. 175; Beavers v. State, 54 Ark. 336; Little Rock & Ft. S. Ry. Co. v. Trotter, 37 Ark. 593; Gaines v. Bard, 57 Ark. 615; Harris v. State, 36 Ark. 127; McCulloch v. Campbell, 49 Ark. 367; Burke v. Snell, 42 Ark. 57; Whitman v. Steiger, 46 Cal. 256; People v. Hong Tong, 85 Cal. 171; In re Estate of Holbert, 57 Cal. 257; Mendelsohn v. Anaheim Lighter Co., 40 Cal. 657; Estate of Calkins, 112 Cal. 296; Johnson v. Jones, 16 Colo. 138; Fisk v. Greeley Electric Light Co., 3 Colo. App. 319; Williams v. Mellor, 12 Colo. 1; Burnham v. Jackson, 1 Colo. App. 237; Simpson v. Post, 40 Conn. 321; Lewis v. Phoenix Mutual Life Ins. Co., 44 Conn. 88; Wright v. Welch, 3 MacArthur (D. C.) 479; Levy v. Cox, 22 Fla. 546; Savannah, F. & W. Ry. Co. v. Tiedeman, 39 Fla. 196; McDonald v. McDonald, 94 Ga. 675; Andrews v. Andrews, 85 Ga. 276; McLean v. Clark, 47 Ga. 24; Paschal v. Davis, 3 Ga. 256; Kyle v. Chattahoochee Nat. Bank, 96 Ga. 693; Gwin v. Gwin (Idaho) 48 Pac. 295; Territory v. Evans (Idaho) 17 Pac. 139; Bradley v. Parks, 83 Ill. 169; City of Freeport v. Isbell, 83 Ill. 440; Howe Sewing Machine Co. v. Layman, 88 Ill. 39; Rabbermann v. Callaway, 63 Ill. App. 154; Swift & Co. v. Raleigh, 54 Ill. App. 44; McMahon v. Flanders, 64 Ind. 334; Blough v. Parry, 144 Ind. 463; Thompson v. Anderson, 86 Iowa, 703; Banning v. Chicago, R. I. & P. Ry. Co., 89 Iowa, 74; Gollobitsch v. Rainbow, 84 Iowa, 567; State v. Myer, 69 Iowa, 148; Stein v. City of Council

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[43] Wells v. Houston, 23 Tex. Civ. App. 629; Fisher v. Central Lead Co., 156 Mo. 479; City Council of Augusta v. Owens, 111 Ga. 464; Garcia v. State (Tex. Cr. App.) 61 S. W. 122.

[44] Parker v. State, 55 Miss. 414; Sutton v. Menser, 6 B. Mon. (Ky.) 434; City of Kinsley v. Morse, 40 Kan. 578; State v. Whitaker, 35 Kan. 731; Moffitt v. Cressler, 8 Iowa, 122; Farr v. Fuller, 8 Iowa, 347; Bank of Monroe v. Anderson Bros. Min. & Ry. Co., 65 Iowa, 692; Whitsett v. Chicago, R. I. & P. Ry. Co., 67 Iowa, 150; Lyons v. Carter, 84 Mo. App. 483; Pearson v. Adams (Ala.) 29 So. 977; People v. Hartman, 130 Cal. 487; State v. Goff (Kan. App.) 61 Pac. 680, 62 Kan. 104.

requests for instructions affected with this vice are made, they may and should be refused.[45] The court should refuse prayers

Bluffs, 72 Iowa, 180; Long Island Ins. Co. v. Hall, 4 Kan. App. 641; Chicago, K. & W. R. Co. v. Prouty, 55 Kan. 503; Feineman v. Sachs, 33 Kan. 621; State v. Whitaker, 35 Kan. 731; Atchison, T. & S. F. R. Co. v. Wells, 56 Kan. 222; Sutton v. Menser, 6 B. Mon. (Ky.) 434; Newport News & M. V. R. Co. v. Deuser, 97 Ky. 92; Kelton v. Hill, 58 Me. 114; Hunnewell v. Hobart, 42 Me. 565; Walter v. Alexander, 2 Gill (Md.) 204; Riggin v. Patapsco Ins. Co., 7 Har. & J. (Md.) 295; Hamilton v. State, 32 Md. 348; Wells v. Prince, 15 Gray (Mass.) 562; Shaughnessey v. Sewall & Day Cordage Co., 160 Mass. 331; Lacy v. Wilson, 24 Mich. 479; Bulen v. Granger, 63 Mich. 311; Locke v. Priestly Express Wagon & Sleigh Co., 71 Mich. 263; Brown v. Metropolitan Life Ins. Co., 65 Mich. 306; Fletcher v. Post, 104 Mich. 424; Mittwer v. Stremel, 69 Minn. 19; Ephland v. Missouri Pac. Ry. Co., 137 Mo. 187; Och v. Missouri, K. & T. Ry. Co., 130 Mo. 27; First Nat. Bank of Ft. Scott v. Lillard, 55 Mo. App. 675; Anchor Milling Co. v. Walsh, 37 Mo. App. 567; Chouteau v. Searcy, 8 Mo. 733; Robinson v. Spears (Miss.) 21 So. 554; Layton v. State, 56 Miss. 791; Hogan v. State, 46 Miss. 274; Dix v. Brown, 41 Miss. 131; Ivy v. Walker, 58 Miss. 253; Campbell v. Metcalf, 1 Mont. 379; Territory v. Whitcomb, 1 Mont. 359; Huntoon v. Lloyd, 7 Mont. 365; Farmers' Loan & Trust Co. v. Montgomery, 30 Neb. 33; Frederick v. Kinzer, 17 Neb. 366; Morearty v. State, 46 Neb. 652; Walrath v. State, 8 Neb. 80; Lee v. McLeod, 15 Nev. 158; Goodrich v. Eastern R. Co., 38 N. H. 390; Consolidated Traction Co. v. Haight, 59 N. J. Law, 577; Gilbert-

[45] Plummer v. City of Milan, 79 Mo. App. 439, 1 Mo. App. Rep'r, 600; Carson v. Norfolk & C. R. Co., 128 N. C. 95; Spaulding v. State (Neb.) 85 N. W. 80; Omaha Loan & Trust Co. v. Douglas Co. (Neb.) 86 N. W. 936; Smith v. Bank of New England (N. H.) 46 Atl. 230; Wamsley v. Atlas Steamship Co., 50 App. Div. 199, 63 N. Y. S. 761; Turner v. Locy, 37 Or. 158; Guckian v. Newbold (R. I.) 47 Atl. 543; Youngblood v. South Carolina & G. R. Co., 60 S. C. 9, 38 S. E. 232; McGhee v. Wells, 57 S. C. 280, 35 S. E. 529; Millam v. Southern Ry. Co., 58 S. C. 247, 36 S. E. 571; Cohen v. Cohen (Tex. Civ. App.) 63 S. W. 544; Martinez v. State (Tex. Cr. App.) 57 S. W. 670; Jessel v. State (Tex. Cr. App.) 57 S. W. 826; Gann v. State (Tex. Cr. App.) 59 S. W. 896; Bailey v. State (Tex. Cr. App.) 59 S. W. 900; Taylor v. State (Tex. Cr. App.) 63 S. W. 330; Thompson v. Johnson (Tex. Civ. App.) 58

for instructions which are merely abstract, and involve excursions into the broad and extended fields of legal science for the purpose of establishing legal principles having no

son v. Forty-Second St., M. & St. N. Ave. Ry. Co., 14 App. Div. (N. Y.) 294; MacGowan v. Duff, 12 N. Y. St. Rep. 680; Gill v. Rochester & P. R. Co., 37 Hun (N. Y.) 107; Jones v. Eason, 24 N. C. 331; State v. Peace, 46 N. C. 251; Pollard v. Teel, 25 N. C. 470; Morgan v. State, 48 Ohio St. 371; Lexington F., L. & M. Ins. Co. v. Paver, 16 Ohio, 324; Morris v. Perkins, 6 Or. 350; Willis v. Oregon Ry. & Nav. Co., 11 Or. 257; Breon v. Henkle, 14 Or. 494; Hasson v. Klee, 168 Pa. 510; Dooner v. Delaware & H. Canal Co., 164 Pa. 17; Sartwell v. Wilcox, 20 Pa. 117; Boyle's Ex'rs v. Kreitzer, 46 Pa. 465; State v. Aughtry, 49 S. C. 285; Murphy v. Murphy, 1 S. D. 316; Croft v. State, 6 Humph. (Tenn.) 317; Graham v. Fidelity Mut. Life Ass'n, 98 Tenn. 48; Houston & T. C. Ry. Co. v. Smith (Tex. Civ. App.) 39 S. W. 582; Chamberlain v. State, 25 Tex. App. 398; Gulf, C. & S. F. Ry. Co. v. Harriett, 80 Tex. 73; Cain v. Thomas, 26 Tex. 581; Hough v. Hill, 47 Tex. 148; Chapman v. Southern Pac. Co., 12 Utah, 30; Good v. Knox, 64 Vt. 97; Baltimore & O. R. Co. v. Few's Ex'rs, 94 Va. 82; Bartley v. McKinney, 28 Grat. (Va.) 750; Miller v. Territory, 3 Wash. T. 554; Oliver v. Ohio River R. Co., 42 W. Va. 703; Storrs v. Feick, 24 W. Va. 606; Lawson v. Dalton, 18 W. Va. 766; Michigan Ins. Bank v. Eldred, 9 Wall. (U. S.) 544; United States v. Breitling, 20 How. (U. S.) 252; Chicago City v. Robbins, 2 Black (U. S.) 418; Keyser v. Hitz, 133 U. S. 138; Northern Pac. R. Co. v. Paine, 119 U. S. 561; Boston & M. R. Co. v. McDuffey (C. C. A.) 79 Fed. 934.

S. W. 1030; Villereal v. State (Tex. Cr. App.) 61 S. W. 715; Forney v. Ward (Tex. Civ. App.) 62 S. W. 108; McGee v. West (Tex. Civ. App.) 57 S. W. 928; Sherman, S. & S. Ry. Co. v. Bell (Tex. Civ. App.) 58 S. W. 147; Beaman v. Martha Washington Min. Co. (Utah) 63 Pac. 631; Traver v. Spokane Street Ry. Co. (Wash.) 65 Pac. 284; Citizens' Street Ry. Co. v. Merl, 26 Ind. App. 284; Mullen v. Bower, 26 Ind. App. 253; Quinn v. Com. (Ky.) 63 S. W. 792; Bishop v. Com., 22 Ky. Law Rep. 760; Produce Exch. Trust Co. v. Bieberbach, 176 Mass. 577; Produce Exch. Trust Co. v. Worcester Brewing Co., 176 Mass. 577; Tarbell v. Forbes, 177 Mass. 238; Whitaker v. Ballard (Mass.) 60 N. E. 379; Washington County Water Co. v. Garver, 91 Md. 398, 46 Atl. 979; State v. Obuchon, 159 Mo. 256; State v. Furgerson (Mo.) 63 S. W. 101; John Deere Plow Co. v. Sullivan, 158 Mo. 440; Wood v. Kelly, 82 Mo. App.

relevancy to the controversy between the parties.[46] The statement of general propositions of law, not warranted by

598; Einseidler v. Whitman Co., 22 Wash. 388, 60 Pac. 1122; Bodine v. State (Ala.) 29 So. 926; Harkness v. State (Ala.) 30 So. 73; Southern Ry. Co. v. Reaves (Ala.) 29 So. 594; People v. Brown, 130 Cal. 591; People v. Shears (Cal.) 65 Pac. 295; Mitchell v. Potomac Ins. Co., 16 App. D. C. 241; Richard v. State (Fla.) 29 So. 413; Willingham v. Macon & B. Ry. Co., 113 Ga. 374; Webb v. Wight & Weslosky Co., 112 Ga. 432; Globe Mut. Life Ins. Ass'n v. Ahern, 191 Ill. 167, 60 N. E. 806; Lusk v. Throop, 189 Ill. 127; Hartman v. Loptien, 93 Ill. App. 472; Pioneer Cooperage Co. v. Romanowicz, 186 Ill. 9, 57 N. E. 864; Boldenwick v. Cahill, 187 Ill. 218, 58 N. E. 351; Kee v. Cahill, 86 Ill. App. 561; Cardwell v. State, 60 Neb. 480; Union Sav. Bank & Trust Co. v. Ellis, 110 Ga. 494, 35 S. E. 780; Board of Trustees of Schools v. King, 85 Ill. App. 220; Rock Island & E. I. Ry. Co. v. Gordon, 184 Ill. 456, 56 N. E. 810; Williams v. Andrew, 185 Ill. 98, 56 N. E. 1041, affirming 84 Ill. App. 289; Samuels v. Burnham (Kan. App.) 61 Pac. 755; Bennett v. McDonald, 60 Neb. 47, 82 N. W. 110; Hersey v. Hutchins (N. H.) 46 Atl. 33; San Antonio Gas Co. v. Robertson, 93 Tex. 503, 56 S. W. 323, reversing judgment (Tex. Civ. App.) 55 S. W. 347; Halsell v. Neal, 23 Tex. Civ. App. 26, 56 S. W. 137; Bostic v. State, 94 Ala. 45; Brown v. Isbell, 11 Ala. 1010; Allen v. Hamilton, 109 Ala. 634; Johnson v. State, 36 Ark. 242; Snapp v. Stanwood, 65 Ark. 222; Thompson v. Bertrand, 23 Ark. 730; Comptoir D'Escompte v. Dresbach, 78 Cal. 15; People v. Roberts, 6 Cal. 214; People v. Hawes, 98 Cal. 648; Cowell v. Colorado Springs Co., 3 Colo. 82; State v. Smith, 49 Conn. 388; Allen v. Ruudle, 50 Conn. 33; Woods v. Trinity Parish, 21 D. C. 540; Mayer v. Wilkins, 37 Fla. 244; Robinson v. Barnett, 18 Fla. 602; Whitner v. Hamlin, 12 Fla. 18; Beach v. Netherland, 93 Ga. 233; Jackson v. State, 91 Ga. 271; Southwestern R. Co. v. Papot, 67 Ga. 676; Johnson v. Fraser, 2 Idaho, 371; Illinois Cent. R. Co. v. Sanders, 166 Ill. 270; East v. Crow, 70 Ill. 91; Doyle v. People, 147 Ill. 394; Cleveland, C., C. & St. L. Ry. Co. v. Hall, 70 Ill. App. 429; Trentman v. Wiley, 85 Ind. 33; Spence v. Board of Com'rs of Owen Co., 117 Ind. 573; Goodbar v. Lidikey, 136 Ind. 1; Hamilton Buggy Co. v. Iowa Buggy Co., 88 Iowa, 364; Norris v. Kipp, 74 Iowa, 444; Messer v. Reginnitter, 32 Iowa, 312; Bigelow v. Henniger, 33 Kan. 362; State v. Hendricks, 32 Kan. 559; City of Abilene v. Hendricks, 36 Kan. 196;

[46] State v. Reigart, 1 Gill (Md.) 1.

the facts in the case, and not applicable thereto, is improper, whether the propositions as stated are correct or not, and re-

Krish v. Ford, 19 Ky. Law Rep. 1167; Louisville & N. R. Co. v. Bell, 13 Ky. Law Rep. 393; Layson v. Galloway, 4 Bibb (Ky.) 100; State v. Labuzan, 37 La. Ann. 489; McIntosh v. Smith, 2 La. Ann. 756; State v. Simmons, 38 La. Ann. 41; Penobscot R. Co. v. White, 41 Me. 512; Rumrill v. Adams, 57 Me. 565; Soule v. Winslow, 66 Me. 447; Caledonian Ins. Co. of Scotland v. Traub, 80 Md. 214; Lurssen v. Lloyd, 76 Md. 360; Kansas Inv. Co. v. Carter, 160 Mass. 421; Northcoate v. Bachelder, 111 Mass. 322; Com. v. Boutwell, 162 Mass. 230; Moon v. City of Ionia, 81 Mich. 635; Farrand v. Aldrich, 85 Mich. 593; People v. Gosch, 82 Mich. 22; Schoenberg v. Voigt, 36 Mich. 311; Johnston Harvester Co. v. Clark, 31 Minn. 165; Weber v. McClure, 44 Minn. 407; Cowley v. Davidson, 13 Minn. 92 (Gil. 86); Browning v. State, 30 Miss. 656; McDaniel v. State, 8 Smedes & M. (Miss.) 401; Schmidt v. Rose, 6 Mo. App. 588; Bell v. Hannibal & St. J. R. Co., 72 Mo. 50; Bowen v. Hannibal & St. J. R. Co., 75 Mo. 426; Dupont v. McAdow, 6 Mont. 234; Caw v. People, 3 Neb. 357; Wells v. State, 11 Neb. 409; Consaul v. Sheldon, 35 Neb. 247; Moore v. Ross, 11 N. H. 547; Ripley v. Colby, 23 N. H. 438; C. J. L. Meyer & Sons Co. v. Black, 4 N. M. 352; Humphreys v. Mayor of Woodstown, 48 N. J. Law, 588; Rushmore v. Hall, 12 Abb. Pr. (N. Y.) 420; Rouse v. Lewis, 2 Keyes (N. Y.) 352; Hope v. Lawrence, 50 Barb. (N. Y.) 258; Carlson v. Winterson, 1 Misc. Rep. (N. Y.) 207; State v. Cain, 47 N. C. 201; Doe d. Freeman v. Edmunds, 10 N. C. 5; Lear v. McMillen, 17 Ohio St. 464; Oliver v. Sterling, 20 Ohio St. 391; Milius v. Marsh, 1 Disn. (Ohio) 512; Salomon v. Cress, 22 Or. 177; Fleckenstein v. Inman, Paulson & Co., 27 Or. 328; State v. Glass, 5 Or. 73; Northern Cent. Ry. Co. v. Husson, 101 Pa. 7; Urket v. Coryell, 5 Watts & S. (Pa.) 60; Kitchen v. McCloskey, 150 Pa. 376; Fell v. Dial, 14 S. C. 250; State v. Petsch, 43 S. C. 143; Whitaker v. Pullen, 3 Humph. (Tenn.) 466; State v. Parker, 13 Lea (Tenn.) 221; Unsell v. State (Tex. Cr. App.) 45 S. W. 902; Ratigan v. State, 33 Tex. Cr. App. 301; Hardin v. State, 4 Tex. App. 355; Wetherby v. Foster, 5 Vt. 136; Mack v. Snider, 1 Aiken (Vt.) 104; Lucia v. Meech, 68 Vt. 175; Fire Ass'n of Philadelphia v. Hogwood, 82 Va. 342; Brown v. Forest, 1 Wash. T. 201; Jack v. Territory, 2 Wash. 101; State v. Greer, 22 W. Va. 801; Thayer v. Davis, 75 Wis. 205; Thomas v. Paul, 87 Wis. 607; Forty-Second St., M. & St. N. Ave. Ry. Co. v. Hannon (C. C. A.) 85 Fed. 852; Hot Springs R. Co. v. Williamson, 136 U. S. 121; Northern Pac. R. Co. v. Paine, 119 U. S. 561.

quests for such instructions may always be refused.[47] An instruction based upon the theory of the nonexistence of a fact or evidence of a fact which there was evidence tending to prove is erroneous, and should be refused where there was evidence from which the jury might find the fact.[48] A charge, as to its sufficiency or insufficiency, is to be examined and tested by its applicability to the facts adduced in evidence;[49] and no instruction should be given to a jury which is not predicated upon some theory deducible from at least some portion of the evidence.[50] The reason why such in-

[47] Winn v. Village of Rutland, 52 Vt. 481; Hamilton v. Russell, 1 Cranch, C. C. 97, Fed. Cas. No. 5,989; Chirac v. Reinecker, 2 Pet. (U. S.) 613; Northern Pac. R. Co. v. Paine, 119 U. S. 561; Haines v. McLaughlin, 135 U. S. 584; Keyser v. Hitz, 133 U. S. 138; Marshall v. Sloan, 26 Ark. 513; State v. Donnelly, 130 Mo. 642; McKeon v. Citizens' Ry. Co., 42 Mo. 79; State v. Miller, 67 Mo. 634; State v. Chambers, 87 Mo. 406; Stucke v. Milwaukee & M. R. Co., 9 Wis. 202; Burney v. State, 21 Tex. App. 565; Bejarano v. State, 6 Tex. App. 265; Gose v. State, 6 Tex. App. 121; Wheeler v. Moody, 9 Tex. 372; Andrews v. Marshall, 26 Tex. 212; Buster's Ex'r v. Wallace, 4 Hen. & M. (Va.) 82; Steamboat Blue Wing v. Buckner, 12 B. Mon. (Ky.) 249; Boyd v. State, 17 Ga. 194; Golding v. Merchant, 43 Ala. 705; Robins v. Fowler, 2 Ark. 133; Howell v. Webb, 2 Ark. 360; Lewis v. State, 4 Ohio, 389; Hine v. Bowe, 114 N. Y. 350; Bradshaw v. State, 17 Neb. 144; Marion v. State, 20 Neb. 233; Uhl v. Robison, 8 Neb. 272; Lake v. Clark, 97 Mass. 346; Hurn's Lessee v. Soper, 6 Har. & J. (Md.) 282; State v. Riculfi, 35 La. Ann. 770; Tryon v. Oxley, 3 G. Greene (Iowa) 289; Hall v. Hunter, 4 G. Greene (Iowa) 539; Whitner v. Hamlin, 12 Fla. 18; Proctor v. Hart, 5 Fla. 465; Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land, Transp. & Mfg. Co., 27 Fla. 1, 157; People v. Roberts, 6 Cal. 214; Aguirre v. Alexander, 58 Cal. 21; People v. Best, 39 Cal. 690; Hogan v. State, 46 Miss. 274; Co-operative Life Ass'n v. McConnico, 53 Miss. 239; Norvell v. Oury, 13 Tex. 31.

[48] Nehring v. McMurrian (Tex.) 57 S. W. 943; McGee v. West (Tex. Civ. App.) 57 S. W. 928; Caruthers v. Balsley, 89 Ill. App. 559; Bailey v. State (Tex. Cr. App.) 59 S. W. 900; Liner v. State, 124 Ala. 1; Cowell v. Phoenix Ins. Co., 126 N. C. 684.

[49] Brown v. State, 6 Tex. App. 286.

[50] People v. Sanchez, 24 Cal. 17.

structions should not be given is that they do not attain the end which courts should always keep in mind,—that of enlightening the jury,—but tend to confuse and mislead, in that they direct the attention of the jury to issues not involved,[51] and are likely to cause the jury to believe that there is evidence to prove the facts referred to in the instructions, when, as a matter of fact, there is no such evidence.[52]

§ 87. Same—Illustrations of rule.

The following cases will serve to illustrate the principles enumerated: "An instruction is erroneous which leaves the jury to determine whether a joint defendant had 'approved or defended' a trespass, if there was no testimony to that effect, and defendants denied its commission."[53] In a case where no facts were in evidence upon which a jury could be asked to find a tender essential, a discussion by the judge to the jury as to the requisites of a sufficient tender would be inappropriate, and likely to impress their minds with the belief that, in the opinion of the judge, a tender might be necessary on the facts in proof.[54] An instruction that, "if they [the jury] believed * * * that the defendant, at the time he fired the pistol, intended to kill A., the deceased, and did kill him, without any provocation, they will find him guilty of murder in the first degree," is erroneous, where there was evidence to show provocation.[55] "Where the plaintiff declares upon a completed sale, it is erroneous for the court, in instructing for him, to submit to the jury the question of an

[51] Chicago, B. & Q. R. Co. v. Gregory, 58 Ill. 272.

[52] Lacy v. Wilson, 24 Mich. 479; Houston & T. C. Ry. Co. v. Rider, 62 Tex. 267; Felker v. State, 54 Ark. 489; Moorehead v. Hyde, 38 Iowa, 382; Little Rock & Ft. S. Ry. Co. v. Trotter, 37 Ark. 593.

[53] Pigott v. Lilly, 55 Mich. 150.

[54] Lacy v. Wilson, 24 Mich. 479.

[55] Harris v. State, 36 Ark. 127.

executory contract of sale, especially where there is no evidence * * * to prove the latter."[56] So, where the judge charged the jury that, if a note was given in consideration of a compromise, the consideration was a good one, and it did not appear from the statement of facts that any such evidence was before the jury, this was also held erroneous.[57] "In the absence of evidence showing an agreement to pay a particular sum for services rendered, or that the services rendered were reasonably worth that sum, it is error in the court to instruct on the basis of an assumed particular sum as the measure of plaintiff's recovery."[58] An instruction that, "if the jury find that the consideration for which the note sued on was given has wholly failed, they will find for the defendant," is erroneous, if there is no evidence of what was the consideration of the note.[59] So, a charge as to the effect of a contract is erroneous, where there is no evidence of such contract.[60] In an action for death by wrongful act, where the negligence of deceased was clearly the proximate cause of death, if he was guilty of negligence, it was error to charge that, if the negligence of deceased was only the remote cause of the injury, plaintiff might recover.[61] Instructions asked by the defendant with reference to an alleged confession made by him, and admitted in evidence, are properly refused when there is nothing in the record showing the nature of the confession, to whom made, its extent, or whether corroborated or not.[62] "Where a plaintiff complains of personal violence as the cause of a physical disability, and no evidence is given in

[56] Seckel v. Scott, 66 Ill. 106.
[57] Kelso v. Townsend, 13 Tex. 140.
[58] Biglow v. Carney, 18 Mo. App. 534.
[59] Webster College v. Tyler, 35 Mo. 268.
[60] Locke v. Priestly Express Wagon & Sleigh Co., 71 Mich. 263.
[61] Chicago, K. & W. R. Co. v. Proutv 55 Kan. 503.
[62] Dodge v. People, 4 Neb. 220.

support of any other theory, it is error to give the jury to understand that they may find that the violence aggravated a pre-existing disability."[63] Numerous other illustrations of the rule under discussion are set out below in the notes.[64]

§ 88. Same—Stating exceptions to general rules announced in other instructions.

An instruction which lays down a general rule of law ap-

[63] Campau v. North, 39 Mich. 607.

[64] An instruction authorizing the jury to allow damages for certain elements of injury which there is no evidence to show were suffered by the plaintiff is erroneous. Smith v. Wilmington & W. R. Co., 126 N. C. 712; Cicero & P. St. Ry. Co. v. Richter, 85 Ill. App. 591; Wilkie v. Raleigh & C. F. R. Co., 128 N. C. 113; Judd v. Isenhart, 93 Ill. App. 520. Instructions that the plaintiff cannot recover damages for consequences of defendant's wrong, which the plaintiff might have prevented, are erroneous, and may be refused when there was no evidence to show how the plaintiff could have avoided the damage. Central of Georgia Ry. Co. v. Windham, 126 Ala. 552. The court need not charge upon contributory negligence where there is no evidence of it. City of Covington v. Diehl, 22 Ky. Law. Rep. 955; Rinard v. Omaha, K. C. & E. Ry. Co. (Mo.) 64 S. W. 124. In an action for personal injuries, an instruction that the defendant is not liable for the mistakes of a doctor called in to care for the injuries may be refused when there is no evidence of any such mistakes. Hicks v. Southern Ry. Co. (S. C.) 38 S. E. 725. The court should not, without testimony on that subject, convey to the jury its impression that the character of the accused is such as to raise an inference of likelihood of his participation in just such violations of law as are charged in the indictment. Mullen v. United States (C. C. A.) 106 Fed. 892. On an indictment for murder, when the defense is insanity, it is error to charge the jury to be careful not to suffer an ingenious counterfeit of insanity to prevail, in the absence of any evidence tending to show a counterfeit of insanity. Sharkey v. State, 2 Ohio Cir. Dec. 443. An instruction in a criminal case which misstates evidence of the state's witnesses by positively limiting the commission of an offense to a certain day is properly refused. Frost v. State, 124 Ala. 71. In the absence of any evidence as to self-defense, the court need not and should not charge thereon.

plicable to the testimony, but which does not also state that the rule is subject to exceptions within which the evidence fairly tends to bring the case, is misleading;[65] but if there is no such evidence, the giving of such instruction is unnecessary and erroneous.[66] Thus, an instruction, in an action to enforce a vendor's lien, that the vendor may waive his lien by taking security, is erroneous where the evidence merely shows that the vendor took the note of the purchaser for the price.[67]

Com. v. Rudert (Ky.) 60 S. W. 489; Castlin v. State (Tex. Cr. App.) 57 S. W. 827. An instruction requested in an action for damages to property, that if any part of the property claimed to have been injured was covered by a bill of sale executed by plaintiff, plaintiff cannot recover for injury to such part of his property, is properly refused on the ground that the bill of sale is not in evidence. Fletcher v. South Carolina & G. E. R. Co., 57 S. C. 205; Murphy v. Farley, 124 Ala. 279. In an action against a railroad company to recover for injuries to a servant, the court, upon the question of alleged negligence of a coemploye, instructed that, in arriving at a conclusion as to whether the train was being run carefully, the jury should consider the evidence tending to show what is careful running on roads in ordinary condition. It was held that, although the road in question was merely a spur track, used for a special purpose, the instruction could not be regarded as misleading. The instruction merely suggests a comparison. But while the instruction is technically correct, it would seem to be separated by a very narrow line from those instructions which tend to entrap the jury. Stetler v. Chicago & N. W. Ry. Co., 49 Wis. 609.

[65] White v. Thomas, 12 Ohio St. 312.

[66] Reinback v. Crabtree, 77 Ill. 182; Fulwider v. Ingels, 87 Ind. 414. See, also, Hadlock v. Brooks (Mass.) 59 N. E. 1009, wherein it was held, under the evidence, that it was not necessary to state the whole law of champerty.

[67] Webb v. Robinson, 14 Ga. 216. Where the court has instructed that a person cannot recover for damages which he permits to go on without making every reasonable effort to have the damages stopped, it is reversible error to add, without evidence to sustain the qualifying clause, "unless the jury further believe from the evidence that defendant directed the plaintiff not to do so," since,

§ 89. Same—Withdrawn or excluded evidence.

Evidence which has been admitted and subsequently withdrawn, or which has been excluded when offered, cannot be considered by the jury for any purpose, and it is therefore error to give instructions based upon such evidence.[68]

§ 90. Same—Sufficiency of evidence to support instructions.

It has already been seen that the weight and sufficiency of the evidence to establish a fact in issue is a question exclusively within the province of the jury to determine.[69] Accordingly, while the court should not give an instruction where there is no evidence to sustain it, the court should not decline to give an instruction merely because it is of the opinion that the evidence is insufficient to establish the fact, as to do so would invade the province of the jury.[70] If there is any evidence whatsoever upon which the jury might base a finding, even though such evidence is slight, it is sufficient to sustain an instruction,[71] and it will be error for the court

if the instruction applies to no particular item of damages, it is impossible to say how much of the damages awarded was due to the qualifying clause. Hartford Deposit Co. v. Calkins, 186 Ill. 104, reversing 85 Ill. App. 627.

[68] Atkinson v. Gatcher, 23 Ark. 101; Pleasants v. Scott, 21 Ark. 371; Com. v. Cosseboom, 155 Mass. 298; Caldwell v. Stephens, 57 Mo. 589; McKinzie v. Hill, 51 Mo. 303; New York & C. Mining Syndicate & Co. v. Fraser, 130 U. S. 611; Hayes v. Kelley, 116 Mass. 300.

[69] See ante, c. 2, "Province of Court and Jury."

[70] Peoria, D. & E. Ry. Co. v. Puckett, 42 Ill. App. 642; Union Mut. Life Ins. Co. v. Buchanan, 100 Ind. 73; Boots v. Canine, 94 Ind. 408; Bradford v. Pearson, 12 Mo. 71.

[71] City of Chicago v. Scholten, 75 Ill. 468; Milliken v. Marlin, 66 Ill. 13; Thompson v. Duff, 119 Ill. 226; Walker v. Camp, 69 Iowa, 741; Brannum v. O'Connor, 77 Iowa, 632; McNeill v. Arnold, 22 Ark. 477; Goodell v. Bluff City Lumber Co., 57 Ark. 203; Frank v. Frank (Tex. Civ. App.) 25 S. W. 819; McFadden v. Ferris, 6 Ind. App. 454; Union Mut. Life Ins. Co. v. Buchanan, 100 Ind.

to refuse to give a requested instruction based upon such evidence.[72] An instruction may be based upon a fact of which there is no direct evidence, if circumstances are proven from which the fact may reasonably be inferred.[73] In order to require the submission of a hypothetical case to the jury, the court need not be satisfied that it is fully sustained by the testimony. It is only necessary that the evidence shall tend to sustain the hypothetical case.[74] It must not be understood

63; Honesty v. Com., 81 Va. 283; Hazell v. Bank of Tipton, 95 Mo. 60; Camp v. Phillips, 42 Ga. 289; Knowles v. Ogletree, 96 Ala. 555; Jones v. Fort, 36 Ala. 449; Bradford v. Marbury, 12 Ala. 520; Partridge v. Forsyth, 29 Ala. 200; Atkins v. Gladwish, 27 Neb. 841; State v. Ezzard, 40 S. C. 312; Allston v. Pickett, 19 S. C. 606; Morton v. O'Connor, 85 Ill. App. 273; Dingee v. Unrue's Adm'x, 98 Va. 247; Harris v. State, 155 Ind. 265; Fant v. Wright (Tex. Civ. App.) 61 S. W. 514; Davis v. Bond, 84 Mo. App. 504; Jackson v. State (Tex. Cr. App.) 61 S. W. 404. Where there is evidence upon which the jury might find the defendant guilty of murder in either the first or the second degree, it is not error for the court to instruct in regard to murder in each degree. Robinson v. State (Tex. Cr. App.) 63 S. W. 869. If a case goes to the jury, and there is no evidence tending to prove a fact, it is proper for the court to give an instruction applicable to it, if requested to do so, even though the evidence is so slight as to be insufficient to support a verdict founded upon it. Southern Ry. Co. v. Wilcox (Va.) 39 S. E. 144. Where a statute was introduced in evidence without objection, it was not error to give an instruction construing it, although it was not necessary to consider such statute in determining the case. Chafee v. City of Aiken, 57 S. C. 507. It is not error for the court to charge upon the whole case, although the evidence is conflicting upon only one issue, where there was no agreement or request that only such issue should be submitted, and the defendant has put in issue the whole of plaintiff's case. Halsell v. Neal, 23 Tex. Civ. App. 26.

[72] Kane v. Torbit, 23 Ill. App. 311; Chicago & A. R. Co. v. Calkins, 17 Bradw. (Ill.) 55; Ridens v. Ridens, 29 Mo. 470; De Camp v. Mississippi & M. R. Co., 12 Iowa, 348; Peoria, D. & E. Ry. Co. v. Puckett, 42 Ill. App. 642; State v. Wright, 112 Iowa, 436; Squires v. Gamble-Robinson Commission Co. (Minn.) 86 N. W. 616.

[73] Chicago, R. I. & P. Ry. Co. v. Lewis, 109 Ill. 134.

[74] Chicago, R. I. & P. Ry. Co. v. Lewis, 109 Ill. 134.

from what has been said, however, that it is necessary or even proper for the court to give instructions based on testimony which, at most, raises a mere possibility or conjecture.[75] It is not easy to draw the line between a total absence of evidence to prove a fact, and evidence confessedly slight; but it seems that, if the evidence is of such a nature that reasonable men might draw an inference therefrom, the court should instruct the jury in regard to it.[76] The question here is substantially the same as where the court is asked to direct a verdict, and authorities upon that subject are relevant here.[77]

§ 91. Same—Violation of rule as ground for reversal.

The giving of an instruction not supported by the evidence

[75] Sutton v. Madre, 47 N. C. 320; Cawfield v. Asheville St. Ry. Co., 111 N. C. 597; O'Connor & Harder Range & Furnace Co. v. Alexe, 28 Mo. App. 184; Bloyd v. Pollock, 27 W. Va. 75; Cobb v. Fogalman, 23 N. C. 440; Dickerson v. Johnson, 24 Ark. 251; Parlin & Orendorff Co. v. Miller (Tex. Civ. App.) 60 S. W. 881; Saunders v. Whitcomb, 177 Mass. 457. Evidence which merely shows that a minor was present at the time a burglary was committed is insufficient to support an instruction stating the law as to an accomplice who stands by and watches while another commits a crime. Sparks v. State, 111 Ga. 830. The mere personal presence of the plaintiff before the jury will not justify an instruction that, in estimating damages, the plaintiff's age is to be taken into consideration. Phelps v. City of Salisbury, 161 Mo. 1. Where, in an action to recover damages for the death of a child, it appears that the deceased was nearly seventeen years of age, and a bright, active boy, who had been for two months working as a fireman upon the identical engine upon which he was riding at the time of the accident, there is no occasion for instructions which deal with the question of the immature judgment of childhood. Lemasters v. Southern Pac. Co., 131 Cal. 105.

[76] Peoria, D. & E. Ry. Co. v. Puckett, 42 Ill. App. 642; Bishop v. State, 43 Tex. 402; Chicago, B. & Q. R. Co. v. Gregory, 58 Ill. 272; Missouri Furnace Co. v. Abend, 107 Ill. 44; Morton v. O'Connor, 85 Ill. App. 273; Wahlgren v. Market St. Ry. Co., 132 Cal. 656.

[77] See ante, § 5, "Directing Verdict."

is sufficient ground for reversal where it appears that such instruction misled, or might have misled, the jury, to the prejudice of the party complaining.[78] Where the instructions, as a whole, are abstract and inapplicable to the facts in issue, the judgment will be reversed.[79] If an instruction submits an issue not warranted by the evidence,[80] or is based on facts not in evidence,[81] or is so worded as to lead the jury

[78] Case v. Illinois Cent. R. Co., 38 Iowa, 581; Lee v. Newell, 107 Pa. 283; Aetna Ins. Co. v. Reed, 33 Ohio St. 283; Ward v. Henry, 19 Wis. 76; People v. Devine, 95 Cal. 227; Webber v. Brown, 38 Ill. 87; Reeder v. Purdy, 41 Ill. 279; King v. Barnes, 30 Ill. App. 339; Nicklaus v. Burns, 75 Ind. 93; Crowder v. Reed, 80 Ind. 1; State Sav. Ass'n of St. Louis v. Hunt, 17 Kan. 532; Raper v. Blair, 24 Kan. 374; Missouri Pac. Ry. Co. v. Pierce, 33 Kan. 61; Zimmerman v. Knox, 34 Kan. 245; Robards v. Wolfe, 1 Dana (Ky.) 156; Hopkins v. Fowler, 39 Me. 568; Weston v. Higgins, 40 Me. 102; Cravens v. Wilson, 48 Tex. 324; Thrasher v. State, 3 Tex. App. 281; Yarborough v. Tate, 14 Tex. 483; Esterly Harvesting Mach. Co. v. Frolkey, 34 Neb. 110; Williams v. State, 6 Neb. 334; Curry v. State, 4 Neb. 545; Clark v. State, 32 Neb. 246; High v. Merchants' Bank, 6 Neb. 155; Harrison v. Baker, 15 Neb. 43; Crossman v. Harrison, 4 Rob. (N. Y.) 38; Pasley v. English, 10 Grat. (Va.) 236.

[79] Fisher v. Central Lead Co., 156 Mo. 479.

[80] Cottrell v. Spiess, 23 Mo. App. 35; Cook v. Dennis. 61 Tex. 246; Blanton v. Mayes, 58 Tex. 422; Lee v. Hamilton, 12 Tex. 413; Austin v. Talk, 20 Tex. 164; Andrews v. Smithwick, 20 Tex. 111; Corzine v. Morrison, 37 Tex. 511; Philadelphia, W. & B. R. Co. v. Alvord, 128 Pa. 42. Where a statute is more stringent in its regulations as to the safeguards to be provided by railroad companies at crossings and at other places, it is error, in an action against a railroad company for injuries occurring at a crossing, to give to the jury any instructions as to such statutes, if the accident did not occur at the crossing, but some distance from it. Sims v. Southern Ry. Co., 59 S. C. 246.

[81] Bowles v. Lewis, 58 Mo. App. 649; State v. Bailey, 57 Mo. 131; Musick v. Atlantic & P. R. Co., 57 Mo. 134; Waddingham v. Hulett, 92 Mo. 528; Stokes v. Ravenswood Distillery Co., 2 Mo. App. Rep'r, 1093; Livingston v. Hudson, 85 Ga. 835; Ashworth v. East Tennessee, V. & G. Ry. Co., 94 Ga. 715; Denver & R. G. R. Co. v. Robinson, 6 Colo. App. 432; Rara Avis Gold & Silver Min.

to infer the existence of a state of facts entirely at variance with the evidence,[82] the error will almost invariably be considered a ground for reversal. The following cases illustrate this principle: On a criminal prosecution it was held reversible error to instruct the jury that, if defendant formed a conspiracy to commit the crime, and became intoxicated to nerve himself to commit it, his intoxication would be no excuse, there being no evidence that he became intoxicated for such purpose.[83] So, in an action for damages, caused by the alleged negligence of the defendant railway company, it was held reversible error to charge as to the duty of the company in the selection and retention of its employes, where there was no evidence or issue as to that subject to submit to the jury.[84] In another action for personal injuries sustained while crossing defendant's track, the court charged the jury as to the duties of railroad companies in operating trains over public crossings, and stated that a "failure to comply with those requirements is made criminal under the law." It was held that this instruction was inapplicable, and ground for a new trial, where it appeared that the place where plaintiff was injured was not a public crossing.[85]

Co. v. Bouscher, 9 Colo. 385; State Bank v. Hubbard, 8 Ark. 183; Goldsmith v. McCafferty, 101 Ala. 663; Long v. Eakle, 4 Md. 454; Marshall v. Haney, 4 Md. 498; Briggs v. Fireman's Fund Ins. Co., 65 Mich. 52; Sheehy v. Flaherty, 8 Mont. 365; Clark v. State, 32 Neb. 246; Atchison, T. & S. F. Ry. Co. v. Click, 5 Tex. Civ. App. 224; Harrell v. Houston, 66 Tex. 278; Wilson v. State (Tex. Cr. App.) 34 S. W. 284; Irwin v. Atkins, 8 Ill. App. 221; Martin v. Union Mut. Ins. Co., 13 Wash. 275; Black v. Brooklyn City R. Co., 108 N. Y. 640; King v. Wells, 94 N. C. 344; Illinois Cent. R. Co. v. Hileman, 53 Ill. App. 57.

[82] Caw v. People, 3 Neb. 357.

[83] Clark v. State, 32 Neb. 246.

[84] Houston & T. C. Ry. Co. v. Gilmore, 62 Tex. 391.

[85] Ashworth v. East Tennessee, V. & G. Ry. Co., 94 Ga. 715, 20 S. E. 424.

Although a charge is predicated on a state of facts not sustained by the evidence, this will not warrant a reversal of the case if it is not likely to mislead the jury, to the prejudice of the party complaining.[86] The giving of instructions which consist in mere abstract and general propositions of law which could not arise upon the testimony will not, in general, be ground for reversal,[87] unless it satisfactorily appears that the jury was misled, to the prejudice of the party complaining.[88] And it has also been held that the statement of an abstract proposition, even though not applicable to the case, furnishes no just ground of complaint, where it is given merely for the purpose of pointing out well-known distinctions,[89] or to illustrate and emphasize rules governing the

[86] Gulf, C. & S. F. Ry. Co. v. Greenlee, 70 Tex. 553; Hall v. Stewart, 58 Iowa, 681; Thomas v. Ingram, 20 Tex. 727; People v. Cochran, 61 Cal. 548; Petrie v. Columbia & G. R. Co., 29 S. C. 303; Daniels v. Western & A. R. Co., 96 Ga. 786; Waters v. Shafer, 25 Neb. 225; Laharee v. Klosterman, 33 Neb. 150; Berry v. Missouri Pac. Ry. Co., 124 Mo. 223; State v. Durbin, 22 La. Ann. 154; Mason v. Southern Ry. Co., 58 S. C. 70. The giving of an instruction stating an abstract principle of law in a criminal case is not error unless the principle stated is erroneous, and, unless the court can see that an instruction not applicable to the facts of the case has confused or misled the jury, it will not reverse the judgment in the lower court for the giving of an abstract instruction. Reed v. Com., 98 Va. 817.

[87] Caw v. People, 3 Neb. 357; Salomon v. Cress, 22 Or. 177; McGregor v. Armill, 2 Iowa, 30; Ward v. Henry, 19 Wis. 76; Proctor v. Hart, 5 Fla. 465; People v. March, 6 Cal. 543; State v. Johnson, 33 La. Ann. 889; Lee v. Merrick, 8 Wis. 229; State v. Canty, 41 La. Ann. 587; Benjamin v. Metropolitan St. Ry. Co., 133 Mo. 274; Schaungut's Adm'r v. Udell, 93 Ala. 302; Payne v. Crawford, 102 Ala. 387; Creed v. Commercial Bank of Cincinnati, 11 Ohio, 489; Reed v. McGrew, 5 Ohio, 375; Upstone v. People, 109 Ill. 169; McCutchen v. Loggins, 109 Ala. 457.

[88] Bernstein v. Humes, 71 Ala. 260; Herring v. Skaggs, 73 Ala. 446; Pittsburg, Ft. W. & C. R. Co. v. Slusser, 19 Ohio St. 157.

[89] McGrew v. Missouri Pac. Ry. Co., 109 Mo. 582.

relations of the parties, and their respective rights and responsibilities.[90] An instruction stating a correct proposition of law is not necessarily misleading, although it refers in no way to the evidence.[91] So, where an instruction is based on a state of facts not in evidence, but favorable to the appellant, he has no right to complain of the giving of such instruction;[92] and a party who has asked instructions on a particular point cannot afterwards complain of instructions given by the court upon that point, on the ground that there is no evidence to support the instructions.[93] So, an instruction which is outside of the issues raised by the pleadings will not be a ground for reversal if it is favorable to the party complaining.[94]

§ 92. Necessity of concrete application to facts of case.

It is not the proper course for a judge to lay down the general principles of law applicable to a case, and leave the jury to apply them; but it is his duty to inform them what the law is as applicable to the facts of the case.[95] An instruc-

[90] West Memphis Packet Co. v. White, 99 Tenn. 256. See, also, Mason v. Southern Ry. Co., 58 S. C. 70. A definition of "probable cause," given merely as an illustration, and having no practical application to the case, is not ground for reversal. Baker v. Hornick, 57 S. C. 213.

[91] Bosqui v. Sutro R. Co., 131 Cal. 390. An instruction that national bank notes are not money for the purpose of tender states the law, and cannot be prejudicial, although the evidence contained no reference to bank notes. Chicago, I. & E. Ry. Co. v. Patterson, 26 Ind. App. 295.

[92] Johnson v. McKee, 27 Mich. 471; Ft. Worth & D. C. Ry. Co. v. Peters, 7 Tex. Civ. App. 78.

[93] Spears v. Town of Mt. Ayr, 66 Iowa, 721.

[94] Miller v. Root, 77 Iowa, 545; Paretti v. Rebenack, 81 Mo. App. 494.

[95] Morris v. Platt, 32 Conn. 82; State v. Stouderman, 6 La. Ann. 286; State v. Jones, 87 N. C. 547; State v. Boon, 82 N. C. 637; Hargis v. St. Louis, A. & T. Ry. Co., 75 Tex. 19; Ocean Steamship

tion, however pertinent and applicable it may be, is abstract unless it be made to apply, in express terms, either to the attitude of the parties or to the very facts in issue.[96] "It

Co. v. McAlpin, 69 Ga. 441; Louisiana Extension Ry. Co. v. Carstens, 19 Tex. Civ. App. 190; Baldwin v. State, 75 Ga. 489; Brown v. Wilson, 1 Litt. (Ky.) 232; Seekel v. Norman, 71 Iowa, 264; State v. Glynden, 51 Iowa, 463; Mason v. Silver, 1 Aik. (Vt.) 367; State v. McDonnell, 32 Vt. 491; East Tennessee, V. & G. R. Co. v. Duffield, 12 Lea (Tenn.) 63; Memphis City Ry. Co. v. Logue, 13 Lea (Tenn.) 32; Chicago & A. R. Co. v. Utley, 38 Ill. 410; Heimann v. Kinnare, 73 Ill. App. 184; Illinois Cent. R. Co. v. McClelland, 42 Ill. 355; Hite v. Blandford, 45 Ill. 9; Hassett v. Johnson, 48 Ill. 68; Atkinson v. Lester, 1 Scam. (Ill.) 407; State v. Pike, 65 Me. 111; Ward v. McCue, 31 Pa. Law J. 160; Shinn v. Tucker, 37 Ark. 580; McKnight v. Ratcliff, 44 Pa. 156; Rider v. Maul, 70 Pa. 15; Hand v. Central Pa. Tel. & ——— Co., 1 Lack. Leg. News (Pa.) 351. This principle is well illustrated by the following case: In a prosecution for an assault, defendant offered evidence to show that he was assailed by plaintiff and others in a manner which indicated a desire to take his life, that he was in great danger of losing his life by the attack, and that he committed the injuries complained of in self-defense. Defendant requested the court to charge that, if the jury found these facts proved as claimed, defendant would be justified, in self-defense, to act as he did; "that the rule of law is 'that a man may lawfully take the life of another who is unlawfully assailing him, if in imminent peril of losing his life or suffering extreme bodily harm.'" The charge did not conform to the request, but, as given, informed the jury what "the great principle" of self-defense is. The reviewing court said: "But that was not all to which the defendant was entitled. It is not for juries to apply 'great principles' to the particular state of facts claimed and found, and thus make the law of the case. When the facts are admitted, or proved and found, it is for the court to say what the law as applicable to them is, and whether or not they furnish a defense to the action, or a justification for the injury, if that be the issue." Morris v. Platt, 32 Conn. 75.

[96] Clarke v. Baker, 7 J. J. Marsh. (Ky.) 197; Metcalfe v. Conner, Litt. Sel. Cas. (Ky.) 370. In a hypothetical statement of facts as a basis for the application of the principles of law governing the case, while it is necessary that all the material facts which the evidence reasonably tends to prove shall be stated,—that is to say, facts essential to the validity of the hypothesis,—it is not necessary to in-

is not the province of the judge to impress any particular view of the facts upon the jury, but it is his province to make his charge so directly applicable to the facts as to enable the jury to render a correct verdict. To leave as little room as possible for them to make mistakes in applying the law to the facts, which they may be very liable to do when they have only general abstract propositions given to them in charge, there ought, if possible, to be no room for misunderstanding the charge or its application, and to this end it ought to be specific and direct."[97] It has been said in one case that nothing is more dangerous than to lay down general propositions which, instead of aiding, scarcely ever fail to mislead, juries. Courts should apply the principles to the facts in evidence, stating the facts hypothetically.[98]

There is some conflict of authority as to whether the giving of instructions in the form of general propositions of law, without a concrete application to the facts of the case, is ground for reversal. In jurisdictions where the court is required, by express statutory provision, to apply the principles of law to the facts of the case in charging the jury, it is held reversible error to give instructions which deal in mere generalities and abstractions;[99] and in other jurisdictions, where no such statutes exist, judgments have been reversed for instructions defective in this regard.[100] In some cases it has been held that the giving of such instructions is not a sufficient ground for reversal,[101] and, in others, that error can-

clude the subsidiary and evidential facts. Hutchinson v. Wenzel, 155 Ind. 49.

[97] East Tennessee, V. & G. R. Co. v. Toppins, 10 Lea (Tenn.) 64.

[98] Gorman v. Campbell, 14 Ga. 142.

[99] State v. Jones, 87 N. C. 547.

[100] Morris v. Platt, 32 Conn. 82; Mason v. Silver, 1 Aik. (Vt.) 367; Fisher v. Central Lead Co., 156 Mo. 479.

[101] Little v. Munson, 54 Ill. App. 437; New Orleans Ins. Co. v. Piaggio, 16 Wall. (U. S.) 378; Axtell v. Caldwell, 24 Pa. 88; Taylor v. Felsing, 164 Ill. 331.

not be assigned because of the giving of such instructions, unless more specific instructions are requested.[102] The correct rule would seem to be that, if the facts of the case are voluminous and complicated, or of such nature that a body of men unacquainted with the law would find difficulty in applying to the facts a general principle of law, the judgment should be reversed if the instructions given consist merely in a statement of general principles; and that, if the facts are few and simple, and of such a nature that a general principle of law may be easily applied, a judgment should not be reversed for the giving of such an instruction.[103]

The rule that an instruction is improper which is expressed in general and abstract terms is applicable only where the trial takes place before a jury. The reason of the rule is that such an instruction is apt to mislead the jury. No ground can exist for the enforcement of such a rule, where the trial is before the court.[104] So it has been held, very properly, that the giving of an abstract instruction, which correctly states the law applicable to the case at bar, cannot be assigned for error, where it is followed immediately by an instruction

[102] East Tennessee, V. & G. R. Co. v. Topplns, 10 Lea (Tenn.) 58; Hansen v. Gaar, Scott & Co., 68 Minn. 68; Kleintobb v. Trescott, 4 Watts (Pa.) 301. See Villereal v. State (Tex. Cr. App.) 61 S. W. 715. Compare Seekel v. Norman, 71 Iowa, 264, where it was held that where an abstract rule of law, though correct, may be misleading, in the absence of instructions for its application, such instructions should be given by the court, even though not asked for by a party. In this state the court is required by statute to state all the law applicable to a case, even though not requested. See, generally, post, c. 13, "Requests for Instructions."

[103] Since, presumptively, an erroneous proposition of law, referring in no way to the evidence in the case submitted to the jury, is not prejudicial, it must follow that a correct proposition of law, not based upon the evidence, will not necessarily mislead the jury. Bosqui v. Sutro R. Co., 131 Cal. 390.

[104] Vigus v. O'Bannon, 118 Ill. 334.

applying the law thus stated to the facts,[105] or where, taken in connection with the other instructions, the charge advises the jury concerning the evidence applicable to the issues clearly and in the concrete.[106]

[105] McGrew v. Missouri Pac. Ry. Co., 109 Mo. 582; First Nat. Bank of Springfield v. Gatton, 71 Ill. App. 323.

[106] Denver Tramway Co. v. Owens, 20 Colo. 107; Blackwell v. Lynchburg & D. R. Co., 111 N. C. 157.

CHAPTER VIII.

STATING ISSUES TO JURY.

§ 93. Statement of Rule.
94. Illustrations of Rule.
95. Exceptions to Rule.
96. How Issues should be Stated.
97. Erroneous Statement of Issues.
98. Incomplete Statement of Issues.
99. Withdrawal of Issues.

§ 93. Statement of rule.

What issues are raised by the pleadings is a question of law which it is the exclusive province of the court to determine. Accordingly, it is usually held to be the duty of the court to instruct the jury as to the issues to be tried, and that it is error to leave the question to the jury, as by referring them to the pleadings.[1] The view has been presented that, where

[1] East Tennessee, V. & G. Ry. Co. v. Lee, 90 Tenn. 570; Myer v. Moon, 45 Kan. 582; Tipton v. Triplett, 1 Metc. (Ky.) 570; Wilbur v. Stoepel, 82 Mich. 344; Remmler v. Shenuit, 15 Mo. App. 192; Hayes v. St. Louis R. Co., 15 Mo. App. 584; Edelmann v. St. Louis Transfer Co., 3 Mo. App. 503; McGinnis v. Missouri Pac. Ry. Co., 21 Mo. App. 399; Cocker v. Cocker, 2 Mo. App. 451; Gessley v. Missouri Pac. Ry. Co., 26 Mo. App. 156; Fleischmann v. Miller, 38 Mo. App. 177; Procter v. Loomis, 35 Mo. App. 482; Dassler v. Wisley, 32 Mo. 498; Blackmore v. Missouri Pac. Ry. Co. (Mo.) 62 S. W. 993; Grant v. Hannibal & St. J. Ry. Co., 25 Mo. App. 227; Faircloth v. Isler, 75 N. C. 551; Burns v. Oliphant, 78 Iowa, 456; Sioux City & Pac. R. Co. v. Finlayson, 16 Neb. 578; Little v. McGuire, 43 Iowa, 450; Keatley v. Illinois Cent. Ry. Co., 94 Iowa, 685; Lindsay v. City of Des Moines, 68 Iowa, 368; Hollis v. State Ins. Co., 65 Iowa, 454; Porter v. Knight, 63 Iowa, 365; Bryan v. Chicago, R. I. & P. Ry. Co., 63 Iowa, 464; Gorman v. Minneapolis

the declaration contains a full statement of the facts, no error is committed in referring the jury to the declaration for information with regard to such facts, and in telling the jury that they must find the facts "in manner and form as charged in the declaration,"[2] and, according to others, while it is not error to refer the jury to the pleadings to determine the issues, it is the better practice not to do so,[3] especially where the pleadings are voluminous and involved.[4] For the purpose of conciseness of expression and description, the court may refer to the pleadings, though of course the greatest care must be exercised not to assume the existence of any controverted fact to which the description may pertain.[5] The right of the court to state the issues to the jury is not taken away by a statute forbidding an expression of opinion upon issues of fact.[6]

& St. L. Ry. Co., 78 Iowa, 509; Hempstead v. City of Des Moines, 52 Iowa, 303; McKinney v. Hartman, 4 Iowa, 154; Pharo v. Johnson, 15 Iowa, 560; Beebe v. Stutsman, 5 Iowa, 274; Reid v. Mason, 14 Iowa, 541; West v. Moody, 33 Iowa, 137; Hall v. Renfro, 3 Metc. (Ky.) 51.

[2] North Chicago City Ry. Co. v. Gastka, 27 Ill. App. 518, affirmed in 128 Ill. 613; Sturgeon v. Sturgeon, 4 Ind. App. 232. The court may read the pleadings to the jury, that they may know the real issues in the case. Baltzer v. Chicago, M. & N. R. Co., 89 Wis. 257.

[3] Texas & Pac. Ry. Co. v. Tankersley, 63 Tex. 57; Clouser v. Ruckman, 104 Ind. 588; Ohio & M. Ry. Co. v. Smith, 5 Ind. App. 560. Where the trial court does not state the issues to the jury otherwise than by copying the pleadings into the charge, the supreme court, though condemning the practice, and recommending a different method on a new trial, will not reverse on this ground alone. McDonald v. Bice (Iowa) 84 N. W. 985.

[4] Woodruff v. Hensley, 26 Ind. App. 592, holding that, in such case, the substance of the issue should be stated.

[5] Corrister v. Kansas City, St. J. & C. B. Ry. Co., 25 Mo. App. 619; Britton v. City of St. Louis, 120 Mo. 437; Myer v. Moon, 45 Kan. 580.

[6] McLellan v. Wheeler, 70 Me. 285.

§ 94. Illustrations of rule.

In accordance with the general rule stated, it is error to submit to the jury the question whether the statute of limitations was pleaded or not,[7] or to give an instruction which, although not a copy of the pleadings, contains every detail, submits issues not in dispute, and fails to specify the issues about which there was controversy.[8] Where there is no statement of the issues in any part of the charge, and the acts of negligence charged in the petition are such that no proper presentation of the case to the jury could have been made without a plain and clear statement of the issues, telling the jury to turn to these papers for the particular statement of fact upon which the plaintiff must recover, if he is entitled to recover at all, under the evidence and the instructions in this case, is prejudicial error.[9] So, in an action for personal injuries, it is erroneous to instruct as follows: "These wrongs and injuries are set out in plaintiff's declaration, which you will have out with you, and which you will read. In the defendant's plea, * * * which you will read, these wrongs and injuries are denied. * * * These pleadings form the issue which you * * * were sworn to well and truly try."[10]

On the other hand, the following instructions have been

[7] Bradshaw v. Mayfield, 24 Tex. 482.

[8] Erh v. German-American Ins. Co., 112 Iowa, 357.

[9] Keatley v. Illinois Cent. Ry. Co., 94 Iowa, 685. But in Chicago & A. R. Co. v. Harrington, 90 Ill. App. 638, it was held that an instruction to the effect that, if the jury believed from the evidence that the injury complained of resulted from defendant's negligence, as charged in the declaration, the defendant was liable, was not erroneous for failure to explain the facts from which the conclusion of the defendant's liability was to be drawn, as it was sufficient to refer to the declaration in which the facts necessary to make out plaintiff's case were stated.

[10] East Tennessee, V. & G. Ry. Co. v. Lee, 90 Tenn. 570.

held not erroneous, as referring the jury to the pleadings for the issues: "That upon the issue of contributory negligence of plaintiff, raised by defendant's answer, the burden of proof is upon defendant."[11] In an action against a city and a contractor for negligently leaving an excavation open in the street, an instruction which says that, if the jury "believe from the evidence that the excavation mentioned in plaintiff's petition was made by defendant, * * * and was made in the alley, in the petition mentioned, * * * they will find," etc., cannot be objected to on the ground that it refers the jury to the petition to find the issues, the excavation being a conceded fact in the case. The reference to the petition is for the purpose of description merely.[12] In an action to recover for injuries received because of careless driving, the expression, "in direct consequence of the acts herein complained of," is not objectionable as requiring a reference to the petition to find the issues to be determined, such expression referring to acts complained of, and mentioned already in the instructions.[13] Where the court fully and clearly states the issues to the jury, and what it is necessary for the plaintiff to prove in order to recover, it is not error for the court to also read the pleadings to the jury, and incorporate them in the instruction.[14] An introductory statement of the allegations of a pleading, though of unnecessary length, is not error.[15] In stating the plaintiff's contentions, the court may properly call the attention of the jury to any allegations of

[11] Sherwood v. Grand Ave. Ry. Co., 132 Mo. 339.

[12] Britton v. City of St. Louis, 120 Mo. 437.

[13] Taylor v. Scherpe & Koken Architectural Iron Co., 133 Mo. 349.

[14] Dorr v. Simerson, 73 Iowa, 89; Lake Shore & M. S. Ry. Co. v. McIntosh, 140 Ind. 261; Morrison v. Burlington, C. R. & N. Ry. Co., 84 Iowa, 663; Probert v. Anderson, 77 Iowa, 60; Jenks v. Lansing Lumber Co., 97 Iowa, 342; Helt v. Smith, 74 Iowa, 667.

[15] Atchison, T. & S. F. Ry. Co. v. Cuniffe (Tex. Civ. App.) 57 S. W. 692.

the petition which have not been demurred to or stricken out, and which are supported by evidence;[16] but merely reading the pleadings to the jury, without including them in the charge by copy, is objectionable as, in effect, partly instructing the jury orally.[17]

§ 95. Exceptions to rule.

Where the pleadings are short and unambiguous, it is not error to quote or refer to them in the instructions without otherwise stating the issues,[18] though, as already stated, where the pleadings are voluminous and involved, it is the better practice to instruct as to the substance of the issues.[19] So it is not error to refer to the pleadings merely to shorten the instructions, where the essential questions in the case are apparent from the instructions.[20] Thus, a reference may be made to the petition for a fuller statement of the items of plaintiff's claim.[21] Where the pleadings are stated or referred to with the assent of the parties, the error, if any, is waived.[22]

§ 96. How issues should be stated.

If an instruction sets forth the legal effect of a pleading, it is sufficient, though it does not set out evidentiary facts, also pleaded,[23] and, indeed, it is the better practice to do so.[24]

[16] Macon Consolidated St. R. Co. v. Barnes, 113 Ga. 212.

[17] Hall v. Carter, 74 Iowa, 364.

[18] Graybill v. Chicago, M. & St. P. Ry. Co., 112 Iowa, 738; Crawford v. Nolan, 72 Iowa, 673.

[19] Woodruff v. Hensley, 26 Ind. App. 592.

[20] Corrister v. Kansas City, St. J. & C. B. R. Co., 25 Mo. App. 619.

[21] Lanning v. Chicago, B. & Q. Ry. Co., 68 Iowa, 502.

[22] Burns v. Oliphant, 78 Iowa, 456. See, also, Sprague v. Atlee 81 Iowa, 1.

[23] Murphey v. Virgin, 47 Neb. 692.

[24] Trott v. Chicago, R. I. & P. Ry. Co. (Iowa) 86 N. W. 33.

It is not required that the issues should all be stated in a single paragraph of the charge. It is sufficient if they are fairly and fully stated to the jury in some part of the charge in such a manner as to be understood by the jury.[25] Thus, the court may state in one instruction the issues as raised by the pleadings, and in another instruction state that a part of the case is admitted.[26] "It is often difficult to frame a single instruction which shall embrace all the phases of a complicated case."[27] Where the issues have once been stated, a repetition is unnecessary.[28] If the issues involved are such as to require explanation, the best practice is to do this in a general charge, and not submit the case entirely on charges asked by the parties and given.[29] The court, in stating the issues to the jury, need not confine itself to the express averments of the pleadings. It will be sufficient if the substance of the issues be correctly stated in such a manner as to work no prejudice;[30] but it is, nevertheless, proper to submit the issues in the terms in which they are raised by the

[25] Timins v. Chicago, R. I. & P. Ry. Co., 72 Iowa, 94; Chicago, R. I. & P. Ry. Co. v. Groves, 56 Kan. 611; Siltz v. Hawkeye Ins. Co., 71 Iowa, 710; Fullerton v. St. Louis, I. M. & S. Ry. Co., 84 Mo. App. 498. "It is not necessary that the issues be grouped and stated in separate paragraphs of the charge, devoted to that purpose alone. It is enough if the instructions, as a whole, point out the entire issue in the case." Meyer v. Boepple Button Co., 112 Iowa, 51.

[26] Haymond v. Saucer, 84 Ind. 3.

[27] Chicago, R. I. & P. Ry. Co. v. Groves, 56 Kan. 611; Muehlhausen v. St. Louis R. Co., 91 Mo. 332.

[28] Richmond v. Sundburg, 77 Iowa, 255.

[29] Redus v. Burnett, 59 Tex. 576.

[30] Sage v. Haines, 76 Iowa, 581. "It is unnecessary for the court * * * to state the substance of the matters pleaded by either party. It is only necessary to submit to the jury the questions of fact raised by the pleadings, and instruct them upon the law as to the issues submitted." Galveston, H. & S. A. Ry. Co. v. Smith, 24 Tex. Civ. App. 127.

pleadings.[31] And though the court may have used words not in the pleadings in submitting the issues, this is not ground for reversal where no new issue was presented. Where inconsistent defenses are pleaded, the court may properly instruct that both cannot be true.[32] The issues must, of course, be fairly and impartially stated, and not so as to put an undue burden upon either party.[33] It is erroneous to give the plaintiff's contention without also stating the defendant's contention.[34] If the instructions are required by statute to be in writing, the statement of the issue should be in writing, and it is not proper to make the statement by reading from the pleadings portions which are not incorporated in the instructions.[35]

§ 97. Erroneous statement of issues.

A misstatement of the issues of a case in an instruction is, of course, erroneous;[36] and when, in consequence of a misstatement of the issues, an instruction has a tendency to confuse and mislead the jury, it is a ground for a new trial.[37] Thus, where the court, in instructing the jury as to the issues in the case, stated them more broadly than was warranted by the instrument which was the foundation of the action, it was

[31] Hess v. Newcomer, 7 Md. 325; Planters' Bank of Prince George's Co. v. Bank of Alexandria, 10 Gill & J. (Md.) 346; Atchison, T. & S. F. Ry. Co. v. Cuniffe (Tex. Civ. App.) 57 S. W. 692.

[32] McGowan v. Larsen (C. C. A.) 66 Fed. 910.

[33] Short v. Kelly (Tex. Civ. App.) 62 S. W. 944.

[34] Brown v. Everett Ridley Ragan Co., 111 Ga. 404.

[35] Hall v. Carter, 74 Iowa, 364.

[36] Galloway v. Hicks, 26 Neb. 531; Marquette, H. & O. R. Co. v. Marcott, 41 Mich. 433; Klosterman v. Olcott, 27 Neb. 685; Howell v. Sewing Machine Co., 12 Neb. 177; Reed v. Gould, 93 Mich. 359; Stafford v. City of Oskaloosa, 57 Iowa, 748; Harley v. Merrill Brick Co., 83 Iowa, 73; Hall v. Woodin, 35 Mich. 67; Fuhs v. Osweiler, 59 Iowa, 431.

[37] Howell v. Sewing Machine Co., 12 Neb. 177.

held reversible error.[38] So, it is reversible error for the court to submit a case to the jury upon a theory entirely different from that claimed in the declaration, and upon which the case has been tried.[39] And "where the evidence tends to show a promise, by way of guaranty, to make good the obligation of others, it is error to submit the case to the jury as one of an absolute and original promise to pay."[40] It has been held, on the other hand, that where a locomotive engineer is charged with negligence in backing up his engine too fast, and the instruction refers to this charge as being "that the parties in charge of the engine moved the train at an unusual fast rate of speed," such instruction is not erroneous in not properly stating the plaintiff's cause of action.[41]

If no prejudice results from a misstatement of the issues, it is not ground for reversal.[42] Thus, the fact that the court, in stating the issues to the jury, confounds the action of trespass with trespass on the case, will not warrant a reversal.[43] And where an instruction submits one question which did not arise under the pleadings, but the issues were properly submitted in other instructions, and it is clear that the question on which the rights of the parties turn was before the jury, the judgment should not be reversed because of error in the one instruction.[44] A charge cannot be attacked as erroneous for misconstruing a pleading, if such misconstruction cannot affect the substantial rights of the party objecting. Thus, in ejectment, where defendant's answer admits plaintiff's title, thus, *prima facie* at least, admitting plaintiff's right to possession, an instruction that defendant admitted

[38] Klosterman v. Olcott, 27 Neb. 685.
[39] Reed v. Gould, 93 Mich. 359.
[40] Hall v. Woodin, 35 Mich. 67.
[41] Beems v. Chicago, R. I. & P. R. Co., 58 Iowa, 150.
[42] Stark v. Willetts, 8 Kan. 203.
[43] Brown v. Hendrickson, 69 Iowa, 749.
[44] Newton v. Ritchie, 75 Iowa, 91.

plaintiff's right to possession is not error, in the absence of any attempt on the part of defendant to show that plaintiff did not have such right of possession.[45]

§ 98. Incomplete statement of issues.

Where the court undertakes to state the issues, it should do so fully, in order that the jury may intelligently pass upon the case,[46] though it has been held that an incomplete statement of the issues is not ground for reversal, unless the party complaining requested an instruction correctly stating the issues.[47] An instruction which purports to enumerate all the material elements which a party must prove in order to maintain his action or support his defense must be correct and complete, and, if any essential element is omitted, the error is ground for reversal.[48] Such error has an obvious tendency to mislead the jury.

§ 99. Withdrawal of issues.

Where there is no evidence to sustain an issue raised in the petition, the court may properly withdraw the issue from the consideration of the jury.[49] Issues which have been abandoned or conceded, and are no longer in dispute, should

[45] Stark v. Willetts, 8 Kan. 203.

[46] Potter v. Chicago, R. I. & P. R. Co., 46 Iowa, 402. Thus it is erroneous to omit reference to a material issue in the case, as, for instance, the issue of contributory negligence. Gamble v. Mullin, 74 Iowa, 99.

[47] Sioux City & Pac. R. Co. v. Finlayson, 16 Neb. 578.

[48] Jackson School Tp. v. Shera, 8 Ind. App. 330; Kentucky & I. Bridge Co. v. Eastman, 7 Ind. App. 514; Hill v. Aultman, 68 Iowa, 630; Gamble v. Mullin, 74 Iowa, 99; State v. Brainard, 25 Iowa, 572; Potter v. Chicago, R. I. & P. R. Co., 46 Iowa, 399.

[49] Whalen v. Chicago, R. I. & P. Ry. Co., 75 Iowa, 563; Dupuy v. Burkitt, 78 Tex. 338.

not be submitted.[50] The court may and should refuse to instruct upon issues which have been withdrawn or stricken out.[51] If the court declines to submit an issue to the jury upon which evidence has been introduced, the evidence bearing upon that issue should be taken from the jury, and it is error, in such case, to instruct that the facts concerning that matter may properly be considered in determining the issues that are submitted.[52] But where an issue raised by the petition is not submitted to the jury, a refusal to withdraw testimony as to such issue is not erroneous, where the jury are instructed to consider only the issues submitted.[53]

[50] Tathwell v. City of Cedar Rapids (Iowa) 86 N. W. 291; Erb v. German-American Ins. Co., 112 Iowa, 357.

[51] Bugbee v. Kendricken, 132 Mass. 349; Fry v. Leslie, 87 Va. 269; Stanford v. Murphy, 63 Ga. 410; New Haven Lumber Co. v. Raymond, 76 Iowa, 225. See, also, Macon Consolidated St. R. Co. v. Barnes, 113 Ga. 212.

[52] Hammer v. Chicago, R. I. & P. Ry. Co., 70 Iowa, 623.

[53] Gulf, C. & S. F. Ry. Co. v. Shieder (Tex. Civ. App.) 26 S. W. 509.

CHAPTER IX.

IGNORING EVIDENCE, ISSUES, THEORIES, AND DEFENSES.

§ 100. Ignoring Evidence—Statement of Rule.
101. Same—Instructions Held Erroneous, as Ignoring Evidence or Withdrawing It from Consideration
102. Same—Instructions Held not Erroneous, as Ignoring Evidence or Withdrawing It from Consideration.
103. Ignoring Issues, Theories, and Defenses.
104. Same—Instructions Held Erroneous, as Ignoring Issues, Theories, and Defenses.

§ 100. Ignoring evidence—Statement of rule.

Instructions which ignore material evidence, or which are so drawn as to exclude such evidence from the consideration of the jury, are erroneous, and should not be given.[1] It

[1] Weiss v. Bethlehem Iron Co. (C. C. A.) 88 Fed. 23; Greenleaf v. Birth, 9 Pet. (U. S.) 292; Ranney v. Barlow, 112 U. S. 207; Clement v. Packer, 125 U. S. 309; Allison v. United States, 160 U. S. 203; Hall v. State, 53 Ala. 463; Anniston Lime & Coal Co. v. Lewis, 107 Ala. 535; Bloch v. Edwards, 116 Ala. 90; Dill v. State, 25 Ala. 15; Woodbury v. State, 69 Ala. 242; Gooden v. State, 55 Ala. 178; Gallagher v. Williamson, 23 Cal. 334; Venine v. Archibald, 3 Colo. 163; Charter v. Lane, 62 Conn. 121; Marx v. Leinkauff, 93 Ala. 453; Hall v. Brown, 30 Conn. 558; Burney v. Ball, 24 Ga. 506; Glass v. Cook, 30 Ga. 133; Leary v. Leary, 18 Ga. 697; Wylly v. Gazan, 69 Ga. 507; Deasey v. Thurman, 1 Idaho, 775; Dean v. State, 130 Ind. 237; Prothero v. Citizens' St. Ry. Co., 134 Ind. 431; Larue v. Russell, 26 Ind. 386; Hunter v. State, 101 Ind. 241; Wabash, St. L. & P. Ry. Co. v. Rector, 104 Ill. 296; Doan v. Duncan, 17 Ill. 272; Lake Shore & M. S. Ry. Co. v. Beam, 11 Ill. App. 215; Dvorak v. Maloch, 41 Ill. App. 131; Sanford v. Miller, 19 Ill. App. 536; Elgin, J. & E. Ry. Co. v. Raymond, 148 Ill. 241; State v. Meshek, 51 Iowa, 308; Carruthers v. Towne, 86 Iowa, 318; Myers v. Sanders' Heirs, 7 Dana (Ky.) 509; Higgins

makes no difference how weak the evidence is on the point in issue, it should not be withdrawn from the consideration of the jury, and an instruction which does so is calculated to

v. Grace, 59 Md. 365; Maryland & D. R. Co. v. Porter, 19 Md. 458; Schillinger v. Kratt, 25 Md. 49; Adams v. Capron, 21 Md. 187; McDonough v. Miller, 114 Mass. 94; Seiber v. Price, 26 Mich. 518; McKay v. Evans, 48 Mich. 597; Sterling v. Callahan, 94 Mich. 536; People v. Marks, 90 Mich. 555; Thrasher v. Gillespie, 52 Miss. 840; Solomon v. City Compress Co., 69 Miss. 319; Stocker v. Green, 94 Mo. 280; Clark v. Hammerle, 27 Mo. 55; Fink v. Phelps, 30 Mo. App. 431; Brownlow v. Woolard, 2 Mo. App. Rep'r, 1404; Birtwhistle v. Woodward, 95 Mo. 113; Wyatt v. Citizens' Ry. Co., 62 Mo. 408; Sigerson v. Pomeroy, 13 Mo. 620; Jones v. Jones, 57 Mo. 138; Uhl v. Robison, 8 Neb. 272; Brown v. State, 9 Neb. 157; Ordway v. Sanders, 58 N. H. 132; Meredith v. Cranberry Coal & Iron Co., 99 N. C. 576; State v. Floyd, 51 N. C. 392; Deal v. McCormick, 3 Serg. & R. (Pa.) 343; Bovard v. Christy, 14 Pa. 267; Ott v. Oyer's Ex'x, 106 Pa. 7; Peirson v. Duncan, 162 Pa. 187; Gulf, C. & S. F. Ry. Co. v. Lankford, 9 Tex. Civ. App. 593; Weis v. Dittman, 4 Tex. Civ. App. 35; Missouri, K. & T. Ry. Co. v. Simmons, 12 Tex. Civ. App. 500; Gordon v. Tabor, 5 Vt. 103; Hash v. Com., 88 Va. 172; McCreery's Adm'x v. Ohio River R. Co., 43 W. Va. 110; McMechen v. McMechen, 17 W. Va. 683; Rio Grande Western Ry. Co. v. Leak, 163 U. S. 280; Lucas v. Brooks, 18 Wall. (U. S.) 436; Ayers v. Watson, 113 U. S. 594; Edwards' Lessee v. Darby, 12 Wheat. (U. S.) 206; Orleans v. Platt, 99 U. S. 676; Louisville & N. R. Co. v. Hurt, 101 Ala. 34; Williamson v. Tyson, 105 Ala. 644; White v. Craft, 91 Ala. 139; Savery v. Moore, 71 Ala. 236; Callan v. McDaniel, 72 Ala. 96; Darnell v. Griffin, 46 Ala. 520; Highland Ave. & B. R. Co. v. Sampson, 112 Ala. 425; Fox v. Stockton Combined H. & A. Works, 83 Cal. 333; Plumb v. Curtis, 66 Conn. 154; Florida Ry. & Nav. Co. v. Webster, 25 Fla. 394; Ryan v. Brown, 59 Ill. App. 394; American Bible Soc v. Price, 115 Ill. 623; Wooley v. Lyon, 117 Ill. 244; Thorne v. McVeagh, 75 Ill. 81; Phenix Ins. Co. v. La Pointe, 118 Ill. 384; Folk v. Wilson, 21 Md. 538; Bosley v. Chesapeake Ins. Co., 3 Gill & J. (Md.) 450; Lewis v. Kramer, 3 Md. 265; Thomas v. Sternheimer, 29 Md. 268; Cover v. Myers, 75 Md. 406; Graves v. Dill, 159 Mass. 74; Kieldsen v. Wilson, 77 Mich. 45; Barada v. Blumenthal, 20 Mo. 162; Jackson v. Bowles, 67 Mo. 609; Greer v. Parker, 85 Mo. 107; Atchison & N. R. Co. v. Jones, 9 Neb. 67; Consaul v. Sheldon, 35 Neb. 247; Hazewell v. Coursen, 81 N. Y. 630; Pennsylvania

mislead, and improper.[2] Where the court instructs affirmatively of its own motion, it should present the case in all the phases and aspects in which the jury ought to consider it, not giving any undue prominence to or leaving in obscurity any phase or aspect there is evidence tending to support; and if such instructions in effect discard or ignore, and thereby induce the jury to discard or ignore, any material evidence, however weak, they are erroneous.[3] Although the judge may lay down the law correctly in his general charge, yet if, in a specific subsequent charge, he places the case upon the existence of certain facts, on which alone it may not properly be made to turn, and the effect of this charge, if literally followed by the jury, is to withdraw from them the consideration of other facts which tend to disprove or materially qualify the facts upon which the charge is predicated, injury will be presumed from the error.[4] "Where a court instructs a jury upon what state of facts they must find a verdict for a party, the instruction should include all the facts in controversy material to the right of the plaintiff or the defense of the defendant."[5]

Canal Co. v. Harris, 101 Pa. 93; Caraway v. Citizens' Nat. Bank of Weatherford (Tex. Civ. App.) 29 S. W. 506; Pitt v. Elser, 7 Tex. Civ. App. 47; Ashley v. Hendee, 56 Vt. 209; Phoenix Ins. Co. v. Sholes, 20 Wis. 35; Sherman v. Kreul, 42 Wis. 33; Thompson v. Douglass, 35 W. Va. 337; McNamara v. Dratt, 40 Iowa, 413; Montgomery v. Com., 98 Vt. 852; Mims v. State (Fla.) 27 So. 865; Texas & P. Ry. Co. v. White, 42 C. C. A. 86, 101 Fed. 928; Bryan Cotton-Seed Oil Mill v. Fuller (Tex. Civ. App.) 57 S. W. 924.

[2] Edgar v. McArn, 22 Ala. 796; Pritchett v. Munroe, 22 Ala. 501; Holmes v. State, 23 Ala. 17; Beale v. Hall, 22 Ga. 431; Mims v. State (Fla.) 27 So. 865; Providence Gold-Min. Co. v. Thompson (Ariz.) 60 Pac. 874.

[3] Woodbury v. State, 69 Ala. 242; Gooden v. State, 55 Ala. 178.

[4] Holmes v. State, 23 Ala. 17. See McVey v. St. Clair Co. (W. Va.) 38 S. E. 648.

[5] Gallagher v. Williamson, 23 Cal. 334; Deasey v. Thurman, 1 Idaho, 779.

§ 101. Same—Instructions held erroneous, as ignoring evidence or withdrawing it from consideration.

The following instructions have been held erroneous, as being in violation of the rule: An instruction on a murder trial, taking from the consideration of the jury the question of self-defense, there being testimony tending to show that the defendant acted in self-defense.[6] An instruction in a prosecution for assault with intent to commit rape, which gathers a cluster of circumstances stated by the witnesses, and presents them as proper to be considered in determining the defendant's intent, making no mention of other circumstances pointing in a different direction.[7] An instruction requiring the jury to discard all evidence of defendant's confessions, properly admitted in evidence, in determining whether or not a crime had been committed.[8] An instruction "that the plaintiff is not entitled to recover the property in controversy if the jury find certain facts, omitting all allusion to the separate use of the property in the plaintiff," there being evidence tending to show such use.[9] An instruction, "in an action by a father against the proprietor of a planing mill to recover damages for a personal injury sustained by his son while in the defendant's employment," directing the jury "that, if changing the boy's work was the cause of the accident and injury, the defendant was liable," the whole evidence tending to show that the injury was the result of the boy's own carelessness.[10] An instruction "that the plaintiffs could recover from the garnishees 'at the rate and valuation of the contract, deducting the cost of completing it,'" not

[6] Brown v. State, 9 Neb. 157. See, also, Martin v. State, 47 Ala. 564.

[7] Coon v. People, 99 Ill. 368.

[8] Dodson v. State, 86 Ala. 60.

[9] Chew v. Beall, 13 Md. 348.

[10] Sinclair v. Berndt, 87 Ill. 174.

noticing payments that had been made to the debtor.[11] An instruction "upon the credibility of a witness," telling the jury that "they have the right to take into consideration the contradictory statements of a party as a witness, setting them forth, without calling their attention to the explanation given as to the error or mistake in the prior statements."[12] Instructions in an action upon a promissory note, where a set-off was pleaded, "founded altogether upon admissions of the execution and nonpayment of the note declared on, and not referring in any way to evidence offered under the plea of set-off."[13] An instruction that, if the jury should find from the evidence certain facts stated, being only a part of the material facts in evidence, and omitting facts in evidence favorable to the defendant, "your finding should be for the plaintiff."[14] An instruction, in an action for damages caused by the negligence of a railroad company, which states that certain matters of fact were, as a matter of law, negligence on the part of the plaintiff, and which ignores the elements of negligence on the part of defendant.[15] In an action by a father for the seduction of his daughter, the court gave the following instruction: "As to the main fact of sexual intercourse, the daughter swears to this fact, and the defendant denies it. If these two witnesses, as they stand before you, seem equally to claim your credence, you cannot, in such a case, find for the plaintiff, because, as to that fact, which is radical in the case, there is no preponderance for the plaintiff." It was held that, where there was any other evidence tending to establish such fact, such instruction was erroneous, as tending to mislead the jury.[16]

[11] Coates v. Sangston, 5 Md. 121.
[12] Chesney v. Meadows, 90 Ill. 430.
[13] Schillinger v. Kratt, 25 Md. 49.
[14] Thompson v. Boden, 81 Ind. 176.
[15] Chicago, B. & Q. R. Co. v. Kuster, 22 Ill. App. 188.
[16] Pruitt v. Cox, 21 Ind. 15.

§ 102. Same—Instructions held not erroneous, as ignoring evidence or withdrawing it from consideration.

The following instructions have been held not in violation of the rule: An instruction that it is a question of fact for the jury to determine whether a part, or, if so, how much, of the proceeds of a designated sale came into the hands of the executor making the sale, after the latter's decease, in an action against the executor to recover the proceeds of the sale.[17] An instruction, in proceedings to condemn land, that "statements of counsel or parties, not made under oath, or made as admissions, are not evidence, and are not to be regarded as such by the jury in making up their verdict." This instruction does not exclude an admission, made by the petitioner for the purpose of the trial, that title to a portion of the lands in question was in one of the parties to the proceeding. Such admission is expressly excluded from the operation of the instruction.[18] An instruction that, if the jury found certain specified facts from plaintiff's testimony, she was not necessarily guilty of negligence, is not erroneous, as ignoring conflicting testimony on the part of the defendant, the general charge being full and correct.[19]

§ 103. Ignoring issues, theories, and defenses.

In charging the jury, it is error to ignore or exclude from the consideration of the jury any of the issues, theories, or defenses presented by the pleadings and the evidence;[20] and

[17] Kirby v. Wilson, 98 Ill. 240, in which it was held this instruction was not to be understood as telling the jury this was the only question for their consideration.

[18] Bowman v. Venice & C. Ry. Co., 102 Ill. 459.

[19] Shaw v. Village of Sun Prairie, 74 Wis. 105.

[20] Bloch v. Edwards, 116 Ala. 90; Remy v. Olds (Cal.) 34 Pac. 216; Klink v. Boland, 72 Ga. 485; Planters' Bank v. Richardson, 15 Ga. 277; Southwestern R. Co. v. Singleton, 67 Ga. 307; McCollom v. Indianapolis & St. L. R. Co., 94 Ill. 534; Volk v. Roche,

this is true, though the evidence in support thereof is very slight.[21] It is error to submit the case entirely from the

70 Ill. 297; Collins v. Waters, 54 Ill. 485; Costly v. McGowan, 174 Ill. 76; Simpson Brick Press Co. v. Wormley, 166 Ill. 383; Chicago & N. W. Ry. Co. v. Clark, 70 Ill. 276; Burke v. State, 72 Ind. 392; Terry v. Shively, 64 Ind. 106; Longnecker v. State, 22 Ind. 247; Eureka Fertilizer Co. of Cecil County v. Baltimore Copper, Smelting & Rolling Co., 78 Md. 179; Turner v. Ellicott, 9 Md. 52; Boofter v. Rogers, 9 Gill (Md.) 53; Wildey v. Crane, 69 Mich. 17; Miller v. Miller, 97 Mich. 151; Dikeman v. Arnold, 71 Mich. 656; People v. Cummins, 47 Mich. 334; De Foe v. St. Paul City Ry. Co., 65 Minn. 319; Walter A. Wood Mowing & Reaping Mach. Co. v. Bobbst, 56 Mo. App. 427; Evers v. Shumaker, 57 Mo. App. 454; Turner v. Loler, 34 Mo. 461; Kraft v. McBoyd, 32 Mo. App. 399; Hayner v. Churchill, 29 Mo. App. 676; Carder v. Primm, 1 Mo. App. Rep'r, 167; Condon v. Missouri Pac. Ry. Co., 78 Mo. 567; Brown v. McCormick, 23 Mo. App. 181; Eaton v. Carruth, 11 Neb. 231; Carruth v. Harris, 41 Neb. 789; Rising v. Nash, 48 Neb. 597; Holmes v. Whitaker, 23 Or. 319; Kearney v. Snodgrass, 10 Or. 181; Fiore v. Ladd, 25 Or. 423; Minick v. Gring, 1 Pa. Super. Ct. 484; Hall v. Vanderpool, 156 Pa. 152; Relf v. Rapp, 3 Watts & S. (Pa.) 21; Nashville & C. R. Co. v. Conk, 11 Heisk. (Tenn.) 575; Cannon v. Cannon, 66 Tex. 682; Eppstein v. Thomas, 16 Tex. Civ. App. 619; Island City Boating & Athletic Ass'n v. New York & T. Steamship Co., 80 Tex. 375; Gulf, C. & S. F. Ry. Co. v. Kizziah, 4 Tex. Civ. App. 356; McGehee v. Lane, 34 Tex. 390; Wootters v. Hale, 83 Tex. 563; Smithwick v. Andrews, 24 Tex. 488; Dignan v. Spurr, 3 Wash. 309; Adams v. Roberts, 2 How. (U. S.) 486; Banner Distilling Co. v. Dieter (Tex. Civ. App.) 60 S. W. 798; Hayes v. Pennsylvania R. Co., 195 Pa. 184; McVey v. St. Clair Co. (W. Va.) 38 S. E. 648; Dorsey Printing Co. v. Gainesville Cotton Seed Oil Mill & Gin Co. (Tex. Civ. App.) 61 S. W. 556; Union Stock Yard & Transit Co. v. Goodman, 91 Ill. App. 426; Taylor v. State (Tex. Cr. App.) 63 S. W. 330; Clark v. Smith, 87 Ill. App. 409; P. J. Willis & Bro. v. Sims' Heirs (Tex. Civ. App.) 57 S. W. 325. "An instruction given at the request of the defendant, and covering only a part of the theory of the defense," is objectionable because too narrow, but it is not ground for reversal where it is manifest that it did not operate to the prejudice of the plaintiff. Maxwell v. Kent (W. Va.) 39 S. E. 174.

[21] McGown v. International & G. N. Ry. Co., 85 Tex. 289; Providence Gold Min. Co. v. Thompson (Ariz.) 60 Pac. 874.

standpoint of one party, by calling the attention of the jury to the claims and evidence of such party, without adverting to the claims and evidence of his adversary.[22] If there is evidence on a material issue, it is error to instruct that it scarcely requires attention, the defendant having made no contest thereon.[23] A refusal of instructions defective in this regard is, of course, proper, and error can in no case be predicated of such refusal;[24] and, on the other hand, a refusal to instruct the jury on a theory, issue, or defense which there is evidence tending to support is erroneous.[25] An instruction ignoring a theory or defense is not erroneous, however, where there is no evidence to sustain the theory or defense ignored.[26]

[22] Hayes v. Pennsylvania R. Co., 195 Pa. 184.

[23] Republican Valley R. Co. v. Fink, 18 Neb. 89; Barker v. State, 126 Ala. 83.

[24] Southwestern R. Co. v. Singleton, 67 Ga. 306; Chicago & N. W. Ry. Co. v. Clark, 70 Ill. 276; Turner v. Ellicott, 9 Md. 52; Condon v. Missouri Pac. Ry. Co., 78 Mo. 567; Martin v. Johnson, 23 Mo. App. 96; Henry v. Bassett, 75 Mo. 89; Carruth v. Harris, 41 Neb. 789; Hall v. Vanderpool, 156 Pa. 152; Gulf, C. & S. F. Ry. Co. v. Kizziah, 4 Tex. Civ. App. 356; Krewson v. Purdom, 13 Or. 563; Pope v. Riggs (Tex. Civ. App.) 43 S. W. 306; Leonard v. Brooklyn Heights R. Co., 57 App. Div. (N. Y.) 125; Mitchell v. La Follett, 38 Or. 178; Westbury v. Simmons, 57 S. C. 467; Kennedy v. Forest Oil Co. (Pa.) 49 Atl. 133; Davis Wagon Co. v. Cannon (Ala.) 29 So. 841; Fulton v. Ryan, 60 Neb. 9, 82 N. W. 105. Remarks of counsel in argument may sometimes require an instruction upon questions not in issue. See Missouri, K. & T. Ry. Co. v. Nail, 24 Tex. Civ. App. 114, where, however, the particular remark was held not to call for an instruction that exemplary damages could not be allowed, the question of exemplary damages not being in issue.

[25] De Foe v. St. Paul City Ry. Co., 65 Minn. 319; Kraft v. McBoyd, 32 Mo. App. 399; Underwood v. Coolgrove, 59 Tex. 164; Smithwick v. Andrews, 24 Tex. 488; Parker v. Chancellor, 78 Tex. 524; Oliver v. Moore (Tex. Civ. App.) 43 S. W. 812; Jackson v. Com., 96 Va. 107; P. J. Willis & Bro. v. Sims' Heirs (Tex. Civ. App.) 57 S. W. 325.

[26] Longnecker v. State, 22 Ind. 247; Gulf, C. & S. F. Ry. Co.

Instructions on matters about which there is no real dispute are properly refused.[27] So it has been held not a ground of reversal that the court omitted, in commenting on the facts, to mention facts favorable to the unsuccessful party, where he told the jury that they were to determine all issues of fact, and that the comments of the court were made for the purpose of illustrating the statements of law, and were not to control the jury.[28] It is not necessary that all issues, theories, and defenses be presented in one instruction. An instruction containing a correct proposition of law in regard to one theory, issue, or defense is not erroneous, where the other issues, theories, or defenses are presented in other instructions.[29] But where the right of action or defense rests upon several questions of fact, an instruction making the question turn upon the finding as to one point, and ignoring the others, is erroneous, and may be refused.[30]

§ 104. Same—Instructions held erroneous, as ignoring issues, theories, and defenses.

The following instructions have been held erroneous, as being in violation of the rules stated: In an action on a note, where proof is offered tending to establish two grounds

v. Dorsey, 66 Tex. 148; E. A. Moore Furniture Co. v. W. & J. Sloane, 166 Ill. 457; Jones v. Missouri Pac. Ry. Co., 31 Mo. App. 614. It is error to leave it to the jury to determine whether there is any evidence to support a particular issue. McAllister v. Ferguson, 50 App. Div. (N. Y.) 529.

[27] Cooke v. Plaisted, 176 Mass. 374.

[28] Lowry v. Mt. Adams & E. P. Incline Plane Ry. Co., 68 Fed. 827.

[29] State v. Hope, 102 Mo. 410; Fessenden v. Doane, 89 Ill. App. 229, affirmed 188 Ill. 228.

[30] Davis Wagon Co. v. Cannon (Ala.) 29 So. 841; Kennedy v. Forest Oil Co. (Pa.) 49 Atl. 133; Deasey v. Thurman, 1 Idaho, 779; Gallagher v. Williamson, 23 Cal. 334; Holmes v. State, 23 Ala. 17; McVey v. St. Clair Co. (W. Va.) 38 S. E. 648.

of defense, either of which were available, an instruction narrowing the defense to a single point.[31] A hypothetical instruction, in an action for negligence, directing a verdict for the plaintiff, and ignoring the defense of contributory negligence.[32] In an action on a note, "with a condition that the same was subject to all payments made to the payee, as a partner of the maker, and not charged upon the books of the firm, where such payments were pleaded, and also a plea of set-off, an instruction that if the matters of defense under the condition in the note are not proved, the jury should find for the plaintiff," since such instruction ignores "the defense and proof under the plea of set-off."[33] In an action on a note, where "defendant pleaded *non est factum* under oath, and also an unsworn denial of any indebtedness to the plaintiff," an instruction telling the jury that the only issue before them was the execution of the note.[34] An instruction to find for the defendant unless they should find from the evidence that a good consideration passed from the plaintiff to the defendant, and the defendant signed a memorandum in writing, charging himself with the debt of another, there being evidence that defendant's undertaking was an original, and not a collateral, agreement.[35] In an action for breach of contract, an instruction that the jury should give plaintiff damages if defendant did not perform withdraws from the jury the question of performance by plaintiff.[36] In an action of trover, where the defendant relies upon two separate and distinct grounds of defense, an instruction submitting the case to the jury upon one of them only, and in such a way as to

[31] Anderson v. Norvill, 10 Ill. App. 240.
[32] McVey v. St. Clair Co. (W. Va.) 38 S. E. 648.
[33] Volk v. Roche, 70 Ill. 297.
[34] McGehee v. Lane, 34 Tex. 390.
[35] Clark v. Smith, 87 Ill. App. 409.
[36] Remy v. Olds (Cal.) 34 Pac. 216.

exclude entirely the other from their consideration.[37] "In an action for an assault and battery, in which was filed a plea of *son assault demesne,* an instruction * * * withdrawing from the jury the consideration of the issue on that plea."[38] An instruction that defendant "does not controvert the evidence for the state," in a prosecution for carrying concealed weapons, where defendant testifies that the weapon carried was not concealed.[39] In an action for breach of warranty of goods alleged to have been sold by defendant to plaintiff, an instruction that, if the jury should believe from the evidence that the goods were deposited with plaintiff, to be sold on commission for defendant, their verdict must be for defendant, is erroneous because no reference is made to the terms on which the jury might have believed the deposit was made.[40] Where the defendant's liability depended on the existence of a partnership, and there was evidence on that subject proper for the jury's consideration, a prayer denying the plaintiff's right to recover, based on the theory of principal and agent (of which there was also evidence), and ignoring the partnership, was properly refused.[41] An instruction that plaintiff is entitled to recover on the note in suit, if a check by defendant was not given in payment thereof, the plea of the statute of limitations having been set up, and evidence offered to sustain it.[42] An instruction, with reference to the credibility of witnesses, concluding as follows: "Always remembering that every variance [or contradiction] is not of itself an indication of any design to evade the truth on the part of those testifying," as its tendency was to with-

[37] White v. Dlnkins, 19 Ga. 285.
[38] Collins v. Waters, 54 Ill. 485.
[39] Barker v. State, 126 Ala. 83.
[40] Beall v. Pearre, 12 Md. 550.
[41] Fulton v. Maccracken, 18 Md. 528.
[42] Gedney v. Gedney, 61 Ill. App. 511.

draw the contradictory statements of the witness from the consideration of the jury, whose province alone it was to judge the motives of the witness in making such statements.[43] So, where there is evidence, in detinue proceedings for mortgaged property, that the mortgagees accepted other property in place of that conveyed, and also evidence that the property had not been accepted as a substitute for that mortgaged, but in part payment of the mortgage debt, an instruction that, before plaintiffs could recover, they must, before the commencement of the action, return the property which defendant claimed was accepted as a substitute, is erroneous, as in effect charging that, although the property may have been received from the defendant by agreement with him as a partial payment upon the debt, and credited thereon, yet, before the plaintiffs could maintain the action, it was necessary to first return the horse to defendant. Such instruction ignores the theory of plaintiff that the property was received in payment.[44] On the other hand, it has been held that an instruction that "the defendant has interposed a general denial of all acts of negligence, and in this suit the pleadings throw the burden upon the plaintiff," is not erroneous, as assuming that no other defense than this denial was interposed.[45]

[43] Newberry v. State, 26 Fla. 334.
[44] Bloch v. Edwards, 116 Ala. 90.
[45] Louisville & N. R. Co. v. Ward (C. C. A.) 61 Fed. 927.

CHAPTER X.

GIVING UNDUE PROMINENCE TO EVIDENCE, ISSUES, AND THEORIES.

§ 105. Rule Against.
106. Same—Singling Out Particular Witnesses.
107. Same—Exceptions to Rule.
108. Giving Undue Prominence by Repetition.
109. Instructions Held Erroneous as Singling Out and Giving Undue Prominence to the Evidence.
110. Instructions Held not Erroneous as Singling Out and Giving Undue Prominence to Evidence.
111. Singling Out Issues and Theories.

§ 105. Rule against.

The court should not instruct specially upon particular portions of the evidence, thereby giving undue prominence to such evidence,[1] and requests for instructions which are open

[1] Scott v. Lloyd, 9 Pet. (U. S.) 418; Coffin v. United States, 162 U. S. 664; Crawford v. State, 112 Ala. 1; Burton v. State, 107 Ala. 108; Bush v. State, 37 Ark. 215; Winter v. Bandel, 30 Ark. 383; People v. Sanders, 114 Cal. 216; Beers v. Housatonuc R. Co., 19 Conn. 570; Holt v. State, 62 Ga. 314; Black v. Thornton, 30 Ga. 361; Flowers v. Flowers, 89 Ga. 632; C. H. Fargo & Co. v. Dixon, 63 Ill. App. 22; Parlin v. Finfrouck, 65 Ill. App. 174; City of Waverly v. Henry, 67 Ill. App. 407; Pittsburgh, C., C. & St. L. R. Co. v. Dahlin, 67 Ill. App. 99; Pennsylvania Co. v. Stoelke, 104 Ill. 201; McCartney v. McMullen, 38 Ill. 237; Barker v. State, 48 Ind. 163; Todd v. Danner, 17 Ind. App. 368; McCorkle v. Simpson, 42 Ind. 453; Atchison, T. & S. F. R. Co. v. Retford, 18 Kan. 245; Gross v. Shaffer, 29 Kan. 442; Moran v. Higgins, 19 Ky. Law Rep. 456; Com. v. Delaney, 16 Ky. Law Rep. 509; Stokes' Ex'r v. Shippen, 13 Bush (Ky.) 180; Louisville & N. R. Co. v. Banks, 17 Ky. Law Rep. 1065; Moseley v. Washburn, 167 Mass. 345; People v. Colerick, 67 Mich. 362; Heddle v. City Electric Ry. Co., 112

to this objection may be properly refused.[2] The reason for this rule is that such instructions are both argumentative[3]

Mich. 547; Banner v. Schlessinger, 109 Mich. 262; Webster v. Sibley, 72 Mich. 630; Prine v. State, 73 Miss. 838; Godwin v. State, 73 Miss. 873; Chaney v. Phoenix Ins. Co., 1 Mo. App. Rep'r, 703; Meyer v. Pacific R. Co., 40 Mo. 151; Pourcelly v. Lewis, 8 Mo. App. 593; Himes v. McKinney, 3 Mo. 382; Mead v. Brotherton, 30 Mo. 201; Argabright v. State, 49 Neb. 760; Markel v. Moudy, 11 Neb. 213; Mendes v. Kyle, 16 Nev. 369; Consolidated Traction Co. v. Behr, 59 N. J. Law, 477; Hughes v. Ferguson, 23 N. Y. Wkly. Dig. 185; Wilson v. White, 80 N. C. 280; Callahan v. State, 21 Ohio St. 306; Church v. Melville, 17 Or. 413; Bohlen v. Stockdale, 27 Pittsb. Leg. J. 198; Gehman v. Erdman, 105 Pa. 371; Reber v. Herring, 115 Pa. 599; Reichenbach v. Ruddach, 127 Pa. 564; Montgomery v. Scott, 10 Rich. (S. C.) 449; Bell v. Hutchings (Tex. Civ. App.) 41 S. W. 200; International & G. N. R. Co. v. Newman (Tex. Civ. App.) 40 S. W. 854; Medlin v. Wilkins, 60 Tex. 409; Goodbar v. City Nat. Bank of Sulphur Springs, 78 Tex. 461; Galveston, H. & S. A. Ry. Co. v. Kutac, 76 Tex. 473; New York, P. & N. R. Co. v. Thomas, 92 Va. 606; Reed v. Reed, 56 Vt. 492; Sexton v. School Dist. No. 34, Spokane Co., 9 Wash. 5; Wabash R. Co. v. Stewart, 87 Ill. App. 446; Goodhue Farmers' Warehouse Co. v. Davis, 81 Minn. 210; Jackson v. Kansas City, Ft. S. & M. R. Co., 157 Mo. 621; Merchants' Loan & Trust Co. v. Lamson, 90 Ill. App. 18; City of Chicago v. Spoor, 190 Ill. 340, reversing 91 Ill. App. 472; Safe-Deposit & Trust Co. v. Berry (Md.) 49 Atl. 401; Strehmann v. City of Chicago, 93 Ill. App. 206; Hayes v. Pennsylvania R. Co., 195 Pa. 184; Montgomery v. Com., 98 Va. 852. Compare State v. Smith, 65 Me. 257; Virgie v. Stetson, 73 Me. 452; Millay v. Millay, 18 Me. 387.

[2] McPherson v. Foust, 81 Ala. 295; Louisville & N. R. Co. v. Hurt, 101 Ala. 34; Louisville & N. R. Co. v. Rice, 101 Ala. 676; Chandler v. Jost, 96 Ala. 596; Louisville & N. R. Co. v. Webb, 97 Ala. 308; Mobile Sav. Bank v. McDonnell, 89 Ala. 445; People v. Hawes, 98 Cal. 648; Model Mill Co. v. McEver, 95 Ga. 701; Toledo, St. L. & K. C. R. Co. v. Mylott, 6 Ind. App. 438; Merrill v. Hole, 85 Iowa, 66; Kline v. Kansas City, St. J. & C. B. R. Co., 50 Iowa, 656; Delaney v. Hall, 130 Mass. 524; Green v. Boston & L. R. Co.,

[3] Martin v. Johnson, 89 Ill. 537; Louisville & N. R. Co. v. Hurt, 101 Ala. 34; Reed v. Reed, 56 Vt. 492; Chapman v. State (Neb.) 86 N. W. 907. See, also, ante §§ 68-70, "Argumentative Instructions."

and misleading, as having a tendency to induce the jury to give undue weight to the evidence singled out.[4] "All the evidence is for the consideration of the jury, and the practice of making detached portions prominent should not be encouraged."[5] The instructions "should be so framed that all parts of the evidence should be considered and weighed by

128 Mass. 221; Manley v. Boston & M. R. R., 159 Mass. 493; Grube v. Nichols, 36 Ill. 95; City of Atchison v. King, 9 Kan. 550; Scott v. People, 141 Ill. 195; City of Aurora v. Hillman, 90 Ill. 61; Bowen v. Schuler, 41 Ill. 193; Callaghan v. Myers, 89 Ill. 566; Busch v. Wilcox, 82 Mich. 315; Beurmann v. Van Buren, 44 Mich. 496; People v. Pope, 108 Mich. 361; Dobbs v. Humphreys, 1 Mo. App. Rep'r, 195; State v. Cantlin, 118 Mo. 100; Chaney v. Phoenix Ins. Co., 62 Mo. App. 45; State v. Homes, 17 Mo. 379; Dobbs v. Cates' Estate, 60 Mo. App. 658; Meyer v. Blakemore, 54 Miss. 570; People v. O'Neil, 109 N. Y. 251; Fitzgerald v. Long Island R. Co., 50 Hun, 605, 3 N. Y. Supp. 230; Dawson v. Sparks, 1 Posey, Unrep. Cas. (Tex.) 735; Schunior v. Russell, 83 Tex. 83; Panhandle Nat. Bank v. Emery, 78 Tex. 498; State v. Clara, 53 N. C. 25; Reed v. Reed, 56 Vt. 492; Donahue v. Egan, 85 Ill. App. 20; Harris v. City of Ansonia, 73 Conn. 359; Dawson v. Falls City Boat Club (Mich.) 84 N. W. 618; Frost v. State, 124 Ala. 71; Anderson v. Canter (Kan. App.) 63 Pac. 285. It has been held not a ground for reversal that the court failed to give an instruction limiting the effect of evidence, not competent for some purposes, where to do so would have the effect of calling the attention of the jury to a very strong criminating fact, and so the omission was not calculated to injure the accused. Thornley v. State, 36 Tex. Cr. App. 118; Travelers' Ins. Co. v. Clark (Ky.) 59 S. W. 7; Southern Ry. Co. v. Reaves (Ala.) 29 So. 594; Decatur Car Wheel & Mfg. Co. v. Mehaffey (Ala.) 29 So. 646; Connecticut Mut. Life Ins. Co. v. Hillmon (C. C. A.) 107 Fed. 834; Pearson v. Adams (Ala.) 29 So. 977; Gilmore v. State, 126 Ala. 20; Huskey v. State (Ala.) 29 So. 838; State v. Morrison (W. Va.) 38 S. E. 481; Chapman v. State (Neb.) 86 N. W. 907.

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[4] McCartney v. McMullen, 38 Ill. 237; Medlin v. Wilkins, 60 Tex. 409; Safe-Deposit & Trust Co. v. Berry (Md.) 49 Atl. 401; Strehmann v. City of Chicago, 93 Ill. App. 206; State v. Morrison (W. Va.) 38 S. E. 481.

[5] Hatch v. Marsh, 71 Ill. 370.

the jury," and not be based on isolated parts of the evidence.[6] Instructions should not be so drawn as to direct the attention of the jury only to the facts which are favorable to one of the parties, leaving out of view those which sustain or tend to sustain the contention of his adversary.[7] It is the duty of the jury to consider all the testimony in the case, as well that which makes for one party as for the other.[8]

It has been said that the court will not, as a general rule, reverse for the giving of instructions singling out and giving undue prominence to evidence, if there are no other errors.[9]

[6] Newton v. State, 37 Ark. 333; Winter v. Bandel, 30 Ark. 383; Moore v. Wright, 90 Ill. 470; City of Aurora v. Hillman, 90 Ill. 61; Wilson v. White, 80 N. C. 280; Reese v. Beck, 24 Ala. 662; Phillips v. Roberts, 90 Ill. 492; Ogden v. Kirby, 79 Ill. 557.

[7] Evans v. George, 80 Ill. 51; Martin v. Johnson, 89 Ill. 537; Moore v. Wright, 90 Ill. 470; Protection Life Ins. Co. v. Dill, 91 Ill. 174; Graves v. Colwell, 90 Ill. 612; City of Aurora v. Hillman, 90 Ill. 61; Pennsylvania Co. v. Conlan, 101 Ill. 93; People v. Murray, 72 Mich. 10; Banner v. Schlessinger, 109 Mich. 262; Flowers v. Flowers, 92 Ga. 688; Prine v. State, 73 Miss. 838; Reber v. Herring, 115 Pa. 599; Minick v. Gring, 1 Pa. Super. Ct. 484; Pittsburgh, C., C. & St. L. R. Co. v. Dahlin, 67 Ill. App. 99; Hayes v. Pennsylvania R. Co., 195 Pa. 184. An instruction which emphasized the evidence in favor of the plaintiff, and minimized the evidence in favor of the defendant, is ground for reversal. McCabe v. City of Philadelphia, 12 Pa. Super. Ct. 383. But it is not reversible error for the court to recite the evidence for the plaintiff more fully than the evidence for the defendant, where the substance of both is fairly and impartially stated. Jamison v. Hawkins, 13 Pa. Super. Ct. 372.

[8] Moore v. Wright, 90 Ill. 470.

[9] McCartney v. McMullen, 38 Ill. 237. See, also, Medlin v. Wilkins, 60 Tex. 409, where it was said that a disregard of the rule against emphasizing "any particular portion of the evidence * * * will only afford ground for reversal when it is calculated to mislead the jury." And see Maes v. Texas & N. O. Ry. Co. (Tex. Civ. App.) 23 S. W. 725; Gulf, C. & S. F. Ry. Co. v. Gordon, 70 Tex. 80; Houston & T. C. Ry. Co. v. Larkin, 64 Tex. 454; Bertram v. People's Ry. Co., 154 Mo. 639.

So, an instruction is not objectionable on the ground that it gives undue prominence to certain facts, if such facts were immaterial to the issues involved.[10] Nevertheless, if it is clear that the jury have been misled to the injury of the party complaining, the judgment will be reversed.[11] Thus, if the case is a close one on the evidence, and the court singles out and lays special stress on the evidence in favor of one of the parties, and no special reference is made anywhere in the charge to any of the evidence favorable to the other side, the judgment will be reversed.[12]

§ 106. Same—Singling out particular witnesses.

An instruction which singles out the testimony of a particular witness or witnesses for examination by the jury, and gives undue prominence thereto, is improper, and should not be given.[13] The court should not place a particular witness in undue prominence by charging the jury to find according to their belief or disbelief in his evidence,[14] and it is accord-

[10] Bertram v. People's Ry. Co., 154 Mo. 639, wherein the instructions gave undue prominence to plaintiff's advanced age.

[11] Jacksonville & S. E. Ry. Co. v. Walsh, 106 Ill. 253; Brown v. Monson, 51 Ill. App. 490; Flowers v. Flowers, 92 Ga. 688; Pennsylvania Co. v. Stoelke, 104 Ill. 201; Reber v. Herring, 115 Pa. 599; Holt v. State, 62 Ga. 314; Polly v. Com., 16 Ky. Law Rep. 203, 27 S. W. 862; Com. v. Delaney, 16 Ky. Law Rep. 509, 29 S. W. 616; McCabe v. City of Philadelphia, 12 Pa. Super. Ct. 383.

[12] Flowers v. Flowers, 92 Ga. 688; McCabe v. City of Philadelphia, 12 Pa. Super. Ct. 383.

[13] Donahue v. Egan, 85 Ill. App. 20; Gibson v. Snow Hardware Co., 94 Ala. 346; Steed v. Knowles, 97 Ala. 573; Wright v. Bell, 5 Ill. App. 352; Grand Rapids & I. R. Co. v. Judson, 34 Mich. 507; Westchester Fire Ins. Co. v. Earle, 33 Mich. 143; Bohlen v. Stockdale, 27 Pittsb. Leg. J. 198; Bell v. Hutchings (Tex. Civ. App.) 41 S. W. 200; Parlin v. Finfrouck, 65 Ill. App. 174; State v. Rogers, 93 N. C. 523; Devlin v. People, 104 Ill. 504; People v. Simpson, 48 Mich. 474; Southern Ry. Co. v. Reaves (Ala.) 29 So. 594.

[14] Willey v. Gatling, 70 N. C. 410; Brem v. Allison, 68 N. C.

ingly proper to refuse an instruction "that, if they [the jury] believe the testimony of certain witnesses as to the whereabouts of the defendant at the time of the * * * alleged offense," they should acquit him;[15] or an instruction which puts a case to the jury upon the testimony of a single witness, and which directs them that, if they believe such witness, their verdict should be for a designated party.[16] It has been held improper to single out a witness by name, and instruct the jury that they are judges of his credibility, though they are further instructed that they are also judges of the credibility of all the other witnesses. This instruction is calculated to make the jury believe that there is more question as to the credibility of the witness thus singled out than as to that of the other witnesses.[17]

§ 107. Same—Exceptions to rule.

There are some exceptions to the rule declaring it to be erroneous to single out portions of the evidence in instructing the jury. A charge may be based on the evidence of a single witness in the cause, without noticing other testimony, if the testimony of the single witness is of such character that, if believed by the jury, it is decisive of the merits of the cause.[18] In so deciding, the reviewing court said "such a

412; Dolan v. Delaware & H. Canal Co., 71 N. Y. 285; McGrath v. Metropolitan Life Ins. Co., 6 N. Y. St. Rep. 376; Thompson v. State, 106 Ala. 67; People v. Simpson, 48 Mich. 474; Chase v. Buhl Iron Works, 55 Mich. 139; Fraser v. Haggerty, 86 Mich. 521; Jackson v. Commissioners of Greene Co., 76 N. C. 282.

[15] Thompson v. State, 106 Ala. 67.

[16] Grand Rapids & I. R. Co. v. Judson, 34 Mich. 507.

[17] Davidson v. Wallingford, 88 Tex. 619. See, also, Goodhue Farmers' Warehouse Co. v. Davis, 81 Minn. 210.

[18] Hart v. Bray, 50 Ala. 446. The judge can declare the law upon certain facts, which the testimony of a single witness tends to prove, without noticing other evidence pertaining to other phases of the case. Garrett's Adm'rs v. Garrett, 27 Ala. 687.

charge does not, either expressly or by implication, exclude the other evidence from the consideration of the jury," and that, if such an inference should be apprehended, it may be guarded against by asking other instructions.[19] It has also been held that, where "there is but one witness who testifies to a certain fact, and a party is entitled to have the existence of the fact so testified to submitted to the jury by instruction, the mere reference, in such an instruction, to the name of the witness, as a method of identifying his evidence, does not render the instruction erroneous, so as to justify the refusal of it."[20] The rule against singling out and giving undue prominence to particular facts only applies where there are two or more facts tending to prove or disprove a given proposition, and has no application where plaintiff's entire case rests upon a single undisputed fact.[21] Though it is not ordinarily competent for a party to select a part of the facts which his adversary claims to have proved, and require a charge upon them, yet an instruction may be based on facts so selected, if their effect cannot be varied by others which may have been proved.[22] A party may ask an instruction that certain facts in the case present a certain question of law, and has a right to the opinion of the court as to what principle is applicable to the facts, though other facts, not embraced in the hypothesis assumed, may justify an application for other and different instructions.[23] It has been said that the court may properly call the attention of the jury to evidence which is obscure, and which might escape their

[19] Garrett's Adm'rs v. Garrett, 27 Ala. 687.

[20] Hartmann v. Louisville & N. R. Co., 39 Mo. App. 88.

[21] Keyes v. Fuller, 9 Ill. App. 528. See, also, Love v. Gregg, 117 N. C. 467, where it was held that an instruction that, if the jury believe a single uncontradicted witness, the case is made out, was not erroneous.

[22] Beers v. Housatonuc R. Co., 19 Conn. 570.

[23] Birney v. New York & W. Printing Tel. Co., 18 Md. 341.

attention.[24] Whether or not the charge gives undue prominence to a portion of the evidence depends upon the nature of the evidence, and, if the substance of the evidence for both parties is fairly and impartially stated, one party cannot complain that the evidence of his adversary is more fully or prominently stated than his own.[25]

§ 108. Giving undue prominence by repetition.

It has been held error to refer repeatedly to a fact or facts in evidence, as this is calculated to give undue prominence to such testimony.[26] Instructions should not be so drawn as to direct and repeatedly call attention to particular facts or features not in themselves conclusive;[27] but a violation of this rule is not necessarily a ground for reversal, and it seems that the judgment should not be reversed unless it is apparent that injury has resulted.[28] It is doubtful whether the rule against repetitions has any application to mere propositions of law, correct in themselves. It would seem that a correct rule of law applicable to the case could not be too firmly impressed upon the jury.[29]

[24] West v. Chicago & N. W. Ry. Co., 77 Iowa, 657.

[25] Irvin v. Kutruff, 152 Pa. 609; Jamison v. Hawkins, 13 Pa. Super. Ct. 372.

[26] Gulf, C. & S. F. Ry. Co. v. Harriett, 80 Tex. 73; Mendes v. Kyle, 16 Nev. 369; Meachem v. Hahn, 46 Ill. App. 149.

[27] Meachem v. Hahn, 46 Ill. App. 149; 2 Thompson, Trials, § 2380.

[28] Maes v. Texas & N. O. Ry. Co. (Tex. Civ. App.) 23 S. W. 725; Gulf, C. & S. F. Ry. Co. v. Gordon, 70 Tex. 80; Houston & T. C. Ry. Co. v. Larkin, 64 Tex. 454. In this last case it was held that the mere repetition, in a charge, of the abstract principle that the jury might consider the physical and mental suffering the plaintiff had endured in estimating damages, cannot be regarded as calculated to affect a jury of ordinary intelligence, and will afford no ground for reversal.

[29] Murray v. New York, L. & W. R. Co., 103 Pa. 37. In Texas it is held to be improper for the court, by frequent repetitions, to place a principle of law too prominently before the jury, and

§ 109. Instructions held erroneous as singling out and giving undue prominence to the evidence.

The following instructions have been held erroneous, as singling out and giving undue prominence to portions of the evidence: An instruction separating the circumstances of the case from each other, and directing the jury that no one of these circumstances in itself amounts to usury.[30] An instruction after a charge on self-defense has been given, in which the facts proved or attempted to be proved, tending to show that defendants did not act in self-defense, are set out, and in which the court says that, if the facts recited existed, defendant would be deprived of the benefit of the law of self-defense.[31] An instruction which informs the jury that they may consider threats made by the deceased against the defendant in determining who brought on the difficulty, and thus generate a doubt of defendant's guilt.[32] An instruction calling attention to a single omission of the defendant, and submitting to the jury the question whether such omission constituted negligence, without reference to the surroundings

requested instructions violating this rule may be refused. Brady v. Georgia Home Ins. Co., 24 Tex. Civ. App. 464; Powell v. Messer's Adm'r, 18 Tex. 401; Traylor v. Townsend, 61 Tex. 147. But the repetition of a principle of law making it too prominent is not necessarily ground for reversal, if the opinion of the court is not indicated. Brady v. Georgia Home Ins. Co., supra. Where an instruction requiring the plaintiff to prove his case by a preponderance of evidence is given in connection with each issue of negligence submitted to the jury, there is not such a repetition of the rule of law as to give undue prominence to it. Martin v. St. Louis & S. W. Ry. Co. (Tex. Civ. App.) 56 S. W. 1011. See, also, Gran v. Houston, 45 Neb. 813.

[30] Scott v. Lloyd, 9 Pet. (U. S.) 458.

[31] Bonner v. Com., 18 Ky. Law Rep. 728, 38 S. W. 488. In this case the court considered that the facts recited were made too prominent.

[32] Crawford v. State, 112 Ala. 1.

or attendant circumstances.[33] An instruction singling out an isolated fact, and telling the jury that, as matter of law, it amounts to negligence.[34] An instruction singling out a particular act, and stating that it would not constitute proper care, the issue being contributory negligence.[35] An instruction to "look to the declarations of the plaintiff, C., to see whether she ever claimed the property in question as her homestead, and to her declarations about leaving it; and they will look to the evidence to see whether she did leave it or leave the state in accordance with her declarations, and, if so, then her declarations are evidence of her intention, and, if the evidence shows that she left the state in 1866, and refused to return when requested by her husband by letter, then the abandonment is complete, and the jury will find for defendant."[36] Instructions that the jury may look to certain facts in determining questions of fact before them.[37] Instructions that the jury cannot look to certain evidence in determining a disputed question of fact.[38] Instructions that certain facts in evidence are not conclusive evidence of one of the ultimate facts in issue, irrespective of whether the proposition of law is correct or not.[39] "It is not customary or good practice to select the testimony of one witness, and tell the jury that they cannot render a verdict upon that testimony alone. While this may be true, the jury have a right to consider the testimony * * * in connection with all the other testimony in the case."[40] An instruction which

[33] Wabash R. Co. v. Stewart, 87 Ill. App. 446.
[34] Meyer v. Pacific R. Co., 40 Mo. 151.
[35] International & G. N. R. Co. v. Newman (Tex. Civ. App.) 40 S. W. 854.
[36] Burcham v. Gann, 1 Posey, Unrep. Cas. (Tex.) 333.
[37] Hussey v. State, 86 Ala. 34; Jackson v. Robinson, 93 Ala. 157; Alabama Great Southern R. Co. v. Sellers, 93 Ala. 9.
[38] Stone v. State, 105 Ala. 60.
[39] Merchants' Loan & Trust Co. v. Lamson, 90 Ill. App. 18.
[40] Dawson v. Falls City Boat Club (Mich.) 84 N. W. 618.

dwells repeatedly on the cases, where one witness is contradicted by more than one, and yet is to be believed, in a case where plaintiff's side of the case is supported by one witness, and that of defendant by several witnesses.[41] An instruction calling the attention of the jury specially to certain portions, bearing upon the question of the scope of a party's agency, and omitting other facts in evidence bearing upon the same question.[42] "An instruction reciting certain acts and declarations of the plaintiff as testified to by the defendants, and informing the jury that, if they believe the existence of such facts and circumstances as sworn to, then such facts, unless otherwise satisfactorily explained, have a tendency to prove that the defendants did not make the alleged contract."[43] An instruction "that a willful and intentional introduction of a falsehood into a defense would tend to strengthen a hypothesis of guilt, should such hypothesis exist in the case, springing out of other parts of the testimony," since such instruction does not submit the evidence for the defense and that for the state upon equal terms.[44] An instruction that flight "is a silent admission by the defendant that he is unwilling or unable to face the case against him. It is in some sense—feeble or strong, as the case may be—a confession."[45] An instruction singling out the conduct, demeanor, or expressions of the defendant, when their weight and importance depend wholly on their combination with other inculpatory facts, and directing the jury that they may

[41] Lendberg v. Brotherton Iron Min. Co., 75 Mich. 84.

[42] Pope v. Lowitz, 14 Ill. App. 96.

[43] Brant v. Gallup, 5 Ill. App. 262.

[44] Holt v. State, 62 Ga. 314.

[45] Alberty v. United States, 162 U. S. 499, in which the reviewing court said that this instruction placed too much stress on the fact of flight, and permitted the inference that this fact alone might be sufficient to raise a presumption of guilt.

look to it alone, as tending to show the defendant's guilt.[46] An instruction, where a photograph was admitted to show the location and appearance of buildings, that "it was for the jury to say how much stock they take in testimony of that kind," since the intimation was that the jury ought not to give any weight to such evidence.[47] An instruction singling out the facts on which the defendant relies to escape liability in a suit upon an accident policy.[48] An instruction giving prominence to the opinions of the medical experts in a will contest, where the issue was testamentary capacity.[49] An instruction that, if the jury found the defendant guilty, they should consider certain enumerated facts in determining what punishment should be inflicted, where the facts enumerated are favorable to the defendant, and the instruction does not particularize other testimony having a contrary tendency.[50] An instruction that, if the jury believed the testimony of a particular witness with regard to a disputed fact, they must acquit.[51] An instruction that the occurrence of a miscarriage did not tend to prove that the accident was the proximate cause of it, and not stating the other evidence.[52] An instruction, in an action of ejectment, that a deed in evidence did not convey the legal title, where such deed was not the only evidence of title and right of possession.[53] An instruction which limits the jury, in determining whether a bill of sale was absolute, or made upon a secret agreement that a debt due another than the purchaser should be paid

[46] McAdory v. State, 62 Ala. 154.

[47] City of Chicago v. Spoor, 190 Ill. 340, reversing 91 Ill. App. 472.

[48] Travelers' Ins. Co. v. Clark (Ky.) 59 S. W. 7.

[49] Safe-Deposit & Trust Co. v. Berry (Md.) 49 Atl. 401.

[50] Gilmore v. State, 126 Ala. 20, holding that such an instruction was properly refused.

[51] Frost v. State, 124 Ala. 71.

[52] Strehmann v. City of Chicago, 93 Ill. App. 206.

[53] Anderson v. Canter (Kan. App.) 63 Pac. 285.

out of the proceeds of the property, to a consideration of the instrument itself, and the parol evidence explanatory thereof, there being other evidence, both parol and documentary, bearing upon the issue.[54] A charge that the declarations and admissions of a party to the action can be considered by the jury as any other evidence.[55] "An instruction which selects conversations, testified to by the party asking it, and attempts to lay down certain conditions, upon which, alone, such conversations can be regarded as proved by a preponderance of the evidence."[56] An instruction that "accused may offer evidence of his previous good character, not only where a doubt exists on the other proof, but even to generate a doubt as to his guilt."[57] Except in cases where the law itself raises a particular presumption from a certain fact or set of facts, the judge should not give his opinion of the probative value of a particular fact, and comment upon any particular fact in evidence is equally vicious, whether its effect is to exaggerate or diminish the importance of such fact as evidence.[58] And it is also improper to call the attention of the jury to particular testimony in such a way as to throw discredit upon it, or to lead the jury to believe that the judge discredits the testimony of the witnesses.[59]

§ 110. Instructions held not erroneous as singling out and giving undue prominence to the evidence.

The following instructions have been held not erroneous, as singling out and giving undue prominence to parts of the evidence: An instruction that, if the jury shall find from

[54] Model Mill Co. v. McEver, 95 Ga. 701.
[55] Dobbs v. Cates' Estate, 60 Mo. App. 658.
[56] Horne v. Walton, 117 Ill. 131.
[57] Miller v. State, 107 Ala. 40.
[58] Leeser v. Boekhoff, 33 Mo. App. 223.
[59] Wilson v. Hotchkiss' Estate, 81 Mich. 172.

the evidence that the facts involved in the issue are proven, reciting the facts, they shall find for the party whose case is established by such facts. If the facts alleged in the declaration are sufficient to make out plaintiff's case, and the court recites all of such facts, the objection cannot be urged that the instruction did not state the facts going to establish the defense.[60] An instruction stating the law on the issue of negligence in not having proper appliances to prevent the emission of sparks, when such issue is not presented elsewhere, except in instructions requested by the defendant.[61] An instruction that, in passing on the testimony of all the witnesses, the jury might consider any interest which such witnesses might feel, is not objectionable as calling special attention to their credibility.[62] An instruction that certain evidence, brought out on cross-examination of the defendant, could be considered only as affecting his credibility, and not as tending to show guilt of the crime charged.[63] An instruction containing a mere statement of the plaintiff's claims.[64] An instruction in an action of tort, that, if the jury should give plaintiff's statements credit after considering the defendant's denial and all other testimony, the verdict should be for plaintiff, the court having also charged that the jury should take into consideration the whole of the testimony of plaintiff, and determine whether it was reasonable or not, and give it such weight as they should deem it entitled to.[65] An instruction commenting on the testimony of one side more than on that of the other, if all the disputed facts be

[60] Chicago & N. W. Ry. Co. v. Snyder, 117 Ill. 376; Frame v. Badger, 79 Ill. 442.

[61] International & G. N. R. Co. v. Newman (Tex. Civ. App.) 40 S. W. 854.

[62] Chicago & A. R. Co. v. Anderson, 166 Ill. 572.

[63] Jasper v. State (Tex. Cr. App.) 61 S. W. 392.

[64] McCann v. Ullman, 109 Wis. 574.

[65] Schenk v. Dunkelow, 70 Mich. 89.

fairly submitted.[66] So, an instruction that, if the jury believe the evidence of a designated witness, they will find for plaintiffs, has been held not erroneous, as giving undue prominence to the testimony of the witness, where there were only two witnesses for the plaintiffs and one of them was called solely to corroborate the testimony of the witness mentioned.[67] On a trial of two defendants for an affray, where the testimony of each tended to excuse himself, and to convict the other, an instruction to acquit one of the defendants if they believed his representation of the facts, and to convict both if they accepted the testimony of a named person, but that they should acquit such defendant unless they were satisfied of his guilt from all the testimony, has been held not to give undue emphasis to the testimony of the witness named.[68] In an action for death by wrongful act, it is not error to instruct the jury that, if the mind and mental faculties of the deceased were impaired, and, by reason of such condition of mind, he could not comprehend the danger in attempting to cross the tracks, they should consider such fact in determining the question of contributory negligence.[69] Where contradictory testimony has been given, it is not error to instruct the jury to consider the probability or improbability of such testimony.[70]

§ 111. Singling out issues and theories.

The practice of singling out one among several important issues, and submitting it to the jury as the controlling issue, is improper;[71] and it is likewise improper to give undue prominence to the theory advanced by one of the parties.

[66] McKnight v. Mathews (Pa.) 11 Atl. 676.
[67] Gregg v. Mallett, 111 N. C. 74.
[68] State v. Weathers, 98 N. C. 685.
[69] Jackson v. Kansas City, Ft. S. & M. R. Co., 157 Mo. 621.
[70] Bowsher v. Chicago, B. & Q. R. Co. (Iowa) 84 N. W. 958.
[71] Bowden v. Achor, 95 Ga. 243; Dallas & O. C. Elevated Ry. Co. v. Harvey (Tex. Civ. App.) 27 S. W. 423.

CHAPTER XI.

NECESSITY OR PROPRIETY OF DEFINITION BY COURT OF TERMS USED, AND CORRECTNESS OF SUCH DEFINITION.

§ 112. Words and Terms of Ordinary Meaning.
113. Legal Terms or Words of Technical Meaning.
114. Defining Offense Alleged Against Defendant in Criminal Prosecution.

§ 112. Words and terms of ordinary meaning.

It is not necessary that the meaning of ordinary words and phrases, used in their customary and conventional sense, should be explained by the court.[1] They are presumed to possess at least ordinary intelligence, and to understand the meaning of words in common and ordinary use.[2] Upon this principle, it has been held unnecessary to define or explain the meaning of the following words and phrases when used in instructions, viz.: "Compel;"[3] "feloniously;"[4] "anger;"[5] "prostitution;"[6] "boarded," in action to recover for board;[7]

[1] Holland v. McCarty, 24 Mo. App. 113; Warder v. Henry, 117 Mo. 530; State v. Sattley, 131 Mo. 464; State v. Cantlin, 118 Mo. 100; Berry v. Billings, 47 Me. 328; Prince v. Ocean Ins. Co., 40 Me. 481; Rogers v. Millard, 44 Iowa, 466; Eastman v. Curtis, 67 Vt. 432; Iowa State Sav. Bank v. Black, 91 Iowa, 490; Henderson v. People, 124 Ill. 607; Humphreys v. State, 34 Tex. Cr. App. 434; Berry v. Billings, 47 Me. 328.

[2] Berry v. Billings, 47 Me. 328; Rogers v. Millard, 44 Iowa, 466; A. J. Anderson Electric Co. v. Cleburne Water, Ice & Lighting Co., 23 Tex. Civ. App. 328.

[3] St. Clair v. Missouri Pac. R. Co., 29 Mo. App. 76.

[4] State v. Cantlin, 118 Mo. 100; State v. Weber, 156 Mo. 249, 56 S. W. 729; State v. Penney (Iowa) 84 N. W. 509.

[5] Robinson v. State (Tex. Cr. App.) 63 S. W. 869.

[6] Tores v. State (Tex. Cr. App.) 63 S. W. 880.

[7] Rogers v. Millard, 44 Iowa, 466.

"unfaithfulness;"[8] "carelessly," when used in an action by a landlord against his tenant for carelessly permitting stock to go into an orchard and destroy fruit trees;[9] "care;"[10] "prudence;"[11] "negligence;"[12] "guarantee;"[13] "ratify" and "ratification;"[15] "adoption;" "repudiation;" "acquiescence;"[16] "holding up" a train;[17] "substantial compliance" with the terms of contract;[18] "remotely;"[19] "by diligent inquiry;"[20] "permit;"[21] "authority," in an action to recover for extra work, where the question was as to the authority of an architect to order extra work;[22] "contributed;"[23] to "counte-

[8] Berry v. Billings, 47 Me. 328.

[9] Warder v. Henry, 117 Mo. 531.

[10] Muehlhausen v. St. Louis R. Co., 91 Mo. 332.

[11] Muehlhausen v. St. Louis R. Co., 91 Mo. 332.

[12] Edelmann v. St. Louis Transfer Co., 3 Mo. App. 506. On the other hand, the phrase "gross negligence" should be defined. Warder v. Henry, 117 Mo. 530.

[13] Reeds v. Lee, 64 Mo. App. 686.

[15] Young v. Crawford, 23 Mo. App. 432. Such words are not purely technical, legal expressions. Iowa State Sav. Bank v. Black, 91 Iowa, 490.

[16] Iowa State Sav. Bank v. Black, 91 Iowa, 490.

[17] Territory v. McGinnis (N. M.) 61 Pac. 208, holding that the words are universally understood to mean an assault on a train with intent to commit murder or some other felony.

[18] A. J. Anderson Electric Co. v. Cleburne Water, Ice & Lighting Co., 23 Tex. Civ. App. 328; Linch v. Paris Lumber & Grain Elevator Co., 80 Tex. 36. But see Johnson v. White (Tex. Civ. App.) 27 S. W. 177, wherein the court inclined to the view that the term ought to be defined, but overruled an assignment of error upon the authority of the preceding case.

[19] Muehlhausen v. St. Louis R. Co., 91 Mo. 332.

[20] Cottrill v. Krum, 100 Mo. 397.

[21] Humphreys v. State, 34 Tex. Cr. App. 434.

[22] Holland v. McCarty, 24 Mo. App. 112.

[23] Bunyan v. Loftus, 90 Iowa, 122, in which the court said that to presume that the jury did not understand this word "would be equivalent to holding that their ignorance was so dense as to unfit them for jury service."

nancce;"[24] "willfully;" "maliciously."[25] So it has been held that it is unnecessary to define the expression in an instruction, "assenting to the reception in said bank of a deposit of * * * $30 or more," after the defendant knew that such bank was in failing circumstances.[26] The mere fact that, under certain circumstanees, eourts of law have been called upon to determine the meaning of such words, does not destroy the popular character of the words.[27]

§ 113. Legal terms or words of technical meaning.

Where legal or technical terms, differing in meaning from their popular use, or not generally known, are used in instructing the jury, it is always proper for the court to explain their meaning to the jury,[28] and the court should do so,[29] especially when requested.[30] While it has been said, in some eases, that it is indispensable that legal and technical terms should be defined and explained,[31] it has nevertheless been held in others that a failure to explain such terms will not be a ground for reversal, unless a definition or explanation was asked by the party claiming to have been prejudiced there-

[24] Cooper v. Johnson, 81 Mo. 483.

[25] State v. Harkins, 100 Mo. 666. But see Dyrley v. State (Tex. Cr. App.) 63 S. W. 631.

[26] State v. Sattley, 131 Mo. 464.

[27] Edelmann v. St. Louis Transfer Co., 3 Mo. App. 506.

[28] Gibson v. Cincinnati Enquirer, 5 Cent. Law J. 380, Fed. Cas. No. 5,392; Cobb v. Covenant Mut. Ben. Ass'n, 153 Mass. 176.

[29] Rush v. French, 1 Ariz. 99; People v. Byrnes, 30 Cal. 207; Jarnigan v. Fleming, 43 Miss. 710; Mullins v. Cottrell, 41 Miss. 291; Stewart v. City of Clinton, 79 Mo. 603; Digby v. American Cent. Ins. Co., 3 Mo. App. 603; Flint-Walling Mfg. Co. v. Ball, 43 Mo. App. 504; Dyer v. Brannock, 2 Mo. App. 432; Rollings v. Cate, 1 Heisk. (Tenn.) 97; Wheeler v. State, 23 Tex. App. 598.

[30] City of Junction City v. Blades, 1 Kan. App. 85.

[31] Schmidt v. Sinnott, 103 Ill. 160; De Los Santos v. State (Tex. Cr. App.) 31 S. W. 395.

by.[32] So it has been held that the unexplained use, in an instruction, of a word having a technical legal meaning, which is not essentially different from the meaning in common use, is not ground for reversing a judgment.[33] It has also been held that, where a word is used in an instruction which might be taken in different senses, and the jury follows the instruction in the sense in which it was intended, a judgment on the verdict will not be reversed because the jury might have followed it in the sense in which it was not intended.[34] And where an instruction is given on the request of a party, he cannot complain that it is insufficient in definition or explanation of terms used therein. If he desires a correct definition of the terms used, he must ask for it.[35] Requested instructions which contain technical terms needing explanation may be refused.[36]

It has been held necessary to explain the following words and terms: "Warranty;"[37] "willfully;"[38] "wrongful con-

[32] Schneider v. Hosier, 21 Ohio St. 98; Lagow v. Glover, 77 Tex. 448; Johnson v. Missouri Pac. R. Co., 96 Mo. 340. In this last case the court said: "As to the failure of the court to go further and define the meaning of the words 'reasonable care and diligence,' we have not been cited to, nor have found, any authority going to the extent of saying that the mere omission to give an instruction defining the above terms, where none is asked, is reversible error."

[33] Miller v. Woolman-Todd Boot & Shoe Co., 26 Mo. App. 57; Murphy v. Creath, 26 Mo. App. 581.

[34] Parkhurst v. Masteller, 57 Iowa, 474.

[35] Kelley v. Cable Co., 7 Mont. 70.

[36] Boogher v. Neece, 75 Mo. 383; Fletcher v. Milburn Mfg. Co., 35 Mo. App. 321.

[37] Flint-Walling Mfg. Co. v. Ball, 43 Mo. App. 504.

[38] Dyrley v. State (Tex. Cr. App.) 63 S. W. 631; Sparks v. State, 23 Tex. App. 447; Thomas v. State, 14 Tex. App. 200; Wheeler v. State, 23 Tex. App. 598; Trice v. State, 17 Tex. App. 43. An instruction defining the term "willful" as "without reasonable ground for believing the act to be lawful, or a reckless disregard of the rights of others," has been held to give a correct definition. Finney

duct;"[39] "material to the issues;"[40] "material facts;"[41] "corroborated;"[42] "exemplary damages;"[43] "malice;"[44] "fixtures;"[45] "adverse possession;"[46] "unlawfully" (as applicable to a homicide or a murder trial);[47] "gross negligence;"[48] "color of title;"[49] "evidence in the case, and the circumstances surrounding the same;"[50] "insane delusion" (on the trial of an issue *devisavit vel non,* involving the insanity of the testator);[51] "preponderance of evidence;"[52] "exciting state of

v. State, 29 Tex. App. 184. Where a penal statute makes intent to defraud one of the elements of the forbidden act, and the court, in a prosecution for a violation of the statute, explains to the jury that the act alleged to constitute a violation must have been committed with intent to defraud, it is not necessary for the court to explain the term "willfully," also used in the statute, as willfulness is necessarily implied in intent to defraud. Wheeler v. State, 23 Tex. App. 598.

[39] Lesser v. St. Louis & Suburban Ry. Co., 85 Mo. App. 326, holding that a failure to instruct as to what facts would, in law, constitute wrongful conduct, is erroneous, as it submits to the jury questions both of law and fact.

[40] State v. McLain, 159 Mo. 340.

[41] Digby v. American Cent. Ins. Co., 3 Mo. App. 603.

[42] State v. McLain, 159 Mo. 340.

[43] Hayes v. St. Louis R. Co., 15 Mo. App. 584.

[44] Morgan v. Durfee, 69 Mo. 469.

[45] Grand Lodge of Masons v. Knox, 27 Mo. 315.

[46] Dyer v. Bannock, 2 Mo. App. 432.

[47] People v. Byrnes, 30 Cal. 207.

[48] Wiser v. Chesley, 53 Mo. 547.

[49] Boogher v. Neece, 75 Mo. 383.

[50] Derham v. Derham (Mich.) 83 N. W. 1005.

[51] Mullins v. Cottrell, 41 Miss. 291.

[52] In Missouri it has been held to be the better practice to define "preponderance of evidence," though a failure to do so is not ground for reversal. Steinwender v. Creath, 44 Mo. App. 360; Berry v. Wilson, 64 Mo. 164; Hill v. Scott, 38 Mo. App. 370. And instructions using the term without explanation may be properly refused. Mackin v. People's St. Ry. & E. L. & P. Co., 45 Mo. App. 82; Clarke v. Kitchen, 52 Mo. 316.

In Texas it has been held unnecessary to define the term, upon

fear" (in an instruction that, if plaintiff took Confederate money in payment of a note, under an exciting state of fear, the payment would not constitute a legal payment);[53] "to dispose of property with the intent to defraud creditors."[54]

§ 114. Defining offense alleged against defendant in criminal prosecution.

In instructing the jury, the court is not compelled to define the offense charged in the very words of elementary text writers. A correct definition in language of the court's own choosing will suffice.[55] If the offense is statutory, it may be defined in the exact language of the statute,[56] and it has been

the ground that it has a well-known popular meaning. Gulf, C. & S. F. Ry. Co. v. Reagan (Tex. Civ. App.) 34 S. W. 798. Where one witness is opposed by three, an instruction is erroneous, as amounting to a comment on the weight of the evidence, that "you will decide all issues submitted to you by this charge by a preponderance of the evidence. By the term 'preponderance of the evidence' is meant not necessarily the greater number of witnesses, but only the facts shall appear by the greater weight of testimony, as may seem to you most worthy of credit, under all the facts and circumstances of the case." St. Louis S. W. Ry. Co. v. Smith (Tex. Civ. App.) 63 S. W. 1064; Dallas Cotton Mills v. Ashley (Tex. Civ. App.) 63 S. W. 160.

See, also, Noyes v. Pugin, 2 Wash. St. 653, where it was held that an instruction that plaintiff must establish the material allegations of his complaint by a preponderance of testimony was not erroneous, the court saying that it would be presumed that the jury understood the word "testimony" as referring to all the evidence.

[53] Rollings v. Cate, 1 Heisk. (Tenn.) 97.

[54] Matthews v. Boydstun (Tex. Civ. App.) 31 S. W. 814.

[55] State v. Clary, 24 S. C. 117. An instruction, in a prosecution of a bank president for receiving deposits, knowing that the bank was insolvent, that "a crime consists in the violation of a public law, in the commission of which there shall be a union, or joint operation, of act and intention, or criminal negligence," being the exact language of the statute, is correct. McClure v. People, 27 Colo. 358.

[56] Duncan v. People, 134 Ill. 110.

said to be the better practice to do so.[57] Nevertheless, the use of other language conveying the same meaning, and not liable to misconstruction by the jury, is not erroneous;[58] but no element of the offense should be overlooked.[59] In stating the statutory definition of a crime, it is unnecessary to state the penalty.[60] It has been held not improper for the court to give the jury a general description of the offense, although embracing modes of commission not pertinent to the case, provided a definition is subsequently given applicable to the pleadings and evidence.[61]

[57] Long v. State, 23 Neb. 33; State v. O'Brien, 18 Mont. 1.

[58] Long v. State, 23 Neb. 33. It is not necessary to copy the statute into the instructions, where the charge, as given, submitted all the constituent elements of the offense. Adkins v. State (Tex. Cr. App.) 56 S. W. 63.

[59] Hix v. People, 157 Ill. 382; Adkins v. State (Tex. Cr. App.) 56 S. W. 63.

[60] Currier v. State (Ind.) 60 N. E. 1023.

[61] State v. Anderson, 10 Or. 448.

CHAPTER XII.

NECESSITY OF INSTRUCTING IN WRITING.

§ 115. Rule at Common Law.
116. Statutory Rules.
117. Effect of Failure to Instruct in Writing When Required.
118. Same—Digest of Decisions.
119. When Statute Applies—What are Instructions.
120. Same—Digest of Decisions.
121. Sufficiency of Compliance with Statute.
122. Same—Oral Explanations, Modifications, and Additions.
123. Same—Subsequent Reduction of Oral Charge to Writing.
124. Same—Reading from Books and Papers.
125. Waiver or Loss of Right to Written Instructions.

§ 115. Rule at common law.

At common law, and in the absence of statute, instructions may be either oral or written, at the discretion of the trial judge. When an instruction contains the law applicable to the case, so explained as to be understood by the jury, and there is no statute governing the matter, it can make no essential difference whether such instruction be given orally or in writing; that is a matter which is left entirely to the discretion of the court, and the manner in which that discretion has been exercised is not subject to criticism in the appellate court.[1]

[1] Smith v. Crichton, 33 Md. 103. In Indian Territory, a party cannot demand a reduction of the charge, given by the court of its own motion, to writing, as a matter of right in civil cases. Gulf, C. & S. F. Ry. Co. v. Campbell, 49 Fed. 354, 4 U. S. App. 133, followed in Baer v. Rooks (C. C. A.) 50 Fed. 898. The practice is governed by Mansf. Dig. Ark. § 5131, subd. 5, which only requires requested instructions to be reduced to writing. Gulf, C. & S. F. Ry. Co. v.

§ 116. Statutory rules.

Statutes exist in many states requiring instructions in all cases to be entirely in writing. In some states, however, the statutes require written instructions only in cases when a timely request has been made therefor.[2] The object of these statutes is to insure the preservation of the instructions *verbatim* as they come from the lips of the judge, so that there will be no dispute as to their form or substance in the subsequent proceedings in the case.[3] But it has been held that a statute requiring instructions to be in writing is not repealed by a subsequent statute providing for an official stenographer, and requiring him to correctly report all the proceedings of the court.[4] In some states, however, the statute only requires written instructions in cases where the instructions are not taken down by the stenographer.[5]

§ 117. Effect of failure to instruct in writing when required.

The giving of an oral instruction in a case where the statute requires written instructions constitutes error for which the judgment may be set aside or a new trial granted, the

Campbell, 49 Fed. 354, 4 U. S. App. 133, 1 C. C. A. 293; Same v. Childs, 49 Fed. 358, 4 U. S. App. 200, 1 C. C. A. 297. Where a party desires to except to an instruction, it is his undoubted right to have it reduced to writing. Smith v. Crichton, 33 Md. 103.

[2] See the codes and statutes of the various states. See, also, the two succeeding sections.

[3] People v. Hersey, 53 Cal. 574; People v. Leary, 105 Cal. 500; State v. Preston (Idaho) 38 Pac. 694; State v. Stewart, 9 Nev. 120; Jenkins v. Wilmington & W. R. Co., 110 N. C. 442.

[4] Bowden v. Achor, 95 Ga. 243. See, also, Wheat v. Brown, 3 Kan. App. 431; Rich v. Lappin, 43 Kan. 666. But see State v. Preston (Idaho) 38 Pac. 694.

[5] Pen. Code Cal. § 1093; People v. Leary, 105 Cal. 500; People v. Ferris, 56 Cal. 442.

statute being regarded as mandatory.[7] Even though it be conceded that the bill of exceptions fairly presents the instructions given, yet, that security against mistakes which the statute awards as a right having been denied, the judgment must be reversed.[8] The error may, however, have been harmless to appellant, in which case it will not be sufficient ground for a reversal.[9] This rule is but simple justice, for

[7] Mazzia v. State, 51 Ark. 177; Anderson v. State, 34 Ark. 257; National Lumber Co. v. Snell, 47 Ark. 407; People v. Beeler, 6 Cal. 246; People v. Sanford, 43 Cal. 29; People v. Hersey, 53 Cal. 575; Wilson v. Town of Granby, 47 Conn. 59; Ellis v. People, 159 Ill. 337; Toledo & W. Ry. Co. v. Daniels, 21 Ind. 260; Rising-Sun & V. Turnpike Co. v. Conway, 7 Ind. 187; Shafer v. Stinson, 76 Ind. 376; Bradway v. Waddell, 95 Ind. 170; Wheat v. Brown, 3 Kan. App. 431; City of Atchison v. Jansen, 21 Kan. 560; State v. Potter, 15 Kan. 302; Insurance Co. v. Trustees C. P. Church, 91 Tenn. 136. Contra, Patterson v. Kountz, 63 Pa. 246; Scheuing v. Yard, 88 Pa. 286. In Texas, the statute is held to be mandatory in criminal cases, but merely directory in civil cases. Pen. Code Cal. § 1093, providing that, if the charge be not given in writing, it must be taken by the phonographic reporter, is mandatory. People v. Hersey, 53 Cal. 575.

[8] Hardy v. Turney, 9 Ohio St. 400.

[9] National Lumber Co. v. Snell, 47 Ark. 407; People v. Leary, 105 Cal. 487; Fry v. Shehee, 55 Ga. 208; Greathouse v. Summerfield, 25 Ill. App. 296; Mutual Ben. Life Ins. Co. v. Miller, 39 Ind. 475; Hall v. Carter, 74 Iowa, 364; State v. Sipult, 17 Iowa, 575; Com. v. Barry, 11 Allen (Mass.) 263; Hogel v. Lindell, 10 Mo. 484; O'Donnell v. Segar, 25 Mich. 369. See, also, Allen v. Rundle, 50 Conn. 33. But see Ray v. Wooters, 19 Ill. 82, wherein it was held that an immaterial modification of a written instruction constituted error. Thus, an oral instruction relating wholly to a conceded matter, although erroneous, is not ground for reversal because not prejudicial. Walsh v. St. Louis Drayage Co., 40 Mo. App. 339. Where plaintiff made out no case, a judgment for defendant will not be reversed because oral instructions were given. Greathouse v. Summerfield, 25 Ill. App. 296. Where it plainly appears from the law and the facts disclosed in the record that a new trial would not change the verdict, the giving of an oral instruction is not ground for reversal. Fry v. Shehee, 55 Ga. 208. Where it cannot be ascertained what the oral instructions were, the judgment must be reversed. Aliter

the oral instructions may have been given without the solicitation of the party obtaining the verdict, or even against his consent.[10] But the mere fact that the oral instructions given were correct will not prevent a reversal.[11] In Indiana it has been held that the judgment will be reversed, even though the instructions were favorable to the appellant.[12]

Where, under the statute, the instructions must be in writing, the giving of oral instructions is error, notwithstanding the fact that "it was impracticable to put the whole charge in writing in the time within which it was necessary to conclude the trial."[13] Where the statute in force requires instructions to be in writing only in cases where such a request has been made, in the absence of a request the statute has no application,[14] and the common-law rule[15] prevails. Under such circumstances, it is not error to give oral instructions.[16] Where the appellant has not himself requested written instructions, the failure of the court to instruct in writing, upon the request of the appellee, is not available error.[17]

where they were preserved in the bill of exceptions, and were favorable to, or did not affect, the party complaining. Hogel v. Lindell, 10 Mo. 484.

[10] Hogel v. Lindell, 10 Mo. 484.

[11] Dorsett v. Crew, 1 Colo. 18; City of Atchison v. Jansen, 21 Kan. 560. It is reversible error whether the oral instruction is in itself right or wrong. Hardin v. Helton, 50 Ind. 320.

[12] Widner v. State, 28 Ind. 394. See, also, Shafer v. Stinson, 76 Ind. 376.

[13] In such case, the court should direct a mistrial. Jenkins v. Wilmington & W. R. Co., 110 N. C. 438, 15 S. E. 193.

[14] See infra, § 125, "Waiver or Loss of Right to Written Instructions."

[15] See supra, § 115, "Rule at Common Law."

[16] Anderson v. State, 34 Ark. 257; Bradford v. People, 22 Colo. 157; Luster v. State, 23 Fla. 339; Sutherland v. Hankins, 56 Ind. 343; Davis v. Wilson, 11 Kan. 74; State v. Chevallier, 36 La. Ann. 85; Blackburn v. State, 23 Ohio St. 146.

[17] Jaqua v. Cordesman & Egan Co., 106 Ind. 141. See, also, Mu-

§ 118. Same—Digest of decisions.

Arkansas.

It is error to charge orally when requested to charge in writing. Anderson v. State, 34 Ark. 257. Or to make oral explanations of a written charge. Mazzia v. State, 51 Ark. 177, 10 S. W. 257. The error may be harmless. See National Lumber Co. v. Snell, 47 Ark. 407, 1 S. W. 708. Const. art. 7, § 23, requires the charge or instructions to be in writing, if requested by either party.

Arizona.

In criminal cases, it is reversible error to charge orally unless written instructions are expressly waived. Territory v. Kennedy, 1 Ariz. 505; Territory v. Duffield, 1 Ariz. 58; Territory v. Gertrude, 1 Ariz. 74.

California.

The act of 1855, § 1 (Code Civ. Proc. § 608, requiring instructions to be written, is mandatory, and not directory. People v. Beeler, 6 Cal. 246. Judgment reversed because of oral instructions. People v. Beeler, 6 Cal. 246; People v. Demint, 8 Cal. 423; People v. Payne, 8 Cal. 341; People v. Ah Fong, 12 Cal. 345; People v. Woppner, 14 Cal. 437; People v. Sanford, 43 Cal. 29. An oral modification of a written instruction is erroneous. People v. Payne, supra. In criminal cases, the giving of oral instructions is reversible error (People v. Carrillo, 70 Cal. 643; People v. Cox, 76 Cal. 281; People v. Hersey, 53 Cal. 575; People v. Curtis, 76 Cal. 57), unless taken down by the official reporter (Pen. Code Cal. § 1093; People v. Leary, 105 Cal. 500; People v. Hersey, supra), unless the defendant consents or waives his right to written instructions (People v. Hersey, 53 Cal. 574; People v. Chares, 26 Cal. 78; People v. Sanford, 43 Cal. 29; People v. Woppner, 14 Cal. 437; People v. Trim, 37 Cal. 274; People v. Max, 45 Cal. 254; People v. Ah Fong, 12 Cal. 345; People v. Bumberger, 45 Cal. 650; People v. Kearney, 43 Cal. 383). The consent of the defendant cannot be presumed from his presence and failure to object at the time the oral instruction was given. People v. Chares, 26 Cal. 78; People v. Sanford, 43 Cal. 29; People v. Prospero, 44 Cal. 186. The defendant need not except to the charge at the time it was given. People v. Ah Fong, 12 Cal. 345. An oral charge in the absence of the reporter is error. People v. Hersey, 53 Cal. 574; People v. Leary, 105 Cal. 500. Where the reporter is present, his failure to perform his duty and take down fully and correctly

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tual Ben. Life Ins. Co. v. Miller, 39 Ind. 475. Compare Toledo & W. Ry. Co. v. Daniels, 21 Ind. 256; Newton v. Newton, 12 Ind. 527.

the charge as given will not be imputed as error to the court. The judge may, in such case, put into the bill of exceptions what was actually said. People v. Cox, 76 Cal. 281, explained in People v. Leary, 105 Cal. 500.

Colorado.

Instructions must be in writing. Mills' Ann. Code, § 187, subdivision 6; Gile v. People, 1 Colo. 60; Montellus v. Atherton, 6 Colo. 224; Lee v. Stahl, 9 Colo. 208; Brown v. Crawford, 2 Colo. App. 235, affirmed Crawford v. Brown, 21 Colo. 272; Wettengel v. City of Denver, 20 Colo. 552, 39 Pac. 343. Instructions required to be in writing cannot be orally qualified or modified. Dorsett v. Crew, 1 Colo. 18. In criminal cases, under Mills' Ann. St. § 1468, oral instructions may be given unless written instructions are requested. Bradford v. People, 22 Colo. 157. Oral instructions are reversible error where counsel do not agree. Wettengel v. City of Denver, 20 Colo. 552; Lee v. Stahl, 9 Colo. 208. And such consent must be affirmatively shown. Dorsett v. Crew, 1 Colo. 18; Gile v. People, 1 Colo. 60.

Connecticut.

Revision 1875, p. 442, § 2 (now appealed,—Acts 1884, p. 375), required a written charge upon written requests. This was held to be mandatory. Wilson v. Town of Granby, 47 Conn. 59. Noncompliance was ground for a new trial. Allen v. Rundle, 50 Conn. 33.

Florida.

Oral instructions held erroneous. Doggett v. Jordan, 2 Fla. 541, 3 Fla. 215; Dixon v. State, 13 Fla. 637, 650; Long v. State, 11 Fla. 295. "The judge may omit to charge the jury, without error, when no instructions are specially requested in writing, but when he charges the jury he must confine himself to the law applicable to the case, and reduce his charge to writing before it is delivered." Long v. State, 11 Fla. 295. After the court had finished its charge, one of the jurors asked whether they must believe all the testimony, or could disbelieve any part of it. The court answered orally that they could reject, etc., and it was held reversible error. Dixon v. State, 13 Fla. 637. In Duggan v. State, 9 Fla. 516, it was held, under Act Jan. 4, 1848, § 8, that a judgment in a criminal case would always be reversed where it did not appear that the charge was reduced to writing and filed in the case. But in the later case of Luster v. State, 23 Fla. 339, it was held that the charge might be oral, in the absence of a timely request for a charge in writing. So, also, the error may be waived by failure to object before the retirement of the jury. Gibson v. State, 26 Fla. 109. See, generally, infra, § 126, "Waiver or Loss of Right to Written Instructions."

Georgia.

Failure to charge in writing when requested is reversible error. Code, § 244; Fry v. Shehee, 55 Ga. 208; Willis v. State, 89 Ga. 188; Jones v. State, 65 Ga. 507; Bowden v. Achor, 95 Ga. 243. Compare Miller v. Mitchel, 38 Ga. 312.

Illinois.

Giving oral instructions constitutes error. Illinois Practice Act (Starr & C. Ann. St. 1896, p. 3047) § 52; McEwen v. Morey, 60 Ill. 32; Ellis v. People, 159 Ill. 337; Ray v. Wooters, 19 Ill. 82; Greathouse v. Summerfield, 25 Ill. App. 296; Bates v. Ball, 72 Ill. 112; Illinois Cent. R. Co. v. Hammer, 85 Ill. 526; City of Abingdon v. Meadows, 28 Ill. App. 442; Arcade Co. v. Allen, 51 Ill. App. 305; Brown v. People, 4 Gilman, 439.

Indiana.

It is reversible error to charge orally when requested to charge in writing. Jaqua v. Cordesman & Egan Co., 106 Ind. 141; Smurr v. State, 88 Ind. 504; Bottorff v. Shelton, 79 Ind. 98; Hauss v. Niblack, 80 Ind. 407; Laselle v. Wells, 17 Ind. 33; Provines v. Heaston, 67 Ind. 482; Bosworth v. Barker, 65 Ind. 595; Bradway v. Waddell, 95 Ind. 170; Stephenson v. State, 110 Ind. 358, 11 N. E. 360; Davis v. Foster, 68 Ind. 238; Toledo & W. Ry. Co. v. Daniels, 21 Ind. 256; Newton v. Newton, 12 Ind. 527; Hardin v. Helton, 50 Ind. 319; Gray v. Stivers, 38 Ind. 197; Shafer v. Stinson, 76 Ind. 374.

Iowa.

All instructions must be in writing, and it is error to instruct orally. Code, §§ 2784, 4440; Head v. Langworthy, 15 Iowa, 235; Pierson v. Baird, 2 G. Greene, 235; State v. Birmingham, 74 Iowa, 407; Harvey v. Tama County, 53 Iowa, 228; Parris v. State, 2 G. Greene, 449; State v. Harding, 81 Iowa, 599.

Kansas.

In criminal cases, the judge must instruct the jury in writing, and the charge must be filed away among the papers in the cause. Gen. St. 1901, § 4722. Noncompliance is reversible error. State v. Bennington, 44 Kan. 583; State v. Huber, 8 Kan. 447; State v. Potter, 15 Kan. 302. In civil cases, the court must instruct in writing when requested so to do by either party. Code Civ. Proc. § 275, subd. 5. Failure to do so is reversible error. Rich v. Lappin, 43 Kan. 666; Wheat v. Brown, 3 Kan. App. 431; City of Atchison v. Jansen, 21 Kan. 560; Jenkins v. Levis, 23 Kan. 255.

Kentucky.

In all criminal cases, the instructions must be in writing, and it is error to charge orally. Payne v. Com., 1 Metc. 377; Coppage v. Com., 3 Bush, 533. In civil cases, written instructions

must be given when requested by either party. Civ. Code, § 317, subd. 5; Louisville & N. R. Co. v. Banks, 17 Ky. Law Rep. 1065, 33 S. W. 627; Ferguson v. Fox's Adm'r, 1 Metc. 86.

Louisiana.

Failure to charge in writing upon a timely request is reversible error. Rev. St. § 2133; State v. Porter, 35 La. Ann. 535; State v. Gilmore, 26 La. Ann. 599; Kellar v. Belleaudeau, 5 La. Ann. 609; State v. Swayze, 30 La. Ann. 1323.

Massachusetts.

All instructions must be reduced to writing and filed in the case. Pub. St. 1882, p. 842, § 11.

Michigan.

In all cases, the charge must be in writing. O'Donnell v. Segar, 25 Mich. 369.

Missouri.

All instructions must be in writing. Oral instructions are reversible error. Hogel v. Lindell, 10 Mo. 483; Walsh v. St. Louis Drayage Co., 40 Mo. App. 339; State v. De Mosse, 98 Mo. 340; City of Cape Girardeau v. Fisher, 61 Mo. App. 509; Mallison v. State, 6 Mo. 399.

Nebraska.

All instructions must be in writing, and the giving of an oral instruction is reversible error. Comp. St. c. 19, §§ 52-56; Hartwig v. Gordon, 37 Neb. 657; Horback v. Miller, 4 Neb. 43; Yates v. Kinney, 23 Neb. 648; Ehrlich v. State, 44 Neb. 810.

Nevada.

All instructions must be in writing, unless by mutual consent. Gen. St. 1885, § 355 ("Crim. Prac. Act"); People v. Bonds, 1 Nev. 33.

North Carolina.

All instructions must be in writing, unless by mutual consent. Comp. Laws, § 4320; People v. Bonds, 1 Nev. 33.

North Carolina.

Instructions must be in writing, when so requested. Noncompliance is reversible error. Code, § 414; Currie v. Clark, 90 N. C. 355; State v. Connelly, 107 N. C. 463; Jenkins v. Wilmington & W. R. Co., 110 N. C. 438.

Ohio.

It is error to charge orally after a timely request to charge in writing. Rev. St. 1890, § 5190, as amended by Act March 3, 1892 (Bates' Ann. St. § 5190); Householder v. Granby, 40 Ohio St. 430; Village of Monroeville v. Root, 54 Ohio St. 523; Hardy v. Turney, 9 Ohio St. 400.

Pennsylvania.

Although it is the duty of the court, under the statute, to reduce to writing and file the points and answers and charge, a failure

to do so is not reversible error. It is sufficient, on error, that the points were sufficiently answered in the charge. Scheuing v. Yard, 88 Pa. 286; Patterson v. Kountz, 63 Pa. 246.

Tennessee.

In civil cases, court must charge in writing when so requested, and it is reversible error to refuse to do so. Code 1896, § 4683; Insurance Co. v. Trustees C. P. Church, 91 Tenn. 136; Equitable Fire Ins. Co. v. Trustees C. P. Church, 91 Tenn. 135. In criminal cases, where a felony is charged, every word of the charge must be in writing (Acts 1873, c. 57), and an oral charge is reversible error. Code 1896, § 7186; Manier v. State, 6 Baxt. 595, overruling Logston v. State, 3 Heisk. 414; Newman v. State, 6 Baxt. 164; Huddleston v. State, 1 Baxt. 109. In misdemeanor cases, a written charge is unnecessary, and a request therefor may be refused. Dobson v. State, 5 Lea, 277.

Texas.

In criminal cases, it is reversible error to charge orally. Winfrey v. State (Tex. Cr. App.) 56 S. W. 919; Carr v. State, 41 Tex. 544; Clark v. State, 31 Tex. 574; Kelley v. State (Tex. Cr. App.) 31 S. W. 390; Smith v. State, 1 Tex. App. 408; Gibbs v. State, 1 Tex. App. 13; West v. State, 2 Tex. App. 210; Lawrence v. State, 7 Tex. App. 192; Trippett v. State, 5 Tex. App. 595; Jordan v. State, 5 Tex. App. 422; Williams v. State, 5 Tex. App. 615; Harkey v. State, 33 Tex. Cr. App. 100. In civil cases, the statute is held to be directory merely, and a violation of it cannot be assigned as error. Reid v. Reid, 11 Tex. 586; Galveston, H. & S. A. Ry. Co. v. Dunlavy, 56 Tex. 256; Boone v. Thompson, 17 Tex. 605; Chapman v. Sneed, 17 Tex. 428; Parker v. Chancellor, 78 Tex. 527; Toby v. Heidenheimer, 1 White & W. Civ. Cas. Ct. App. § 795; Gulf, C. & S. F. Ry. Co. v. Holt, 1 White & W. Civ. Cas. Ct. App. § 835. Contra, Levy v. McDowell, 45 Tex. 220.

Wisconsin.

Under St. Wis. § 2853, instructions must be in writing, whether requested or not. Stringham v. Cook, 75 Wis. 590; Penherthy v. Lee, 51 Wis. 261.

§ 119. When statute applies—What are instructions.

Statutes requiring instructions to be in writing apply only to "instructions," technically so called. Not every remark by the judge to the jury need be in writing, for not every

such communication is an instruction,[18] The court may properly make oral statements to the jury in reference to the form of the verdict, the manner in which the trial has been conducted, the behavior of the jury or counsel or parties, or any other oral statement which does not relate to the rules of law applicable to the case, or which is not intended to guide the jury in their examination of the evidence.[19] Thus, remarks made to the jury just prior to giving written instructions, commenting upon the trial as a long and fatiguing one as a reason for impatience manifested by the court with delays of counsel, and cautioning the jury not to be influenced by any impatient remark, are not within the rule.[20] Neither is a statement addressed to counsel of one of the parties, though in the hearing of the jury, of the reasons for refusing instructions requested.[21] "The mere fact that an oral communication has passed from the court to the jury is not of itself proof that the statute has been disregarded."[22] Remarks made to the jury concerning their duties as jurors, not relating particularly to the case, but of a general character, need not be in writing.[23]

In order to fall within the statutory requirement, the remarks of the judge must amount to a positive direction to the jury as to the principles of law applicable to the case on trial, and the evidence adduced.[24] Instructions, proper,

[18] "The word 'charge,' as used in the statutes, is not intended to include any and every question and answer passing between the court and jury." Millard v. Lyons, 25 Wis. 516.

[19] See McCallister v. Mount, 73 Ind. 559; Lehman v. Hawks, 121 Ind. 541; Hasbrouck v. City of Milwaukee, 21 Wis. 219; Malachi v. State, 89 Ala. 134; State v. Potter, 15 Kan. 302.

[20] Hasbrouck v. City of Milwaukee, 21 Wis. 219.

[21] Hasbrouck v. City of Milwaukee, 21 Wis. 219.

[22] State v. Potter, 15 Kan. 302.

[23] Moore v. City of Platteville, 78 Wis. 644.

[24] Hasbrouck v. City of Milwaukee, 21 Wis. 217; Boggs v. United States, 10 Okl. 424.

are directions as to the law of the case.[25] A statement not bearing upon questions of law or fact involved in the issue is not to be taken as a part of the instruction;[26] and it has been quite uniformly held that remarks made to the jury upon matters not relating particularly to the case on trial, and of a general character as to their duties as jurors, are not a part of the instructions required by the statute to be in writing, and that such remarks will not be a good ground for reversal merely because made orally.[27] Numerous illustrations of these principles will be found in the following section.

§ 120. Same—Digest of decisions.

Remarks held to constitute instructions.

A statement by the court to the jury that "the defendant's attorney had let down the fence, and that all is now before the jury,"

[25] Lawler v. McPheeters, 73 Ind. 579; Fry v. Shehee, 55 Ga. 208; Ellis v. People, 159 Ill. 337; Illinois Cent. R. Co. v. Wheeler, 149 Ill. 525; Dodd v. Moore, 91 Ind. 522; Stanley v. Sutherland, 54 Ind. 339; Dupree v. Virginia Home Ins. Co., 92 N. C. 417; Jenkins v. Wilmington & W. R. Co., 110 N. C. 438. Statements of rules of law governing the matter in issue or the amount of recovery are instructions. Bradway v. Waddell, 95 Ind. 170; Lawler v. McPheeters, 73 Ind. 579; Stanley v. Sutherland, 54 Ind. 339. What the court may say in regard to the principles of law applicable to the case on trial and the evidence adduced is a part of the charge, and must be in writing, if a written charge is required. Hasbrouck v. City of Milwaukee, 21 Wis. 217; Millard v. Lyons, 25 Wis. 517. An instruction which is not to govern the jury, as a matter of law, as to the substance of their verdict, need not be in writing. Burns v. People, 45 Ill. App. 70.

[26] Hasbrouck v. City of Milwaukee, 21 Wis. 219; McCallister v. Mount, 73 Ind. 559; Lawler v. McPheeters, 73 Ind. 577; Lehman v. Hawks, 121 Ind. 541.

[27] See Hasbrouck v. City of Milwaukee, 21 Wis. 238; Grant v. Connecticut Mut. Life Ins. Co., 29 Wis. 125; Millard v. Lyons, 25 Wis. 516; Seymour v. Colburn, 43 Wis. 67; State v. Glass, 50 Wis. 218; Moore v. City of Platteville, 78 Wis. 644. Oral statements as to the form of the verdict, the manner in which the trial has been conducted, the behavior of the jury or counsel or parties, are proper, as is "any other oral statement which is not fairly and strictly a direction or instruction upon some question or rule of law involved in or applicable to the trial, or a comment upon the evidence." State v. Potter, 15 Kan. 302.

is an oral instruction, and therefore erroneous. Coppage v. Com., 3 Bush (Ky.) 532. See, also, Cedar Rapids, I. F. & N. W. Ry. Co. v. Cowan, 77 Iowa, 535, for remarks as to the effect of a stipulation held to constitute harmless error. A remark made by the court in the hearing of the jury has the same effect as if given as a formal instruction. People v. Bonds, 1 Nev. 33.

——*Statement that theory is not tenable.*

The following statement has been held to be an instruction, within the rule requiring instructions to be written, viz.: "This idea of an accident, which has been urged by the defense, amounts to nothing, and is not tenable. There is no evidence to show it was an accident. On the contrary, it shows there was a scuffle, and that the defendant persisted in holding on to the pistol." People v. Bonds, 1 Nev. 31.

——*Direction to try case on the evidence.*

A statement by the judge to the jury, before delivering his written charge, that it is their duty to try the case on the sworn testimony, and to disregard their personal knowledge, is an instruction, and must be in writing. Equitable Fire Ins. Co. v. Trustees of Fosterville C. P. Church, 91 Tenn. 135.

——*As to duty to acquit upon reasonable doubt.*

Where there was a request for written instructions, it was held error to charge the jury orally that, "if the state has failed to make out a case against this defendant beyond a reasonable doubt, or if the defendant, by his evidence, has raised a reasonable doubt, then your verdict will be as follows (reading form of verdict for defendant)." Stephenson v. State, 110 Ind. 358; Smurr v. State, 88 Ind. 504.

——*Recapitulating testimony.*

"When the court has been requested to give the instructions to the jury in writing, it is erroneous to recapitulate the substance of the testimony verbally, notwithstanding the court states that the jury should not take its statements." McClay v. State, 1 Carter (Ind.) 385.

——*Statement as to duty of jury to agree upon verdict.*

An oral statement to the jury in the nature of an argument upon the facts, and in regard to the duty of the jury to agree upon a verdict, is an instruction, within the meaning of the statutes, and is erroneous. City of Abingdon v. Meadows, 28 Ill. App. 442.

——*Direction as to mode of arriving at verdict.*

"It is a violation of our statute for the court to instruct the jury orally as to the impropriety of certain modes of arriving at the amount of a verdict." Illinois Cent. R. Co. v. Hammer, 85 Ill. 526.

——*Statement as to right of jury to disbelieve evidence.*

After the court had finished its charge, one of the jurors asked whether they must believe all the testimony, or could disbelieve any part of it. The court answered orally that they could reject, etc., and it was held reversible error. Dixon v. State, 13 Fla. 637.

——*Reading statute to jury.*

Reading a statute to the jury constitutes an instruction. Bottorff v. Shelton, 79 Ind. 98. And see full collection of cases infra, § 121, "Sufficiency of Compliance with Statute."

Remarks held not to constitute instructions—As to form of verdict.

An oral direction by the court to the jury as to the form of their verdict is not an instruction, and need not be in writing. People v. Bonney, 19 Cal. 427; Illinois Cent. R. Co. v. Wheeler, 149 Ill. 525; Stanley v. Sutherland, 54 Ind. 339; Bradway v. Waddell, 95 Ind. 170; McCallister v. Mount, 73 Ind. 559; Lehman v. Hawks, 121 Ind. 541; State v. Potter, 15 Kan. 302. Contra, Helm v. People, 186 Ill. 153.

The jury may be told orally that they must find one of three verdicts, the forms of which are submitted to them. State v. Glass, 50 Wis. 219. A direction to sign the general verdict is not an instruction. McCallister v. Mount, 73 Ind. 559. A statement that, if the verdict is for the plaintiff, it should be for the amount claimed, and, if for the defendant, it should simply be for the defendant, need not be in writing. Jenkins & Reynolds Co. v. Lundgren, 85 Ill. App. 494. Where the jury return with an informal verdict, the court may direct the jury orally to retire and bring in a verdict covering the issues in the case, such a statement not being an exposition of any principle of law to be applied to the case. Lehman v. Hawks, 121 Ind. 541; Bradway v. Waddell, 95 Ind. 170; State v. Potter, 15 Kan. 302. So, a direction to retire and return a verdict in accordance with the previous charge does not constitute an instruction, and need not be in writing. Johnson v. Rider, 84 Iowa, 50.

——*Direction to find a verdict.*

Directing a jury to find a verdict is not an instruction, and need not be in writing. Stone v. Chicago & N. W. R. Co., 47 Iowa, 82.

——*As to agreement upon a verdict.*

The mere fact that the court made certain oral statements to the jury in relation to their agreeing upon a verdict, after they had retired to consider their verdict, and had been returned into court, is not such an instruction as is required to be in writing by Crim. Code Kan. § 236, where the court did not direct them upon any rule

of law involved in the trial, or make any comment upon the testimony. State v. McLafferty, 47 Kan. 140.

——*As to importance of agreeing upon verdict*

An oral admonition as to the importance of finding a verdict is not an instruction, within the rule. Strepey v. Stark, 7 Colo. 614; Moore v. City of Platteville, 78 Wis. 644. See, also, State v. Jones, 7 Nev. 408.

——*Direction to retire for further consideration of verdict.*

A direction to the jury to retire and consider further of their verdict, and answer an interrogatory previously propounded to them, is not such an instruction as must be in writing. Judge v. Jordan, 81 Iowa, 519.

——*Directing verdict.*

According to some decisions, a direction to the jury to find a verdict for one party, when such direction is proper, is not an instruction, and need not be in writing. Milne v. Walker, 59 Iowa, 186; Young v. Burlington Wire Mattress Co., 79 Iowa, 415; Leggett & Myer Tobacco Co. v. Collier, 89 Iowa, 144; Stone v. Chicago & N. W. R. Co., 47 Iowa, 82; Grant v. Connecticut Mut. Life Ins. Co., 29 Wis. 125. According to other decisions, it is an instruction, within the rule. Greenwich Ins. Co. v. Raab, 11 Ill. App. 636.

——*Direction to answer interrogatories.*

An oral statement by the judge to the jury, directing them to answer certain interrogatories, is not an instruction, within the meaning of the law, and there is no error in making it after a request to instruct in writing. Trentman v. Wiley, 85 Ind. 33; Judge v. Jordan, 81 Iowa, 519; McCallister v. Mount, 73 Ind. 559.

——*Statement as to duty of jurors.*

An admonition by the court, before reading the charge to the jury, that they are to pay particular and careful attention to each word and sentence of the charge, so that they may be advised as to the law of the case, is not a part of the charge, and may be made orally. Sargent v. State, 35 Tex. Cr. App. 325. The court may verbally impress upon the jury the importance of agreeing upon a verdict, point out the expense to the county and to the parties which the suit involves, and ask the individual jurors to listen to the arguments of the others. Moore v. City of Platteville, 78 Wis. 644; cf. Equitable Fire Ins. Co. v. Trustees C. P. Church, 91 Tenn. 135.

——*As to conduct of jurors.*

Oral directions by the court to the jury to retire with their bailiff, to separate for their meals, to seal up their verdict, to abstain

from talking among themselves or with others, to sign their general verdict, or to answer interrogatories, are not instructions, within the meaning of the statute requiring the court to instruct the jury in writing when so requested by a party. McCallister v. Mount, 73 Ind. 559, 567; Trentman v. Wiley, 85 Ind. 33; Lehman v. Hawks, 121 Ind. 541. An oral statement to the jury that it would be improper for them to examine the scene of the accident except by agreement of counsel, and in charge of an officer, and that they must keep away, in the absence of such agreement, is not error. Pioneer Fireproof Const. Co. v. Sunderland, 188 Ill. 341.

——*Remarks on voir dire as to qualifications of jurors.*

Explanatory remarks to the jury, on their voir dire examination, as to what facts will or will not disqualify them, do not violate the statutory prohibition against oral instructions. Oberbeck v. Mayer, 59 Mo. App. 289.

——*Remarks not addressed to jury.*

Where a stipulation in another case was introduced in evidence during the progress of a trial, and the court said, in the presence of the jury, "I shall hold that by that stipulation defendants acknowledge that there was twelve hundred dollars and interest due the said railroad company that has not been paid," it was held that, as the remark was not addressed to the jury, and as there was no conflict in the evidence as to the fact that the amount named was in fact due the railroad company, and the question of indebtedness was fairly submitted to the jury, no prejudice could have resulted from the remark. Cedar Rapids, I. F. & N. W. Ry. Co. v. Cowan, 77 Iowa, 535. A remark of the court, not designed as an instruction to the jury, nor addressed to them, nor of a nature to be considered while they were deliberating upon their verdict, will not be presumed to have influenced their verdict. Cormac v. Western White Bronze Co., 77 Iowa, 32.

——*Remarks leading up to charge.*

It was held in People v. Cox, 76 Cal. 281, that, although it is error to charge a jury in a criminal case orally, "yet, where the record shows that the language used, which was not taken down by the reporter, merely led up to an instruction which was properly taken down, and did not affect nor in any way qualify the charge which was taken down, it is not ground for reversal." If any more absolute rule was intended to be announced in People v. Hersey, 53 Cal. 574, it is to be taken as modified by what was held in the Cox Case.

——*As to admissibility of evidence.*

"A casual remark by the presiding judge to counsel, pending the discussion of a legal question, as to the admissibility of evidence,

though made in the hearing of the jury, is not revisable on error as a ruling or charge, when the record shows that it was not intended for the jury, and it does not appear to have influenced their verdict." Meinaka v. State, 55 Ala. 47.

The court may give its opinion orally of the law governing the admissibility of testimony in the presence of the jury, and although all instructions were requested to be in writing. Fruchey v. Eagleson, 15 Ind. App. 88. See, also, McCormick v. Ketchum, 48 Wis. 643.

——*Statement of purpose of evidence.*

The court may state orally the purpose for which evidence was introduced. Green v. Com., 17 Ky. Law Rep. 943, 33 S. W. 100; Farmer v. Thrift, 94 Iowa, 374. Explanations or statements made by the court, during the trial, to the jury, in order that they may understand the purpose and condition on which the evidence is admitted, are not "instructions" which, on request, should be in writing. Stanley v. Sutherland, 54 Ind. 339. An oral statement by the judge during the trial, limiting the application of the evidence, and stating the grounds and purposes for which it is admissible, is not reversible error. State v. Becton, 7 Baxt. (Tenn.) 139.

——*Recapitulation of evidence.*

The recapitulation of the evidence need not be in writing. Jenkins v. Wilmington & W. R. Co., 110 N. C. 442; Dupree v. Virginia Home Ins. Co., 92 N. C. 417.

——*Repeating admissions made by party.*

Where, in an action for personal injuries, the defendants, at the close of the trial, admit that the premises where the accident occurs was owned and controlled by them, and the court merely repeats, in the hearing of the jury and of the counsel on both sides, so that the jury can understand what it is, the statute prohibiting oral instructions is not violated. Hinckley v. Horazdowsky (Ill.) 23 N. E. 338.

——*Withdrawing evidence.*

"Oral directions to the jury to reject evidence * * * are not 'instructions.'" Bradway v. Waddell, 95 Ind. 170; Stanley v. Sutherland, 54 Ind. 339; Lawler v. McPheeters, 73 Ind. 579; State v. Good, 132 Mo. 114; Madden v. State, 148 Ind. 183.

——*Withdrawing instructions.*

In reading the instructions to the jury, the judge read one by mistake which he had marked "Refused." He then said to the jury orally that he had read the instruction by mistake, and they should not consider it. Counsel insist that the court erred in making this statement orally. The statement made by the court did not bear

upon any question of law or fact involved in the issue, and should not be taken or treated as a part of the instruction. Ohio & M. Ry. Co. v. Stansberry, 132 Ind. 533; Bradway v. Waddell, 95 Ind. 170; McCallister v. Mount, 73 Ind. 559; Wall v. State, 10 Ind. App. 530, 38 N. E. 190; Edwards v. Smith, 63 Mo. 119.

——*Repeating written instructions orally.*

Where the court, having complied with a request to give its instructions in writing, repeats a portion thereof orally, and no exception is taken to such repetition, it cannot be objected to in the supreme court. Howard v. State, 73 Ind. 528.

——*Stating at whose request instructions are given.*

It is not reversible error, no harm being shown, for the court to state orally to the jury that "defendant's counsel have asked me to give the following instructions." Sample v. State, 104 Ind. 289. See, also, Dodd v. Moore, 91 Ind. 522; Scott v. Chicago, M. & St. P. R. Co., 68 Iowa, 360.

——*Remarks as to right of court to instruct.*

A statute requiring a charge "to be in writing is not violated by the judge telling the jury that he could not instruct them as to matters of fact." State v. Waterman, 1 Nev. 543.

——*Reply to exception to charge.*

The following remark in reply to an exception to charge, viz., "I have not attempted to state what the facts are, but simply what is claimed," is in no sense a charge. Malachi v. State, 89 Ala. 134, 8 So. 104.

——*Answering questions of jury.*

"Where, after having received full written instructions, the jury returned into court, and, in the absence of the official reporter, orally asked the court whether, if the defendant was found guilty of murder in the first degree, the jury could fix the punishment of imprisonment for life, to which the court orally answered that they could, if that was their verdict, and, upon one of the jurymen orally asking whether the jury could bring in any one of the six verdicts given to the jury which they might agree upon, the court orally answered, 'Yes,' such oral conversation and instruction to the jury causes no prejudicial injury to the defendant, and is not ground for a new trial." People v. Leary, 105 Cal. 487.

——*Answering irrelevant questions.*

Where the jury returned and inquired what was the least punishment for the offense charged, and the court replied orally that the jury had nothing to do with that matter, but informed them of the

penalty, it was held that such remarks were immaterial, and not erroneous for not being in writing. People v. Jackson, 57 Cal. 316.

——*Answering question by simple affirmance or denial.*

"Where a juror propounds a question to the court, it may make a direct answer without reducing the same to writing, provided, in so doing, it does not make an independent statement of a rule of law. In other words, where the question of the juror is the full statement of the rule, and the answer is no more than an affirmation or denial, such affirmation or denial need not be reduced to writing before it is given." State v. Potter, 15 Kan. 302.

——*Refusal to answer questions of jury.*

Where the jury send questions to the judge, who, in reply, states that such questions have nothing to do with the case under the evidence and instructions given, such reply is not an instruction, but rather a refusal to instruct, and need not be in writing. Sullivan v. Collins, 18 Iowa, 228. So, the court may tell the jury orally that questions asked by them are irrelevant. Seymour v. Colburn, 43 Wis. 71.

——*Comments on conduct of trial.*

"The court may properly make oral statements to the jury in reference to * * * the manner in which the trial has been conducted, the behavior of the jury, or counsel, or parties, or any other oral statement which is not fairly and strictly a direction or instruction upon some question or rule of law involved in or applicable to the trial, or a comment upon the evidence." State v. Potter, 15 Kan. 302.

——*Apologies for impatience at length of trial.*

The following oral remarks were held not erroneous: "Before reading the instructions to you, I desire to say that the trial has been a long and tedious one, occupying one day longer in taking the evidence than any case which has been tried in this circuit for seven years. During the long and fatiguing trial, the court may have become impatient at the delay of the counsel, and made remarks that may possibly have influenced some juror. I wish it especially understood that nothing I have said was intended to influence unduly the verdict of the jury, and I do not wish any juror to be influenced by it in the least." Hasbrouck v. City of Milwaukee, 21 Wis. 227.

——*Directions of counsel as to scope of arguments.*

The court may orally direct counsel to confine their arguments to the points of law which it deems controlling, and may state what

those points are. Such directions are not instructions. O'Hara v. King, 52 Ill. 304.

§ 121. Sufficiency of compliance with statute.

Where instructions are required to be in writing, every word of the charge should be in writing, and it is error to charge the jury orally, either in whole or in part.[28] "Charges in writing should be given literally as they are written."[29] An instruction that the defendant is on trial on the "following indictment," and which says that the defendant has entered a plea of not guilty to such indictment, but which does not actually include the indictment, does not comply with the statute.[30] A judge need not write the whole charge himself, but may adopt part or all from charges of other judges or from books, provided he puts all in such shape that the jury can take it with them to the jury room;[31] but "it is error to

Conway, 7 Ind. 187; Riley v. Watson, 18 Ind. 291; Feriter v. State, 33 Ind. 283; Sutherland v. Venard, 34 Ind. 390; Gray v. Stivers, 38 Ind. 197; Hardin v. Helton, 50 Ind. 319; Watts v. Coxen, 52 Ind. 155; Bosworth v. Barker, 65 Ind. 596; Davis v. Foster, 68 Ind. 238; State v. Bennington, 44 Kan. 583; Householder v. Granby, 40 Ohio St. 430; Manier v. State, 6 Baxt. (Tenn.) 595. See, also, infra, § 123, "Oral Explanations, Modifications, and Additions." "The judge having refused to give instructions asked for by the defendant, and having given oral instructions, subsequently, and before the jury retired, gave the jury written instructions offered by the plaintiff, saying to the jury that the written instructions thus given were substantially the oral instructions he had given, and that he adopted them as the instructions of the court. This is a compliance with the statute, requiring charges in cases of this character to be wholly in writing." Southern Exp. Co. v. Van Meter, 17 Fla. 783.

[28] Wheatley v. West, 61 Ga. 401; Rising-Sun & V. Turnpike Co. v.

[29] Morrison v. State (Fla.) 28 So. 97.

[30] State v. Birmingham, 74 Iowa, 407.

[31] Ohio & M. R. Co. v. Sauer, 4 Ohio Cir. Ct. R. 466, wherein the court read part prepared by himself, and part from a copy of a former charge of another judge at a former trial. It was held that error in not putting the charge in such shape that the jury could

give an instruction, not reduced to writing, otherwise than by reference to a certain page of a law magazine."[32] It is sufficient for the judge to dictate an instruction, and for the attorney to reduce it to writing. It is not necessary for the judge to do it with his own hand.[33] A charge written in English, and orally translated for the jury into Spanish, which was their language, is a charge "in writing," within the meaning of the statute,[34] as is also a printed charge,[35] or a charge written in lead pencil.[36]

§ 122. Same—Oral explanations, modifications, and additions.

Under statutes requiring instructions to be in writing, it is error, after written instructions have been given, to make oral explanations or additions, or to orally modify or illustrate the principles of law laid down.[37] The error is not cured by a direction from the court to the jury to consider

take it with them was waived by consent of counsel that it need not go into the jury room.

[32] Hopt v. People, 104 U. S. 631.

[33] Barkman v. State, 13 Ark. 706; Pleasant v. State, 13 Ark. 360.

[34] Territory v. Romine, 2 N. M. 114.

[35] State v. Kelly, 73 Mo. 608; State v. Stewart, 9 Nev. 120; State v. Fooks, 65 Iowa, 196.

[36] Harvey v. Tama County, 53 Iowa, 228.

[37] City Bank of Macon v. Kent, 57 Ga. 283; Willis v. State, 89 Ga. 188; Ray v. Wooters, 19 Ill. 82; Ellis v. People, 159 Ill. 337; Kenworthy v. Williams, 5 Ind. 375; Townsend v. Doe, 8 Blackf. (Ind.) 328; Lung v. Deal, 16 Ind. 349; Laselle v. Wells, 17 Ind. 33; Toledo & W. Ry. Co. v. Daniels, 21 Ind. 256; Meredith v. Crawford, 34 Ind. 399; Bosworth v. Barker, 65 Ind. 595; Provines v. Heaston, 67 Ind. 482; Hauss v. Niblack, 80 Ind. 407; Stephenson v. State, 110 Ind. 358; Parris v. State, 2 G. Greene (Iowa) 449; State v. Harding, 81 Iowa, 599; Bird & M. Map Co. v. Jones, 27 Kan. 177; Payne v. Com., 1 Metc. (Ky.) 378; Hartwig v. Gordon, 37 Neb. 657; Householder v. Granby, 40 Ohio St. 430; McMahon v. State, 1 Tex. App. 102; Rupp v. Shaffer, 21 Ohio Cir. Ct. R. 643, 12 Ohio Cir. Dec. 154.

the oral explanations and illustrations withdrawn,[38] nor by subsequently, after the jury has retired, reducing such verbal explanations in writing;[39] but the error is cured by recalling the jury, adding the remark in writing to the charge, and then reading it to the jury.[40] It has been held that such oral additions to written instructions constitute reversible error, even though such additions are immaterial,[41] but this is at least doubtful; and where the record discloses that oral explanations were made, and states at length what was said, and it appears that it could not and did not modify the effect of any written charge, it has been held not to be reversible error.[42] Wherever the statute applies at all, it applies equal-

"A judge on the trial of a cause has no authority to affect or change the law, as stated in written instructions, by any statement not in writing. It is error for the court to instruct the jury orally, or to orally explain or modify an instruction." Bradway v. Waddell, 95 Ind. 174. To be available error, it must expressly appear by the bill of exceptions. Hauss v. Niblack, 80 Ind. 407, 416. The error is waived by failure to save an exception. Louisville & N. R. Co. v. Hall, 91 Ala. 112. An oral preface to an instruction, that the judge had concentrated all there was in the instructions in this one, as embodying all the law necessary for the case, when in fact it did not, is error. McEwen v. Morey, 60 Ill. 32. In some states, the statute expressly says that, after the instructions are given, the court shall not "orally qualify, modify, or in any manner explain the same to the jury."

[38] Laselle v. Wells, 17 Ind. 33.

[39] Payne v. Com., 1 Metc. (Ky.) 378. See, also, infra, § 124, "Subsequent Reduction of Oral Charge to Writing."

[40] Powers v. Hazelton & L. Ry. Co., 33 Ohio St. 429.

[41] Ray v. Wooters, 19 Ill. 82.

[42] O'Donnell v. Segar, 25 Mich. 369. See, also, Continental Nat. Bank of New York v. Folsom, 67 Ga. 624, and Fry v. Shehee, 55 Ga. 208. Oral utterances in precise accord with what is written are not

ly to instructions in chief given by the court *suo motu*, and to instructions asked by a party and given by the court.[43] So, also, the rule is applicable to further instructions given after the recall of the jury, or upon a request of the jury for further instructions.[44]

§ 123. Same—Subsequent reduction of oral charge to writing.

In many jurisdictions, it is held not to be a sufficient compliance with the statute to charge the jury orally, and subsequently reduce the charge to writing.[45] Certainly, the object of the statute, which is to insure the preservation of the instructions for review exactly as they were delivered, would be defeated if the judge could charge the jury orally, and trust to memory to reproduce it in writing afterwards.[46]

grounds for a venire de novo. If, however, it is suggested that they are not in accordance with the written charge, they should be reduced to writing. Currie v. Clark, 90 N. C. 355.

[43] Strattan v. Paul, 10 Iowa, 139. In a civil action it is error to orally explain or modify an instruction asked by either party, and equally so for the court, on its own motion, to charge the jury orally. State v. Harding, 81 Iowa, 599.

[44] People v. Woppner, 14 Cal. 437; Willis v. State, 89 Ga. 188; Bowden v. Achor, 95 Ga. 243; State v. Harding, 81 Iowa, 599; State v. Stoffel, 48 Kan. 364; Columbia Veneer & Box Co. v. Cottonwood Lumber Co., 99 Tenn. 122.

[45] Arizona Territory v. Kennedy, 1 Ariz. 505; Payne v. Com., 1 Metc. (Ky.) 377; Long v. State, 11 Fla. 295; Dixon v. State, 13 Fla. 637; Rising-Sun & V. Turnpike Co. v. Conway, 7 Ind. 187; Widner v. State, 28 Ind. 394. "The judge must commit his instructions to writing, and read them to the jury from the original manuscript; and where this is not done, the error is not cured by subsequently reducing them to writing." Territory v. Duffield, 1 Ariz. 58.

[46] Dixon v. State, 13 Fla. 650. In Toledo & W. R. Co. v. Daniels,

But this view has been carried to the extent of prohibiting the giving of oral instructions, even where they are taken down by a stenographer, and afterwards accurately transcribed.[47] It would seem that, in such a case, the error, if any, should be held to be harmless.[48] In some jurisdictions it is deemed a sufficient compliance with the statute to charge the jury orally, and afterwards to reduce the charge to writ-

21 Ind. 260, the court, at the very time the objection was made, set out, in a bill of exceptions, the exact words used by him in his oral charge. It was argued that the purpose of the statute, which was to give the party the benefit of a record containing the words used by the court, had been complied with. But the court said: "We are not inclined to adopt that argument. The statute, as we understand it, requires the court, when asked for written instructions, to reduce them to writing, and then give them, as written, to the jury. This construction of the statute, in its strictness, as a rule of practice, imposes no hardship, and, were the rule once relaxed, it is easy to see that the object of it would be defeated."

[47] Crawford v. Brown, 21 Colo. 272; Bowden v. Achor, 95 Ga. 243; Shafer v. Stinson, 76 Ind. 374; State v. Harding, 81 Iowa, 599; Wheat v. Brown, 3 Kan. App. 431; Rich v. Lappin, 43 Kan. 666; State v. Bennington, 44 Kan. 583. But see Union St. Ry. Co. v. Stone, 54 Kan. 83. Contra, Yates v. Kinney, 23 Neb. 648; State v. Preston (Idaho) 38 Pac. 694. Where the court disregarded a request, properly made, to instruct in writing, and caused a stenographer to take down its oral instructions, a failure to object to this mode of preserving the evidence of the instructions did not waive the request, nor did such mode satisfy the statute. Under such a request, the instructions must be written, and given as written. Shafer v. Stinson, 76 Ind. 374. See, also, Sutherland v. Venard, 34 Ind. 390. But compare State v. Sipult, 17 Iowa, 575.

[48] See State v. Sipult, 17 Iowa, 575; State v. Preston (Idaho) 38 Pac. 694. "Where a simple instruction, without complication, is given orally to the jury, * * * and is thereafter accurately reduced to writing by the judge without unnecessary delay, no prejudice could result to the complaining party, and the statute directs that no judgment shall be reversed for an error which does not affect the substantial rights of the party appealing." National Lumber Co. v. Snell, 47 Ark. 407.

ing.[49] In California, the statute, by its terms, does not require written instructions in criminal cases, provided the instructions given are taken down by the shorthand reporter.[50] The statute in Wisconsin is similar, except that it is not confined to criminal cases.[51]

§ 124. Same—Reading from books and papers.

It has been frequently held that it is not a violation of the statute requiring instructions to be in writing for the court to read to the jury from the statutes of the state, without otherwise embodying such statutes in the written charge.[52] This seems to proceed upon the ground that the statutes of the state are sufficiently fixed, permanent, and known to come within the spirit of the statute requiring instructions to be in writing, for, in preparing a bill of exceptions, it is always conveniently accessible.[53] In this connection, a dis-

[49] National Lumber Co. v. Snell, 47 Ark. 407; Powers v. Hazelton & L. Ry. Co., 33 Ohio St. 429; Yates v. Kinney, 23 Neb. 648.

[50] Pen. Code Cal. § 1093; People v. Leary, 105 Cal. 500; People v. Hersey, 53 Cal. 575; People v. Ferris, 56 Cal. 442.

[51] Laws Wis. 1871, c. 89; Penberthy v. Lee, 51 Wis. 261.

[52] Palmore v. State, 29 Ark. 248; People v. Brown, 59 Cal. 345; People v. Mortier, 58 Cal. 262; People v. Lewis, 64 Cal. 404; State v. Mortimer, 20 Kan. 93; State v. Thomas, 34 La. Ann. 1084; Swartwout v. Michigan Air Line R. Co., 24 Mich. 389; State v. Stewart, 9 Nev. 120. But see Josselyn v. McAllister, 22 Mich. 300.

[53] Palmore v. State, 29 Ark. 268; Swartwout v. Michigan Air Line R. Co., 24 Mich. 389; State v. Stewart, 9 Nev. 120. In Josselyn v. McAllister, 22 Mich. 306, the question was raised whether the entire charge was not vitiated by the course of the judge in reading orally from a text book a passage, with a statement that he would afterwards insert it in the written charge, instead of embodying it there in the first instance. The court, however, refused to decide the question, as no objection was made until after the verdict. A contrary conclusion was reached in People v. Sanford, 43 Cal. 29, but this was overruled by later cases.

tinction has been drawn between reading from the statutes and reading from other books or papers;[54] and it has also been admitted that the case might be different where the jury are to take the charge with them into the jury room.[55] But other courts have held, without qualification, that it is a violation of the statute and error for the court to read from books and papers,—even from the statutes,—where such extracts are not copied into the written charge.[56] This is upon the theory that it is only by a strict enforcement of the statute that the identity of the charge can be secured.[57]

[54] Swartwout v. Michigan Air Line R. Co., 24 Mich. 389.

[55] Swartwout v. Michigan Air Line R. Co., 24 Mich. 389; State v. Stewart, 9 Nev. 120. See Manier v. State, 6 Baxt. (Tenn.) 595. See, also, Hopt v. People, 104 U. S. 631.

[56] Bottorff v. Shelton, 79 Ind. 98; Smurr v. State, 88 Ind. 504; Bradway v. Waddell, 95 Ind. 170; Sellers v. City of Greencastle, 134 Ind. 645; Hall v. Carter (Iowa) 37 N. W. Rep. 956; State v. Birmingham, 74 Iowa, 407; Manier v. State, 6 Baxt. (Tenn.) 595, overruling Logston v. State, 3 Heisk. (Tenn.) 414. See, also, People v. Sanford, 43 Cal. 29, which case, however, is overruled by later cases.

[57] "Where the request to instruct in writing is made, it is not complied with by reading from the statutes of the state or from other law books. This is not reducing the charge to writing, as required by the statute. It is proper, of course, for the court to make extracts which are law and applicable to the case, from any law book, and to copy the same in its written charge, and to read the charge containing such extracts to the jury. The extracts from books given in this way to the jury become part of the court's written charge. The identity of the charge is secured. But if the court may, in charging the jury, where there is a request to instruct in writing, read from law books, reading a few lines here and a few there, omitting occasionally a word or a sentence not deemed applicable to the case, a party would be put to much, and, perhaps, fruitless, effort in collecting together the court's charge." Smurr v. State, 88 Ind. 509. The error may, of course, have been harmless. See Hall v. Carter, 74 Iowa, 364. In Texas, the question has been decided both ways. See Hobbs v. State, 7 Tex. App. 117, and Carr v. State, 41 Tex. 544. It is reversible error to read the complaint and answer to the jury from

§ 125. Waiver or loss of right to written instructions.

The right to have the jury instructed in writing may be waived by the parties concerned, even in criminal cases;[58] but it seems that, if such waiver was induced by any action upon the part of the court or the prosecution, such that the defendant did not dare to insist upon his right to written instructions for fear of prejudicing the jury against him, he will not be bound thereby.[59] The right to written instructions may be expressly waived by consent to an oral charge.[60] It may also be waived or lost by failure to make

the originals, without oral explanation, without copying them into the instruction. Woodruff v. Hensley (Ind. App.) 60 N. E. 312.

[58] Territory v. Gertrude, 1 Ariz. 74; Territory v. Kennedy, 1 Ariz. 505; Territory v. Duffield, 1 Ariz. 58; Bates v. Ball, 72 Ill. 108; Voght v. State, 145 Ind. 12; State v. Bungardner, 7 Baxt. (Tenn.) 163; Penberthy v. Lee, 51 Wis. 261. Contra, State v. Cooper, 45 Mo. 66.

[59] State v. Hopkins, 33 La. Ann. 34; State v. Cooper, 45 Mo. 66. "When, on the application of the counsel of an accused on trial for murder, the judge promises to put his charge to the jury in writing, and up to the close of the trial has failed to do so, the mere fact that the counsel for the accused renounced his right to a written charge, for fear that the additional delay necessary to enable the judge to write out his charge might prejudice the jury against the accused, will not impair the right of the accused to a new trial on the ground that the judge failed to give the written charge." State v. Swayze, 30 La. Ann. 1323, disapproved in State v. Hopkins, 33 La. Ann. 34. In State v. Bungardner, 7 Baxt. (Tenn.) 163, the court said that it was the duty of the judge, under the statute, to charge the jury in writing, and that he was guilty of an impropriety in asking the defendant, in the presence of the jury, to waive the performance of this duty; but as it appeared that the defendant, by his counsel, had freely and voluntarily waived a written charge, the court refused to reverse a conviction.

[60] Rice v. Goodridge, 9 Colo. 237; Keith v. Wells, 14 Colo. 321; Edwards v. Smith, 16 Colo. 529; Continental Nat. Bank of New York v. Folsom, 67 Ga. 624; Bates v. Ball, 72 Ill. 112; Litzelman v. Howell, 20 Bradw. (Ill.) 588; Best v. Wilson, 48 Ill. App. 352; Mutual Ben. Life Ins. Co. v. Miller, 39 Ind. 475; Voght v. State, 145 Ind. 12; State v. Sipult, 17 Iowa, 575; State v. Chevallier, 36

a timely request for written instructions in cases where written instructions are not required unless requested.[61] Where no request for written instructions was made, an objection taken after the giving of oral instructions will not be considered.[62] The withdrawal of a request operates as a waiver.[63] To be in time, the request should be made at or before the close of the evidence,[64] and before the argument is begun.[65] It is too late to make a request for written instructions after the court has began to instruct the jury orally.[66] A rule of

La. Ann. 85; Com. v. Barry, 11 Allen (Mass.) 263; Keithler v. State, 10 Smedes & M. (Miss.) 192; Fitzgerald v. Fitzgerald, 16 Neb. 413; State v. Bungardner, 7 Baxt. (Tenn.) 163; Clark v. State, 31 Tex. 574; Killman v. State, 2 Tex. App. 222; Chamberlain v. State, 2 Tex. App. 451; Goode v. State, 2 Tex. App. 520; Kuhn v. Nelson (Neb.) 85 N. W. 56.

[61] Jones v. State, 65 Ga. 507; Sutherland v. Hankins, 56 Ind. 343; Ferguson v. Fox's Adm'r, 1 Metc. (Ky.) 86; Village of Monroeville v. Root, 54 Ohio St. 523; Hardwick v. State, 6 Lea (Tenn.) 230; Risk v. Ewing (Ky.) 60 S. W. 923.

[62] Davis v. Wilson, 11 Kan. 74.

[63] Continental Nat. Bank of New York v. Folsom, 67 Ga. 624; State v. Hopkins, 33 La. Ann. 34. Where one party requests written instructions, but afterwards withdraws the request, the other party cannot complain of oral instructions merely because he did not hear the withdrawal. Henke v. Babcock (Wash.) 64 Pac. 755.

[64] McJunkins v. State, 10 Ind. 143; Manning v. Gasharie, 27 Ind. 399; Jenkins v. Levis, 23 Kan. 255; Atchison, T. & S. F. R. Co. v. Franklin, 23 Kan. 74. But see Connor v. Wilkie, 1 Kan. App. 492.

[65] Chance v. Indianapolis & W. Gravel Road Co., 32 Ind. 472; Powers v. State, 87 Ind. 144; McCalment v. State, 77 Ind. 250; Welsh v. State, 126 Ind. 71; Atchison, T. & S. F. R. Co. v. Franklin, 23 Kan. 74; Village of Monroeville v. Root, 54 Ohio St. 523; Blackburn v. State, 23 Ohio St. 146. The record must show affirmatively that the request was made before the commencement of the argument in the cause. Welsh v. State, 126 Ind. 71. A request made during the closing argument may be disregarded. Atchison, T. & S. F. R. Co. v. Franklin, 23 Kan. 74.

[66] Newton v. Newton, 12 Ind. 527; Cortner v. Amick, 13 Ind. 463; Boggs v. Clifton, 17 Ind. 217.

court requiring a request for written instructions to be made at or before the commencement of the trial is unreasonable[67] and void, as being repugnant to the statute.[68] The failure to object and save an exception to the giving of an oral instruction waives the error.[69] The objection must be made at the time the oral charge is given,[70] and it comes too late if not made until after the retirement of the jury,[71] or after verdict,[72] or for the first time upon motion for a new trial.[73] The objection, however, must be repeated in the motion for a new trial, or it will be considered as waived.[74] In a few states it is held that, under a statute requiring instructions to be in writing, unless written instructions are waived by consent of parties, the failure to object and save an exception does not operate as a waiver, and the judgment will be reversed unless the record affirmatively shows consent to the

[67] Connor v. Wilkie, 1 Kan. App. 492.

[68] Laselle v. Wells, 17 Ind. 33.

[69] Louisville & N. R. Co. v. Hall, 91 Ala. 113; Jacobs v. Mitchell, 2 Colo. App. 456; Stamm v. Coates, 4 Dak. 69; Heaston v. Cincinnati & F. W. R. Co., 16 Ind. 275; Tenbrook v. Brown, 17 Ind. 410; Sutherland v. Venard, 34 Ind. 390; Head v. Langworthy, 15 Iowa, 235; State v. Sipult, 17 Iowa, 575; Prater v. Snead, 12 Kan. 447; State v. Potter, 15 Kan. 303; Bird & M. Map Co. v. Jones, 27 Kan. 177; Josselyn v. McAllister, 22 Mich. 300; Garton v. Union City Nat. Bank, 34 Mich. 279; State v. De Mosse, 98 Mo. 340; Power v. Larabee, 2 N. D. 141; Village of Monroeville v. Root, 54 Ohio St. 523; Frye v. Ferguson, 6 S. D. 392; Carr v. State, 41 Tex. 543; Vanwey v. State, 41 Tex. 639; Stringham v. Cook, 75 Wis. 590.

[70] State v. Outs, 30 La. Ann. 1155; State v. Barrow, 31 La. Ann. 691; State v. De Mosse, 98 Mo. 340; Vanwey v. State, 41 Tex. 639.

[71] Gibson v. State, 26 Fla. 109; Garton v. Union City Nat. Bank, 34 Mich. 279.

[72] Josselyn v. McAllister, 22 Mich. 306.

[73] Vanwey v. State, 41 Tex. 639; Goode v. State, 2 Tex. App. 520; Franklin v. State, 2 Tex. App. 8.

[74] Horbach v. Miller, 4 Neb. 43, citing Midland Pac. R. Co. v. McCartney, 1 Neb. 404; Mills v. Miller, 2 Neb. 317; Wells, Fargo & Co. v. Preston, 3 Neb. 446.

oral instructions;[75] but in other states, under similar statutes, the ordinary rule is applied, and, in the absence of objection, the giving of oral instructions is not reversible error.[76]

[75] Territory v. Gertrude, 1 Ariz. 74; Territory v. Duffield, 1 Ariz. 58; People v. Trim, 37 Cal. 274; People v. Sanford, 43 Cal. 29; People v. Chares, 26 Cal. 78; People v. Bonds, 1 Nev. 33.

[76] Keithler v. State, 10 Smedes & M. (Miss.) 192; Horbach v. Miller, 4 Neb. 43; Republican Val. R. Co. v. Arnold, 13 Neb. 485; Goode v. State, 2 Tex. App. 520; Franklin v. State, 2 Tex. App. 8; Vanwey v. State, 41 Tex. 639; Clark v. State, 31 Tex. 575.

CHAPTER XIII.

REQUESTS FOR INSTRUCTIONS.

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I. Right to Instruct in Absence of Request.

§ 126. Rule stated.

At common law, and unless prohibited by statute, the court has a right to give the jury correct instructions applicable to the law and facts of the case, irrespective of whether any instructions have been requested by the parties or not.[1] The court may volunteer an instruction embracing its views of the law;[2] and, indeed, it is the duty of the court to do so where the justice of the case seems to require it.[3] But by

[1] Brown v. People, 9 Ill. 439; City of Chicago v. Keefe, 114 Ill. 222; Thistle v. Frostburg Coal Co., 10 Md. 129; State v. Burns, 8 Nev. 251; State v. Pierce, 8 Nev. 291; Gwatkin v. Com., 9 Leigh (Va.) 678; Blunt v. Com., 4 Leigh (Va.) 689. A justice of the peace has no authority to instruct a jury, in the absence of a statute expressly conferring such power. St. Joseph Mfg. Co. v. Harrington, 53 Iowa, 380.

[2] Thistle v. Frostburg Coal Co., 10 Md. 129. The court has the right to volunteer an additional charge on the general rule as to finding according to a preponderance of the evidence. Parker v. Georgia Pac. Ry. Co., 83 Ga. 539.

[3] Gwatkin v. Com., 9 Leigh (Va.) 678. But see infra, § 128, "Where no Instructions are Given." One of the very objects of having a judge is to instruct the jury on the law applicable to the case. Hence it is rather a duty than error for the court, on its own motion, to instruct the jury, where it seems to be required by the justice of the case. Stumps v. Kelley, 22 Ill. 140.

statute in Mississippi, the giving of instructions is prohibited, in the absence of a request for instructions.[4] Under this statute, the giving of even a correct instruction, in the absence of a request, is reversible error.[5] But where the court is requested to charge upon a certain point, the court is not confined to merely giving or refusing the identical charge asked, but may modify it, or may refuse it, and give another instruction materially different.[6]

II. NECESSITY OF REQUEST AS FOUNDATION FOR ERROR.

§ 127. Where no instructions are given.

In a number of states the rule is well established that, if the parties desire to have instructions given to the jury, they must make a proper request for instructions, and, in the absence of such a request, it is not error for the court to totally

[4] Archer v. Sinclair, 49 Miss. 343; Davis v. Tiernan, 2 How. (Miss.) 786; Williams v. State, 32 Miss. 389; Montgomery v. Griffin, Walk. (Miss.) 453; Edwards v. State, 47 Miss. 581; Stewart v. State, 50 Miss. 587; Bangs v. State, 61 Miss. 363. The circuit judge has no power to originate independent instructions not called for nor rendered necessary by those requested by counsel, "and he cannot evade this in a criminal case by handing the charge to the district attorney, who returns it requesting that it be given, which the judge does." Watkins v. State, 60 Miss. 323.

[5] Williams v. State, 32 Miss. 389.

[6] Watkins v. State, 60 Miss. 323. The statute forbidding judges to charge the jury, except when requested, should receive a liberal construction in favor of the judge's power, and he is not bound by it to give the identical charge asked, or refuse it, but, when asked to charge on a certain point, may give an instruction differing materially from the one asked. Carprew v. Canavan, 4 How. (Miss.) 370. "If the charges as asked are correct and pertinent, the safe practice is to give them as propounded. Upon the judge rests the responsibility of a correct statement of the law. He should not permit the jury to be confounded or misled by the language in which instructions are couched." Archer v. Sinclair, 49 Miss. 343.

omit giving any instructions.[7] In other states it is held that it is the duty of the court, whether requested or not, to give instructions substantially covering the material issues in the case, though in some states this rule is confined to criminal cases.[8] The sufficiency of instructions given to comply with this requirement is considered in a succeeding section of this chapter.[9] A failure to instruct the jury will be deemed to be harmless error where, upon a general view

[7] Chung Sing v. United States (Ariz.) 36 Pac. 205; Carter v. Bennett, 4 Fla. 283; Clarke v. Baker, 7 J. J. Marsh. (Ky.) 197; Coates v. Sangston, 5 Md. 121; Drury v. White, 10 Mo. 354; Nolan v. Johns, 126 Mo. 166; Farmer v. Farmer, 129 Mo. 530; Simonds v. Oliver, 23 Mo. 32; Clark v. Hammerle, 27 Mo. 55; Haupt v. Pohlmann, 1 Rob. (N. Y.) 121, 16 Abb. Pr. 301; Bynum v. Bynum, 33 N. C. 632; State v. Morris, 10 N. C. 388; Taft v. Wildman, 15 Ohio, 129; Dewees v. Hudgeons, 1 Tex. 192; Linn v. Wright, 18 Tex. 317; Farquhar v. Dallas, 20 Tex. 200; Berry v. Texas & N. O. Ry. Co., 72 Tex. 620; Womack v. Circle, 29 Grat. (Va.) 208; Stuckey v. Fritsche, 77 Wis. 329; Hepler v. State, 58 Wis. 49.

[8] People v. Byrnes, 30 Cal. 206; Amos v. Amos, 12 Ga. 100; Formby v. Pryor, 15 Ga. 258; Pryor v. Coggin, 17 Ga. 444; Keener v. State, 18 Ga. 194; Freeman v. Hamilton, 74 Ga. 318; Central R. R. v. Harris, 76 Ga. 502; State v. Phipps, 95 Iowa, 487; Owen v. Owen, 22 Iowa, 270; State v. Brainard, 25 Iowa, 572; Douglass v. Geiler, 32 Kan. 499; State v. Pfefferle, 36 Kan. 90; Heilman v. Com., 84 Ky. 461; Barton v. Gray, 57 Mich. 622; People v. Murray, 72 Mich. 10, 40 N. W. 29; State v. Stonum, 62 Mo. 596; State v. Matthews, 20 Mo. 55; Sandwich Mfg. Co. v. Shiley, 15 Neb. 109; Sioux City & P. R. Co. v. Finlayson, 16 Neb. 578; Long v. State, 23 Neb. 33; York Park Bldg. Ass'n v. Barnes, 39 Neb. 834, 58 N. W. 440; German Nat. Bank of Hastings v. Leonard, 40 Neb. 676; Hill v. State, 42 Neb. 503; Housh v. State, 43 Neb. 163; Phifer v. Alexander, 97 N. C. 335; Lister v. State, 3 Tex. App. 18; Jenkins v. State, 1 Tex. App. 346; Wasson v. State, 3 Tex. App. 474; Curry v. State, 4 Tex. App. 574; Robinson v. State, 5 Tex. App. 519; Villareal v. State, 26 Tex. 107; Maria v. State, 28 Tex. 698; Fulcher v. State, 41 Tex. 233; Sanders v. State, 41 Tex. 306; Miers v. State, 34 Tex. Cr. App. 161; Bishop v. State, 43 Tex. 390; Donahue v. Windsor County M. Fire Ins. Co., 56 Vt. 374.

[9] See infra, § 130, "When Insufficient Instructions are Given."

of the whole case, the verdict seems to be right, but it will be reversible error if the verdict appears to be wrong.[10]

§ 128. Same—Digest of decisions.

Rule that instructions are unnecessary in absence of request.

Where the only instructions requested are erroneous, and therefore properly refused, the court need not instruct generally on the law of the case. Womack v. Circle, 29 Grat. (Va.) 192. A party cannot, by asking for an erroneous instruction, or by asking for a general instruction, devolve upon the court the duty of charging the jury on the law of the case. Womack v. Circle, 29 Grat. (Va.) 208. Where the action is triable by the court, and only specific questions of fact are submitted to the jury, the answers to which may be accepted or rejected by the court, no instructions are necessary. Saint v. Guerrerio, 17 Colo. 448. See, also, infra, c. 21, "Instructions to Jury Trying Issues from Court of Chancery." A statute (Rev. St. Wis. § 2853) requiring the court to charge the jury in writing does not make it the duty of the trial judge to charge the jury in every case, but merely requires the charge to be in writing, if a charge is given, and, where no instructions are requested, none need be given. Stuckey v. Fritsche, 77 Wis. 329, 46 N. W. 59; Hepler v. State, 58 Wis. 49.

Rule that court must instruct, even in absence of request—In general.

An entire failure to state the law to the jury is to be distinguished from an omission to instruct on some particular phase of the case, and is erroneous, whether requests for instructions are made or not. Such entire failure has the effect of submitting to the jury the determination, not only of the facts, but also of the law. York Park Bldg. Ass'n v. Barnes, 39 Neb. 834. "In Manufacturing Co. v. Shirley, 15 Neb. 109, 17 N. W. 267, it was said: 'It is undoubtedly the duty of the judge presiding at a trial to instruct the jury upon the law of the case which is to be observed by them; and should a case arise in which it shall appear from the record that the jury has taken a wrong view of the law applicable to the case, and where the judge has failed to instruct them, whether requested by the counsel or not, this court would not hesitate to grant a new trial.' The same principle was substantially announced in C. Aultman & Co. v. Martin (Neb.) 56 N. W. 622. An

[10] Owen v. Owen, 22 Iowa, 270; State v. Brainard, 25 Iowa, 572; State v. Helvin, 65 Iowa, 289; Sandwich Mfg. Co. v. Shiley, 15 Neb. 109; York Park Bldg. Ass'n v. Barnes, 39 Neb. 834.

entire failure to instruct the jury in regard to the law of the case is very different from an omission to instruct in regard to some particular phase of the case, or some particular question arising upon the trial. In the latter case a proper instruction upon the subject must be requested before error can be predicated upon a failure to instruct; but the law imposes upon the court the duty of stating to the jury the law applicable to the case, and an entire failure to state the law to the jury has the effect of submitting to the jury the determination, not only of facts, but of the law. In this case there was a total failure to instruct the jury upon the law of the case. This would not be prejudicially erroneous if it were apparent that the jury had come to a correct conclusion (Manufacturing Co. v. Shiley, supra); but the error is prejudicial if it is apparent that the jury has taken a wrong view of the law. We must therefore examine the record in order to determine that question." York Park Bldg. Ass'n v. Barnes, 39 Neb. 834. In North Carolina, Code, § 413, expressly requires the court to explain the law arising upon the facts. See infra, § 131, "Exceptions to General Rule." Some charge is necessary. State v. Boyle, 104 N. C. 820; Phifer v. Alexander, 97 N. C. 335.

§ 129. Where insufficient instructions are given.

Though the court may very properly give instructions on certain points not touched upon in its general charge, or though it may be most advisable that questions not presented should have been discussed, yet, if it is not claimed that any error is contained in the instructions given, a party who requests no instructions upon the points omitted cannot allege the omissions as error.[11] An omission to instruct on any

[11] See numerous cases collected in digest note infra, § 131. "It is no ground of reversal that the court below omitted to give directions to the jury upon any points of law which might arise in the cause, where it was not requested by either party at the trial. It is sufficient that the court has given no erroneous directions. * * * The court cannot be presumed to do more in ordinary cases than to express its opinion upon questions which the parties themselves have raised on the trial." Pennock v. Dialogue, 2 Pet. (U. S.) 1. "When counsel want every detail of the law applicable to the facts gone over by the court, they should call attention to such minute matters. Unless they do so, the court

point, however material, is not assignable as error if there was no request to instruct upon it.[12] It is sufficient to sustain the verdict that no erroneous instructions were given.[13] In order to raise the question for review, the party must ask the particular instructions desired, and assign their refusal as error.[14] The rule is well settled that it is not sufficient to merely except to the charge of the court as given,—the additional instructions desired must be requested.[15] But

may instruct, in general terms, on broad and controlling principles, and then stop." Moore v. Brown, 81 Ga. 10. "Good faith requires that a litigant who claims to be prejudiced by a ruling of the court shall at once call attention to the fact by apt language, to the end that, if an error has been committed, it may be corrected or put in shape for review on the spot." Smith v. Matthews, 9 Misc. Rep. (N. Y.) 431.

[12] Frick v. Wilson, 36 S. C. 65; Armstrong v. Toler, 11 Wheat. (U. S.) 258; Pennock v. Dialogue, 2 Pet. (U. S.) 1; Mutual Life Ins. Co. v. Snyder, 93 U. S. 393; Texas & P. R. Co. v. Volk, 151 U. S. 73. This rule is not affected by Code N. C. § 412, which declares that the error alleged need not be put in writing, and may be taken advantage of at any time, even on appeal. Terry v. Danville, M. & S. W. R. Co., 91 N. C. 236.

[13] Pennock v. Dialogue, 2 Pet. (U. S.) 1, affirming 4 Wash. C. C. 538, Fed. Cas. No. 10,941; Seabury v. Field, 1 McAll. (U. S.) 60, Fed. Cas. No. 12,575; United States v. Fourteen Packages of Pins, Gilp. (U. S.) 235, Fed. Cas. No. 15,151.

[14] White v. Hand, 76 Ga. 3; Stevens v. Central Railroad & Banking Co., 80 Ga. 24; Du Souchet v. Dutcher, 113 Ind. 249; Burgett v. Burgett, 43 Ind. 78; Lipprant v. Lipprant, 52 Ind. 273; Ireland v. Emmerson, 93 Ind. 6; Carver v. Carver, 97 Ind. 497; Reed v. Call, 5 Cush. (Mass.) 14; Edwards v. Carr, 13 Gray (Mass.) 238; Barr v. City of Omaha, 42 Neb. 341; Hogan v. Cregan, 6 Rob. (N. Y.) 138; Smith v. Matthews, 9 Misc. Rep. 427, 29 N. Y. Supp. 1058; Arey v. Stephenson, 34 N. C. 34; Torrence v. Graham, 18 N. C. 284; Kearney v. Snodgrass, 12 Or. 317; Powell v. Haley, 28 Tex. 52; Gillmore v. State, 36 Tex. 334; Shumard v. Johnson, 66 Tex. 70; O'Neil v. Wills Point Bank, 67 Tex. 36; Freiberg v. Johnson, 71 Tex. 558; Bowden v. Crow, 2 Tex. Civ. App. 591; Gulf, C. & S. F. Ry. Co. v. Shearer, 1 Tex. Civ. App. 343.

[15] Poullain v. Poullain, 79 Ga. 11; Adams v. Stringer, 78 Ind. 175;

the failure or refusal of the court, when asked, to give proper instructions to supply such omissions, is an error of law, and, if excepted to, constitutes a good cause for a new trial.[16] An objection for failure to instruct cannot be raised for the first time on motion for a new trial,[17] or on appeal.[18] A mere promise of the judge to give an instruction upon a cer-

Hodge v. State, 85 Ind. 561; Fitzgerald v. Goff, 99 Ind. 28, 40; Du Souchet v. Dutcher, 113 Ind. 249; Ryan v. Madden, 46 Kan. 245; Emery v. Vinall, 26 Me. 295; State v. Hing, 16 Nev. 307; Dows v. Rush, 28 Barb. (N. Y.) 157; Hotchkins v. Hodge, 38 Barb. (N. Y.) 117; People v. McLaughlin, 2 App. Div. 419, 37 N. Y. Supp. 1005; Gwaltney v. Scottish Carolina Timber Co., 115 N. C. 579; Wright v. Cincinnati St. Ry. Co., 9 Ohio Cir. Ct. R. 503, 2 Ohio Dec. 308; Jones v. State, 20 Ohio, 34; Schryver v. Hawkes, 22 Ohio St. 308; Caveny v. Neely, 43 S. C. 70; Browning v. State, 1 Tex. App. 96; Foster v. State, 1 Tex. App. 363; Porter v. State, 1 Tex. App. 479; Goode v. State, 2 Tex. App. 520; Schell v. State, 2 Tex. App. 31; Forrest v. State, 3 Tex. App. 232; Work v. State, 3 Tex. App. 234; Davidson v. State, 27 Tex. App. 262, 11 S. W. 371; Garner v. Butcher, 1 Posey, Unrep. Cas. (Tex.) 431; Tomlinson v. Wallace, 16 Wis. 224; Lela v. Domaske, 48 Wis. 623; Newton v. Whitney, 77 Wis. 515, 46 N. W. 882. Contra, Donahue v. Windsor County M. Fire Ins. Co., 56 Vt. 374. Where an instruction is manifestly erroneous, and is excepted to, it is not necessary for a party to ask to have it corrected by a proper charge; but "when a charge is not positively erroneous, but merely defective in not stating the law fully, as applicable to the case, then it is the duty of the party who is not satisfied with the charge to request an instruction curing the defect; otherwise, the objection will be considered waived." Missouri, K. & T. Ry. Co. v. Kirschoffer (Tex. Civ. App.) 24 S. W. 577.

[16] Blacketer v. House, 67 Ind. 414; Durant v. Fish, 40 Iowa, 559; Pennock v. Dialogue, 2 Pet. (U. S.) 1. See, also, infra, § 145, "Necessity of Giving Requested Instructions."

[17] Lary v. Young (Tex. Civ. App.) 27 S. W. 908. It is too late, after verdict, to object to the failure to charge upon a particular matter. Boon v. Murphy, 108 N. C. 187.

[18] Goldhammer v. Dyer, 7 Colo. App. 29; Hall v. Incorporated Town of Manson, 90 Iowa, 585; Burkitt v. Twyman (Tex. Civ. App.) 35 S. W. 421.

tain point will not excuse a party from requesting such instruction at the proper time, if he wishes it given.[19]

§ 130. Same—Digest of decisions.

General rule.

A request for proper instructions is necessary to raise the point that the instructions given were insufficient. Hunt v. Toulmin, 1 Stew. & P. (Ala.) 185; Herbert v. Huie, 1 Ala. 18; Ewing v. Sanford, 19 Ala. 605; Hutchinson v. Dearing, 20 Ala. 798; Dave v. State, 22 Ala. 23; Skinner v. State, 30 Ala. 524; Scully v. State, 39 Ala. 240; Robins v. Fowler, 2 Ark. 133; Holt v. State, 47 Ark. 196, 1 S. W. 61; Fordyce v. Jackson, 56 Ark. 594; White v. McCracken, 60 Ark. 613, 31 S. W. 882; People v. Haun, 44 Cal. 96; People v. Ah Wee, 48 Cal. 236; Hart v. Western Union Telegraph Co., 66 Cal. 591; Rice v. Whitmore, 74 Cal. 619; People v. McNutt, 93 Cal. 658; People v. Fice, 97 Cal. 459; People v. Marks, 72 Cal. 46; Scott v. Wood, 81 Cal. 398, 22 Pac. 871; Weinburg v. Somps (Cal.) 33 Pac. 341; Mackey v. Briggs, 16 Colo. 143, 26 Pac. 131; Saint v. Guerrerio, 17 Colo. 448; Goldhammer v. Dyer, 7 Colo. App. 29; Carter v. Bennett, 4 Fla. 283; Cato v. State, 9 Fla. 163; Haber v. Nassitts, 12 Fla. 589; Lungren v. Brownlie, 22 Fla. 491; Rozar v. Burns, 13 Ga. 34; Durand v. Grimes, 18 Ga. 693; Wright v. State, 18 Ga. 383; Averett v. Brady, 20 Ga. 523; Alston v. Grantham, 26 Ga. 374; Brown v. State, 28 Ga. 199; Street v. Lynch, 38 Ga. 631; Nicol v. Crittenden, 55 Ga. 497; Mitchell v. State, 63 Ga. 222; Hardin v. Almand, 64 Ga. 582; Rush v. Ross, 65 Ga. 144; Downing v. State, 66 Ga. 114; Wilson v. State, 69 Ga. 226; Bertody v. Ison, 69 Ga. 317; Sapp v. Faircloth, 70 Ga. 691; City of Atlanta v. Brown, 73 Ga. 631; Bailey v. Ogden, 75 Ga. 874; Central R. Co. v. Harris, 76 Ga. 502; Richmond & D. R. Co. v. Howard, 79 Ga. 45; Rutledge v. Hudson, 80 Ga. 267; White v. Hand, 76 Ga. 3; Stevens v. Central Railroad & Banking Co., 80 Ga. 19, 24; Spurlock v. West, 80 Ga. 302; Moore v. Brown, 81 Ga. 11; McCook v. Harp, 81 Ga. 229; Ronsheim v. Brimberry, 89 Ga. 97; East Tennessee, V. & G. Ry. Co. v. Fleetwood, 90 Ga. 24, 15 S. E. 778; Thomas v. State, 91 Ga. 204, 18 S. E. 305, 95 Ga. 485; Poullain v. Poullain, 76 Ga.

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[19] Carleton v. State, 43 Neb. 373; York Park Bldg. Ass'n v. Barnes, 39 Neb. 834; Avery v. New York Cent. & H. R. R. Co., 17 N. Y. St. Rep. 417, 2 N. Y. Supp. 101; International & G. N. R. Co. v. Smith (Tex. Sup.) 1 S. W. 565. See, also, Louisville, N. A. & C. Ry. Co. v. Hubbard, 116 Ind. 193.

420; Fortson v. Mikell, 97 Ga. 336; Morgan v. Swann, 81 Ga. 207; Hessing v. McCloskey, 37 Ill. 341; Town v. Vinegar Hill v. Busson, 42 Ill. 45; City of Chicago v. Keefe, 114 Ill. 222; Village of Hyde Park v. Washington Ice Co., 117 Ill. 233; Plaut v. Young, 38 Ill. App. 102; Sloan v. Lingafelter, 56 Ill. App. 320; Ames v. Stachurski, 46 Ill. App. 310; Provident Hospital & Training School v. Barbour, 58 Ill. App. 421; Louisville, E. & St. L. Consol. R. Co. v. Spencer, 149 Ill. 97; Boffandick v. Raleigh, 11 Ind. 136; Murray v. State, 26 Ind. 141; Carpenter v. State, 43 Ind. 371; Jones v. State, 49 Ind. 549; Chamness v. Chamness, 53 Ind. 301; Bissot v. State, 53 Ind. 408; Rollins v. State, 62 Ind. 46; Adams v. State, 65 Ind. 565; Blacketer v. House, 67 Ind. 414; McClary v. State, 75 Ind. 260; Adams v. Stringer, 78 Ind. 175; Hatton v. Jones, 78 Ind. 466; Bishop v. Redmond, 83 Ind. 158; Mobley v. State, 83 Ind. 92; Hodge v. State, 85 Ind. 561; Dyer v. Dyer, 87 Ind. 13, 18; Powers v. State, 87 Ind. 144; Wells v. Morrison, 91 Ind. 51; Ireland v. Emmerson, 93 Ind. 1, 6; Garber v. State, 94 Ind. 219; Simpkins v. Smith, 94 Ind. 470; Batten v. State, 80 Ind. 394; Carver v. Carver, 97 Ind. 497; Judd v. Martin, 97 Ind. 173; City of South Bend v. Hardy, 98 Ind. 577; Barnett v. State, 100 Ind. 171; Harper v. State, 101 Ind. 109; Louisville, N. A. & C. Ry. Co. v. Grantham, 104 Ind. 354; Conrad v. Kinzie, 105 Ind. 281; Western Union Telegraph Co. v. Buskirk, 107 Ind. 549; Rauck v. State, 110 Ind. 384; Du Souchet v. Dutcher, 113 Ind. 249; Warner v. State, 114 Ind. 137; Morgan v. State, 117 Ind. 569, 19 N. E. 154; Moore v. Shields, 121 Ind. 267; Marshall v. State, 123 Ind. 128; Cincinnati, I., St. L. & C. Ry. Co. v. Smock, 133 Ind. 411; Morningstar v. Hardwick, 3 Ind. App. 431; Hindman v. Timme, 8 Ind. App. 416; Leeper v. State, 12 Ind. App. 637, 40 N. E. 1113; Insurance Co. of North America v. Brim, 111 Ind. 281; Marshall v. State, 123 Ind. 128; Eppert v. Hall, 133 Ind. 417; German Fire Ins. Co. v. Columbia Encaustic Tile Co., 15 Ind. App. 623; Island Coal Co. v. Neal, 15 Ind. App. 15; Citizens' St. Ry. Co. v. Abright, 14 Ind. App. 433; Ault v. Sloan, 4 Iowa, 508; State v. Tweedy, 11 Iowa, 350; Hubbell v. Ream, 31 Iowa, 289; Dixon v. Stewart, 33 Iowa, 125; Miller v. Bryan, 3 Iowa, 58; Harrison v. Iowa Midland R. Co., 36 Iowa, 323; State v. Hazen, 39 Iowa, 648; Koehler v. Wilson, 40 Iowa, 183; Gwinn v. Crawford, 42 Iowa, 67; Mackie v. Central Railroad of Iowa, 54 Iowa, 540; Hall v. Stewart, 58 Iowa, 681; State v. Helvin, 65 Iowa, 289; Gwynn v. Duffield, 66 Iowa, 708; State v. O'Day, 69 Iowa, 368; Duncombe v. Powers, 75 Iowa, 185; Deere v. Wolf, 77 Iowa, 115; McCausland v. Cresap, 3 G. Greene (Iowa) 161; Wimer v. Allbaugh, 78 Iowa, 79; Churchill v. Gronewig, 81 Iowa, 449; State v. Viers, 82 Iowa, 397, 48 N. W. 732; Wheelan v. Chicago, M. & St. P. Ry. Co., 85

Iowa, 167; State v. Illsley, 81 Iowa, 49, 46 N. W. 977; State v. Watson, 81 Iowa, 380; Buetzier v. Jones, 85 Iowa, 721; Dimmick v. Babcock, 92 Iowa, 692; State v. Phipps, 95 Iowa, 487; State v. Potter, 15 Kan. 302; Douglass v. Geiler, 32 Kan. 499; State v. Shenkle, 36 Kan. 43; State v. Pfefferle, 36 Kan. 90; State v. Peterson, 38 Kan. 211; Phinney v. Bronson, 43 Kan. 451; State v. Estep, 44 Kan. 572; State v. Falk, 46 Kan. 498; Ryan v. Madden, 46 Kan. 245; Hoyt v. Dengler, 54 Kan. 309, 38 Pac. 260; State v. Cox, 1 Kan. App. 447; State v. Scott, 12 La. Ann. 386; Hatch v. Spearin, 11 Me. 354; Inhabitants of Harpswell v. Inhabitants of Phipsburg, 29 Me. 313; Stowell v. Goodenow, 31 Me. 538; Osgood v. Lansil, 33 Me. 360; State v. Straw, 33 Me. 554; Rogers v. Kennebec & P. R. Co., 38 Me. 227; Purrington v. Pierce, 38 Me. 447; Stone v. Redman, 38 Me. 578; State v. Conley, 39 Me. 78; State v. Knight, 43 Me. 11; Darby v. Hayford, 56 Me. 246; Willey v. Inhabitants of Belfast, 61 Me. 569; State v. Reed, 62 Me. 129; Hunter v. Heath, 67 Me. 507; Webber v. Dunn, 71 Me. 331; Hearn v. Shaw, 72 Me. 187; Hall v. Weir, 1 Allen (Mass.) 261; Reed v. Call, 5 Cush. (Mass.) 14; Davis v. Elliott, 15 Gray (Mass.) 90; Corrigan v. Connecticut Ins. Co., 122 Mass. 298; People v. McKinney, 10 Mich. 54; Rankin v. West, 25 Mich. 195; Driscoll v. People, 47 Mich. 413; Copas v. Anglo-American Provision Co., 73 Mich. 541; Peterson v. Toner, 80 Mich. 350; Pickard v. Bryant, 92 Mich. 430; People v. Willett, 105 Mich. 110; Hitchcock v. Supreme Tent, K. M. W., 107 Mich. 391; Little v. Williams, 107 Mich. 632; Minnesota Cent. Ry. Co. v. McNamara, 13 Minn. 508 (Gil. 468); Warner v. Myrick, 16 Minn. 91 (Gil. 81); Jaspers v. Lano, 17 Minn. 296 (Gil. 273); Egan v. Faendel, 19 Minn. 231 (Gil. 191); Le Clair v. First Div. St. Paul & Pac. R. Co., 20 Minn. 9 (Gil. 1); Clapp v. Minneapolis & St. L. Ry. Co., 36 Minn. 6, 29 N. W. 340; Bowe v. Hyland, 44 Minn. 88, 46 N. W. 142; Edwards v. State, 47 Miss. 589; Drey v. Doyle, 99 Mo. 459; Coleman v. Drane, 116 Mo. 387, 22 S. W. 801; Farmer v. Farmer, 129 Mo. 530, 31 S. W. 926; Chicago, M. & St. P. Ry. Co. v. Randolph Town-Site Co., 103 Mo. 468; State v. Haase, 6 Mo. App. 586; Otto v. St. Louis, I. M. & S. Ry. Co., 12 Mo. App. 168; De Laureal v. Kemper, 9 Mo. App. 77; Brown v. Missouri Pac. R. Co., 13 Mo. App. 463; Cahill v. Liggett & Meyers Tobacco Co., 14 Mo. App. 596; Remmler v. Shenuit, 15 Mo. App. 192; McHale v. Oertel, 15 Mo. App. 583; Young v. Keller, 16 Mo. App. 551; Campbell v. St. Louis, I. M. & S. Ry. Co., 16 Mo. App. 553; Estes v. Fry, 22 Mo. App. 80; Tyler v. Larimore, 19 Mo. App. 445; Hyde v. St. Louis Book & News Co., 32 Mo. App. 298; Bindbeutal v. Street Ry. Co., 43 Mo. App. 463; Taylor v. City of Springfield, 1 Mo. App. Rep'r, 383; Hurst v. Scammon, 2 Mo. App. Rep'r, 946; Kelley

v. Cable Co., 7 Mont. 70; Gettinger v. State, 13 Neb. 308, 14 N. W. 403; Burlington & M. R. Co. v. Schluntz, 14 Neb. 421; Sioux City & P. R. Co. v. Finlayson, 16 Neb. 578; Republican Valley R. Co. v. Fellers, 16 Neb. 169; Republican Valley R. Co. v. Fink, 18 Neb. 89; Klosterman v. Olcott, 25 Neb. 382; York Park Bldg. Ass'n v. Barnes, 39 Neb. 834, 58 N. W. 440; German Nat. Bank of Hastings v. Leonard, 40 Neb. 676; Hill v. State, 42 Neb. 503; Carleton v. State, 43 Neb. 402; Carter White Lead Co. v. Kinlin, 47 Neb. 409; Moore v. Ross, 11 N. H. 547; Cole v. Taylor, 22 N. J. Law, 59; Folly v. Vantuyl, 9 N. J. Law, 157; Hetfield v. Dow, 27 N. J. Law, 440; Westcott v. Garrison, 6 N. J. Law, 132; Mead v. State, 53 N. J. Law, 601, 23 Atl. 264; Territory v. O'Donnell, 4 N. M. 66; United States v. De Amador, 6 N. M. 173; United States v. De Lujan, 6 N. M. 179; United States v. Chaves, 6 N. M. 180; State v. Smith, 10 Nev. 106; Gaudette v. Travis, 11 Nev. 149; Allison v. Hagan, 12 Nev. 38; State v. Davis, 14 Nev. 407; State v. St. Clair, 16 Nev. 207; State v. Hing, 16 Nev. 307; Haupt v. Pohlmann, 1 Rob. (N. Y.) 126; Wyman v. Hart, 12 How. Pr. (N. Y.) 122; Law v. Merrills, 6 Wend. (N. Y.) 268; Winchell v. Hicks, 18 N. Y. 558; Parsons v. Brown, 15 Barb. (N. Y.) 594; Dunlop v. Patterson, 5 Cow. (N. Y.) 243; Burtch v. Nickerson, 17 Johns. (N. Y.) 217; Ward v. Lee, 13 Wend. (N. Y.) 41; Gardner v. Picket, 19 Wend. (N. Y.) 186; Ford v. Monroe, 20 Wend. (N. Y.) 210; Simpson v. Downing, 23 Wend. (N. Y.) 316; Stafford v. Bacon, 1 Hill (N. Y.) 532; Underhill v. Pomeroy, 2 Hill (N. Y.) 603; Fisher v. Monroe, 16 Daly, 461, 12 N. Y. Supp. 273; David v. Williamsburgh City Fire Ins. Co., 7 Abb. N. C. (N. Y.) 47; Smith v. Matthews, 9 Misc. Rep. 427, 29 N. Y. Supp. 1058; Hogan v. Cregan, 6 Rob. (N. Y.) 138; Colemard v. Lamb, 15 Wend. (N. Y.) 329; Muller v. McKesson, 73 N. Y. 195; Van Akin v. Caler, 48 Barb. (N. Y.) 58; Stedman v. Western Transportation Co., 48 Barb. (N. Y.) 97; Fasshender v. Western Transit Co., 26 N. Y. St. Rep. 112, 7 N. Y. Supp. 134; Sudlow v. Warshing, 108 N. Y. 520, 15 N. E. 532; Boon v. Murphy, 108 N. C. 187, 12 S. E. 1032; Arey v. Stephenson, 34 N. C. 34; Brown v. Morris, 20 N. C. 429; Hice v. Woodard, 34 N. C. 293; Bynum v. Bynum, 33 N. C. 632; State v. O'Neal, 29 N. C. 251; McRae's Adm'r v. Evans, 18 N. C. 243; Torrence v. Graham, 18 N. C. 284; Simpson v. Blount, 14 N. C 34; Shelfer v. Gooding, 47 N. C. 175; Doe d. Ward v. Herrin, 49 N. C. 23; Boykin v. Perry, 49 N. C. 325; Gillespie v. Shuliberrier, 50 N. C. 157; Higdon v. Chastaine, 60 N. C. 212; Morgan v. Smith, 77 N. C. 37; Harrison v. Chappell, 84 N. C. 258; Horah v. Knox, 87 N. C. 483; Brown v. Calloway, 90 N. C. 118; White v. Clark, 82 N. C. 6; Pierce v. Alspaugh, 83 N. C. 258; Fry v. Currie, 91 N. C. 436; Dupree v. Virginia Home Ins. Co.,

92 N. C. 417; Branton v. O'Briant, 93 N. C. 99; Tayloe v. Old Dominion Steamship Co., 88 N. C. 15; Burton v. Wilmington & W. R. Co., 82 N. C. 504; Thornhurgh v. Mastin, 93 N. C. 258; Morgan v. Lewis, 95 N. C. 296; King v. Blackwell, 96 N. C. 322; Hall v. Castleberry, 101 N. C. 153, 7 S. E. 706; Thompson v. Western Union Telegraph Co., 107 N. C. 449; State v. Jackson, 112 N. C. 850; State v. Varner, 115 N. C. 744, 20 S. E. 518; Gwaltney v. Scottish Carolina T. & L. Co., 115 N. C. 579, 20 S. E. 465; Kendrick v. Dellinger, 117 N. C. 491, 23 S. E. 438; State v. Debnam, 98 N. C. 712; State v. Bailey, 100 N. C. 528; Taft v. Wildman, 15 Ohio, 123; Jones v. State, 20 Ohio, 46; Smith v. Pittsburg, Ft. W. & C. Ry. Co., 23 Ohio St. 10; Doll v. State, 45 Ohio St. 445; Rolling Mill Co. v. Corrigan, 46 Ohio St. 283; Meyer v. State, 1 Ohio N. P. 241, 2 Ohio Dec. 233; Myer v. State, 3 Ohio Dec. 198; Schoellhamer v. Rometsch, 26 Or. 394; Levers v. Van Buskirk, 4 Pa. 309; Seigle v. Louderbaugh, 5 Pa. 490; Dennis v. Alexander, 3 Pa. 50; Fisher v. Filbert, 6 Pa. 61; Crail v. Crail, 6 Pa. 480; Burns v. Sutherland, 7 Pa. 103; Klein v. Franklin Ins. Co., 13 Pa. 247; Holliday v. Rheem, 18 Pa. 465; Mulvany v. Rosenberger, 18 Pa. 203; Wertz v. May, 21 Pa. 274; Huber v. Wilson, 23 Pa. 178; Raush v. Miller, 24 Pa. 277; Storch v. Carr, 28 Pa. 135; Weamer v. Juart, 29 Pa. 257; Reeves v. Delaware, L. & W. R. Co., 30 Pa. 454; Newman v. Edwards, 34 Pa. 32; Deen v. Herrold, 37 Pa. 150; Bain v. Doran, 54 Pa. 124; Walker v. Humbert, 55 Pa. 407; Davis v. Bigler, 62 Pa. 242; Cooper v. Altimus, 62 Pa. 486; Philadelphia & Reading R. Co. v. Getz, 113 Pa. 214; Thomas v. Loose, 114 Pa. 35; Stuckslager v. Neel, 123 Pa. 53; Serfass v. Dreisbach, 141 Pa. 142; Com. v. Zappe, 153 Pa. 498; Brinser v. Longenecker, 169 Pa. 51, 32 Atl. 60; Paterson v. Blaisdell, 169 Pa. 636; Curtin v. Gephart, 175 Pa. 417, 34 Atl. 790; Fox v. Fox, 96 Pa. 60; Lilly v. Paschal's Ex'rs, 2 Serg. & R. (Pa.) 394; Poorman v. Smith's Ex'rs, 2 Serg. & R. (Pa.) 464; Kean v. McLaughlin, 2 Serg. & R. (Pa.) 469; Carothers v. Dunning's Lessee, 3 Serg. & R. (Pa.) 373; Fisher v. Larick, 7 Serg. & R. (Pa.) 99; Morris v. Travis, 7 Serg. & R. (Pa.) 220; Munderbach v. Lutz's Adm'r, 14 Serg. & R. (Pa.) 220; Rahn v. McElrath, 6 Watts (Pa.) 151; Brittain v. Doylestown Bank, 5 Watts & S. (Pa.) 87; Arthurs v. Bascom, 28 Leg. Int. (Pa.) 284; Neely v. Merrick, 7 Phila. (Pa.) 170; Mershon v. Hood, 2 Pittsb. R. (Pa.) 207; Dawson v. Robinson, 3 Wkly. Notes Cas. (Pa.) 449; Menges v. Muncy Creek Township, 1 Penny. (Pa.) 179; Sayer v. Schroeder, 2 Penny. (Pa.) 79; Gowen v. Glaser, 3 Cent. Rep. (Pa.) 109; Beaver v. Sandham, 3 Del. (Pa.) 163; Payne v. Noon (Pa.) 8 Atl. 428; McMeen v. Com., 114 Pa. 300; Kurtz v. Haines (Pa.) 15 Atl. 716; Madsden v. Phoenix Fire Ins. Co., 1 Rich. (S. C.) 24; Abrahams v. Kelly, 2 Rich. (S. C.)

237; Congdon v. Morgan, 13 S. C. 190; Sullivan v. Jones, 14 S. C. 365; Ancrum v. Wehmann, 15 S. C. 122; Fox v. Savannah & C. R. Co., 4 Rich. (S. C.) 543; State v. Dodson, 16 S. C. 463; Carter v. Columbia & G. R. Co., 19 S. C. 26; Jordan v. Laug, 22 S. C. 164; Hume v. Providence Washington Ins. Co., 23 S. C. 199; State v. Anderson, 24 S. C. 113; Asbill v. Asbill, 24 S. C. 360; Du Rant v. Du Rant, 36 S. C. 49, 14 S. E. 929; State v. Davenport, 38 S. C. 348; Dial v. Agnew, 28 S. C. 454; Frick & Co. v. Wilson, 36 S. C. 65; State v. Meyers, 40 S. C. 555; State v. Robinson, 40 S. C. 553; Brown v. Foster, 41 S. C. 118; Caveny v. Neely, 43 S. C. 70; State v. Sullivan, 43 S. C. 205; Hammett v. Brown, 44 S. C. 397; Lagrone v. Timmerman, 46 S. C. 372; Jones v. Spartanburg Herald Co., 44 S. C. 526, 22 S. E. 731; State v. Smith, 10 Rich. Law (S. C.) 341; Bridges v. Vick, 2 Humph. (Tenn.) 516; Mann v. Grove, 4 Heisk. (Tenn.) 405; Butler v. State, 7 Baxt. (Tenn.) 35; Louisville & N. R. Co. v. Wynn, 88 Tenn. 320, 14 S. W. 311; Maxwell v. Hill, 89 Tenn. 584; Dewees v. Hudgeons, 1 Tex. 192; Robinson v. Varnell, 16 Tex. 382; O'Connell v. State, 18 Tex. 343; Linn v. Wright, 18 Tex. 317; Farquhar v. Dallas, 20 Tex. 200; Thompson v. Payne, 21 Tex. 621; Farris v. Bennett's Ex'rs, 26 Tex. 568; Berry v. Donley, 26 Tex. 737; Peeler v. Guilkey, 27 Tex. 355; Metzger v. Wendler, 35 Tex. 367; Greenwood v. State, 35 Tex. 587; Jenkins v. State, 36 Tex. 638; Texas & P. R. Co. v. Casey, 52 Tex. 112; Beazley v. Denson, 40 Tex. 434; Ford v. McBryde, 45 Tex. 499; Van Alstyne v. Houston & T. C. Ry. Co., 56 Tex. 373; San Antonio St. Ry. Co. v. Helm, 64 Tex. 147; International & G. N. Ry. Co. v. Leak, 64 Tex. 654; Cockrill v. Cox, 65 Tex. 669; Liverpool & L. & G. Ins. Co. v. Ende, 65 Tex. 118; Chalk v. Foster, 2 Posey, Unrep. Cas. (Tex.) 704; Smyth v. Caswell, 67 Tex. 567; O'Neil v. Wills Point Bank, 67 Tex. 36; Texas & P. Ry. Co. v. Beard, 68 Tex. 265; Tucker v. Smith, 68 Tex. 473; Half v. Curtis, 68 Tex. 640; Currie v. Gunter, 77 Tex. 490; Texas & P. Ry. Co. v. Brown, 78 Tex. 397; Milmo v. Adams, 79 Tex. 526; Hocker v. Day, 80 Tex. 529; McKinney v. Nunn, 82 Tex. 44; Stephens v. Motl, 82 Tex. 81; Mayer v. Walker, 82 Tex. 222; Wilkinson v. Johnson, 83 Tex. 392; Witt v. Repey, 2 Posey, Unrep. Cas. (Tex.) 654; Gulf, C. & S. F. Ry. Co. v. Jones, 1 Tex. Civ. App. 372; Galveston, H. & S. A. Ry. Co. v. Daniels, 1 Tex. Civ. App. 695; Bowden v. Crow, 2 Tex. Civ. App. 591; Hays v. Hays, 66 Tex. 606, 1 S. W. 895; International & G. N. R. Co. v. Smith (Tex.) 1 S. W. 565; Sanger v. Craddock (Tex.) 2 S. W. 196; Pitkins v. Johnson (Tex.) 2 S. W. 459; Smith v. Caswell (Tex.) 4 S. W. 848; Reed v. Hardeman (Tex.) 5 S. W. 505; Mayer v. Duke, 72 Tex. 445; Trinity & S. Ry. Co. v. Schofield, 72 Tex. 496; Neyland v. Bendy, 69 Tex. 711; Beeks v. Odom, 70 Tex. 183;

Odom v. Woodward, 74 Tex. 41; Adams v. Crenshaw, 74 Tex. 111; Silberberg v. Pearson, 75 Tex. 287, 12 S. W. 850; Railway v. Kell (Tex. App.) 16 S. W. 936; Milburn Wagon Co. v. Kennedy, 75 Tex. 212, 13 S. W. 28; Myer v. Fruin (Tex.) 16 S. W. 868; Gulf, C. & S. F. Ry. Co. v. Box, 81 Tex. 670, 17 S. W. 375; Bluefields Banana Co. v. Wolfe (Tex. Civ. App.) 22 S. W. 269; McLane v. Elder (Tex. Civ. App.) 23 S. W. 757; Richardson v. Jankofsky (Tex. Civ. App.) 23 S. W. 815; Blum v. Jones (Tex. Civ. App.) 23 S. W. 844; Missouri, K. & T. Ry. Co. v. Kirschoffer (Tex. Civ. App.) 24 S. W. 577; Receivers of Missouri, K. & T. Ry. Co. v. Pfluger (Tex. Civ. App.) 25 S. W. 792; Galveston, H. & S. A. Ry. Co. v. McMonigal (Tex. Civ. App.) 25 S. W. 341; Templeton v. Green (Tex. Civ. App.) 25 S. W. 1073; Galveston, H. & S. A. Ry. Co. v. Edmunds (Tex. Civ. App.) 26 S. W. 633; Missouri Pac. Ry. Co. v. Peay (Tex. Civ. App.) 26 S. W. 768; Hargadine v. Davis (Tex. Civ. App.) 26 S. W. 424; Willis v. Lockett (Tex. Civ. App.) 26 S. W. 419; Johnson v. White (Tex. Civ. App.) 27 S. W. 174; Mills v. Haas (Tex. Civ. App.) 27 S. W. 263; Gulf, C. & S. F. Ry. Co. v. Moody (Tex. Civ. App.) 30 S. W. 574; Gulf, C. & S. F. Ry. Co. v. Perry (Tex. Civ. App.) 30 S. W. 709; Reichstetter v. Bostick (Tex. Civ. App.) 33 S. W. 158; City of Waxahachie v. Connor (Tex. Civ. App.) 35 S. W. 692; Decatur Cotton Seed Oil Mill Co. v. Johnson (Tex. Civ. App.) 35 S. W. 951; Stephens v. Anderson (Tex. Civ. App.) 36 S. W. 1000; Walker v. Wait, 50 Vt. 668; State v. Hanlon, 62 Vt. 334; Crawford v. Morris, 5 Grat. (Va.) 90; McQuillan v. City of Seattle, 13 Wash. 600; State v. Robinson, 20 W. Va. 714; State v. Donohoo, 22 W. Va. 761; Lachner v. Salomon, 9 Wis. 129; Chappell v. Cady, 10 Wis. 111; Brower v. Merrill, 3 Pin. (Wis.) 46; Karber v. Nellis, 22 Wis. 215; Weisenberg v. City of Appleton, 26 Wis. 56; Roebke v. Andrews, 26 Wis. 311; Lela v. Domaske, 48 Wis. 623; Knoll v. State, 55 Wis. 249; Clifford v. State, 58 Wis. 477; Austin v. Moe, 68 Wis. 458; Sullivan v. State, 75 Wis. 650; Winn v. State, 82 Wis. 571; Porath v. State, 90 Wis. 537; Schaefer v. Osterbrink, 67 Wis. 495; Stennett v. Bradley, 70 Wis. 278; Lueck v. Heisler, 87 Wis. 644; Bunce v. McMahon, 6 Wyo. 24; Armstrong v. Toler, 11 Wheat. (U. S.) 258, 6 L. Ed. 468; Pennock v. Dialogue, 2 Pet. (U. S.) 1, 7 L. Ed. 327; United States Express Co. v. Kountze, 8 Wall. (U. S.) 342, 19 L. Ed. 457; Butler v. Maples, 9 Wall. (U. S.) 766; Shutte v. Thompson, 15 Wall. (U. S.) 151, 21 L. Ed. 123; Hall v. Weare, 92 U. S. 728; Mutual Life Ins. Co. v. Snyder, 93 U. S. 393, 23 L. Ed. 887; Congress & E. Spring Co. v. Edgar, 99 U. S. 645, 25 L. Ed. 487; Carter v. Carusi, 112 U. S. 478.

Indefinite and uncertain instructions.

The fact that the instructions given are general, indefinite, vague,

or uncertain is not ground for reversal, in the absence of a request for proper instructions. People v. Olsen, 80 Cal. 122, 22 Pac. 125; Hallock v. Iglehart, 30 Ind. 327; Eichel v. Senhenn, 2 Ind. App. 208; Gastlin v. Weeks, 2 Ind. App. 222; Morningstar v. Hardwick, 3 Ind. App. 431; State v. Jelinek, 95 Iowa, 420; State v. Falk, 46 Kan. 500; Clapp v. Minneapolis & St. L. Ry. Co., 36 Minn. 6, 29 N. W. 340; Warner v. Myrick, 16 Minn. 91; Sioux City, etc., R. Co. v. Brown, 13 Neb. 317; Rousel v. Stanger, 73 Tex. 670, 11 S. W. 906; Lela v. Domaske, 48 Wis. 623; Page v. Town of Sumpter, 53 Wis. 652.

Ambiguous instructions.

A merely ambiguous instruction is not ground for reversal, in the absence of a request for proper instructions correcting the defect. Sharp v. Burns, 35 Ala. 663; Stratton v. Staples, 59 Me. 94; McCormick v. Louden, 64 Minn. 509; Boyle v. Louden, 64 Minn. 509; Kearney v. Snodgrass, 12 Or. 317; Schoellhamer v. Rometsch, 26 Or. 394; McQuillan v. City of Seattle, 13 Wash. 600, 43 Pac. 893; Box v. Kelso, 5 Wash. 360; Schuylkill & Dauphin Imp. & R. Co. v. Munson, 14 Wall. (U. S.) 442. "Where a charge is merely ambiguous, a party dissatisfied with it ought, before the jury leave the bar, to ask the court to make it clear. He should not acquiesce in the correctness of the instruction, take his chance with a jury, and, after the verdict is against him, claim the benefit of the ambiguity on error." Schuylkill & Dauphin Imp. & R. Co. v. Munson, 14 Wall. (U. S.) 442.

Obscure instructions.

The mere fact that an instruction is obscure is not ground for reversal. The party complaining must ask an explanatory or qualifying charge. State v. Brinyea, 5 Ala. 241; Jones v. Fort, 36 Ala. 449; Pulliam v. Newberry's Adm'r, 41 Ala. 168; Johnson v. State, 14 Ga. 55; Stockwell v. Byrne, 22 Ind. 6; Fife v. Commonwealth, 29 Pa. 429.

Misleading instructions.

The mere fact that the charge, though correct, might mislead the jury, or has a tendency to mislead, is not reversible error, in the absence of a request for a proper instruction. Casky v. Haviland, 13 Ala. 321; Hodges v. Branch Bank at Montgomery, 13 Ala. 455; Kenan v. Holloway, 16 Ala. 53; Ewing v. Sanford, 19 Ala. 605; Fitzpatrick v. Hays, 36 Ala. 684; Hughes v. Hughes' Ex'r, 31 Ala. 519; Abraham v. Nunn, 42 Ala. 57; Durrett v. State, 62 Ala. 434; Towns v. State, 111 Ala. 1; Jones v. State, 49 Ind. 549; Deere v. Wolf, 77 Iowa, 115; Gwinn v. Crawford, 42 Iowa, 63; Churchill v. Gronewig, 81 Iowa, 449; Milne v. Pontchartrain R. Co., 9 La.

257; Hyde v. St. Louis Book & News Co., 32 Mo. App. 298. But where the almost necessary effect of the charge is to mislead the jury, or where the result shows that the jury were probably misled, it seems that the judgment should be reversed. Toulmin v. Lesesne, 2 Ala. 359; Towns v. Riddle, 2 Ala. 694; Kenan v. Holloway, 16 Ala. 53; Towns v. State, 111 Ala. 1; Peirson v. Duncan, 162 Pa. 187, 29 Atl. 733; International & G. N. Ry. Co. v. Philips, 63 Tex. 590. In many cases, the general rule that a request is necessary is stated with the proviso that the instructions given were not misleading. Hill v. Newman, 47 Ind. 187; Jones v. State, 49 Ind. 549; Driscoll v. People, 47 Mich. 413; Schryver v. Hawkes, 22 Ohio St. 308; Ott v. Oyer's Ex'x, 106 Pa. 7. "If the instructions given are correct, are applicable to the facts, and are not fairly open to misconstruction, there can be no reversal for their want of greater fullness." Hyde v. St. Louis Book & News Co., 32 Mo. App. 298. If the counsel was apprehensive that the jury would understand the court as saying that probable cause was a question of fact, and not of law, he should have required the instruction to be made more definite, by calling on the court to pass upon such proposition more definitely. Wyman v. Hart, 12 How. Pr. (N. Y.) 122; Winchell v. Hicks, 18 N. Y. 558; Law v. Merrills, 6 Wend. (N. Y.) 268; Haupt v. Pohlmann, 1 Rob. (N. Y.) 126. A charge to the jury, asserting that an equal distribution of the testator's property among his children "is no legal reason why it should be considered an irrational act," is not erroneous, though it may be calculated to mislead the jury. Explanatory charges should have been asked. Hughes v. Hughes' Ex'r, 31 Ala. 519.

Exceptions, qualifications, and limitations.

Where the instructions given are abstractly correct, but it is claimed that in the particular case there are exceptions, qualifications, or limitations to the general rule laid down, which should be given, a failure to state such exceptions, qualifications, or limitations is not error, in the absence of a request to do so. Ivey's Adm'r v. Owens, 28 Ala. 648; Bartlett v. Board of Education of Freeport School Dist., 59 Ill. 364; Reissner v. Oxley, 80 Ind. 580; State v. Tweedy, 11 Iowa, 350; Gwinn v. Crawford, 42 Iowa, 67; Malone v. State, 77 Ga. 767; State v. Phinney, 42 Me. 384; Eaton v. New England Telegraph Co., 68 Me. 63; McKnight v. Chicago, M. & St. P. Ry. Co., 44 Minn. 141, 46 N. W. 294; Haymaker v. Adams, 1 Mo. App. Rep'r, 409; People v. Moett, 58 How. Pr. (N. Y.) 467; Fasshender v. Western Transit Co., 26 N. Y. St. Rep. 112; Texas & N. O. Ry. Co. v. Crowder, 70 Tex. 222; Gallagher v. Bowie, 66 Tex. 265. "If a party desires that the exceptions to a general

rule of law be stated in an instruction to a jury, he should, in general, ask the court so to do; but where the court states a legal proposition, and that the same is the rule 'except in cases I shall hereafter enumerate,' if the court afterwards undertakes to enumerate the exceptions, he must state them all, and for a failure so to do the judgment will be reversed." Wells v. Morrison, 91 Ind. 52. The failure to state an exception to the general rule as to the burden of proof in actions against carriers for injury to goods is not reversible error, where the charge was not excepted to, and no request for a further charge was made. Fasshender v. Western Transit Co., 26 N. Y. St. Rep. 112, 7 N. Y. Supp. 134. The court charged as follows: "If the jury believe from the evidence that M. was justly and honestly indebted to B. the sum for which the judgment was rendered, * * * he had a right to prefer B. by confessing said judgment." Held that, if appellants desired that these instructions should be qualified by adding, "if there are no distinctive badges of fraud to vitiate the transaction," they should have asked it. Stockwell v. Byrne, 22 Ind. 6.

Misapprehension of request.

If the court misapprehend the meaning of a point submitted to counsel, it is his duty to call the judge's attention to it, otherwise he will be concluded by the interpretation put upon it by the court. Booth v. Boston & A. R. Co., 73 N. Y. 38.

Overlooking requests.

Where a point on "which the court had been requested to charge was forgotten, but at the end of his charge the court asked the counsel on both sides if there was any other matter on which they wished instructions, who both answered in the negative, the omission was held not to be a good ground of exception." Gillespie v. Shuliberrier, 50 N. C. 157. Where a party requests a series of instructions, and the court fails to respond to all *seriatim*, but the attention of the court is not, at the close of the charge, called to any one or more of such series, although the counsel of the party are invited by the court to do so, if desired, the failure of the court in this respect is not regarded, in an appellate court, as error, even if some of such instructions ought to be given. Hudson v. Charleston, C. & C. R. Co. (C. C.) 55 Fed. 252.

Explanation of pleadings.

"An objection to an instruction to the jury that it fails to state the difference between the various paragraphs of defendant's answer is unavailable. An instruction covering the point should have been asked." Conrad v. Kinzie, 105 Ind. 281.

Failure to submit an issue.

The failure to submit an issue made by the pleadings and evidence will not be ground for reversal where no request was made that such issue be submitted. Ronsheim v. Brimberry, 89 Ga. 97; Barrett v. Delano (Me.) 14 Atl. 288; Copas v. Anglo-American Provision Co., 73 Mich. 541; McCarvel v. Phenix Ins. Co., 64 Minn. 193; Barr v. City of Omaha, 42 Neb. 341, 60 N. W. 591; Carnes v. Platt, 6 Rob. (N. Y.) 271; Brinser v. Longenecker, 169 Pa. 51, 32 Atl. 60; Hume v. Providence Washington Ins. Co., 23 S. C. 199; Milmo v. Adams, 79 Tex. 526; Wilkinson v. Johnson, 83 Tex. 392, 18 S. W. 746; Texas & P. Ry. Co. v. Gay, 86 Tex. 571, 26 S. W. 599; Missouri Pac. Ry. Co. v. Peay, 7 Tex. Civ. App. 400, 26 S. W. 768; Blackwell v. Hunnicutt, 69 Tex. 273; Myer v. Fruin (Tex.) 16 S. W. 868; Bernheim v. Shannon (Tex. Civ. App.) 21 S. W. 386; Texas & P. Ry. Co. v. Robinson, 4 Tex. Civ. App. 121, 23 S. W. 433; Mills v. Haas (Tex. Civ. App.) 27 S. W. 263; Missouri, K. & T. Ry. Co. v. Kirkland, 11 Tex. Civ. App. 528; Missouri, K. & T. Ry. Co. v. Thompson, 11 Tex. Civ. App. 658; Texas Land & Loan Co. v. Watkins, 12 Tex. Civ. App. 603; Voorheis v. Waller (Tex. Civ. App.) 35 S. W. 807; Newton v. Whitney, 77 Wis. 515, 46 N. W. 882. "On a trial before a jury, where the court directs a verdict for the defendant, if there is any question for the jury, the party should request the court to submit the same. If no such request is made, the question cannot be considered on review." Seymour v. Cowing, 1 Keyes (N. Y.) 532. "Where, in an action against carriers, the plaintiff intends to claim that there is a disputed question of fact in regard to the defendant's negligence, he should make a distinct request that it be submitted to the jury." Stedman v. Western Transp. Co., 48 Barb. (N. Y.) 97. A guarantor, intending to rely on the want of due diligence in collecting, or in efforts to collect, the money due from the principal, should distinctly raise the question at the trial by asking specific instructions to be given to the jury. Gallagher v. White, 31 Barb. (N. Y.) 92. "Where the evidence is barely sufficient, if at all, to raise the issue of fraud, failure of the court to charge on such issue is error of omission, and can be taken advantage of only where appellant asked correct instruction below covering the omission." Kidwell v. Carson, 3 Tex. Civ. App. 327. The court below does not err in failing to instruct the jury upon defendant's plea of privilege of being sued in another county, where no such instruction is requested by them, and the error is therefore one of omission, of which they cannot complain. Sigal v. Miller (Tex. Civ. App.) 25 S. W. 1012. Where, in an action to recover for goods furnished to one alleging himself to be an infant, the only evidence as to defendant's age is the testimony of his father, it

cannot be contended that the court erred in submitting the question of his age to the jury, where defendant did not request an instruction that his age was conclusively proven. Lynch v. Johnson, 109 Mich. 640. In Iowa, it is held to be "the duty of the trial court to submit to the jury all questions of fact arising under the pleadings upon which evidence is introduced on the trial." Upton v. Paxton, 72 Iowa, 299. See, also, infra, § 131, "Exceptions to General Rule."

Failure to define terms.

"A mere defect in the charge, in failing to explain an expression used in it, cannot avail an appellant who did not ask an appropriate instruction at the trial." Texas & P. Ry. Co. v. O'Donnell, 58 Tex. 27. If an explanation of what constitutes a legal tenancy is desired, it must be requested, Crail v. Crail, 6 Pa. 480. If the court, in its instructions, gives, in general terms, the elements of the crime charged, and it is not asked by defendant to enlarge upon and explain further and particular elements or features thereof, failure to give fuller and more explicit instructions is not error which will justify a reversal. State v. Potter, 15 Kan. 302. Where a charge on the issue of adverse possession was not erroneous, but only defective, in not defining "adverse possession," plaintiff cannot assign error, in the absence of a request for an instruction curing the omission. Robinson v. McIver (Tex. Civ. App.) 23 S. W. 915. An omission to instruct the jury that plaintiff is entitled to interest on damages found by the jury cannot be alleged as error where plaintiff did not ask for such an instruction. Gulf, C. & S. F. Ry. Co. v. Fink, 4 Tex. Civ. App. 269. In an action for negligence, a failure to define the terms "negligence," "ordinary care," "reasonable care and diligence," "gross negligence," "carelessness," "unfitness," as used in the instructions, is not error, in the absence of a request to do so. Johnson v. Missouri Pac. Ry. Co., 96 Mo. 340; Quirk v. St. Louis United Elevator Co., 126 Mo. 279; Kelley v. Cable Co., 7 Mont. 70; Galveston, H. & S. A. Ry. Co. v. Arispe, 81 Tex. 517, 17 S. W. 47; Galveston, H. & S. A. Ry. Co. v. Waldo (Tex. Civ. App.) 26 S. W. 1004.

Failure to direct verdict.

A failure to direct a verdict for the defendant is not error, in the absence of a request so to do. Reading v. Metcalf, Hardin (Ky.) 544; Lawrence v. Hester, 93 N. C. 79; Wiggins v. Guthrie, 101 N. C. 661; Readdy v. Borough of Shamokin, 137 Pa. 98; Pennsylvania R. Co. v. Page, 21 Wkly. Notes Cas. (Pa.) 52; Cannell v. Smith, 142 Pa. 25; Wray v. Spence, 145 Pa. 399, 22 Atl. 693; Carr v. H. C. Frick Coke Co., 170 Pa. 62, 32 Atl. 656.

Form of verdict.

Where the court instructed as to the form of a verdict of guilty of petit or grand larceny, a failure to instruct as to the form of a verdict of not guilty is not error, in absence of a request. Hodge v. State, 85 Ind. 561, 564.

Verdict in case of joint defendants.

A failure to instruct that the jury might find one joint defendant guilty, and disagree as to the other, is not erroneous, in the absence of a request to so instruct. Morgan v. State, 117 Ind. 569, 19 N. E. 154.

Liability of joint defendants.

A failure to instruct as to a separate defense of one of several joint defendants is not error, in the absence of a request. Edwards v. Smith, 71 Tex. 156; Shilling v. Shilling (Tex. Civ. App.) 35 S. W. 420.

Province of court and jury.

Merely omitting to charge, when not requested, that the jury are the judges of the facts and of the application of the law, is not reversible error. Butler v. State, 7 Baxt. (Tenn.) 35. The failure of the court to inform the jury that they are the exclusive judges of the law and facts is not such error as will justify a judgment of reversal, unless defendant asks an instruction upon this point. Keyes v. State, 122 Ind. 527, 23 N. E. 1097.

Instructions as to evidence—In general.

Where a party desires the court to charge specially on the testimony of a witness, attention should be called to the testimony by a proper request. Kurtz v. Haines (Pa.) 15 Atl. 716. The mere omission to refer in the charge to all the evidence is not a sufficient cause for reversing the judgment, in the absence of a request. Payne v. Noon (Pa.) 8 Atl. 428. The court need not bring to the notice of the jury all the evidence in relation to a subject on which they charge. State v. Morris, 10 N. C. 388. Unless requested, the court need not charge upon all the points of the case, nor recapitulate all the evidence, nor charge upon a particular part of the testimony. Boykin v. Perry, 49 N. C. 325. There is no rule of law which requires that any particular part of the evidence shall be charged upon, whether requests for instructions are made or not, and the failure of the court to notice admissions introduced in evidence by one of the parties is not error, in the absence of any request to charge upon such admissions. Hawkins v. Kermode, 85 Ga. 116, 11 S. E. 560. If, in recapitulating the testimony, the court overlooks evidence important to the defendant, it is the duty of the prisoner's counsel to call the attention of the trial judge to the

omission, or error cannot be predicated upon the refusal of the trial court to grant a new trial because of such omission. State v. Grady 83 N. C. 643; Brown v. Calloway, 90 N. C. 118; State v. Gould, 90 N. C. 658; State v. Reynolds, 87 N. C. 545. "The trial judge is not required, in the absence of a prayer for special instructions, to present the evidence in his charge in every possible aspect." Morgan v. Lewis, 95 N. C. 296. The omission of the court to comment upon the alleged extraordinary character of the testimony of a witness cannot be alleged as error if the court was not requested to make and comment. Warden v. City of Philadelphia, 167 Pa. 523, 31 Atl. 928. Although plaintiff's counsel, in an action for injuries to a passenger, argued that the failure of defendant's servants to appear and testify raised a presumption that they were negligent, in the absence of a request, there was no duty on the court to charge that defendant was not bound to produce all the agents and employes who were connected with the running of the train. Chattanooga, R. & C. R. Co. v. Huggins, 89 Ga. 494; Huggins v. Chattanooga, R. & C. R. Co., 89 Ga. 494. On a prosecution for a misdemeanor, failure to charge on circumstantial evidence is not ground for reversal, in the absence of a request. Lucio v. State, 35 Tex. Cr. App. 320. The omission to charge the jury, without special request, that mere possession by the husband of the wife's property will not subject it to his debts, and that conflicting testimony ought to be reconciled, if practicable, is not ground for a new trial. Morgan v. Swann, 81 Ga. 207.

Effect of evidence.

A party may entitle himself to the opinion of the court on the legal effect of any portion of the evidence only by specifically referring to it in his prayer for instructions. Garrett v. Jackson, 20 Pa. 331; Lancaster County Bank v. Albright, 21 Pa. 228; Dingee v. Jackson, 23 Pa. 176. "A judge's omission, while calling attention to the conflict in testimony as to a disputed payment, to state what effect the truth of either statement would have in respect to the operation of the statute of limitations, was error warranting reversal if he had been properly requested to charge that the items of plaintiff's claim were barred unless renewed by the payment." Hollywood v. Reed, 55 Mich. 308. On a rule to compel an attorney to pay over money collected for his client, it is not error to fail to instruct as to the effect of receipts in full, where no such instruction is requested. Howland v. Bartlett, 86 Ga. 669, 12 S. E. 1068. "It is not always necessary for the court to tell the jury, when not requested to do so, what are the legal inferences from certain facts, if proved; but where the inference is clear, and the request is made,

it is error to refuse to so instruct." Howard v. Mutual Benefit Life Ins. Co., 6 Mo. App. 577.

Sufficiency of evidence.

"A party who does not ask for specific instructions as to the amount of evidence required to overturn the presumption arising from a settlement cannot complain if none are given." Gheen v. Heyburn, 1 Walk. (Pa.) 148. The court having charged, on plaintiff's request, that an affirmative defense must be established by a preponderance of the evidence, a failure to charge that the evidence on this point must be clear and positive is not error. Gottstein v. Seattle Lumber & Commercial Co., 7 Wash. 424, 35 Pac. 133. Where an instruction asked by plaintiff enumerates facts which establish a prima facie case of negligence under a statute, the plaintiff need not also recite the facts the defendant's evidence tends to prove, and which would rebut the prima facie case established by the facts recited by plaintiff. Louisville, E. & St. L. Consolidated R. Co. v. Spencer, 149 Ill. 97.

Purpose of evidence.

The failure of the court to instruct the jury that certain evidence was admitted only for a certain purpose, and can be considered by them only for that purpose, is not error, in the absence of a request to so instruct. People v. Collins, 48 Cal. 277; People v. Gray, 66 Cal. 276; People v. Connelly (Cal.) 38 Pac. 42; Stone v. Redman, 38 Me. 578; Nininger v. Knox, 8 Minn. 140 (Gil. 116); Dow v. Merrill, 65 N. H. 107; People v. McLaughlin, 2 App. Div. 419, 37 N. Y. Supp. 1005; Walker v. Brown, 66 Tex. 556, 1 S. W. 797; Shumard v. Johnson, 66 Tex. 70, 17 S. W. 398; Roos v. Lewyn, 5 Tex. Civ. App. 593, 23 S. W. 450, 24 S. W. 538; Roebke v. Andrews, 26 Wis. 312. The failure of the court to instruct as to the purpose for which certain evidence was admitted is not error, in the absence of a request for an instruction limiting the effect of such evidence to its legitimate purpose. Where the court instructs the jury that certain admissions admitted in evidence are not binding upon the plaintiff, a failure to instruct the jury for what purpose they might consider the admissions is not error, in the absence of a request to so charge. Mayer v. Walker, 82 Tex. 222, 17 S. W. 505; People v. Ah Yute, 53 Cal. 613. Failure to restrict the jury in its consideration of evidence, when no instruction to that effect has been requested, is not reversible error. Mutual Life Ins. Co. of New York v. Baker, 10 Tex. Civ. App. 515. On an indictment for embezzlement, where evidence of other similar embezzlements by defendant was admitted, but the court charges that the defendant is not on trial for such other embezzlements, a failure to charge that the evidence of such other

embezzlements is admissible only to show a criminal intent is not error, in the absence of a request. People v. Connelly (Cal.) 38 Pac. 42.

Instructing to disregard evidence.

Where, on objection, the court excludes hearsay evidence, and the party objecting fears the effect of such testimony notwithstanding its exclusion, he should request an instruction to the jury to disregard it, and cannot complain of a failure to give such instruction unless he does so request. Russell v. Nall, 79 Tex. 664, 15 S. W. 635.

Correcting error in admission of evidence.

"Where a party fails to request that an instruction given by the court to correct an error in the admission of evidence be made more explicit, it will be deemed to have been satisfactory to him at the time, and he cannot afterwards be heard to complain." Moore v. Shields, 121 Ind. 267.

——*Exceptions.*

See infra, § 131, "Exceptions to General Rule."

Proximate and remote cause.

A charge is not erroneous merely upon the ground that it does not enter sufficiently into the particulars which distinguish proximate from remote causes. International & G. N. R. Co. v. Smith (Tex. Sup.) 1 S. W. 565. In an action against a master by a servant to recover for injuries caused by the alleged negligence of another servant, an instruction cannot be objected to as authorizing the jury to find for plaintiff if defendant was negligent in employing the other servant, regardless of the remoteness of the negligent act of employment, unless defendant requests a charge reciting the facts which tend to establish such remoteness. Mexican Nat. R. Co. v. Musette, 7 Tex. Civ. App. 169.

Probable cause.

A failure to charge specially as to the meaning of probable cause in an action for malicious prosecution cannot be assigned as error in the absence of a request. Peterson v. Toner, 80 Mich. 350, 45 N. W. 346; Lueck v. Heisler, 87 Wis. 644, 58 N. W. 1101.

Reasonable doubt.

A failure to instruct the jury as to the law with respect to a "reasonable doubt" is not error, in the absence of a request. Butler v. State, 7 Baxt. (Tenn.) 35; Mead v. State, 53 N. J. Law, 601, 23 Atl. 264. Where the court instructs the jury that, "if they believe from the evidence, etc.," and omits to add "beyond a reasonable doubt," because, when such instruction is given, it is intended and understood that, before the jury can convict, they must believe the

material facts, "beyond a reasonable doubt," there is no available error, and, if the defendant wants the very words inserted in the instruction, he must ask to have it done, or ask for a general instruction on the subject. State v. Robinson, 20 W. Va. 714.

Negligence and contributory negligence.

Failure to define the terms "negligence," "ordinary care," etc., see supra, this note, under "Failure to Define Terms." Where the court charged that, "by the term 'negligence,' when used in this charge, is meant the omission or failure to do something which an ordinarily prudent and careful person would have done under like circumstances," it cannot be contended that this definition of negligence did not include the doing of any affirmative act, unless a further charge upon this phase of the case is requested. Campbell v. Warner (Tex. Civ. App.) 24 S. W. 703. The failure of the court to charge as to contributory negligence in an action for reckless driving is not error, where no request is made for such a charge. Orr v. Garabold, 85 Ga. 373. An exception must be taken to the refusal of the court to give a requested instruction to make such refusal available on appeal; and where the defendant orally requests an instruction that he is not liable for pain or suffering arising from act of plaintiff committed after the injury sued for, and the court says that it has already instructed that defendant is not liable for any aggravation of the injuries caused by the default or negligence of plaintiff, and no exception is taken, defendant cannot afterwards complain. Thrasher v. Postel, 79 Wis. 503.

Mental capacity.

Where the evidence, in an action to set aside a conveyance, is such as to require a charge upon the nature and degree of mental capacity to make a valid conveyance, a request for a special instruction upon the mental capacity of the grantor must be made to render the failure to charge on the point error. Berryman v. Schumaker, 67 Tex. 312.

Payment.

Where, in an action to recover for services rendered, payment of part of the account is admitted, the court's failure to mention the subject of payment in its charge is not error, where its attention is not called to the matter, and where no request is made. Crowell v. Truax, 94 Mich. 585, wherein the court said: "We think that error could not be predicated upon this, as the jury could hardly overlook so plain a proposition as that payments should be deducted, when it was conceded upon the trial." The failure to charge as to the presumption of payment from lapse of time is not error, in the ab-

sence of a request to charge upon that point. Abrahams v. Kelly, 2 S. C. 237.

Notice.

Where the court charged that the case turned mainly upon the question of notice, but did not explain what amounted to notice, as applied to the facts in evidence, nor as to the legal effect of rumors as notice, such failure is not ground for a new trial, in the absence of a request. Street v. Lynch, 38 Ga. 631. Where the issue is whether or not the defendant purchased with notice of plaintiff's claim, a failure to instruct as to the law of constructive notice is not error, in the absence of a request. Brotherton v. Weathersby, 73 Tex. 471, 11 S. W. 505. Where the court instructed that notice to a clerk would not be notice to his employer of certain facts, a failure to charge as to the effect of notice to a business manager is not error, in the absence of a request to charge upon that point. Brown v. Foster, 41 S. C. 118.

Adverse possession and statute of limitations.

Where adverse possession is an issue, the failure of the court to define "adverse possession," and to state that the running of the statute of limitations would be interrupted by the filing of the suit, is not error, in the absence of a request to charge upon these points. Robinson v. McIver (Tex. Civ. App.) 23 S. W. 915. Where adverse possession of uncultivated and uninclosed land is relied upon, a failure to instruct that the extent of possession should be denoted by natural or artificial boundaries has been held not error, in the absence of a request for such an instruction. In this case, however, no injury could have resulted from the omission. Wood v. Figard, 28 Pa. St. 403. The general rule that, when the court fails to charge on an issue raised by the pleadings and evidence, the omission cannot be alleged as error unless a special charge covering the point is asked, applies to the issue of the application of the statute of limitations. Rackley v. Fowlkes (Tex. Civ. App.) 36 S. W. 75. "The defendant pleaded the statute of limitations, and the testimony was such as to raise the issue. The court charged the jury that 'the defendant had pleaded the statute of limitations in bar of plaintiff's action, among other defenses,' and did not further instruct upon that subject. No instruction was asked. Held, that it was the duty of plaintiff to ask further instructions, if he desired, and, having failed to do so, he cannot complain on appeal of the defective charge." Hocker v. Day, 80 Tex. 529, 16 S. W. 322.

Existence of contract.

"Where the question raised by the pleadings was whether there had been an express contract by a mother-in-law to pay her son-

in-law, with whom she lived, for her board, and the court had charged the jury that she would not be liable to pay for such board, in the absence of an agreement, but had failed to instruct the jury that they should consider all the circumstances, for the purpose of determining whether or not an agreement should be implied or inferred therefrom," the failure to give additional and more explicit instructions is not error, in the absence of a request therefor. Austin v. Moe, 68 Wis. 458.

Performance of contract.

"It was proper for the trial court to submit to the jury the question whether or not the plaintiff, by reason of her temporary disability, failed to perform the contract of employment on her part in any substantial manner; but inasmuch as defendant's counsel failed to make a specific request that the court so charge, his omission to submit that question to the jury cannot, for the purpose of this appeal, be assigned as error." Fisher v. Monroe, 16 Daly (N. Y.) 467; Winchell v. Hicks, 18 N. Y. 559; Muller v. McKesson, 73 N. Y. 195.

Construction of written instrument.

If a party desires the court to place a construction upon a contract, he should ask for it. State Nat. Bank of Springfield v. Bennett, 8 Ind. App. 679; Barnett v. State, 100 Ind. 171. "If the presiding judge is not requested to give any instructions in reference to the nature and effect of a written instrument introduced in evidence at the trial, the omission to do so is no valid ground of exceptions unless the liability of the party is to be determined solely by the legal construction to be put upon it." Badger v. Bank of Cumberland, 26 Me. 428.

False representations.

"In an action on a promissory note given upon an exchange of horses, the jury were instructed that, if the plaintiffs, at the time of the exchange, made false representations as to the soundness of their horse, upon which the defendant relied as true, and the horse received by the defendant was worth the most, the difference between the actual value of that horse and what would have been its value if the representations had been true should be deducted from the amount of the note. It was held that the plaintiffs, if they requested no instructions upon the hypothesis that the defects in that horse might have been ascertained by the defendant by the exercise of ordinary care and vigilance, had no ground of exception." Davis v. Elliott, 15 Gray (Mass.) 90.

Assumption of risks.

The failure of the court to charge that a servant assumes the

risk incident to the employment does not furnish ground for reversal, where no special charge is requested. International & G. N. R. Co. v. Beasley, 9 Tex. Civ. App. 569.

Fellow servants.

Where, in an action by a servant against a master, the court has correctly stated who are fellow servants, if the defendant desires specific instructions on the point of the relation between the plaintiff and another employe whose negligence is alleged to have caused the injury sued for, the defendant should request such instruction. Philadelphia & Reading R. Co. v. Trainor, 137 Pa. 148, 26 Wkly. Notes Cas. (Pa.) 441, 20 Atl. 632.

Scope of employment.

Where the court has charged the jury that the defendant is not liable for the acts of his servant beyond the scope of his employment, a failure to state what constitutes an act within the scope of a servant's employment is not reversible error, in the absence of a request for such an explanation. Vernon v. Cornwell, 104 Mich. 62.

Present worth of money.

An instruction on the measure of damages in an action, "I suppose you all understand what the present worth of a given sum means. It is arrived at by dividing a given sum by one dollar, plus the legal rate of interest, or usual rate of interest, for the given time," where no other instruction was requested or suggested, is sufficient. Kinney v. Folkerts, 84 Mich. 616, 48 N. W. 283.

Theory of case.

A party cannot complain that the instructions given did not properly present his theory of the case, where he did not request an instruction covering the omission complained of. Village of Hyde Park v. Washington Ice Co., 117 Ill. 233; Turner v. People, 33 Mich. 382; Howry v. Eppinger, 34 Mich. 35; Ward v. Ward, 37 Mich. 259, and cases cited; Advertiser & Tribune Co. v. City of Detroit, 43 Mich. 120; Hitchcock v. Supreme Tent, K. M. W., 107 Mich. 391. "It is the duty of counsel to ask instructions embodying their theory of the case, and, if they fail to do so, the court is not bound to embody the whole case in one instruction." State v. Haase, 6 Mo. App. 586.

Measure of damages.

A party will not be heard to complain that the instructions as to the measure of damages in the particular case were insufficient, in the absence of a request for further instruction. The failure to state a definite rule for assessing damages is not error. Buzzell v. Emerton, 161 Mass. 176; Clapp v. Minneapolis & St. L. Ry. Co., 36

Minn. 6; Taylor v. City of Springfield, 61 Mo. App. 263; Browning v. Wabash Western Ry. Co., 124 Mo. 55, 27 S. W. 644; Harris v. Northern Indiana R. Co., 20 N. Y. 232, 239; Willey v. Norfolk S. R. Co., 96 N. C. 408, 1 S. E. 446; Page v. Finley, 8 Or. 45; Freiberg v. Elliott (Tex.) 8 S. W. 322; Maverick v. Maury, 79 Tex. 435, 15 S. W. 686; Gulf, C. & S. F. Ry. Co. v. Harmonson (Tex. Civ. App.) 22 S. W. 764; Galveston, H. & S. A. Ry. Co. v. Worthy (Tex. Civ. App.) 27 S. W. 426; Stewart v. City of Ripon, 38 Wis. 584; Texas & P. Ry. Co. v. Cody, 14 C. C. A. 310. "The better practice in suits for damages for personal injuries is for a party who is disappointed with the terms in which the district judge has stated to the jury the rule to be followed in estimating damages to at once ask him to give to the jury, in addition, a carefully drawn instruction, embracing the rule to be followed in estimating the damages, as he believes it to be." Galveston Oil Co. v. Malin, 60 Tex. 645. The omission of the court to charge for interest on damages recovered cannot be assigned as error where no special instruction is asked. Gulf, C. & S. F. Ry. Co. v. Fink, 4 Tex. Civ. App. 269. In the absence of a request, a failure to instruct as to what matters may be considered in mitigation of damages is not error. East Tennessee, V. & G. Ry. Co. v. Fleetwood, 90 Ga. 24; Kelley v. Kelley, 8 Ind. App. 606, 613; Tetherow v. St. Joseph & D. M. R. Co., 98 Mo. 74; San Antonio & A. P. Ry. Co. v. Kniffen, 4 Tex. Civ. App. 484, 23 S. W. 457.

Costs.

Where a set-off was involved, and a general verdict was rendered for the defendant, without showing whether the plaintiff had failed to establish any claim, or whether his demand was balanced by the set-off, the plaintiff cannot complain that the judge did not instruct the jury in relation to the costs, unless such instruction was requested. Osgood v. Lansil, 33 Me. 360.

Lower degrees of crime.

It cannot be urged as error in a case of homicide that the court failed to submit instructions to the jury as to the law of manslaughter applicable to the case, defendant not having asked it. Edwards v. State, 47 Miss. 589. Compare Sanders v. State, 41 Tex. 306. Failure to instruct as to involuntary manslaughter in a trial for murder is not error, in the absence of request. Adams v. State, 65 Ind. 565. On indictment for assault with intent to commit rape, it is not error to fail to charge that the jury may find the defendant guilty of a simple assault in case they find him not guilty of assault with intent to commit rape, as the defendant could not have been prejudiced by a charge which allowed the defendant to be

acquitted unless the jury, on the evidence, found him guilty of the higher crime charged. State v. Hanlon, 62 Vt. 334.

Venue of crime.

The failure of the court to instruct the jury to acquit if the venue was not proven is not error, in the absence of a request. People v. Marks, 72 Cal. 46.

Drunkenness as a defense to crime.

A failure to charge in respect to a statute providing that drunkenness shall be no excuse for crime is not error, in the absence of a request. So held on indictment for assault with intent to kill. Thomas v. State, 91 Ga. 204, 18 S. E. 305.

Self-defense.

"Where a prisoner prayed for instructions only on the ground that the deceased did not intend to kill him, and not on the ground of a reasonable belief on his part that the deceased did so intend, the judge did not err in omitting to instruct the jury on the latter point." State v. Scott, 26 N. C. 409.

Recommendation to mercy.

In the absence of a request, it is not a ground for a new trial that the judge failed to instruct the jury, in an arson case, that the prisoners might be recommended to mercy, and their punishment mitigated. State v. Dodson, 16 S. C. 463.

Right of jury to relieve from death penalty.

"The language used is: 'It is within your discretion to pronounce such a sentence as will relieve such defendant from the extreme penalty of the law.' The instruction is certainly open to criticism in this respect. In the trial of cases of this kind, the court should carefully instruct the jury, not only that they have the discretion to relieve a defendant from the extreme penalty of the law, but they should be told in specific terms what verdict they are authorized to return, and the forms of the different kinds of verdicts should be stated, and such forms of verdicts prepared and sent out with the jury, allowing them to select the one agreed upon by them. But the jury were apprised of the fact here that they were not bound to return such a verdict as would result in the infliction of the death penalty. There was nothing in the instruction to mislead. If the counsel for defendant desired a more specific charge upon the point, they should have asked it, and, if they did not do so, the responsibility must rest with them. People v. Haun, 44 Cal. 96; People v. Ah Wee, 48 Cal. 237; People v. Collins, Id. 277; People v. Flynn, 73 Cal. 511, 15 Pac. 102. We do not wish to be understood as holding that an entire failure to instruct on this subject, in this class of cases, would not be error; but where the

court does instruct and call to the attention of the jury that it is within their province to determine whether or not the extreme penalty shall be inflicted, and the instruction is not such as to mislead the jury, a defendant cannot be allowed to complain that the instruction was not sufficiently certain and specific, when the attention of the court below has not been called to it, and no more specific instruction has been asked for." People v. Olsen, 80 Cal. 122.

§ 131. Same—Exceptions to general rule.

In a few states, as has been seen, the rule prevails, even in civil cases, that the court must instruct the jury upon the substantial issues involved, whether requested to do so or not.[20] A failure to instruct to this extent constitutes error, even though no instructions were asked.[21] In criminal cases it is the rule in several states that it is the duty of the court, whether properly requested or not, to instruct the jury fully upon all questions of law arising in the case, and a failure to do so is ground for a new trial and reversible error,[22] unless in the particular case the error was harmless.[23] In Texas this rule applies in cases of felony,[24] but not in cases

[20] See supra, § 127, "Where No Instructions are Given."

[21] Donahue v. Windsor County M. Fire Ins. Co., 56 Vt. 374. For various statements and illustrations of this rule, see cases collected in digest of decisions, infra, § 132.

[22] People v. Byrnes, 30 Cal. 206; State v. Brainard, 25 Iowa, 572; State v. O'Hagan, 38 Iowa, 504; Heilman v. Com., 84 Ky. 461; People v. Murray, 72 Mich. 10; State v. Matthews, 20 Mo. 55; State v. Stonum, 62 Mo. 596; State v. Branstetter, 65 Mo. 155; State v. Kilgore, 70 Mo. 546; State v. Banks, 73 Mo. 592; Id., 10 Mo. App. 111; State v. Palmer, 88 Mo. 572; Lang v. State, 16 Lea (Tenn.) 433; Potter v. State, 85 Tenn. 88; Nelson v. State, 2 Swan (Tenn.) 237; Williams v. State, 3 Heisk. (Tenn.) 379; State v. Myers, 8 Wash 177.

[23] Honeycutt v. State, 8 Baxt. (Tenn.) 372; Good v. State, 1 Lea (Tenn.) 293; Pitts v. State (Tex. Cr. App.) 24 S. W. 896; Gentry v. State, 25 Tex. App. 614.

[24] Sanders v. State, 41 Tex. 306; Villareal v. State, 26 Tex. 107; Maria v. State, 28 Tex. 698; Fulcher v. State, 41 Tex. 233; Bishop

of misdemeanor, as to which the ordinary rule requiring a request as a foundation for error applies.[25]

Even under this exception, however, if the instructions given fairly and substantially cover the issues in the case, a failure to give a particular instruction is not error, in the absence of a request. If a party desires further and more specific instructions, he must request them, or he will not be heard to complain.[26]

v. State, 43 Tex. 390; Jenkins v. State, 1 Tex. App. 346; Jobe v. State, 1 Tex. App. 186; Lister v. State, 3 Tex. App. 18; Wasson v. State, 3 Tex. App. 474; Curry v. State, 4 Tex. App. 574; Robinson v. State, 5 Tex. App. 519; Smith v. State, 7 Tex. App. 414; Reynolds v. State, 8 Tex. App. 412; Greta v. State, 9 Tex. App. 434; Jackson v. State, 15 Tex. App. 84; White v. State, 18 Tex. App. 57; Bell v. State, 21 Tex. App. 270; Barbee v. State, 23 Tex. App. 199, 4 S. W. 584; Warren v. State, 33 Tex. Cr. App. 502; Sexton v. State, 33 Tex. Cr. App. 416; Miers v. State, 34 Tex. Cr. App. 161; Moore v. State (Tex. Cr. App.) 33 S. W. 980. Contra, Greenwood v. State, 35 Tex. 587. Though in every case of felony the court is required by statute to give a written charge, whether asked by the parties or not, yet it is only necessary for the court to give such instructions as are applicable to every legitimate deduction which the jury may draw from the evidence. Johnson v. State, 27 Tex. 758; Dawson v. State, 33 Tex. 491; Curry v. State, 4 Tex. App. 574; Jobe v. State, 1 Tex. App. 186; Bronson v. State, 2 Tex. App. 46; Lister v. State, 3 Tex. App. 18; Thrasher v. State, 3 Tex. App. 281; Noland v. State, 3 Tex. App. 598; Holden v. State, 1 Tex. App. 226; Bishop v. State, 43 Tex. 391.

[25] Sparks v. State, 23 Tex. App. 447; Davidson v. State, 27 Tex. App. 262, 11 S. W. 371; Lyon v. State (Tex. Cr. App.) 34 S. W. 947; Porter v. State, 1 Tex. App. 477; Waechter v. State, 34 Tex. Cr. App. 297; Lucio v. State, 35 Tex. Cr. App. 320; Hurley v. State, 36 Tex. Cr. App. 73.

[26] People v. Byrnes, 30 Cal. 206; Fortson v. Mikell, 97 Ga. 336; State v. Helvin, 65 Iowa, 289; Douglass v. Geiler, 32 Kan. 499; State v. Pfefferle, 36 Kan. 90; State v. Nickens, 122 Mo. 607; State v. Baldwin, 56 Mo. App. 423; State v. Kilgore, 70 Mo. 546; State v. Brooks, 92 Mo. 542; State v. Leeper, 78 Mo. 470; Sioux City & P. R. Co. v. Finlayson, 16 Neb. 578; York Park Bldg. Ass'n v. Barnes, 39 Neb. 834; German Nat. Bank of Hastings v. Leonard,

Where it appears that the trial court was unwilling or thought it unnecessary to give any charge upon a certain point, a party is not called upon to ask instructions upon such point.[27] So, where the cause of action is based upon an illegal or immoral consideration, it is the duty of the court, of its own motion, to instruct the jury that the plaintiff cannot recover, and a failure to do so is ground for a new trial, because the court will not enforce such claims, even if the parties do not object.[28] In an action of criminal conversation, where it appeared that the husband had connived at the intercourse, a failure of the court to apply the rule that such connivance is a bar to the action is ground for reversal, even in the absence of a request, because in such case the real question in issue has not been determined.[29]

§ 132. Same—Digest of decisions.

Civil cases.

"In a trial by a jury, it is the duty of the court to instruct the jury on questions of law which he deems applicable to the case as made by the pleadings and evidence." Douglass v. Geiler, 32 Kan. 499. "All the rights of a respondent can be saved without any requests for instructions." Taft, J., in State v. Hopkins, 56 Vt. 250. "No requests are needed in any case for the purpose of protecting any rights." Veazey, J., in Town of Westmore v. Town of Sheffield, 56 Vt. 239. The county court is bound to charge upon every point material to the decision of the case upon which there is evidence, and to charge correctly and fully, whether requested to do so or not. Donahue v. Windsor Co. M. Ins. Co., 56 Vt. 374. In an action on a fire insurance policy which provides that notice of a loss must be given "forthwith," the question of seasonable notice is one of fact

40 Neb. 676; Hill v. State, 42 Neb. 503; Housh v. State, 43 Neb. 163; Carleton v. State, 43 Neb. 402; Bramlette v. State, 21 Tex. App. 611; Marshall v. State, 37 Tex. Cr. App. 450; Walker v. Walt, 50 Vt. 668; Howland v. Day, 56 Vt. 324.

[27] International & G. N. R. Co. v. Underwood, 64 Tex. 463.

[28] Viser v. Bertrand, 14 Ark. 267.

[29] Bunnell v. Greathead, 49 Barb. (N. Y.) 106.

which the court must submit to the jury, whether requested to do so or not, and a failure to do so is covered by a general exception to the charge. Donahue v. Windsor Co. M. Ins. Co., 56 Vt. 374. The court is "bound to charge the jury correctly upon all the points raised in argument, or which fairly grow out of the evidence," whether requested or not. Vaughan v. Porter, 16 Vt. 266; Donahue v. Windsor Co. M. Ins. Co., 56 Vt. 374. It is the duty of the trial court to instruct the jury on questions of law which he deems applicable to the case made by the pleadings and the evidence, and, if the party desires other or different instructions, he must request them. If no such request is made, the instructions given stand as the law of the case for that trial. Douglass v. Geiler, 32 Kan. 499. Where an instruction as to a certain rule of law was not asked for, the failure of the court to give such instruction cannot be complained of if an instruction upon such rule was not necessary for the correct determination of the case. Deere v. Wolf, 77 Iowa, 115. The theory of each side should be fully and fairly given. Freeman v. Hamilton, 74 Ga. 318. "The law of the case must be given to the jury to the extent of covering the substantial issues made by the evidence" (Central R. Co. v. Harris, 76 Ga. 502), and fairly presenting the case to the jury (Phinney v. Bronson, 43 Kan. 451). "It is the duty of the trial court to submit to the jury all questions of fact arising under the pleadings upon which evidence is introduced on the trial." Upton v. Paxton, 72 Iowa, 299. "A judge is not bound to charge upon all the points in a case,—he may be silent, unless called on by one of the parties to give his opinion on a question of law; but where he passes over one point, which is preliminary, to get at another, which could not fairly arise until the first is disposed of, it is error." McNeill v. Massey, 10 N. C. 91.

Criminal cases.

The instructions must go to the extent of fairly presenting the case to the jury. State v. Shenkle, 36 Kan. 43; State v. Pfefferle, 36 Kan. 90. In a trial for forgery, a failure by the court to give instructions respecting the law applicable to the offense, and to a certain line of defense, of which there was sufficient evidence to require it to be considered by the jury, though no instructions were asked by the counsel for defendant, was sufficient to warrant a reversal, the court saying that, although the court below is not bound to give instructions on its own motion where those asked by counsel are sufficient, yet, when they are defective or insufficient, the law complicated, and the offense of a highly criminal character, the court should point out the controverted questions of fact, and state the law applicable thereto. State v. Brainard, 25 Iowa, 572.

"It is the duty of the judge [in criminal cases] to declare to the jury what the law is, with its exceptions and qualifications, and then to state, hypothetically, that if certain facts, which constitute the offense, are proved to their satisfaction, they will find the defendant guilty; otherwise, they will acquit him." Keener v. State, 18 Ga. 194. "It is the duty of the trial court to submit to the jury, by way of proper instructions, such principles of law as may be applicable to the case on trial as it appears from the evidence, and also such principles as should be applied to witnesses who are interested in the result, or whose testimony should be weighed with special care and caution as accomplices. But it is not proper to discuss the policy of using such witnesses. This should be left to the counsel in the argument." Long v. State, 23 Neb. 33. "It is the duty of the court to explain to the jury the offense with which the defendant is charged, what acts constitute it, and explain or define the words used in the statute prescribing the offense." More than this is not necessary by way of definition. State v. Clark, 78 Iowa, 492.

——*Jury as judges of facts.*

A conviction of felony will be reversed for failure to instruct the jury that they are the exclusive judges of the facts proved, and of the weight to be given to the testimony. Barbee v. State, 23 Tex. App. 199.

——*Degree of crime.*

The court must instruct as to all the different degrees of murder to which the evidence is applicable. State v. Palmer, 88 Mo. 572; State v. Branstetter, 65 Mo. 155; State v. Banks, 73 Mo. 592. But see Williams v. State, 3 Heisk. (Tenn.) 379. "Failure to define murder in the second degree, in a case where the jury, upon the evidence, might have found the defendant guilty of the lesser offense, will be cause for reversal, whether the instructions were asked or not." Sanders v. State, 41 Tex. 306. "Where, upon a trial for murder, there was conflicting evidence as to the circumstances immediately antecedent to the commission, which, in connection with the other evidence, was important with reference to the degree of offense of which the accused was guilty, it was the duty of the judge to have instructed the jury distinctly as to the degrees of murder, and to have defined what the law means by express malice and implied malice, in such manner that a jury of ordinary intelligence would be enabled to comprehend the distinction between the two kinds of malice." Villareal v. State, 26 Tex. 107. "In Ray v. State (1871) cited in 3 Heisk. 379, note, the indictment contained two counts,—one for rape, and the other for an assault with intent

to commit rape,—and the verdict was that the defendant was guilty of rape, which was sustained by proof. The court held that the failure of the judge to charge the law relating to the offense in the second count was not reversible error." Parham v. State, 10 Lea (Tenn.) 502. On an indictment for mayhem, where the evidence tends to show a simple assault and battery, it is error for the court to neglect to instruct as to the latter offense, and the error is not waived by the defendant's failing to request such an instruction, or to except to its omission. State v. Cody, 18 Or. 506, 23 Pac. 891.

——*Alibi.*

Under a statute making it the duty of the court to instruct the jury on all questions of law arising in the case, where there is evidence in a criminal case tending to prove an alibi, an instruction on that subject must be given, whether requested by defendant or not. State v. Taylor, 118 Mo. 153, 24 S. W. 449. In a prosecution for a misdemeanor, before defendant can be heard to complain of an omission to charge an alibi, he must have prepared and presented a charge to the court on alibi, and, on the refusal of the court to give such charge, he must have saved his bill of exceptions thereto. Lyon v. State (Tex. Cr. App.) 34 S. W. 947. "It is settled by repeated decisions in this state that the defense of alibi is sufficiently embraced in a general charge to the effect that a defendant is presumed by law to be innocent until his guilt is established by competent evidence beyond a reasonable doubt, where no additional instruction is requested, more explicitly amplifying the law upon that subject." Oxford v. State, 32 Tex. Cr. App. 272.

——*Self-defense.*

Where the evidence tends to show that defendant charged with murder acted in self-defense, the jury should be fully charged in reference to that subject. State v. Donahoe, 78 Iowa, 486; Jackson v. State, 15 Tex. App. 84; Ashworth v. State, 19 Tex. App. 182; Guffee v. State, 8 Tex. App. 277; King v. State, 13 Tex. App. 277; Edwards v. State, 5 Tex. App. 593; North v. State, 12 Tex. App. 111; Sterling v. State, 15 Tex. App. 249; Foster v. State, 8 Tex. App. 248; Kemp v. State, 11 Tex. App. 174. "Where, on trial for murder, there is proof that deceased made threats against defendant, some of which were communicated to him, and there is proof also tending to show that deceased was a dangerous man, and brought about the difficulty, and was in fault at time of killing, the failure of the court to charge the law applicable to such threats is an error equivalent to the affirmative injury of an erroneous charge, and this court will reverse for such omission in the charge, though no further instructions were asked." Potter v. State, 85 Tenn. 88.

——*Insanity as a defense.*

Where there is evidence tending to establish the defense of insanity, the court should give a direct, positive and affirmative instruction upon insanity as a defense, and should tell the jury what the statute declares,—that "no act done in a state of insanity can be punished as an offense." Smith v. State, 19 Tex. App. 96.

——*Good character of defendant.*

The trial court is not bound, unless requested, to instruct the jury as to the legal effect of evidence offered by defendant to establish his general reputation as a peaceable and quiet citizen. State v. Nugent, 71 Mo. 136; State v. Nickens, 122 Mo. 607.

——*Presumption of innocence.*

"The court should have charged the jury that the respondent was presumed to be innocent until proved guilty. It is claimed that the court charged that the jury must find that all the material facts were proved beyond a reasonable doubt, and that should be held sufficient. There is a difference between innocence and doubtful innocence. Neither, it is true, will allow a conviction, but the presumption abides with the accused from the beginning, and is alone a sufficient defense until overthrown by proof. This is not the impression with many who are called to act as jurors, as I presume has been found to be the experience of most trial lawyers; but the fact that a person has been brought to the bar of the court charged with crime, and asked to answer, causes him not unfrequently to be regarded by the average juror from the first with suspicion amounting almost to a presumption of guilt, and hence the necessity for the charge omitted in this case. It should have been given by the court, although no request therefor was made by counsel." People v. Macard, 73 Mich. 25.

——*Reasonable doubt.*

"The court instructed the jury that, before they convicted defendant, they ought to be satisfied of his guilt beyond a reasonable doubt. Held, that it was not for the defendant to complain that the court failed to add that such doubt ought to be substantial doubt touching his guilt, and not a mere possibility of his innocence. If defendant desired this addition to the instruction, he should have asked for it." State v. Leeper, 78 Mo. 470. Where no special charge was asked applying the doctrine of reasonable doubt to any particular fact, and the circumstances do not call for any special charge relating thereto, a correct general charge on reasonable doubt is sufficient. Carson v. State, 34 Tex. Cr. App. 342.

——*Presumption from refusal to testify.*

Where the statute provides that "it shall be the duty of the court

to instruct the jury that no inference of guilt shall arise against the accused if he fail or refuse to testify as a witness in his own behalf," the omission to so instruct is reversible error, though counsel asks for specific instruction, and fails to ask for an instruction on the effect of failure to testify. In case of such a statute, the general rule that, where the law requires the court to instruct the jury upon the law, the failure of the court to do so, in the absence of a request, is not error, does not apply. State v. Myers, 8 Wash. 177, 35 Pac. 580, 756.

Limiting effect of evidence.

Where testimony as to other and different offenses is admitted, the judge, whether requested or not, should, in his charge, limit the evidence to the purpose for which it was admitted, viz., the impeachment of the credibility of defendant. Warren v. State, 33 Tex. Cr. App. 502; Sexton v. State, 33 Tex. Cr. App. 416. But this rule does not apply to proof of a former indictment of a witness who is not a defendant. Matkins v. State, 33 Tex. Cr. App. 605, 28 S. W. 536.

——*Effect of impeaching testimony.*

The court is not bound to instruct as to the effect of impeaching testimony, in the absence of a request, this being a collateral matter. State v. Kilgore, 70 Mo. 546, distinguishing State v. Branstetter, 65 Mo. 149.

——*Presumptions as to criminal capacity.*

The court must instruct as to the presumptions of legal capacity of children to commit a crime, where the evidence raises the question. Heilman v. Com., 84 Ky. 461.

In North Carolina, Code, § 413, requires the court to "state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon." For the construction and application of this statute, see the following cases: State v. Moses, 13 N. C. 452; State v. Morris, 10 N. C. 391; Bailey v. Poole, 35 N. C. 404; State v. Dunlop, 65 N. C. 292; State v. Matthews, 78 N. C. 523; State v. Jones, 87 N. C. 547; State v. Rogers, 93 N. C. 523; Holly v. Holly, 94 N. C. 100; Phifer v. Alexander, 97 N. C. 335; State v. Boyle, 104 N. C. 820; State v. Pritchett, 106 N. C. 667, 11 S. E. 357; State v. Brady, 107 N. C. 822. "A charge to the jury, in which the judge deals in generalities and abstract propositions of law (merely reading "headnotes" of reported cases), without making any application of them to the facts of the case, does not meet the requirements of the statute, and furnishes sufficient grounds for a new trial. He should not recapitulate the evidence in detail, but eliminate the material facts, array the state of facts on both sides, and

apply the principles of law to each, that the jury may decide the case according to the credibility of the witnesses and the weight of the evidence." State v. Jones, 87 N. C. 547.

§ 133. Where erroneous instructions are given.

The giving of an erroneous instruction is error, whether any requests to charge were made or not. A request to modify or correct the instruction given is not necessary to enable a party to assign error.[30] Such error may, of course, be harmless, and not ground for reversal.[31] And, as a general

[30] State v. Pennell, 56 Iowa, 29; State v. Walters, 45 Iowa, 390; State v. Glynden, 51 Iowa, 463; Stephenson v. Thayer, 63 Me. 143; Parsons v. Brown, 15 Barb. (N. Y.) 590; Carnes v. Platt, 6 Roh. (N. Y.) 270; Gowdey v. Robbins, 38 N. Y. Supp. 280, 3 App. Div. 353; Bynum v. Bynum, 33 N. C. 632; Hice v. Woodard, 34 N. C. 293; McRae's Adm'r v. Evans, 18 N. C. 243; Pierce v. Alspaugh, 83 N. C. 258; Jones v. State, 20 Ohio, 46; Globe Ins. Co. v. Sherlock, 25 Ohio St. 50; Seigle v. Louderbaugh, 5 Pa. 490; Carter v. Columbia & G. R. Co., 19 S. C. 26; Ford v. McBryde, 45 Tex. 499. "If a judge omits to charge upon a point presented by the evidence, it is no error, unless he has been requested to give the charge; but if he make a charge against law, it is error, unless it be upon a mere abstract proposition, and it is apparent upon the whole case that it could not have misled the jury." Hice v. Woodard, 34 N. C. 293. "Where the charge of the court in effect excluded material conclusions to be deduced from the evidence, it is error, without counter instructions having been presented." Stude v. Saunders, 2 Posey, Unrep. Cas. (Tex.) 122. Where the judge charged that defendants were liable even if the jury should find the facts precisely as defendant's witnesses testified, and thereupon directed verdict for plaintiffs, to which defendants excepted, it was held that defendants might, on appeal, raise the question of the correctness of the charge and direction, though they had not requested the court to submit any question of fact. Low v. Hall, 47 N. Y. 104.

[31] Generally, as to harmless error in instructions, see chapter 32, "Appellate Review of Instructions." "Where the jury has been misdirected in reference to a controlling question in the case, the judgment should be reversed and a new trial granted, although the weight of evidence may seem to support the verdict." Globe Ins. Co. v. Sherlock, 25 Ohio St. 50.

rule, an objection must be made and an exception saved, or the error will be deemed waived.[32]

III. Time of Making Request.

§ 134. Necessity of request in apt and proper time.

In order to entitle a party to insist that a proper instruction requested by him shall be given, his request must have been presented to the court in apt and proper time. It is a general rule that requests not made at the proper time may be refused.[33] Requests prematurely made may be refused without error, as well as requests made too late.[34] The court, however, is not bound to refuse a request for instructions merely because it is presented at an improper time, but may, if it sees fit, give the requested instruction.[35] In other

[32] See chapter 32, "Appellate Review of Instructions." See Abrahams v. Kelly, 2 S. C. 237, wherein it is said that a misstatement of the law is not error unless the attention of the trial court is called to it, and he neglects or refuses to correct it.

[33] Territory v. Harper, 1 Ariz. 399; Waldie v. Doll, 29 Cal. 555; Anderson v. Parker, 6 Cal. 197; Chicago Anderson Pressed Brick Co. v. Sobkowiak, 148 Ill. 573, 36 N. E. 572; Benson v. State, 119 Ind. 488; Town of Noblesville v. Vestal, 118 Ind. 80; Grubb v. State, 117 Ind. 277; Evansville & Terre Haute R. Co. v. Crist, 116 Ind. 446; Hege v. Newsom, 96 Ind. 426; Terry v. Shively, 93 Ind. 413; Fitzgerald v. Jerolaman, 10 Ind. 336; Kackley v. Evansville & Terre Haute R. Co., 7 Ind. App. 169; Payne v. Payne, 57 Mo. App. 130; Watson v. Race, 46 Mo. App. 546; Schuhle v. Cunningham, 13 N. Y. St. Rep. 81; Shober v. Wheeler, 113 N. C. 370, 18 S. E. 328; Luttrell v. Martin, 112 N. C. 593; Grubbs v. North Carolina Home Ins. Co., 108 N. C. 472, 13 S. E. 236; Marsh v. Richardson, 106 N. C. 539; Davis v. Council, 92 N. C. 725; Kinley v. Hill, 4 Watts & S. (Pa.) 426; Wilmot v. Howard, 39 Vt. 447; Cady v. Owen, 34 Vt. 598; Vaughan v. Porter, 16 Vt. 266; Richmond & M. R. Co. v. Humphreys, 90 Va. 425; Allen v. Perry, 56 Wis. 178.

[34] Chesapeake, O. & S. W. R. Co. v. Hendricks, 88 Tenn. 710.

[35] A rule of court as to the time of presenting requests for instructions is permissive only, and may be waived by the court. Sanborn v. School Dist. No. 10, 12 Minn. 17.

words, where the request is not made at the proper time, the court, in the exercise of a sound discretion, may either give or refuse the requested instructions, and in either case no error is committed.[36] While this is undoubtedly the general rule, it is not rigidly adhered to in all cases. Circumstances may exist, such as matters arising in the course of the argument, or errors or omissions in the general charge, making it error to refuse to give a requested instruction, although the request was not made at the time designated by statute or rule of court.[37] "The object of the law is to administer

[36] Phillips' Case, 132 Mass. 233; Ela v. Cockshott, 119 Mass. 416; Shartle v. City of Minneapolis, 17 Minn. 308; Sanborn v. School Dist. No. 10, 12 Minn. 17; Wood v. State, 64 Miss. 761; Buck v. People's St. Ry. & Electric Light & Power Co., 108 Mo. 179; Cluskey v. City of St. Louis, 50 Mo. 89; State v. Bickel, 7 Mo. App. 572; Engeman v. State, 54 N. J. Law, 247; Chapman v. McCormick, 86 N. Y. 479; Ward v. Albemarle & R. R. Co., 112 N. C. 168; Shober v. Wheeler, 113 N. C. 370; State v. Barbee, 92 N. C. 820; Jarrett v. Stevens, 36 W. Va. 445; Tully v. Despard, 31 W. Va. 370; Life Ins. Co. v. Francisco, 17 Wall. (U. S.) 680.

[37] People v. Sears, 18 Cal. 635; Brick v. Bosworth, 162 Mass. 338; McMahon v. O'Connor, 137 Mass. 216; Ela v. Cockshott, 119 Mass. 416; Crippen v. Hope, 38 Mich. 344; People v. Garbutt, 17 Mich. 25; Chapman v. McCormick, 86 N. Y. 479; Winne v. Brundage, 40 N. Y. Supp. 225; Carey v. Chicago, M. & St. P. Ry. Co., 61 Wis. 76. "A rule of a circuit court, 'that instructions to a jury will not be entertained or considered unless submitted before the conclusion of the argument of the case,' is a reasonable rule, and tends to the promotion of justice, and should be enforced, unless in a particular case there exist peculiar circumstances, which would render the enforcement of this rule unjust to one of the parties, and in such a case the court ought to disregard the rule, and grant or refuse instructions, though asked too late under the rule." Sterling Organ Co. v. House, 25 W. Va. 65. A rule of court requiring requests for instructions to be submitted to the opposite counsel before final argument will not justify a refusal to charge upon a material point in a criminal case. People v. Williams, 32 Cal. 280. The court may refuse to entertain a request because not presented at the time fixed by rule of court, but, if the request is entertained, the rule is waived, and it becomes the duty of the court to charge

justice, and rules of court for conducting trials should not be so construed as to prevent a fair submission of a case to the jury."[38] Where the refusal to give an instruction be-

as requested, if the request is otherwise proper. Sanborn v. School Dist. No. 10, 12 Minn. 17. On a trial for assault with intent to commit mayhem, it was held error for the court to refuse to charge on simple assault, although the request was not made until after argument, and a rule of court required requests to be presented before argument. People v. Demasters, 105 Cal. 669. Instructions which are reasonable and pertinent, and are submitted before the jury retire, should be given, notwithstanding there is a general rule of the court that requests for instructions must be submitted before the summing up. Billings v. McCoy, 5 Neb. 187. "Where instructions are asked by either party before the jury retire, which are unobjectionable, pertinent to the issue, and necessary for the jury to consider in making up their verdict, they should be given by the court, notwithstanding a rule requiring all instructions to be submitted before the commencement of the argument." Billings v. McCoy, 5 Neb. 188. "It is error in the court, at the close of its charge to the jury, to refuse to listen to a written request, at the instance of counsel to further charge the jury, regardless of the character of the request." Wood v. McGuire's Children, 17 Ga. 303. Where an instruction, proper and necessary to the trial, is inadvertently overlooked, the court should not refuse to give it, even after argument, unless giving it at that time will unduly prejudice the opposite party. Wills v. Tanner, 13 Ky. Law Rep. 741, 18 S. W. 166.

[38] Billings v. McCoy, 5 Neb. 191. "To refuse an instruction asked for soon after the court had refused one deemed deficient in form, but containing the same legal principle, because tendered after the time fixed by the court for the presentation of instructions, is not a proper exercise of the discretion of the court, where the giving it could not injure the opposite party, and refusing to give it was to deprive the party of the application of a legal principle to which he was entitled by the facts of the case." Hill v. Wright, 23 Ark. 530. "Rules of court are but a means to accomplish the ends of justice, and it is always in the power of the court to suspend its own rules, or except a particular case from their operation, whenever the purposes of justice require it." People v. Demasters, 105 Cal. 673, quoting, with approval, Pickett v. Wallace, 54 Cal. 148. See, also, People v. Williams, 32 Cal. 280.

cause not presented in time would work injustice, the court should either waive its rule, and give the instruction, or make such explanations of its own as would put the law correctly before the jury.[39] But where a full and fair opportunity has been afforded to counsel to submit their requests for instructions, a very clear case of abuse of discretion must be made out to call for any interference with the refusal of the trial judge to receive other requests, the presentation of which has been unnecessarily delayed.[40] At the close of the evidence, and before the argument, the granting of time to prepare special instructions is a matter resting in the sound discretion of the trial court.[41]

§ 135. What is apt and proper time.

The proper time at which to submit requests for instructions varies in different jurisdictions. Sometimes it is fixed by statute or rule of court.[42] The court may prescribe reasonable rules as to the time of presenting requests.[43] The

[39] People v. Keefer, 18 Cal. 636.

[40] Schuhle v. Cunningham, 14 Daly (N. Y.) 404; O'Neil v. Dry Dock, E. B. & B. R. Co., 129 N. Y. 130; Williams v. Com., 85 Va. 607; Tully v. Despard, 31 W. Va. 370.

[41] Phillips v. Thorne, 103 Ind. 275, 278; Atchison, T. & S. F. R. Co. v. Frazier, 27 Kan. 463.

[42] Tinney v. Endicott, 5 Cal. 102; Fitch v. Belding, 49 Conn. 469; McCaleb v. Smith, 22 Iowa, 242; Billings v. McCoy, 5 Neb. 187; State v. Hutchings, 24 S. C. 145.

[43] Carney v. Barrett, 4 Or. 171; Prindeville v. People, 42 Ill. 217; McMahon v. O'Connor, 137 Mass. 216. A rule requiring requests to be submitted before the conclusion of the argument is a reasonable rule. Sterling Organ Co. v. House, 25 W. Va. 65. An instruction should not be refused upon the ground that it was not presented in time, where there is no written rule of court limiting the time for presenting requests. "A rule could only exist in writing of record, as, when thus adopted, it has the force of law. The rule could not exist in the breast of the judge alone, but must be announced as a rule made of record, and is then applicable to all

rule prevailing in most jurisdictions requires the request to be made at or before the close of the evidence, and before the beginning of the argument,[44] though in some states it is the

cases without discretion, unless an exercise of discretion is reserved in the rule." Chicago Anderson Pressed Brick Co. v. Sobkowiak, 148 Ill. 573. Rule requiring instructions to be presented in writing before argument is reasonable. Manhattan Life Ins. Co. v. Francisco, 17 Wall. (U. S.) 672. "Courts have the right to make a rule, in criminal cases, that written instructions must be handed to the court before the argument of the case commences." People v. Sears, 18 Cal. 635. The court cannot lay down an unbending rule that all requests to charge shall be submitted before the argument is begun. People v. Garbutt, 17 Mich. 9. "A rule of court prohibiting a party from obtaining the instruction of the court to the jury on any matter of law relevant in the case, at any time before the jury retire from the bar, ought not be made, and, if made, ought not to be adhered to." Bell v. North, 4 Litt. (Ky.) 133.

[44] Territory v. Harper, 1 Ariz. 399; McMahon v. Sankey, 35 Ill. App. 345; Benson v. State, 119 Ind. 438; Evansville & T. H. R. Co. v. Crist, 116 Ind. 446; Phillips v. Thorne, 103 Ind. 275, 278; Hege v. Newsom, 96 Ind. 426; Terry v. Shively, 93 Ind. 413; Grubb v. State, 117 Ind. 277, 280; Surber v. State, 99 Ind. 71, 73; Foxwell v. State, 63 Ind. 539; Glasgow v. Hobbs, 52 Ind. 239; Ollam v. Shaw, 27 Ind. 388; Louisville, N. A. & C. Ry. Co. v. Wood, 113 Ind. 544; Kopelke v. Kopelke, 112 Ind. 435; Anderson v. Lake Shore & M. S. Ry. Co., 26 Ind. App. 196; Lake Erie & W. R. Co. v. Brafford (Ind. App.) 43 N. E. 882; Ransbottom v. State, 144 Ind. 250; German Fire Ins. Co. v. Columbia Encaustic Tile Co., 15 Ind. App. 623; Atchison, T. & S. F. R. Co. v. Franklin, 23 Kan. 74; Ela v. Cockshott, 119 Mass. 416; Payne v. Payne, 57 Mo. App. 130; State v. Bickel, 7 Mo. App. 572; Luttrell v. Martin, 112 N. C. 593; Ward v. Albemarle & Raleigh R. Co., 112 N. C. 16[illegible]; State v. Whitmire, 110 N. C. 367; Posey v. Patton, 109 N. C. 455; Grubbs v. North Carolina House Ins. Co., 108 N. C. 472; Taylor v. Plummer, 105 N. C. 56; Powell v. Wilmington & W. R. Co., 68 N. C. 395; State v. Rowe, 98 N. C. 629; Caldwell v. Brown, 9 Ohio Cir. Ct. R. 691; Lutterbeck v. Toledo Consolidated St. R. Co., 5 Ohio Cir. Dec. 141; Kinley v. Hill, 4 Watts & S. (Pa.) 426; White v. Amrhien, 14 S. D. 270; United States v. Gilbert, 2 Sumn. 22, Fed. Cas. No. 15,204; Manhattan Life Ins. Co. v. Francisco, 17 Wall. (U. S.) 672. See People v. Demasters, 105 Cal. 669; People v. Sears, 18 Cal. 635; Brick v. Bosworth, 162 Mass. 338; Carey v. Chicago, M. & St. P.

practice to request instructions after the argument.[45] In some jursdictions, the request must be made before the giving of the general charge, or it will be too late, and may be refused;[46] while in other jurisdictions, requests for additional instructions may be made after the general charge, and before the retirement of the jury,[47] and requests made before

Ry. Co., 61 Wis. 71. See, also, Buck v. People's St. Ry. & Electric L. & P. Co., 108 Mo. 179.

[45] In Iowa, under a statute providing that, when the argument is concluded, either party may request instructions, instructions which are submitted during the opening and only argument made at the trial cannot be refused as being presented too late. McCaleb v. Smith, 22 Iowa, 242. In Oregon, requests should be presented before conclusion of the argument. Sterling Organ Co. v. House, 25 W. Va. 65; Carney v. Barrett, 4 Or. 171. In South Carolina, under rule of court, requests should be presented before the argument, but at the close of the argument either counsel may present such "additional requests as may be suggested by the course of the argument." State v. Hutchings, 24 S. C. 145. "A rule of court requiring counsel to file and submit to the court any instructions they may offer, before the argument is closed, to the jury, does not operate where the cause is submitted without argument." Tinney v. Endicott, 5 Cal. 102. Where no request for instructions is made in writing before the closing argument, as required by a rule of court, a special leave to present requests later cannot be implied from "a postponement of discussion of a question raised on evidence to the arguments." In re Keohane (Mass.) 60 N. E. 406.

[46] Donahue v. Coleman, 49 Conn. 464; Fitch v. Belding, 49 Conn. 469; Shartle v. City of Minneapolis, 17 Minn. 308 (Gil. 284); Schuhle v. Cunningham, 14 Daly, 404, 13 N. Y. St. Rep. 81; Posey v. Patton, 109 N. C. 455; Marsh v. Richardson, 106 N. C. 539; Powell v. Wilmington & W. R. Co., 68 N. C. 395; Flint v. Nelson, 10 Utah, 261; United States v. Gilbert, 2 Sumn. 21, Fed. Cas. No. 15,204. See Billings v. McCoy, 5 Neb. 187. Compare Winne v. Brundage, 40 N. Y. Supp. 225.

[47] Brooks v. State, 96 Ga. 353; Yeldell v. Shinholster, 15 Ga. 189; Brick v. Bosworth, 162 Mass. 334; People v. Garbutt, 17 Mich. 25; Pfeffele v. Second Ave. R. Co., 34 Hun (N. Y.) 499; Venable v. State, 1 Ohio Cir. Dec. 165; Williams v. Miller, 2 Lea (Tenn.) 406. The request should be made immediately after the close of the

the general charge have been held to be premature, and therefore properly refused.[48] It is practically a universal rule that requests, to be in time, must be presented before the case has been finally submitted to the jury.[49] After the jury have been charged, and are leaving the jury box, it is too late for counsel to request the court to make any specific charge in the case.[50] In some cases it has been stated that it is

charge. Boone v. Miller, 73 Tex. 557. "The proper time to present requests for instructions is before the charge, and not after, unless there are circumstances making it necessary to call attention to some matter of detail or some phase of the case which has been overlooked or inaccurately dealt with." Leydecker v. Brintnall, 158 Mass. 298. "While the practice referred to may be, and undoubtedly is, an excellent one, yet it must be apparent to any one that the charge of the court may itself develop the necessity of counsel's calling the attention of the court to some point that has been overlooked, and asking a direct charge thereon. Counsel need not, in the first instance, make any requests, or they may request the court to charge upon some particular part of the case. In either event, they are justified in assuming that the court will fully, in the charge, cover all the essential parts of the case, and if, after the charge has been given, they see that some essential has been overlooked, no practice or rule of that court adopted for mere convenience will deprive them of their right to present a request covering the omission." Crippen v. Hope, 38 Mich. 344.

[48] Chicago Guaranty Fund Life Soc. v. Ford, 104 Tenn. 533; Chesapeake, O. & S. W. R. Co. v. Hendricks, 88 Tenn. 710; Chesapeake, O. & S. W. R. Co. v. Foster, 88 Tenn. 671; Roller v. Bachman, 5 Lea (Tenn.) 158.

[49] Bradstreet v. Rich, 74 Me. 303; Smart v. White, 73 Me. 332; Phillips' Case, 132 Mass. 233; Watson v. Race, 46 Mo. App. 546; Garrity v. Higgins, 177 Mass. 414; State v. Engeman (N. J. Law) 23 Atl. 676; State v. Barbee, 92 N. C. 820; Davis v. Council, 92 N. C. 725; Stanton v. Bannister, 2 Vt. 464; Wetherby v. Foster, 5 Vt. 136; Williams v. Com., 85 Va. 607; Jarrett v. Stevens, 36 W. Va. 445; Tully v. Despard, 31 W. Va. 370. "An instruction asked after the rendition of the verdict is not in apt time, and may be disregarded." Davis v. Council, 92 N. C. 725.

[50] Tinkham v. Thomas, 34 N. Y. Super. Ct. 236; Tully v. Despard, 31 W. Va. 370. "A case on appeal stated in substance that, after

never too late to present requests until the jury have retired.[51] In some cases it is proper for the court to give additional instructions to the jury after they have retired. This subject is considered in a separate chapter.[52]

§ 136. Same—Digest of decisions.

Where counsel, at the "conclusion of the trial, handed to the court fifty-eight written instructions, occupying twenty pages, it was not incumbent upon the judge to stop the progress of the trial for their examination, and they were properly refused." Anderson v. Parker, 6 Cal. 197. "It would be better if requests to charge could be submitted in writing before the court proceeds to charge; but if, in the pressure of business, this is impracticable, in such event, after the charge has closed, the attention of the court may be called to the point omitted." Yeldell v. Shinholster, 15 Ga. 189. "It is not proper for counsel to interrupt the court, while charging the jury, for the purpose of asking for other instruction to them; but it is proper, after the charge is closed, to call the attention of the court to a point omitted, and on which the charge should have been given," and, having done so, counsel may insist, on the recall of the jury for further instruction, that a charge be given on the point omitted. Yeldell v. Shinholster, 15 Ga. 189. A request for written instructions, made during the concluding argument, is too late. Atchison, T. & S. F. R. Co. v.

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the court had charged the jury, and they had risen from their seats and were about to retire, defendant's counsel requested that they should wait a moment. The court stated he would not add to his charge, and directed the jury to go on. Said counsel then stated that he desired 'to ask the court to make some charge * * *,—to charge the jury in certain respects.' The court refused to hear the requests." It was held "that it was the right of the counsel to present his requests; that, while these rights might be forfeited by the omission of counsel to speak in time, and the court had large discretion in this respect, here it was not exercised; but the court, anticipating the object of counsel, decided to deny him, and the refusal of the court to listen to the request was error." Chapman v. McCormick, 86 N. Y. 479.

[51] Brooks v. State, 96 Ga. 353; Crippen v. Hope, 38 Mich. 344. See, also, Billings v. McCoy, 5 Neb. 187.

[52] See infra, chapter 17, "Reinstructing Jury after Retiring."

Franklin, 23 Kan. 74. "It is a perfectly legitimate and usual practice to offer a prayer involving the right of the plaintiff to recover on the case made by him before any proof is offered by the defendant; and if, as in the present case, the court below erroneously grant the defendant's prayer, and the judgment is reversed on appeal, it would often be doing the greatest injustice if the court should enter final judgment, thereby depriving the defendant of the privilege of offering any evidence." In the absence of any rule of the court below requiring all the testimony on both sides to be offered before any prayer is made to the court, the appellate court cannot assume that the defendant did not intend to offer any proof, in the event of his want of success in his prayer to the court. Howard v. Carpenter, 22 Md. 249. It is obviously reasonable that it should be settled as far as possible, before the arguments begin, what facts must be found by the jury to entitle one side or the other to prevail; and it is still more obvious that, if the right to present requests for rulings is to be an aid in the administration of justice, the court must have an opportunity to consider the requests which are made. We do not see sufficient reason for disturbing the now settled practice, which leaves it within the discretion of the court, when a multitude of requests are presented after the arguments have begun, to throw the burden on counsel of calling attention to points not dealt with, at the end of the charge, with the right, of course, to except to such portions of the charge as they deem erroneous. It is not to be supposed that this discretion would be used in such a way as to avoid dealing with an important point that arises, or is first thought of, at a late stage. McMahon v. O'Connor, 137 Mass. 216. Until defendant has announced that he rests his case, he cannot insist upon the court's instructing the jury. Morley v. Liverpool & L. & G. Ins. Co., 85 Mich. 210; Denman v. Johnston, 85 Mich. 387; Hinchman v. Weeks, 85 Mich. 535; Clow v. Plummer, 85 Mich. 550; Kelso v. Woodruff, 88 Mich. 299. "The court may, after argument begun by counsel for the defendant, give additional instructions, or modify those already given, at the request of the district attorney." Wood v. State, 64 Miss. 761. While requests should properly be presented to the court before the general charge, there is no rule of practice which absolutely precludes counsel from asking additional instructions after the general charge to the jury; and where the instruction asked is material, and is intended to supply omissions in the general charge which counsel did not anticipate, it is error to refuse to give it. Gallagher v. McMullen, 7 App. Div. (N. Y.) 321. Even after the judge has instructed the

jury, it is error to refuse to attend to further requests, on the ground that counsel had already, in pursuance to the direction of the court, presented their requests. Pfeffele v. Second Ave. R. Co., 34 Hun (N. Y.) 497. The defendant has a right to ask for special instructions only before the case is given to the jury. He is not entitled to them as of right, although, after asking for them, the jury is given additional instructions by the judge. State v. Barbee, 92 N. C. 820; State v. Rowe, 98 N. C. 629. It is clear that the court does not err in this respect. A request of counsel that the court shall arrest, and thereby disarrange, the argument of counsel, in order to instruct the jury on the law of the case, is premature, and opposes the well-settled rules of practice. Richmond & M. R. Co. v. Humphreys, 90 Va. 425. Where his attention is called to certain legal points involved in the case by instructions asked, the judge, although he refuses such instructions, because not presented within the time prescribed by the rules, is bound in his charge to the jury to submit the law applicable to the case as made by the evidence. Allen v. Perry, 56 Wis. 178. In Vermont, the rule of practice requires that any special requests to charge should be presented to the court by the opening of the argument for the party making the requests. Vaughan v. Porter, 16 Vt. 266; Cady v. Owen, 34 Vt. 598; Wilmot v. Howard, 39 Vt. 455.

IV. Form and Sufficiency of Request.

§ 137. Correctness in form and substance.

The form and sufficiency of instructions have been considered in several of the preceding chapters of this work. Requests for instructions must conform to the rules there stated. In order to entitle a party to insist that a requested instruction be given to the jury, such instruction must be correct both in form and substance, and such that the court might give to the jury without modification or omission. If the instruction, as requested, is objectionable in any respect, its refusal is not error.[53] A party cannot complain that the court did not, of its

[53] Johnson v. King, 20 Ala. 270; Long v. Rodgers, 19 Ala. 321; Miller v. State, 107 Ala. 40; Barnes v. State, 103 Ala. 44; People v. Harlan, 133 Cal. 16; Condiff v. Kansas City, Ft. S. & G. R. Co., 45 Kan. 256; Dickson v. Randal, 19 Kan. 214; Douglas v. Wolf,

own motion, modify and correct the request, and then give it as corrected. No such duty rests upon the court.[54] Where a part only of a requested instruction is erroneous, the whole

6 Kan. 88; Western Union Tel. Co. v. Getto-McClung Boot & Shoe Co., 9 Kan. App. 863; Chicago, R. I. & P. Ry. Co. v. Clough, 134 Ill. 586; Ricketts v. Harvey, 106 Ind. 566; Goodwin v. State, 96 Ind. 566; Roots v. Tyner, 10 Ind. 87; Lawrenceburgh & U. M. R. Co. v. Montgomery, 7 Ind. 474; Kackley v. Evansville & T. H. R. Co., 7 Ind. App. 169; Duley v. Kelley, 74 Me. 556; Clintsman v. Alfred J. Brown Seed Co. (Mich.) 86 N. W. 797; Hodges v. Cooper, 43 N. Y. 216; Hollywood v. People, 3 Keyes (N. Y.) 55, 2 Abb. Dec. 376; Wright v. Paige, 3 Keyes (N. Y.) 581; Walker v. Gilbert, 2 Daly (N. Y.) 80; Brignoli v. Chicago & G. E. Ry. Co., 4 Daly (N. Y.) 182; People v. Holmes, 6 Park. Cr. R. (N. Y.) 25; Keller v. New York Cent. R. Co., 24 How. Pr. (N. Y.) 172; Bagley v. Smith, 10 N. Y. 489; Hayden v. Wheeler & Tappan Co., 66 Hun, 629, 20 N. Y. Supp. 902; Baltimore & O. R. Co. v. Schultz, 43 Ohio St. 270; Ratcliff v. Baird, 14 Tex. 43; Underwood v. Hart, 23 Vt. 120; Vaughan v. Porter, 16 Vt. 266; Fenelon v. Butts, 53 Wis. 344; Violett v. Patton, 5 Cranch (U. S.) 142; Brooks v. Marbury, 11 Wheat. (U. S.) 78; Buck v. Chesapeake Ins. Co., 1 Pet. (U. S.) 151; Elliott v. Piersol's Lessee, 1 Pet. (U. S.) 328; Columbian Ins. Co. v. Lawrence, 2 Pet. (U. S.) 25; Patterson v. Jenks, 2 Pet. (U. S.) 216; Scott's Lessee v. Ratliffe, 5 Pet. (U. S.) 81; Winn v. Patterson, 9 Pet. (U. S.) 663; United States v. Metropolis Bank, 15 Pet. (U. S.) 377; Catts v. Phalen, 2 How. (U. S.) 376; Haffin v. Mason, 15 Wall. (U. S.) 671.

[54] Callan v. McDaniel, 72 Ala. 96; Savery v. Moore, 71 Ala. 236; City Nat. Bank of Selma v. Burns, 68 Ala. 267; Farrish v. State, 63 Ala. 164; Duvall v. State, 63 Ala. 12; Dotson v. State, 62 Ala. 141; Green v. State, 59 Ala. 68; Leach v. Bush, 57 Ala. 145; Caldwell v. Parmer's Adm'r, 56 Ala. 405; McWilliams v. Rodgers, 56 Ala. 87; Swallow v. State, 22 Ala. 20; Rives v. McLosky, 5 Stew. & P. (Ala.) 330; Carmichael v. Brooks, 9 Port. (Ala.) 330; Morrison v. Wright, 7 Port. (Ala.) 67; Blackmore v. Neale, 15 Colo. App. 49; Rolfe v. Rich, 149 Ill. 436, affirming 46 Ill. App. 406; Vanlandingham v. Huston, 4 Gilm. (Ill.) 125; Coney v. Pepperdine, 38 Ill. App. 403; Louisville, N. A. & C. Ry. Co. v. Shanks, 132 Ind. 395; Rogers v. Leyden, 127 Ind. 50; Mosier v. Stoll, 119 Ind. 244; Ricketts v. Harvey, 106 Ind. 564; Over v. Schiffling, 102 Ind. 191; Goodwin v. State, 96 Ind. 550; Toops v. State, 92 Ind. 13; Goodwine v.

may be properly refused,[55] especially in jurisdictions where the court is required to give instructions in the exact words in

State, 5 Ind. App. 63; Howlett v. Dilts, 4 Ind. App. 23; Kluse v. Sparks, 10 Ind. App. 444; Keenan v. Missouri State Mut. Ins. Co., 12 Iowa, 126; Morrison v. Myers, 11 Iowa, 538; Grimes v. Martin, 10 Iowa, 347; Tifield v. Adams, 3 Iowa, 487; Kansas Ins. Co. v. Berry, 8 Kan. 159; Clarke v. Baker, 7 J. J. Marsh. (Ky.) 197; Maryland Ins. Co. v. Bathurst, 5 Gill & J. (Md.) 159; Garvey v. Wayson, 42 Md. 178; Baltimore & O. R. Co. v. Resley, 14 Md. 424; Dempsey v. Reinsedler, 22 Mo. App. 43; Mitchell v. Charleston Light & Power Co., 45 S. C. 146; Missouri Pac. Ry. Co. v. Cullers, 81 Tex. 382; Rosenthal v. Middlebrook, 63 Tex. 333; Brownson v. Scanlan, 59 Tex. 222; Wells v. Barnett, 7 Tex. 584; Hardy v. De Leon, 5 Tex. 211; Galveston, H. & S. A. Ry. Co. v. Schrader, 1 White & W. Civ. Cas. Ct. App. (Tex.) § 1147; Pfeuffer v. Wilderman, 1 White & W. Civ. Cas. Ct. App. (Tex.) § 1171; Rosenbaums v. Weeden, 18 Grat. (Va.) 785; Kincheloe v. Tracewells, 11 Grat. (Va.) 587; Gas Co. v. Wheeling, 8 W. Va. 371; Henry v. Davis, 7 W. Va. 715; Smith v. Carrington, 4 Cranch (U. S.) 62; Catts v. Phalen, 2 How. (U. S.) 382.

[55] Preston v. Dunbam, 52 Ala. 217; Baker v. State, 49 Ala. 350; Slater v. Carter, 35 Ala. 679; Long v. Rodgers, 19 Ala. 321; Stanton v. State, 13 Ark. 317; Marriner v. Dennison, 78 Cal. 202; Garlick v. Bowers, 66 Cal. 122; Smith v. Richmond, 19 Cal. 476; Thompson v. Paige, 16 Cal. 77; Charter v. Lane, 62 Conn. 121; State v. Stanton, 37 Conn. 423; Marlborough v. Sisson, 23 Conn. 44; Wooten v. State, 24 Fla. 355; City of Atlanta v. Buchanan, 76 Ga. 585; Urquhart v. Leverett, 69 Ga. 92; Denman v. Bloomer, 11 Ill. 177; McCammon v. Cunningham, 108 Ind. 545; Christian v. State, 7 Ind. App. 417; State v. Cassady, 12 Kan. 551; Kansas Ins. Co. v. Berry, 8 Kan. 159; Mayberry v. Kelly, 1 Kan. 116; Douglas v. Wolf, 6 Kan. 88; Tower v. Haslam, 84 Me. 86; Snow v. Penobscot River Ice Co., 77 Me. 55; Grand Trunk Ry. Co. v. Latham, 63 Me. 177; State v. Cleaves, 59 Me. 298; Bryant v. Crosby, 40 Me. 9; Atkinson v. Snow, 30 Me. 364; Tibbetts v. Baker, 32 Me. 25; Inhabitants of Thomaston v. Inhabitants of Warren, 28 Me. 289; Doyle v. Commissioners of Baltimore County, 12 Gill & J. (Md.) 484; Gray v. Crook, 12 Gill & J. (Md.) 236; Kettlewell v. Peters, 23 Md. 316; Birney v. New York & W. Printing Telegraph Co., 18 Md. 341; Budd v. Brooke, 3 Gill (Md.) 198; Whiteford v. Burckmyer, 1 Gill. (Md.) 127; Baltimore & O. R. Co. v. Resley, 7 Md. 297; Preston v. Leighton, 6 Md. 88;

which they are requested.[56] Where special requests to charge are asked as a series, if any one of such requests is bad or improper the court may refuse them all.[57] A request containing

Stewart v. Spedden, 5 Md. 433; Bond v. Corbett, 2 Minn. 248; Castner v. The Dr. Franklin, 1 Minn. 73 (Gil. 51); Doe d. Martin v. King's Heirs, 3 How. (Miss.) 125; Dickson v. Moody, 2 Smedes & M. (Miss.) 17; Lail v. Pacific Exp. Co., 81 Mo. App. 232; State v. Anderson, 4 Nev. 265; Wright v. Paige, 36 Barb. (N. Y.) 438; Newman v. Cordell, 43 Barb. (N. Y.) 448; Keller v. New York Cent. R. Co., 24 How. Pr. (N. Y.) 172; Doughty v. Hope, 3 Denio (N. Y.) 594; Gardner v. Clark, 17 Barb. (N. Y.) 538; Halsey v. Rome, W. & O. R. Co., 12 N. Y. St. Rep. 319; Vanderbilt v. Brown, 128 N. C. 498; People v. Holmes, 6 Park. Cr. Rep. (N. Y.) 25; Eckels v. State, 20 Ohio St. 508; Inglebright v. Hammond, 19 Ohio, 337; Walker v. Devlin, 2 Ohio St. 593; State v. Tarrant, 24 S. C. 593; Carter v. Columbia & G. R. Co., 19 S. C. 28; Gunter v. Graniteville Mfg. Co., 15 S. C. 454; Ragsdale v. Southern R. Co. (S. C.) 38 S. E. 609; East Tennessee, V. & G. R. Co. v. Gurley, 12 Lea (Tenn.) 46; East Tennessee, V. & G. R. Co. v. Fain, 12 Lea (Tenn.) 35; Sommers v. Mississippi & T. R. Co., 7 Lea (Tenn.) 205; Hills v. Goodyear, 4 Lea (Tenn.) 233; Brownson v. Scanlan, 59 Tex. 222; Lanyon v. Edwards (Tex. Civ. App.) 26 S. W. 524; Hardy v. De Leon, 5 Tex. 211; Houston & T. C. Ry. Co. v. Kelley, 13 Tex. Civ. App. 1; Dallas Consolidated Traction Ry. Co. v. Hurley, 10 Tex. Civ. App. 246; Underwood v. Hart, 23 Vt. 120; Brooke v. Young, 3 Rand. (Va.) 106; Sterling v. Ripley, 3 Chand. (Wis.) 166, 3 Pin. 155; Stucke v. Milwaukee & M. R. Co., 9 Wis. 202; Catts v. Phalen, 2 How. (U. S.) 376, 11 L. Ed. 306; Monarch Cycle Mfg. Co. v. Royer Wheel Co., 44 C. C. A. 523, 105 Fed. 324.

[56] United States Life Ins. Co. v. Lesser, 126 Ala. 568; Stanton v. State, 13 Ark. 317; Castello v. Landwehr, 28 Wis. 522; Lyle v. McCormick Harvesting Mach. Co., 108 Wis. 81.

[57] Slater v. Carter, 35 Ala. 679; Price v. State, 107 Ala. 161; Hicks v. Maness, 19 Ark. 701; Williamson v. Tobey, 86 Cal. 497; Smith v. Richmond, 19 Cal. 476; Marlborough v. Sisson, 23 Conn. 54; Baker v. Chatfield, 23 Fla. 540; Hunt v. Pond, 67 Ga. 578; Head v. Bridges, 67 Ga. 228; Grace v. McKinney, 112 Ga. 425; Roberts v. State, 83 Ga. 369; Atkinson v. Snow, 30 Me. 365; Blumhardt v. Rohr, 70 Md. 328; Marshall v. Haney, 4 Md. 498; Greenway v. Turner, 4 Md. 296; Bedford v. Penny, 58 Mich. 424; Westchester Fire Ins. Co. v. Earle, 33 Mich. 143; Sword v. Keith, 31 Mich. 247; Sim-

several alternative propositions of law, one of which is incorrect, may be refused entirely.[58] It has been held, however, that where a request to charge, though in form one instruction, contains in fact several distinct and separable propositions, some of which are correct and should be given, and others are incorrect, the court should not reject the whole, but should separate them, giving the correct and refusing the incorrect propositions.[59] A requested instruction which, although correct as a proposition of law, is not pertinent to the issues, may be refused.[60] The same is true as to requests for instructions which, under the circumstances, would be uncertain, ambiguous, or misleading unless qualified or

mons v. St. Paul & C. Ry. Co., 18 Minn. 184; Village of Mankato v. Meagher, 17 Minn. 265 (Gil. 243); Bond v. Corbett, 2 Minn. 248 (Gil. 209); Castner v. The Dr. Franklin, 1 Minn. 73 (Gil. 51); Consolidated Traction Co. v. Chenowith, 58 N. J. Law, 416; Palmer v. Holland, 51 N. Y. 416; Magee v. Badger, 34 N. Y. 247; Gutwillig v. Zuberbier, 41 Hun (N. Y.) 361; Inglebright v. Hammond, 19 Ohio, 337; Fuller v. Coats, 18 Ohio St. 343; Holmes v. Ashtabula Rapid Transit Co., 10 Ohio Cir. Dec. 638; Hamburg v. Wood, 66 Tex. 168; Burnham v. Logan, 88 Tex. 1; Yarborough v. Weaver, 6 Tex. Civ. App. 215; McWhirter v. Allen, 1 Tex. Civ. App. 649; Sabine & East Texas Ry. Co. v. Ewing, 1 Tex. Civ. App. 531; Fordyce v. Yarborough, 1 Tex. Civ. App. 260; People v. Thiede, 11 Utah, 241; Johnston v. Jones, 1 Black (U. S.) 209; Lincoln v. Claflin, 7 Wall. (U. S.) 132; Harvey v. Tyler, 2 Wall. (U. S.) 328; United States v. Hough, 103 U. S. 71; Springer v. United States, 102 U. S. 586; Worthington v. Mason, 101 U. S. 149; Eastern Trans. Line v. Hope, 95 U. S. 297; Beaver v. Taylor, 93 U. S. 46; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291; Mann Boudoir Car Co. v. Dupre, 4 C. C. A. 540, 54 Fed. 646.

[58] Richard v. State (Fla.) 29 So. 413; Boyden v. Fitchburg R. Co., 72 Vt. 89.

[59] Sword v. Keith, 31 Mich. 247; Lawrence v. Hudson, 12 Heisk. (Tenn.) 671; Burnham v. Logan, 88 Tex. 1; Peshine v. Shepperson, 17 Grat. (Va.) 472. Contra, Slater v. Carter, 35 Ala. 679.

[60] Wahlgren v. Market St. Ry. Co. (Cal.) 62 Pac. 308; Lamkin v. Palmer, 164 N. Y. 201, 58 N. E. 123, affirming 24 App. Div. 255.

explained.[61] Requests singling out and giving undue prominence to issues, theories, or evidence should be refused.[62] Argumentative instructions are properly refused.[63] Where a requested instruction has been given, an inconsistent instruction asked by the same party is properly refused, although the latter instruction is in itself correct.[64] In some jurisdictions it is held that a request which is properly refused for defects in form or substance may be sufficient to call the attention of the court to the matter upon which an instruction is desired, and make a failure to give an appropriate instruction thereon error.[65] The specific instructions desired should be requested, and a mere general request for instructions may be disregarded.[66]

[61] Lafayette Ry. Co. v. Tucker, 124 Ala. 514; Adams v. State, 52 Ala. 379; Partridge v. Forsyth, 29 Ala. 200; Dunlap v. Robinson, 28 Ala. 100; Godbold v. Blair, 27 Ala. 592; Rolston v. Langdon, 26 Ala. 661; Southern Ry. Co. v. Lynn (Ala.) 29 So. 573; Swallow v. State, 22 Ala. 20; Hall v. Hunter, 4 G. Greene (Iowa) 539; Stockton v. Frey, 4 Gill (Md.) 406; Whiteford v. Burckmyer, 1 Gill (Md.) 127; Ohliger v. City of Toledo, 20 Ohio Cir. Ct. R. 142, 10 Ohio Cir. Dec. 762; Levasser v. Washburn, 11 Grat. (Va.) 572; Kincheloe v. Tracewells, 11 Grat. (Va.) 587.

[62] Kenny v. Town of Ipswich (Mass.) 59 N. E. 1007; People v. Finley, 38 Mich. 482; Thornton's Ex'rs v. Thornton's Heirs, 39 Vt. 122.

[63] Singleton v. State, 106 Ala. 49.

[64] Healey v. Rupp (Colo.) 63 Pac. 319.

[65] People v. Tapia, 131 Cal. 647; State v. Moore, 160 Mo. 443; Cleveland v. Empire Mills, 6 Tex. Civ. App. 479; Carpenter v. Dowe (Tex. Civ. App.) 26 S. W. 1002; Gulf, C. & S. F. Ry. Co. v. Hill (Tex. Civ. App.) 58 S. W. 255.

[66] Simonds v. Oliver, 23 Mo. 32. "A party asking instructions of the court to the jury as to the law should specify the points, and not ask instructions generally as to the law arising out of a complicated mass of evidence." Kitty v. Fitzhugh, 4 Rand. (Va.) 600.

§ 138. Same—Digest of decisions.

Alabama.

"When a party requests charges which, though separately numbered, were not separately asked, and any of the charges thus requested are erroneous, the court is not required to distinguish between the good and the bad, but may refuse them all." Eagle & P. Mfg. Co. v. Gibson, 62 Ala. 369. "The court never errs in refusing a charge requiring explanation, or which has a tendency to mislead or confuse the jury, e. g., as where the court in its charge enumerates several facts connected with a criminal transaction, upon consideration of which the jury might pronounce a verdict of guilty, and the defendant singles out one of these facts, and requests a charge that, 'from this fact alone,' guilt cannot be inferred." Adams v. State, 52 Ala. 379. An incomplete and meaningless request as written may be refused. Hooper v. State, 106 Ala. 41. In a proceeding to contest a will, an instruction that "the court charges the jury, on behalf of contestants, that the burden of proving the due execution of the will S., and, if he has failed to prove that the will was duly executed to the reasonable satisfaction of the jury, the jury must find for the contestant," is properly refused as incomplete, though what the court meant is apparent. Schieffelin v. Schieffelin, 127 Ala. 14.

California.

"In preparing instructions, each party may assume any reasonable hypothesis in relation to the facts of the case, and ask the court to declare the law as applicable to it; and it is error to refuse an instruction so framed because the case supposed does not include some other hypothesis equally rational." People v. Taylor, 36 Cal. 255.

Connecticut.

Request should specify count to which it applies. State v. Stanton, 37 Conn. 423.

Georgia.

A request setting forth a proposition which is an absurdity is properly refused, "though it may be manifest that this is the result of a palpable and unintentional error on the part of counsel in framing the request." Macon Consolidated St. R. Co. v. Barnes, 113 Ga. 212.

Illinois.

In an action by a broker to recover for losses sustained in the purchase of rye for future delivery, an instruction that, if the

methods adopted by plaintiff were too intricate and tortuous to be explained to the full comprehension of the jury, the verdict should be for defendant, was properly refused. Wolcott v. Reeme, 44 Ill. App. 196. "The plaintiff is only obliged to state the law correctly in his instructions applicable to his theory of the case, and is not bound, in every instruction, to anticipate and exclude every possible defense." Mitchell v. Milholland, 106 Ill. 175; Mt. Olive & S. Coal Co. v. Rademacher, 190 Ill. 538, affirming 92 Ill. App. 442. An instruction that does not fully and perfectly state the facts involved may be refused. Phenix Ins. Co. v. Woland, 48 Ill. App. 535.

Indiana.

"Instructions which profess to fully state the law upon a particular subject, but which omit some material fact, essential to the validity of the hypothesis, may be properly refused." Pennsylvania Co. v. Weddle, 100 Ind. 138. "The court may refuse an instruction if satisfied that it is erroneous, although it may have previously indicated that it would be given." Louisville, N. A. & C. Ry. Co. v. Hubbard, 116 Ind. 193, citing City of Logansport v. Dykeman, 116 Ind. 15.

Kansas.

"The court is not bound to select the good from bad law in an instruction asked, especially when it gives the law applicable to the case otherwise." City of Topeka v. Tuttle, 5 Kan. 426. "Where an instruction is asked which, in a disjunctive statement, presents two conditions of acquittal, and there is error in one of these conditions, the court may properly refuse the whole instruction." State v. Cassady, 12 Kan. 551.

Maryland.

"It is no ground for refusing a prayer that a party has asked of the court less than he was entitled to." Pennsylvania, D. & M. Steam Nav. Co. v. Dandridge, 8 Gill & J. (Md.) 248. "Where testimony has been offered and received legally insufficient to establish the issues, or where there is no evidence to establish a material fact involved in the issue, the prayer must point out specifically the defects or omissions in the proof." Hatton v. McClish, 6 Md. 407. See, also, Tyson v. Shueey, 5 Md. 540; Stewart v. Spedden, 5 Md. 433. A prayer "that the plaintiff has offered no evidence upon which to maintain any count of his declaration, there being a variance between the contract declared on and the contract as offered in evidence," sufficiently raises the question of variance. Bull v. Schuberth, 2 Md. 38. A clause in a prayer for rulings,

containing the words, "and if the jury shall find all the other facts assumed in this prayer," would vitiate the prayer, though in other respects unexceptionable. Augusta Ins. & Banking Co. v. Abbott, 12 Md. 348. "Prayers should be so framed as to instruct, not to embarrass, juries, and, where the court thinks they may have the latter effect, it is not its duty to place a construction on the language employed by counsel, but may reject the prayers as offered." Baltimore & O. R. Co. v. Resley, 14 Md. 424. When the court has rejected a prayer incorrectly defining malice, it is not bound ex mero motu to give any definition of it. Garvey v. Wayson, 42 Md. 178.

Michigan.

In an action to recover for fruit sold, where plaintiff claimed that he sold to defendant five carloads of potatoes at 25 cents a bushel, and consigned over 1,800 baskets of grapes, a quantity of pears, and 4 bushels of apples, under a guaranty price, and that, after crediting defendant with payments amounting to $950, there was due him $177.48, an instruction: "According to the testimony, there was no direct sale of the fruit in controversy, consisting of the grapes, pears, and apples which were shipped to the defendant on consignment. Plaintiff claims that, in the telephone talk about the grapes, B. assured him that they could make him some money if he consigned them, and would guaranty that they would make him a profit; all of which is denied by B. There being no sale, and defendant never having seen the fruit, these statements, if actually made, would be regarded only as an expression of confidence, and would not constitute a legal contract of guaranty, upon which the plaintiff could recover, and he would be entitled only to the proceeds of sale, less commissions,"—is properly refused. Clintsman v. Alfred J. Brown Seed Co. (Mich.) 86 N. W. 797, 8 Detroit Leg. N. 285. "A request to charge, which begins with a recital of facts as undisputed, and closes with several propositions which the court is expected to charge 'upon these undisputed facts,' must be considered a single request; and if any part of the statement of facts is incorrect, the whole request must fail, and the judge is right in refusing to give it." Bedford v. Penny, 58 Mich. 424. "The omission to give requests for instructions which tend to distract the jury by calling special attention to metaphysical subtleties or particular testimony" is not error. People v. Finley, 58 Mich. 482. A requested instruction that does not state correctly the facts which it assumes is properly refused. Conely v. Wood, 73 Mich. 203.

Minnesota.

It is not error to refuse an instruction relevant to a question about which there is no dispute. Shartle v. City of Minneapolis, 17 Minn. 308 (Gil. 284).

Missouri.

A requested instruction on the whole case must be so framed as not to exclude the points raised by the evidence of the adverse party. Evans Garden Cultivator Co. v. Missouri, K. & T. Ry. Co., 2 Mo. App. Rep'r, 973, 64 Mo. App. 305.

New Hampshire.

A request for instructions "is properly refused when it does not state the question with sufficient fullness." Ordway v. Sanders, 58 N. H. 132.

New York.

"Where a party relies upon an exception for refusing to charge as requested, the request must be perfectly proper as an entirety. If it embraces a single idea or view which ought not to be presented, it destroys the value of the exception, although a part of the legal proposition embraced, if detached and presented separately, might be entirely proper." People v. Holmes, 6 Park. Cr. R. (N. Y.) 25. Points of law and fact upon which the judge is requested to charge, in pursuance of section 1023 of the Code, must be separately and distinctly stated,—propositions of fact and law should not be embraced in the same request. Sniffen v. Koechling, 45 N. Y. Super. Ct. 61.

Ohio.

A correct and pertinent statement of law, though abstract, should be given, if requested. Cleveland, P. & E. R. Co. v. Nixon, 21 Ohio Cir. Ct. 736, 12 Ohio Cir. Dec. 79. When an instruction is prayed for as an entirety, part of which is proper, and part improper, it is generally better to give the good and refuse the bad only, but it is not error to decline doing so; for, being asked as an entire thing, it may be treated as an entirety, and refused if a portion of it is inadmissible. French v. Millard, 2 Ohio St. 45; Walker v. Devlin's Lessee, 2 Ohio St. 593; Mayberry v. Kelly, 1 Kan. 116. "To constitute error in the refusal of a court to charge a jury as requested, the proposition requested and refused must be absolutely true under all reasonably conceivable circumstances." Cleveland & P. R. Co. v. Sargent, 119 Ohio St. 438. A charge predicated on an imperfect statement of the facts and circumstances bearing on the point to which they were directed is properly refused, as where, on a question of negligence, charges

devolved on the plaintiff the duty of giving notice to the engineer in charge of the engine. Even if such duty existed, it might be dispensed with in certain cases, and circumstances tending to show that it was dispensed with are proper to be left to the jury. Jenkins v. Little Miami R. Co., 2 Disn. (Ohio) 49.

Pennsylvania.

A general prayer for a charge that there is no evidence of a particular fact is bad practice. Lancaster County Bank v. Albright, 21 Pa. 228. "If a defendant, in his prayer for instructions, sets up a broader right than he is entitled to, the judge should not deny it altogether, but should explain to the jury the true extent of his right." Amer v. Longstreth, 10 Pa. 145. But compare Hodges v. Cooper, 43 N. Y. 216.

Texas.

"Counsel desiring additional instructions * * * should present them to the court in the very language in which he wants them given." Heilbron v. State, 2 Tex. App. 538. "That instructions asked * * * do not embrace all the law of the case is no reason for refusing them." Waul v. Hardie, 17 Tex. 553. Since Rev. St. art. 1321, provides that instructions given to the jury may be carried with them in their retirement, the court may refuse to give requested instructions on the ground that the good are written with the bad, on the same piece of paper, such ground of refusal being stated at the time of refusal. Missouri Pac. Ry. Co. v. King, 2 Tex. Civ. App. 122. Refused charges should not be given to the jury with other papers under such a statute; and where "defendant handed the court two special requested charges, Nos. 1 and 2, both written on the same piece of paper," and "the court gave No. 1, and refused No. 2, and so indorsed them, but handed both to the jury," and "when he read No. 1 he 'called the attention of the jury especially to the one "refused," as refused, and told them that they should not consider it,'" and some of the matter contained in the refused instruction was correct, it was reversible error to allow the jury to take to their room the instruction so marked "Refused." Trinity County Lumber Co. v. Denham, 85 Tex. 56. "Where a number of requested charges, which, in so far as they contained correct propositions, were embodied in the main charge, were written on the same sheets, and were refused by the judge, who indorsed thereon as the reasons for refusal that they were so written, and that the substance of those correct was given in his main charge, it was held that this amounted to a requirement by the court that such of the charges as were correct should be submitted separately from the others, that such action was

within judicial discretion, and that there was no error in refusing to give the charges for the reasons stated in the indorsement of refusal." Missouri Pac. Ry. Co. v. King, 2 Tex. Civ. App. 122. All the special charges were presented together to the court, and constituted different paragraphs of the same paper. The first paragraph did not correctly present the law of the case, and therefore the court did not err in rejecting the entire paper offered. The court was under no obligation to separate the paragraphs, and give that which was correct, and refuse that which was error. Yarborough v. Weaver, 6 Tex. Civ. App. 215. It is not error to refuse a special charge, correct in its application of law and fact, when presented with other charges which are objectionable, the whole being attached together, though on separate papers, and in such a manner as not to be readily separated. International & G. N. R. Co. v. Neff (Tex. Civ. App.) 26 S. W. 784. In preparing instructions, attorneys must take the risk of putting them in proper form for the court to act upon separately, and, if two propositions be so united that the court must pass upon both at the same time, one being correct and the other not, the judge will not be required to reconstruct his charge so as to cull out that which ought to be given, but may refuse the entire charge as written. Wells v. Barnett, 7 Tex. 584; Brownson v. Scanlan, 59 Tex. 222; Hamburg v. Wood, 66 Tex. 168; Missouri Pac. Ry. Co. v. Cullers, 81 Tex. 394; Burnham v. Logan, 88 Tex. 1.

Vermont.

A court is never bound to regard written requests to charge, "unless they are couched in such terms as to be sound to the full extent. The fact that some sound law might be extracted from the requests, or that, in general terms, they may be sound law, with certain qualifications, is not enough. They must be wholly sound law, and without any necessary qualification, or it is not error" to refuse them. Redfield, J., in Vaughan v. Porter, 16 Vt. 266.

Virginia and West Virginia.

In Virginia and West Virginia it is held that if an instruction asked is equivocal, but is open to a construction by the jury which would make it a correct rule of law to be applied to the case, a refusal to give the instruction will be misleading, and, though the instruction is also open to a construction which would make it an incorrect rule, the court should give it with such an explanation as will insure its being understood by the jury in the proper sense. Ward v. Churn, 18 Grat. (Va.) 801; Peshine v. Shepperson, 17 Grat. (Va.) 473; Baltimore & O. R. Co. v. Polly, 14 Grat. (Va.)

447; Carrico v. West Virginia Cent. & P. Ry. Co., 35 W. Va. 389; Gas Co. v. Wheeling, 8 W. Va. 371.

§ 139. Written request.

In some jurisdictions, requests for instructions must be presented in writing, and, if not so presented, their refusal is not error, though otherwise the instruction is correct.[67] A rule of court that, "before the argument of the case commences, the counsel on either side shall read and submit to the court in writing such propositions of law as they propose to rely on, which shall constitute the requests to charge," is designed mainly for the benefit of the trial judge, and there is no reason why he should not dispense with the rule requiring requests to be read; and the fact that a party is in court at the time instructions are given, and does not call

[67] Winslow v. State, 76 Ala. 42; Green v. State, 66 Ala. 40; Tuttle v. Walker, 69 Ala. 172; South & North Alabama R. Co. v. Seale, 59 Ala. 608; Mayberry v. Leech, 58 Ala. 339; Jacobson v. State, 55 Ala. 151; Crosby v. Hutchinson, 53 Ala. 5; Lyon v. Kent, 45 Ala. 656; Milner v. Wilson, 45 Ala. 478; Broadbent v. Tuskaloosa S. & A. Ass'n, 45 Ala. 170; Myatts v. Bell, 41 Ala. 222; Hooper v. State, 106 Ala. 41; Bellinger v. State, 92 Ala. 86; Schmidt v. First Nat. Bank of Denver, 10 Colo. App. 261; Fields v. Carlton, 75 Ga. 556; Rogers v. Rogers, 74 Ga. 598; Williams v. Gunnels, 66 Ga. 521; Central R. Co. v. Richards, 62 Ga. 306; Sims v. James, 62 Ga. 260; Wilson v. First Presbyterian Church of Savannah, 56 Ga. 554; Jackson v. Jackson, 47 Ga. 101; Street v. Lynch, 38 Ga. 631; Brown v. State, 28 Ga. 199; Atlanta Machine Works v. Pope, 111 Ga. 872; Harding v. Sandy, 43 Ill. App. 442; Burgett v. Burgett, 43 Ind. 78; Leeper v. State, 12 Ind. App. 637; Tays v. Carr, 37 Kan. 741; State v. Pfefferle, 36 Kan. 96; Douglass v. Geiler, 32 Kan. 499; State v. Horton, 100 N. C. 443; Marshall v. Stine, 112 N. C. 697; Cleveland, etc., R. Co. v. Nixon, 12 Ohio Cir. Dec. 79; Williams v. Miller, 2 Lea (Tenn.) 405; Griffin v. Chadwick, 44 Tex. 406; Hobbs v. State, 7 Tex. App. 117; Jones v. Thurmond's Heirs, 5 Tex. 318; Osborne v. State (Tex. Cr. App.) 56 S. W. 53; Waechter v. State, 34 Tex. Cr. App. 297; Mills v. Haas (Tex. Civ. App.) 27 S. W. 263; Sparks v. State, 23 Tex. App. 447.

the attention of the judge to his failure to charge upon requests, does not create an estoppel, nor preclude the judge from granting a new trial because of failure to charge on the requests.[68]

§ 140. Same—Digest of decisions.

The refusal to grant an oral request to instruct that the jury shall disregard a remark of opposing counsel is not error. Harding v. Sandy, 43 Ill. App. 442. A statute requiring requests to be in writing is satisfied if the instructions are written with a lead pencil. Writing in ink is not essential. Harvey v. Tama County, 53 Iowa, 228. "The failure of the judge to comply with the oral request to modify the written charge was not error. When the court requested counsel to reduce the modification to writing, so that it could be understood, counsel should have complied with the request. The court is not bound to give in charge a request not made in writing, and clearly is not bound to give in charge oral modifications of a written request, especially where he has asked counsel to reduce the modification to writing, and counsel has failed to do so. A request of this kind is sometimes calculated to confuse the judge, and it would not always be safe to change or modify the written charge upon such a request, as the judge might misunderstand counsel, or not fully comprehend the modification desired." Savannah, T. & I. of H. Ry. v. Beasley, 94 Ga. 144.

§ 141. Signing by party or counsel.

In some jurisdictions, requests for instructions must be signed by the party requesting them, or his counsel, and requests not so signed may be properly refused.[69] Even where

[68] Herskovitz v. Baird, 59 S. C. 307.

[69] Mason v. Sieglitz, 22 Colo. 320; Orman v. Mannix, 17 Colo. 564; Schmidt v. First Nat. Bank of Denver, 10 Colo. App. 261; Schoolfield v. Houle, 13 Colo. 394; Craig v. Frazier, 127 Ind. 286; Glover v. State, 109 Ind. 391; Childress v. Callender, 108 Ind. 394; State v. Sutton, 99 Ind. 300; Hunt v. Elliott, 80 Ind. 245; Beatty v. Brummett, 94 Ind. 76; Buchart v. Ell, 9 Ind. App. 353; Collett v. State, 156 Ind. 64; Citizens' St. Ry. Co. v. Hobbs, 15 Ind. App. 610; Con-

not required, the fact that instructions requested and given to the jury are signed by counsel is not error.[70]

V. Disposition of Requests.

§ 142. In general.

In passing upon requests to charge, the judge should refrain from remarks which might mislead the jury.[71] A re-

duitt v. Ryan, 3 Ind. App. 1; State v. Horton, 100 N. C. 443; Houston v. Blythe, 60 Tex. 506; Redus v. Burnett, 59 Tex. 576; Texas & P. Ry. Co. v. Mitchell (Tex. Civ. App.) 26 S. W. 154; Smith v Fordyce (Tex.) 18 S. W. 663.

[70] Morisette v. Howard, 62 Kan. 463.

[71] Biehler v. Coonce, 9 Mo. 347. "The defendant asked the following charge: 'If the braces in question [which proved defective] were fastened with twenty-penny nails or spikes, and the fastenings were reasonably sufficient to * * * guard against any accident therefrom which was probable, and could have been reasonably foreseen, then you will find for the defendant.' The instruction was refused, but it was written upon the same paper upon which was written another that was given. The trial judge, in handing the paper to the jury, cautioned them to disregard the refused instructions. Objection was made. It was held that, while the instruction was properly refused, yet in going to the jury, its rejection emphasized by the remark of the judge, it may have had the effect of withdrawing from their consideration the testimony noted therein, and the act was reversible error." Trinity County Lumber Co. v. Denham, 85 Tex. 56. Where a statute provides that, when special instructions are requested, "the court shall either give or refuse these charges with or without modification, and certify thereto, and, when the court shall modify a charge, it shall be done in writing, and in such manner as to clearly show what the modification is," and a special instruction is requested that "an aggravated assault and battery may be committed by any indecent handling or fondling of the person of a female by an adult male, without her consent and against her will," it is improper to add the words "Submitted by the court, and the jury will please be governed thereby." Bradford v. State, 25 Tex. App. 723.

Where the court, on being handed requests, states that "counsel have handed me some requests as stating propositions of law by which you should be guided in determining your verdict," and proceeds to read the instructions to the jury, the court need not

fusal to give an instruction should be made in such a manner as not to mislead the jury as to the cause of the refusal.[72] The refusal of an instruction is not equivalent to the assertion of the converse of the proposition contained in it.[73] It has been held to be error not to answer directly a point proposed by counsel.[74] The court should either affirm or deny

also state that he gives the requests in charge to the jury, or that such requests are correct. Noble v. Bessemer Steamship Co. (Mich.) 86 N. W. 520, 8 Detroit Leg. N. 244.

[72] State v. McCartey, 17 Minn. 76 (Gil. 54). If the judge refuses to comply with a request to charge, on the ground that he has already so charged, he should refuse the request upon that ground, lest the jury should be misled by an unqualified refusal. Welling v. Judge, 40 Barb. (N. Y.) 193.

[73] Miles v. Davis, 19 Mo. 408; Dempsey v. Reinsedler, 22 Mo. App. 43.

[74] Keitt v. Spencer, 19 Fla. 748; Sommer v. Gilmore, 160 Pa. 129; Selin v. Snyder, 11 Serg. & R. (Pa.) 319; Simpson v. Wray, 7 Serg. & R. (Pa.) 336; Fisher v. Larick, 3 Serg. & R. (Pa.) 319; Smith v. Thompson, 2 Serg. & R. (Pa.) 49; Powers v. McFerran, 2 Serg. & R. (Pa.) 44; Carpenter v. Mayer, 5 Watts (Pa.) 483; Slaymaker v. St. John, 5 Watts (Pa.) 27; Geiger v. Welsh, 1 Rawle (Pa.) 349; Tenbrooke v. Jahke, 77 Pa. 392; Hood v. Hood, 2 Grant, Cas. (Pa.) 229; Noble v. McClintock, 6 Watts & S. (Pa.) 58; Crumless v. Sturgess, 6 Heisk. (Tenn.) 190. "The plaintiff's counsel submitted a series of points, ten in number, to which the court made this response: 'So far as the points are in accordance with what we have said to you was the controlling question in the case, they are affirmed, and, so far as they are not in accordance with the opinion we expressed in the general charge, they are refused.' It was not necessary to answer specifically every point in this series, but it was necessary to tell the jury the legal rule controlling the questions suggested by the points. We repeat what was said by our Brother Paxson in Huddleston v. Borough of West Bellevue, 111 Pa. 122: 'This is a very unsatisfactory way of answering points. It renders the point of no possible value with the jury, and always adds greatly to our labors.' When such answer leaves the jury without adequate instruction upon the questions presented by the

a well-constructed point submitted.[75] It is not necessary, however, to affirm or deny the points separately.[76] It is error to evade a direct answer by telling the jury to be directed by the evidence before them. This is no instruction at all.[77] "Points or requests for charge are statements of the rules or particular portions of the law which counsel deem applicable to the special facts of the case. Their use is, first, to direct the attention of the judge to the view of the law which the parties desire him to take, and, secondly, thereby to have the jury instructed upon the principles which they ought to apply in making up their verdict, after they have ascertained the facts. * * * Where, upon the whole case, the judge conceives it his duty to give the jury a binding instruction, the answers to points become mere dissertations on the law, useless to the jury, unnecessarily burdensome to the judge, and complicating to the record when presented for consideration here."[78] An alteration is equivalent to a refusal.[79]

points, it must, if the questions presented are fairly and legitimately raised, be ground for reversal." Duncan v. Sherman, 121 Pa. 530.

[75] Awank v. Phillips, 113 Pa. 482. A party is entitled to an answer which is intelligible to the jury. Mills v. Buchanan, 14 Pa. 59.

[76] Com. v. Cleary, 135 Pa. 64, 26 Wkly. Notes Cas. 137. If the judge's charge contains a sufficient answer to the points, it is enough, although they are not answered separately. Patterson v. Kountz, 63 Pa. 246.

[77] Waynesboro Mut. Fire Ins. Co. v. Creaton, 98 Pa. 451. Where the court is asked to charge what would be the legal effect of certain findings of fact, the answer must be responsive, and it is error to merely state that the jury must find the facts from all the evidence. Cross v. Tyrone Min. & Mfg. Co., 121 Pa. 387; Kraft v. Smith, 117 Pa. 183.

[78] Myers v. Kingston Coal Co., 126 Pa. 582, 24 Wkly. Notes Cas. 223.

[79] Pensacola & A. R. Co. v. Atkinson, 20 Fla. 450. A charge not given substantially as requested is to be regarded as refused. McHugh v. State, 42 Ohio St. 154.

Where the court is evenly divided in opinion as to a prayer, it is to be regarded as refused.[80] An accidental omission to give a requested instruction has the same effect as a refusal.[81] Instructions requested and refused need not be read to the jury.[82] Nor need the court tell the jury "that it had received them, or that it charged or refused to charge them."[83] An instruction need not be given as a requested instruction,[84] nor in immediate response to the request, for it will be sufficient if, in the course of the instructions, it is given in charge to the jury.[85] It is not improper to submit a request for instructions to the opposing counsel for examination and discussion before action on it.[86] Where the court, instead of giving or refusing certain requested instructions, told the jury that they might "use them as far as the same are practicable in arriving at a verdict," it was error, because it left the jury to decide whether the requested instructions were correct or not.[87] In case a requested instruction is read by counsel to the court in the presence and hearing of the jury, the court need not repeat it, but may tell the jury that such is the law, and that it is given them as an instruction.[88] It is sufficient if the law is given in a charge so plainly that the

[80] Michael v. Schroeder, 4 Har. & J. (Md.) 227; Smith v. Gilmor, 4 Har. & J. (Md.) 177.

[81] State v. McNamara, 3 Nev. 70.

[82] Stewart v. Mills, 18 Fla. 57.

[83] Soper Lumber Co. v. Halsted & Harmount Co., 73 Conn. 547.

[84] Anderson v. City of Bath, 42 Me. 346.

[85] Barkman v. State, 13 Ark. 706; Long v. State, 12 Ga. 293. A party cannot complain that correct instructions requested by his adversary are given in connection with instructions requested by himself. Robertson v. Parks, 76 Md. 118.

[86] East Tennessee, V. & G. R. Co. v. Gurley, 12 Lea (Tenn.) 46.

[87] Duthie v. Town of Washburn, 87 Wis. 231.

[88] Dillon v. McRae, 40 Ga. 107; East Tennessee, V. & G. R. Co. v. Fain, 12 Lea (Tenn.) 35. Compare Leaptrot v. Robertson, 44 Ga. 50.

jury have no difficulty in understanding it, whether it is repeated in their hearing by the judge himself, or read by another, and sanctioned by him as read.[89] Where a requested instruction is handed the court, it will be sufficient for the court to read it to the jury, and say, "I give you that in charge;"[90] or that it is the law;[91] or to state approval of it, without using any formal mode of statement.[92] If, however, it is provided by statute that the court shall read over to the jury all the instructions which it intends to give, and no others, it is reversible error to hand to the jury instructions announced as given, without first reading them to the jury.[93]

§ 143. Marking instructions "Given" or "Refused."

The charge of the court, given of its own motion, need not be marked by the court.[94] Under a statutory provision which requires the court to mark the word "Given" on instructions given, and the word "Refused" on instructions refused, it has been held that "an instruction or a series of instructions headed, 'Instructions given by the court on its own motion,' and so placed in the record as to be clearly separate and distinguishable from the instructions presented by the parties," will suffice. The word "Given" need not be marked on instructions given by the court of its own motion.[95] So, where several instructions were asked, written on sheets of paper fastened at the top and on the margin of

[89] Dillon v. McRae, 40 Ga. 107.
[90] Feagan v. Cureton, 19 Ga. 404.
[91] Long v. State, 12 Ga. 293.
[92] State v. Stewart, 26 S. C. 125.
[93] Veneman v. McCurtain, 33 Neb. 643; McDuffie v. Bentley, 27 Neb. 380; State v. Missio, 105 Tenn. 218.
[94] People v. Samsels, 66 Cal. 99.
[95] Gillen v. Riley, 27 Neb. 158.

the first sheet, and the court wrote, "Instructions one to seven all refused," this was held a sufficient compliance with the statute.[96] Where the record shows that a series of instructions requested were actually refused, the mere failure to mark each instruction "Refused" is not reversible error.[97] Where there is a series of instructions, a refusal thereof, in a single sentence, instead of marking a refusal against the margin of each one singly, has been held sufficient.[98] The principal object of a statute requiring the judge to mark on the instruction "Given" or "Refused" is to avoid disputes as to what instructions were given; and the statute will be satisfied by marking at the bottom of the last of the pages on which the instructions were written, "The foregoing are all refused."[99] If an instruction is refused merely because the substance thereof has already been given, advantage cannot be taken, upon appeal, of the fact that the court simply marked "Refused" on the instruction, without stating the ground of refusal.[100] Where the court writes "Held" on an instruction, in compliance with the statute, the addition of an explanation that the instruction was not warranted by the evidence does not amount to a refusal.[101] The indorsement by the court, upon a requested instruction, that it "did not consider and pass upon said proposition because it did not include and was not based on the leading facts upon which the case was tried," amounts to a refusal, and is a sufficient compliance with the statute.[102] Where the court

[96] Harvey v. Tama County, 53 Iowa, 228.

[97] McDonald v. Fairbanks, Morse & Co., 161 Ill. 131.

[98] Lawrenceville Cement Co. v. Parker, 60 Hun (N. Y.) 586.

[99] Territory v. Baker, 4 N. M. (Gild.) 236, 4 N. M. (Johns.) 117.

[100] People v. Douglass, 100 Cal. 1.

[101] Flower v. Beveridge, 161 Ill. 53, affirming 58 Ill. App. 431.

[102] Moore v. Sweeney, 28 Ill. App. 547; appeal dismissed, 128 Ill. 204.

marked a requested instruction, "Not given; given in instruction 37. N., Judge," and he also drew his pencil through several of the lines which were typewritten, and drew a pen across them vertically several times, and diagonally twice, and subsequently drew his pencil through all that he had written except the words, "Given. N., Judge," and added these words, "Pen and pencil marks not to be considered by the jury. N., Judge," and there is a photographic copy of the instruction in the record as handed to the jury, it cannot be contended that the marks upon the instruction rendered it unintelligible.[103]

§ 144. Same—Effect of noncompliance with statute.

The provision of the statute that instructions shall be marked "Given" or "Refused" is merely directory, and failure to so mark certain instructions will not work a reversal, where the record shows that they were actually given or refused, and consequently no harm can have resulted from failure to obey the statute.[104] It has been held in one case that if instructions are asked by the defendant, and the court, through inadvertence, neither marks them "Given" nor "Refused," and they are not given to the jury, when such instructions announce correct principles of law, and have not already been given in substance, the effect is precisely the

[103] People v. Shears (Cal.) 65 Pac. 295.

[104] Daxanbeklav v. People, 93 Ill. App. 553; Harrigan v. Turner, 65 Ill. App. 470; McDonald v. Fairbanks, Morse & Co., 161 Ill. 124; McKenzie v. Remington, 79 Ill. 388; Tobin v. People, 101 Ill. 123; St. Louis, A. & T. H. R. Co. v. Hawkins, 39 Ill. App. 406; Frame v. Murphy, 56 Ill. App. 555; Cook v. Hunt, 24 Ill. 550; Washington v. State, 106 Ala. 58. Where the court fails to mark a request as either "Given" or "Refused," but materially modifies it, and gives it, as modified, as coming from one of the parties, it is reversible error. Peart v. Chicago, M. & St. P. Ry. Co., 8 S. D. 431. See, also, Galloway v. McLean, 2 Dak. 372.

same as if the instructions had been formally marked "Refused," and is a ground for reversal.[105] So it has been held in another case that, "although the presiding judge does not write 'Given' or 'Refused' upon the written charge, and does not sign his name thereto, yet, if the charge is set forth in the bill of exceptions, which shows that it was asked in writing, and that exception was reserved to the ruling of the court, error can be assigned in the appellate court on such ruling."[106] There are, however, a number of decisions in many jurisdictions which hold that, unless instructions are marked "Given" or "Refused," they will not be regarded as properly before the court on appeal, and no error can be assigned to the giving or refusal of such instructions.[107] That the trial court gave or refused instructions is not proven by the indorsements "Given" and "Refused" on papers sent up, it not appearing who made the indorsements, nor by allegations made in motion for new trial.[108]

§ 145. Necessity of giving requested instructions.

Where the court is requested, in apt and proper time, to give certain instructions to the jury, and such instructions are correct in form and substance, and applicable to the law and facts of the case, it is the duty of the court to give such instructions, and a failure to do so is reversible error.[109]

[105] Calef v. Thomas, 81 Ill. 486.

[106] Liltle v. State, 58 Ala. 265.

[107] Cadwallader v. Blair, 18 Iowa, 421; Thompson v. Chumney, 8 Tex. 394; Jones v. Buzzard, 2 Ark. 415.

[108] Jones v. Buzzard, 2 Ark. 415. See, generally, post, c. 32, "Appellate Review of Instructions."

[109] Harvey v. State, 125 Ala. 47; Sperry v. Spaulding, 45 Cal. 544; Emerson v. Santa Clara Co., 40 Cal. 543; People v. Taylor, 36 Cal. 255; Kinkle v. People, 27 Colo. 459; Morris v. Platt, 32 Conn. 75; Keitt v. Spencer, 19 Fla. 748; Baker v. State, 17 Fla. 406; Central of Georgia Ry. Co. v. Bond, 111 Ga. 13; Simms v. Floyd, 65 Ga. 719;

The fact that in criminal cases the jury are the judges of both the law and the facts will not justify the court in refusing to instruct the jury on the law of the case, when

Pugh v. McCarty, 44 Ga. 383; Chastain v. Robinson, 30 Ga. 55; Terry v. State, 17 Ga. 204; Davis v. State, 10 Ga. 101; Stearns v. Reidy, 18 Ill. App. 582; Cohen v. Schick, 6 Ill. App. 280; Leuder v. People, 6 Ill. App. 98; State v. Wilson, 2 Scam. (Ill.) 225; Bennett v. Connelly, 103 Ill. 50; Bowman v. Wettig, 39 Ill. 416; Fisher v. Stevens, 16 Ill. 397; Chicago W. D. Ry. Co. v. Haviland, 12 Ill. App. 561; Suttle v. Finnegan, 86 Ill. App. 423; Jared v. Goodtitle, 1 Blackf. (Ind.) 29; Taylor v. Hillyer, 3 Blackf. (Ind.) 433; Parker v. State, 136 Ind. 284; Blacketer v. House, 67 Ind. 414; Carpenter v. State, 43 Ind. 371; Conaway v. Shelton, 3 Ind. 334; Case v. Weber, 2 Ind. 108; Spaulding v. Adams, 63 Iowa, 437; Prichard v. Hopkins, 52 Iowa, 120; Muldowney v. Illinois Cent. R. Co., 32 Iowa, 176; State v. Gibbons, 10 Iowa, 117; Dickinson v. Beal (Kan. App.) 62 Pac. 724; Reading v. Metcalf, Hardin (Ky.) 544; Bell v. North, 4 Litt. (Ky.) 133; Owings v. Trotter, 1 Bibb (Ky.) 157; State v. Tucker, 38 La. Ann. 789; Anderson v. City of Bath, 42 Me. 346; Lapish v. Wells, 6 Me. 175; Wells v. Turner, 16 Md. 133; Union Bank of Maryland v. Kerr, 7 Md. 88; Coffin v. Coffin, 4 Mass. 25; People v. Jacks, 76 Mich. 218; Cooper v. Mulder, 74 Mich. 374; O'Callaghan v. Boeing, 72 Mich. 669; Babbitt v. Bumpus, 73 Mich. 331; Hartford Fire Ins. Co. v. Raynolds, 36 Mich. 502; Nichols v. State, 46 Miss. 284; First Nat. Bank of Madison v. Carson, 30 Neb. 104; Gilbert v. Merriam & Roberson Saddlery Co., 26 Neb. 194; Skinner v. Majors, 19 Neb. 453; Billings v. McCoy, 5 Neb. 188; Comstock v. Dodge, 43 How. Pr. (N. Y.) 97; Pfeffele v. Second Ave. R. Co., 34 Hun (N. Y.) 499; Schaefer v. Metropolitan St. Ry. Co., 34 Misc. Rep. 554, 69 N. Y. Supp. 980; Kearns v. Brooklyn Heights R. Co., 60 App. Div. (N. Y.) 631; Brockman v. Metropolitan St. R. Co., 32 Misc. Rep. 728; Foster v. People, 50 N. Y. 601; State v. Gilmer, 97 N. C. 429; State v. Gaskins, 93 N. C. 547; State v. Christmas, 51 N. C. 471; Lytle v. Boyer, 33 Ohio St. 506; Cleveland, P. & E. R. Co. v. Nixon, 21 Ohio Cir. Ct. R. 736, 12 Ohio Cir. Dec. 79; Jones v. State, 20 Ohio, 46; Lewis v. State, 4 Ohio, 389; Bellas v. Hays, 5 Serg. & R. (Pa.) 427; Shaeffer v. Landis, 1 Serg. & R. (Pa.) 449; Hamilton v. Menor, 2 Serg. & R. (Pa.) 70; Vincent v. Huff, 4 Serg. & R. (Pa.) 298; Humes v. McFarlane, 4 Serg. & R. (Pa.) 427; Pedan v. Hopkins, 13 Serg. & R. (Pa.) 45; Bemus v. Howard, 3 Watts (Pa.) 255; Robeson v. Gibbons, 2 Rawle (Pa.) 45; Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318; Belmont Church v. Devine, 28

properly requested.[110] It is the privilege of a party to raise any question of law arising out of the facts, and to demand the opinion of the court distinctly upon it; and the opposite party has the equal privilege of asking an opinion upon additional facts, not embraced in the hypothesis of his adversary's prayer, but not of controlling or modifying that

Leg. Int. (Pa.) 85; Hughes v. Boyer, 9 Watts (Pa.) 556; McGavock v. Ward, Cooke (Tenn.) 405; Baird v. Trimble's Lessee, Cooke (Tenn.) 289; Souey v. State, 13 Lea (Tenn.) 472; Kendrick v. Cisco, 13 Lea (Tenn.) 251; Lawrence v. Hudson, 12 Heisk. (Tenn.) 671; Johnson v. McCampbell, 11 Heisk. (Tenn.) 28; Wilson v. Smith, 5 Yerg. (Tenn.) 379; Williams v. Norwood, 2 Yerg. (Tenn.) 329; Gann v. State (Tex. Cr. App.) 57 S. W. 837; Coyle v. McNabb (Tex. App.) 18 S. W. 198; Purnell v. Gandy, 46 Tex. 190; Norwood v. Boon, 21 Tex. 592; Washburn v. Tracy, 2 D. Chip. (Vt.) 128; Brainard v. Burton, 5 Vt. 97; Eastman v. Curtis, 67 Vt. 432; Womack v. Circle, 29 Grat. (Va.) 208; Baltimore & O. R. Co. v. Polly, 14 Grat. (Va.) 447; Wells v. Washington's Adm'r, 6 Munf. (Va.) 532; Brooke v. Young, 3 Rand. (Va.) 106; Picket v. Morris, 2 Wash. (Va.) 255; Gordon v. City of Richmond, 83 Va. 436; McGee v. Wineholt (Wash.) 63 Pac. 571; Riley v. West Virginia Cent. & P. Ry. Co., 27 W. Va. 147; Sailer v. Barnousky, 60 Wis. 169; Campbell v. Campbell, 54 Wis. 90; Roberts v. McGrath, 38 Wis. 52; Wheeler v. Konst, 46 Wis. 398; Tupper v. Huson, 46 Wis. 646; Conners v. State, 47 Wis. 523; Rogers v. Brightman, 10 Wis. 55; Thorwegan v. King, 111 U. S. 549; Livingston v. Maryland Ins. Co., 7 Cranch (U. S.) 506; Douglass v. McAllister, 3 Cranch (U. S.) 298; Mullen v. United States (C. C. A.) 106 Fed. 892; Texas & P. R. Co. v. Rhodes, 30 U. S. App. 561, 18 C. C. A. 9, 71 Fed. 145. The neglect or refusal of the judge to cousider requests and give his ruling thereon to the jury in writing as required by statute is error. Keitt v. Spencer, 19 Fla. 748. A refusal to charge the jury upon "reasonable doubt" in a criminal case is reversible error. Parker v. State, 136 Ind. 284. It is often error to refuse a request, because such refusal amounts to an affirmance of the converse of the proposition requested. Thus, "it is error to refuse to charge that the jury are not to draw any deductions against either party from objections made and evidence excluded." Scott v. Third Ave. R. Co., 59 Hun, 456, 13 N. Y. Supp. 344. "An instruction commenting on evidence is unnecessary." Pryor v. Metropolitan St. Ry. Co., 85 Mo. App. 367.

[110] Leuder v. People, 6 Ill. App. 98; Parker v. State, 136 Ind. 284.

hypothesis.[111] What is admitted or conceded to be law by the plaintiff or defendant, as the case may be, is binding upon him, and, if it is accepted by the other side, it becomes the law of the particular case; and it is error in the court to reject a prayer the correctness of which has been conceded.[112] The right to demand instructions, however, has a limit, and counsel will not be permitted to abuse the right.[113] It is not error to refuse to give an instruction which would conflict with other instructions given at the request of the same party.[114]

§ 146. Same—As affected by state of evidence.

Where there is any evidence, however slight, to sustain a legal claim or a legal defense, the party introducing such evidence has a right to have it submitted to the jury by appropriate instructions; and when an instruction is submitted, based upon evidence in the case, and stating correctly a principle of law applicable to such evidence, and not covered by any instruction given, it is error to refuse the instruction, however meager the evidence to sustain the hypothesis con-

[111] Whiteford v. Burckmyer, 1 Gill (Md.) 127; Parkhurst v. Northern Cent. R. Co., 19 Md. 472; Birney v. New York & W. Printing Telegraph Co., 18 Md. 341. "Where all the facts and circumstances relating to the subject are admitted, a party has the right to ask the court to instruct the jury whether the evidence is sufficient to establish a waiver or not." Spring Garden Mut. Ins. Co. v. Evans, 9 Md. 1. "After a party has obtained a correct statement of the law governing a point in the case, he has the right to an application of the principle to the facts in evidence, and a declaration from the court that these facts, if believed by the jury to be established, call for the application of the principle." Aldrige v. State, 59 Miss. 250.

[112] Sittig v. Birkenstack, 35 Md. 273.

[113] Fisher v. Stevens, 16 Ill. 397.

[114] Scott v. Texas & P. Ry. Co., 93 Tex. 625, reversing (Tex. Civ. App.) 56 S. W. 97; Texas & P. Ry. Co. v. Hassell, 23 Tex. Civ. App. 681.

tained in it,[115] as the party asking the instruction is entitled to the benefit of whatever inferences the jury may think proper to draw from the proof, however slight.[116] "The judge is not authorized to refuse requested charges because, while not denying the material facts stated, he disputes the correctness of the contentions of counsel based thereon. Counsel has the right to urge his own theory as to the inferences of motive and intention to be drawn from the facts,

[115] Liner v. State, 124 Ala. 1; Davis v. Russell, 52 Cal. 611; People v. Taylor, 36 Cal. 255; Cook County v. Harms, 108 Ill. 153; Missouri Furnace Co. v. Abend, 107 Ill. 44; Eames v. Rend, 105 Ill. 506; Trask v. People, 104 Ill. 569; City of Chicago v. Scholten, 75 Ill. 468; Wooters v. King, 54 Ill. 343; Peoria M. & F. Ins. Co. v. Anapow, 45 Ill. 86; Riedle v. Mulhausen, 20 Ill. App. 73; Edwards v. Dettenmaier, 88 Ill. App. 366; Chicago Heights Land Ass'n v. Butler, 55 Ill. App. 461; Carpenter v. State, 43 Ind. 371; Conaway v. Shelton, 3 Ind. 334; Tribble v. Frame, 5 Litt. (Ky.) 189; Anderson v. City of Bath, 42 Me. 346; Dikeman v. Arnold, 71 Mich. 656; Hancock v. Stout, 28 Neb. 301; State v. Levigne, 17 Nev. 435; Evarts v. Burton, 17 N. Y. Wkly. Dig. 401; Lawrence v. Hudson, 12 Heisk. (Tenn.) 671; Hopkins v. Richardson, 9 Grat. (Va.) 485. When there is any evidence tending to prove a material fact in the case, the party in whose favor it is has the right, without regard to the amount of the evidence, to have the court instruct the jury as to the law arising upon the fact or facts which the evidence tends to prove, and leave to them to find whether or not the evidence is sufficient to establish the fact it was introduced to prove. Hopkins v. Richardson, 9 Grat (Va.) 485; Farish v. Reigle, 11 Grat. (Va.) 697; Early v. Garland's Lessee, 13 Grat. (Va.) 1; Honesty v. Com., 81 Va. 283; New York, P. & N. R. Co. v. Thomas, 92 Va. 606. If there be any evidence of a fact, though the weight of evidence be against it, it is error to refuse to instruct the jury as to the legal effect of that fact, if they believe it from the evidence. Levy v. Gray, 56 Miss. 318. "If the court be requested, in writing, to give a legal charge, and refuses upon the ground that there is no evidence to support it, when in fact there is evidence, it is error, and on account of which a new trial will be awarded, if the point was material in the case." Cook v. Wood, 30 Ga. 891.

[116] Peoria M. & F. Ins. Co. v. Anapow, 45 Ill. 86; Wells v. Turner, 16 Md. 133; Sword v. Keith, 31 Mich. 247.

and to impress the same upon the jury; and though the judge may take a different view, the question is to be determined by the jury, and, in case the jury should concur with counsel, defendant has the clear right to have them instructed as to the law applicable to the case."[117] It is error to refuse a request applicable to the evidence upon a material point, where the evidence upon that point is conflicting.[118] Where there is no evidence in the case supporting or tending to support the proposition involved in the request, it is not only proper to refuse the request, but it would be improper to give it.[119]

§ 147. Same—Requests covered by other instructions.

It is not error to refuse to give requested instructions which are sufficiently covered by other instructions given in the case.[120] The cases announcing and applying this rule

[117] State v. Tucker, 38 La. Ann. 789.

[118] Hunt v. Elliott, 77 Cal. 588; Renton v. Monnier, 77 Cal. 449; Sperry v. Spaulding, 45 Cal. 549; Trask v. People, 104 Ill. 569; Wooters v. King, 54 Ill. 343; Wisner v. Davenport, 5 Mich. 501; State v. Partlow, 90 Mo. 608; Smith v. J. W. Wilson & Boatman Sav. Bank, 1 Tex. Civ. App. 115.

[119] Bacon v. Green, 36 Fla. 325; Pensacola & A. R. Co. v. Atkinson, 20 Fla. 450; Willis v. Bullitt, 22 Tex. 330. See ante, c. 5. The evidence relied on must be legally sufficient to warrant the conclusion sought to be deduced from it, or the request may be refused. Wells v. Turner, 16 Md. 133. "Where the payee of a note is dead, if the maker offers himself as a witness, and is excluded by reason of the death, there will be no need to instruct the jury why he cannot testify." Corbitt v. Mooney, 84 Mo. App. 645.

[120] Alabama: Zimmerman v. State (Ala.) 30 So. 18; Southern Ry. Co. v. Shirley (Ala.) 29 So. 687; Alabama Lumber Co. v. Keel, 125 Ala. 603; Liner v. State, 124 Ala. 1; Murphy v. State, 108 Ala. 10; Smith v. State, 92 Ala. 30. In this state, the rule in the text applies only where the instruction given was at the request of the same party. Instructions given at the request of the opposite party, or by the court of its own motion, furnish no ground for refusing

are almost innumerable. Indeed, it is an obvious and necessary rule, for otherwise counsel could easily trip the court

a request, as a party is entitled to have an instruction given in the exact language of his request.

Arizona: Morgan v. Territory (Ariz.) 64 Pac. 421.

Arkansas: Reed v. State, 54 Ark. 621; Johnson v. Brock, 23 Ark. 283.

California: People v. Ramirez, 56 Cal. 533; People v. Williams, 32 Cal. 280; Trabing v. California Nav. & Imp. Co., 133 Cal. xx., 65 Pac. 478; People v. Shears, 133 Cal. 154; Wahlgren v. Market St. Ry. Co., 132 Cal. 656; People v. Grimes, 132 Cal. 30; Taylor v. Ford, 131 Cal. 440; People v. Rodley, 131 Cal. 240; Sutro v. Easton, Eldridge & Co., 130 Cal. 339.

Colorado: Kansas Pac. Ry. Co. v. Ward, 4 Colo. 31; City of Boulder v. Fowler, 11 Colo. 396.

Connecticut: Town of Ridgefield v. Town of Fairfield, 73 Conn. 47; Charter v. Lane, 62 Conn. 124; City of Hartford v. Champion, 58 Conn. 276.

District of Columbia: United States v. McBride, 7 Mackey, 371; Johnson v. Baltimore & P. R. Co., 6 Mackey, 232.

Florida: Wooten v. State, 24 Fla. 355; Higginbotham v. State (Fla.) 29 So. 410; Long v. State (Fla.) 28 So. 775; Coleman v. State, 26 Fla. 61.

Georgia: Odum v. Creighton Mining & Milling Co., 111 Ga. 873; Gramling v. Pool, 111 Ga. 93; Hoffman v. Oates, 77 Ga. 701; Bernhard v. State, 76 Ga. 613; O'Neal v. O'Neal, 112 Ga. 348; Taylor v. Allen, 112 Ga. 330.

Idaho: State v. Lyons (Idaho) 64 Pac. 236.

Illinois: Globe Mut. Life Ins. Ass'n v. Ahern, 191 Ill. 167, affirming 92 Ill. App. 326; Merritt v. Boyden, 191 Ill. 136, affirming 93 Ill. App. 613; Moore v. People, 190 Ill. 331; City of La Salle v. Kostka, 190 Ill. 130, affirming 92 Ill. App. 91; Cleveland, C., C. & St. L. Ry. Co. v. Keenan, 190 Ill. 217, affirming 92 Ill. App. 430; Jennings v. People, 189 Ill. 320; Pioneer Fireproof Construction Co. v. Howell, 189 Ill. 123, affirming 90 Ill. App. 122; Cleveland, C., C. & St. L. Ry. Co. v. Wood, 189 Ill. 352, affirming 90 Ill. App. 551; Saville v. Marsach, 93 Ill. App. 589; City of Sterling v. Merrill, 124 Ill. 522; Mason v. Jones, 36 Ill. 212.

Indiana: Chicago, I. & E. Ry. Co. v. Curless (Ind.) 60 N. E. 467; City of Evansville v. Senhenn (Ind.) 59 N. E. 863; North British & Mercantile Ins. Co. v. Rudy (Ind.) 60 N. E. 9; Lake Erie & W. R. Co. v. Keiser, 25 Ind. App. 417; Trittipo v. Beaver, 155 Ind. 652; Whitney v. State, 154 Ind. 573; Blume v. State, 154 Ind. 343; Chi-

by multiplying requests for the same proposition in varying phraseology, and thus speculate on the chance of securing a

cago, I. & E. Ry. Co. v. Patterson, 26 Ind. App. 295; Citizens' St. Ry. Co. v. Merl, 26 Ind. App. 284; Home Ins. Co. v. Sylvester, 25 Ind. App. 207; Ray v. Moore, 24 Ind. App. 480; Benson v. State, 119 Ind. 488; Westbrook v. Aultman, Miller & Co., 3 Ind. App. 83.

Iowa: Lillie v. Brotherhood of Railway Trainmen (Iowa) 86 N. W. 279; State v. Easton (Iowa) 85 N. W. 795; Klos v. Zahorik (Iowa) 84 N. W. 1046; Graybill v. Chicago, M. & St. P. R. Co., 112 Iowa, 738; Meyer v. Boepple Button Co., 112 Iowa, 51; Sanders v. O'Callaghan, 111 Iowa, 574; Shambaugh v. Current, 111 Iowa, 121; State v. Peterson, 110 Iowa, 647; Albrosky v. Iowa City, 76 Iowa, 301; State v. Winter, 72 Iowa, 627.

Kansas: State v. Elliott, 62 Kan. 869, 64 Pac. 1027; Anderson v. Canter (Kan. App.) 63 Pac. 285; McCormick Harvesting Mach. Co. v. Hayes (Kan. App.) 62 Pac. 901; State v. Peterson, 38 Kan. 204; State v. Bailey, 32 Kan. 83.

Kentucky: Bonte v. Postel, 22 Ky. Law Rep. 583, 58 S. W. 536; Stafford v. Hussey, 17 Ky. Law Rep. 1194, 33 S. W. 1115; Whittaker v. Com., 13 Ky. Law Rep. 504, 17 S. W. 358.

Louisiana: State v. Hartleb, 35 La. Ann. 1180; State v. Garic, 35 La. Ann. 970.

Maine: Strickland v. Hamlin, 87 Me. 81; State v. Williams, 76 Me. 480.

Maryland: Gill v. Staylor (Md.) 49 Atl. 650; United Railways & Electric Co. of Baltimore City v. Seymour, 92 Md. 425; Lake Roland El. Ry. Co. v. McKewen, 80 Md. 593; Baltimore & R. Turnpike Road v. State, 71 Md. 573.

Massachusetts: Hadlock v. Brooks (Mass.) 59 N. E. 1009; McCoubrey v. German-American Ins. Co., 177 Mass. 327; Hopkins v. O'Leary, 176 Mass. 258; McLean v. Wiley, 176 Mass. 233; Com. v. Cosseboom, 155 Mass. 298; Com. v. Ford, 146 Mass. 131.

Michigan: Bates v. Kuney's Estate, 124 Mich. 596; Keables v. Christie, 47 Mich. 594; Joslin v. Le Baron, 44 Mich. 160.

Minnesota: Parsons Band Cutter & Self-Feeder Co. v. Haub, 83 Minn. 180; Ladd v. Newell, 34 Minn. 107; State v. McCartey, 17 Minn. 76 (Gil. 54); State v. Beebe, 17 Minn. 241 (Gil. 218).

Missouri: Perrette v. City of Kansas City, 162 Mo. 238; Brash v. City of St. Louis, 161 Mo. 433; De Donato v. Morrison, 160 Mo. 581; Anderson v. Union Terminal R. Co., 161 Mo. 411; McBaine v. Johnson, 155 Mo. 191; Harris v. Lee, 80 Mo. 420; State v. King, 44 Mo. 238; Baldwin v. Boulware, 79 Mo. App. 5, 2 Mo. App. Rep'r. 359;

favorable verdict, and at the same time being able to secure a reversal in case the verdict and judgment were unfavor-

Connor v. Heman, 44 Mo. App. 346; State v. Bradford, 156 Mo. 91; State v. Miller, 156 Mo. 76; Norris v. Whyte, 158 Mo. 20; State v. West, 157 Mo. 309; Stalzer v. Jacob Dold Packing Co., 84 Mo. App. 565; State v. Gregory, 158 Mo. 139.

Montana: State v. Mahoney, 24 Mont. 281; Territory v. Corbett, 3 Mont. 50; Territory v. McAndrews, 3 Mont. 164.

Nebraska: Coil v. State (Neb.) 86 N. W. 925; Chapman v. State (Neb.) 86 N. W. 907; Green v. Lancaster County (Neb.) 85 N. W. 439; Spaulding v. State (Neb.) 85 N. W. 80; Smith v. State (Neb.) 85 N. W. 49; Cardwell v. State, 60 Neb. 480; Missouri Pac. Ry. Co. v. Fox, 60 Neb. 531; Bushnell v. Chamberlain, 44 Neb. 751; Hodgman v. Thomas, 37 Neb. 568.

Nevada: State v. Maher, 25 Nev. 465; State v. Ward, 19 Nev. 297; State v. Cardelli, 19 Nev. 319.

New Hampshire: Smith v. Bank of New England (N. H.) 46 Atl. 230; Whitman v. Morey, 63 N. H. 448.

New Jersey: Smith v. Irwin, 51 N. J. Law, 507; Jackson v. State, 49 N. J. Law, 252.

New Mexico: Territory v. Baker, 4 N. M. (Gild.) 236, 4 N. M. (Johns.) 117; Anderson v. Territory, 4 N. M. (Johns.) 108.

New York: Wagner v. Buffalo & R. Transit Co., 59 App. Div. 419, 69 N. Y. Supp. 113; Powell v. F. C. Linde Co., 58 App. Div. 261; Frank v. Metropolitan St. Ry. Co., 58 App. Div. 100; Minister v. Benoliel, 32 Misc. Rep. 630, 66 N. Y. Supp. 493; Henn v. Long Island R. Co., 51 App. Div. 292, 65 N. Y. Supp. 21; Rommeney v. City of New York, 49 App. Div. 64, 63 N. Y. Supp. 186; Lawson v. Metropolitan St. Ry. Co., 166 N. Y. 589, affirming 40 App. Div. 307, 57 N. Y. Supp. 997; Horowitz v. Hamburg American Packet Co., 15 Misc. Rep. 466; Holbrook v. Utica & S. R. Co., 12 N. Y. 236.

North Carolina: Bradley v. Ohio River & C. Ry. Co., 126 N. C. 735; State v. Neville, 51 N. C. 423; Redmond v. Stepp, 100 N. C. 212.

North Dakota: State v. Pancoast (N. D.) 67 N. W. 1052.

Ohio: Bond v. State, 23 Ohio St. 349; Stewart v. State, 1 Ohio St. 67.

Oklahoma: Gatliff v. Territory, 2 Okla. 523.

Oregon: Stamper v. Raymond, 38 Or. 16; Lieuallen v. Mosgrove, 37 Or. 446; Roth v. Northern Pac. Lumbering Co., 18 Or. 205; State v. Brown, 7 Or. 186.

Pennsylvania: Munderbach v. Lutz's Adm'r, 14 Serg. & R. 220; Kroegher v. McConway & Torley Co., 149 Pa. 444.

able. Moreover, a multiplication of instructions announcing, in effect, the same legal principle, only tends to incumber

Rhode Island: Hampson v. Taylor, 15 R. I. 83.

South Carolina: Lowrimore v. Palmer Mfg. Co., 60 S. C. 153; Mason v. Southern Ry. Co., 58 S. C. 70, rehearing denied 58 S. C. 582; Emory v. Hazard Powder Co., 22 S. C. 483; State v. Robinson, 35 S. C. 340.

South Dakota: Blair v. City of Groton, 13 S. D. 211; State v. Phelps, 5 S. D. 480; Griswold v. Sundback, 4 S. D. 441.

Tennessee: Stacker v. Louisville & N. R. Co., 106 Tenn. 450; Arkansas River Packet Co. v. Hobbs, 105 Tenn. 29; Guaranty, etc., Soc. v. Ford, 104 Tenn. 533; Brown v. Odill, 104 Tenn. 250; Knights of Pythias v. Rosenfeld, 92 Tenn. 508; Southern R. Co. v. Pugh, 97 Tenn. 624.

Texas: Texas & P. Ry. Co. v. Durrett (Tex. Civ. App.) 63 S. W. 904; Texas & P. Ry. Co. v. Wooldridge (Tex. Civ. App.) 63 S. W. 905; Tyler S. E. Ry. Co. v. Hitchins (Tex. Civ. App.) 63 S. W. 1069; Houston & T. C. Ry. Co. v. Moss (Tex. Civ. App.) 63 S. W. 894; Texas & P. Ry. Co. v. McClane, 24 Tex. Civ. App. 321; Fant v. Wright (Tex. Civ. App.) 61 S. W. 514; Galveston, H. & S. A. Ry. Co. v. Williams (Tex. Civ. App.) 62 S. W. 808; Galveston, H. & S. A. Ry. Co. v. Morris (Tex.) 61 S. W. 709, affirming 60 S. W. 813; Houston & T. C. R. Co. v. Milam (Tex. Civ. App.) 60 S. W. 591, reversing 58 S. W. 735; Galveston, H. & S. A. Ry. Co. v. English (Tex. Civ. App.) 59 S. W. 626; International & G. N. R. Co. v. Newburn (Tex. Civ. App.) 58 S. W. 542; Galveston, H. & S. A. Ry. Co. v. Johnson, 24 Tex. Civ. App. 180; Nehring v. McMurrian (Tex.) 57 S. W. 943, reversing 53 S. W. 381; Johnson v. State (Tex. Cr. App.) 55 S. W. 968; Galveston, H. & S. A. Ry. Co. v. McGraw (Tex. Civ. App.) 55 S. W. 756; Houston & T. C. R. Co. v. White, 23 Tex. Civ. App. 280, 56 S. W. 204; Smith v. Clay (Tex. Civ. App.) 57 S. W. 74; City of Corsicana v. Tobin, 23 Tex. Civ. App. 492; Houston & T. C. R. Co. v. Patterson (Tex. Civ. App.) 57 S. W. 675; Texas Midland R. Co. v. Brown (Tex. Civ. App.) 58 S. W. 44; Sherman, S. & S. Ry. Co. v. Bell (Tex. Civ. App.) 58 S. W. 147; Texas & P. R. Co. v. Taylor (Tex. Civ. App.) 58 S. W. 166, reversed on rehearing 58 S. W. 844; Kirby v. Estell, 24 Tex. Civ. App. 106; Luckie v. Schneider (Tex. Civ. App.) 57 S. W. 690; Massingill v. State (Tex. Cr. App.) 63 S. W. 315; Tippett v. State (Tex. Cr. App.) 63 S. W. 883; Duckworth v. State (Tex. Cr. App.) 63 S. W. 874; Bell v. State (Tex. Cr. App.) 62 S. W. 567; Patton v. State (Tex. Cr. App.) 61 S. W. 309; Aston v. State (Tex. Cr. App.) 61 S. W. 307; Harris v. State (Tex. Cr. App.) 57 S. W.

the record and confuse the jury.[121] It is also likely to result in giving undue prominence to issues, theories, and evidence,[122] which, as already seen, is improper and erroneous.[123] It is ordinarily sufficient for the court, in its charge to the jury, to "state once, fully and clearly," the propositions of law governing the case.[124] The court should not "multiply instructions, with changed phraseology, on a single proposition of law. One clear, pointed statement to the jury of each proposition advanced is sufficient."[125] The

833; Wilkerson v. State (Tex. Cr. App.) 57 S. W. 956; Blanco v. State (Tex. Cr. App.) 57 S. W. 828; Carroll v. State (Tex. Cr. App.) 56 S. W. 913; Yoakum v. Kelly (Tex. Civ. App.) 30 S. W. 836; Muely v. State, 31 Tex. Cr. App. 155.

Utah: Osborne v. Phenix Ins. Co., 64 Pac. 1103; People v. Chadwick, 7 Utah, 134; Cunningham v. Union Pac. Ry. Co., 4 Utah, 206; Konold v. Rio Grande Western Ry. Co., 21 Utah, 379.

Virginia: Longley v. Com., 37 S. E. 339; Richmond & D. R. Co. v. Burnett, 88 Va. 538; Harman v. Cundiff, 82 Va. 239.

Washington: Howay v. Going-Northrup Co. (Wash.) 64 Pac. 135; Cowie v. City of Seattle, 22 Wash. 659; Einseidler v. Whitman County, 22 Wash. 388; Brewster v. Baxter, 2 Wash. T. 135; State v. Freidrich, 4 Wash. St. 204.

West Virginia: State v. Bingham, 42 W. Va. 234; Davidson v. Pittsburg, C., C. & St. L. Ry. Co., 41 W. Va. 407.

Wisconsin: Osen v. Sherman, 27 Wis. 501; Spain v. Howe, 25 Wis. 625; Shaw v. Gilbert (Wis.) 86 N. W. 188; Messman v. Ihlenfeldt, 89 Wis. 585.

United States: Marchand v. Griffon, 140 U. S. 516; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291; Denver & R. G. R. Co. v. Roller, 41 C. C. A. 22, 100 Fed. 738.

[121] Haney v. Caldwell, 43 Ark. 184; Continental Ins. Co. v. Horton, 28 Mich. 173; Pettigrew v. Barnum, 11 Md. 434; Baltimore & O. R. Co. v. Resley, 14 Md. 424.

[122] City of Lincoln v. Holmes, 20 Neb. 39; Campbell v. Holland, 22 Neb. 587; Gray v. Burk, 19 Tex. 228; Newman v. Farquhar, 60 Tex. 640; Powell v. Messer's Adm'r, 18 Tex. 401; Hays v. Hays, 66 Tex. 606; Traylor v. Townsend, 61 Tex. 144.

[123] See ante, c. 8.

[124] State v. Kearley, 26 Kan. 77.

[125] Olive v. State, 11 Neb. 1.

duty of the court is fully discharged if the instructions given embrace all the points of law arising in the case,[126] and its effort should be to render the instructions as free from complexity as possible.[127] The rule making it proper to refuse instructions reiterating a rule of law already announced to the jury applies, though the language of the request differs from the language used in the instruction given,[128] and without regard to whether the requested instructions are covered by the general charge,[129] or by instructions given at the re-

[126] Deitz v. Regnier, 27 Kan. 95.

[127] Deford v. State, 30 Md. 179.

[128] Stanton v. State, 13 Ark. 317; Richard v. State (Fla.) 29 So. 413; Kennard v. State (Fla.) 28 So. 858; Keeler v. Stuppe, 86 Ill. 309; Earll v. People, 73 Ill. 329; Roth v. Smith, 41 Ill. 314; Chicago & E. I. R. Co. v. Boggs, 101 Ind. 522; Norris v. Kipp, 74 Iowa, 444; Lobenstein v. Pritchett, 8 Kan. 213; Marshall v. Bingle, 36 Mo. App. 125; Binfield v. State, 15 Neb. 484; People v. O'Connell, 62 How. Pr. (N. Y.) 436; Donald v. State, 21 Ohio Cir. Ct. R. 124, 11 Ohio Cir. Dec. 483; Tucker v. Hamlin, 60 Tex. 171; Powell v. Messer's Adm'r, 18 Tex. 401; Grand Trunk Ry. Co. v. Ives, 144 U. S. 408. Refusal to give an instruction in the language of the statute was not error, where it had been given in substance, and one merely in the language of the statute would have been of no assistance. State v. Reed, 68 Ark. 331.

[129] State v. Hamann (Iowa) 85 N. W. 614; Shannon v. Town of Tama City, 74 Iowa, 22; State v. Start (Kan. App.) 63 Pac. 448; Missouri Pac. Ry. Co. v. Johnson, 44 Kan. 660; State v. Tulip, 9 Kan. App. 454; State v. Fontenot, 48 La. Ann. 283; Schultz v. Bower, 64 Minn. 123; Mahon v. Metropolitan St. Ry. Co., 68 N. Y. Supp. 775; City Trust, Safe Deposit & Surety Co. of Philadelphia v. Fidelity & Casualty Co. of New York, 58 App. Div. 18, 68 N. Y. Supp. 601; Hummel v. Stern, 164 N. Y. 603; Gatliff v. Territory, 2 Okl. 523; State v. McDaniel (Or.) 65 Pac. 520; State v. Tucker, 36 Or. 291; Wilkie v. Raleigh & C. F. R. Co., 127 N. C. 203; State v. McGahey, 3 N. D. 293; Watterson v. Fuellhart, 169 Pa. 612, 36 Wkly. Notes Cas. 565; Long v. Hunter, 58 S. C. 152; International & G. N. R. Co. v. Jackson (Tex. Civ. App.) 62 S. W. 91; Parlin & Orendorff Co. v. Coffey (Tex. Civ. App.) 61 S. W. 512; Houston & T. C. R. Co. v. Byrd (Tex. Civ. App.) 61 S. W. 147;

quest of the opposite party,[130] or by the court of its own motion.[131] Nevertheless, repetition of instructions will not work a reversal of the judgment unless the effect was to give undue prominence to some portion of the case, or to otherwise mislead the jury.[132]

§ 148. Same—Digest of decisions.

Alabama.

"No suitor, civil or criminal, can claim, as matter of right, that a charge once given at his request shall be repeated. It is better and safer, however, if the charge assert a correct legal principle, when viewed in connection with the testimony, that it be given, unless it is an exact copy of one previously given in charge." Smith v. State, 92 Ala. 30. "It is well to keep in mind the rule declared in the case of Louisville & N. R. Co. v. Hurt, 101 Ala. 34, where it is held that the court commits no error in refusing charges requested by a party which are mere repetitions of charges already given at his request. A mere variation in the use of words, which

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Bruce v. First Nat. Bank of Weatherford (Tex. Civ. App.) 60 S. W. 1006; Houston & T. C. R. Co. v. George (Tex. Civ. App.) 60 S. W. 313; Sherman, S. & S. Ry. Co. v. Bell (Tex. Civ. App.) 58 S. W. 147; Ramey v. State (Tex. Cr. App.) 61 S. W. 126; Gann v. State (Tex. Cr. App.) 59 S. W. 896; Padron v. State (Tex. Cr. App.) 55 S. W. 827; Cannon v. State (Tex. Cr. App.) 56 S. W. 351; Neely v. State (Tex. Cr. App.) 56 S. W. 625; Courtney v. State (Tex. Cr. App.) 57 S. W. 654; Stevens v. State (Tex. Cr. App.) 58 S. W. 96; Dudley v. State (Tex. Cr. App.) 58 S. W. 111; Texas & P. Ry. Co. v. Padgett (Tex. Civ. App.) 36 S. W. 300; Pless v. State, 23 Tex. App. 73; Coffin v. United States, 162 U. S. 664.

[130] Casey v. State, 37 Ark. 67; Lake Roland El. Ry. Co. v. McKewen, 80 Md. 593. In Alabama the rule is different. See post, § 152, "Duty to Follow Language of Request."

[131] People v. Benc, 130 Cal. 159. "It is competent for the court to reject all the prayers offered, and grant instructions to the jury in its own language; and, where these are correct, and cover the whole ground, the judgment will not be reversed, even though some of the rejected prayers might properly have been granted." McCarty v. Harris (Md.) 49 Atl. 414.

[132] Lawder v. Henderson, 36 Kan. 754; Ratto v. Bluestein, 84 Tex. 57; International & G. N. R. Co. v. Leak, 64 Tex. 654.

does not change the meaning in any respect, or application of the principles asserted, does not affect the rule. Smith v. State, 92 Ala. 30; Murphy v. State, 108 Ala. 10.

California.

Where the court instructed that the rights of the parties were to be determined by the strict rules of law, a refusal to charge that plaintiff was not entitled to any sympathy from the jury was not error. Parker v. Otis, 130 Cal. 322. A refusal to charge that the jury had a right to consider that innocent men had been convicted, and the danger of convicting men, was not error where the rule as to the degrees of proof required in criminal cases, and the doctrine of reasonable doubt, were fully stated and explained. People v. Findley, 132 Cal. 301. Where the court has explicitly instructed the jury upon the subject of degrees of the offense charged against defendant, and defined the different degrees, "and expressly informed them that the defendant might be convicted of either, * * * it is not required that the court shall repeat such instruction in every possible connection in which reference could be made to the degrees of the offense." People v. Schmitt, 106 Cal. 48.

Georgia.

Where the jury have been instructed that the plaintiff has the burden of proving a certain proposition, the court may properly refuse to instruct that the burden of proof is not upon the defendant to prove the negative of such proposition. Richmond R. Co. v. Howard, 79 Ga. 44.

Illinois.

An instruction that the jury, in weighing the evidence of a party who testifies in his own behalf, may consider his interest in the result, was properly refused, where the court had already instructed them that, in weighing evidence, they had the right to consider whatever interest the witnesses might have in the result. Chicago City Ry. Co. v. Mager, 185 Ill. 336, affirming 85 Ill. App. 524.

Indiana.

Where, in a prosecution for larceny, "full and clear definitions of the crime with which the appellant is charged are given, and the jury is properly instructed as to the difference between a mere trespass and the crime of larceny," a modification of an instruction tendered by defendant "by striking therefrom the words, 'Larceny is something more than mere trespass,' does not constitute reversible error." Currier v. State (Ind.) 60 N. E. 1023.

Iowa.

A refusal to instruct that fraud is not presumed, and that, if the

evidence is consistent with fair dealing, the jury should so find, is not error where an instruction is given that, where the evidence is as consistent with an honest purpose as a fraudulent one, the verdict should be for the person charged therewith. Connors v. Chingren, 111 Iowa, 437. The refusal of an instruction calling attention to the effect of impeaching evidence upon the credibility of any particular witness is not erroneous where a general instruction on the question has been given. State v. Curran, 51 Iowa, 112. Where, "in several of the instructions, the attention of the jury is called to the fact that, to convict defendant, they must be satisfied of his guilt beyond a reasonable doubt, and the jury is fully instructed as to what in law is a reasonable doubt," error cannot be assigned "to the giving of certain instructions because the jury are not told therein that, before they can find the defendant guilty, they must be satisfied of his guilt beyond a reasonable doubt. It is not practicable for a trial court to state all the law governing a case in each and every instruction given." State v. Tippet, 94 Iowa, 646.

Kansas.

Where the court has instructed the jury generally upon the effect of false testimony given knowingly and willfully, it is not error to refuse an instruction as to the effect of a contradiction between testimony given on different occasions on a single point. Bernstein v. Smith, 10 Kan. 60.

Kentucky.

Where the court has given a very clear instruction on contributory negligence, it is proper to refuse an instruction concerning a particular circumstance from which contributory negligence may be inferred. Paducah Railway & Light Co. v. Ledsinger (Ky.) 63 S. W. 11.

Massachusetts.

Where a statute provides that, in actions at law, "the defendant may 'allege as a defense any facts that would entitle him in equity to be absolutely and unconditionally relieved against the plaintiff's claim or cause of action, or against a judgment obtained by the plaintiff in such action,'" and the jury are told that certain facts are a legal defense, it will be of no advantage to a party to tell the jury that such facts are also a defense, under the statute. Twomey v. Linnehan, 161 Mass. 91.

Missouri.

Where the jury have been instructed that a preponderance of evidence in plaintiff's favor is necessary to a recovery, it may refuse to instruct that the verdict should be for defendant if the evidence is evenly balanced. Blitt v. Heinrich, 33 Mo. App. 243.

Where "the court instructs the jury that, if they believe from the evidence that the defendant * * * stabbed and cut T. with a knife, with intent to kill said T., and that said knife was a deadly weapon, they should find defendant guilty," it is not necessary that every subsequent instruction "should submit to the jury the question as to whether or not the knife was a dangerous or deadly weapon." State v. Weeden, 133 Mo. 70.

New York.

Where, in an action to recover for injuries caused by a collision of a tally-ho coach with a train at a railroad crossing, the court has charged that "there can be no recovery if the accident is caused by the driver or helper, and the character of the vehicle and teams," it is proper to refuse a charge that "if, upon all the evidence, the jury find that this collision would not have happened except for the unusual character of the turnout, then the verdict must be for the defendant." Henn v. Long Island R. Co., 51 App. Div. 292, 65 N. Y. Supp. 21. Where the court has charged, in a civil case, that "the burden is upon the plaintiff to establish the essential features of her case by a fair preponderance of the credible testimony in the case, and he has further charged that if, upon the conflict of testimony, the plaintiff has not proved her case by a preponderance of testimony, but the testimony stands equal, there can be no recovery by the plaintiff, because it is incumbent upon her to prove her case by a fair preponderance," it is proper to refuse to charge the jury "that, if they are in doubt after hearing all this testimony, they must give their verdict for the defendant." Hamel v. Brooklyn Heights R. Co., 59 App. Div. 135, 69 N. Y. Supp. 166. Where the court has charged that, if certain "witnesses were believed and were corroborated, the evidence would be sufficient to warrant a conviction," it need not also charge that, if the jury did not believe the testimony of such witnesses, they must acquit, it not being contended by any one that, without the testimony of such witnesses, the defendant could be convicted. People v. McQuade, 48 Hun, 620, 1 N. Y. Supp. 156.

Rhode Island.

Where, in an action by a servant against a master to recover for injuries caused by defective machinery, the court has charged "that the plaintiff assumed all obvious risks, including those caused by the breaking of belts, if she knew that they were frequently accustomed to break," it is proper to refuse an instruction that, "if belts were constantly breaking in the room where plaintiff worked, and the plaintiff knew of that fact, and continued to work

there, she assumed the risk of being injured by such breaking. If belts were constantly breaking, it would be presumed that the plaintiff knew of the fact, and hence assumed the risk, and she cannot recover of the defendant corporation." McGar v. National & Providence Worsted Mills (R. I.) 47 Atl. 1092.

South Carolina.

Where the jury have been warned against deciding the case by sympathy, a special charge on the subject may be refused. Hay v. Carolina Midland R. Co., 41 S. C. 542.

Texas.

In a prosecution for an assault, the court was not required to give a charge that a "mere knowledge on the part of defendant that an assault would be committed did not render him a principal in the offense," where the court "sufficiently instructed the jury on the doctrine of principals, and required the jury to believe beyond a reasonable doubt that defendant acted as a principal in committing the assault on the prosecutor, before they could find him guilty,—having previously defined to the jury the law of principals." Grammer v. State (Tex. Cr. App.) 61 S. W. 402. Where the court has charged that, if the jury believe that certain witnesses are accomplices, they shall not find the defendant guilty upon their testimony unless they are satisfied "that the same had been corroborated by other evidence tending to establish that the defendant did in fact commit the offense," it is proper to refuse to charge that "one accomplice cannot corroborate another, and that two or more accomplices cannot corroborate each other," though, where more than one accomplice testifies, it is advisable for the court to instruct that one accomplice cannot corroborate another. Stevens v. State (Tex. Cr. App.) 58 S. W. 96. In a prosecution for theft, where the jury has been instructed that "the evidence, on the whole, must produce in your minds, to a reasonable and moral certainty, that the accused, and none other, committed the offense," it is proper to refuse an instruction, "if the jury believe from the evidence or have a reasonable doubt whether appellant or some one else took the money from the injured party, to acquit defendant." McNamara v. State (Tex. Cr. App.) 55 S. W. 823. Where the court has charged that, if defendant "was insane, and did not know the nature and quality of his act, then he was not amenable to punishment," it is proper to refuse to charge "upon the species of insanity known as 'temporary mental aberration, as produced by adequate causes, and arising from surrounding circumstances; said state or condition of the mind being an excuse for crime committed.'" Castlin v. State (Tex. Cr. App.) 57 S. W. 827. Where, in an action against a telegraph company

for failure to transmit a telegram, the principal question is as to the authority of the receiving agent to execute the alleged contract for the transmission of the telegram, and the court has charged that the receiving agent must have had actual or apparent authority to bind defendant, it is not error to refuse to charge upon the issue as to whether the delivering agent had notice of the want of authority, as such issue is immaterial. Western Union Tel. Co. v. Carter, 24 Tex. Civ. App. 80. Where the court has instructed that the jury must receive the law of the case from the court, it is proper to refuse an instruction that a statement by counsel of a certain rule of law is not correct. The court cannot undertake to follow counsel through an extended argument, and confine him at all times to an absolutely accurate statement of the law. International & G. N. R. Co. v. Crook (Tex. Civ. App.) 56 S. W. 1005. The court may give a charge "requested by plaintiff which included a statement of the issues as they have already been stated in the general charge." Galveston, H. & S. A. Ry. Co. v. Tuckett (Tex. Civ. App.) 25 S. W. 150. It is not error to refuse to charge that the claimant of property taken on execution must sustain his title by "abundant proof," where the court has already instructed that the burden of proof is upon the claimant. Swinney v. Booth, 28 Tex. 113. Where the jury have been told that certain evidence had nothing to do with the case, and was to be disregarded, it was not erroneous to refuse to repeat the rule on a motion to strike out. Rollins v. O'Farrel, 77 Tex. 90.

§ 149. Same—Qualifications and exceptions to rule.

A party has a right to direct, positive, and certain instructions, and it is not sufficient that a charge is given which, by inference and argument, may be pressed to the same extent as the instruction refused.[133] Although the court may have charged in a general way upon a given issue, yet, if this be a determinative issue of the case, it is the duty of the

[133] State v. Hollingsworth, 156 Mo. 178; Koontz v. Kaufman, 31 Mo. App. 397; Gray v. McDonald, 28 Mo. App. 492; Klatt v. Houston Electric St. Ry. Co. (Tex. Civ. App.) 57 S. W. 1112; Harris v. State (Tex. Cr. App.) 57 S. W. 833; Livingston v. Maryland Ins. Co., 7 Cranch (U. S.) 506. It is not error to refuse a requested instruction where everything in it is plainly implied in the instructions given. People v. Rodley, 131 Cal. 240.

court to give a requested charge pertinently applying the law to the facts in evidence relating to such issue.[134] A concrete instruction is always preferable to an abstract one; and where the law governing the case is stated in an abstract and general way, without applying it to the facts of the case, it is error to refuse an instruction stating correctly the law as applied to the specific facts involved.[135] Especially in close cases is a party entitled to a full and correct charge on the facts of the particular case, if requested, and it is reversible error to refuse such a request, although the charge is correct on the general principles involved in the case.[136] It is error to refuse a requested instruction, although covered by the general charge or other instructions, where the proposition is given in such a disconnected manner as to impair its force,[137] or where it is not given in terms as full, clear, and favorable as in the one requested,[138] or where, as given, the charge was apt to mislead the jury, and the fault is corrected by the required instruction.[139] Where the requested charge

[134] Fox v. Brady, 1 Tex. Civ. App. 590. "Where the testimony tends to show facts which, if found, constitute a complete defense, the defendant is entitled to have a special charge upon such issue, and a refusal to give such charge is reversible error where the general charge fails to present clearly the law upon such issue." Western Union Tel. Co. v. Andrews, 78 Tex. 305.

[135] Thompson v. Thompson, 77 Ga. 692; Metropolitan St. R. Co. v. Johnson, 90 Ga. 500; Parkhill v. Town of Brighton, 61 Iowa, 103; Muldowney v. Illinois Cent. R. Co., 39 Iowa, 615; Aldrige v. State, 59 Miss. 250; Lamar v. State, 64 Miss. 428; Gerdine v. State, 64 Miss. 798.

[136] Souey v. State, 13 Lea (Tenn.) 472.

[137] Mynning v. Detroit, L. & N. R. Co., 59 Mich. 257. See, also, infra, § 152, "Duty to Follow Language of Request."

[138] Muldowney v. Illinois Cent. R. Co., 32 Iowa, 180; State v. Maher, 25 Nev. 465.

[139] Manuel v. Chicago, R. I. & P. R. Co., 56 Iowa, 655; Haines v. Illinois Cent. R. Co., 41 Iowa, 227; Willis v. McNeill, 57 Tex. 465.

is not fairly covered by the instructions given, its refusal is, of course, error in accordance with the general rule.[140] Though the matter contained in requested instructions has been clearly set forth in instructions given, it is better to give the requested instructions, if they state the law correctly, as a refusal may cause an appeal, which otherwise would not be taken.[141]

§ 150. Same—Necessity of stating grounds of refusal to jury.

If the contents of requested instructions are read in the presence of the jury, or otherwise made known to them, and the court refuses such instructions on the ground that they have already been given in the general charge, or in the form of other special instructions, the ground of refusal should be plainly stated to the jury, for otherwise they might be misled into the belief that they were refused on the merits.[143] Where the jury are not made acquainted with the contents of a refused instruction, the rule stated does not apply. If the requests are not read in their presence, but are submitted in writing (as is the case in probably the greater number of jurisdictions) to the judge, who marks them "Refused" if he rejects them, the jury cannot be misled by the refusal of the

[140] McCormick Harvesting Mach. Co. v. Volkert, 81 Minn. 434. See ante, § 146 et seq., "Necessity of Giving Requested Instructions." See, also, post, § 152, "Duty to Follow Language of Request."

[141] People v. Murray, 41 Cal. 66; People v. Strong, 30 Cal. 151; People v. King, 27 Cal. 515; Banks v. State, 7 Tex. App. 591.

[143] People v. Hurley, 8 Cal. 390; People v. Ramirez, 13 Cal. 172; People v. Williams, 17 Cal. 148; State v. Anderson, 4 Nev. 265; People v. Bonds, 1 Nev. 33; State v. Ferguson, 9 Nev. 106; Davis v. Richmond & D. R. Co., 30 S. C. 613. Contra, Hopcraft v. Lachman, 68 Hun (N. Y.) 433. See, also, People v. Hobson, 17 Cal. 424, wherein it was held that failure to state the reason for refusal is not ground for reversal unless the refused request was entirely free from objection.

request.[144] It has been said in one case that, even if the jury do not know the substance of instructions refused, it would be well to note on the instruction the ground of the refusal, and in support of this view it is said: "A defendant might appeal without making any bill of exceptions, and in that case the charge of the judge would form no part of the record, whereas the instructions refused by him would come before us for review; and if we found that an instruction manifestly correct and applicable to the case had been refused, * * * we might be compelled to reverse the judgment for a reason that in fact did not exist."[145]

§ 151. Same—Harmless error.

Although it is the duty of the court to comply with a proper request for instructions, a failure to do so may, under the circumstances, constitute merely a harmless error, which is not a sufficient ground for reversal.[146] Thus, where a verdict is properly directed, a refusal to charge as requested is not error.[147]

§ 152. Duty to follow language of request.

In the absence of statute, while it is the duty of the court to give correct instructions when properly requested, it need

[144] People v. Saunders, 25 Mich. 119. See, also, State v. O'Connor, 11 Nev. 416.

[145] State v. O'Connor, 11 Nev. 427.

[146] Douglass v. McAllister, 3 Cranch (U. S.) 298. It is the duty of the court, when properly called upon, to declare the law applicable to the case. If, however, the verdict is, notwithstanding an omission to instruct, for the same amount as must have been awarded if the required instruction had been given, the error may be disregarded. Douglass v. McAllister, 3 Cranch (U. S.) 298. See, also, Trial of Hodges, Hall's Law Tracts, 111.

[147] Myers v. Kingston Coal Co., 126 Pa. 582, 24 Wkly. Notes Cas. 223; Lewis v. Simon, 72 Tex. 470.

not do so in the exact language of the request, but may do so in its own language, provided the request is given in substance, and the party is not injured.[148] This is the rule pre-

[148] Arkansas: Crisman v. McDonald, 28 Ark. 8; Sadler v. Sadler, 16 Ark. 628; Viser v. Bertrand, 16 Ark. 296; Metcalf v. Little Rock St. Ry. Co. (Ark.) 13 S. W. 729.

California: O'Rourke v. Vennekohl, 104 Cal. 254; Boyce v. California Stage Co., 25 Cal. 460; People v. Kelly, 28 Cal. 425; People v. Dodge, 30 Cal. 451.

Colorado: Martin v. Hazzard Powder Co., 2 Colo. 596; Jenkins v. Tynon, 1 Colo. App. 133.

Connecticut: Tiesler v. Town of Norwich, 73 Conn. 199; Charter v. Lane, 62 Conn. 121; Appeal of Livingston, 63 Conn. 68.

Florida: Nickels v. Mooring, 16 Fla. 76; Young v. State, 24 Fla. 147.

Georgia: Freeman v. Coleman, 88 Ga. 421; Robinson v. State, 82 Ga. 535; Durham v. State, 70 Ga. 264; McConnell v. State, 67 Ga. 633; Williamson v. Nabers, 14 Ga. 286; Long v. State, 12 Ga. 293; Parker v. Georgia Pac. R. Co., 83 Ga. 539.

Illinois: Bland v. People, 3 Scam. 364; Hanchett v. Kimbark, 118 Ill. 121; Chicago & W. I. R. Co. v. Bingenheimer, 116 Ill. 226; Hill v. Parsons, 110 Ill. 107; Chicago, B. & Q. R. Co. v. Avery, 109 Ill. 314; Pennsylvania Co. v. Rudel, 100 Ill. 603; Village of Fairbury v. Rogers, 98 Ill. 554; Bromley v. Goodwin, 95 Ill. 118; Chicago, B. & Q. R. Co. v. Dickson, 88 Ill. 431; Hays v. Borders, 1 Gilm. 46; Birmingham Fire Ins. Co. of Pittsburg v. Pulver, 27 Ill. App. 17; City of Chicago v. Moore, 139 Ill. 201, affirming 40 Ill. App. 332; Chicago & A. R. Co. v. Pillsbury, 123 Ill. 9.

Indiana: Trogdon v. State, 133 Ind. 1, 4; White v. Gregory, 126 Ind. 95.

Iowa: National State Bank of Burlington v. Delahaye, 82 Iowa, 34; Norris v. Kipp, 74 Iowa, 444; Larsh v. City of Des Moines, 74 Iowa, 512; Bixby v. Carskaddon, 70 Iowa, 726; Galpin v. Wilson, 40 Iowa, 90; Smith v. Sioux City & P. R. Co., 38 Iowa, 173; State v. Stanley, 33 Iowa, 526; State v. Gibbons, 10 Iowa, 117; Abbott v. Striblen, 6 Iowa, 191; Paukett v. Livermore, 5 Iowa, 277.

Kansas: Missouri Pac. Ry. Co. v. Cassity, 44 Kan. 207; Chicago, K. & W. R. Co. v. Brunson, 43 Kan. 371; State v. Tatlow, 34 Kan. 80; State v. Groning, 33 Kan. 18; Fullenwider v. Ewing, 25 Kan. 69; Rice v. State, 3 Kan. 152.

Kentucky: Jackson v. Com. (Ky.) 34 S. W. 14.

vailing in most of the states. It seems a necessary consequence of the rule already considered, that requests for in-

Louisiana: State v. Miller, 41 La. Ann. 677; State v. Wright, 41 La. Ann. 605; State v. Durr, 39 La. Ann. 751; State v. Porter, 35 La. Ann. 1159; State v. St. Geme, 31 La. Ann. 302; State v. Carr, 25 La. Ann. 407.

Maine: Inhabitants of Naples v. Inhabitants of Raymond, 72 Me. 213; Foye v. Southard, 64 Me. 389; State v. Reed, 62 Me. 129; State v. Barnes, 29 Me. 561; Hovey v. Hobson, 55 Me. 256; Anderson v. City of Bath, 42 Me. 346.

Maryland: Hall v. Hall, 6 Gill & J. 386; Mutual Safety Ins. Co. v. Cohen, 3 Gill, 459; Kershner v. Kershner's Lessee, 36 Md. 334; Smith v. Wood, 31 Md. 300; Philadelphia, W. & B. R. Co. v. Harper, 29 Md. 338; Davis v. Furlow's Lessee, 27 Md. 546; Baltimore & O. R. Co. v. Worthington, 21 Md. 281; Snively v. Fahnestock, 18 Md. 391; Higgins v. Carlton, 28 Md. 115; Mayor, etc., of Baltimore v. Pendleton, 15 Md. 12; Pettigrew v. Barnum, 11 Md. 434; Coates v. Sangston, 5 Md. 121; Key v. Dent, 6 Md. 142; New York Life Ins. Co. v. Flack, 3 Md. 341; Keener v. Harrod, 2 Md. 63.

Massachusetts: Com. v. Mullen, 150 Mass. 394; McMahon v. O'Connor, 137 Mass. 216; Randall v. Chase, 133 Mass. 210; Howes v. Grush, 131 Mass. 207; Thurston v. Perry, 130 Mass. 240; Com. v. Cobb, 120 Mass. 356; Costley v. Com., 118 Mass. 1; Norwood v. City of Somerville, 159 Mass. 105.

Michigan: Eldredge v. Sherman, 79 Mich. 484; Champlain v. Detroit Stamping Co., 68 Mich. 238; Brown v. McCord & Bradfield Furniture Co., 65 Mich. 360; Lewis v. Rice, 61 Mich. 97; Kendrick v. Towle, 60 Mich. 363; Mynning v. Detroit, L. & N. R. Co., 59 Mich. 258; People v. Hare, 57 Mich. 506; Pound v. Port Huron & S. W. Ry. Co., 54 Mich. 13; Campau v. Dubois, 39 Mich. 274; Ulrich v. People, 39 Mich. 245; Campbell v. People, 34 Mich. 351; Fraser v. Jennison, 42 Mich. 206; Fowler v. Hoffman, 31 Mich. 215; Josselyn v. McAllister, 22 Mich. 300; Fisher v. People, 20 Mich. 135; People v. Weaver, 108 Mich. 649; Moore v. City of Kalamazoo, 109 Mich. 176; Babbitt v. Bumpus, 73 Mich. 331.

Minnesota: State v. Beebe, 17 Minn. 241 (Gil. 218); State v. McCartey, 17 Minn. 76 (Gil. 54); Dodge v. Rogers, 9 Minn. 223 (Gil. 209); Chandler v. De Graff, 25 Minn. 88; State v. Mims, 26 Minn. 183; Smith v. St. Paul & D. R. Co., 51 Minn. 86.

Mississippi: Scott v. State, 56 Miss. 287; Green v. State, 28 Miss. 688; Masks v. State, 36 Miss. 77; Doe v. Peck, 4 How. 407; Boles v. State, 9 Smedes & M. 284.

structions substantially covered by other instructions given in the case may be refused without error; but in a few states

Missouri: State v. St. Louis Brokerage Co., 85 Mo. 411; State v. Jones, 61 Mo. 232; Harman v. Shotwell, 49 Mo. 423; State v. Ott, 49 Mo. 326; Mitchell v. City of Plattsburg, 33 Mo. App. 555; Smith v. Eno, 15 Mo. App. 576; Taylor v. Missouri Pac. R. Co. (Mo.) 16 S. W. 206; Muehlhausen v. St. Louis R. Co., 91 Mo. 332.

Nebraska: Lau v. W. B. Grimes Dry-Goods Co., 38 Neb. 215.

Nevada: State v. Davis, 14 Nev. 407.

New Hampshire: Walker v. Walker, 64 N. H. 55; Welch v. Adams, 63 N. H. 352; Whitman v. Morey, 63 N. H. 448; Rublee v. Belmont, 62 N. H. 365; Hardy v. Keene, 54 N. H. 449; Tucker v. Peaslee, 36 N. H. 167; Clark v. Wood, 34 N. H. 447; Walcott v. Keith, 22 N. H. 196.

New Jersey: Fath v. Thompson, 58 N. J. Law, 180.

New York: Sherman v. Wakeman, 11 Barb. 262; Williams v. Birch, 6 Bosw. 299; Bulkeley v. Keteltas, 4 Sandf. 450; Fay v. O'Neill, 36 N. Y. 11; Trustees of First Baptist Church v. Brooklyn Fire Ins. Co., 23 How. Pr. 448; Carroll v. Tucker, 6 Misc. Rep. 613; Morehouse v. Yeager, 71 N. Y. 594; People v. Williams, 92 Hun, 354, 36 N. Y. Supp. 511; Sherlock v. German American Ins. Co., 162 N. Y. 656.

North Carolina: Commissioners of Newbern v. Dawson, 32 N. C. 436; Burton v. March, 51 N. C. 409; State v. Neville, 51 N. C. 423; Marshall v. Flinn, 49 N. C. 199; Cornelius v. Brawley, 109 N. C. 542; Brink v. Black, 77 N. C. 59; State v. Scott, 64 N. C. 586; State v. Brantley, 63 N. C. 518; Burton v. March, 51 N. C. 409; State v. Brewer, 98 N. C. 607; State v. McNeill, 92 N. C. 812; State v. Anderson, 92 N. C. 632; Michael v. Foil, 100 N. C. 178; McDonald v. Carson, 94 N. C. 497; Rencher v. Wynne, 86 N. C. 268; Moore v. Parker, 91 N. C. 275; Patterson v. McIver, 90 N. C. 493; Kinney v. Laughenour, 89 N. C. 365; State v. Brabham, 108 N. C. 793; Thompson v. Western Union Tel. Co., 107 N. C. 449; Everett v. Williamson, 107 N. C. 204; Bethea v. Raleigh & A. R. Co., 106 N. C. 279; Carlton v. Wilmington & W. R. Co., 104 N. C. 365; Conwell v. Mann, 100 N. C. 234; Newby v. Harrell, 99 N. C. 149; McFarland v. Southern Imp. Co., 107 N. C. 368; State v. Jones, 97 N. C. 469; Clements v. Rogers, 95 N. C. 248; Patterson v. McIver, 90 N. C. 493; State v. Hinson, 83 N. C. 640; State v. Boon, 82 N. C. 637; Long v. Pool, 68 N. C. 479; Wilcoxon v. Logan, 91 N. C. 449; State v. Bowman, 80 N. C. 432; State v. Dunlap, 65 N. C. 288; State v. Hargett, 65 N. C. 669;

the rule obtains, either by virtue of a statute or as an established rule of practice, that requested instructions must be given in the exact language of the request,[149] and the error

Hawkins v. House, 65 N. C. 614; State v. Crews, 128 N. C. 581; State v. Mills, 116 N. C. 992; State v. Thomas, 98 N. C. 599.

Ohio: McHugh v. State, 42 Ohio St. 154; Bolen v. State, 26 Ohio St. 371; Bond v. State, 23 Ohio St. 349; Ashtabula, etc., Co. v. Dagenbach, 11 Ohio Cir. Dec. 307; United States Home & Dower Ass'n v. Kirk, 9 Wkly. Law Bul. (Ohio) 48.

Oklahoma: Veseley v. Engelkemeier, 10 Okl. 290.

Pennsylvania: Munderbach v. Lutz's Adm'r, 14 Serg. & R. 220; Geiger v. Welsh, 1 Rawle, 349; Duncan v. Sherman, 121 Pa. 520; Ridgway v. Longaker, 18 Pa. 215; Groft v. Weakland, 34 Pa. 304; Arbuckle v. Thompson, 37 Pa. 170; Lycoming Ins. Co. v. Schreffler, 42 Pa. 188; Winsor v. Maddock, 64 Pa. 231; Jacobs v. Curtis, 11 Leg. Int. 27; Lynch v. Welsh, 3 Pa. 294; Com. v. McManus, 143 Pa. 64.

South Carolina: State v. Wine, 58 S. C. 94; State v. Petsch, 43 S. C. 132; Hay v. Carolina Midland R. Co., 41 S. C. 542.

Texas: Missouri Pac. Ry. Co. v. Williams, 75 Tex. 4; Shultz v. State, 13 Tex. 401.

Utah: Scoville v. Salt Lake City, 11 Utah, 64; People v. Chadwick, 7 Utah, 141, 142; Cunningham v. Union Pac. Ry. Co., 4 Utah, 206; People v. Olsen, 4 Utah, 413; People v. Hampton, 4 Utah, 258; Clampitt v. Kerr, 1 Utah, 247; Reddon v. Union Pac. Ry. Co., 5 Utah, 344.

Vermont: Reed v. Newcomb, 64 Vt. 49; Campbell v. Day, 16 Vt. 558; State v. Eaton, 53 Vt. 574; Whittaker v. Perry, 38 Vt. 107.

Virginia: Richmond & D. R. Co. v. Norment, 84 Va. 167.

Washington: State v. Baldwin, 15 Wash. 15; City of Seattle v. Buzby, 2 Wash. T. 25.

United States: Clymer's Lessee v. Dawkins, 3 How. 674; Kelly v. Jackson, 6 Pet. 622; Ohio & M. Ry. Co. v. McCarthy, 96 U. S. 258; Pitts v. Whitman, 2 Story, 609, Fed. Cas. No. 11,196; Chicago & N. W. Ry. Co. v. Whitton, 13 Wall. 270; Laber v. Cooper, 7 Wall. 565; Ayers v. Watson, 137 U. S. 601, 11 Sup. Ct. 201; Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291; Continental Imp. Co. v. Stead, 95 U. S. 161; Southern Bell Tel. & Tel. Co. v. Watts, 13 C. C. A. 586, 66 Fed. 466.

[149] East Tennessee, V. & G. R. Co. v. Bayliss, 77 Ala. 480; Cunningham v. State, 73 Ala. 53; Eiland v. State, 52 Ala. 322; Baker

is not cured by giving a charge of equivalent import.[150] An alteration of a requested instruction under this rule is equivalent to a refusal of the request.[151] Under the Alabama statute, charges moved for in writing must be given or refused in the terms in which they are written, but, if the request is oral, it is subject to qualification, and the court may charge

v. State, 49 Ala. 351; Sawyer v. Lorillard, 48 Ala. 332; Bush v. Glover, 47 Ala. 167; Warren v. State, 46 Ala. 549; Knight v. Clements, 45 Ala. 89; Milner v. Wilson, 45 Ala. 478; Lyon v. Kent, 45 Ala. 656; Edgar v. State, 43 Ala. 45; Polly v. McCall, 37 Ala. 21; Bell's Adm'r v. Troy, 35 Ala. 186; Hogg v. State, 52 Ala. 2; Phillips v. Beene, 16 Ala. 721; Cole v. Spann, 13 Ala. 537; Hinton v. Nelms, 13 Ala. 222; Clealand v. Walker, 11 Ala. 1059; Ivey v. Phifer, 11 Ala. 535; United States Life Ins. Co. v. Lesser, 126 Ala. 568; Pensacola & A. R. Co. v. Atkinson, 20 Fla. 450; Pate v. Wright, 30 Ind. 476; People v. Stewart, 75 Mich. 21; Lutterbeck v. Toledo Consolidated St. R. Co., 5 Ohio Cir. Dec. 141; Galloway v. McLean, 2 Dak. 372; Peart v. Chicago, M. & St. P. Ry. Co., 8 S. D. 431; Green v. Hughitt School Tp., 5 S. D. 452; Dillingham v. Fields, 9 Tex. Civ. App. 4; Baltimore & O. R. Co. v. Laffertys, 14 Grat. (Va.) 478; State v. Evans, 33 W. Va. 417; Eldred v. Oconto Co., 33 Wis. 134; Andrea v. Thatcher, 24 Wis. 471; Mason v. Whitbeck Co., 35 Wis. 164; Castello v. Landwehr, 28 Wis. 522; Rogers v. Brightman, 10 Wis. 55; Lake Shore & M. S. Ry. Co. v. Schultz, 19 Ohio Cir. Ct. R. 639; Murphy v. City of Cincinnati, 8 Ohio N. P. 244, 11 Ohio S. & C. P. Dec. 119; Grace v. Dempsey, 75 Wis. 313.

[150] Bush v. Glover, 47 Ala. 167; Williams v. State, 47 Ala. 659; Carson v. State, 50 Ala. 134; Knight v. Clements, 45 Ala. 89; East Tennessee, V. & G. R. Co. v. Bayliss, 77 Ala. 429; Edgar v. State, 43 Ala. 45; Polly v. McCall, 37 Ala. 20; Phillips v. Beene, 16 Ala. 720; Cole v. Spann, 13 Ala. 537; Hinton v. Nelms, 13 Ala. 222; Clealand v. Walker, 11 Ala. 1059; Ivey v. Phifer, 11 Ala. 535; Maynard v. Johnson, 4 Ala. 116; Rives v. McLosky, 5 Stew. & P. (Ala.) 330; Rogers v. Brightman, 10 Wis. 55. The earlier cases in Alabama establishing this rule were overruled in Long v. Rodgers, 19 Ala. 321, and Ewing v. Sanford, 21 Ala. 157, but the original rule was restored by statute. Rev. Code, § 2756. See Eiland v. State, 52 Ala. 322.

[151] Pensacola & A. R. Co. v. Atkinson, 20 Fla. 450.

in its own language.[152] On appeal, it will be presumed, in support of the judgment, that the charges were asked orally, unless the record show affirmatively that they were requested in writing.[153] In Texas it is held that the judge should give or refuse a charge in the very terms of the request, and, if he wishes to give it in a qualified form, he should make the changes separately and distinctly from the charge as asked.[154] He should not make changes by erasure and interlineations.[155] The rule that instructions must be given in the language of the request does not deprive the court of the right to give additional and explanatory charges, where necessary to prevent a misunderstanding or misapplication of the charge by the jury;[156] but the court cannot, by such additional instructions, so limit, restrict, and modify the requested instruc-

[152] Richardson v. State, 54 Ala. 158; Warren v. State, 46 Ala. 549; Milner v. Wilson, 45 Ala. 478; Lyon v. Kent, 45 Ala. 656; Broadbent v. Tuskaloosa S. & A. Ass'n, 45 Ala. 170.

[153] Milner v. Wilson, 45 Ala. 478.

[154] Southern Cotton Press & Mfg. Co. v. Bradley, 52 Tex. 587; Trezevant v. Rains (Tex. Civ. App.) 25 S. W. 1092; Missouri Pac. Ry. Co. v. Williams, 75 Tex. 4. See, also, King v. Rea, 13 Colo. 69; Parker v. Georgia Pac. Ry. Co., 83 Ga. 539. "It is the right of the party asking a special charge to have the same kept distinct from any qualifications made by the judge presiding, so that it may clearly appear to the appellate court what the charge was as asked, and what modifications, if any, were made by the court below." Southern Cotton Press & Mfg. Co. v. Bradley, 52 Tex. 602.

[155] Southern Cotton Press & Mfg. Co. v. Bradley, 52 Tex. 602.

[156] Morris v. State, 25 Ala. 58; Eldred v. Oconto Co., 33 Wis. 134; Hogg v. State, 52 Ala. 2; Blair v. State, 52 Ala. 343; Eiland v. State, 52 Ala. 322; Bell's Adm'r v. Troy, 35 Ala. 184. Giving the requested instruction "in connection with the general charge" is not a violation of the statute. Baker v. State, 49 Ala. 350. A further charge requiring the jury to look to the evidence or all the evidence in determining a question covered by requested instructions does not violate the statute. Blair v. State, 52 Ala. 343; Hogg v. State, 52 Ala. 2.

tion as to limit or weaken its force.[157] In some jurisdictions it is held that instructions should be given in the language of the request if found correct, and that a failure to do so is error unless the substance of the request is as well stated by the court in its own language.[158] But though the judge may limit himself to giving the instructions submitted by counsel, it is entirely competent for him to prepare his own charge, embodying the substance of all proper instructions asked by counsel, and such a practice will often result in furnishing to the jury a terse, consecutive, and logical statement of the law applicable to the case, in place of the loose and fragmentary presentation of the law which is the natural consequence of giving instructions in the form in which they are requested by the respective counsel. In other jurisdictions it is said to be the better practice for the court to put aside the instructions asked by counsel, and to cover the whole ground of the controversy in a methodical and corrected charge of its own, stating the questions of fact to be decided, and the law applicable thereto under the issues and the evidence.[159] Under the rule that the court is not bound to follow the exact language of the request, while the

[157] Eiland v. State, 52 Ala. 322.

[158] People v. Williams, 17 Cal. 142; People v. Stewart, 75 Mich. 29; Babbitt v. Bumpus, 73 Mich. 338; Cook v. Brown, 62 Mich. 477; Mynning v. Detroit, L. & N. R. Co., 59 Mich. 257; Mask v. State, 36 Miss. 77; Fells Point Sav. Inst. of Baltimore v. Weedon, 18 Md. 320; Snively v. Fahnestock, 18 Md. 391. See, also, Hall v. Hall, 6 Gill & J. (Md.) 386; Harman v. Shotwell, 49 Mo. 423.

[159] Birmingham Fire Ins. Co. v. Pulver, 126 Ill. 329; City of Chicago v. Moore, 40 Ill. App. 334; State v. Collins, 20 Iowa, 85; Key v. Dent, 6 Md. 142; Bulkeley v. Keteltas, 4 Sandf. (N. Y.) 450. See, also, Alexander v. Mandeville, 33 Ill. App. 589; Fowler v. Hoffman, 31 Mich. 215. It is not good practice for the court to charge the jury in chief, and then give all the instructions asked by either party. "A clear and distinct enunciation of the law" should be given. Wilson Sewing Mach. Co. v. Bull, 52 Iowa, 554.

court may modify the phraseology, it must not alter the sense,[160] or change the language so as to render the instruction misleading,[161] or so as to obscure its vital point,[162] or essentially weaken its force.[163] Counsel have a right to a clear formulation of every important view of the law, either as they drew it up, or in some equally proper form.[164] The charges as given must cover all the points of the instructions requested.[165] Failure to charge in the exact language of the request may be, in many cases, mere harmless error, and not ground for reversal.[166] Thus, where the instructions given

[160] Jamson v. Quivey, 5 Cal. 490; Russel v. Amador, 3 Cal. 400; Conrad v. Lindley, 2 Cal. 173; Chicago & W. I. R. Co. v. Bingenheimer, 116 Ill. 226; Chicago, B. & Q. R. Co. v. Dickson, 88 Ill. 431; Kinney v. Laughenour, 89 N. C. 368; Brink v. Black, 77 N. C. 59.

[161] Russel v. Amador, 3 Cal. 400; Baltimore & O. R. Co. v. Laffertys, 14 Grat. (Va.) 478.

[162] Parrish v. Bradley, 73 Mich. 610.

[163] Young v. State, 24 Fla. 147; Horton v. Williams, 21 Minn. 187; Patterson v. McIver, 90 N. C. 493; Brink v. Black, 77 N. C. 59; State v. Evans, 33 W. Va. 421.

[164] Campau v. Dubois, 39 Mich. 274.

[165] People v. Dodge, 30 Cal. 448; Alexander v. Mandeville, 33 Ill. App. 589; City of Chicago v. Moore, 139 Ill. 201, affirming 40 Ill. App. 332; Missouri Pac. Ry. Co. v. Cassity, 44 Kan. 207; State v. Carr, 25 La. Ann. 407; State v. Reed, 62 Me. 129; State v. Barnes, 29 Me. 561; Mynning v. Detroit, L. & N. R. Co., 59 Mich. 258; Campau v. Dubois, 39 Mich. 274; State v. St. Louis Brokerage Co., 85 Mo. 411; Coleman v. Roberts, 1 Mo. 97; Newbern Com'rs v. Dawson, 32 N. C. 436; McDonald v. Carson, 94 N. C. 507; Rencher v. Wynne, 86 N. C. 268; Duncan v. Sherman, 121 Pa. 520; Baltimore & O. R. Co. v. Laffertys, 14 Grat. (Va.) 478. Where instructions present the law of the case with reasonable accuracy, it is immaterial that all points sought to be covered by instructions requested are not met. People's Fire Ins. Co. v. Pulver, 127 Ill. 246.

[166] Lafayette, M. & B. R. Co. v. Murdock, 68 Ind. 137; Binns v. State, 66 Ind. 428; Kramer v. Warth, 66 Ind. 548; Hadley v. Prather, 64 Ind. 137; Jones v. State, 64 Ind. 473; Pate v. First Nat. Bank of Aurora, 63 Ind. 254; Brooks v. Allen, 62 Ind. 401; Crandall v. First Nat. Bank of Auburn, 61 Ind. 349; Beard v. Sloan, 38 Ind. 128;

were more favorable than those requested and refused, the error, if any, in refusing to give the instructions as requested is harmless, and not ground for reversal.[167] But in Alabama and Ohio it is held that the statute is peremptory, and that the doctrine of error without injury cannot be applied to a refusal to charge in the terms of the request.[168]

§ 153. Same—Digest of decisions.

"Counsel have a right to require of the court to give an instruction as asked, when the same is in conformity with the law; and if, in the opinion of the court, the jury may not fully comprehend, or may be misled by, such instructions, unless explained, it is then the province of the court to give such additional instructions or explanations as may obviate the danger of misapprehension on the part of the jury. But where such course has not been pursued, and the instruction given has but slightly varied from the one asked, and if its legal import is substantially the same, the judgment of the court below will not, for that reason alone, be disturbed." State v. Wilson, 2 Scam. (Ill.) 225. A failure to charge a settled rule of law when requested is reversible error when the charge given in the new language of the court is doubtful. Turner v. State, 4 Lea (Tenn.) 208; Lawless v. State, 4 Lea (Tenn.) 173.

Nelson v. Hardy, 7 Ind. 364; Taber v. Hutson, 5 Ind. 322; Lawrenceburgh & U. M. R. Co. v. Montgomery, 7 Ind. 474; Abrams v. Smith, 8 Blackf. (Ind.) 95; Gentry v. Bargis, 6 Blackf. (Ind.) 261; Norris v. Kipp, 74 Iowa, 444; Hall v. Hall, 6 Gill & J. (Md.) 386; Smith v. St. Paul & D. R. Co., 51 Minn. 86; Green v. Hughitt School Tp., 5 S. D. 452; Dillingham v. Fields, 9 Tex. Civ. App. 1; Trezevant v. Rains (Tex. Civ. App.) 25 S. W. 1092; Andrea v. Thatcher, 24 Wis. 471; Eldred v. Oconto Co., 33 Wis. 134; Rogers v. Brightman, 10 Wis. 55; Schools v. Risley, 10 Wall. (U. S.) 115; Mason v. H. Whitbeck Co., 35 Wis. 164; Grace v. Dempsey, 75 Wis. 313, 43 N. W. 1127.

[167] Dillingham v. Fields, 9 Tex. Civ. App. 1; Watson v. Com., 87 Va. 608.

[168] East Tennessee, V. & G. R. Co. v. Bayliss, 77 Ala. 429; Eiland v. State, 52 Ala. 322; Carson v. State, 50 Ala. 134; Williams v. State, 47 Ala. 659; Bush v. Glover, 47 Ala. 167; Polly v. McCall, 37 Ala. 20; City of Cincinnati v. Lochner, 8 Ohio N. P. 436, 11 Ohio S. & C. P. Dec. 119. Compare Sawyer v. Lorillard, 48 Ala. 333.

For the court below to refuse to charge the jury, when requested, in writing, in the language of the judgment of a higher court, on the same statement of facts in a case between the same parties, which had previously been adjudicated in the latter court, is error. Pugh v. McCarty, 44 Ga. 383. Where the defendant requests a series of instructions, the court may separate them, and give them in an order chosen by itself. It is certainly "not objectionable to group the instructions on particular subjects, and give them to the jury, so that they may have those upon the same subject, and which qualify each other, in juxtaposition, forming a more connected statement of the law than if separated." Crowell v. People, 190 Ill. 508. When a special instruction in writing is asked for, the court must examine it, and, if correct, it must be given in whole in writing, or refused. It is error to hand it to the jury with an indorsement, "Accepted and given to the jury, except in so far as they conflict with the principles laid down in the charge." It is reversible error to require the jury to compare diverse charges to find the law of the case. Lang v. State, 16 Lea (Tenn.) 433. "When an instruction asked presents the law accurately, the court ought always to give it in the very words asked, especially in criminal cases," though failure to do so is not necessarily a ground for reversal. People v. Williams, 17 Cal. 142. "The prayer was that every link in the chain of circumstantial evidence must be as satisfactorily proved as the main fact of the murder, and the judge in reply said that, in a case in which the jury are asked to convict on circumstantial evidence, they must be fully satisfied of every link in the chain. It was held to be a substantial compliance with the prayer." State v. Bowman, 80 N. C. 432. Where, in a prosecution for forcible trespass, the court charges "that there must be a sufficient display of force to intimidate, or such as was calculated to produce a breach of the peace, and that they must judge from all the facts whether there had been a sufficient display of force to intimidate," it is proper to refuse to charge "that, before the jury can find the defendant guilty, they must first find that he entered with a strong hand, accompanied with a display of weapons or other force." The court is not required to give an instruction asked in the very language of the request. State v. Hinson, 83 N. C. 640. "Where the court, in its general charge, covers a request except as to an item which is not disputed, the request is substantially covered." Crane Lumber Co. v. Otter Creek Lumber Co., 79 Mich. 307.

§ 154. Modification of requested instructions.

The duty of the court to follow the language of a request, where the requested instruction was in all respects correct, has been considered in the preceding sections.[169] Where a requested instruction is incorrect, or for any reason should not be given, the court may, as has been seen, refuse to give it, but it is not bound to do so, and may, if it sees fit, modify the instruction so as to make it state the law correctly, or remove any other objection to the instruction as proposed, and then give the charge as modified.[170] Indeed, it has

[169] See ante, §§ 153, 154.

[170] Alabama: Eiland v. State, 52 Ala. 330. See, also, Morris v. State, 25 Ala. 57.

California: People v. Dolan, 96 Cal. 315; People v. Hall, 94 Cal. 595; People v. Cotta, 49 Cal. 166; People v. Davis, 47 Cal. 93; King v. Davis, 34 Cal. 100; People v. Williams, 32 Cal. 280; Boyce v. California Stage Co., 25 Cal. 460; People v. Methever, 132 Cal. 326.

Connecticut: State v. Duffy, 66 Conn. 551; Marlborough v. Sisson, 23 Conn. 55.

Florida: Evans v. Givens, 22 Fla. 476.

Georgia: Lacewell v. State, 95 Ga. 346; Doe d. Stephens v. Roe, 37 Ga. 289; Ray v. State, 15 Ga. 223.

Illinois: Kadgin v. Miller, 13 Ill. App. 474; Cohen v. Schick, 6 Ill. App. 280; Doggett v. Ream, 5 Ill. App. 174; Town of Earlville v. Carter, 2 Ill. App. 34; Bannister v. Read, 1 Gilm. 92; Bland v. People, 3 Scam. 364; Sanitary Dist. of Chicago v. City of Joliet, 189 Ill. 270; Village of Cullom v. Justice, 161 Ill. 372; Kreigh v. Sherman, 105 Ill. 49; Kimmel v. People, 92 Ill. 457; Meyer v. Mead, 83 Ill. 19; Trustees of Schools v. McCormick, 41 Ill. 323; Hovey v. Thompson, 37 Ill. 538; Morgan v. Peet, 32 Ill. 281; Galena & C. U. R. Co. v. Jacobs, 20 Ill. 478; Wells v. Ipperson, 48 Ill. App. 580; Cary v. Norton, 35 Ill. App. 365; Terre Haute & I. R. Co. v. Voelker, 31 Ill. App. 324; City of Chicago v. Moore, 139 Ill. 201; Chicago, B. & Q. R. Co. v. Perkins, 125 Ill. 127; Jansen v. Grimshaw, 125 Ill. 468.

Indiana: Chicago, St. L. & P. R. Co. v. Spilker, 134 Ind. 380; Musgrave v. State, 133 Ind. 297; Sherfey v. Evansville & T. H. R. Co., 121 Ind. 427; Smith v. State, 117 Ind. 167; Louisville, N. A. & C. Ry. Co. v. Hubbard, 116 Ind. 193; City of Logansport v. Dykeman, 116 Ind. 15; Bishop v. Welch, 54 Ind. 527; Over v. Schiffling,

been said to be the duty of the court, when not entirely satisfied with the instructions requested, to prepare other in-

102 Ind. 191; Board Com'rs Howard Co. v. Legg, 93 Ind. 523; Lake Erie & W. R. Co. v. Arnold, 8 Ind. App. 297. See, also, Taylor v. Wootan, 1 Ind. App. 188.

Iowa: Large v. Moore, 17 Iowa, 258; Keenan v. Missouri State Mut. Ins. Co., 12 Iowa, 126; State v. Gibbons, 10 Iowa, 117; Abbott v. Striblen, 6 Iowa, 191; Paukett v. Livermore, 5 Iowa, 280; Tifield v. Adams, 3 Iowa, 487.

Kansas: Evans v. Lafeyth, 29 Kan. 736; Reed v. Golden, 28 Kan. 632; St. Joseph & D. C. R. Co. v. Chase, 11 Kan. 47.

Kentucky: Pleak v. Chambers, 7 B. Mon. 569.

Michigan: Evans v. Montgomery, 95 Mich. 497; Weimer v. Bunbury, 30 Mich. 201; American Merchants' Union Exp. Co. v. Phillips, 29 Mich. 515.

Minnesota: Bartlett v. Hawley, 38 Minn. 308; Blackman v. Wheaton, 13 Minn. 326 (Gil. 299); Dodge v. Rogers, 9 Minn. 223 (Gil. 209).

Mississippi: Doss v. Jones, 5 How. 158; Doe d. Vick v. Peck, 4 How. 407; Cicely v. State, 13 Smedes & M. 202; Boles v. State, 9 Smedes & M. 284; Brown v. State, 72 Miss. 990; Scott v. State, 56 Miss. 289; White v. State, 52 Miss. 216; Archer v. Sinclair, 49 Miss. 343; Wilson v. Kohlheim, 46 Miss. 346.

Missouri: State v. Ott, 49 Mo. 326; Kaw Brick Co. v. Hogsett, 82 Mo. App. 546.

Nebraska: Tracey v. State, 46 Neb. 361.

Nevada: State v. Watkins, 11 Nev. 30; State v. Smith, 10 Nev. 123; Gerhauser v. North British & Mercantile Ins. Co., 7 Nev. 174; State v. Davis, 14 Nev. 407.

New York: Knickerbocker v. People, 57 Barb. 365; Stewart v. New York, O. & W. R. Co., 54 Hun, 638, 8 N. Y. Supp, 19.

North Carolina: State v. Horton, 100 N. C. 443; Overcash v. Kitchie, 89 N. C. 384.

Ohio: Avery v. House, 2 Ohio Cir. Ct. R. 246.

Pennsylvania: Yardley v. Cuthbertson, 108 Pa. 395; Killion v. Power, 51 Pa. 429; Hays v. Paul, 51 Pa. 134; Lloyd v. Carter, 17 Pa. 216; Amer v. Longstreth, 10 Pa. 145.

South Carolina: Fletcher v. South Carolina & G. Extension R. Co., 57 S. C. 205.

Texas: Brownson v. Scanlan, 59 Tex. 222.

Utah: Clampitt v. Kerr, 1 Utah, 246.

structions which will properly submit the case to the jury.[171] Even under a statute prohibiting the modification of requested instructions, the modification of an erroneous instruction asked, though in disregard of the statute, is not ground for reversal, unless the party asking the instruction was injured by the modification.[172] Of course, the modification made by the court must not be such as to render the instructions as given erroneous, misleading, or otherwise objectionable.[173] A correct instruction should not be modified unless the modification is supported by the evidence, and it is error to do so.[174]

§ 155. Same—Particular modifications considered.

A modification which does not change the meaning is not erroneous.[175] The mere addition of a legal principle, pertinent and proper to be considered with the facts of the case,

Virginia: Rosenbaums v. Weeden, 18 Grat. 785.
Washington: State v. Robinson, 12 Wash. 491.
United States: Smith v. Carrington, 4 Cranch, 62.

[171] Bell's Adm'r v. Troy, 35 Ala. 185; Kadgin v. Miller, 13 Ill. App. 474; State v. Jones, 61 Mo. 232; Harman v. Shotwell, 49 Mo. 423; Wilson v. Kohlheim, 46 Miss. 346; Phifer v. Alexander, 97 N. C. 335. "If a defendant in his prayer for instructions sets up a broader right than he is entitled to, the judge should not deny it altogether, but should explain to the jury the true extent of his right." Amer v. Longstreth, 10 Pa. 145.

[172] Franke v. Riggs, 93 Ala. 252; Eiland v. State, 52 Ala. 330; Sawyer v. Lorillard, 48 Ala. 333; Dupree v. State, 33 Ala. 380; Morris v. State, 25 Ala. 57; Dillingham v. Fields, 9 Tex. Civ. App. 1; Grace v. Dempsey, 75 Wis. 313; Mason v. H. Whitbeck Co., 35 Wis. 164.

[173] Orr v. Jason, 1 Ill. App. 446; State v. Green, 20 Iowa, 424.

[174] Shelby v. Offutt, 51 Miss. 128; Walker v. Stetson, 14 Ohio St. 89; Bain v. Wilson, 10 Ohio St. 14.

[175] People v. Davis, 47 Cal. 93; Chicago, R. I. & P. Ry. Co. v. Kinnare, 190 Ill. 9; Richelieu Hotel Co. v. International Military Encampment Co., 140 Ill. 248; Moore v. Chicago, B. & Q. Ry. Co., 65

is not error.[176] Mere repetitions and reiterations,[177] or unnecessary and irrelevant matters, may be stricken out.[178] Where an instruction as requested is ambiguous, obscure, involved, or misleading, it is proper for the court to modify it so as to make it intelligible, or to give additional instructions properly presenting the case to the jury.[179] The addition of a proper explanation is not error.[180] The court may add such observations as are necessary to show the proper application of the principle to the case in hand.[181] A modi-

Iowa, 505; Reed v. Golden, 28 Kan. 632; John Deere Plow Co. v. Sullivan, 158 Mo. 440; State v. Fannon, 158 Mo. 149; State v. Powers, 59 S. C. 200; State v. Smith, 10 Nev. 123. See, also, ante, § 152.

[176] People v. Davis, 47 Cal. 93; Meyer v. Mead, 83 Ill. 19; Reed v. Golden, 28 Kan. 632; Pleak v. Chambers, 7 B. Mon. (Ky.) 569.

[177] Gerhauser v. North British & Mercantile Ins. Co., 7 Nev. 174.

[178] People v. Cotta, 49 Cal. 166; Sherfey v. Evansvile & T. H. R. Co., 121 Ind. 427.

[179] Eiland v. State, 52 Ala. 330; Bell's Adm'r v. Troy, 35 Ala. 185; People v. Dolan, 96 Cal. 315; Trustees of Schools v. McCormick, 41 Ill. 323; Kadgin v. Miller, 13 Ill. App. 474; Cohen v. Schick, 6 Ill. App. 280; Evans v. Lafeyth, 29 Kan. 736; Pleak v. Chambers, 7 B. Mon. (Ky.) 569; American Merchants' Union Exp. Co. v. Phillips, 29 Mich. 515; State v. Davis, 14 Nev. 407; Gaudette v. Travis, 11 Nev. 149; State v. Watkins, 11 Nev. 30; State v. Smith, 10 Nev. 106; Knapp v. King, 6 Or. 243; Com. v. McMurray, 198 Pa. 51; Womack v. Circle, 29 Grat. (Va.) 192; Keen's Ex'r v. Monroe, 75 Va. 424; Dodge v. O'Dell's Estate, 106 Wis. 296.

[180] State v. Duffy, 66 Conn. 551; Needham v. People, 98 Ill. 275; Reinback v. Crabtree, 77 Ill. 182; Meserve v. Delaney, 105 Ill. 53; Overcash v. Kitchie, 89 N. C. 384. In an action against a master for injuries to a servant, on the request of counsel to charge that the question before the jury was not one of science, the judge said he was in doubt as to the meaning of the request, but, if it meant that the defendant was not bound to use the most scientific method, he so charged. He then gave counsel an opportunity for explanation. It was held no error. Stewart v. New York, O. & W. R. Co., 54 Hun (N. Y.) 638.

[181] State v. Duffy, 66 Conn. 551; Green v. State, 28 Miss. 687; Lloyd v. Carter, 17 Pa. 216; Reed v. Newcomb, 64 Vt. 49. It is not

fication which merely requires the jury to determine the issue from all the evidence in the case,[182] or which confines the jury to the evidence, or conforms the instructions to the pleadings,[183] or which adds a cautionary statement of an abstract principle of law, is not error;[184] and, of course, where abstract instructions have been given tending to mislead the jury by diverting their attention from the issues in the case, a modification which fits such instructions to the facts of the case is not only proper, but it is error not to give the modification.[185] A modification to make the instruction harmonize with other instructions requested by the same party is not erroneous.[186]

§ 156. Same—Harmless error.

Where the modification of an instruction could not have misled the jury to the injury of the plaintiff in error, the judgment will not be reversed.[187] A modification rendering

error for the court, after answering a point affirmatively, to qualify it by stating that, if the facts were different from those assumed, the law would be otherwise. Columbia Bridge Co. v. Kline, Brightly N. P. (Pa.) 320, 4 Clark, 39; Lloyd v. Carter, 17 Pa. 216.

[182] Meserve v. Delaney, 105 Ill. 53; Kreigh v. Sherman, 105 Ill. 49.

[183] Evans v. Givens, 22 Fla. 476; Kimmel v. People, 92 Ill. 457; Terre Haute & I. R. Co. v. Voelker, 31 Ill. App. 314; Smith v. State, 117 Ind. 167; Large v. Moore, 17 Iowa, 258; Shelby v. Offutt, 51 Miss. 128; O'Neil v. Capelle, 56 Mo. 296; Newby v. Chicago, R. I. & P. Ry. Co., 19 Mo. App. 391; Hays v. Paul, 51 Pa. 134; Killion v. Power, 51 Pa. 429.

[184] Yardley v. Cuthbertson, 108 Pa. 395.

[185] Trustees of Schools v. McCormick, 41 Ill. 323; Bannister v. Read, 1 Gilm. (Ill.) 92; Blackman v. Wheaton, 13 Minn. 326 (Gil. 299); Gaudette v. Travis, 11 Nev. 149.

[186] Feary v. Metropolitan St. Ry. Co., 162 Mo. 75.

[187] Meserve v. Delaney, 105 Ill. 53; Reinback v. Crabtree, 77 Ill. 182; Howard F. & M. Ins. Co. v. Cornick, 24 Ill. 455; Bartlett v. Hawley, 38 Minn. 308; Alexander v. Richmond & D. R. Co., 112 N. C. 720.

the instruction more favorable than the one asked is, at most, harmless error as respects the party making the request.[188] It has been held that no modification of an erroneous instruction can be assigned as error by the party asking the instruction, because the court might have wholly refused to give such instruction.[189] But it seems to be the better view that an instruction modified by the court is to be regarded as an instruction given by the court of its own motion, and, if it fails to properly state the law, it is erroneous, and open to objection from either party.[190] A proviso qualifying an instruction to the prejudice of the party asking it is reversible error.[191]

§ 157. Same—Manner of making modification.

In some states the court is forbidden to modify instructions by interlineation or erasure,[192] and in all states good

[188] King v. Rea, 13 Colo. 69; Watson v. Com., 87 Va. 608.

[189] Louisville, N. O. & T. Ry. Co. v. Suddoth, 70 Miss. 265, wherein the court said: "It may be admitted that the instruction, as modified, imposed upon the defendant too great a degree of care to avoid injury to the animal after its danger was discovered, and was therefore erroneous; but this will avail nothing unless the instruction, as asked, was correct. If the defendant was not content with the instruction as modified, it should have declined to read it to the jury. No modification of an erroneous instruction can be assigned for error by the party asking the instruction, for the court might refuse such instruction outright. One who is entitled to nothing cannot complain that he gets something, but less than he asks. The instruction, as asked, was erroneous, because of its statement, in the disjunctive, that doing what could have been done to avoid the injury, after the danger was discovered, discharged the defendant from any precedent negligence."

[190] O'Niel v. Orr, 4 Scam. (Ill.) 1; Morgan v. Peet, 32 Ill. 288; Town of Earlville v. Carter, 2 Ill. App. 34. See Abbott v. Striblen, 6 Iowa, 191; State v. Gibbons, 10 Iowa, 117.

[191] Little Rock Traction & Electric Co. v. Trainer, 68 Ark. 106; Wells v. Turner, 16 Md. 133.

[192] Ham v. Wisconsin, I. & N. R. Co., 61 Iowa, 720; Phillips v.

practice requires that it shall distinctly appear what the instruction asked and given is, and what the qualification is, so that exceptions may be properly saved for review;[193] but a disregard of the prohibition is not ground for reversal unless an exception was saved, and it appears that the party

Starr, 26 Iowa, 349; Tracey v. State, 46 Neb. 370; Daly v. Bernsteln, 6 N. M. 380. "The statute points out the mode in which instructions may be modified, and prohibits this from being done 'by interlineation or erasure.' Revision, § 3053. The first instruction asked by the plaintiff has indorsed on the margin, 'Given as modified;' with this memorandum by the clerk: 'The words underscored are added by the judge, and those with a pencil mark through them are erased by the judge. T. A. Bereman, Clerk.' We cannot act upon any such certificate. The clerk is not authorized to make it. How dangerous it would be to allow a clerk to certify that the judge erased portions of instructions by drawing pencil marks through them. We are not disposed to be overnice in matters of practice. Every lawyer knows how important—how vital—a part of a cause the instructions are. It is a wise provision of the statute which forbids interlineations and erasures in modifying instructions asked, and it should be followed; at least, if modifications are made in this way, the judge, and not the clerk, should certify in what they consist." Phillips v. Starr, 26 Iowa, 352.

[193] King v. Davis, 34 Cal. 100; Bishop v. Welch, 54 Ind. 527; Ham v. Wisconsin, I. & N. Ry. Co., 61 Iowa, 720; Campbell v. Fuller, 25 Kan. 723; Exchange Bank v. Cooper, 40 Mo. 169; Meyer v. Pacific R. Co., 40 Mo. 151. Modification of instructions asked may be made by cutting off a part of the sheet on which the instruction is written, notwithstanding the particular provisions of Code 1873, § 2785, as to the method of making modifications. Ham v. Wisconsin, I. & N. R. Co., 61 Iowa, 716. Although the judge has the right to qualify propositions requested to be presented by him to the jury, when they are not strictly legal or pertinent, or when they require some addition or diminution to make them entirely correct, or are unauthorized by the facts in the case, yet, when the matters involved in the qualification made by the judge are entirely separable from the request made, and substantially disconnected from it, those matters of qualification should be presented, not in connection with the instruction requested, but independently. Stephens v. Mattox, 37 Ga. 289.

complaining may have been prejudiced.[194] The fact that the erasure left the words stricken out still legible is immaterial.[195] It is not necessary that an instruction given should show that a modification was made by the court, and words so indicating should be omitted, but error in this regard is not so material as to justify a reversal.[196]

§ 158. Same—Digest of decisions.

In the following charge: "The jury are instructed that the following persons, among others, are not capable of committing crime under the laws of the state of California: Lunatics and insane persons, persons who commit the act charged without being conscious thereof, persons who commit the act charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence; and if the jury are satisfied beyond a reasonable doubt, by the evidence in this case, that the defendant, when he killed the deceased, was either a lunatic or an insane person [as 'insanity' is defined in these instructions]," —it was proper to insert, after the words "insane person," the words "as insanity is defined in these instructions." People v. Methever, 132 Cal. 326. Where an instruction is requested that "the jury are instructed that the following persons, among others, are not capable of committing crime under the laws of the state of California: Lunatics and insane persons, persons, who commit the act charged without being conscious thereof, persons who commit the act charged through misfortune or by accident, where it

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[194] Campbell v. Fuller, 25 Kan. 723; Tracey v. State, 46 Neb. 361; Daley v. Bernstein, 6 N. M. 380; Denver & R. G. Ry. Co. v. Harris, 3 N. M. (Gild.) 114, 3 N. M. (Johns.) 109.

[195] Union Ry. & Transit Co. v. Kallaher, 114 Ill. 325; Gerhauser v. North British & Mercantile Ins. Co., 7 Nev. 174. "The court modified an instruction by erasing the words, 'and the jury must find for the defendant,' with one stroke of the pen, leaving them legible to the jury. It was held that it was the privilege of the appellant to ask leave to rewrite the instruction, or obliterate the rejected words, and, not having done so, she is not in a position to complain of the action of the court, the instruction being otherwise correct." Allison v. Hagan, 12 Nev. 38. See, also, Gerhauser v. North British & Mercantile Ins. Co., 7 Nev. 174.

[196] Manrose v. Parker, 90 Ill. 581.

appears that there was no evil design, intention, or culpable negligence; and if the jury are satisfied beyond a reasonable doubt, by the evidence in this case, that the defendant, when he killed the deceased, was either a lunatic or an insane person,"—the elimination of the words, "beyond a reasonable doubt," is clearly proper, as the law does not demand that measure of proof in order that insanity may be established. People v. Methever, 132 Cal. 326. A requested instruction in a criminal case, that every witness, including defendant, is presumed to speak the truth, and the jury are bound to remember such presumption, is properly modified by adding that such presumption is disputable, and the jury are the sole judges of credibility and of the weight of the evidence, and that they may consider the interest, conduct, and demeanor of a witness. People v. Dolan, 96 Cal. 315. Striking out from a requested charge on credibility of witnesses the words, "from the appearance of the witnesses on the stand," is harmless error, the charge, as left, stating that the jury "have the right to determine * * * from their manner of testifying, their apparent candor and fairness, their apparent intelligence or lack of intelligence, and all the other surrounding circumstances appearing on the trial, which witnesses are the more worthy of credit," etc. City of La Salle v. Kostka, 190 Ill. 130, affirming 92 Ill. App. 91. "On the trial of one for robbery, the court was asked on the part of the defendant to instruct the jury that 'concealment of the robbery does not amount to participation in it,' which the court modified by adding, 'but it is a circumstance to be weighed with all others in determining the question of participation.' Held, that there was no error in the modification." Needham v. People, 98 Ill. 275. "An instruction which attempts to tell the jury that a plaintiff cannot recover for a present bodily condition not resulting from an injury received on a defective sidewalk may properly be modified so as not to deprive the jury of the right to give damages for other injuries not connected with such present condition." Village of Cullom v. Justice, 161 Ill. 372. Where, in an action for personal injuries, an instruction was asked that the failure of plaintiff to perform certain acts would constitute a bar to recovery, thereby telling the jury that such omission would constitute negligence, it was proper to substitute an instruction, "the law required of the plaintiff that she should exercise ordinary care for her safety." City of Chicago v. Moore, 139 Ill. 201. The court read the jury an instruction asked, and then, misliking the last sentence, struck it out, told the jury he would read it again, and did so without said sentence. If was held no error. Wells v. Ipperson, 48 Ill. App. 580.

"Parties have a right to require the court to give an instruction as asked, when it is in conformity with the law, and if, in the opinion of the court, the jury may be misled by such instruction, unless explained, it is the province of the court to give such further instructions as may obviate the danger of misapprehension; but it is error to add to an instruction upon one point of the case words directing the jury as to other branches of the case." Cohen v. Schick, 6 Ill. App. 280. "The court may modify instructions asked, even after indicating, according to the requirement of the statute, what instructions would be given and what refused." City of Logansport v. Dykeman, 116 Ind. 15, 26; Louisville, N. A. & C. Ry. Co. v. Hubbard, 116 Ind. 193. "It would be a travesty upon the administration of justice if a court was compelled to give an erroneous instruction, simply because it had acted incautiously in indicating what instructions would be given." City of Logansport v. Dykeman, supra. The following instruction was properly modified by the insertion of the words inclosed in brackets: "From the want of probable cause in the prosecution, the jury are not bound to [but they may] imply malice; and if they are not satisfied that the prosecution was instituted or carried on through malice [express or implied], they will find for the defendant." Paukett v. Livermore, 5 Iowa, 280. "Where the defendant demands a special verdict, and then asks the court to give an instruction to the jury which can apply only to a general verdict, the court may, without committing any error, so change the instruction as to make it apply to a special verdict. Indeed, the court might in such a case refuse the instruction entirely." St. Joseph & D. C. R. Co. v. Chase, 11 Kan. 47. A party requested a charge that the measure of damages was the cash value of the property in question. The court struck out the word "cash." It was held not error where the record did not show that any two standards of value were placed before the jury. Weimer v. Bunbury, 30 Mich. 201. In a civil action, a request to charge that the jury is "not authorized to find, except upon clear and convincing proof," etc., is properly changed by the court so as to read, "except upon a fair preponderance of proof." Evans v. Montgomery, 95 Mich. 497. "A plaintiff asked a certain instruction, authorizing a verdict for him in a certain state of facts. The court modified it by adding, 'unless the jury believe from the evidence the facts stated in the instructions for the defendant.' The instructions referred to were correct. Held, that the sole effect of this modification was to call the attention of the jury, perhaps unnecessarily, to the defendant's instructions, but in itself is not sufficient to cause a reversal of the case." Moyers

v. Columbus Banking & Ins. Co., 64 Miss. 48. An instruction that the jury should receive the testimony of an accomplice with great caution, and might disbelieve it altogether, is properly qualified by adding, "if they have a reasonable doubt of its truth." Brown v. State, 72 Miss. 990. The court may refuse to give a charge that, in an action of slander, the plea of justification is no evidence that the words were spoken, though the general issue be also pleaded, and may charge in lieu thereof that such plea is evidence of malice, and may be considered by the jury by way of aggravation of damages. Doss v. Jones, 5 How. (Miss.) 158. On an issue whether defendants, as insurance brokers, had agreed to keep plaintiff's property insured, a requested instruction that, "if defendants were the agents of plaintiff for the purpose of keeping plaintiff insured," certain consequences followed, was properly modified to read, "if defendant agreed with plaintiff to keep the plaintiff insured," since the instruction as requested left the jury to determine a question of law. Kaw Brick Co. v. Hogsett, 82 Mo. App. 546. Where the judge refused to charge that mere possession of stolen property was not prima facie evidence of commission of the burglary by prisoner, but, on exception taken, at once added, "Possession of the property immediately after commission of the offense is prima facie evidence of guilt," it was held that the ruling on the request to charge was qualified by the substituted instruction. Knickerbocker v. People, 57 Barb. (N. Y.) 365. "The defendant asked a special instruction, beginning: 'If the jury believe the testimony of S. W.,' etc. The judge gave the instruction thus: 'If the jury believe from the testimony of S. W.,' etc. Held, that it was proper to insert the word 'from,' because it is the province of the jury to interpret and determine what is proved by a witness." State v. Horton, 100 N. C. 443. A charge as follows is erroneous: "The defendants ask that we give you in charge the following, which we give you as correct general propositions of law, except so far as modified by the general charge of the court." The part which is not correct should have been stricken out or rectified. Avery v. House, 2 Ohio Cir. Ct. Rep. 246. The court may append explanation in writing to instruction requested. Knapp v. King, 6 Or. 243. The court is not bound to address instructions to each one of the jury, and a request to charge that "each and every one of the jury" must be satisfied of defendant's guilt beyond a reasonable doubt was properly modified by striking out the qualifying words. State v. Robinson, 12 Wash. 491.

CHAPTER XIV.

NUMBERING AND SIGNING INSTRUCTIONS.

§ 159. Numbering Instructions.
160. Signing by Party or Counsel.
161. Signing by Court.

§ 159. Numbering instructions.

In a few states, statutes exist requiring requests for instructions, and instructions given by the court, to be numbered. The object of the requirement is to promote the convenience of the court and parties in saving exceptions to the instructions given or refused.[1] A failure to number requests as required is sufficient ground for refusing them, though otherwise they are correct;[2] but a failure to number the instructions given may be harmless error, and therefore not ground for reversal,[3] and the error is waived by a failure to make and save a timely objection and exception.[4] As reiteration is a fault to be avoided, it is highly proper that modifications of numbered instructions should be given by instructions of a different number.[5]

§ 160. Signing by party or counsel.

In a few states, requests for instructions must be signed by party or counsel, and, as has been seen, a noncompliance

1 Moffatt v. Tenney, 17 Colo. 189; Kansas Pac. Ry. Co. v. Ward, 4 Colo. 36.

2 Coryell v. Stone, 62 Ind. 308.

3 Miller v. Preston, 4 N. M. (Johns.) 314, 4 N. M. (Gild.) 396.

4 See post, c. 32, "Appellate Review of Instructions."

5 Columbia & P. S. R. Co. v. Hawthorn (Wash.) 19 Pac. 25.

with this requirement is ground for refusing to give the instructions requested.[6] On the other hand, unless an exception is saved, error cannot be assigned to the giving of an instruction not signed by counsel.[7] And it has been held not reversible error to give a requested charge, though unsigned by counsel, where the judge officially signs it, and marks it "Given."[8] Under such a statute, it is not error to permit the instructions to go to the jury signed by counsel.[9]

§ 161. Signing by court.

Unless required by statute, the signature of the trial judge to the instructions is not necessary.[10] Under a statute requiring the judge to charge the jury in writing, and that the charge shall be filed among the papers in the case, but not in terms requiring the judge to sign the instructions, or to give the paper containing the instructions to the jury, the failure of the judge to sign the instruction is not error where no one has requested that such paper be given the jury.[11] In a few states, statutes exist requiring the judge to sign the instructions given, and a noncompliance with the statute has been held to be reversible error, regardless of whether the party appealing was harmed thereby or not.[12] In other states, the judgment will not be reversed for this cause alone, unless it may have resulted in prejudice to the appellant,[13]

[6] See ante, § 141, "Signing by Party or Counsel."

[7] Little v. State, 58 Ala. 265.

[8] Galveston, H. & S. A. Ry. Co. v. Neel (Tex. Civ. App.) 26 S. W. 788.

[9] Schmidt v. First Nat. Bank of Denver, 10 Colo. App. 261.

[10] Hunter v. Parsons, 22 Mich. 96.

[11] State v. Davis, 48 Kan. 1.

[12] Tyree v. Parham's Ex'r, 66 Ala. 424; Fridenberg v. Robinson, 14 Fla. 130; Baker v. State, 17 Fla. 410.

[13] State v. Stanley, 48 Iowa, 221; State v. McCombs, 13 Iowa, 426;

except in Texas, where, in cases of felony, a stricter rule is applied, and a failure to sign the instructions is reversible error, regardless of actual prejudice.[14] It has been held a sufficient signing of an instruction to write at the foot of it, "Refused, as it charges on the evidence. E. K. Foster, Judge of the 7th Judicial Circuit. To which ruling of the court the defendant then and there excepted. E. K. Foster, Judge 7th Judicial Circuit. [L. S.]"[15] The failure of the judge to sign a charge is not reversible if the charge is filed at the time of the trial, and thereby made a record in the case, so that its identity is placed beyond doubt.[16]

Parker v. Chancellor, 78 Tex. 524; Dillingham v. Bryant (Tex. App.) 14 S. W. 1017.

[14] Smith v. State, 1 Tex. App. 416; Longino v. Ward, 1 White & W. Civ. Cas. Ct. App. § 522; Hubbard v. State, 2 Tex. App. 506.

[15] Carter v. State, 22 Fla. 553.

[16] Parker v. Chancellor, 78 Tex. 523.

CHAPTER XV.

PRESENTATION OF INSTRUCTIONS TO JURY.

§ 162. Matters Elsewhere Considered.
163. Time of Delivering Instructions.
164. Reading from Statutes.
165. Reading from Text Books.
166. Reading from Reported Decisions.
167. Diminishing or Weakening Effect of Instructions by Words or Actions.
168. Giving Undue Importance to Instructions by Words or Actions.
169. Unduly Emphasizing Proposition of Law by Repetition.
170. Manner and Emphasis of Judge in Giving Instructions.
171. Stating Reasons for Giving or Refusing Instructions.

§ 162. Matters elsewhere considered.

Several matters which might very properly have been considered in this connection have been elsewhere treated in this work. Thus, the necessity of instructing in writing has been considered in a chapter by itself.[1] The necessity of marking instructions "Given" or "Refused," and the disposition of requests for instructions generally, have been considered in the chapter on "Requests for Instructions."[2] The necessity of signing and numbering instructions has also been made the subject of a special chapter.[3] There remain a few other considerations which may be conveniently treated here.

[1] See ante, c. 10.
[2] See ante, c. 11.
[3] See ante, c. 12.

§ 163. Time of delivering instructions.

In some states the court is required to instruct the jury before the beginning of the argument;[4] but notwithstanding such a statute, the court may, in its discretion, after the argument, "correct or qualify any statement of counsel that is liable to mislead the jury."[5] But additional instructions after the argument should not go beyond what is fairly called for by the nature of the argument, or by some other good reason.[6] In other states the statute requires the instructions to be given after the arguments of counsel are concluded.[7] "The court does not err in reading to the jury and passing on the points of defendant, before giving the general charge to the jury."[8] Where a charge in writing is requested, the judge is not bound to give it at once, but may adjourn over to another day to prepare it.[9] Instructions given by the presiding judge in a criminal case, in the presence of the

[4] Kellogg v. Lewis, 28 Kan. 535; Mills' Ann. Code Colo. c. 14, § 187; 1 Horner's St. Ind. 1896, § 377. In Ohio, under Rev. St. § 7300, subd. 5, the court is not required, in a criminal case, to give defendant's requests before the argument begins. Umbenhauer v. State, 4 Ohio Cir. Ct. R. 378, disapproving McGuire v. State, 3 Ohio Cir. Ct. R. 551.

[5] Kellogg v. Lewis, 28 Kan. 535. In Indiana, the statute expressly provides that the court may give additional instructions at the close of the argument. 1 Horner's St. Ind. 1896, § 377. It is not error for the trial court to give additional instructions, or to modify those already given, after the beginning of the argument. Wood v. State, 64 Miss. 761. The giving of an instruction after the close of the argument before the jury, although irregular, is not sufficient ground for reversal where the giving of the instruction could work no harm. Cluskey v. City of St. Louis, 50 Mo. 89.

[6] Foster v. Turner, 31 Kan. 58.

[7] Cleveland & E. Electric R. Co. v. Hawkins, 64 Ohio St. 391, holding that Rev. St. Ohio, § 5190, does not leave it discretionary with the court to give instructions after the evidence is closed.

[8] Walton v. Hinnan, 146 Pa. 396.

[9] Head v. Bridges, 67 Ga. 227.

other judges, immediately after the proclamation of adjournment, but intended as the act of the court, are to be regarded as the act of the court.[10]

§ 164. Reading from statutes.

In giving instructions to the jury, the trial judge may read or copy into its charge, as a part thereof, sections of the statutes which apply to the facts of the case.[11] Even where a part of the statute read is not relevant, the judgment will not for that reason be reversed, unless it appears that some substantial right of the party complaining has been affected.[12] This principle is well illustrated in the following case: On a prosecution "for robbery, an instruction was given, in the language of the statute, defining the offense, and prescribing the punishment. It further gave the jury, in the language of the statute, the more severe punishment if the defendant was armed with a dangerous weapon, with intent, if resisted, to kill or maim, or, being so armed, should wound or strike the person robbed, or if he had any confederate present, so armed, to aid or abet him. There was evidence that one of the parties robbing struck the person robbed with a pistol. The jury found the defendant guilty, and fixed his punishment at the lowest term they could, without regard to the use of any dangerous weapon." The objection was made that the instruction was not applicable to the facts, but the court held that there was no error prejudicial to the defendant.[13] It has been said that an instruction is not neces-

[10] State v. Engle, 13 Ohio, 490.

[11] Simons v. State (Tex. Cr. App.) 34 S. W. 619; People v. Henderson, 28 Cal. 465; People v. Galvin, 9 Cal. 115; Johnson v. Schultz, 74 Mich. 75; Miller v. Com. (Va.) 21 S. E. 499; Com. v. Harris, 168 Pa. 619; Territory v. Mahaffey, 3 Mont. 116.

[12] People v. Burns, 63 Cal. 614.

[13] Needham v. People, 98 Ill. 275.

sarily correct because it uses the words of a statute, if the use of those words, without explanation, has a tendency to mislead;[14] but if a construction of the language used is desired, a request therefor must be made.[15]

§ 165. Reading from text books.

The court may also read to the jury an extract from a text book as a part of its charge; but while this is not an improper method of expounding the law of the case,[16] it is not error to refuse to embody the language of a text writer in a charge to the jury, as the court is vested with the discretion of using language of its own choosing.[17] This is especially true where the requested instruction merely contains philosophical remarks copied from text books, and it makes no difference how wise or true they may be in the abstract, or how high the reputation of the author.[18]

§ 166. Reading from reported decisions.

It is also proper for the court to read or embody in its written charge extracts from reported decisions which correctly express the law applicable to the facts of the case at bar.[19] It is proper to read that part of the opinion ren-

[14] State v. Laurie, 1 Mo. App. 371.

[15] Town of Fox v. Town of Kendall, 97 Ill. 72.

[16] People v. Niles, 44 Mich. 606; Bronnenburg v. Charman, 80 Ind. 475.

[17] People v. Wayman, 128 N. Y. 585. See, generally, ante, § 152 et seq.

[18] Walker v. Johnson, 96 U. S. 424.

[19] Estate of Spencer, 96 Cal. 448; Anderson v. McAleenan, 15 Daly (N. Y.) 444; People v. Minnaugh, 131 N. Y. 563; Panama R. Co. v. Johnson, 63 Hun (N. Y.) 629; Cordell v. New York Cent. & H. R. R. Co., 6 Hun (N. Y.) 461; Power v. Harlow, 57 Mich. 107; Kirby v. Wilson, 98 Ill. 240; Johnson v. Baltimore & P. R. Co., 6 Mackey (D. C.) 232; Henry v. Klopfer, 147 Pa. 178; Hood v. Hood, 25 Pa. 417. Compare People v. McNabb, 79 Cal. 419, where the

dered on a previous appeal laying down the law applicable to the case, care being taken not to state the result of the former trial.[20] Of course the evidence given in the pending cause must be substantially the same as that given on the former trial to make it proper to quote the opinion of the reviewing court as the law of the case.[21] And it will be error to read only a part of the opinion as the law of the case, when, if the context is considered, it will be found that a very different rule of law was laid down by the reviewing court. The quotation from the opinion of such court must be sufficiently full to show its exact thought, and to avoid all possibility of misleading the jury.[22] So it frequently happens that "the language of an opinion rendered in the decision of a case is to be taken concretely with its context, * * * and a portion of its language cannot properly be made the foundation of an abstract instruction, to be applied to a different case, to which it is not applicable."[23] The court may, of course, add such further instructions or explanations as are necessary to apply the opinions read to the case at bar.[24] It is error to read a decision, and then state that the case at bar is a similar case, as this amounts to the expression of an opinion on the evidence.[25]

practice of reading opinions in other cases to the jury as a part of the charge of the court in a criminal case was advised against as a dangerous practice. It is not error to read a case from the Reports as an illustration. State v. Chiles, 58 S. C. 47.

[20] Power v. Harlow, 57 Mich. 107; Panama R. Co. v. Johnson, 63 Hun (N. Y.) 629.

[21] Power v. Harlow, 57 Mich. 107.

[22] Laidlaw v. Sage, 80 Hun (N. Y.) 550. See, also, Cordell v. New York Cent. & H. R. R. Co., 6 Hun (N. Y.) 461.

[23] Etchepare v. Aguirre, 91 Cal. 288.

[24] Freeman v. Weeks, 48 Mich. 255.

[25] Frank v. Williams, 36 Fla. 136.

§ 167. Diminishing or weakening effect of instructions by words or actions.

In giving requested instructions to the jury, the court should not, by word or action, do anything which will have a tendency to cause the jury not to give such instructions the consideration and credit to which they properly are entitled.[26] Thus, where the court gave a requested instruction, and accompanied it with the following remark, "Yes, if the defendant's papers are all right, and the plaintiff's all wrong, then this is so, and I so charge the jury," it was held prejudicial error.[27] And in submitting special questions by request it was held error to state: "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."[28] It is also improper for the court to criticise the justice of the law as laid down in the instructions.[29] It is said to be better practice, in giving requested instructions, not to state at whose request they were given, but to give all proper instructions as emanating from the court itself.[30] So it has been said to be better not to state at whose request instructions were reduced to writing.[31] Nevertheless, these errors, if such they may be termed, will not be sufficient ground for reversal if no injury is shown.[32] Where the court lays down the law appli-

[26] Stebbins v. Keene Tp., 55 Mich. 552; Watson v. Union Iron & Steel Co., 15 Ill. App. 509; Horton v. Williams, 21 Minn. 187; Head v. Bridges, 67 Ga. 227; Sieling v. Clark, 18 Misc. Rep. (N. Y.) 464.

[27] Horton v. Williams, 21 Minn. 187.

[28] Cone v. Citizens' Bank, 4 Kan. App. 470.

[29] Stebbins v. Keene Tp., 55 Mich. 552.

[30] Stevenson v. Chicago & N. W. Ry. Co., 94 Iowa, 719. See, also, State v. Pitts, 11 Iowa, 343.

[31] Head v. Bridges, 67 Ga. 235; Wilson v. White, 71 Ga. 507.

[32] Wilson v. White, 71 Ga. 507; Stevenson v. Chicago & N. W. Ry. Co., 94 Iowa, 719.

cable to a set of facts, and then states that the rule of law is given with some hesitation because of the doubt the court has as to the effect of an additional fact not enumerated in the hypothesis, but again reiterates the rule of law, there is no error.[33] In one case it was held not improper for the judge to inform the jury that he charged them on the prisoner's statement because the law compelled him to do so.[34] It has likewise been held that, when requested instructions are already covered by the general charge, "the court may properly say to the jury that such requests are the law, but no more so than when given in the general charge," and that error cannot be predicated of this remark, "especially when the same remark was made in respect to like requests made by the defendant."[35]

§ 168. Giving undue importance to instructions by words or actions.

Remarks or actions tending to cause the jury to attach undue importance to any particular instruction are improper. Thus, the practice of underscoring words in the instructions submitted to the jury is very generally condemned on the ground that it has a tendency to give undue weight and force to the words and sentences underscored, and thereby to prevent the jury from giving the other portions of the charge the weight and consideration they are entitled to.[36] It has been held, however, that an instruction in which the words underscored are usually italicised in legal treatises and judicial opinions does not fall within this rule.[37] Instructions con-

[33] Evans v. Foss, 49 N. H. 490.

[34] McCord v. State, 83 Ga. 521.

[35] Roberts v. Neal, 62 Ga. 163.

[36] State v. Cater, 100 Iowa, 501; Wright v. Brosseau, 73 Ill. 381; Heyer v. Salsbury, 7 Ill. App. 93; McCormick Harvesting Mach. Co. v. Sendzikowski, 72 Ill. App. 402.

[37] Philpot v. Lucas, 101 Iowa, 478. In this case it appears that the words "prima facie" were underscored in an instruction.

taining words which are underscored may properly be refused;[38] but the giving of such an instruction is not a ground for reversal, unless prejudicial to the party complaining.[39] There is some conflict of authority as to the propriety of making marginal citations of reports or text books, on instructions taken out by the jury. One court sees nothing improper in this practice,[40] but others have disapproved it. They hold, however, that, in the absence of special circumstances, the error is without prejudice, and that a judgment should not be reversed for such a reason unless prejudice be made to appear affirmatively.[41] A prosecuting attorney has a right to request instructions. Instructions given on such request are to be given the same consideration as instructions given by the court on its own motion;[42] but an instruction that it is the duty of the jury to carefully consider the written charges given on request, and that they should apply the law as laid down in the written charge, as well as that in the oral charge, is properly refused, as tending to exaggerate the importance of the written charge. It was within the discretion of the court, however, to have given the instruction.[43]

§ 169. Unduly emphasizing proposition of law by repetition.

The mere repetition of a correct proposition of law several times in the instructions is not error, for the jury cannot be

[38] McCormick Harvesting Mach. Co. v. Sendzikowski, 72 Ill. App. 402. The instructions condemned in this case were printed,—some of the words being in large type, and the others in type half as large.

[39] Wright v. Brosseau, 73 Ill. 381.

[40] Wright v. Brosseau, 73 Ill. 381.

[41] Herzog v. Campbell, 47 Neb. 370; Sioux City & P. R. Co. v. Finlayson, 16 Neb. 578; Williams v. St. Louis & S. F. Ry. Co., 123 Mo. 573.

[42] Dixon v. State, 46 Neb. 298.

[43] Martin v. State, 104 Ala. 71.

too strongly impressed with the correct rule of law applicable to the case.[44] In one case where the trial court repeated seven times to the jury the proposition that evidence to "impeach a written instrument on the ground of fraud, accident, or mistake must be clear, precise, and indubitable," the reviewing court said that, as it was good law, "seventy times seven would not have been too often."[45] Other decisions are not wholly in accord with the ones just cited. In one there is a *dictum* to the effect that "it is undoubtedly improper for a court to place, by frequent repetitions, too prominently before a jury any principle of law involved in the case."[46] In another it was said: "Especially is it important that this rule be observed in criminal cases, in order to guard against creating an impression upon the minds of the jury as to what may be the opinion of the court with regard to the facts to which the principle applies." Whether the court would have reversed for this error cannot be determined, as there were other errors in the record sufficient to reverse.[47]

§ 170. Manner and emphasis of judge in giving instructions.

The weight of authority, it is believed, is to the effect that no objection to the manner or tone of voice of the trial judge in delivering his charge can be sustained on appeal.[48]

[44] Coffman v. Reeves, 62 Ind. 334; Murray v. New York, L. & W. R. Co., 103 Pa. 37; Gran v. Houston, 45 Neb. 813. See, also, ante, § 108.

[45] Murray v. New York, L. & W. R. Co., 103 Pa. 37.

[46] Traylor v. Townsend, 61 Tex. 147.

[47] Irvine v. State, 20 Tex. App. 12.

[48] Anderson v. Tribble, 66 Ga. 588; Rountree v. Gurr, 68 Ga. 292; Page v. Town of Sumpter, 53 Wis. 656; Horton v. Chevington & B. Coal Co., 2 Penny. (Pa.) 49; Gibbs v. Johnson, 63 Mich. 671; Merchants' Bank of Canada v. Ortmann, 48 Mich. 419. See, also, Maloney v. Roberts, 32 Tex. 136; Beal v. Lowell & D. St. Ry. Co., 157 Mass. 444; Bishop v. Journal Newspaper Co., 168 Mass. 327.

Courts are "powerless to afford relief for grievances of that kind, by the ordinary method of assignments of error,"[49] there being no way by which the manner or tone can be preserved and presented to the court on appeal for review.[50] In one case it was said: "We cannot concern ourselves with the manner of the court in instructing the jury, only so far as we can measure it by the language employed. He may have peculiar methods of emphasis, which may, before a jury, have a prejudicial effect; but this we cannot reach."[51] Where the court charged that counsel had admitted "as from the evidence they were forced to admit," and it was contended that the observation was made in a manner to throw discredit upon the whole defense, the reviewing court said that they could not perceive from the record that any injury had been done, implying that, if the reviewing court could see that harm had been done, the judgment would have been reversed. This decision, perhaps, is not at variance with the other authorities cited.[52] In another case it was said that the judge should not intimate, by the earnestness of his charge, his own opinion as to the facts.[53] So it has been said that if the manner and emphasis with which a charge is delivered to the jury can be assigned as error at all, it must first be made the ground of a motion for a new trial, supported by affidavits.[54]

§ 171. Stating reasons for giving or refusing instructions.

It is immaterial whether the reasons advanced by the court for giving or refusing instructions were correct or not, where

[49] Horton v. Chevington & B. Coal Co., 2 Penny. (Pa.) 1, 50.

[50] Rountree v. Gurr, 68 Ga. 292; Gibbs v. Johnson, 63 Mich. 671.

[51] Gibbs v. Johnson, 63 Mich. 674.

[52] Ernull v. Whitford, 48 N. C. 474.

[53] State v. Howell, 28 S. C. 250. See, also, Wheeler v. Wallace, 53 Mich. 357.

[54] Murphy v. Whitlow, 1 Ariz. 340.

the action of the court was correct in giving or refusing the instructions in question,[55] unless the statement of an erroneous reason for the court's action may have misled the jury, or affected the verdict to the prejudice of the party complaining.[56]

[55] Dale v. Arnold, 2 Bibb (Ky.) 606; Marion v. State, 20 Neb. 233; Rupp v. Orr, 31 Pa. 517; Easley v. Craddock, 4 Rand. (Va.) 423; Posey v. Patton, 109 N. C. 455; Budd v. Brooke. 3 Gill (Md.) 198; Blodgett v. Berlin Mills Co., 52 N. H. 215.

[56] Carpenter v. Pierce, 13 N. H. 403.

CHAPTER XVI.

ADDITIONAL INSTRUCTIONS AFTER RETIREMENT OF JURY.

I. Right and Duty to Give Additional Instructions.

§ 172. General Rule.
173. At Request of Jury.
174. At Request of Parties.
175. By Consent of Counsel.
176. What Further Instructions Proper.
177. Same—Necessity of Repeating Entire Charge.
178. Exceptions to Additional Instructions.

II. Delivery in Open Court.

§ 179. General Rule.
180. Violation of Rule as Ground for Reversal.
181. Waiver of Objections.

III. Presence of Counsel.

§ 182. Rule that Presence of or Notice to Counsel is Unnecessary.
183. Rule that Presence of Counsel or Notice is Necessary.
184. Same—Violation of Rule as Ground for Reversal.

IV. Presence of Accused in Criminal Cases.

§ 185. Statement of Rule.

I. Right and Duty to Give Additional Instructions.

§ 172. General rule.

In Mississippi, the trial judge is prohibited by statute from giving the jury any instructions, unless a request therefor is made by the parties,[1] and this prohibition makes it er-

[1] Lavenburg v. Harper, 27 Miss. 299. See, also, ante, § 126.

roneous for the court, of its own motion, or at the request of the jury, to give the jury further instructions after they have retired to consider their verdict.[2] Except in this state, it is a rule of almost universal application that the trial court may, of its own motion, recall the jury after they have retired to deliberate on their verdict, to give them further instructions,[3] especially after they have considered a case submitted to them for some length of time,[4] or where they report that they are unable to agree on a verdict.[5] On learning of a jury's disagreement, "it is competent for the court, of its own motion, to give them any additional instruction, proper in itself, which may be necessary to meet the difficulty in their minds."[6] No request on the part of the jury for fur-

[2] Duncan v. State, 49 Miss. 331; Taylor v. Manley, 6 Smedes & M. (Miss.) 305; Randolph v. Govan, 14 Smedes & M. (Miss.) 9, holding that a violation of the statute is a mere irregularity, and not ground for reversal where the instruction given is correct.

[3] Morris v. State, 25 Ala. 57; National Lumber Co. v. Snell, 47 Ark. 407; McDaniel v. Crosby, 19 Ark. 533; People v. Perry, 65 Cal. 568; People v. Mayes, 113 Cal. 618; Hayes v. Williams, 17 Colo. 465; People v. Odell, 1 Dak. 197; White v. Fulton, 68 Ga. 511; Wood v. Isom, 68 Ga. 417; Pritchett v. State, 92 Ga. 65; Shaw v. Camp, 160 Ill. 425; City of Joliet v. Looney, 159 Ill. 471, affirming 56 Ill. App. 502; Breedlove v. Bundy, 96 Ind. 319; Hartman v. Flaherty, 80 Ind. 472; Hall v. State, 8 Ind. 439; Nichols v. Munsel, 115 Mass. 567; Florence Sewing Mach. Co. v. Grover & Baker Sewing Mach. Co., 110 Mass. 70; Scott v. Haynes, 12 Mo. App. 597; McClary v. Stull, 44 Neb. 191; Phillips v. New York Cent. & Hudson River R. Co., 127 N. Y. 657; Cox v. Highley, 100 Pa. 252; State v. Lightsey, 43 S. C. 114; Jones v. Swearingen, 42 S. C. 58; Benavides v. State, 31 Tex. Cr. App. 173.

[4] Allis v. United States, 155 U. S. 117; State v. Rollins, 77 Me. 380.

[5] McDaniel v. Crosby, 19 Ark. 533; Hogg v. State, 7 Ind. 551; State v. Pitts, 11 Iowa, 343; State v. Chandler, 31 Kan. 201; Com. v. Snelling, 15 Pick. (Mass.) 334; Edmunds v. Wiggin, 24 Me. 505; Dowzelot v. Rawlings, 58 Mo. 75; Salomon v. Reis, 5 Ohio Cir. Ct. R. 375; Alexander v. Gardiner, 14 R. I. 15; Turner v. Lambeth, 2 Tex. 365; Hannon v. State, 70 Wis. 448.

[6] State v. Chandler, 31 Kan. 201.

ther instructions is necessary in any case.[7] It is within the discretion of the judge to have the jury brought in at any time to give them additional instructions, or to restate the evidence and principles of law applicable to the case, and the jury cannot forestall the action of the court by saying that they do not desire additional instructions.[8] The trial court has a large discretion in recalling juries and submitting amended or additional legal propositions by way of instructions, and, unless it fairly appears that such discretion has been abused to prejudice of the party complaining, there is no ground for reversal.[9] The discretion with which the court is thus vested is based on the soundest reasons. In the hurry of the trial, the court may have overlooked some instruction vitally important to a correct determination of the case.[10] It may also be that the instructions which it has given are vague and obscure, and have a tendency to mislead, which may be removed by a little explanation.[11] So, the court may have given some instructions which are, in point of law, erroneous.[12] It can hardly be contended that it would be preferable to leave the court no discretion in the matter of giving further instructions in any of these contingencies, and to run the risk of an erroneous verdict and the expense of a new trial.[13] In a number of states this matter of further instructing the jury after their retirement has been made the subject of statutory regu-

[7] See cases cited in the two preceding notes.

[8] Nichols v. Munsel, 115 Mass. 567.

[9] Hayes v. Williams, 17 Colo. 465.

[10] City of Joliet v. Looney, 159 Ill. 471; Cox v. Highley, 100 Pa. 252.

[11] Florence Sewing Mach. Co. v. Grover & Baker Sewing Mach. Co., 110 Mass. 70; Morris v. State, 25 Ala. 57.

[12] State v. Lightsey, 43 S. C. 114.

[13] In Com. v. Snelling, 15 Pick. (Mass.) 334, the court said that the propriety of recalling the jury and explaining the matter further is hardly open to reasonable doubt.

lations, but it is believed that no court in which one of these statutes has been construed has ever held that the court cannot, of its own motion, give further instructions when the exigencies of the case demand such action. It has been held that, even after the jury have announced their verdict, but before its acceptance, the court may correct any erroneous instruction that has been given, and send them back again to deliberate.[14]

§ 173. At request of jury.

With the exception of one state, where the court can only give instructions on the request of the parties,[15] it is well settled that the court may properly recall the jury if they request it, and give them additional instructions.[16] This is a

[14] Jack v. Territory, 2 Wash. T. 101. See, also, dictum in Florence Sewing Mach. Co. v. Grover & Baker Sewing Mach. Co., 110 Mass. 71. Compare State v. Johnson, 30 La. Ann. 921, where it was held "not within the province of the judge presiding at a criminal trial to give such instructions to the jury" as would lead to a modification or change of the verdict.

[15] Lavenburg v. Harper, 27 Miss. 299. In this case it was held error to recall the jury and give them further instructions at their request, but without the consent of parties. It was further held that, if the instruction given were in conformity to law, the cause would not be reversed. See, also, Taylor v. Manley, 6 Smedes & M. (Miss.) 305; Randolph v. Govan, 14 Smedes & M. (Miss.) 9.

[16] Lee v. Quirk, 20 Ill. 392; Shaw v. Camp, 160 Ill. 425; Arnold v. Phillips, 59 Ill. App. 213; Farley v. State, 57 Ind. 331; Sage v. Evansville & T. H. R. Co., 134 Ind. 100; Gaff v. Greer, 88 Ind. 122; Wilkinson v. St. Louis Sectional Dock Co., 102 Mo. 130; State v. Williams, 69 Mo. 110; Hulse v. State, 35 Ohio St. 421; Wilson v. State, 37 Tex. Cr. App. 156; Turner v. Lambeth, 2 Tex. 365; State v. Kessler, 15 Utah, 142; Williams v. Com., 85 Va. 607; Richlands Iron Co. v. Elkins, 90 Va. 249; Woodruff v. King, 47 Wis. 261; Forrest v. Hanson, 1 Cranch, C. C. 63, Fed. Cas. No. 4,943; Turner v. Foxall, 2 Cranch, C. C. 324, Fed. Cas. No. 14,255; United States v. White, 5 Cranch, C. C. 116, Fed. Cas. No. 16,677. A rule of court that represents for instructions will not be considered "unless presented before the commencement of the final argument" has no

practice not only common, but approved by all authorities.[17] And some decisions go a step further, and hold that it is not only proper, but the duty of the court, to comply with a request from the jury for further instructions.[18] As was said in one case: "There may be instances when it will become the imperative duty of a court to rectify some omission, or cure some oversight, by giving to a jury * * * an additional instruction."[19]

§ 174. At request of parties.

As shown in another section, the court is not bound to give requested instructions unless the request was made within the proper time, but that it is within the sound discretion of the court to do so if it sees fit.[20] The action of the trial court in refusing requests for instructions, made after the retirement of the jury,[21] or after they have announced their inability to agree on a verdict, has accordingly been sustained,[22] it being considered that, when the jury has retired under instructions to which there was no exception, it is with-

application to requests by a juror for further instructions. Arnold v. Phillips, 59 Ill. App. 213.

[17] Woodruff v. King, 47 Wis. 261; Bank of Kentucky v. McWilliams, 2 J. J. Marsh. (Ky.) 263.

[18] O'Shields v. State, 55 Ga. 696; Phelps v. State, 75 Ga. 571; Bank of Kentucky v. McWilliams, 2 J. J. Marsh. (Ky.) 263; King v. State, 86 Ga. 355.

[19] Dowzelot v. Rawlings, 58 Mo. 75.

[20] See ante, § 134, "Necessity for Request in Apt and Proper Time." See, also, Buck v. Buck, 4 Baxt. (Tenn.) 392, where it was held that, after the jury have failed to agree, they may be recalled at the instance of a party, and given further and fuller instructions.

[21] Norton v. McNutt, 55 Ark. 59; State v. Barbee, 92 N. C. 820; Scott v. Green, 89 N. C. 278; State v. Rowe, 98 N. C. 629; Lafoon v. Shearin, 95 N. C. 391; Forrest v. Hanson, 1 Cranch, C. C. 63, Fed. Cas. No. 4,943; Turner v. Foxall, 2 Cranch, C. C. 324, Fed. Cas. No. 14,255; Williams v. Com., 85 Va. 609.

[22] Cady v. Owen, 34 Vt. 598.

in the unreviewable discretion of the court whether they shall be recalled for further instructions.[23] Even if the court should choose to exercise its discretion by recalling the jury for further instructions at the request of the parties, it should not do so without good grounds. The indiscriminate exercise of such discretion might place it in the power of counsel to have emphasized by the court any proposition he might choose to submit, and have the jury believe the court attached great weight to the matter about which it had been recalled for instructions.[24] A somewhat different question is presented when the court has given the jury further instructions of its own motion, or at the request of the jury, and the decisions are not entirely harmonious as to the right of the parties to further instructions. A mere repetition of instructions already given does not give parties the right to ask a new and substantial charge,[25] or for any additional instructions whatever, though it would seem that it is within the court's discretion to comply with a request for additional instructions in such case.[26] So, in one state, when the court gives further instructions of its own motion, or at the request of the jury, no right of the parties to any further instructions is recognized.[27] So, in another state, it was held that, where the court gave additional instructions at the request of the jury, a refusal to give further instructions at the request of the parties was not reversible error.[28] In all other

[23] Lafoon v. Shearin, 95 N. C. 391.

[24] Bowling v. Memphis & C. R. Co., 15 Lea (Tenn.) 122.

[25] Prosser v. Henderson, 11 Ala. 484, where it was said: "If this can be done, we see no reason why the jury should not be required to be brought again into court at any time before they have rendered their verdict, and additional charges required to be given by the court."

[26] Harvey v. Graham, 46 N. H. 175.

[27] Nelson v. Dodge, 116 Mass. 367; Kellogg v. French, 15 Gray (Mass.) 354.

[28] State v. Maxent, 10 La. Ann. 743; Williams v. Com., 85 Va. 607.

jurisdictions where this question has been passed upon it has been either held or said that the parties are entitled to further instructions by way of explanation or modification of additional instructions given by the court of its own motion, or at the request of the jury.[29]

§ 175. By consent of counsel.

It is no error for the judge, by consent of counsel on both sides, to indorse on instructions already given additional instructions to the jury.[30]

§ 176. What further instructions proper.

After the retirement of the jury, the court may, of its own motion, recall them and give instructions inadvertently omitted,[31] or which have been erroneously refused,[32] or instructions explanatory of those already given,[33] or withdrawing or

[29] Shaw v. Camp, 160 Ill. 430; Fisher v. People, 23 Ill. 283; Keeble v. Black, 4 Tex. 69; Harper v. State, 109 Ala. 66; Prosser v. Henderson, 11 Ala. 484; Kuhl v. Long, 102 Ala. 569; Page v. Kinsman, 43 N. H. 328; O'Connor v. Guthrie, 11 Iowa, 80; Chouteau v. Jupiter Iron Works, 94 Mo. 388; Hudson v. Minneapolis, L. & M. Ry. Co., 44 Minn. 55; Cook v. Green, 6 N. J. Law, 109. See, also, Yeldell v. Shinholster, 15 Ga. 189, in which it was held that where, after failure to agree, the jury return into court for further instructions, and a party requests an instruction on a point omitted in the charge, and to which omission the party had called the court's attention at the time, it is error to refuse the instruction. Where, after failure to agree, the jury return into court for further instructions, and a party requests an instruction on a point omitted in the charge, and to which omission the party had called the court's attention at the time, it is error to refuse the instruction.

[30] Noffsinger v. Bailey, 72 Mo. 216.

[31] Pritchett v. State, 92 Ga. 65; Cox v. Highley, 100 Pa. 252; Com. v. Snelling, 15 Pick. (Mass.) 334; Dowzelot v. Rawlings, 58 Mo. 75.

[32] Phillips v. New York Cent. & H. R. R. Co., 127 N. Y. 657.

[33] Florence Sewing Mach. Co. v. Grover & Baker Sewing Mach Co., 110 Mass. 70; Com. v. Snelling, 15 Pick. (Mass.) 334.

modifying an erroneous instruction given;[34] or, where the parties have consented that the jury shall take the minutes of the testimony to the jury room, the court may recall the jury to read to them a portion of a deposition admitted on the trial, but which, through inadvertence, had not been given to the jury,[35] or to restate the court's opinion as to the credibility of a witness (the court having stated such opinion in the original charge, at the instance of counsel);[36] or to define the punishment for the different degrees of crime;[37] or to admonish the jury of the impropriety of a juror going into the jury box with a predetermination as to the result which he will favor, and to cause a disagreement if the verdict cannot be rendered as he wants it.[38] So, the original instructions may be re-read to the jury when they say that they do not understand them,[39] or request that the instructions be re-read in order to satisfy them as to the true state of the law upon the issue before them;[40] and when a request is made that the instructions be re-read, the court may correct an erroneous instruction given,[41] or give additional instructions.[42] So, where the jury request further instructions, the court may withdraw instructions already given.[43] In

[34] State v. Lightsey, 43 S. C. 114; Jack v. Territory, 2 Wash. T. 101; Scott v. Haynes, 12 Mo. App. 597; Hartman v. Flaherty, 80 Ind. 472; Hall v. State, 8 Ind. 439; Sage v. Evansville & T. H. R. Co., 134 Ind. 100.

[35] Colt v. Waples, 1 Minn. 134 (Gil. 110).

[36] State v. Summers, 4 La. Ann. 27.

[37] State v. Kessler, 15 Utah, 142.

[38] State v. Lawrence, 38 Iowa, 51. See, also, State v. Blackwell, 9 Ala. 79.

[39] Gaff v. Greer, 88 Ind. 122; Salomon v. Reis, 5 Ohio Cir. Ct. R. 375. See, also, Nichols v. Munsel, 115 Mass. 567.

[40] Woodruff v. King, 47 Wis. 261.

[41] McClelland v. Louisville, N. A. & C. Ry. Co., 94 Ind. 276; Sage v. Evansville & T. H. R. Co., 134 Ind. 100.

[42] Hamilton v. State, 62 Ark. 543.

[43] Sage v. Evansville & T. H. R. Co., 134 Ind. 100.

some jurisdictions the court may restate the evidence, or a portion of it.[44] This, however, is not proper in most jurisdictions, as judges are expressly prohibited from charging in respect to matters of fact.[45] The court may, at their request, give the jury any further instruction on any question of law arising on the facts proven, on which they say that they are in doubt.[46] Nevertheless, the court is not justified, in any case, in giving another full, complete, and different charge to the jury upon nearly all, or even some, of the material questions involved in the case.[47] The Texas statute provides that, where the jury, after retirement, asks further instructions, no charge shall be given except upon the particular point on which it is asked,[48] and this statute has been strictly enforced in a number of cases.[49] The wisdom of such a statute is questionable, and the general rule is that, "in answering questions asked by the jury when they come in for further instructions, the court is not restricted to categorical answers," but may and should give any further instructions necessary.[50] As already shown, the discretion of the court in recalling the jury for further instructions is practically unlimited, and, this being so, there can be no reason

[44] Hulse v. State, 35 Ohio St. 421; Nichols v. Munsel, 115 Mass. 567; Allis v. United States, 155 U. S. 117; Byrne v. Smith, 24 Wis. 68; Hannon v. State, 70 Wis. 448; Drew v. Andrews, 8 Hun (N. Y.) 23; Edmunds v. Wiggin, 24 Me. 505.

[45] See State v. Maxwell, 42 Iowa, 208. See, also, ante, § 38 et seq.

[46] O'Shields v. State, 55 Ga. 696; Wilkinson v. St. Louis Sectional Dock Co., 102 Mo. 130; State v. Chandler, 31 Kan. 201.

[47] Foster v. Turner, 31 Kan. 65.

[48] Pasch. Dig. art. 3079.

[49] Chamberlain v. State, 2 Tex. App. 451; Garza v. State, 3 Tex. App. 287; Hannahan v. State, 7 Tex. App. 610; Wharton v. State, 45 Tex. 2.

[50] Paine v. Hutchins, 49 Vt. 314; McClelland v. Louisville, N. A. & C. Ry. Co., 94 Ind. 276; Edmunds v. Wiggin, 24 Me. 509; Hamilton v. State, 62 Ark. 543; Sage v. Evansville & T. H. R. Co., 134 Ind. 100. And see, generally, the cases cited supra, this section.

why it should be restricted to answering the precise point presented by the jury. On principle, there can be no difference in the extent to which it may go in giving further instructions, whether it take the initiative, and gives further instructions of its own motion, or merely at the request of the jury.

§ 177. Same—Necessity of repeating entire charge.

In case the jury asks the court to repeat a portion of the charge, or to give a new instruction on a particular point, it is not, according to some decisions, bound to repeat the whole charge,[51] as this practice might lead to confusion, and tend to protract proceedings needlessly.[52] It has been held, however, in one case, that, if the jury merely disagree as to the result, after considering the evidence and instructions, it is erroneous for the court to repeat or recharge disputed portions of the charge, and the reason assigned was that the jury would probably conclude that the matter thus recharged was controlling in the case.[53] Assuming to follow this decision it was held in another case that it was reversible error to recall the jury, and repeat a portion of the charge, in the absence of a request by the jury, and against the objection of the appellant.[54] A refusal to accede to a request of a party to re-read a portion of the instructions touching a special point is not error where the court offers to re-read the entire charge if the jury desire it, and the foreman states that the jury do not desire such reading.[55] In jurisdictions where it is permissible for the court to state the evidence in char-

[51] Wilson v. State, 68 Ga. 827; O'Shields v. State, 55 Ga. 696; Hatcher v. State, 18 Ga. 460; Gravett v. State, 74 Ga. 196.
[52] Gravett v. State, 74 Ga. 196.
[53] Swaggerty v. Caton, 1 Heisk. (Tenn.) 202.
[54] Granberry v. Frierson, 2 Baxt. (Tenn.) 326.
[55] Cockrill v. Hall, 76 Cal. 192.

ging the jury, the court is not bound to repeat all the evidence when asked by the jury to restate a portion of it.[56] Though it is better practice, on restating the evidence upon a particular point, to restate all of it, yet, under a statute authorizing the court to state anew the evidence or any part of it, the court may merely state the evidence in favor of one party.[57] But where a part only of the evidence is restated, it is well to caution the jury that the other evidence in the case must be equally considered.[58]

§ 178. Exceptions to additional instructions.

When further instructions are given after the retirement of the jury, parties have the same right to except to such instructions as to those originally given,[59] and may also except to a refusal of further instructions asked by them in cases where they are entitled to ask for further instructions.[60]

II. Delivery in Open Court.

§ 179. General rule.

After the jury have retired, the judge should not go to the jury room to communicate with the jury, nor should he send additional instructions by the hands of an officer,—all communications should be made in open court.[61] If they desire

[56] Allis v. United States, 155 U. S. 117; Byrne v. Smith, 24 Wis. 68.

[57] Byrne v. Smith, 24 Wis. 69.

[58] Allis v. United States, 155 U. S. 124.

[59] Kellogg v. French, 15 Gray (Mass.) 357; Com. v. Snelling, 15 Pick. (Mass.) 334; Nelson v. Dodge, 116 Mass. 367; Wade v. Ordway, 1 Baxt. (Tenn.) 229; Cook v. Green, 6 N. J. Law, 109; Kuhl v. Long, 102 Ala. 563; Feibelman v. Manchester Fire Assur. Co., 108 Ala. 180; State v. Frisby, 19 La. Ann. 143; O'Connor v. Guthrie, 11 Iowa, 81; Fish v. Smith, 12 Ind. 563; Crabtree v. Hagenbaugh, 23 Ill. 349.

[60] Prosser v. Henderson, 11 Ala. 484; Feibelman v. Manchester Fire Assur. Co., 108 Ala. 180.

[61] Johnson v. State, 100 Ala. 55; Cooper v. State, 79 Ala. 54; Fisher v. People, 23 Ill. 283; Crabtree v. Hagenbaugh, 23 Ill. 349; Chicago

any further instructions, they should send a request to the court through the officers in attendance, that they may, in a body, be brought into court.[62] The judge has no more right in the jury room while the jury are deliberating than any other person, even though he holds no communication with them,[63] and, if he does so, the honesty of his intentions in no way lessens the impropriety of such action.[64] In one case it was said that the affidavits of jurors cannot be read to impeach their verdict after it has been rendered, so that it may be impossible to show in any given case whether or not an intruder in the jury room did converse with the jury, or what he said, and that, if it were assumed that the judge said nothing, but merely remained in the jury room listening to their discussions, it could not be said that his presence did not affect their decision.[65] So, in another case, the judgment

& A. R. Co. v. Robbins, 159 Ill. 598; Hall v. State, 8 Ind. 444; Fish v. Smith, 12 Ind. 563; Quinn v. State, 130 Ind. 340; Low v. Freeman, 117 Ind. 341; Blacketer v. House, 67 Ind. 414; Goode v. Campbell, 14 Bush (Ky.) 75; Sargent v. Roberts, 1 Pick. (Mass.) 337; Read v. City of Cambridge, 124 Mass. 567; Hopkins v. Bishop, 91 Mich. 328; Fox v. Peninsular White Lead & Color Works, 84 Mich. 676; Snyder v. Wilson, 65 Mich. 336; Hoberg v. State, 3 Minn. 262 (Gil. 181); Chouteau v. Jupiter Iron Works, 94 Mo. 388; Norton v. Dorsey, 65 Mo. 376; State v. Miller, 100 Mo. 606; Watertown Bank & Loan Co. v. Mix, 51 N. Y. 561; Taylor v. Betsford, 13 Johns. (N. Y.) 487; Mahoney v. Decker, 18 Hun (N. Y.) 365; Plunkett v. Appleton, 51 How. Pr. (N. Y.) 469; Kehrley v. Shafer, 92 Hun (N. Y.) 196; Kirk v. State, 14 Ohio, 511; Sommer v. Huber, 183 Pa. 162; State v. Smith, 6 R. I. 33; State v. Patterson, 45 Vt. 316; Campbell v. Beckett, 8 Ohio St. 211; State v. Wroth, 15 Wash. 621; High v. Chick, 81 Hun (N. Y.) 100; Wiggins v. Downer, 67 How. Pr. (N. Y.) 68; Smith v. McMillen, 19 Ind. 391; State v. Alexander, 66 Mo. 148.

[62] Fisher v. People, 23 Ill. 283.

[63] Gibbons v. Van Alstyne, 29 N. Y. St. Rep. 463; Hoberg v. State, 3 Minn. 262 (Gil. 181).

[64] Fish v. Smith, 12 Ind. 563; Hoberg v. State, 3 Minn. 262 (Gil. 181); Valentine v. Kelley, 54 Hun (N. Y.) 79.

[65] Gibbons v. Van Alstyne, 29 N. Y. St. Rep. 461.

was reversed because the judge went to the jury room and stood in the doorway, which was partially open. It was held that the party in whose favor the decision was rendered could not be permitted to show that the judge said nothing to the jury.[66] The rule prohibiting judges from communicating with the jury except in open court is applicable, though the court has temporarily adjourned. "The judge carries no power with him to his lodgings, and has no more authority over the jury than any other person, and any direction to them from him, either verbal or in writing, is improper."[67]

In New Hampshire, the rule that no communications between the court and jury should be had except in open court does not obtain.[68] In South Carolina, a similar decision was made in an early case.[69]

§ 180. Violation of rule as ground for reversal.

In most of the cases where the court has violated the rule requiring instructions to be delivered in open court, the judgment has been reversed for that reason,[70] and the position taken that injury will be conclusively presumed, without stopping to inquire whether the instruction given was material,

[66] State v. Wroth, 15 Wash. 621.

[67] Sargent v. Roberts, 1 Pick. (Mass.) 337.

[68] School Dist. No. 1 in Milton v. Bragdon, 23 N. H. 517; Allen v. Aldrich, 29 N. H. 63; Bassett v. Salisbury Mfg. Co., 28 N. H. 438; Shapley v. White, 6 N. H. 172.

[69] Goldsmith v. Solomons, 2 Strob. (S. C.) 296.

[70] See Plunkett v. Appleton, 51 How. Pr. (N. Y.) 469; High v. Chick, 81 Hun (N. Y.) 100; Gibbons v. Van Alstyne, 29 N. Y. St. Rep. 461; Fish v. Smith, 12 Ind. 563; Quinn v. State, 130 Ind. 340; Hall v. State, 8 Ind. 439; Chicago & A. R. Co. v. Robbins, 159 Ill. 598; Sargent v. Roberts, 1 Pick. (Mass.) 337; State v. Alexander, 66 Mo. 148; Norton v. Dorsey, 65 Mo. 376; Chouteau v. Jupiter Iron Works, 94 Mo. 388; Hopkins v. Bishop, 91 Mich. 328; Hoberg v. State, 3 Minn. 262 (Gil. 181); Somner v. Huber, 183 Pa. 162.

or had any influence upon the verdict,[71] or was prejudicial to either party,[72] and that the party complaining need not show that he was prejudiced, in order to be entitled to a new trial.[73] There are decisions, however, in which the court has refused to reverse for a violation of this rule, basing the decision on the ground that no prejudice could have resulted in that particular case.[74]

§ 181. Waiver of objections.

If the parties consent to the giving of further instructions otherwise than in open court, the trial judge may properly do so, as this amounts to a waiver of the rule,[75] but both parties must consent.[76] Some decisions hold that, where irregular communications are made to the jury, either in the absence of counsel or by sending to the jury room, and counsel are afterwards apprised of the communication, and make no objection, a new trial will not be granted.[77] Others hold that consent must be expressly given.[78] That counsel are aware that the judge is going into the jury room, and make no objection, does not amount to a consent to instructions

[71] Kehrley v. Shafer, 92 Hun (N. Y.) 196; Gibbons v. Van Alstyne, 29 N. Y. St. Rep. 461.

[72] Read v. City of Cambridge, 124 Mass. 567.

[73] People v. Linzey, 79 Hun (N. Y.) 23.

[74] Moseley v. Washburn, 165 Mass. 417; Galloway v. Corbitt, 52 Mich. 461.

[75] Smoke v. Jones, 35 Mich. 408; McCrory v. Anderson, 103 Ind. 12; City of Joliet v. Looney, 159 Ill. 471. See, also, Taylor v. Betsford, 13 Johns. (N. Y.) 487; Neil v. Abel, 24 Wend. (N. Y.) 185; Benson v. Clark, 1 Cow. (N. Y.) 258; Plunkett v. Appleton, 51 How. Pr. (N. Y.) 469; Hopkins v. Bishop, 91 Mich. 328.

[76] Smith v. McMillen, 19 Ind. 391.

[77] Thorp v. Riley, 29 N. Y. St. Rep. 520; Zust v. Smitheimer, 34 N. Y. St. Rep. 583; Mahoney v. Decker, 18 Hun (N. Y.) 365.

[78] Watertown Bank & Loan Co. v. Mix, 51 N. Y. 561; Moody v. Pomeroy, 4 Denio (N. Y.) 115; Bunn v. Crowl, 10 Johns. (N. Y.) 239.

given while in the jury room.[79] Even when consent is obtained for the trial judge to go to the jury room, he should confine his visit strictly to the purpose for which permission was granted, and should not give any instructions without the knowledge of counsel.[80]

III. Presence of Counsel.

§ 182. Rule that presence of or notice to counsel is unnecessary.

In a number of states it is held that, while a trial court should refrain from instructing a jury in the absence of counsel, when it can do so conveniently, it is not reversible error for the court to give further instructions after the retirement of the jury, in compliance with a request from the jury, or upon the court's own motion, although counsel for neither party is present, and no attempt has been made to notify them, where such instructions are given in open court, during a regular session, when counsel might reasonably have been expected to be in attendance.[81] Although it is said in some of these cases cited that it would be better to attempt to notify counsel,[82] this is regarded as a matter of courtesy,

[79] Moody v. Pomeroy, 4 Denio (N. Y.) 115.

[80] Seeley v. Bisgrove, 83 Hun (N. Y.) 293.

[81] Hudson v. Minneapolis, L. & M. Ry. Co., 44 Minn. 52; Reilly v. Bader, 46 Minn. 212; Alexander v. Gardiner, 14 R. I. 15; Chapman v. Chicago & N. W. Ry. Co., 26 Wis. 295; Torque v. Carrillo, 1 Ariz. 336; State v. Pike, 65 Me. 111; Cooper v. Morris, 48 N. J. Law, 607; Ahearn v. Mann, 60 N. H. 472; Milton School Dist. v. Bragdon, 23 N. H. 507; Allen v. Aldrich, 29 N. H. 63; Bassett v. Salisbury Mfg. Co., 28 N. H. 438; Leighton v. Sargent, 31 N. H. 119; Meier v. Morgan, 82 Wis. 289; Kullberg v. O'Donnell, 158 Mass. 405 (explaining Sargent v. Roberts, 1 Pick. [Mass.] 337); Aerheart v. St. Louis, I. M. & S. R. Co. (C. C. A.) 99 Fed. 907.

[82] Meier v. Morgan, 82 Wis. 289; Hudson v. Minneapolis, L. & M. Ry. Co., 44 Minn. 52; Torque v. Carrillo, 1 Ariz. 336.

rather than of legal right.[83] "In contemplation of law, the parties and their counsel remain in court until a verdict has been rendered, or the jury discharged from rendering one."[84] The giving of notice to counsel is a matter of grace or favor, and, while the custom of giving notice is not inherently vicious, the court must have power to proceed without such notice; otherwise, the transaction of business would be dependent upon the favor of counsel or litigants.[85] "The court may proceed without it [notice], subject to the power of opening the proceedings, where sufficient cause of absence is shown, and it appears that injustice has been done. The idea that the court cannot proceed without causing notice to be given, or that it is error to do so, and that it must await the motion and presence of counsel or their clients, would be intolerable, for then no business could be done and no proceedings taken except by the favor of counsel or of litagants."[86] "Counsel, by purposely or inadvertently withdrawing from the court, cannot take away the power, or suspend the right to exercise it until they can be found and brought in, if willing to come. It is the duty of counsel engaged in the trial of a case to remain in or be represented at the court during its sessions until the jury having the case in charge is discharged. * * * The failure of counsel to perform their duty does not deprive the court of its power to discharge its duty. The court is not required to send out its officers to invite counsel to attend to their duties, and hear additional instructions which the court proposes to give to the jury. Undoubtedly, in most cases, courts will endeavor, as a matter of courtesy, to secure the attendance of counsel

[83] Hudson v. Minneapolis, L. & M. Ry. Co., 44 Minn. 52; State v. Pike, 65 Me. 111; Chapman v. Chicago & N. W. R. Co., 26 Wis. 295.

[84] Cooper v. Morris, 48 N. J. Law, 607.

[85] Chapman v. Chicago & N. W. Ry. Co., 26 Wis. 295.

[86] Chapman v. Chicago & N. W. Ry. Co., 26 Wis. 306.

before reinstructing a jury, but it is not error if it is not done."[87] The power to reinstruct a jury in the absence of counsel, like other powers, may be abused, and in such case the remedy is by motion for a new trial.[88]

§ 183. Rule that presence of counsel or notice is necessary.

In a number of jurisdictions, usually under statutes regulating the practice, any additional instructions must be given either in the presence of counsel, or after an attempt has been made to notify them that further instructions will be given.[89] It has been held, however, that re-reading a portion of

[87] Cornish v. Graff, 36 Hun (N. Y.) 160. To the same effect is Hudson v. Minneapolis, L. & M. Ry. Co., 44 Minn. 52.

[88] Cornish v. Graff, 36 Hun (N. Y.) 160.

[89] People v. Trim, 37 Cal. 274; Redman v. Gulnac, 5 Cal. 148; People v. Mayes, 113 Cal. 618; Goode v. Campbell, 14 Bush (Ky.) 75; Pierce v. Com. (Ky.) 42 S. W. 107; Martin v. State, 51 Ga. 569; McNeil v. State, 47 Ala. 498; Kuhl v. Long, 102 Ala. 569; Johnson v. State, 100 Ala. 55; State v. Davenport, 33 La. Ann. 231; State v. Frisby, 19 La. Ann. 143; Jones v. Johnson, 61 Ind. 257; Fish v. Smith, 12 Ind. 563; Blacketer v. House, 67 Ind. 414; Chinn v. Davis, 21 Mo. App. 363; State v. Miller, 100 Mo. 606; Wade v. Ordway, 1 Baxt. (Tenn.) 229; People v. Cassiano, 30 Hun (N. Y.) 388; Wheeler v. Sweet, 137 N. Y. 438; Kehrley v. Shafer, 92 Hun (N. Y.) 196. Contra, Wiggins v. Downer, 67 How. Pr. (N. Y.) 69. In Ohio there is a statutory provision as follows: "After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court, where the information upon the point of law shall be given; and the court may give its recollection as to the testimony on the point in dispute, in the presence of, or after notice to, the parties or their counsel." Code, § 270. The decisions under this statute are so conflicting that no rule can be deduced therefrom. In Campbell v. Beckett, 8 Ohio St. 211, it was held reversible error for the judge, during recess of court, in the absence of parties and counsel, and without notice to them, to give further instructions on a point of law. In Chambers' Adm'r v. Ohio Life Ins. & Trust Co., 1 Disn. (Ohio) 327, and Milius v. Marsh,

the charge already given in the absence of counsel is not within the rule, and that error cannot be assigned thereto.[90] The impropriety of giving further instructions in the absence of counsel, and without an attempt to notify them, is increased when the court is convened and the instructions given on a day during which no court business is usually transacted. "When a court meets at a time so unusual, and without notice to parties, it is manifestly improper, and might work oppressively, to proceed in so important a matter as that of charging a jury without the knowledge or presence of a party or of his counsel."[91] Where, before giving additional instructions, the court sends officers to look for counsel, the court may proceed in their absence,[92] particularly if the party rep-

1 Disn. (Ohio) 512, it was held that the provision requiring the presence of or notice to counsel when the court states its recollection of the evidence to the jury does not apply to instructions on matters of law. "There is a clear distinction, under section 270 of the Code, between further instructions in matter of law and a statement by the court of the evidence on a point." So, in Seagrave v. Hall, 10 Ohio Cir. Ct. R. 395, it was held that a verdict should be set aside where the jury were recalled and given further instructions, not upon questions of law, without any attempt to notify the parties or their counsel, none of whom were present. On the other hand, it was held in Moravee v. Buckley, 11 Wkly. Law Bul. (Ohio) 225, that an instruction by the court as to the form of the verdict, given on the jury's request after they had retired to deliberate upon their verdict, was an instruction on the law of the case, and, if given in the absence of counsel, was error. In Emery v. Whitaker, 2 Cin. Super. Ct. R. 36, it was held that, where the jury come out and ask further instructions on the law, in the absence of counsel, though no call for counsel is made at the court-house door, if the counsel is sent for into every court room and office in the court house, it is sufficient, though it seems that even this is not necessary when the court is in session.

[90] People v. La Munion, 64 Mich. 709.

[91] Davis v. Fish, 1 G. Greene (Iowa) 410. The additional instructions in this case were given on Sunday.

[92] McNeil v. State, 47 Ala. 498; People v. Mayes, 113 Cal. 618;

resented by the absent counsel is present.[93] And it is, of course, proper to give further instructions to the jury at their request, in the absence of counsel, where they have been duly notified that further instructions will be given, and neglect or refuse to attend.[94] It must depend largely on circumstances as to what notice will be sufficient, and much must be left to the discretion of the trial judge. It has been held a sufficient notice to call the attorneys at the court-house door, or at any place where witnesses are usually called.[95] Instructions to the jury after they have retired, in the absence of counsel, are objectionable, though no harm is done, for the reason that all proceedings of the court should be open and notorious, so that, if a party is not satisfied with them, he may take exceptions.[96] This objection, of course, does not apply in jurisdictions where instructions given after the jury retire are returned into court with the verdict, and are then allowed to be excepted to.[97] Where the jury have been charged, and have retired, counsel may presume that no other instructions will be given without notice or an attempt to notify, and can reasonably object to instructions given in their absence, as they thereby lose the opportunity of asking for explanatory charges, if deemed necessary,[98] and of except-

State v. Dudoussat, 47 La. Ann. 996; Preston v. Bowers, 13 Ohio St. 1; Dobson v. State, 5 Lea (Tenn.) 277; Collins v. State, 33 Ala. 434.

[93] People v. Mayes, 113 Cal. 618.

[94] Cook v. Green, 6 N. J. Law, 109.

[95] McNeil v. State, 47 Ala. 498; Dobson v. State, 5 Lea (Tenn.) 277.

[96] Wade v. Ordway, 1 Baxt. (Tenn.) 229; Feibelman v. Manchester Fire Assur. Co., 108 Ala. 180; Crabtree v. Hagenbaugh, 23 Ill. 349. In Wade v. Ordway, 1 Baxt. (Tenn.) 229, however, it was held that, if the upper court could see that no harm had been done, the trial court would not be reversed for its departure from propriety.

[97] Allen v. Aldrich, 29 N. H. 63; School Dist. No. 1 v. Bragdon, 23 N. H. 507; Shapleigh v. White, 6 N. H. 172.

[98] Wade v. Ordway, 1 Baxt. (Tenn.) 229; Kuhl v. Long, 102 Ala. 569.

ing to their refusal if the court declines to give them.[99] The objection that counsel could stop the trial by absenting himself from the court house has been disposed of as follows: "Courts are armed with plenary authority to enforce the discharge of duty on the part of all their officers; and, besides a fitting and proper penalty on derelict counsel in the case supposed, they could, in cases when the necessity arose, require the defendant to procure other counsel, or make the appointment for him. If the absence of counsel resulted from a cause which would be a good ground for continuance, and it would not be proper to substitute other counsel, it were better that there should be a continuance, or at least a temporary postponement, than that one not skilled in the law, and who was largely ignorant of his legal rights, and perhaps totally ignorant of the practice on which those rights rested, should lose a privilege, the value of which cannot be estimated."[100]

§ 184. Same—Violation of rule as ground for reversal.

In a number of cases, both civil and criminal, the giving of additional instructions in the absence of counsel, and without attempting to notify them, has been held reversible error.[101] Where additional instructions are given to a jury in the absence of counsel, a constitutional provision guarantying the right to prosecute a cause by counsel is violated, and the reviewing court cannot "inquire, in such a case, what instructions were given by the court to the jury,—whether they

[99] Feibelman v. Manchester Fire Assur. Co., 108 Ala. 180.

[100] Martin v. State, 51 Ga. 569.

[101] McNeil v. State, 47 Ala. 498; Kuhl v. Long, 102 Ala. 569; Feibelman v. Manchester Fire Assur. Co., 108 Ala. 180; Reidman v. Gulnac, 5 Cal. 148; People v. Trim, 37 Cal. 274; People v. Cassiano, 30 Hun (N. Y.) 388; State v. Davenport, 33 La. Ann. 231; State v. Frisby, 19 La. Ann. 143.

were correct or incorrect, prejudicial or otherwise. We cannot be informed of their nature or effect by lawful and constitutional methods. The counsel not being present to observe the proceedings of the court, and learn for themselves what transpired, and, by their advice and counsel, it may be, give shape to the action of the court, the plaintiff can have no just and fair representation—indeed, no constitutional representation by counsel—in making up the record for the presentation of the illegal proceedings to this court for review."[102] In another case it was said that additional instructions, given in the absence of counsel, and at the request of the jury, will be presumed important, if the contrary is not shown, from the fact that the jury have asked for them.[103] In other cases the reviewing court has refused to reverse, where it was apparent that no prejudice resulted.[104]

IV. Presence of Accused in Criminal Cases.

§ 185. Statement of rule.

In all criminal cases the defendant has the right to be present in person throughout every stage of the trial.[105] The court cannot give any further instructions to the jury after their retirement, except in the presence of the defendant,[106] unless he has absconded,[107] or unless he has waived the benefit

[102] Feibelman v. Manchester Fire Assur. Co., 108 Ala. 180.

[103] Redman v. Gulnac, 5 Cal. 148.

[104] Wade v. Ordway, 1 Baxt. (Tenn.) 229; Smith v. Kelly, 43 Mich. 390.

[105] Bonner v. State, 67 Ga. 510.

[106] Cooper v. State, 79 Ala. 54; Johnson v. State, 100 Ala. 58; Rafferty v. People, 72 Ill. 37; Wade v. State, 12 Ga. 25; Bonner v. State, 67 Ga. 510; Wilson v. State, 87 Ga. 583; State v. Miller, 100 Mo. 606; Benavides v. State, 31 Tex. Cr. App. 173, 37 Am. St. Rep. 799; Kirk v. State, 14 Ohio, 512; Jones v. State, 26 Ohio St. 208; Hulse v. State, 35 Ohio St. 429; Maurer v. People, 43 N. Y. 1.

[107] Hulse v. State, 35 Ohio St. 429.

of the rule, which it seems he may do.[108] Presence of counsel at time of giving instructions, and his failure to object, will not waive the absence of the accused.[109] The irregularity of charging in the defendant's absence is not cured by the presence of his counsel at the giving of such additional instructions, and his failure to make objections.[110] It is the duty of the court to see that defendant is present when any instructions are delivered to the jury,[111] the rule being that prejudice will be presumed without inquiring into the correctness of the instructions,[112] and it has almost invariably been held a ground for reversal to deliver any further instructions in the absence of the defendant.[113] Thus, if the judge recharges the jury without verifying for himself the defendant's presence, and it afterwards appears that the prisoner was not present, but was in an adjoining room, in custody of an officer, and did not know that the jury was being recharged, and knowledge did not come to him until after such recharge was concluded, it is cause for a new trial.[114] So, on a trial for murder, where the jury returned into court and asked questions as to what had been the evidence on a particular point, it was held reversible error to give the requested information in the absence of the accused.[115] There is only one decision which conflicts with the rule stated, the view being taken that, if by no possibility the defendant could have been injured, the error should not work a reversal.[116]

[108] Benavides v. State, 31 Tex. Cr. App. 173, 37 Am. St. Rep. 799.
[109] Bonner v. State, 67 Ga. 510; Maurer v. People, 43 N. Y. 1; Jones v. State, 26 Ohio St. 208.
[110] Jones v. State, 26 Ohio St. 208.
[111] Wilson v. State, 87 Ga. 583.
[112] Jones v. State, 26 Ohio St. 208.
[113] See cases already cited in this section.
[114] Wilson v. State, 87 Ga. 583.
[115] Maurer v. People, 43 N. Y. 1.
[116] Rafferty v. People, 72 Ill. 37.

CHAPTER XVII.

INSTRUCTIONS AS TO PUNISHMENT AND GRADES OF OFFENSE.

I. Instructions as to Punishment.

§ 186. When Unnecessary.
187. When Necessary.
188. Same—Invading Province of Jury.
189. Same—Misstating Punishment.

II. Instructions as to Lower Grades or Degrees of Offense.

§ 190. Necessity of Basing on Evidence.
191. Same—Illustrations of Rule.
192. Necessity of Giving When Warranted by the Evidence.
193. Propriety of Particular Instructions.

I. Instructions as to Punishment.

§ 186. When unnecessary.

In jurisdictions where it is the exclusive province of the court to fix the punishment for the offense with which the defendant is charged, the refusal of an instruction as to the degree of punishment to be meted out to defendant if he should be convicted is proper. The verdict of the jury should not be influenced by any consideration of the degree of punishment, and information with regard thereto is likely to create sympathy or prejudice.[1] Under such circumstances, there is no legitimate object to be subserved by instructing the jury as to the punishment which may be inflicted as

1 State v. Ragsdale, 59 Mo. App. 590; People v. Ryan, 55 Hun (N. Y.) 214; State v. Peffers, 80 Iowa, 580; Ford v. State, 46 Neb. 390; Keller v. Strasburger, 90 N. Y. 379; Wood v. People, 1 Hun (N. Y.) 381. Contra, People v. Cassiano, 30 Hun (N. Y.) 388.

a result of their verdict.[2] The verdict should not be affected by any such considerations.[3] But the trial judge has a discretion as to whether he will instruct upon the consequences which may result from the verdict of the jury. It may be important to give the jury such instruction in order to induce them to greater care in weighing and scrutinizing the evidence.[4] In one case it is said that, where the jury have nothing to do with the punishment prescribed by law for the offense, it is much the better practice for the court to say nothing about the punishment in its charge.[5] It is proper, however, to instruct the jury that they have nothing to do with assessing the punishment if they find the defendant guilty, and that this is a matter of law devolving upon the court.[6]

§ 187. When necessary.

In some jurisdictions the matter of fixing the punishment to be inflicted is placed by statute in the hands of the jury. Where this is the case, it is the duty of the court to instruct the jury upon the question of punishment, when properly requested to do so, or without a request, in jurisdictions where the court is required to charge on the law of the case, whether requested or not,[7] and a failure to do so is reversible error.[8] Where the jury have an option to choose between two alternative punishments, it is reversible error for the court to fail to give to the jury, in its charge, the statute pro-

[2] Russell v. State, 57 Ga. 420; People v. Ryan, 55 Hun (N. Y.) 214; State v. Peffers, 80 Iowa, 580.

[3] Wood v. People, 1 Hun (N. Y.) 381.

[4] Keller v. Strasburger, 90 N. Y. 379.

[5] Russell v. State, 57 Ga. 424.

[6] State v. Howard, 118 Mo. 144; State v. Avery, 113 Mo. 501.

[7] As to the necessity of a request, see ante, § 127 et seq.

[8] Cesure v. State, 1 Tex. App. 20; Prinzel v. State, 35 Tex. Cr. App. 274; Ringo v. State, 2 Tex. App. 291; Brannigan v. People, 3 Utah, 488; Calton v. Utah, 130 U. S. 83.

viding for such alternative punishments.[9] A charge which stated the term of confinement, but did not state where the confinement was to be, was held erroneous as not stating the law of the case.[10] Of course, where a request is necessary, and none is made, a failure to instruct as to punishment is not available error.[11]

§ 188. Same—Invading province of jury.

Where the jury is invested by statute with the discretion of commuting the death penalty to a life sentence, in case of extenuating circumstances, this discretion is, nevertheless, not an arbitrary one, and the court may properly instruct them as to its exercise;[12] but the court, in giving its instruction, should say nothing which will interfere with the proper exercise of this discretion.[13]

§ 189. Same—Misstating punishment.

An incorrect instruction as to the penalty which may be inflicted upon the defendant is fundamental error, for which the conviction will be set aside,[14] though the error inures to the benefit of defendant, or though the error does not relate to the offense of which the defendant was convicted.[15] Thus,

[9] Ringo v. State, 2 Tex. App. 291.

[10] Hamilton v. State, 2 Tex. App. 494.

[11] State v. Becton, 7 Baxt. (Tenn.) 138; Honeycutt v. State, 8 Baxt. (Tenn.) 371.

[12] People v. Jones, 63 Cal. 168.

[13] People v. Bawden, 90 Cal. 195; People v. Brick, 68 Cal. 190; People v. Murback, 64 Cal. 369.

[14] Rodriguez v. State, 8 Tex. App. 129: Graham v. State, 29 Tex. App. 31; Hargrove v. State (Tex. Cr. App.) 30 S. W. 801; Williams v. State, 25 Tex. App. 89; State v. Sands, 77 Mo. 118; State v. McNally, 87 Mo. 644; Watson v. People, 134 Ill. 374; State v. Wheeler, 108 Mo. 658; Mitchell v. Com., 75 Va. 856; Whitlock v. Com., 89 Va. 340.

[15] Graham v. State, 29 Tex. App. 31.

it is error to misstate the maximum punishment;[16] as to say unqualifiedly that a verdict of guilty will carry with it imprisonment in the penitentiary for a prescribed period, when such punishment is only authorized in case of a former conviction;[17] or to state the minimum punishment for an offense as a term of imprisonment longer than that prescribed by law as the minimum penalty.[18] Where a statute provides that one convicted of assault may be both fined and imprisoned, an instruction that the penalty is a fine "or" imprisonment is fatally erroneous.[19] So, if the punishment may be either by fine or imprisonment, it is error not to instruct that the jury might inflict the imprisonment without the fine.[20] And if a penalty is fixed by statute for a specific theft, it is error to state, as the penalty, that which is prescribed for theft in general.[21] "An instruction overstating the maximum fine, and omitting to state the minimum term of imprisonment," is also erroneous.[22] In Texas, an erroneous instruction upon the question of punishment is in all cases reversible error, without regard to whether the defendant was harmed by it or not.[23] In other jurisdictions, the rule is not so rigid, and the doctrine of error without injury has been held to apply. Thus, where the court overstates the maxi-

[16] Hargrove v. State (Tex. Cr. App.) 30 S. W. 801.

[17] Watson v. People, 134 Ill. 374.

[18] State v. McNally, 87 Mo. 644; Williams v. State, 25 Tex. App. 89.

[19] Moody v. State, 30 Tex. App. 422.

[20] Irvin v. State, 25 Tex. App. 558.

[21] Jones v. State, 7 Tex. App. 338.

[22] State v. Sands, 77 Mo. 118.

[23] Buford v. State, 44 Tex. 525; Veal v. State, 8 Tex. App. 478; Gardenhire v. State, 18 Tex. App. 565; Williams v. State, 25 Tex. App. 76; Jones v. State, 7 Tex. App. 338; Sanders v. State, 17 Tex. App. 222; Irvin v. State, 25 Tex. App. 558; Wilson v. State, 14 Tex. App. 527; Bostic v. State, 22 Tex. App. 136; Graham v. State, 29 Tex. App. 32; Howard v. State, 18 Tex. App. 348. Contra, Work v. State, 3 Tex. App. 234.

mum punishment, this will not be ground for reversal where the jury find defendant guilty, but leaves the court to fix the punishment, and the court sentences him for a much less period than the maximum allowed by statute.[24] So it has been held that an overstatement of the minimum punishment is no ground for reversal where the jury assessed the punishment at the maximum amount, which has been correctly stated to them.[25] So, where the court incorrectly tells the jury that a designated statute fixes the minimum punishment for the offense with which defendant is charged, and the minimum punishment, which is in fact regulated by another statute, is the same as that fixed by the statute referred to by the court in its charge, the defendant is not prejudiced.[26] So, a misstatement of the minimum punishment is harmless error where the jury assess a punishment much larger than the minimum punishment.[27]

II. Instructions as to Lower Grades or Degrees of Offense.

§ 190. Necessity of basing on evidence.

As already shown in another chapter, it is essential that instructions should conform to the evidence in the case, and that instructions inapplicable to the facts as disclosed by the evidence should not be given, for the reason that they might have a tendency to mislead the jury.[28] It follows that, in a criminal prosecution, error cannot be predicated of the omission or refusal of a trial judge to instruct as to the lesser grades of the offense charged, where there is no evidence to

[24] State v. Wheeler, 108 Mo. 658.
[25] Mitchell v. Com., 75 Va. 856.
[26] Whitlock v. Com., 89 Va. 340.
[27] Quinn v. People, 123 Ill. 333.
[28] State v. Estep, 44 Kan. 575. See, also, ante, § 86 et seq.

reduce the offense to a lesser grade.[29] The practice of laying down general principles relating to the offense charged in all its degrees, without reference to the evidence in the case, is objectionable, as tending to confuse and perplex the jury,[30] and, if prejudicial to the party complaining, will be sufficient

[29] Alabama: Ragland v. State, 125 Ala. 12.

Arkansas: Benton v. State, 30 Ark. 328; Curtis v. State, 36 Ark. 284.

California: People v. Byrnes, 30 Cal. 207.

Colorado: Smith v. People, 1 Colo. 121.

Iowa: State v. Sterrett, 80 Iowa, 609; State v. Cole, 63 Iowa, 695; State v. Mahan, 68 Iowa, 304; State v. Reasby, 100 Iowa, 231; State v. Perigo, 80 Iowa, 37; State v. Casford, 76 Iowa, 330.

Indiana: Richie v. State, 58 Ind. 355.

Kansas: State v. Kornstett, 62 Kan. 221; State v. Mowry, 37 Kan. 369; State v. Mize, 36 Kan. 187; State v. Rhea, 25 Kan. 576; State v. Hendricks, 32 Kan. 566; State v. Estep, 44 Kan. 572.

Missouri: State v. Alcorn, 137 Mo. 121; State v. Turlington, 102 Mo. 642.

Oregon: State v. Garrand, 5 Or. 216.

Tennessee: Williams v. State, 3 Heisk. 376; Ray v. State, 3 Heisk. 379, note; Good v. State, 1 Lea, 293; State v. Hargrove, 13 Lea, 178; State v. Parker, 13 Lea, 221.

Texas: Stelner v. State, 33 Tex. Cr. App. 291; Collins v. State, 6 Tex. App. 72; Mayfield v. State, 44 Tex. 59; Browning v. State, 1 Tex. App. 96; Holden v. State, 1 Tex. App. 226; Gatlin v. State, 5 Tex. App. 531; Hodge v. State (Tex. Cr. App.) 26 S. W. 69; Washington v. State, 1 Tex. App. 647; Taylor v. State, 3 Tex. App. 387; Hubby v. State, 8 Tex. App. 597; Lum v. State, 11 Tex. App. 483; Neyland v. State, 13 Tex. App. 536; Davis v. State, 14 Tex. App. 645; Gomez v. State, 15 Tex. App. 327; Darnell v. State, 15 Tex. App. 70; Smith v. State, 15 Tex. App. 139; Rhodes v. State, 17 Tex. App. 579; Jackson v. State, 18 Tex. App. 586; Johnson v. State, 18 Tex. App. 385; Bryant v. State, 18 Tex. App. 107; May v. State, 22 Tex. App. 595; Henning v. State, 24 Tex. App. 315; Trumble v. State, 25 Tex. App. 631; Blocker v. State, 27 Tex. App. 41.

Washington: Smith v. United States, 1 Wash. T. 262.

[30] People v. Byrnes, 30 Cal. 206; Lopez v. State, 42 Tex. 299; Serio v. State, 22 Tex. App. 633; Curtis v. State, 36 Ark. 284; State v. Mize, 36 Kan. 187; People v. Chun Heong, 86 Cal. 329.

ground upon which to reverse the judgment;[31] but if the evidence shows that the offense of the accused is either murder in the first degree or homicide in self-defense, and the jury convict of murder in the first degree, an uncalled-for instruction on murder in the second degree cannot injure the accused. So, an instruction correct as to murder in the first degree, but which might compel the jury to acquit improperly of murder in the second degree, will not work a reversal.[32] Thus, if the jury find a verdict of murder in the first degree, a reversal will not be warranted by the giving of an instruction as to murder in the second degree, when the act, if not done in self-defense, must have been murder in the first degree.[33] So, where the evidence does not warrant an instruction on the lower degrees of crime, and such an instruction is given, the fact that such instruction stated the law erroneously will not be ground for reversal if no prejudice could have resulted therefrom.[34]

§ 191. Same—Illustrations of rule.

In applying the doctrine, it has been held that an instruction defining murder in the second degree on the trial of an

[31] State v. Mize, 36 Kan. 187, in which case it was held that, "where a defendant is charged with an offense which includes others of an inferior degree, the law of each degree which the evidence tends to prove should be given to the jury; but where the defendant was charged with assault and battery, and convicted of assault, and it appears from the evidence that, if he was not guilty of assault and battery, he was not guilty of any offense, an instruction as to the lower degree of the offense is inapplicable, and might have misled the jury, and, as the testimony is such as to leave the question of the defendant's guilt in doubt," the judgment should be reversed.

[32] People v. Chun Heong, 86 Cal. 329; State v. Ellis, 74 Mo. 207.

[33] State v. Ellis, 74 Mo. 207.

[34] State v. Kotovsky, 74 Mo. 247; State v. Erb, 74 Mo. 199.

indictment for murder should not be given unless there is evidence in the case tending to prove that the crime was or may have been of that grade.[35] And where there is no question but that the defendant inflicted the mortal wound, and the only question is whether he did so willfully, it is not necessary to instruct the jury as to assault with intent to inflict great bodily injury, assault and battery, and other offenses less than manslaughter.[36]

In a prosecution for murder, where it is admitted that defendant, by violence, caused the death of deceased, and claims that his act was done in self-defense, and was not unlawful, it is not necessary to instruct as to offenses lower than manslaughter, which may be included in the crime of murder charged.[37] Where the evidence, if true, sustains an indictment charging an assault with intent to commit rape, no instructions should be given as to common assault.[38] And on a trial for robbery, if there is no evidence to show the offense to be larceny, a failure to instruct as to larceny is not error.[39] Where an indictment charges a felonious assault within the exact terms of a statute, and no effort is made to prove any other offense, it is not error to fail to instruct on the offense of maiming, wounding, or disfiguring, prohibited by another statute.[40] Where the defendant is charged with assault with intent to murder, he may be convicted of simple assault, and where the weapon used is not a deadly weapon, and the injuries inflicted are not serious, it may be error not to charge upon simple assault; but where the evidence shows that the injuries inflicted by defendant were quite serious, and the

[35] People v. Byrnes, 30 Cal. 206; O'Connell v. State, 18 Tex. 343; State v. Garrand, 5 Or. 216.
[36] State v. Perigo, 80 Iowa, 37.
[37] State v. Mahan, 68 Iowa, 304.
[38] State v. Alcorn, 137 Mo. 121.
[39] State v. Reasby, 100 Iowa, 231.
[40] State v. Johnson, 129 Mo. 26.

weapon used might reasonably be found by the jury to be a deadly weapon, the failure to submit the question of simple assault to the jury will not work a reversal.[41] Where, in a prosecution for violating a statute describing the offense of willfully and maliciously throwing vitriol upon the person of another, with the intent to injure the flesh or disfigure the body of such person, the only question left open by the evidence is the one as to the intent of defendant, the willful and malicious throwing being abundantly proven, it is not error to fail to charge upon simple assault.[42] On a prosecution for murder in the first degree, if the evidence is indisputable that the deceased died from the effects of a wound inflicted by the defendant, it is not necessary for the court to instruct as to crime less in degree than that of criminal homicide.[43] If there is no evidence tending to prove that the crime was manslaughter, or that the killing was excusable or justifiable, it is not error to instruct that, "if the killing was willful (that is, intentional), deliberate, and premeditated, it is murder in the first degree; otherwise, it is murder in the second degree."[44] Where, under the evidence, "the defendant is either guilty of murder in the first degree or innocent of any offense, it is unnecessary to charge * * * as to any degree of the offense other than murder in the first degree."[45] An incorrect charge on manslaughter is not cause for reversal if the defendant, if guilty of any crime, is guilty of murder.[46]

§ 192. Necessity of giving when warranted by the evidence.

When there is evidence on which instructions as to lower

41 Hodge v. State (Tex. Cr. App.) 26 S. W. 69.
42 People v. Stanton, 106 Cal. 139.
43 State v. Froelick, 70 Iowa, 213.
44 People v. Welch, 49 Cal. 174.
45 State v. Kornstett, 62 Kan. 221.
46 Ragland v. State, 125 Ala. 12.

grades of an offense charged can be based, the court should give such instructions,[47] and this the court is required to do in some jurisdictions, although no request for instructions of this character is made,[48] or, if made, state the law incorrectly.[49] Even though there is only slight evidence that the offense committed may have been of a lower degree than the one charged, it is the duty of the court to define such lower degree, and to give the law applicable to such lower offense.[50] This duty is not dependent upon the court's judgment of the strength or weakness of the testimony supporting the theory, it being the prerogative of the jury to pass upon the probative force of the testimony.[51] If there is any doubt in the judge's mind as to the degree of the offense established, the law of the lesser as well as of the greater offense should be given in charge to the jury.[52] So, instructions on the lower grades of offense should be given, although the only testimony tending to show a lower degree of crime is that of defendant himself,[53] and although his testimony is at variance with that of every other witness.[54] For the purpose of instructing the jury, the defendant's testimony

[47] State v. Young, 99 Mo. 666; State v. Banks, 73 Mo. 592; State v. O'Hara, 92 Mo. 59; Crawford v. State, 12 Ga. 142; Jackson v. State, 76 Ga. 473; Territory v. Romero, 2 N. M. 474; People v. Palmer, 96 Mich. 580; State v. Mize, 36 Kan. 187.

[48] Dolan v. State, 44 Neb. 643; Vollmer v. State, 24 Neb. 838; Ross v. State, 23 Tex. App. 689; Chappel v. State, 7 Cold. (Tenn.) 92.

[49] State v. Young, 99 Mo. 666.

[50] State v. Mize, 36 Kan. 187; State v. Evans, 36 Kan. 497; Holden v. State, 1 Tex. App. 225; Blocker v. State, 27 Tex. App. 16; State v. Elliott, 98 Mo. 150; Madison v. Com., 13 Ky. Law Rep. 313, 17 S. W. 164; Faulkner v. Territory, 6 N. M. 464.

[51] Liskosski v. State, 23 Tex. App. 165.

[52] Holden v. State, 1 Tex. App. 225.

[53] State v. Banks, 73 Mo. 592; State v. Partlow, 90 Mo. 608; State v. Palmer, 88 Mo. 568.

[54] State v. Banks, 73 Mo. 592.

"occupies the same footing as that of any other witness."[55] Nevertheless, it has been held not erroneous to refuse an instruction on the lower degrees of crime, where it is a physical impossibility that defendant's testimony could be true, "Neither courts nor juries should be required to base their actions or belief on physical impossibilities."[56] While the defendant is always entitled to instructions on the lower grades of offense, if there is any evidence on which to base them, this right is waived if he asks that the instructions be confined to the offense charged.[57] Yet this right is not waived by his counsel's insisting, during the course of the trial, that he is guilty of the offense charged, or of none at all.[58]

§ 193. Propriety of particular instructions.

An instruction that, if the jury find that certain facts, which constitute the offense of assault with intent to commit murder, are proved beyond a reasonable doubt, they must find the defendant guilty of that offense, is not erroneous, as the law does not intend a person to be found guilty of a lesser crime than that of which the evidence shows him guilty.[59] So, an instruction that, if the jury had a reasonable doubt as to the degree of the offense of which the defendant was guilty, "they should find him guilty of that offense highest in degree of which they may have no reasonable doubt," is not prejudicial error, though not in conformity to the statute.[60] If the court assumes to give instructions relating to several grades of offense, the jury should be made to understand to what grade each instruction applies.[61]

[55] State v. Palmer, 88 Mo. 568.
[56] State v. Turlington, 102 Mo. 642.
[57] State v. Keele, 105 Mo. 38.
[58] State v. Johnson, 8 Iowa, 525.
[59] Crowell v. People, 190 Ill. 508.
[60] Ireland v. Com., 22 Ky. Law Rep. 478, 57 S. W. 616.
[61] Burris v. State, 38 Ark. 221.

CHAPTER XVIII.

DECLARATIONS OF LAW IN CASES TRIED WITHOUT A JURY.

§ 194. In general.

In several jurisdictions, where an action at law is tried before the court without a jury, the practice prevails of presenting to the court propositions of law which the court is requested to declare as legal principles applicable to the facts of the case, and in accordance with which its decision is rendered. Such declarations of law are in some respects quite analogous to the instructions in jury cases, but there are obvious differences. The object of such declarations of law is to enable the reviewing court to see upon what theory or principle the lower court based its judgment.[1] This

[1] See, generally, upon this subject, the following cases: Allman v. Lumsden, 159 Ill. 219; Loudon v. Mullins, 52 Ill. App. 410; Kraemer v. Leister, 35 Ill. App. 391; Mead v. Spalding, 94 Mo. 43; Conran v. Sellew, 28 Mo. 320; Krider v. Milner, 99 Mo. 145; Wellandy v. Lemuel, 47 Mo. 322; Methudy v. Ross, 10 Mo. App. 106; Gaty v. Clark, 28 Mo. App. 332; Rogers v. Johnson, 125 Mo. 202; Daudt v. Keen, 124 Mo. 105; Suddarth v. Robertson, 118 Mo. 286; Gaff v. Stern, 12 Mo. App. 115; Christy v. Stafford, 123 Ill. 464; Lyon v. George, 44 Md. 295; Cook v. Gill, 83 Md. 177; Gage v. Averill, 57 Mo. App. 111; Hisey v. Goodwin, 90 Mo. 366; Davis v. Scripps, 2 Mo. 187; Methudy v. Ross, 10 Mo. App. 106; Cooper v. Ord, 60 Mo. 420; Dollarhide v. Mabary, 125 Mo. 197; Suddarth v. Robertson, 118 Mo. 286; Gaff v. Stern, 12 Mo. App. 115; Perkins v. School Dist. No. 2, Greene County, 61 Mo. App. 512; Harrington v. Minor, 80 Mo. 270; Lee v. Porter, 18 Mo. App. 377; Cape Girardeau County v. Harbison, 58 Mo. 90; Blanke v. Dunnerman, 67 Mo. App. 591;

practice does not obtain in chancery cases, because, in such cases, upon appeal, the case is tried *de novo* upon the pleadings and proofs, and it is therefore immaterial upon what theory the lower court proceeded.[2] This subject is not regarded as being within the scope of this work, and will therefore be no further considered.

King v. Allemania Fire Ins. Co., 37 Mo. App. 102; Stocker v. Green, 94 Mo. 280; Mayor of Liberty v. Burns, 114 Mo. 426; Fairbanks v. Long, 91 Mo. 628; Stone v. Pennock, 31 Mo. App. 544; De Laureal v. Kemper, 9 Mo. App. 77.

[2] Gill v. Clark, 54 Mo. 415; Smith v. St. Louis Beef Canning Co., 14 Mo. App. 526; Clouse v. Maguire, 17 Mo. 158; Freeman v. Wilkerson, 50 Mo. 554; Hunter v. Miller, 36 Mo. 143; Moore v. Wingate, 53 Mo. 398; Wendover v. Baker, 121 Mo. 273; Durfee v. Moran, 57 Mo. 377.

CHAPTER XIX.

ISSUES OUT OF CHANCERY.

§ 195. Necessity and Propriety of Giving Instructions.
196. Rules Governing Instructions Given.

§ 195. Necessity and propriety of giving instructions.

Where a court of chancery submits to a jury for determination issues as to certain specific facts, neither party has a right to insist that the court shall instruct the jury, because the court is not in any manner controlled by the verdict.[1] Error in giving or refusing instructions is immaterial, where the court adopts the findings of the jury, and finds on all the issues, as the correctness of the finding may be tested by the evidence, and, if erroneous conclusions are drawn, the question may be presented on appeal.[2] In some jurisdictions, however, it seems to be the practice to instruct the jury, and certainly the court may, if it sees fit, give the jury instructions properly applicable to the issue submitted to them to

[1] Danielson v. Gude, 11 Colo. 96; Van Vleet v. Olin, 4 Nev. 95; Freeman v. Wilkerson, 50 Mo. 554; Conran v. Sellew, 28 Mo. 322; Branger v. Chevalier, 9 Cal. 353. "Where the action is tried as an action at law, and so treated by the court and parties, it should, at least, be fairly submitted to the jury, and the law correctly stated to them." Van Vleet v. Olin, 4 Nev. 98.

[2] Hewlett v. Pilcher, 85 Cal. 542; Sweetser v. Dohbins, 65 Cal. 529; Riley v. Martinelli, 97 Cal. 585. In Kellogg v. Krauser, 14 Serg. & R. (Pa.) 137, the court said: "Should there be a mistake in the admission or rejection of evidence, or in charging a jury, on a feigned issue, a writ of error lies." Quoted with approval in Brown v. Parkinson, 56 Pa. 341.

be tried.[3] In Georgia, by statute, parties are entitled to a jury in equity cases to the same extent as in an action at law, and accordingly the instructions in equity cases are subject to the same considerations as in actions at law, and the parties are entitled to them as of right.[4]

§ 196. Rules governing instructions given.

Where instructions are given, they should not be general, as in an action at law, but should relate only to the determination of the questions of facts submitted.[5] No instructions should be given except those pertinent to the issue, no matter how pertinent they may be to other questions in the case, not covered by the issues submitted.[6] Instructions upon the law of the whole case need not be given, for the jury do not find a general verdict, and it is the province of the court to apply the law to the facts found.[7] The instructions given should not change the issues submitted.[8] Errors in instructions which could not have affected the result are not ground for reversal.[9] The verdict of the jury being merely advisory, the court may direct a verdict, even though the evidence is conflicting.[10]

[3] Snouffer's Adm'r v. Hansbrough, 79 Va. 177; Barth v. Rosenfeld, 36 Md. 604. See, also, the following section.

[4] Beall v. Beall, 10 Ga. 342; Shiels v. Stark, 14 Ga. 429; Neal v. Patten, 40 Ga. 363; Brown v. Burke, 22 Ga. 574; Mounce v. Byars, 11 Ga. 180; Webb v. Robinson, 14 Ga. 216; Doggett v. Simms, 79 Ga. 253; Adkins v. Hutchings, 79 Ga. 260.

[5] Farmers' Bank v. Butterfield, 100 Ind. 229.

[6] Carlisle v. Foster, 10 Ohio St. 198.

[7] Stickel v. Bender, 37 Kan. 457; Swales v. Grubbs, 126 Ind. 107; Dominguez v. Dominguez, 7 Cal. 424.

[8] Hoobler v. Hoobler, 128 Ill. 645.

[9] Snouffer's Adm'r v. Hansbrough, 79 Va. 177.

[10] Galvin v. Palmer, 113 Cal. 46; Hess v. Miles, 70 Mo. 203; Robinson v. Dryden, 118 Mo. 534; Ely v. Early, 94 N. C. 1; Baldwin v. Taylor, 166 Pa. 507; Pier v. Prouty, 67 Wis. 218.

CHAPTER XX.

SPECIAL VERDICT OR FINDINGS.

§ 197. What Instructions Unnecessary or Improper.
198. What Instructions Proper.

§ 197. What instructions unnecessary or improper.

Where the jury are to find a general verdict according to the evidence and the law as laid down by the court, the court must instruct as to the law; but where the jury are to find simply the facts, entirely independent of their legal bearings, the court need not state the rules of law by which certain facts are to be weighed, nor give general instructions as to the law of the case.[1] The law must be applied by the court to the facts after they are found by the jury.[2] "There is * * * neither propriety nor fitness that the court should, either upon its own motion or at the request of either party, give any general instructions as to the law of the case. The jury should be left entirely free to find the facts material to the several issues, without instruction as to whether the law will declare one way or the other, upon any fact or state of facts which may be found."[3] It is, of course, proper

[1] Indianapolis, P. & C. Ry. Co. v. Bush, 101 Ind. 582; Toler v. Keiher, 81 Ind. 383; Louisville, N. A. & C. Ry. Co. v. Frawley, 110 Ind. 18; Louisville, N. A. & C. Ry. Co. v. Buck, 116 Ind. 566; Johnson v. Culver, 116 Ind. 278; Woollen v. Wire, 110 Ind. 253; Sprinkle v. Taylor, 1 Ind. App. 74; Ward v. Cochran (C. C. A.) 71 Fed. 127. A similar situation arises in the case of issues out of chancery. See ante, c. 17.

[2] Johnson v. Culver, 116 Ind. 278.

[3] Louisville, N. A. & C. Ry. Co. v. Frawley, 110 Ind. 28. An in-

to refuse requests for such instructions,[4] but the giving of them will not be reversible error;[5] and it makes no difference that they state the law incorrectly, provided the trial court correctly applies the law to the facts.[6]

Where special interrogatories are submitted to be answered by the jury in connection with their general verdict, it is error to instruct the jury that their answers should be consistent with the general verdict,[7] or each other,[8] since it is the duty of the jury to answer each question in accordance with the preponderance of the evidence bearing thereon.[9] So, the court should not direct the jury how to answer the questions submitted under any given circumstances, since

struction that the special verdict must state whether plaintiff contributed to the injury by a slight want of ordinary care, which would be negligence on plaintiff's part, is not open to the objection that it tells the jury the effect of their answer on plaintiff's right of recovery. Brunette v. Town of Gagen, 106 Wis. 618.

[4] Indianapolis, P. & C. Ry. Co. v. Bush, 101 Ind. 582; Stayner v. Joyce, 120 Ind. 99; Louisville, N. A. & C. Ry. Co. v. Frawley, 110 Ind. 18. Compare Western Union Tel. Co. v. Newhouse, 6 Ind. App. 422, where it was held error "for the court to refuse proper instructions as to the measure of damages, where it is the duty of the jury to assess damages, even though a special verdict is asked for, provided all the legal rules relative to the request for and submission of such instructions are complied with." See, also, Burns v. North Chicago Rolling Mill Co., 60 Wis. 544. An instruction that, if a certain fact is found to exist, the jury should find for the contestant in a will contest case, is properly refused. Tarbell v. Forbes, 177 Mass. 238.

[5] Louisville, N. A. & C. Ry. Co. v. Frawley, 110 Ind. 18; Louisville, N. A. & C. Ry. Co. v. Buck, 116 Ind. 566; Johnson v. Culver, 116 Ind. 278. But see Rhyner v. City of Menasha, 107 Wis. 201.

[6] Woollen v. Wire, 110 Ind. 253.

[7] Coffeyville Vitrified Brick Co. v. Zimmerman, 61 Kan. 750; Mechanics' Bank of Detroit v. Barnes, 86 Mich. 632.

[8] St. Louis & S. F. R. Co. v. Burrows, 62 Kan. 89. Contra, Hoppe v. Chicago, M. & St. P. Ry. Co., 61 Wis. 357.

[9] St. Louis & S. F. R. Co. v. Burrows, 62 Kan. 89.

the object of submitting interrogatories would be thereby defeated.[10]

§ 198. What instructions proper.

Although the court should not instruct the jury as to the law of the case, in case a special verdict is directed, the court may and should state "the matter put in issue by the pleadings, * * * the rules for weighing or reconciling conflicting testimony, with whatever else may be necessary to enable the jury clearly to comprehend the subjects" to be comprehended by their special verdict.[11] The court may state the form of the verdict to be rendered, and the general duties of the jurors.[12] So, where special interrogatories are submitted, the court should instruct that it is the duty of the jury to answer them,[13] and to do so in accordance with the burden of proof and preponderance of the evidence.[14]

[10] Maclean v. Scripps, 52 Mich. 214; Cole v. Boyd, 47 Mich. 98; Beecher v. Galvin, 71 Mich. 391.

[11] Louisville, N. A. & C. Ry. Co. v. Frawley, 110 Ind. 28; Toler v. Keiher, 81 Ind. 388; Woollen v. Wire, 110 Ind. 251; Louisville, N. A. & C. Ry. Co. v. Frawley, 110 Ind. 28; Louisville, N. A. & C. Ry. Co. v. Balch, 105 Ind. 93.

[12] Toler v. Keiher, 81 Ind. 383; Louisville, N. A. & C. Ry. Co. v. Frawley, 110 Ind. 28.

[13] Redford v. Spokane St. Ry. Co., 9 Wash. 55; Woollen v. Whitacre, 91 Ind. 502.

[14] Harriman v. Queen Ins. Co., 49 Wis. 71; Kansas Pac. Ry. Co. v. Peavey, 34 Kan. 472.

CHAPTER XXI.

INSTRUCTIONS AS TO DUTY OF JURORS TO AGREE UPON VERDICT.

§ 199. What Instructions Proper.
200. Instructions Tending to Coerce Jury into Agreement.
201. Statements as to Length of Time Jury Will be Kept Together.
202. Directing Jury to Compromise.

§ 199. What instructions proper.

In case of an announcement by the jury that they are unable to agree on a verdict, the trial court is vested with a large discretion in the matter of instructions to the jury on the subject of agreement, and, unless this discretion is abused, the reviewing court will not interfere.[1] Accordingly, it is proper for the trial judge to express his desire that they will be able to agree on further consideration of the case,[2] and he may admonish them of the importance and necessity of agreeing, and urge them to make an attempt to arrive at a verdict.[3] He may state the reasons why it is im-

[1] German Sav. Bank of Davenport v. Citizens' Nat. Bank, 101 Iowa, 530; Giese v. Schultz, 69 Wis. 526.

[2] Com. v. Kelley, 165 Mass. 175; Kelly v. Emery, 75 Mich. 147.

[3] Wheeler v. Thomas, 67 Conn. 577; State v. Smith, 49 Conn. 376; Allen v. Woodson, 50 Ga. 63; Warlick v. Plonk, 103 N. C. 81; Jackson v. State, 91 Wis. 267; Giese v. Schultz, 69 Wis. 526; McDonald v. Richolson, 3 Kan. App. 255; State v. Hawkins, 18 Or. 476; Krack v. Wolf, 39 Ind. 88; Niles v. Sprague, 13 Iowa, 198; Kelly v. Emery, 75 Mich. 147; State v. Rollins, 77 Me. 381; Taylor v. Jones, 2 Head (Tenn.) 565; East Tennessee & W. N. C. R. Co. v. Winters, 85 Tenn. 240; State v. Pierce, 136 Mo. 34; State v. Gorham, 67 Vt. 371; Muckieroy v. State (Tex. Cr. App.) 42 S. W. 383; Cowan v. Umbagog Pulp Co., 91 Me. 26.

portant that they shall reach an agreement, as, for instance, that the case had been long pending, exhaustively tried,[4] and that a new trial would entail a large additional expense; or that there had already been two trials;[5] or that "the case has already been tried once, and the amount involved is not very large, and the parties cannot afford to litigate it forever, and the county cannot afford to have them do it. You see, it takes some time to try the case, and I hope you will be able to arrive at a conclusion, and settle the facts in the case, at least."[6] An instruction may be given that it is the duty of each juryman to give careful consideration to the views of his fellow jurors, and that he should not shut his ears and stubbornly stand upon the position which he may have first assumed, regardless of anything that may be said by the other jurymen;[7] that they should reason together, and talk over the existing differences, if any, and harmonize them, if possible,[8] and examine such differences in a spirit of fairness and candor;[9] that it is the duty of the jury to agree upon a verdict, if that is possible;[10] that they should lay aside all pride of judgment,[11] and not stand out in an unruly and obstinate way through mere stubbornness;[12] or that the jury is, in the eye of the law, as capable as any jury will ever be of

[4] Frandsen v. Chicago, R. I. & P. R. Co., 36 Iowa, 376, 378; Allen v. Woodson, 50 Ga. 53; Pierce v. Rehfuss, 35 Mich. 53; Stoudt v. Shepherd, 73 Mich. 588; Clinton v. Howard, 42 Conn. 310; Hannon v. State, 70 Wis. 448; Niles v. Sprague, 13 Iowa, 198.

[5] Niles v. Sprague, 13 Iowa, 198.

[6] Kelly v. Emery, 75 Mich. 147.

[7] Jackson v. State, 91 Wis. 257. See, also, Ahearn v. Mann, 60 N. H. 472; Whitman v. Morey, 63 N. H. 458.

[8] Odette v. State, 90 Wis. 258.

[9] Frandsen v. Chicago, R. I. & P. R. Co., 36 Iowa, 372.

[10] Jackson v. State, 91 Wis. 253.

[11] Frandsen v. Chicago, R. I. & P. R. Co., 36 Iowa, 378; Odette v. State, 90 Wis. 258; Warlick v. Plonk, 103 N. C. 81.

[12] Odette v. State, 90 Wis. 258; Jackson v. State, 91 Wis. 253.

reaching a verdict, or to direct them to return to their room and make an honest effort to agree, and to tell them that it is the opinion of the court that, if they will follow the rules laid down by the court, they will have no trouble in agreeing;[13] or that "this case is submitted to you for decision, and not for disagreement. I think I will let you give it a further trial."[14] It is, of course, not proper to give an instruction which has a tendency to restrain jurors from agreeing upon a verdict, and a request for such an instruction may be properly refused,[15] though it is proper to add that the jurors should not yield any conscientious views founded on the evidence.[16]

§ 200. Instructions tending to coerce jury into agreement.

Any statement by the court which has a tendency to coerce the jury into an agreement, or which may impress the jury with the belief that the judge wants the case decided for a particular party to the suit, cannot be sustained, and will, in general, be reversible error.[17] It is therefore error

[13] Parker v. Georgia Pac. Ry. Co., 83 Ga. 539.

[14] German Sav. Bank of Davenport v. Citizens' Nat. Bank, 101 Iowa, 530.

[15] San Antonio & A. P. Ry. Co. v. Choate, 22 Tex. Civ. App. 618. See, also, Horton v. United States, 15 App. D. C. 310.

[16] Warlick v. Plonk, 103 N. C. 81.

[17] See German Sav. Bank of Davenport v. Citizens' Nat. Bank, 101 Iowa, 530; Georgia R. Co. v. Cole, 77 Ga. 77. In the latter case, which was an action for personal injuries, the jury disagreed, and, in answer to a question of the court, stated that they differed about the amount of damages. The court said: "Gentlemen, I cannot aid you in that, as I know of, in any way, further than to say that, upon that matter, the jury ought to make a very earnest effort to agree,—to reconcile conflicting opinions as to amounts. I merely give you that as advice of the court. You must make an effort to agree upon the amount. Of course, a juror ought not to give up his convictions if they are so strong, but there ought to be an effort to come to an agreement. You can retire and see if you can-

to give an instruction censuring jurors for not yielding to the majority.[18] It is also error to tell the jury that the case had become "an incubus upon the business of the court," that "they must decide it," and that "it is no credit to a man, merely because he has an opinion, to stubbornly stick to it."[19] So it has been held that, where the judge declares that he must have a verdict in the case, on the jury's stating the third time their inability to agree, and that he has reasons to believe that some of the jury have been tampered with, such remarks will be considered sufficient ground for new trial.[20] Where the evidence is of so conclusive a character that the court may direct a verdict for one of the parties, it is not error for the court to tell one of the jurors that it is his duty to agree with the other jurors in finding a verdict for such party.[21]

§ 201. Statements as to length of time jury will be kept together.

According to some decisions, it is error to tell the jury that the court will not discharge them until they agree upon a verdict, or until the end of the term, unless they sooner agree.[22] Other cases, however, have taken the opposite

not agree upon the amount." This was held error warranting a new trial on a recovery by plaintiff, on the ground that the jury might have understood the court as favoring a finding for plaintiff, and because his remark might have induced some of them to give up opinions which they might have entertained in favor of the defendant.

[18] Stoudt v. Shepherd, 73 Mich. 588; Mahoney v. San Francisco & S. M. Ry. Co., 110 Cal. 471.

[19] Randolph v. Lampkin, 90 Ky. 551.

[20] State v. Ladd, 10 La. Ann. 271.

[21] W. B. Grimes Dry-Goods Co. v. Malcolm (C. C. A.) 58 Fed. 670.

[22] Chesapeake, O. & S. W. R. Co. v. Barlow, 86 Tenn. 537; North Dallas Circuit Ry. Co. v. McCue (Tex. Civ. App.) 35 S. W. 1080; Taylor v. Jones, 2 Head (Tenn.) 565. See, also, Perkins v. State,

view.[23] In one case it was held reversible error to tell the jury that the court would keep them together for four days unless they agreed;[24] and in another, that, if the jury agreed by a certain time, they would be discharged; if not, they would be kept together until they did agree.[25] So it was held error for the trial judge to say to the jury, "If you cannot agree one way or another in as plain a state of facts as this is,—I don't say which way,—it is useless to try causes in courts of justice," and added that "he would not discharge them if they stayed till Saturday night."[26] It is not improper, after telling the jury that common-law juries were kept together until they agreed, and that such rule has been mitigated in the United States, to tell the jury that they would have to remain together and could not separate until they agreed on a verdict. Such statement does not indicate a determination on the part of the court to keep the jury indefinitely until they should agree.[27]

§ 202. Directing jury to compromise.

It is not proper for the court to direct the jury, either expressly or by implication, that they may render a compromise verdict.[28] The law contemplates that they shall,

50 Ala. 154. In this case the court told the jury that he would keep the court open until they reached an agreement, but he further told them that they had nothing to do but to find defendant guilty; that they were bound to do so under the instruction of the court, and that, if they did not, they would be guilty of moral perjury.

[23] State v. Green, 7 La. Ann. 518; Hannon v. Grizzard, 89 N. C. 115. To the same effect, see Osborne v. Wilkes, 108 N. C. 651.

[24] Terre Haute & I. R. Co. v. Jackson, 81 Ind. 19. See, also, Ingersoll v. Town of Lansing, 51 Hun (N. Y.) 101.

[25] State v. Hill, 91 Mo. 423.

[26] Nash v. Morton, 48 N. C. 3.

[27] State v. Saunders, 14 Or. 300.

[28] Richardson v. Coleman, 131 Ind. 210; Goodsell v. Seeley, 46

by their decisions, harmonize their vote, if possible, but not that they shall compromise, divide, or yield for the mere purpose of agreement.[29] Hence it is erroneous to instruct that, "if you can't each get exactly what you want, get the next best thing to it;"[30] or "that the law which requires unanimity on the part of the jury to render a verdict expects and will tolerate reasonable compromise and fair concessions;"[31] or "that many things juries were authorized to compromise, such as amounts; that very seldom twelve men went into the jury room with the same notions as to amounts, and compromises were necessary;"[32] or that "no number of minds can agree upon a multitude of facts, such as this case presents, without some yielding of the judgment of individuals upon the evidence, some deference to the opinion of others,—without what some might call a compromise of different views;"[33] or that "I can't take any such statement as that, gentlemen; you must get together upon a matter of this kind. No juror ought to remain entirely firm in his own conviction, one way or another, until he has made up his mind, beyond all question, that he is necessarily right, and the others are necessarily wrong."[34]

Mich. 626; Boden v. Irwin, 92 Pa. 345; Cranston v. New York Cent. & H. R. R. Co., 103 N. Y. 614; Southern Ins. Co. v. White, 58 Ark. 277; Edens v. Hannibal & St. J. R. Co., 72 Mo. 212; Clem v. State, 42 Ind. 420.

[29] Goodsell v. Seeley, 46 Mich. 623.

[30] Southern Ins. Co. v. White, 58 Ark. 277.

[31] Richardson v. Coleman, 131 Ind. 210.

[32] Edens v. Hannibal & St. J. R. Co., 72 Mo. 212.

[33] Clem v. State, 42 Ind. 420.

[34] Cranston v. New York Cent. & Hudson River R. Co., 103 N. Y. 614.

CHAPTER XXII.

WITHDRAWAL OR MODIFICATION OF INSTRUCTIONS.

§ 203. Right to Withdraw or Modify Instructions.
204. Sufficiency and Effect.
205. At Request of Parties.

§ 203. Right to withdraw or modify instructions.

It is well settled that, where erroneous instructions have been given to the jury, the court may, at any time before verdict, either of its own motion or at the request of parties, withdraw or amend and correct such instructions.[1] The court may recall the jury and withdraw an instruction, though a part of it is proper, if that part of it which is proper has been embraced in an instruction given.[2] The trial court may amend instructions during the progress of arguments of counsel, if abundant time remains for the discussion to the jury of the effect of such amendments.[3]

§ 204. Sufficiency and effect.

Though there may be cases in which the withdrawal of an erroneous instruction and telling the jury to disregard it will not remove the wrong impression on the minds of the jury, it will be presumed that a correction by the trial court, in its charge, of a proposition laid down in a former part of

[1] Greenfield v. People, 85 N. Y. 91; Hail v. State, 8 Ind. 439; Eggler v. People, 56 N. Y. 642; Sittig v. Birkestack, 38 Md. 158; Goldsborough v. Cradie, 28 Md. 477; Smith v. Maxwell, 1 Stew. & P. (Ala.) 221; Renner v. Thornburg, 111 Iowa, 515.

[2] Lautman v. Pepin, 26 Ind. App. 427.

[3] Powers v. Com. (Ky.) 61 S. W. 735.

the charge, has been accepted by the jury as the law of the case.[4] Still, the withdrawal must be made in express terms. Unless the jury are made to understand clearly that the instruction is not to be considered, the error is not obviated.[5] The giving of a fatally erroneous instruction can only be cured by a plain withdrawal of the instruction.[6] Where erroneous instructions are given, the mere giving of other instructions, explanatory or contradictory thereof, does not cure the error.[7] Thus, if the court erroneously instructs the jury, as a "matter of law, that a certain material fact is as contended by plaintiff, * * * a subsequent charge * * * that the burden of proof is on plaintiff to show the said fact to be as claimed by him, and that on the evidence in the case it is a question for the jury whether it is so or not," does not cure the error.[8] Where, in a criminal case, an instruction goes too far in making inferences from facts which the jury may find to have been proven, but the court withdraws the instruction, and limits his statement to the proposition that the supposed facts, if proved, will be sufficient to warrant a finding of guilty, the error in the first instruction is cured;[9] and a verbal withdrawal of a written instruction improperly stating the elements of damage will

[4] Goodsell v. Taylor, 41 Minn. 207.

[5] Chapman v. Erie Ry. Co., 55 N. Y. 579; Leonard v. Collins, 70 N. Y. 90; Driggs v. Phillips, 103 N. Y. 77; New Albany Woolen Mills v. Meyers, 43 Mo. App. 124; Eldridge v. Hawley, 115 Mass. 410; Wenning v. Teeple, 143 Ind. 189; McCrory v. Anderson, 103 Ind. 12; Greenfield v. People, 85 N. Y. 91.

[6] Lower v. Franks, 115 Ind. 334. Generally, as to the sufficiency of the withdrawal of instructions, see New Albany Woolen Mills v. Meyers, 43 Mo. App. 124; Eldridge v. Hawley, 115 Mass. 410.

[7] Jones v. Talbot, 4 Mo. 279. See, also, ante, § 76, "Incorrect Instructions not Cured by Inconsistent Correct Instructions."

[8] Canfield v. Baltimore & O. R. Co., 46 N. Y. Super. Ct. 238.

[9] Com. v. Clifford, 145 Mass. 97. See, also, Sergeant v. Martin (Pa.) 19 Atl. 568.

cure the error therein contained.[10] Where the court gives the jury an instruction which is entirely abstract or irrelevant, it is not error afterwards, on request, to state to the jury the character of the instruction. The error, if any, would be in giving the instruction in the first instance, and not in withdrawing it.[11] A judge, other than the judge who presided at the trial, and who gave the instructions, may recall the jury, and withdraw certain erroneous instructions, if he does so at the request of the judge who gave them, and if he has jurisdiction.[12]

§ 205. At request of parties.

"The court may withdraw a charge at the instance of a party in whose favor it is made." The other party can, if he sees proper, request the charge to be given to the jury at his instance.[13] The theory of the statute requiring the judge to write "Refused" upon instructions refused is that frequently it is important for the jury to understand both what is and what is not the law of the case, and the judge cannot allow a party "to withdraw charges requested after the judge has declared his determination to refuse them. To allow a party to withdraw such refused charges would be to afford an opportunity to experiment with the court, and to deny the adversary party the benefit of having the jury take and consider them on their retirement, against the spirit and policy of the statute."[14] A party to an action

[10] Yoakum v. Mettasch (Tex. Civ. App.) 26 S. W. 129.

[11] Carlock v. Spencer, 7 Ark. 12.

[12] Renner v. Thornburg, 111 Iowa, 515. In this case, however, some stress was laid upon the fact that the manner of withdrawal did not result in any prejudice, and that the objection was not raised in the lower court.

[13] Harrison v. Powell, 24 Ga. 530.

[14] Redus v. State, 82 Ala. 53.

who has presented declarations of law may be allowed to withdraw them, where the other party submits no declarations.[15]

[15] Smith v. Mayfield, 60 Ill. App. 266.

CHAPTER XXIII.

CURING ERROR IN THE ADMISSION OF EVIDENCE BY INSTRUCTIONS.

§ 206. Whether Error can be Thus Cured.
207. Directing Jury not to Consider Evidence Offered and Excluded.
208. Necessity for Objections as a Basis of Request to Withdraw Evidence.
209. Request for Instructions Withdrawing Evidence.
210. What Withdrawal of Evidence Sufficient.

§ 206. Whether error can be thus cured.

The authorities are very conflicting as to whether error in the admission of evidence can be cured by an instruction withdrawing it. Some decisions hold, without qualification, that an instruction withdrawing, or attempting to withdraw, evidence erroneously admitted, does not cure the error in admitting it, on the ground that the impression created in the minds of the jury by the admission of the improper evidence is not easily removed or obliterated, and the court can never be sure as to whether the jury have been entirely successful in shutting out from their mental vision the objectionable testimony,[1] and in one state this is the rule in criminal cases.[2] The rule thus stated is not in accord with the weight of authority, which holds that the erroneous admis-

[1] City of Chicago v. Wright & Lawther Oil & Lead Mfg. Co., 14 Ill. App. 119; Irvine v. Cook, 15 Johns. (N. Y.) 239; Penfield v. Carpender, 13 Johns. (N. Y.) 350; Arthur v. Griswold, 55 N. Y. 400; State v. Mix, 15 Mo. 153.

[2] State v. Mix, 15 Mo. 153; State v. Wolff, 15 Mo. 168; State v. Marshall, 36 Mo. 400; State v. Kuehner, 93 Mo. 193.

sion of evidence may be cured by instructions withdrawing it;[3] and the application of the rule as thus stated does not depend upon the motives which may have influenced the withdrawal of the incompetent evidence. The only question is whether the court has unqualifiedly withdrawn the evidence. If so, the jury will be presumed to have followed the instruction, though the court stated that the evidence was withdrawn to avoid grounds of exception, thereby intimating that the evidence withdrawn was not necessarily incompetent.[4] "While it is error for the court to admit evidence of the unlawful conversion of property as a set-off, in an action of *assumpsit*, yet, if it instructs the jury to reject the set-off, and they find accordingly, the error is cured."[5] In a suit to recover the value of logs, some of which had been manufactured into lumber, where evidence was received of the value of the lumber and also of the logs, as to which latter value there was no serious dispute, and the jury were instructed that it could only allow plaintiff the value of the logs, it was held that the admission of the testimony as to the value of

[3] Zehner v. Kepler, 16 Ind. 290; Indianapolis, P. & C. Ry. Co. v. Bush, 101 Ind. 582; Conklin v. Parson, 2 Pin. (Wis.) 264; Beck v. Cole, 16 Wis. 95; Griffith v. Hanks, 91 Mo. 109; Durant v. Lexington Coal Min. Co., 97 Mo. 62; Davis v. Peveler, 65 Mo. 189; Stephens v. Hannibal & St. J. R. Co., 96 Mo. 207; Bridgers v. Dill, 97 N. C. 222; King v. Rea, 13 Colo. 69; Busch v. Fisher, 89 Mich. 192; Tolbert v. Burke, 89 Mich. 132; Deeman v. Black, 49 Mich. 598; Mitts v. McMorran, 85 Mich. 94; Blaisdell v. Scally, 84 Mich. 149; Puget Sound Iron Co. v. Worthington, 2 Wash. 472; Com. v. Clements, 6 Bin. (Pa.) 208; State v. Towler, 13 R. I. 665; Tullidge v. Wade, 3 Wils. 18; Hamblett v. Hamblett, 6 N. H. 333; Smith v. Whitman, 6 Allen (Mass.) 562; Hawes v. Gustin, 2 Allen (Mass.) 402; Mimms v. State, 16 Ohio St. 221; Jones v. Reus, 5 Tex. Civ. App. 628; Links v. State, 13 Lea (Tenn.) 701; McKnight v. Dunlop, 5 N. Y. 537; People v. Parish, 4 Denio (N. Y.) 153; Specht v. Howard, 16 Wall. (U. S.) 564; Pennsylvania Co. v. Roy, 102 U. S. 451.

[4] State v. Towler, 13 R. I. 665.

[5] Conklin v. Parsons, 2 Pin. (Wis.) 264.

the lumber was not prejudicial.[6] So it has been held that, although the wife cannot prove nonaccess of the husband, and the court causes a question to be asked of her, from the answer to which nonaccess may be inferred, the verdict cannot be disturbed because of the question, where the jury are instructed that they must not consider anything the wife might say as evidence of nonaccess.[7]

Of course, if it appears that, notwithstanding an instruction to disregard evidence improperly admitted, such evidence has affected the verdict, the error in the admission of the evidence is not cured by the instruction, for it is obvious that the instruction has proven ineffective;[8] but there is great conflict in the cases as to whether the error will be presumed to be cured by the instruction, or whether it must affirmatively appear that the instruction was effective, and that no prejudice resulted from the erroneous admission of the evidence.[9] According to some decisions, an instruction withdrawing erroneous evidence will be held to cure the error of admitting it, unless it is apparent that prejudice resulted notwithstanding such instruction;[10] that it is only when it is apparent that immaterial or irrelevant evidence has affected the verdict that evidence excluded or limited will afford a ground for reversal.[11] According to other decisions, the remedy is ineffectual unless it affirmatively appears that no

[6] Busch v. Fisher, 89 Mich. 192.

[7] Com. v. Shepherd, 6 Bin. (Pa.) 283.

[8] Castleman v. Griffin, 13 Wis. 602; Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99; Sinker v. Diggins, 76 Mich. 557; Sterling v. Sterling, 41 Vt. 80. See, also, Boyd v. Readsboro, reported in State v. Meader, 54 Vt. 654.

[9] See, generally, upon this subject, post, c. 32, "Appellate Review of Instructions."

[10] Deerfield v. Northwood, 10 N. H. 269; Jones v. Reus, 5 Tex. Civ. App. 628; Missouri Pac. Ry. Co. v. Mitchell, 75 Tex. 81.

[11] Jones v. Reus, 5 Tex. Civ. App. 628.

prejudice resulted from the admission of such evidence,[12] and that, if it is probable that such evidence has influenced the verdict, the judgment must be reversed, notwithstanding the jury were instructed not to consider it.[13] So, according to some decisions, the presumption is that the jury based their verdict upon legal evidence only;[14] that the testimony, after being withdrawn, is no longer before the jury, but it is out of the case; that, where the jury are instructed to disregard the evidence, it must be presumed that they followed the instructions;[15] that the law intends that jurors pay attention to the charge of the court;[16] that, unless it can be seen that a party has been injured by the admission of such illegal evidence, a reversal should not be had for that cause.[17]

§ 207. Directing jury not to consider evidence offered and excluded.

Where the court refuses to admit offered testimony, it may properly warn the jury against the consideration of such evidence;[18] but it is certainly under no obligation to do so, in the absence of a request therefor.[19] According to some decisions, the court may properly refuse an instruction to disregard excluded evidence, and to the writer this view seems correct. A jury of even less than ordinary intelligence would hardly consider excluded evidence in making up their verdict.[20]

[12] State v. Meader, 54 Vt. 131; Coleman v. People, 58 N. Y. 555. See, also, Wood v. Willard, 36 Vt. 82; Hodge v. Town of Bennington, 43 Vt. 450.

[13] Erhen v. Lorillard, 19 N. Y. 299.

[14] Pennsylvania Co. v. Roy, 102 U. S. 451.

[15] State v. Meller, 13 R. I. 669.

[16] Com. v. Shepherd, 6 Bln. (Pa.) 283.

[17] Links v. State, 13 Lea (Tenn.) 708.

[18] McCoy v. Bateman, 8 Nev. 126.

[19] Russell v. Nall, 79 Tex. 664.

[20] Pfaffenback v. Lake Shore & M. S. Ry. Co., 142 Ind. 246; Grand Rapids & I. R. Co. v. Horn, 41 Ind. 479.

§ 208. Necessity for objections as a basis of request to withdraw evidence.

According to what is believed to be the weight of authority, evidence admitted without objection cannot be nullified by requesting the court to instruct the jury to disregard such evidence.[21] The view taken by the majority of decisions is that the objection cannot regularly or properly be raised in this manner, nor at this stage of the proceedings,[22] and the reason on which this view is based is that, if the party had an opportunity to interpose an objection, he cannot take the chances that the testimony will be favorable to him, and, when it turns out otherwise, raise his objection;[23] that it would be unjust for the court to thus exclude evidence at a stage of the trial when it is too late for the party to adduce other evidence which might warrant its admission.[24] There are, however, some decisions which apparently take the opposite view, and hold that "an omission to object to testimony is not a concession that it is competent," and that, if testimony is incompetent, the party against whom it is received is entitled to an instruction that it should not be considered,[25] and that a refusal to give an instruction of this nature is reversible error.[26] So, in another case, it has been held that, where incompetent evidence has been admitted either with or without objection, it is not necessarily to be

[21] State v. Pratt, 20 Iowa, 267; Becker v. Becker, 45 Iowa, 239; Fish v. Chicago, R. I. & P. Ry. Co., 81 Iowa, 280; Edge v. Keith, 13 Smedes & M. (Miss.) 295; Ann Berta Lodge v. Leverton, 42 Tex. 18; Missouri Pac. R. Co. v. Mitchell, 75 Tex. 77; Maxwell v. Hannibal & St. J. R. Co., 85 Mo. 106; Harrison v. Young, 9 Ga. 359.

[22] State v. Pratt, 20 Iowa, 269.

[23] Maxwell v. Hannibal & St. J. Ry. Co., 85 Mo. 106.

[24] Ann Berta Lodge v. Leverton, 42 Tex. 18.

[25] Hamilton v. New York Cent. R. Co., 51 N. Y. 101.

[26] Sperry v. Helman, 20 N. Y. Civ. Proc. R. 226; Bank of United States v. Johnson, 3 Cranch, C. C. 228, Fed. Cas. No. 919.

stricken out on motion, but the remedy of the party is to ask for instructions to the jury to disregard it.[27] It has also been held that, where a certain defense is fairly covered by the answer, although so indefinite that greater certainty might have been required, when the evidence to establish such defense has been admitted without objection, it is not proper to direct the jury to disregard such evidence.[28] So, in one state it has been held in criminal cases that, if incompetent evidence goes to the jury without objection at the time by defendant, a request that the court instruct the jury that such evidence be disregarded should be granted.[29] If evidence to which no objection is apparent at the time of its admission is subsequently shown to be incompetent, the rule that an objection must be taken at the time does not apply.[30]

§ 209. Request for instructions withdrawing evidence.

Where improper evidence has been admitted, the court may, of its own motion, instruct the jury to disregard it,[31] and it will be error to refuse a request for an instruction to disregard such evidence. The defendant has the right to require a court to instruct that, in the making up of their verdict, they must disregard such evidence, provided objections were made to the admission of the evidence when offered in jurisdictions where such objections are necessary.[32]

[27] Marks v. King, 64 N. Y. 628.

[28] Liverpool & L. Ins. Co. v. Gunther, 116 U. S. 114.

[29] State v. Owens, 79 Mo. 619; State v. Cox, 65 Mo. 29.

[30] State v. Lavin, 80 Iowa, 559.

[31] Utter v. Vance, 7 Blackf. (Ind.) 514. See, also, Rankin v. Thomas, 50 N. C. 435; Haney v. Marshall, 9 Md. 194.

[32] State v. Brown, 28 La. Ann. 279; Greenup v. Stoker, 2 Gilm. (Ill.) 688; State v. Owens, 79 Mo. 619; State v. Cox, 65 Mo. 29. Compare George v. Norris, 23 Ark. 130. In this case it was said: "The first and fifth instructions asked the court to declare that evidence which it had admitted against the objection of the plaintiff

It has been held, however, that where evidence which is material and competent at the time it is received becomes subsequently incompetent and immaterial, and no request is made to the court to instruct the jury to disregard it, a failure to give such an instruction affords no ground for reversal.[33] Where evidence has been properly received, but its effect has been destroyed by other evidence, a party has not an absolute right to have the evidence first received stricken out. He should request a charge of the court that such evidence be not considered.[34] If, notwithstanding the fact that the court has excluded evidence at the time it was offered on objection raised, the party objecting is apprehensive that the offered testimony may have affected the jury, he should request the court to instruct the jury to disregard such testimony, and, failing to so request, cannot assign as error the failure of the court to give the instruction.[35] Where depositions are introduced in evidence, the proper practice is to point out the objectionable parts, and request an instruction that the jury disregard such parts.[36]

§ 210. What withdrawal of evidence sufficient.

In case illegal evidence has been admitted, the better practice is to withdraw it from the consideration of the jury in

was not legal, and could not be considered by the jury. The court did not err in refusing the instructions,—its error was in allowing parol evidence to go to the jury, to construe the bill of sale as a mortgage; but when the evidence was before the jury, the plaintiff should have rested his objection to it on his exception to its introduction,—should not have asked the court to pronounce that not to be law which the court in a former period of the case ruled to be the law. The instructions were properly refused."

[33] Aitkin's Heirs v. Young, 12 Pa. 15.

[34] Gawtry v. Doane, 51 N. Y. 84.

[35] Russell v. Nall, 79 Tex. 664.

[36] Buster's Ex'r v. Wallace, 4 Hen. & M. (Va.) 82.

express terms.[37] As was said in one decision: "It is difficult to tell what effect evidence once admitted may have upon the triors of fact; but the impression made by hearing what the court has declared to be competent testimony can hardly be removed by anything short of a flat direction that it must be disregarded."[38] It is not sufficient to withdraw the evidence by implication merely.[39] If evidence is improperly admitted, but afterwards withdrawn by express direction, it is held that this will be sufficient without again directing the jury not to consider it in the general charge.[40] So, if, after the admission of illegal testimony, the judge, of his own motion, excludes it, and informs the jury that the testimony has nothing to do with the case, the failure to again inform the jury that it was excluded on a subsequent motion made to strike out the testimony is immaterial.[41] It has also been held that, where "evidence properly to be considered under the prayer for exemplary damages was introduced without objection, and afterwards the court charged the jury, excluding from their consideration the question of exemplary damages, the failure of the court, of its own accord, to instruct the jury not to consider the evidence thus admitted, is not ground for reversal."[42]

[37] Pavey v. Burch, 3 Mo. 314; Castleman v. Griffin, 13 Wis. 602; Griffith v. Hanks, 91 Mo. 109; Durant v. Lexington Coal Min. Co., 97 Mo. 62; Henkle v. McClure, 32 Ohio St. 202; Scripps v. Reilly, 35 Mich. 393; Keil v. Chartiers Val. Gas Co., 131 Pa. 466. See, also, Wright v. Gillespie, 43 Mo. App. 244.

[38] Henkle v. McClure, 32 Ohio St. 202.

[39] Pavey v. Birch, 3 Mo. 314.

[40] Brown v. Matthews, 79 Ga. 1; Martin v. McCray, 171 Pa. 575.

[41] Rollins v. O'Farrel, 77 Tex. 90.

[42] Brown v. Bacon, 63 Tex. 595.

CHAPTER XXIV.

INSTRUCTIONS PERMITTING JURORS TO USE PERSONAL KNOWLEDGE AS EVIDENCE.

§ 211. In General.
212. View by Jury of Locus in Quo.

§ 211. In general.

Although the rule was otherwise at early common law,[1] it is now well settled that a jury must base their verdict upon the evidence delivered to them in open court, and they may not take into consideration facts known [2] to them personally, but outside of the evidence produced before them in court. If a party would avail himself of facts known to a juror, he must have him sworn and examined as other witnesses, so that his evidence, like that of other witnesses, may be first scrutinized as to its competency and bearing upon the issue, and for the further reason that the court and parties may know upon what evidence the verdict was rendered.[3] Accordingly, it is error to give instructions directing or permitting jurors to apply their own personal knowledge of the facts,[4] or of the character of the witnesses, in determining

[1] 3 Bl. Comm. 374; 5 Bacon, Abr. 351; Orcutt v. Nelson, 1 Gray (Mass.) 536.

[2] Close v. Samm, 27 Iowa, 503, 507.

[3] Orcutt v. Nelson, 1 Gray (Mass.) 536; 1 Starkie, Ev. 449; Chattanooga, R. & C. R. Co. v. Owen, 90 Ga. 265. See, also, Patterson v. City of Boston, 20 Pick. (Mass.) 166; Murdock v. Sumner, 22 Pick. (Mass.) 156; Wharton v. State, 45 Tex. 2.

[4] Gibson v. Carreker, 91 Ga. 617; Douglass v. Trask, 77 Me. 35; Junction City v. Blades, 1 Kan. App. 85; Burrows v. Delta Transp. Co., 106 Mich. 582; Chattanooga, R. & C. R. Co. v. Owen, 90 Ga. 265.

their verdict.[5] Thus, it is error "to instruct the jury: 'You may even consider their [the witnesses'] character for truth and veracity, if it be known to you.' "[6] So, in an action for breach of a bond to convey real estate, an instruction "that, in ascertaining the value of the lands at the time of the breach of the bonds, they [the jury] might consider, not only the evidence, but their own knowledge, as to the value of the land," is erroneous,[7] as is also an instruction that, in estimating damages, they are to use their own judgment, as well as the judgment of the witnesses;[8] but an instruction permitting jurors, in weighing the evidence, to apply the knowledge and experience which they possess as intelligent men, does not violate the rule, since it does not permit them to use any peculiar or personal knowledge they may possess.[9] The court may instruct "that a juror can neither consider any fact which comes within his personal

[5] Pettyjohn v. Liebscher, 92 Ga. 149; Chattanooga, R. & C. R. Co. v. Owen, 90 Ga. 265, overruling Head v. Bridges, 67 Ga. 236; Anderson v. Tribble, 66 Ga. 584; Howard v. State, 73 Ga. 84, criticising dictum in Rogers v. King, 12 Ga. 229; Patterson v. City of Boston, 20 Pick. (Mass.) 166. Compare State v. Jacob, 30 S. C. 131, where it was held not improper to instruct that the jury are presumed to know the character of the witnesses, having been drawn from the vicinage for that reason.

[6] Pettyjohn v. Liebscher, 92 Ga. 149.

[7] Gibson v. Carreker, 91 Ga. 617.

[8] Brakken v. Minneapolis & St. L. Ry. Co., 29 Minn. 41, 43. See, also, Heady v. Vevay, Mt. S. & V. Turnpike Co., 52 Ind. 117.

[9] Jenney Electric Co. v. Branham, 145 Ind. 314; Sanford v. Gates, 38 Kan. 405. See, also, Morrison v. State (Fla.) 28 So. 97. Where a broken plank, which caused the injury, was introduced in evidence, an instruction that the jury were not restricted to the opinions of expert witnesses, but had the right to use their own intelligence, and the knowledge and experience of lumber which they brought with them into the jury box, in connection with their inspection of the exhibit, was held not erroneous. Lafayette Bridge Co. v. Olsen (C. C. A.) 108 Fed. 335.

knowledge, nor can he communicate it to the other jurors," where it appears that one of the jurors knew some fact material to the defense.[10] When a juror asks whether he may consider his own personal knowledge of certain facts, the court should instruct that the case must be tried upon the evidence given at the trial, and not upon information that any one or more of their number may have outside of the record.[11] So, if a juror ask whether the jury can "judge a witness just by what he says on the stand, and not by what they know of him privately," it is error for the court to ignore such question, and instruct the jury as to the rules governing juries in weighing testimony. In such case it is not authorized to do more than answer the question, and inform them that they should decide the case upon the evidence adduced at the trial.[12]

§ 212. View by jury of locus in quo.

In case of view by the jury, there is some conflict of opinion as to the right of the jury to use, as evidence in the case, what they learned by personal inspection. The probable weight of authority is to the effect that the view is not allowed for the purpose of furnishing evidence upon which a verdict is to be found, but for the purpose of enabling the jury better to understand and apply the evidence which is given in court,[13] and that instructions authorizing the jury to treat their own personal observations as evidence in the case are erroneous.[14] "An instruction to a jury sent out to

[10] State v. Jones, 29 S. C. 201.

[11] Citizens' St. R. Co. v. Burke, 98 Tenn. 650.

[12] Wharton v. State, 45 Tex. 2.

[13] Close v. Samm, 27 Iowa, 503; Schultz v. Bower, 57 Minn. 493; Chute v. State, 19 Minn. 271 (Gil. 230); Brakken v. Minneapolis & St. L. Ry. Co., 29 Minn. 43; Heady v. Vevay, Mt. S. & V. Turnpike Co., 52 Ind. 118; Stanford v. Felt, 71 Cal. 251.

[14] Wright v. Carpenter, 49 Cal. 609; Brakken v. Minneapolis & St. L. Ry. Co., 29 Minn. 43.

view land in controversy, 'that they examine the land, examine the quality of the soil, and the growth upon it,' and that 'you avoid forming an opinion as to its quality until you have finally heard all the evidence,' does not authorize them to take into consideration the result of their own examination, as independent evidence."[15] It has been urged, as a reason in support of this view, that, if the rule were otherwise, the jury might base its verdict wholly on the knowledge thus acquired, regardless of an overwhelming weight of evidence to the contrary, and the losing party would be without a remedy by motion for new trial; that it would be impossible to determine how much weight was due to such knowledge, as contrasted with the opposing evidence, or, treating such knowledge as evidence, whether it was sufficient to raise a substantial conflict in the evidence; and that "the cause would be determined, not upon evidence given in court, to be discussed by counsel and considered by the court in deciding a motion for a new trial, but upon the opinions of the jurors, founded on a personal inspection, the value or the accuracy of which there would be no method of ascertaining."[16] Judge Thompson pronounces this view absurd, and says bluntly that there is no sense in it.[17] And there are decisions in support of his view that the jury may be instructed upon the theory that what they have learned from the view is evidence in the case.[18]

[15] Wright v. Carpenter, 50 Cal. 556.

[16] Wright v. Carpenter, 49 Cal. 609.

[17] Thomp. Trials, § 893.

[18] Toledo, A. A. & G. T. Ry. Co. v. Dunlap, 47 Mich. 466; City of Topeka v. Martineau, 42 Kan. 390; Washburn v. Milwaukee & L. W. R. Co., 59 Wis. 364.

CHAPTER XXV.

CAUTIONARY INSTRUCTIONS ON THE CREDIBILITY OF WITNESSES AND THE PROBATIVE FORCE OF EVIDENCE.

I. General Considerations.

§ 213. Right and Duty to Give Cautionary Instructions.
214. Credibility of Witnesses and Effect of Evidence in General.

II. Testimony of Accomplices.

§ 215. Rules of Evidence Governing this Class of Testimony.
216. Instructing Jury that They may Convict on Accomplice Testimony.
217. Instructing Jury to Receive with Caution.
218. Advising Jury to Acquit Unless Corroborated.
219. Binding Instructions to Acquit Unless Corroborated.
220. Explaining Nature of Corroboration Required.
221. Instructing as to Who are Accomplices.
222. Instructions Giving Undue Weight to Accomplice Testimony.
223. Evidence on Which to Base Instructions Necessary.
224. Same—Evidence Held Sufficient to Warrant Instructions.

III. Testimony of Parties and Interested Witnesses.

§ 225. What Instructions Proper.
226. What Instructions Improper.
227. Instructing that Jury "may" Consider Interest of Party or Witness.
228. Same—Rule in Kentucky, Mississippi, and Texas.
229. Instructing that Jury "must" or "should" Consider Interest of Party or Witness.
230. Same—Rule in Kentucky, Mississippi, Texas, and Indiana.

IV. Admissions and Confessions in Criminal Cases.

§ 231. General Considerations Governing Instructions on this Kind of Evidence.
232. What Instructions may Properly be Given.
233. Same—Instructions to Receive and Weigh with Caution.
234. Same—Instructions Giving Undue Weight to Evidence.

V. Admissions in Civil Cases.

§ 235. Instructions to Receive and Weigh with Caution.
236. Instructions Giving Undue Weight to this Class of Evidence.
237. Instructions as to Admissions of Record.

VI. Testimony of Expert Witnesses.

§ 238. Rules Governing this Class of Evidence.
239. Instructing that Expert Testimony is to be Considered the Same as That of Other Witnesses.
240. Instructions Tending to Discredit Expert Testimony.
241. Instructions Directing Jury to Attach Great Weight to Expert Testimony.
242. Instructing Jury to Take into Consideration Witness' Means of Knowledge.
243. Instructions Contrasting Testimony of Experts.
244. Directing Jury to Consider, in Connection with Other Evidence.
245. Instructions Giving Undue Prominence to Skill and Experience of Experts.
246. Instructions with Regard to Hypothetical Questions.
247. Miscellaneous Instructions.
248. Necessity of Requesting Instructions.

VII. Testimony of Impeached Witnesses.

§ 249. Propriety and Necessity of Instructions on this Subject.
250. What Instructions Proper.
251. What Instructions Erroneous.

VIII. Applications of the Maxim, "Falsus in Uno, Falsus in Omnibus."

§ 252. Propriety or Necessity of Instructing as to this Maxim.
253. Instructing that Jury "may" or "should" Disregard Evidence.
254. Omitting Element of Interest in Charging.
255. Omitting Element of Materiality of Testimony in Charging.
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IX. Relative Force of Positive and Negative Testimony.

§ 257. In Jurisdictions Where Charge on Weight of Evidence is Improper.
258. In Jurisdictions Where Charge on Weight of Evidence is Permitted.
259. What Instructions Proper.

X. Manner of Testifying, Bias, Etc.

§ 260. In General.

XI. Unsworn Statement of Defendant in Criminal Cases.

§ 261. In General.

XII. Identity of Defendant

§ 262. In General.

XIII. Evidence of Character.

§ 263. Rules Governing this Class of Evidence.
264. Instructions Limiting Effect of Evidence to Doubtful Cases Improper.
265. Instructing that Evidence of Good Character may Create Reasonable Doubt.
266. Instructions as to Effect of Evidence of Good Character in Cases of Great and Atrocious Criminality.
267. Instructing that Evidence of Good Character Cannot Avail Against Clear Proof of Guilt.
268. Other Instructions as to Character.
269. Necessity of Instructiona on Character.

XIV. Conflicting Evidence.

§ 270. In General.

XV. Comparison of Number of Witnesses.

§ 271. What Instructions Proper.
272. What Instructions Improper.

I. General Considerations.

§ 213. Right and duty to give cautionary instructions.

As has already been seen, it is exclusively within the province of the jury to determine questions of fact, and, as necessarily involved therein, the credibility of witnesses, and the weight and effect of testimony.[1] But subject to certain limitations, which will be noticed as the discussion of the sub-

[1] See ante, c. 2, "Province of Court and Jury."

ject proceeds, the court may instruct the jury as to the considerations by which they may or should be controlled in weighing the evidence and finding the facts. The most important limitation upon this right, and the one most frequently violated, is that the court must not invade the province of the jury.[2] The giving of proper cautionary instructions is largely within the discretion of the court;[3] and, though great care should be exercised as to the time, manner, and form of giving such instructions, lest they impress the jury that the court has convictions on one side or the other, the discretion of the court will not be limited unless it has been grossly abused.[4] Where a question submitted to a jury on a special finding is so clear and unambiguous as not to require, for the protection of either party, any qualifying charge, the failure to caution the jury in the line suggested by request of a party is not prejudicial, although such caution, if given, would not have been improper.[5] The right of parties to have cautionary instructions given, upon request, under particular circumstances, will be considered in connection with the various circumstances which call for cautionary instructions.

§ 214. Credibility of witnesses and effect of evidence in general.

The court may give the jury cautionary instructions containing general advice as to the credibility of witnesses and the weight of evidence, but exceedingly great care is necessary to avoid invading the province of the jury in this respect. While courts may set aside verdicts as against the weight of evidence, it is nevertheless proper to instruct the

[2] See ante, c. 3, "Invading Province of Jury."
[3] Dinsmore v. State (Neb.) 85 N. W. 445.
[4] Rayburn v. State (Ark.) 63 S. W. 356.
[5] Lyle v. McCormick Harvesting Mach. Co., 108 Wis. 81.

jury that they are the sole judges of the credibility of witnesses and the weight of the evidence. Such an instruction is calculated to impress jurors with a sense of their responsibility.[6] Such an instruction will go far to prevent the other instructions from invading the province of the jury, and it is almost always given.[7] Where the evidence consists partly of depositions and partly of oral testimony, an instruction that the jury are the sole judges of the credibility of the several 'witnesses that had appeared before them' " is erroneous, as the jury might infer that the credibility of the depositions was not open to question.[8] So, an instruction that the jury are the sole judges of the "weight and importance" of the testimony of the various witnesses is erroneous, as it makes the jury the judges of the materiality of the testimony.[9] The court may instruct the jury what circumstances they may consider as affecting the "credibility of witnesses,"[10] but not that

[6] State v. Kelly, 73 Mo. 608; McClurkan v. Byers, 74 Pa. 405; Dibble v. Northern Assur. Co., 70 Mich. 1; Chicago & A. R. Co. v. Fisher, 141 Ill. 614; People v. Chadwick, 7 Utah, 134; Lampe v. Kennedy, 60 Wis. 110; Clarey v. State (Neb.) 85 N. W. 897; State v. Adair, 160 Mo. 391; Com. v. Bubuis, 197 Pa. 542. An instruction that the jury are the exclusive judges of the credibility, of the weight of the evidence, and all the facts proved," is not open to the objection that it omits to tell "the jury that they are the judges of the credibility of the 'witnesses.' " Binyon v. State (Tex. Cr. App.) 56 S. W. 339.

[7] See Stewart v. Anderson, 111 Iowa, 229.

[8] Hansberger v. Sedalia Electric Ry., Light & Power Co., 82 Mo. App. 566.

[9] Hansberger v. Sedalia Electric Ry., Light & Power Co., 82 Mo. App. 566.

[10] Wabash R. Co. v. Biddle (Ind. App.) 59 N. E. 284. The following instruction is not erroneous: "You have a right to consider the circumstances and condition of any witness as proven to have been at the time of the incidents about which said witness testifies. You may consider such condition of any witness as to soberness, the surroundings of such witness, with reference to determining whether or not such witness was in a condition to see and understand what was occurring." Wheeler v. State, 112 Ga. 43.

they must or should consider such circumstances, as this would invade the province of the jury,[11] although, in one case at least, such an instruction was held not to be reversible error.[12] So it is proper to refuse to instruct that the testimony of a certain witness should be considered with great distrust, since the weight to be given thereto is a question for the jury.[13] The reputation of a witness is presumed to be good until impeached, but there is no presumption that his testimony is true, and it is reversible error to so instruct.[14] So it is proper to instruct that the jury are not bound to believe a thing to be a fact merely because testified to be so by a witness, if they believe from the evidence that the witness was mistaken or had sworn falsely.[15] An instruction that certain evidence is to be treated "with like effect" as certain other evidence is erroneous, since it is the province of the jury to determine, in view of all the circumstances, how much credence they will give to any particular evidence.[16] So it is for the jury to say "what part of the evidence of a witness should be given most weight, * * * and it is error for the trial judge to charge that one part of the testimony is to be given more weight than another."[17]

II. Testimony of Accomplices.

§ 215. Rules of evidence governing this class of testimony.

In order to understand what instructions may properly

[11] Wabash R. Co. v. Biddle (Ind. App.) 59 N. E. 284.

[12] State v. Fisher, 162 Mo. 169.

[13] Tarbell v. Forbes, 177 Mass. 238.

[14] State v. Taylor, 57 S. C. 483.

[15] Goss Printing Press Co. v. Lempke, 90 Ill. App. 427, affirmed 191 Ill. 199.

[16] Connecticut Mut. Life Ins. Co. v. Hillmon (C. C. A.) 107 Fed. 834.

[17] Owen v. Palmour, 111 Ga. 885.

be given on the subject of accomplice testimony, it is necessary to know the rules of law governing this kind of evidence. In all jurisdictions except where it is otherwise provided by statute,[18] a conviction may be had on the uncorroborated testimony of an accomplice.[19] While "the source of this evidence is so corrupt that it is always looked upon with suspicion and jealousy, and is deemed unsafe to rely upon without confirmation,"[20] it is not a rule of law that accomplices must be corroborated in order to render a conviction valid.[21] The degree of credit to be given an accomplice is a matter exclusively within the province of the jury. They may, if they see fit, act upon an accomplice's testimony, even in a capital case, without any confirmation of his statements.[22] "The evidence of an accomplice is un-

[18] In a number of states, by virtue of statutory provisions, a conviction cannot be had upon the testimony of an accomplice alone. It must be supported by corroborating evidence.

[19] Rex v. Atwood, 1 Leach, 464; Rex v. Durham, 1 Leach, 478; Flanagin v. State, 25 Ark. 96; State v. Hardin, 19 N. C. 407; State v. Barber, 113 N. C. 711; Com. v. Bosworth, 22 Pick. (Mass.) 398; Rex v. Wilkes, 7 Car. & P. 272; United States v. Neverson, 1 Mackey (D. C.) 154; Collins v. People, 98 Ill. 589; Earll v. People, 73 Ill. 333; Friedberg v. People, 102 Ill. 160; State v. Mason, 38 La. Ann. 476; State v. Prudhomme, 25 La. Ann. 525; Olive v. State, 11 Neb. 1; Tuberson v. State, 26 Fla. 472; State v. Litchfield, 58 Me. 267; State v. Hyer, 39 N. J. Law, 603; Linsday v. People, 63 N. Y. 143; Brown v. Com., 2 Leigh (Va.) 769; State v. Brown, 3 Strob. (S. C.) 508; People v. Costello, 1 Denio (N. Y.) 83; Cox v. Com., 125 Pa. 94; Schulz v. Schulz (Ill.) 30 N. E. 317; Steinham v. United States, 2 Paine, 68, Fed. Cas. No. 13,355; Ulmer v. State, 14 Ind. 52; State v. Dawson, 124 Mo. 418; State v. Stebbins, 29 Conn. 463; State v. Betsall, 11 W. Va. 704; Fitzcox v. State, 52 Miss. 923; Ingalls v. State, 48 Wis. 647. Contra, Shelly v. State, 95 Tenn. 152.

[20] Com. v. Bosworth, 22 Pick. (Mass.) 399.

[21] Reg. v. Stubbs, 33 Eng. Law & Eq. 551.

[22] United States v. Neverson, 1 Mackey (D. C.) 154.

doubtedly competent, and may be acted on by the jury" as a sufficient basis for a conviction, although entirely unsupported.[23] However this may be, such evidence is considered very unsafe upon which to base a conviction, and it is usual for the court to give certain cautionary instructions in regard to it.[24] Yet the court cannot go beyond the usual cautions, "and, if the jury really yield faith to it [the testimony of an accomplice], it is not only legal, but obligatory on their consciences, to found their verdict upon it."[25]

§ 216. Instructing jury that they may convict on accomplice testimony.

The jury may be instructed that an accomplice is a competent witness,[26] and that they may legally convict on his testimony, unless there is a statute providing that there can be no conviction on the uncorroborated testimony of an accomplice;[27] but where this instruction is given, it is always in conjunction with other instructions, warning the jury of the suspicious nature and unreliability of such testimony.[28] An instruction that an accomplice is a competent witness, and if the jury, weighing the probabilities of his evidence, think him worthy of belief, a conviction, supported by such

[23] State v. Hardin, 19 N. C. 407; United States v. Sykes, 58 Fed. 1000.

[24] Com. v. Bosworth, 22 Pick. (Mass.) 398; State v. Barber, 113 N. C. 711; State v. Hardin, 19 N. C. 407.

[25] State v. Hardin, 19 N. C. 407.

[26] Wisdom v. People, 11 Colo. 170.

[27] Wisdom v. People, 11 Colo. 170; State v. Barber, 113 N. C. 711; Olive v. State, 11 Neb. 1; State v. Hyer, 39 N. J. Law, 603; Rex v. Wilkes, 7 Car. & P. 272; Com. v. Price, 10 Gray (Mass.) 472, 71 Am. Dec. 668; Com. v. Brooks, 9 Gray (Mass.) 299; United States v. Babcock, 3 Dill. 619, Fed. Cas. No. 14,487; Reg. v. Stubbs, 33 Eng. Law & Eq. 551; Collins v. People, 98 Ill. 589; Earll v. People, 73 Ill. 333; State v. Dawson, 124 Mo. 418; State v. Crab, 121 Mo. 554.

[28] See ante, § 217, "Instructing Jury to Receive Accomplice Testimony with Caution," and ante, § 218, "Advising Jury to Acquit Unless Corroborated."

testimony alone, is legal, is correct, the jury being further instructed that evidence from an accomplice should be received with great caution.[29] So, an instruction that "the fact that a witness was an accomplice may affect his credibility, but not his competency,—that is, he is a legal witness, and you must determine what credit you think his testimony is entitled to, whether corroborated or uncorroborated,"—has been approved.[30] So, an instruction that, "while it is a rule of law that a person may be convicted upon the uncorroborated testimony of an accomplice, still a jury should always act upon such testimony with great care and caution, and subject it to careful examination in the light of all other evidence in the case; and the jury ought not to convict upon such testimony alone, unless, after a careful examination of such testimony, you are satisfied beyond all reasonable doubt of its truth," is not erroneous in a jurisdiction which does not absolutely require, in all cases, that the testimony of an accomplice shall be corroborated. All that is necessary is to caution the jury to carefully examine the testimony of the accomplice before accepting it.[31] It is not proper to charge "that the only chance to bring offenders to justice, and to protect the lives and property of honest citizens, is often that which is offered by allowing one offender to turn state's evidence and to escape, that another may be convicted and punished." The policy of using the evidence of an accomplice should not be discussed in the instructions to the jury.[32]

§ 217. Instructing jury to receive with caution.

Except in one state,[33] it seems to be the well-settled and

[29] Wisdom v. People, 11 Colo. 170.

[30] State v. Banks, 40 La. Ann. 736.

[31] State v. Coates, 22 Wash. 601, 61 Pac. 726.

[32] Long v. State, 23 Neb. 33.

[33] In West Virginia it seems that no caution as to accomplice tes-

almost universal practice for the court to instruct that the testimony of accomplices should be viewed by the jury with great care and caution.[34] It has been held, however, that, in the absence of a request, failure to give such an instruction cannot be assigned as error.[35] There is some diversity of opinion as to whether a refusal to give an instruction of this nature, when requested, will be ground for reversal. There are rulings both ways on this point.[36] So it has been held error to refuse to charge "that the evidence of an accomplice is to be viewed * * * with caution and distrust," where a statute provides that the evidence of an accomplice is to be viewed with distrust, and that an instruction to that effect should be given when applicable to the case.[37] It has

timony is proper. In that state it has been said that, while such testimony is suspicious, and emanates from a bad source, yet the jury may believe it, although it is wholly uncorroborated. And it is not proper for the court to give any instructions to the jury as to the weight of such, or any other, evidence. State v. Betsall, 11 W. Va. 704.

[34] Olive v. State, 11 Neb. 1; Long v. State, 23 Neb. 33; United States v. Sykes, 58 Fed. 1004; United States v. Harries, 2 Bond, 311, Fed. Cas. No. 15,309; United States v. Babcock, 3 Dill. 619, Fed. Cas. No. 14,487; State v. Brown, 3 Strob. (S. C.) 508; State v. Miller, 97 N. C. 484; Ferrall v. Broadway, 95 N. C. 551; State v. Hardin, 19 N. C. 407; Arnold v. State, 5 Wyo. 439; State v. Dawson, 124 Mo. 418; State v. Walker, 98 Mo. 95; State v. Harkins, 100 Mo. 666; State v. Minor, 117 Mo. 302; State v. Jackson, 106 Mo. 174; State v. Donnelly, 130 Mo. 642; State v. Dana, 59 Vt. 614; People v. Costello, 1 Denio (N. Y.) 87; Com. v. Price, 10 Gray (Mass.) 472; State v. Kellerman, 14 Kan. 135; State v. Coates, 22 Wash. 601.

[35] State v. Rook, 42 Kan. 419.

[36] A refusal is ground for reversal. Solander v. People, 2 Colo. 48; Cheatham v. State, 67 Miss. 335. A refusal is not ground for reversal. Hoyt v. People, 140 Ill. 588. See, also, State v. Jones, 64 Mo. 391.

[37] People v. Sternberg, 111 Cal. 11; People v. Strybe (Cal.) 36 Pac. 3. To the same effect, see People v. Bonney, 98 Cal. 278, in which it was held that, where the only evidence to justify a verdict against the defendant was the testimony of an admitted accomplice

been held, however, that, where an accomplice is called as a witness in behalf of defendant, it is not proper to instruct that his testimony should be viewed with caution and distrust, on the ground that such instruction tends to discredit a witness for the defendant, and charges the jury with respect to matters of fact.[38]

§ 218. Advising jury to acquit unless corroborated.

It is proper to advise the jury to acquit, where there is no evidence other than the uncorroborated testimony of an accomplice, and it is almost the universal practice to do so.[39] As was said by a learned judge, "It is a practice which deserves all the reverence of law, that judges have uniformly told juries that they ought not to pay any respect to the testimony of an accomplice, unless the accomplice is corroborated in some material circumstance."[40] And it was

and that of a third person as to defendant's oral admissions, the refusal of the court to instruct the jury that "the testimony of an accomplice ought to be viewed with distrust, and the evidence of the oral admissions of a party with caution," is prejudicial error.

[38] People v. O'Brien, 96 Cal. 171; People v. Bonney, 98 Cal. 278.

[39] Reg. v. Stubbs, 33 Eng. Law & Eq. 551; Rex v. Wilkes, 7 Car. & P. 272; Rex v. Jones, 2 Camp. 132; Flanagin v. State, 25 Ark. 96; United States v. Neverson, 1 Mackey (D. C.) 154; Com. v. Bosworth, 22 Pick. (Mass.) 398; Com. v. Brooks, 9 Gray (Mass.) 299; Com. v. Bishop, 165 Mass. 148; Allen v. State, 10 Ohio St. 288; State v. Williamson, 42 Conn. 263; State v. Prudhomme, 25 La. Ann. 522; State v. Hyer, 39 N. J. Law, 598; McNeally v. State, 5 Wyo. 67; State v. Mason, 38 La. Ann. 476; Earll v. People, 73 Ill. 333; Hoyt v. People, 140 Ill. 588; Collins v. People, 98 Ill. 584; Schulz v. Schulz (Ill.) 30 N. E. 317; State v. Haney, 19 N. C. 390; Cox v. Com., 125 Pa. 94; Watson v. Com., 95 Pa. 424; Cheatham v. State, 67 Miss. 335; State v. Green, 48 S. C. 136; State v. Walker, 98 Mo. 95; State v. Chyo Chiagk, 92 Mo. 415; State v. Potter, 42 Vt. 496; State v. Barber, 113 N. C. 711; Ingalls v. State, 48 Wis. 647; Black v. State, 59 Wis. 471; United States v. Sykes, 58 Fed. 1004; Steinham v. United States, 2 Paine, 180, Fed. Cas. No. 13,355.

[40] Reg. v. Farler, 8 Car. & P. 106.

said in another case that the fact that one may be convicted of a felony on the uncorroborated testimony of an accomplice makes it the more necessary the jury should be properly cautioned by the court in regard to such testimony.[41] While the cases are all agreed that it is the better practice to give the jury a caution of this nature, it is nevertheless held by the majority of decisions that this is merely "a rule of practice, and not a rule of law," and therefore a failure of the judge to give such an instruction of his own motion, or even a refusal to do so on request, is not erroneous, or, if erroneous, is not ground for reversal.[42] The practice of giving such instructions rests in the discretion of the presiding judge;[43] and in one case the appellate court said that, although it did not approve of the trial judge's neglect to give the customary caution, they could not treat it as legal error.[44] Where an instruction of this nature is given, the judge does not thereby withdraw the case from the jury by positive direction to acquit, but merely advises them not to give credit to the testimony of the accomplice.[45]

§ 219. Binding instructions to acquit unless corroborated.

In jurisdictions where it is provided by statute that there can be no conviction on the uncorroborated testimony of an

[41] State v. Jones, 64 Mo. 391.

[42] State v. Potter, 42 Vt. 495; Reg. v. Stubbs, Dears. Cr. Cas. 555; Cheatham v. State, 67 Miss. 335; Com. v. Wilson, 152 Mass. 12; Collins v. People, 98 Ill. 584; State v. Prudhomme, 25 La. Ann. 525; State v. Williamson, 42 Conn. 263; Cox v. Com., 125 Pa. 94; Com. v. Price, 10 Gray (Mass.) 472, 71 Am. Dec. 673; Porath v. State, 90 Wis. 527; State v. Watson, 31 Mo. 361; Black v. State, 59 Wis. 471; Allen v. State, 10 Ohio St. 287; Com. v. Holmes, 127 Mass. 424. Contra, State v. Woolard, 111 Mo. 248; Hoyt v. People, 140 Ill. 588.

[43] State v. Haney, 19 N. C. 390.

[44] State v. Potter, 42 Vt. 495.

[45] Flanagin v. State, 25 Ark. 96; United States v. Sykes, 58 Fed. 1000.

accomplice, it is, of course, proper to give the jury a binding instruction to this effect,[46] and a refusal to give such an instruction, when warranted by the evidence, is clearly erroneous.[47] The decisions are not harmonious as to whether or not it is necessary to give such an instruction, in the absence of a request therefor. Some courts hold that the general principle that an omission to charge on a particular point is not error, in the absence of a request, applies to the question of the necessity of corroborating the testimony of an accomplice.[48] Where the state does not seek to convict upon the evidence of the accomplice alone, but adduces other proof, almost, if not wholly, sufficient to warrant a verdict against defendant, it is not incumbent upon the court, without request, to charge as to necessity of corroboration.[49] In other jurisdictions, a failure to give such an instruction when the evidence warrants it has been held reversible error, the view being taken that, if "evidence is adduced tending to show that a witness * * * is an accomplice, * * * it becomes the duty of the trial court to give in charge to the jury the law governing the testimony of accomplices";[50] and in one of these last-named jurisdictions it is not even neces-

[46] Bernhard v. State, 76 Ga. 613.

[47] Brann v. State (Tex. Cr. App.) 39 S. W. 940; Martin v. State, 36 Tex. Cr. App. 632; Wicks v. State, 28 Tex. App. 448; Sitterlee v. State, 13 Tex. App. 581; Coffelt v. State, 19 Tex. App. 436; Craft v. Com., 80 Ky. 349; State v. Patterson, 52 Kan. 335.

[48] State v. Lawlor, 28 Minn. 224.

[49] Robinson v. State, 84 Ga. 674.

[50] Fuller v. State, 19 Tex. App. 380; Parr v. State, 36 Tex. Cr. App. 493; Miller v. State, 4 Tex. App. 251; Winn v. State, 15 Tex. App. 169; Owens v. State (Tex. Cr. App.) 20 S. W. 558; Stewart v. State, 35 Tex. Cr. App. 174; Williams v. State, 42 Tex. 392; Stone v. State, 22 Tex. App. 185; Anderson v. State, 20 Tex. App. 312; Hunnicutt v. State, 18 Tex. App. 522; Ray v. State, 1 G. Greene (Iowa) 324; Brooks v. State (Tex. Cr. App.) 56 S. W. 924; Brace v. State (Tex. Cr. App.) 62 S. W. 1067. The court may submit to the jury, as an

sary to save an exception in order to make the error available on appeal.[51] A federal judge, trying a case in a state whose laws forbid conviction upon the uncorroborated testimony of an accomplice, will charge the jury to return a verdict of not guilty if the case goes before them on the testimony of the accomplice alone.[52] In jurisdictions where the court is bound to instruct on this point, whether requested or not, if the charge given by the court of its own motion sufficiently covers the point, special requested instructions thereon may be properly refused.[53] Where the court instructs the jury on what constitutes an accomplice, and then instructs them, if a certain witness comes within such requirements, to disregard his testimony, the court does not err in not specifically telling them to disregard his testimony, if he is not a credible witness.[54] Where a person jointly indicted with defendant only consents to testify on condition of exemption from prosecution, and is promised that exemption by the state, he must be regarded as an accomplice, and the defendant is entitled to an instruction that his uncorroborated testimony is not sufficient to convict. It is not the fact that the witness has been indicted that is material, but the fact that he testifies to escape prosecution.[55] A statute requiring corroboration of an accomplice's testimony extends to accessories, and, if the evidence strongly tends to show that

issue of fact, the question as to whether a witness is an accomplice, though that the witness is an accomplice is unquestioned. In such a case, the court may charge that the witness is an accomplice, but it is not error not to do so. Carroll v. State (Tex. Cr. App.) 62 S. W. 1061.

[51] Coburn v. State, 36 Tex. Cr. App. 257.

[52] United States v. Van Leuven, 65 Fed. 78.

[53] Powell v. State (Tex. Cr. App.) 44 S. W. 504; Mercer v. State, 17 Tex. App. 452.

[54] Beach v. State, 32 Tex. Cr. App. 240.

[55] Barrara v. State, 42 Tex. 260.

a witness endeavored, after the crime, to screen and shield the accused, and to enable him to avoid arrest, the court should charge on the necessity of corroboration.[56] It is reversible error not to tell the jury that they cannot convict the defendant upon the testimony of an accomplice or accomplices, unless such testimony be corroborated by other evidence tending to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows that the offense was committed, and circumstances thereof. While one accomplice may corroborate another, the testimony of an accomplice is not the corroboration of the testimony of another accomplice which is required to convict.[57] A charge upon accomplice testimony, which refers to only one witness, when other witnesses participated in the crime, or had guilty knowledge thereof, is erroneous.[58]

§ 220. Explaining nature of corroboration required.

An instruction that "you are further instructed that the defendant in this case cannot be convicted on the unsupported evidence of the accomplice" is erroneous, in that it does not define to the jury the nature of the corroborative testimony required.[59] Where a statute requires corroboration as to "matters material to the issue," the instruction should tell the jury what is meant by these words,[60] and, if the corroboration of the testimony of the accomplice is required to go so far as to identify the person of the defendant, the jury should be so instructed.[61] If the statute requires that the

[56] Hunnicutt v. State, 18 Tex. App. 500.
[57] Powers v. Com. (Ky.) 61 S. W. 735.
[58] Powell v. State (Tex. Cr. App.) 57 S. W. 95; Powell v. State (Tex. Cr. App.) 57 S. W. 94.
[59] Mitchell v. State, 38 Tex. Cr. App. 325.
[60] State v. Pratt, 98 Mo. 482; State v. Chyo Chiagk, 92 Mo. 395.
[61] State v. Chyo Chiagk, 92 Mo. 395; State v. Pratt, 98 Mo. 482.

corroborating evidence shall tend "to connect the defendant with the offense committed," an instruction that, "in order to convict a defendant upon the testimony of an accomplice, there must be sufficient corroborating testimony of his guilt to satisfy your minds of the truth of the charge against him," does not sufficiently comply with the statutory requirement, and is erroneous.[62] Where a statute provides that "a conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances thereof," and the court charges, "The corroboration is not sufficient if it merely shows that the offense has been committed by some person," an omission to refer to the "circumstances" of the offense is error.[63] And if the corroboration "required by the statute * * * must relate to material facts which go to the identity of defendant in connection with the crime," an instruction "that, if the testimony of a witness shows him to be an accomplice, the jury should not convict, unless his testimony is corroborated by testimony they believe to be true beyond a reasonable doubt," is erroneous, and properly refused.[64] In instructing on what corroboration is sufficient, the following charge has been approved: "The corroboration ought to be sufficient to satisfy the jury of the truth of the evidence of the accomplice. If the jury are satisfied that he speaks the truth in some material part of his testimony, in which they see him confirmed by unim-

In this last case it was held that, if the other testimony was amply sufficient, and the identity of the offense was well established by evidence aliunde, the error was not prejudicial.

[62] Watson v. State, 9 Tex. App. 237.

[63] State v. Smith, 102 Iowa, 666.

[64] Vaughan v. State, 58 Ark. 354.

peachable evidence, this may be a ground for their believing that he also speaks the truth in other parts, as to which there may be no confirmation; but the corroboration ought to be as to some fact or facts connecting the prisoner with the offense, the truth or falsehood of which would go to prove or disprove the offense charged against the prisoner."[65] Where, in a prosecution for arson, it is not claimed that defendant took any part in the burning, but that he procured it to be done by others, who testified at the trial, and evidence is introduced showing that defendant was seen talking with the witnesses, but the subject of their conversation is not shown, and, on all the evidence, the case is a very close one, it is error to refuse to charge "that evidence showing the defendant was in the society of the accomplices is not sufficient, and such relations are consistent with innocence."[66] A requested charge that the testimony of an accomplice could not be "taken" unless corroborated by evidence going to show some fact, not only that a crime had been committed, but that the prisoner was implicated in it, is properly refused. Such refusal does not involve the question whether the judge should have warned the jury that they ought not to convict on the uncorroborated testimony of the accomplice.[67]

§ 221. Instructing as to who are accomplices.

A charge on the subject of the corroboration of accomplices should explain to the jury who are accomplices, in the sense requiring corroboration.[68] But in one state it has been held that "a defendant who claims that a witness [who testified] against him was an accomplice, * * * and must

[65] Jackson v. State, 64 Ga. 345.

[66] People v. Butler, 62 App. Div. (N. Y.) 508.

[67] State v. Vicknair, 52 La. Ann. 1921.

[68] Myers v. State, 6 Tex. App. 1; Zollicoffer v. State, 16 Tex. App. 312; Suddeth v. State, 112 Ga. 407.

be corroborated, has the right to have the court instruct the jury what constitutes an accomplice; but if he fails to ask such an instruction, he cannot complain of the omission of the court to give it."[69] Where the court charges that a conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect defendant with the offense charged, and that the corroboration is not sufficient if it merely shows the commission of the offense, and defines "an accomplice" in statutory language, it is not error, in the absence of a request, to fail to submit to the jury the necessity of corroboration of the testimony of the alleged accomplice, if they should find that he was an accomplice.[70] "It is not allowable in a criminal prosecution, where a witness is claimed to have testified as an accomplice, to instruct the jury as to the matter of fact whether the witness was an accomplice of the defendant."[71] If there is any evidence to show that the witness is an accomplice, the court should not take the question from the jury.[72] Where there is evidence that a witness had guilty knowledge of the crime, and he aided the defendant in manufacturing a defense, the court should charge on accomplice's testimony with reference to this witness, and leave it to them to say whether or not he was an accomplice in the case.[73] While declarations made by a prisoner out of court should be received with caution, it is proper for the court to refuse to caution the jury against giving credence to one, not an acknowledged accompliee, who has testified to such declarations.[74] But, of

[69] Carroll v. State, 45 Ark. 539.

[70] Lockhart v. State, 29 Tex. App. 35.

[71] People v. Sansome, 98 Cal. 235.

[72] People v. Curlee, 53 Cal. 604.

[73] Ballew v. State (Tex. Cr. App.) 34 S. W. 616; White v. State (Tex. Cr. App.) 62 S. W. 749; Powell v. State (Tex. Cr. App.) 57 S. W. 94.

[74] Rafferty v. People, 72 Ill. 37.

course, if a witness is admitted to testify solely as an accomplice, the court may properly assume that he is an accomplice, in giving instructions.[75] Where unequivocal and uncontradicted evidence shows that a certain witness was an accomplice, the court may assume that fact, and charge that a conviction cannot be had on his uncorroborated testimony.[76] Where defendant's principal turns state's evidence, an instruction that he is an accomplice, and must be corroborated, is not erroneous, as assuming that the principal committed the crime, in the absence of any evidence contradicting the principal's confession as to his part in the crime.[77]

§ 222. Instructions giving undue weight to accomplice testimony.

It is improper to charge "that the jury are bound to accept and credit testimony of an accomplice, either standing alone or more or less corroborated. It is their province to determine whether he is to be credited at all, and, if so, to what extent."[78] So, in case of a dismissal of the indictment as to an accomplice jointly indicted with defendant, in order that he might testify for the state, it is error to charge "that this fact should not be taken into consideration in determining the credibility of the accomplice."[79]

§ 223. Evidence on which to base instructions necessary.

To invoke instructions on the law in regard to accomplice's testimony, there must be evidence to which the in-

[75] Barrara v. State, 42 Tex. 260; Zollicoffer v. State, 16 Tex. App. 312.

[76] Torres v. State (Tex. Cr. App.) 55 S. W. 828.

[77] Wilkerson v. State (Tex. Cr. App.) 57 S. W. 956.

[78] Hamilton v. People, 29 Mich. 174.

[79] Gill v. State, 59 Ark. 422.

structions would be applicable.[80] But where the evidence as to whether a witness was an accomplice or not is conflicting, it is error to refuse an instruction defining an accomplice.[81] In the absence of any evidence to show that a witness who has testified is an accomplice, instructions as to the effect of accomplice's testimony should not be given.[82] By parity of reasoning, no instruction should be given as to the effect of testimony of accessories when there is no evidence to show that any witness is an accessory.[83] "Mere knowledge on the part of a witness that the defendant committed the crime does not render such witness an accomplice, so as to require corroboration of his testimony."[84] So, the mere fact that a witness of the crime charged remains silent concerning it will not warrant an instruction on accomplice's testimony.[85] Where the testimony of an accomplice does not in the least contribute to a conviction, it is unnecessary to instruct as to necessity of corroboration.[86] Where, in a prosecution for establishing a lottery, it appears that the lottery was operated by means of a slot machine, the fact that a witness who worked for defendant is shown to have put nickels in the machine does not constitute him an accomplice

[80] Pitner v. State, 23 Tex. App. 366; Kerrigan v. State, 21 Tex. App. 487; Brown v. State, 6 Tex. App. 286.

[81] Suddeth v. State, 112 Ga. 407.

[82] Tuberson v. State, 26 Fla. 472; Smith v. State, 28 Tex. App. 309; May v. State, 22 Tex. App. 595; Moseley v. State, 36 Tex. Cr. App. 578; People v. Chadwick, 7 Utah, 134; Lawrence v. State, 35 Tex. Cr. App. 114.

[83] State v. Morgan, 35 W. Va. 260.

[84] Smith v. State, 28 Tex. App. 309.

[85] O'Connor v. State, 28 Tex. App. 288. In this case, certain Mexicans were witnesses for the state. At the time of the murder, which they saw, they were several hundred miles from home, and did not know the English language and the person killed, and the defendants were Americans, and not known to the witnesses.

[86] Waggoner v. State, 35 Tex. Cr. App. 199.

in the establishment of the lottery, and the court consequently does not err in failing to submit the question of accomplice testimony in connection with testimony of such witness.[87]

Where, in a prosecution for murder, it is shown that a witness for the state accompanied the defendants to the body of deceased, which they reached after traveling several miles, some distance of the way on foot, through dense brush, and upon inquiring of the defendants, while *en route* to the body, their destination, and where they were taking him, this witness stated he was informed by them that they were going to bury deceased, and it is shown that the witness dug the grave, at the direction of the defendants, and was warned by them to say nothing of the affair, it is error to refuse a charge on accomplice testimony in connection with the testimony of such witness.[88]

§ 224. Same—Evidence held sufficient to warrant instructions.

The following state of facts has been held sufficient to warrant the giving of an instruction on accomplice testimony: "In a trial for attempting to produce an abortion, the female's father was a witness for the prosecution, and testified that the defendant informed him of his daughter's pregnancy, and suggested that he (the defendant) could give her a drug that would remove it, whereupon he (the witness) replied, 'All right; anything to save my child.'"[89] So, on defendant's "trial for incest with his step-daughter, where she was the principal witness for the state, and portions of her testimony tended to inculpate herself, it was held that the trial court should have given in charge * * * the statutory provisions controlling accomplice testimony, and

[87] Prendergast v. State (Tex. Cr. App.) 57 S. W. 850.
[88] Conde v. State, 33 Tex. Cr. App. 10.
[89] Watson v. State, 9 Tex. App. 237.

its corroboration."[90] It is beyond the scope of this book to consider fully what constitutes an accomplice; but any evidence which tends to connect the witness with the commission of the offense is sufficient to require or justify a charge on accomplice testimony.[91]

III. Testimony of Parties and Interested Witnesses.

§ 225. What instructions proper.

In regard to the testimony of the accused in a criminal prosecution, the court may properly charge that the accused is by law made a competent witness in his own behalf, and that the jury are bound to consider his testimony.[92] Where no question is made but that the defendant has an absolute right to testify in his own behalf, an instruction that, "under the statute of this state, a defendant in a criminal action is permitted to be a witness in his own behalf, and the jury are to be exclusive judges of the weight and credibility to be given his testimony," is not erroneous for the use of the word "permitted."[93] So, also, it is proper to charge that the jury must consider his testimony;[94] and that the jury have no right to disregard defendant's testimony merely because he is the defendant.[95] An instruction that, while the

[90] Freeman v. State, 11 Tex. App. 92.

[91] See Brace v. State (Tex. Cr. App.) 62 S. W. 1067.

[92] Creed v. People, 81 Ill. 569; Rider v. People, 110 Ill. 13; State v. Sterrett, 71 Iowa, 386. See State v. Miller, 162 Mo. 253; State v. Adair, 160 Mo. 391; State v. Miller, 159 Mo. 113.

[93] State v. Porter, 32 Or. 135.

[94] State v. Sterrett, 71 Iowa, 386.

[95] Creed v. People, 81 Ill. 565. Compare Lang v. State (Fla.) 28 So. 856. An instruction that "the defendant is a competent witness in his own behalf, and his evidence should not be discarded by the jury for the reason alone that he is the defendant on trial, but such fact may be considered by the jury in determining the credit to be given to his testimony; and the jury are further instructed that

jury should not disregard the testimony of the defendant, they should consider his interest, has been held proper.[96] The jury may also be instructed to give defendant's "testimony such weight, in connection with the other evidence in the case, as you think it entitled to, and no more;"[97] that, "if convincing, and carrying with it a belief in its truth," the jury may act upon it, and, if not, they have a right to reject it;[98] or that the jury are "to consider the testimony of the defendant in connection with all the other evidence," but that, if they are not satisfied that it is true, they may disregard it;[99] or that the jury are under no obligation to believe it if they consider it unreliable.[100] So, a statement of the legal effect of contradictory statements may properly be given to the jury in relation to the testimony of a defendant in a criminal trial.[101] The rules that govern other witnesses apply to the accused when he goes upon the stand, and it is proper for the court to instruct that, if the testimony of the accused is contradicted, the jury ought to take the fact of such contradiction into consideration in determining the

they are the sole judges of the credibility of the witnesses and the weight of testimony, and, if they believe that any witness has intentionally testified falsely as to any material fact in the case, they may disregard the whole or any part of the testimony of such witness,"—is erroneous, as telling the jury that they may discard the testimony of accused on some ground. The jury should not be invited to discard the testimony of defendant, but to weigh it. State v. Austin, 113 Mo. 543; State v. Miller, 162 Mo. 253.

[96] State v. Ryan (Iowa) 85 N. W. 812.

[97] State v. Sterrett, 71 Iowa, 386; Solander v. People, 2 Colo. 48; Meyer v. Blakemore, 54 Miss. 574; Barber v. State, 13 Fla. 675.

[98] People v. O'Neal, 67 Cal. 378; People v. Cronin, 34 Cal. 195; People v. Morrow, 60 Cal. 147.

[99] Lewis v. State, 88 Ala. 11.

[100] Creed v. People, 81 Ill. 569; State v. Elliott, 90 Mo. 350.

[101] Faulkner v. Territory, 6 N. M. 464.

weight of his testimony.[102] So, an instruction that the jury "should consider whether it is consistent with the other facts proven to their satisfaction, and whether it is corroborated or not by the other proofs, facts, or circumstances of the case," has been approved.[103] It has also been held proper to charge "that if, after considering all the evidence in the case, they [the jury] find that the accused has willfully and corruptly testified falsely to any fact material to the issue, * * * they have the right to entirely disregard his testimony, excepting in so far as his testimony is corroborated by other credible evidence."[104] This instruction, however, it is believed, violates the rule against singling out a witness, and applying to him alone the maxim, *Falsus in uno,* etc.[105] Where the defendant testifies in his own behalf, he is entitled, on request, to an instruction "that the fact that he is the defendant is not of itself sufficient to impeach or discredit his testimony," especially where the requested instruction contains the further statement that the jury may take into consideration the fact that the witness is the accused.[106] And it has been held error to refuse defendant's request for an instruction that the jury "have the right to disbelieve the evidence of any interested witness upon no other ground than the fact of interest," and that they "have the right to disbelieve the evidence of any noninterested witness if his evidence appears impossible or improbable."[107] It has been

[102] Rider v. People, 110 Ill. 13; Hinton v. Cream City R. Co., 65 Wis. 335; Hatfield v. Chicago, R. I. & P. Ry. Co., 61 Iowa, 434.

[103] People v. Jones, 24 Mich. 216. See, also, Durant v. People, 13 Mich. 355.

[104] Rider v. People, 110 Ill. 11; People v. Petmecky, 99 N. Y. 415.

[105] See post, §§ 252-256, "Instructions as to maxim, 'Falsus in Uno, Falsus in Omnibus.'"

[106] State v. Metcalf, 17 Mont. 417. Compare Lang v. State (Fla.) 28 So. 856.

[107] Hunter v. State, 29 Fla. 486.

held, however, that the court need not, of its own motion, instruct the jury as to the credit to be given to the testimony of defendant in a criminal case, where he takes the stand in his own behalf, and gives testimony tending to exonerate himself.[108] On the other hand, it has been held that an instruction that the jury "must give it [the testimony of defendant] the same consideration they would any other witness'" should be refused.[109] So, a similar instruction that defendant's testimony is to be received and weighed as that of any other witness, and that his statement of any fact of his own which the jury believe to be wrong should not be considered for the purpose of punishing him for the crime charged, was considered too broad in not being limited to any act not connected with the crime charged. In one decision it was held proper to charge that "they [the accused] do not stand in the same position as a witness who is entirely disinterested. The time has not yet come when men who confess themselves guilty of crime are to stand alongside of and made equal to men who have lived upright and honest lives; but the value of their testimony is to be entirely estimated by you [the jury];" but the court said that it was "just on the verge of error."[111] An instruction that "the testimony [of the accused] * * * is subject to the same tests as the testimony of any other witness," and that, if "the testimony of the prisoner * * * is contradictory

[108] People v. Rodundo, 44 Cal. 538.

[109] McKee v. State, 82 Ala. 32; People v. Calvin, 60 Mich. 114. Where defendant offers himself as a witness, he stands the same as any other witness, and the court may instruct that his testimony should be weighed like that of any other, though the state succeeded in having his answers to questions excluded, and the state was refused permission to cross-examine. State v. Uisemer (Wash.) 64 Pac. 800.

[111] People v. Ferry, 84 Cal. 31.

of itself, it cannot be true," is proper.[112] But in another state an instruction "that the jury were not bound to believe the evidence of the defendant in a criminal case, and treat it the same as the evidence of other witnesses, but the jury may take into consideration the fact that he [the witness] is defendant," is held to be in violation of a statute which provides that "no person shall be disqualified as a witness in any criminal case * * * by reason of his interest in the event of the same."[113] The court may properly direct the jury to scrutinize with caution the testimony of relations,[114] but the omission to give this caution cannot be assigned as error.[115] It has also been held proper to charge "that the law regarded with suspicion the testimony of near relations."[116] It is proper to refuse an instruction that the testimony of a witness is to be distrusted because, if the suit or prosecution should terminate in a certain way, he would be benefited pecuniarily.[117] The court may properly instruct "that you, the jury, are the sole judges of the credibility of witnesses and the weight of evidence; but you should be circumspect in the consideration of evidence given by either side which it is impossible, in the nature of things, for the other side to disprove,—such as conversations or transactions with one deceased,—and give to such evidence only such weight as, in view of the interest of the witness and all circumstances, you may deem it fairly entitled to."[118] And an instruction that the testimony of interested witnesses

[112] People v. Petmecky, 99 N. Y. 421.

[113] Chambers v. People, 105 Ill. 412.

[114] State v. Byers, 100 N. C. 512; Ferrall v. Broadway, 95 N. C. 551.

[115] Wiseman v. Cornish, 53 N. C. 218.

[116] State v. Nash, 30 N. C. 35.

[117] Com. v. Pease, 137 Mass. 576.

[118] Meyer v. Blakemore, 54 Miss. 575.

is to be examined with greater care than that of disinterested witnesses has been approved.[119] So it has been held that the defendant in a criminal case is entitled to an instruction that greater care should be exercised in weighing the testimony of informers, detectives, or other persons employed to hunt up evidence against him than in the case of witnesses who are wholly disinterested.[120] If the mode of obtaining admissions indicates that a skilled and experienced person has unduly influenced or unfairly induced admissions, such facts should be closely scanned by the jury, and should greatly affect the weight to be given to the admissions, and the jury may be told to closely examine such evidence.[121] An instruction: "While it is the law that the testimony of the prosecutrix should be carefully scanned, still this does not mean that such evidence is never sufficient to convict. If you believe the prosecutrix, it is your duty to render a verdict accordingly,"—is not open to the objection that it tells the jury that they may act on the testimony if they believe it, although it may not be sufficient in substance, though true, to establish the offense.[123] Where the right to recover is based almost entirely upon the testimony of plaintiff, the defendant has a right to have the jury told specifically that they may consider the interest of any of the witnesses in the result of the suit, and it is error to refuse an instruction that "the jury are the sole judges of the credibility of the witnesses and the weight to be given to their testimony, and, in passing upon the testimony of any witness, the jury have a right to take into consideration the interest any such witness may have in the result of this trial, the

[119] Hinton v. Cream City R. Co., 65 Wis. 335.

[120] Sandage v. State (Neb.) 85 N. W. 35. But compare Cooney v. State (Neb.) 85 N. W. 281.

[121] Fidelity Mut. Life Ass'n v. Jeffords (C. C. A.) 107 Fed. 402.

[123] People v. Wessel, 98 Cal. 352.

manner of testifying, and the former life or history any such witness may have given of him or herself in this case."[124] Where a delay in bringing suit is most unusual, and the parties are the only witnesses, it is proper to instruct that, as bearing upon the credibility of the witnesses and probabilities of the case, the jury may take into consideration the delay of the plaintiffs in bringing the suit.[125] The court should, on request, charge "that any money offered or promise made to the accomplice, to induce him to testify, is material, as bearing on the credibility of the witness," if there is evidence on which to base such an instruction.[126] A failure to comment on all the circumstances tending to discredit or corroborate the witnesses is not error, as there is no rule of law requiring such comments.[127]

§ 226. What instructions improper.

In instructing as to the credibility of the testimony of the accused in a criminal case, the court should refrain from making hostile comments upon such testimony.[128] It is therefore erroneous to draw a comparison between the testimony of the accused and the circumstances against him, and tell the jury that "they [the circumstances] cannot be bribed, that they cannot be dragged into perjury, they cannot be seduced by bribery into perjury, but they stand as bloody, naked facts before you, * * * in opposition to and confronting this defendant, who stands before you as an interested party."[129] And for the same reason it is improper to instruct that "something more tangible, real, and certain than

[124] Lancashire Ins. Co. v. Stanley (Ark.) 62 S. W. 66.
[125] Walker v. Harvey (C. C. A.) 108 Fed. 741.
[126] People v. Butler, 62 App. Div. (N. Y.) 508.
[127] Faulkner v. Paterson Ry. Co. (N. J. Sup.) 46 Atl. 765.
[128] Hicks v. United States, 150 U. S. 442.
[129] Hickory v. United States, 160 U. S. 408.

a simple declaration of the accused is necessary to show self-defense on a murder trial."[130] So it is error for the court to place the defendant in a separate and inferior class from all other witnesses, by instructing that the jury are not bound to treat his evidence the same as that of other witnesses.[131] Thus, an instruction that the jury have no right to disregard the testimony of the defendant on the ground alone that he is charged with crime, but that the law presumes him innocent until he is proved guilty, and that his testimony should be fairly weighed, is properly refused as directing the jury to weigh his testimony by an arbitrary standard.[132] An instruction that the jury "shall not capriciously reject the testimony of the defendant simply because he is interested, but, unless the jury have good reason to believe, under all the circumstances, that the defendant has sworn falsely, then the jury should believe his testimony, and consider it along with all other testimony in the case in making up their verdict," is faulty in that it is argumentative, and also invades the province of the jury in instructing them as to what they should believe.[133] An instruction that the jury have no right to disregard the defendant's testimony merely because he is the defendant is properly refused, where the court has given full instructions as to how the jury should weigh the testimony of witnesses generally.[134] An instruction that the jury "must bear in mind the tendency on the part of the guilty, when ac-

[130] Allison v. United States, 160 U. S. 203.

[131] Hellyer v. People, 186 Ill. 550, wherein it was held error to instruct that, while defendant is a competent witness, yet his credibility and the weight of his evidence are exclusively for the jury, and, while the jury should not disregard his evidence through mere caprice, yet they are not bound to believe him, but may take into consideration his interest in the result.

[132] Lang v. State (Fla.) 28 So. 856.

[133] Bodine v. State (Ala.) 29 So. 926.

[134] Lang v. State (Fla.) 28 So. 856.

cused of crime, to fabricate some story or stories which they think may effect their acquittal," is erroneous, and prejudicial to the defendant.[135] So, in instructing as to the credibility of interested witnesses generally, whether parties or not, it is improper to instruct that a witness' interest affects his credit,[136] or that, "if the witness is interested in the result of the prosecution, this tends to discredit him."[137] So, the court should not charge that "one interested will not usually be as honest and candid as one not so;"[138] or that "the evidence of parties to the action, and of those related to them, * * * is not entitled to as much weight as the evidence of disinterested witnesses;"[139] or that the court admitted the testimony of a witness with great doubt as to its admissibility, on account of her relationship to a party;[140] or that, where two adverse "witnesses appear to be equally credible in every other respect, the one who appears to have the greater interest in the result of the case is to have the less weight of the two;"[141] or "that the weight to be given to the testimony of the plaintiff and defendant, as witnesses, depends upon the interest each may have in the result of the suit,"[142]

[135] State v. Hoy, 83 Minn. 286.

[136] Davis v. Central R. Co., 60 Ga. 329, in which it was said the better instruction is "that it may affect his credit, and that it is for the consideration of the jury, they being the judges of whether it does or does not influence his testimony, and, if so, to what extent."

[137] Pratt v. State, 56 Ind. 179.

[138] Veatch v. State, 56 Ind. 584; Greer v. State, 53 Ind. 420.

[139] Nelson v. Vorce, 55 Ind. 455.

[140] Potts v. House, 6 Ga. 324.

[141] Lee v. State, 74 Wis. 45, in which it was alleged, as a reason, that such instruction leaves out any consideration of surrounding circumstances, or of the effect of corroborative testimony.

[142] Dodd v. Moore, 91 Ind. 522. Compare Hess v. Lowrey, 122 Ind. 234, where it was held that an instruction "that the credit and weight that should be attached to the testimony of the witness depends upon his disinterestedness in the result of the suit, and his freedom from bias or prejudice," was not ground for reversal where

or to state "that an important witness * * * on the material question at issue was 'apparently interested';"[143] or "that witnesses who are disinterested are entitled to more weight than those who, for any reason, are shown to have an interest in the determination of the case;"[144] or that the testimony of a disinterested witness is entitled to more weight than that of plaintiff.[145] "Where the witness, from motives of friendship or from family ties, makes statements favorable to those in whom he is interested, the suggestion by the court, in an instruction, that they should give to the testimony of each witness such weight as they may deem it entitled to, is in effect saying to the jury that the statement of such a witness is entitled to less weight than statements made by those entirely disinterested in the result."[146] And it has been held erroneous to charge that "the jury are not bound to believe the testimony of any of the witnesses," where there were several disinterested witnesses whose testimony was not contradicted, and was not inherently improbable.[147] An instruction that "the jury have the right, and may take the liberty, of disregarding the witnesses of the defendant, if they consider them interested, even though they be not contradicted or impeached," is improper, and is too broad, as making the criterion whether the jury considers the

there was nothing to show that it was more prejudicial to one party than the other.

[143] Lellyett v. Markham, 57 Ga. 13.

[144] Omaha Belt Ry. Co. v. McDermott, 25 Neb. 714.

[145] Platz v. McKean Tp., 178 Pa. 601, in which it was said: "The fact that the witness has an interest in the case may and should be considered in determining what weight should be given to his testimony, but we know of no legal warrant for an instruction from the court that the testimony of a disinterested witness is entitled to 'more weight' than his."

[146] Barnard v. Com. (Ky.) 8 S. W. 444.

[147] Tyler v. Third Ave. R. Co., 18 Misc. Rep. (N. Y.) 165.

witness interested, and giving to the jury a discretion to refuse to consider evidence which is competent.[148] It is improper to instruct that the jury may remember that a defendant testifying is interested in the result of the prosecution, and that they may, if they think that fact sufficient, entirely disregard his testimony if it is in conflict with the other evidence, as such instruction authorizes the jury to disregard the testimony, though they may believe it;[149] or that, if the plaintiff swears one way and defendant another, the jury should leave the parties as it finds them;[150] or that the testimony of the party in interest should "be disregarded, unless corroborated by other witnesses, or by documentary evidence;"[151] or that, where a "defendant is a witness in his own behalf, * * * the jury * * * may believe or disbelieve" his testimony, according as it is or is not corroborated;[152] or 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."[153] So, an instruction to the jury: "In estimating the value of the defendant's testimony, you have a right to consider what he has at stake in this case, the gravity of the charge against him, and the motives which might induce him to misrepresent or speak falsely in regard to it; and you have a right to consider the motives of the other members of the family, and, after considering these, not only in their own intrinsic light, but in the light of all the testimony in the

148 Berzeviży v. Delaware, L. & W. R. Co., 19 App. Div. (N. Y.) 309.
149 Allen v. State, 87 Ala. 107.
150 McLean v. Clark, 47 Ga. 24.
151 Prowattain v. Tindall, 80 Pa. 297.
152 State v. Patterson, 98 Mo. 283.
153 Coloritype Co. v. Williams, 24 C. C. A. 163, 78 Fed. 450.

case, give such testimony the value you consider, under all the circumstances of the case, it is entitled to in coming to a final conclusion,"—is objectionable, as telling the jury, in effect, that the wife and daughter had strong motives for giving the most favorable coloring possible in behalf of the accused to the facts which they were called to delineate.[154] Where an instruction was asked, "that, under the law, the evidence of the defendants is just as proper for your consideration in determining their guilt or innocence as the evidence of other witnesses," it was held proper to modify "the same by striking out the words, 'as the evidence of other witnesses,' and adding, 'and should receive such weight as you think it entitled to.' "[155] So, a request for an instruction that the jury should weigh, examine, and test defendant's testimony, "the same as it does the testimony of all the other witnesses in the case," was properly modified by striking therefrom the words quoted.[156] An instruction that defendant's statements of his innocence of the charge, which were brought out by the state on the examination of the state's witnesses, are evidence to be considered by them as any other evidence in the case, is objectionable, as importing to the jury that they were bound, as matter of law, to give to the defendant's declarations of innocence the same weight they give to other evidence.[157] It has been held proper to refuse an instruction which is not clear in its statement of the legal principle, and which impresses "the jury that they must consider any interest, 'either financial or otherwise,' that each witness may have in the event of the suit."[158] An instruction suggesting that "suspicion attaches to the testimony of

[154] State v. Pomeroy, 30 Or. 16.

[155] Bulliner v. People, 95 Ill. 407.

[156] People v. Cowgill, 93 Cal. 596. See, also, Clark v. State (Tex. Cr. App.) 59 S. W. 887.

[157] Childress v. State, 86 Ala. 77.

[158] City of Lincoln v. Beckman, 23 Neb. 677.

agents or servants of a corporation or individual by reason of their employment, or that they have any such interest as requires them to be dealt with differently from other witnesses," should not be given.[159] It is improper to cast discredit upon a medical witness because he may have attended the trial from an adjoining state, with the expectation that his expenses would be paid. Presumally, the witness was actuated by humane motives.[160] Where the only evidence of the character of the defendant is that he was a quiet and peaceable man, it is proper to refuse an instruction that the jury "may look to the fact, if it be a fact, that defendant is a man of good character, in determining what weight they will give to the testimony of the defendant."[161] The court does not err in failing to instruct the jury that evidence of defendant's bad character went only to his credibility as a witness, and was not evidence of his guilt. Where no such evidence is adduced, and even if there is such evidence, the court cannot be convicted of error in failing to instruct with respect to it, in the absence of a request to do so by defendant, or of its attention being called in time to its failure to instruct upon the law of the case.[162]

§ 227. Instructing that jury "may" consider interest of party or witness.

In all jurisdictions, except Kentucky, Mississippi, and

[159] Marquette, H. & O. R. Co. v. Kirkwood, 45 Mich. 53; West Chicago St. R. Co. v. Raftery, 85 Ill. App. 319. An instruction that the jury "will consider the interest of the parties; consider the relationship as well as the employment, as calculated to bias, whether it biased in this case."—is not erroneous as intimating "that employment would necessarily bias a witness." Central of Georgia Ry. Co. v. Bernstein (Ga.) 38 S. E. 394.

[160] Bradley v. State, 31 Ind. 492.

[161] Bodine v. State (Ala.) 29 So. 926.

[162] State v. Furgerson, 162 Mo. 668.

Texas, it is held that the court may properly instruct the jury that they may consider the interest of the person testifying, whether as a party or witness, in determining his credibility.[163] The jury may be instructed that, in determining the credit to be given to the testimony of defendants, "you may consider the very great interest which they must have and feel in the result of this case, and the effect which a verdict would have upon them, and determine to what extent, if at all, such interest may color their testimony or affect their credibility. If their statements be convincing, and carry with them belief in their truth, you have the right to receive and act upon them; if not, you have a right to reject them."[164] And an instruction of similar import, re-

[163] Norris v. State, 87 Ala. 85; Hamilton v. State, 62 Ark. 543; Bressler v. People, 117 Ill. 439; Siebert v. People, 143 Ill. 571; Rider v. People, 110 Ill. 11; State v. Metcalf, 17 Mont. 417; Faulkner v. Territory, 6 N. M. 464; Territory v. Romine, 2 N. M. 114; State v. Bohan, 19 Kan. 35; Haines v. Territory, 3 Wyo. 167; People v. Knapp, 71 Cal. 1; Clark v. State, 32 Neb. 246; Barmby v. Wolfe, 44 Neb. 77; Dixon v. State, 46 Neb. 298; Bulliner v. People, 95 Ill. 407; City of Harvard v. Crouch, 47 Neb. 133; State v. Carey, 15 Wash. 549; State v. Nordstrom, 7 Wash. 506; Klepsch v. Donald, 4 Wash. 436; State v. McCann, 16 Wash. 249; State v. Carey, 15 Wash. 549; Felker v. State, 54 Ark. 489; Chicago & A. R. Co. v. Anderson, 166 Ill. 572; State v. Zorn, 71 Mo. 415; State v. Wells, 111 Mo. 533; State v. Maguire, 69 Mo. 197; State v. McGinnis, 76 Mo. 326; State v. Patterson, 98 Mo. 283; State v. Kelly, 9 Mo. App. 512, affirmed in 73 Mo. 608; State v. Miller, 93 Mo. 263; State v. Wisdom, 84 Mo. 190; State v. Parker, 39 Mo. App. 116; State v. Morse, 66 Mo. App. 303; McDonell v. Rifle Boom Co., 71 Mich. 61; Davis v. Central R. Co., 60 Ga. 329; Goodwine v. State, 5 Ind. App. 63; Randall v. State, 132 Ind. 539; Lake Erie & W. Ry. Co. v. Parker, 94 Ind. 91; Young v. Gentis, 7 Ind. App. 199; Wabash R. Co. v. Biddle (Ind. App.) 59 N. E. 284; Clarey v. State (Neb.) 85 N. W. 897; Lancashire Ins. Co. v. Stanley (Ark.) 62 S. W. 66.

[164] Norris v. State, 87 Ala. 85; Bressler v. People, 117 Ill. 439; Siebert v. People, 143 Ill. 571; Rider v. People, 110 Ill. 1; State v. Metcalf, 17 Mont. 417; Halderman v. Territory (Ariz.) 60 Pac. 876; State v. Adair, 160 Mo. 391; State v. Miller, 159 Mo. 113.

lating to the credibility of parties in civil cases, is proper.[165] In giving instructions in criminal cases, the following instructions have also been approved: "The defendant is competent to testify as a witness in this case, but the fact that he is the defendant may be shown for the purpose of affecting his credibility."[166] "The defendant is a competent witness in his own behalf, but the fact that he is a witness testifying in his own behalf may be considered by the jury in determining the credibility of his testimony."[167] "That the defendant has a right to be a witness in his own behalf, yet, in weighing his evidence, and the weight to be given thereto, they have a right to take into consideration the interest that he has at stake in this case."[168] That, "in case of the defendant, you have a right to take into consideration the great interest he has in your verdict."[169] That "the fact that such witness is specially interested in the result of the action or of your deliberations may be taken into account by you."[170] That "it will be proper for you to consider the fact that he is the defendant, and that greatest possible temptation is presented to him to testify in his own favor, if he is really guilty."[171] But, in instructing the jury that they may consider the interest of a defendant as affecting his credibility, it is erroneous to give this statement undue weight by repetition.[172]

[165] Lake Erie & W. R. Co. v. Parker, 94 Ind. 91; Young v. Gentis, 7 Ind. App. 199; Chicago & G. T. Ry. Co. v. Spurney, 69 Ill. App. 549.

[166] State v. Zorn, 71 Mo. 415.

[167] State v. Maguire, 69 Mo. 197. See, also, State v. Wisdom, 84 Mo. 190, in which an instruction almost identical with the one set out above was approved.

[168] State v. McGinnis, 76 Mo. 326.

[169] State v. Bohan, 19 Kan. 35.

[170] Faulkner v. Territory, 6 N. M. 464.

[171] Territory v. Romine, 2 N. M. 114. This case was decided before the statutory provision against charging on the weight of the evidence was passed.

[172] Clark v. State, 32 Neb. 246.

In charging as to the credibility of witnesses other than parties, it has been held proper to instruct that the jury may consider the interest of the witnesses in the event of the suit.[173] Where the wife of a defendant is a witness, the court may instruct that, in weighing her testimony, the jury may take into consideration the fact that the defendant is the accused, and is on trial, the statute expressly providing that the fact of the relationship may be shown as affecting credibility.[174] Instructions that the interest of defendants in a criminal case is a proper matter for the consideration of the jury have been held not erroneous as singling out such witnesses for special comment.[175] It is proper to refuse an instruction which tells the jury that the credibility of the witnesses on one side is affected by their interest in the event of the suit, while the instructions ignore similar facts affecting the credibility of the witnesses on the other side.[176] So, an instruction calling the jury's attention to the plaintiff's interest in the suit as affecting his credibility is properly refused if the test of interest is applicable to other witnesses in the case.[177]

§ 228. Same—Rule in Kentucky, Mississippi, and Texas.

In these jurisdictions, instructions of the kind mentioned

[173] Klepsch v. Donald, 4 Wash. 436; City of Harvard v. Crouch, 47 Neb. 133; McDonell v. Rifle Boom Co., 71 Mich. 61. In the last case, the instruction approved was as follows: "Now, it is said that some of these witnesses are interested in or in the employ of the boom company, and you are to consider that circumstance in weighing your testimony. You have a right to do that, gentlemen, and if you think that any circumstance of that kind has operated upon their judgment, so that they have not been able to form an impartial judgment, you must consider their testimony for what it is worth."

[174] State v. Parker, 39 Mo. App. 116.

[175] Haines v. Territory, 3 Wyo. 167; Chicago & A. R. Co. v. Anderson, 166 Ill. 572.

[176] Phenix Ins. Co. v. La Pointe, 118 Ill. 389.

[177] Pennsylvania Co. v. Versten, 140 Ill. 637.

in the preceding section cannot be given. Thus, in Kentucky, it has been held that the court has no right to direct attention to the interest of witnesses in the result or character of statements made by them, the jury being the sole judges of the weight of the evidence, and of the credibility of the witnesses.[178] So, in Mississippi, it has been held erroneous to instruct that, "in weighing the defendant's testimony, they [the jury] should consider the interest he has in the result, and they may disregard it altogether;"[179] or that, "if the jury believe from the evidence that any witness who has testified in this case has any feeling or interest in the result of this trial, then the jury should consider such feeling or interest in connection with all the evidence in the case in determining how far, if at all, they will believe such witness or consider such testimony."[180] In one of these decisions it was said: "A defendant has the right to submit his testimony to the jury to be judged of by it, uninfluenced by any suggestions of its probable falsity, or an authorization to the jury to throw it aside as unworthy of belief because of the strong temptation to the defendant to swear falsely. There is little danger that juries will be unduly influenced by the testimony of defendants in criminal cases. They do not need any cautioning against too ready credence to the exculpation furnished by one on trial for a felony. The accused should be allowed to exercise his right to testify, unimpaired by any suggestions calculated to detract from its value in the estimation of the jury."[181] In Texas, the decisions in civil cases are unanimous to the effect that it is improper to tell the jury that they may consider the interest of the wit-

[178] Wright v. Com., 85 Ky. 123.

[179] Buckley v. State, 62 Miss. 705.

[180] Woods v. State, 67 Miss. 575. To the same effect, see Townsend v. State (Miss.) 12 So. 209.

[181] Buckley v. State, 62 Miss. 705.

nesses in the matter in controversy in determining their credibility.[182] In criminal cases there seems to be some diversity of opinion, and, while there are some cases in which instructions of this nature have been approved,[183] a later decision overrules the former cases and holds that it is erroneous to give such an instruction,[184] and this doctrine now seems to be the settled law.[185] It is held that the same rule applies whether the witness be pointed out and named in the charge, or whether the charge does not in terms point out the witness by name, but states conditions that can only apply to a certain witness or witnesses.[186] It is proper to refuse a charge that, in weighing the testimony of defendant, the jury should treat him as any other witness, judging his appearance, demeanor, etc.[187]

§ 229. Instructing that jury "must" or "should" consider interest of party or witness.

According to the weight of authority, it is proper for the court to instruct "that, in weighing and determining the

[182] Willis v. Whitsitt, 67 Tex. 673; Kellogg v. McCabe, 14 Tex. Civ. App. 598.

[183] Brown v. State, 2 Tex. App. 115; Cockerell v. State, 32 Tex. Cr. App. 585; Adam v. State (Tex. Cr. App.) 20 S. W. 548.

[184] Harrell v. State, 37 Tex. Cr. App. 612.

[185] Shields v. State, 39 Tex. Cr. App. 13; Oliver v. State (Tex. Cr. App.) 42 S. W. 554.

[186] Harrell v. State, 37 Tex. Cr. App. 612, criticising Muely v. State, 31 Tex. Cr. App. 155, where it was held improper to instruct that, "in determining the credibility of the defendant, who testifies in his own behalf, his interest in the issues involved is to be considered." In this case the court intimated that an instruction, generally, that the jury might consider the interest of the witnesses in determining their credibility, would not have been improper. The instruction given was condemned on the ground that it singled out defendant for special comment.

[187] Clark v. State (Tex. Cr. App.) 59 S. W. 887.

truth of defendant's testimony, they should take into consideration the interest he must necessarily have in the result of the trial."[188] This rule is applicable whether the person testifying is the defendant in a criminal suit;[189] or any party to a civil suit;[190] or any witness either in a civil suit or a criminal prosecution other than the parties thereto,[191] as, for instance, the wife of the defendant in a criminal prosecution;[192] or of any other person related to him;[193] or of a prosecuting witness in a criminal case.[194] Keeping in view these principles, it has been held proper to charge "that, in considering the weight of the evidence given by both the de-

[188] People v. Calvin, 60 Mich. 114; People v. Herrick, 59 Mich. 563; State v. Cook, 84 Mo. 40; State v. Young, 105 Mo. 634; State v. Renfrow, 111 Mo. 589; State v. Morrison, 104 Mo. 642; State v. Brown, 104 Mo. 374; State v. Lingle, 128 Mo. 537; State v. Young, 99 Mo. 666; State v. Turner, 110 Mo. 196; Johnson v. People, 140 Ill. 350; Salazar v Taylor, 18 Colo. 538; State v. Hogard, 12 Minn. 293 (Gil. 191); St. Louis v. State, 8 Neb. 418; Johnson v. State, 34 Neb. 257; Murphy v. State, 15 Neb. 389; People v. O'Neal, 67 Cal. 378; People v. Knapp, 71 Cal. 1; Rogers v. King, 12 Ga. 229; State v. Fiske, 63 Conn. 392; State v. Slingerland, 19 Nev. 135; State v. Streeter, 20 Nev. 403; State v. Hymer, 15 Nev. 51; State v. Viers, 82 Iowa, 397; Hatfield v. Chicago, R. I. & P. Ry. Co., 61 Iowa, 440; West Chicago St. R. Co. v. Estep, 162 Ill. 130. Contra, State v. Fairlamb, 121 Mo. 139; Wabash R. Co. v. Biddle (Ind. App.) 59 N. E. 284.

[189] State v. Mounce, 106 Mo. 226; People v. Knapp, 71 Cal. 1; People v. Cronin, 34 Cal. 192; State v. Fisk, 63 Conn. 392; State v. Sterrett, 71 Iowa, 386; State v. Ryan (Iowa) 85 N. W. 812; State v. Miller, 162 Mo. 253.

[190] West Chicago St. R. Co. v. Estep, 162 Ill. 130.

[191] Salazar v. Taylor, 18 Colo. 538; State v. Hogard, 12 Minn. 293 (Gil. 191); State v. Lingle, 128 Mo. 528; People v. Herrick, 59 Mich. 563.

[192] State v. Napper, 141 Mo. 401; State v. Strattman, 100 Mo. 540; State v. Lingle, 128 Mo. 537; State v. Young, 99 Mo. 666.

[193] State v. Hogard, 12 Minn. 293 (Gil. 191); State v. Fisher, 162 Mo. 169.

[194] State v. Hogard, 12 Minn. 293 (Gil. 191).

fendant and his wife, they [the jury] will take into consideration the fact that he is the defendant testifying in his own behalf, and that she is his wife, and you may consider their interest in the case, and the marital relation, in passing upon the credibility of their testimony."[195] Or that "it is the duty [of the jury] to reconcile and harmonize the evidence, if possible;" to "take into consideration the appearance of the witness on the stand, his interest in the result of the suit, or the want of it."[196] Or "that the jury should consider and decide whether such relationship (of any of the witnesses to the complaining witness or defendant) acted upon the witnesses, * * * to make false statements in their evidence, or whether such relationship influenced said witnesses and swerved them from the truth."[197] Or that "the defendant has offered himself as a witness on his own behalf in this trial, and, in considering the weight and effect to be given his evidence, in addition to noticing his manner and the probability of his statements, taken in connection with the evidence in the cause, you should consider his relation and situation under which he gives his testimony, the consequences to him relating from the result of this trial, and all the inducements and temptations which would ordinarily influence a person in his situation."[198] Or that the jury should "consider his [defendant's] relation and situation under which he gives his testimony, the consequences to him relating from the result of this trial, and all the inducements and temptations which would ordinarily influence a person in his situation. * * *

[195] State v. Napper, 141 Mo. 401. See, also, State v. Strattman, 100 Mo. 540, where an instruction almost identical in language was approved.

[196] Little v. McGuire, 43 Iowa, 447.

[197] State v. Hogard, 12 Minn. 295 (Gil. 192).

[198] State v. Hymer, 15 Nev. 51.

If convincing and carrying with it a belief in its truth, act upon it; if not, you have a right to reject it."[199] Or that, "above all, you are to take into consideration the fact that he [defendant] is the accused in the case; and, taking those facts into consideration, you are to give to his statements in court, or any statements made by him out of court, such effect and such force as you think they justly should have."[200] Or "that, in determining the weight of the testimony [concerning material matters in controversy], * * * the jury have the right, and it is their duty as jurors, to take into consideration the interest which any witness may have in the subject-matter involved."[201] Or "that, in determining the weight and credibility to be attached to the testimony of defendants, they should consider the fact that they are the defendants."[202] Or "that, in weighing his [the defendant's] testimony, they [the jury] should consider his position, the manner in which he might be affected by the verdict, and the very grave interest he must feel in it, and whether this position and interest might not affect his credibility and color his testimony, but that they should weigh the testimony fairly, and give it such credit as they thought it ought to receive."[203] Or that the jury should consider the relations which the prosecuting witness and the defendant bore to the case, in determining what weight to give their testimony.[204] Or that the jury should "look at all the facts and circumstances of the case, the character of the witnesses, * * * their relationship to the parties, * * * and

[199] People v. Cronin, 34 Cal. 192. See, also, People v. Wheeler, 65 Cal. 77; State v. Streeter, 20 Nev. 403; People v. Morrow, 60 Cal. 142, in which instructions substantially the same were upheld.

[200] State v. Fiske, 63 Conn. 392.

[201] Salazar v. Taylor, 18 Colo. 538.

[202] State v. Brown, 104 Mo. 374.

[203] People v. Knapp, 71 Cal. 1.

[204] People v. Herrick, 59 Mich. 563.

thus determine upon which side the credibility preponderates, and render a verdict accordingly."[205]

§ 230. Same—Rule in Kentucky, Mississippi, Texas, and Indiana.

As already shown, it is settled in Kentucky, Mississippi, and Texas that the court cannot instruct that the jury "may" consider the interest of a witness in determining his credibility, and of course it would be improper to instruct that the jury "should" consider such interest.[206] The decisions in Indiana on this question are very conflicting, and it is impossible to decide whether an instruction of this nature would be sustained in this state. In a number of Indiana decisions it has been held that an instruction that the jury "should" consider the interest of parties and other witnesses related to them in testing their credibility is an invasion of the province of the jury, because it indicates, as a matter of law, that the testimony of such witnesses was entitled to less weight than that of others.[207] On the other hand, the following instruction has been approved, and this ruling is in direct variance with that of the decisions set forth in the preceding note: "In determining the weight to be given the testimony of the different witnesses, you should take into account the interest or want of interest they have in the case, their manner on the stand," etc.[208] And a similar instruction has been sustained in a very recent decision.[209] In sustaining this instruction, the court considered that the use

[205] Rogers v. King, 12 Ga. 229.

[206] Eddy v. Lowry (Tex. Civ. App.) 24 S. W. 1076; Muely v. State, 31 Tex. Cr. App. 155. See. also, ante, § 228, setting forth the practice in Mississippi, Kentucky, and Texas.

[207] Unruh v. State, 105 Ind. 118; Bird v. State, 107 Ind. 154; Lynch v. Bates, 139 Ind. 210; Woollen v. Whitacre, 91 Ind. 502; Dodd v. Moore, 91 Ind. 522.

[208] Anderson v. State, 104 Ind. 467.

[209] Deal v. State, 140 Ind. 354.

of the word "should" "does not tell them [the jury] how much, if any, that interest ought to detract from their testimony, but leaves that wholly to the exclusive determination of the jury. To consider evidence is one thing, and to determine its weight and force is another, and quite a different, thing. If the court may not tell the jury that it is a legal obligation resting on them, under their oaths, to consider all the evidence adduced before them, then it follows, as a logical sequence, that they are not bound to give any consideration whatever to the evidence introduced before them under the permission of the court."[210]

IV. Admissions and Confessions in Criminal Cases.

§ 231. General considerations governing instructions on this kind of evidence.

Evidence of confessions, like any other evidence, ought to be the subject of appropriate instructions to the jury, so that they can consider and pass upon the weight of the evidence, and determine whether or not it is entitled to any weight. There may be many circumstances surrounding the making of a confession which may very much affect it, and these are for the consideration of the jury.[211] Where defendant, when on the stand, denies that the confessions are freely and voluntarily made, and claims that he was induced to make same by promises to him by an officer, the court should instruct the jury on this point, and inform them that, if they do not believe that said confessions are freely and voluntarily made by the defendant, but on compulsion or promises on the part of the officer, they may wholly disregard the same; and this, notwithstanding no exception is taken to the failure

[210] Deal v. State, 140 Ind. 368.

[211] Williams v. State, 63 Ark. 527.

of the court to so charge.[212] Where no issue is presented by the testimony as to the voluntary character of the confessions of defendant, it is proper to refuse to charge the jury that, before they could consider confessions made by defendant, they must believe the same were made voluntarily, and not under promise, or induced by improper influence.[213] Where two theories are presented by the evidence, one of which renders the confession admissible, and the other excludes it, if the court, after hearing the testimony, should, in a case where such confession is very material, conclude to admit it, it then becomes the duty of the court to instruct the jury, if they believe that the confession was not freely and voluntarily made, after having been warned by the officer, as the statute requires, but that same was induced by duress, threats, or coercion on the part of the officer, to wholly disregard and not consider such confession.[214] If two or more defendants are jointly indicted and tried, the jury should be instructed that admissions or confessions made by one defendant, not in the presence of the other, should not be considered as evidence against the defendant who did not make them.[215] And in instructing on this question, a general charge "that the jury should not consider any admission or declaration of one prisoner against the others, unless they were present when made," will not be sufficient. The attention of the jury should be directed to the specific admission, and they should be cautioned not to give it any weight in determining the guilt or innocence

[212] Paris v. State, 35 Tex. Cr. App. 82. In this case it was further held that a failure of defendant to take any exception made no difference. See, also, State v. Moore, 160 Mo. 443.

[213] Bailey v. State (Tex. Cr. App.) 59 S. W. 900.

[214] Sparks v. State, 34 Tex. Cr. App. 86.

[215] State v. Talbott, 73 Mo. 348; State v. Oxendine, 107 N. C. 783; Wilkerson v. State (Tex. Cr. App.) 57 S. W. 956. See, also, Givens v. State, 103 Tenn. 648.

of the party who is not bound by it.[216] Though there is evidence of a conspiracy between defendant and others to do the acts for which defendant is prosecuted, yet the court should grant a request to charge that the jury will disregard the testimony of the acts of the alleged co-conspirators unless a conspiracy is shown.[217] An instruction that all statements by a witness, who was also indicted as an accomplice, made to other witnesses, not in the presence of defendant, were admitted solely upon the issue of the guilt or innocence of the accomplice, and cannot be considered for any other purpose, if for any purpose, is not erroneous, in that it assumes as a fact proven that the accomplice did make statements to other witnesses, which tended to establish the guilt or innocence of said accomplice.[218] Where the confession of the defendant is not disputed, or its meaning, there is no necessity of calling the attention of the jury to it, for it is not likely that they will forget it. To predicate error on refusal to instruct concerning confessions, it should appear that it was either necessary, or that it was the duty of the court to instruct the jury on that subject.[219] In instructing the jury it is erroneous to assume that the defendant has made an admission or confession,[220] or to charge that defendant has made an admission, when such is not the case,[221] and it is also erroneous to intimate an opinion as to whether an admission was made seriously.[222] So, instructions on the subject of confessions or admissions which are not based on any evidence in

[216] State v. Oxendine, 107 N. C. 783.

[217] Casner v. State (Tex. Cr. App.) 57 S. W. 821; Segrest v. State (Tex. Cr. App.) 57 S. W. 845.

[218] Wilkerson v. State (Tex. Cr. App.) 57 S. W. 956.

[219] Bernhardt v. State, 82 Wis. 23.

[220] Hogan v. State, 46 Miss. 274.

[221] Andrews v. State, 21 Fla. 598.

[222] People v. Brow, 90 Hun (N. Y.) 509.

the case should not be given;[223] as, for instance, where, on a criminal trial, there is other evidence against the prisoner besides his confessions, it is proper to refuse an instruction that confessions not corroborated will not warrant a conviction.[224] Where the admissibility of a confession is the dominant question before the jury, it is error to refuse a request to charge on the subject of confessions, though the request is faulty.[225] An instruction that "if you [the jury] find and believe that any statements of the defendant have been proven by the state, and not denied by the defendant, then they are to be taken as admitted as true," is erroneous, as charging in effect that defendant must specifically deny every statement attributed to him.[226]

§ 232. What instructions may properly be given.

In instructing the jury upon the subject of admissions and confessions, the following charge has been approved: "When the admissions or confessions of a party are introduced in evidence by the state, then the whole of the admissions or confessions are to be taken together, and the state is bound by them unless they are shown to be untrue by the evidence. Such admissions or confessions are to be taken into consideration by the jury as evidence, in connection with all other facts and circumstances of the case."[227] So it has been held proper to charge that, in considering what

[223] Gentry v. State, 24 Tex. App. 80; Com. v. Tarr, 4 Allen (Mass.) 315; Com. v. McCann, 97 Mass. 580. Where there is no evidence of a confession, but simply evidence of an admission of a fact which might tend to criminate, it is error to charge the jury as to the law in regard to confessions. Suddeth v. State, 112 Ga. 407.

[224] Com. v. Tarr, 4 Allen (Mass.) 315; Bailey v. State (Tex. Cr. App.) 59 S. W. 900.

[225] State v. Moore, 160 Mo. 443.

[226] State v. Hollingsworth, 156 Mo. 178.

[227] Pharr v. State, 7 Tex. App. 478.

the defendant said, "the jury must consider it all together. The defendant is entitled to the benefit of what he said for himself, if true, as the state is to anything he said against himself in any conversation proved by the state. What he said against himself in any conversation the law presumes to be true, because against himself; but what he said for himself the jury are not bound to believe, because said in a conversation proved by the state. They may believe or disbelieve it, as it is shown to be true or false by all the evidence in the case."[228] The court may also instruct that verbal statements of defendant may be considered with the other facts in the case;[229] and a charge that the jury could believe the confession, or any part thereof, as true or false, has been approved.[230] So it has been held that the court may properly charge that evidence of admissions may be subject to much imperfection and mistake, and that the jury may, if they think proper, give great, little, or no weight at all to such admissions.[231] On the other hand, it is improper to charge that " 'the fact that the person who is charged with the commission of a crime says nothing, but remains silent, is a circumstance to which the jury may look as a confession of guilt.' It is often a circumstance, the significance of which may be misunderstood, and it ought, therefore, always to be questioned very carefully, if not distrustingly, by a jury."[232]

§ 233. Same—Instructions to receive and weigh with caution.

In many jurisdictions it is held improper for the court to

[228] State v. Curtis, 70 Mo. 594, State v. Vansant, 30 Mo. 67; State v. Peak, 85 Mo. 190. See, also, Jackson v. People, 18 Ill. 269, where an instruction almost identical with the above was approved.

[229] State v. Tobie, 141 Mo. 547.

[230] State v. Gunter, 30 La. Ann. 537.

[231] Koerner v. State, 98 Ind. 20.

[232] Campbell v. State, 55 Ala. 80.

instruct the jury that evidence of alleged admissions and confessions should be received with caution, or to otherwise disparage such evidence,[233] and several reasons are assigned why an instruction of this nature should not be given. According to the views of some courts, such an instruction invades the province of a jury as to matters of which jurors are the exclusive judges.[234] It is further urged as a reason that the processes of reasoning by which a conclusion is reached, if well made, are appropriate to be found in either text books or opinions, but rarely, if ever, is it proper to deliver such reason in the form of instructions; that the teachings of experience on questions of fact are not doctrines of law, which may be announced as such from the bench; that they may well enter into the arguments of attorneys, one side claiming that experience teaches one thing, and the other asserting another conclusion; but the jury, not the judge, is the arbiter of such contentions, as of all questions of fact.[235] Accordingly, it has been held proper to refuse an instruction that "the confessions of a defendant are to be received with caution,"[236] or that "it is not uncommon for different witnesses of the same conversation to give precisely opposite accounts of it."[237] According to other decisions, however, it is not improper for the court to caution the jury against placing too much reliance upon this kind of evidence.[238] And one decision holds that the trial judge "may so charge,

[233] Garfield v. State, 74 Ind. 60; Collins v. State, 20 Tex. App. 400; Thuston v. State, 18 Tex. App. 26; White v. Territory, 3 Wash. T. 397; Com. v. Galligan, 113 Mass. 202; Koerner v. State, 98 Ind. 7.

[234] Collins v. State, 20 Tex. App. 400; Garfield v. State, 74 Ind. 63.

[235] Garfield v. State, 74 Ind. 63.

[236] Collins v. State, 20 Tex. App. 420.

[237] Garfield v. State, 74 Ind. 60.

[238] State v. Shelledy, 8 Iowa, 477; State v. Hardee, 83 N. C. 619; Hunter v. State, 43 Ga. 483; Haynes v. State (Miss.) 27 So. 601.

or not, in the exercise of a wise discretion, to be guided by the circumstances of each particular case."[239] So it has been held that a failure to include in the charge as to confessions the qualification that "a confession alone, uncorroborated by other evidence, will not justify a conviction," will render the charge erroneous.[240] It is error to refuse to instruct that, if the jury "believe from the evidence that the prisoner made any confessions or admissions of guilt, such confessions or admissions are to be received by them with great caution, and, unless supported by other proof in the case, are not sufficient to convict."[241] An instruction that it is the duty of the jury "to view with distrust evidence of the oral admissions of defendant * * * is at variance with the Code provision which declares that evidence of the oral admissions of a party is to be viewed with caution."[242] Where an instruction is given at defendant's request, cautioning the jury against verbal admissions and statements, though such instruction is in disregard of "the provision of the constitution that 'judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law,' " the defendant cannot afterwards ask for other similar instructions.[243]

§ 234. Same—Instructions giving undue weight to evidence.

No instruction on this subject should be given, the tendency of which will be to make the jury attach undue weight to this kind of evidence. Thus, it is improper to charge

239 State v. Hardee, 83 N. C. 619.

240 Lucas v. State, 110 Ga. 756.

241 Haynes v. State (Miss.) 27 So. 601. In this case, the evidence relied on as an admission was that, when asked why he killed deceased, defendant replied that he did not know what he was doing.

242 People v. Sternberg, 111 Cal. 11.

243 People v. Rodley, 131 Cal. 240.

that a confession is of the most weighty nature in law;[244] or that "confessions made by a prisoner charged with an offense, when made voluntarily, and not obtained by force, fraud, or threats, are regarded by the law as the highest and most satisfactory character of proof;"[245] or "that the confessions of the accused of his guilt, when confirmed by circumstances, become the highest evidence of his guilt;"[246] or "that the voluntary confessions of a defendant are evidence against him, and are to be regarded as the strongest proof in the law;"[247] or that the "admissions of the defendant against himself are to be taken as true;"[248] or that, if the jury believe that defendant confessed he was guilty, they may find him guilty as charged.[249]

V. Admissions in Civil Cases.

§ 235. Instructions to receive and weigh with caution.

In charging as to admissions in civil cases, practically the same considerations govern as in criminal cases, and the same conflict is found in the decisions as to the propriety of instructions cautioning the jury to receive this kind of evidence with caution. According to many decisions, such an instruction is upon the weight of the evidence, and is therefore improper.[250] "The reasons which are to be urged in favor

[244] Ledbetter v. State, 21 Tex. App. 344.

[245] Brown v. State, 32 Miss. 433.

[246] Hogsett v. State, 40 Miss. 522.

[247] Morrison v. State, 41 Tex. 520. See, also, Harris v. State, 1 Tex. App. 79.

[248] Grant v. State, 2 Tex. App. 164.

[249] Long v. State, 1 Tex. App. 466.

[250] Davis v. Hardy, 76 Ind. 272; Finch v. Bergins, 89 Ind. 360; Newman v. Hazelrigg, 96 Ind. 377; Lewis v. Christie, 99 Ind. 377; Shorb v. Kinzie, 100 Ind. 429; Morris v. State, 101 Ind. 560; Unruh v. State, 105 Ind. 117; Castleman v. Sherry, 42 Tex. 59; Shinn v. Tucker, 37 Ark. 580; Kauffman v. Maier, 94 Cal. 282; Wastl v. Mon-

of receiving such statements with caution are based upon human experience, and vary in strength and conclusiveness with the facts and circumstances of each case, and their sufficiency in any particular case is an inference which the reason of the jury makes from those facts and circumstances; but there is no rule of law which directs the jury to invariably make such an inference from the mere fact that the proof of the admission is by oral testimony. * * * To weigh the evidence and find the facts in any case is the province of the jury, and that province is invaded by the court whenever it instructs them that any particular evidence which has been laid before them is or is not entitled to receive weight or consideration from them."[251] "Statements in the nature of or tending to prove admissions * * * should be considered and given such weight by the jury as they may think them entitled to, without any advice of the court as to their force."[252] A number of illustrative cases are cited below in the note, wherein instructions have been condemned for disparaging this class of evidence.[253] There are nevertheless quite a number of decisions holding that it is not improper for the court to caution the jury against placing too much reliance upon testimony as to admissions. Thus, it has been held proper to charge "that the verbal admissions of a party to a suit, when made understandingly

tana Union R. Co., 17 Mont. 213; Knowles v. Nixon, 17 Mont. 473; Johnson v. Stone, 69 Miss. 826; Mauro v. Platt, 62 Ill. 450; Zenor v. Johnson, 107 Ind. 69; Morris v. State, 101 Ind. 560; Frizell v. Cole, 29 Ill. 465; Tobin v. Young, 124 Ind. 507.

251 Kauffman v. Maier, 93 Cal. 269. See, also, Castleman v. Sherry, 42 Tex. 59.

252 Shinn v. Tucker, 37 Ark. 580.

253 Wastl v. Montana Union R. Co., 17 Mont. 213; Knowles v. Nixon, 17 Mont. 473; Lewis v. Christie, 99 Ind. 377; Kauffman v. Maier, 94 Cal. 269; Zenor v. Johnson, 107 Ind. 69; Newman v. Hazelrigg, 96 Ind. 73; Frizell v. Cole, 29 Ill. 465; Johnson v. Stone, 69 Miss. 826; Mauro v. Platt, 62 Ill. 450.

and deliberately, often afford satisfactory evidence; yet, as a general rule, the statements of a witness as to verbal admissions of a party should be received by the jury with great caution, as that kind of evidence is subject to imperfection and mistake;"[254] or that "evidence of casual statements or admissions by a party, made in casual conversations, and to disinterested persons, is regarded by law as very weak testimony, owing to the liability of the witness to misunderstand or forget what was really said or intended by the party;"[255] or that, "with respect to verbal admissions, they ought to be received with great caution;"[256] or that "admissions are regarded as weak testimony;"[257] or that admissions of a party were "the weakest kind of evidence that could be produced;"[258] or that "admissions should be scanned with care, —the jury should look to them carefully to see what they mean, and see that they are not being used to imply and to carry with them more meaning than they are justly entitled to."[259] So it has been held proper, after suggesting that evidence of verbal admissions should be received with great caution, to charge that the reasons stated constitute a very strong argument, but that it was for the jury to determine the weight of such evidence according to the way in which it affected their own mind.[260] The following charge on this subject has also been approved: "Evidence consisting of the mere repetition of oral statements, and being therefore subject to much imperfection and mistake, through misunderstanding, excitement, or impulse of the party, and want of

254 Allen v. Kirk, 81 Iowa, 658.
255 Haven v. Markstrum, 67 Wis. 493.
256 Tozer v. Hershey, 15 Minn. 257 (Gil. 197).
257 Nash v. Hoxie, 59 Wis. 384.
258 Dreher v. Town of Fitchburg, 22 Wis. 680.
259 Stewart v. De Loach, 86 Ga. 729.
260 Moore v. Dickinson, 39 S. C. 441.

proper understanding of the words by the hearers, and their imperfection of memory, should be cautiously received; but when such admissions are deliberately made, or often repeated, and are correctly given, they are often the most satisfactory evidence; that the jury should consider all the circumstances under which such admissions were made and introduced in evidence, and give them such weight as they were justly entitled to receive."[261] It is not error not to caution the jury in regard to verbal admissions where the statements of defendant seem to have been made deliberately and understandingly in a conversation in which his purpose was to state the particular facts of his connection with the crime.[262] And an instruction that the "confessions or declarations of a party, in evidence before them, is the weakest and most unsatisfactory kind of evidence, on account of the facility with which it may be fabricated, and the difficulty of disproving it when false," has been held erroneous, for the reason that it confounds the evidence of the admissions with the admissions themselves, and fails to observe the distinction between them.[263]

§ 236. Instructions giving undue weight to this class of evidence.

In charging as to evidence of admissions, it is improper to make any statement which will cause the jury to attach undue importance to such evidence. Thus, it is erroneous to instruct "that the admissions of a party to a civil suit are strong evidence against him;"[264] or that testimony against

261 Martin v. Town of Algona, 40 Iowa, 392.

262 State v. Jackson, 103 Iowa, 702.

263 Higgs v. Wilson, 3 Metc. (Ky.) 338. To the same effect, see Botts v. Williams, 17 B. Mon. (Ky.) 687.

264 Westbrook v. Howell, 34 Ill. App. 571; Earp v. Edgington (Tenn.) 64 S. W 40.

interest is to be taken as true;[265] or "that the admissions and declarations of a party are legal and sufficient evidence against him, but not in his favor."[266] In one decision, however, it has been held that it is not improper for the court to charge that admissions made before the controversy arose were entitled to great weight.[267] It is not error to refuse to instruct that, "while proof of the fact that admissions were made, and the terms on which they were made, ought to be cautiously scanned, yet, when deliberately made and precisely identified, they are usually received as satisfactory. 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." The weight to be given to admissions of a party depends upon the circumstances under which they are made, and the effect of such circumstances is to be judged by the jury alone, and therefore such instruction invades the province of the jury.[268]

§ 237. Instructions as to admissions of record.

Upon request of either party, the court must instruct the jury what facts are admitted of record.[269]

VI. Testimony of Expert Witnesses.

§ 238. Rules governing this class of evidence.

While the competency of an expert witness is, of course, a question to be determined by the court, it is the exclusive province of the jury to determine what weight shall be given

[265] Ephland v. Missouri Pac. Ry. Co., 57 Mo. App. 147.
[266] Baker v. Kelly, 41 Miss. 696.
[267] Buford v. McGetchie, 60 Iowa, 298.
[268] Phoenix Ins. Co. v. Gray, 113 Ga. 424.
[269] Evans v. Foreman, 69 Mo. 449.

to his testimony, and the court, in giving its instructions, should not interfere with the right of the jury in this regard.[270] As was said in one case: "Its value may be very great, or it may be of little worth. It may be conclusive, or it may be not even persuasive. Its weight will be determined by the character, the capacity, the skill, the opportunities for observation, and the state of mind of the experts themselves, as seen and heard and estimated by the jury, and, it should be added, by the nature of the case and all its developed facts."[271] In determining the credibility and weight of such evidence, the jury should consider it in connection with all the other evidence in the case.[272] They are not bound by such evidence, but are at liberty to reject it altogether if they do not consider it credible.[273]

§ 239. Instructing that expert testimony is to be considered the same as that of other witnesses.

According to many decisions, an expert witness is to be

[270] State v. Cole, 63 Iowa, 695; Bever v. Spangler, 93 Iowa, 576; Fox v. Peninsular White Lead & Color Works, 84 Mich. 676; Rivard v. Rivard, 109 Mich. 98; Taylor v. Cox, 153 Ill. 220; Keithsburg & E. R. Co. v. Henry, 79 Ill. 290; Burney v. Torrey, 100 Ala. 157; Gunter v. State, 83 Ala. 96; Mewes v. Crescent Pipe Line Co., 170 Pa. 369; Wells v. Leek, 151 Pa. 431; Templeton v. People, 3 Hun (N. Y.) 360; Roberts v. Johnson, 58 N. Y. 613; Anderson v. Barksdale, 77 Ga. 86; Stevens v. City of Minneapolis, 42 Minn. 136; White v. Fitchburg R. Co., 136 Mass. 321; Atchison, T. & S. F. R. Co. v. Thul, 32 Kan. 255; Tatum v. Mohr, 21 Ark. 349; Johnson v. Thompson, 72 Ind. 167; Davis v. State, 35 Ind. 496; Humphries v. Johnson, 20 Ind. 190; Kansas City, W. & N. W. R. Co. v. Ryan, 49 Kan. 1; Tillotson v. Ramsay, 51 Vt. 309; Sioux City & P. R. Co. v. Finlayson, 16 Neb. 578; St. Louis Gaslight Co. v. American Fire Ins. Co., 33 Mo. App. 348.

[271] Louisville, N. O. & T. Ry. Co. v. Whitehead, 71 Miss. 451.

[272] Epps v. State, 102 Ind. 539; Guetig v. State, 66 Ind. 107; Alabama G. S. R. Co. v. Hill, 93 Ala. 514; Kilpatrick v. Haley, 6 Colo. App. 407.

[273] Aetna Life Ins. Co. v. Ward, 140 U. S. 76; Anthony v. Stinson, 4 Kan. 211; Flynt v. Bodenhamer, 80 N. C. 208.

judged from the same standpoint as any other witness, and the jury are to apply the same general rules to the testimony of experts as are applicable to the testimony of any other witness in determining its weight and credibility, and an instruction so directing the jury is not improper.[274]

§ 240. Instructions tending to discredit expert testimony.

There is some conflict of opinion as to whether it is proper to instruct the jury that the testimony of experts is to be received with caution and circumspection. In some cases, an instruction of this nature has been approved,[275] but the weight of authority is to the effect that such an instruction is erroneous, and should not be given.[276] In one of these cases, however, it was held that the judgment should not be

[274] Carter v. Baker, 1 Sawy. 525, Fed. Cas. No. 2,472; Chandler v. Barrett, 21 La. Ann. 58; Thornton's Ex'rs v. Thornton's Heirs, 39 Vt. 122; Eggers v. Eggers, 57 Ind. 461; Cuneo v. Bessoni, 63 Ind. 524; Shellaharger v. Thayer, 15 Kan. 619; Ball v. Hardesty, 38 Kan. 540; Haight v. Vallet, 89 Cal. 245; Williams v. State, 50 Ark. 511; Louisville, N. O. & T. Ry. Co. v. Whitehead, 71 Miss. 451; Hampton v. Massey, 53 Mo. App. 501; Turnbull v. Richardson, 69 Mich. 400; Maynard v. Vinton, 59 Mich. 139; Rivard v. Rivard, 109 Mich. 98; Epps v. State, 102 Ind. 539; Langford v. Jones, 18 Or. 307; Thompson v. Ish, 99 Mo. 160; Brehm v. Great Western Ry. Co., 34 Barb. (N. Y.) 256.

[275] Haight v. Vallet, 89 Cal. 245; Buxly v. Buxton, 92 N. C. 479. See, also, dictum in Templeton v. People, 3 Hun (N. Y.) 357. It has been held proper to refuse an instruction that expert testimony should be received with caution and scrutiny, where the court has instructed that the opinion of medical experts is not conclusive, "but that the purpose of the introduction is to supplement the general knowledge and experience of the jury in relation to the matters before them, and thereby to aid them in the exercise of their own judgment upon the facts, which must be exercised independently of the opinion evidence." McLean v. Crow, 88 Cal. 644.

[276] Weston v. Brown, 30 Neb. 609; Atchison, T. & S. F. R. Co. v. Thul, 32 Kan. 255; People v. Seaman, 107 Mich. 348; Kankakee & S. R. Co. v. Horan, 23 Ill. App. 259; Louisville, N. O. & T. Ry. Co. v. Whitehead, 71 Miss. 451.

reversed for this error, where "the record is otherwise free from error, and the case not close on the point upon which the expert evidence bore."[277] So, also, there is a conflict of opinion as to whether it is proper to instruct that testimony of an expert is entitled to little weight. In one case, an instruction of this nature has been approved,[278] but in another case an instruction to this effect has been held properly refused,[279] and an instruction that expert testimony is usually of little value has been condemned.[280] An instruction characterizing expert testimony as "made up largely of mere theory and speculation, and which suggests mere possibilities, * * * is properly refused, as inaccurate in point of fact, and conveying a severe criticism of such evidence."[281] So, an instruction, "It may be further remarked, too, in regard to evidence which is made up largely of mere theory and speculation, and which suggests mere probabilities, that it ought never to be allowed to overcome clear and well-established facts, and, further, that the law recognizes expert testimony as the lowest order of evidence," is erroneous, as expert testimony may sometimes be of the highest character.[282] So, the following instructions, tending to discredit expert testimony, have been held erroneous: That the court "place no reliance whatever upon the expert testimony, except what is due to the testimony of a sensible and honest gentleman;"[283] that "it is your own opinion upon the matter, and the conclusion you draw from the facts proven, that

277 Kankakee & S. R. Co. v. Horan, 23 Ill. App. 259.

278 Whitaker v. Parker, 42 Iowa, 585.

279 Rivard v. Rivard, 109 Mich. 98.

280 Eggers v. Eggers, 57 Ind. 461; Gunter v. State, 83 Ala. 96.

281 Long v. Travellers' Ins. Co. (Iowa) 85 N. W. 24.

282 Brush v. Smith, 111 Iowa, 217, wherein veterinary surgeons had testified that certain hogs had hog cholera.

283 Templeton v. People, 3 Hun (N. Y.) 357.

should determine your verdict, and not what any other person says or thinks;"[284] that "we question very much whether you will realize much, if any, valuable aid from them [expert witnesses] in coming to a correct conclusion as regards the responsibility for crime by this prisoner;"[285] that "it is the most remarkable circumstance that you can always obtain an equal number [of experts], as a rule, to swear on both sides of any question;"[286] or that the court did not think that expert testimony "was worth one fig, given as it was;"[287] that the "evidence [of experts] is intrinsically weak, and ought to be received and weighed by the jury with great caution;"[288] that, in regard to testamentary capacity, the opinions of testator's neighbors, if men and women of good common sense, were worth more than those of medical experts. The relative weight of expert and nonexpert testimony must be left to the jury.[289]

§ 241. Instructions directing jury to attach great weight to expert testimony.

On this question, also, the authorities are very conflicting. Thus, the following instructions have been approved: That the opinion of medical experts is "entitled to great weight," when given in connection with another instruction that the jury are not compelled to take such testimony as true;[290] that

[284] Ball v. Hardesty, 38 Kan. 540.
[285] Pannell v. Com., 86 Pa. 260.
[286] People v. Webster, 59 Hun (N. Y.) 398.
[287] Reichenbach v. Ruddach, 127 Pa. 564.
[288] Coleman v. Adair, 75 Miss. 660.
[289] Taylor v. Cox, 153 Ill. 220.
[290] St. Louis, I. M. & S. Ry. Co. v. Phillips (C. C. A.) 66 Fed. 35, in which the court took the view that this was a mere expression of opinion, and not an obligatory rule for the jury's guide. See, also, Laflin v. Chicago, W. & N. R. Co. (C. C.) 33 Fed. 422, in which the following charge was held proper: "Great weight should al-

"the proof made by expert witnesses * * * is of much greater value than of other persons who have no scientific or experimental knowledge of the subject of insanity, and who can only speak from observation of outward signs or appearances;"[291] "that the opinion of experts ought to have weight with the jury, as they are familiar with these questions, but the jury are not concluded by their opinion;"[292] that "the law likewise attaches peculiar importance to the opinion of medical men who have an opportunity of observation upon a question of mental capacity, as by study and experience * * * they become experts in the matter of bodily and mental ailments."[293] So in one case it has been held improper to refuse the following instruction: "Considering the extraordinary character of the injuries alleged in this case, and the great difficulty attendant upon their proper investigation, great weight should be given by the jury to the opinion of scientific witnesses, accustomed to investigate the causes and effect of injuries to the eye, and a distinction should be made in favor of the opinion of those accustomed to use the most perfect instruments and processes, and who are acquainted with the most recent discoveries of science, and most improved methods of treatment and investigation."[294]

There is, however, a line of decisions which take the opposite view from those cited. Thus, it has been held error to

ways be given to the opinions, honestly and candidly expressed, of those familiar with the subject. They are not to be blindly received, but are to be intelligently examined by the jury in the light of their own general knowledge, giving them force and control only to the extent that they are found to be reasonable."

[291] State v. Reidell, 9 Houst. (Del.) 479.

[292] State v. Owen, 72 N. C. 605.

[293] Flynt v. Bodenhamer, 80 N. C. 205.

[294] Tinney v. New Jersey Steam Boat Co., 12 Abb. Pr. (N. S.; N. Y.) 3.

charge that "the opinion of physicians upon questions of mental competency is entitled to greater weight than that of ordinary laymen;"[295] or that, "when the experience, honesty, and impartiality of the experts are undoubted, their testimony is entitled to great weight;"[296] or "that, in questions involving science and skill, the opinions of scientific men in professions or pursuits, to which such questions may pertain, are authoritative, and in all doubtful cases, in which such questions are involved, should control the jury;"[297] or "that the testimony of experts is supposed to be the best that can be furnished;"[298] or that the testimony of experts as to professional services "is the guide of the jury in finding the amount justly due, and in this case you must take the testimony of these witnesses, and be governed by it."[299] It is proper to refuse to instruct: "On the matter of insanity set up in this case, it is your duty, if you believe the testimony upon which the opinions testified to by the medical experts are based is true, to weigh and test those opinions; * * * and if you find that they are learned in their professions, and have, in giving their opinions, testified candidly, sincerely, honestly, and truthfully, you should give their testimony due weight, and, if such testimony is all on one side, you should return your verdict in accordance with it. If the jury believe the testimony of physicians and others who testified as to the mental condition of the defendant at the time of the commission of the act complained of to be true, and such testimony is all on one side, then the verdict should be in accordance with such testimony. If you believe that the medical experts—the physicians who have testified in this

295 Maynard v. Vinton, 59 Mich. 139.
296 Wall v. State (Ga.) 37 S. E. 371.
297 Humphries v. Johnson, 20 Ind. 190.
298 Kansas City, W. & N. W. R. Co. v. Ryan, 49 Kan. 1.
299 Anthony v. Stinson, 4 Kan. 211.

case—have testified to the truth, and also believe that the testimony of the witnesses on which their opinions, as testified to, are based, is true, you should acquit the defendant." The jury are not bound to accept the conclusions of experts as their own.[300]

§ 242. Instructing jury to take into consideration witness' means of knowledge.

It is proper to instruct the jury to take into consideration the means and opportunity of acquiring knowledge possessed by experts, as shown by the evidence, in estimating the weight which they should give to other testimony.[301]

§ 243. Instructions contrasting testimony of experts.

Though it is proper for the court to instruct the jury to scrutinize the testimony of experts, and it is his duty to instruct them to look to their character, manner, and capability; to the circumstances that brought them in as witnesses; to the fact of compensation, and to what extent, if any, under all the circumstances, their credibility might be affected thereby,—it is error to say, in almost direct terms, that, while the medical experts introduced by defendant were admissible in law as witnesses, they were not entitled to credit, while on the other hand, when experts are appointed by the state, or by referees agreed on by the parties, and when such examinations made by such experts are not *ex parte,* but conducted with notice to the opposite party, then the testimony is entitled to great weight.[302] A general instruction given to aid the jury to know the value of, or weight to be given to, testimony of certain experts, where their

[300] Williams v. State, 50 Ark. 511.

[301] Wells v. Leek, 151 Pa. 431; State v. Hinkle, 6 Iowa, 380; Aetna Life Ins. Co. v. Ward, 140 U. S. 76.

[302] Persons v. State, 90 Tenn. 291.

opinions are based on facts drawn from other evidence, and not from their personal observation, is not objectionable as impliedly depreciating the value of the testimony of an expert of little experience, as compared with another witness in the case.[303] An instruction that a medical or scientific book, introduced in evidence, "is entitled to as much authority as a witness," is in violation of a statute forbidding the judge to comment on the weight of evidence.[304] An instruction that the testimony of certain experts is entitled to more weight than the testimony of other experts should be refused.[305] Where some of the expert witnesses pointed out the facts upon which they based their opinions, and others did not, a refusal to charge that the facts have greater weight than the opinions is not erroneous, as such instruction was on the weight of the evidence, and would have invaded the province of the jury.[306] Where the court disclaims any intention of expressing an opinion on the testimony, it is not error to call the attention of the jury to the testimony of experts on each side, and direct them to consider it and the reasons on which the experts based their opinions.[307]

§ 244. Directing jury to consider, in connection with other evidence.

The court may properly instruct that "the opinions of medical experts are to be considered * * * in connection with all the other evidence in the case, but you [the jury] are not bound to act upon them, to the exclusion of all other evidence."[308]

[303] Powell v. Chittick, 89 Iowa, 513.
[304] Melvin v. Easly, 46 N. C. 386.
[305] Bever v. Spangler, 93 Iowa, 576.
[306] Breck v. State, 2 Ohio Cir. Dec. 477.
[307] Com. v. Barner, 199 Pa. 335.
[308] Goodwin v. State, 96 Ind. 550; Guetig v. State, 66 Ind. 107; Wagner v. State, 116 Ind. 181; Epps v. State, 102 Ind. 539.

§ 245. Instructions giving undue prominence to skill and experience of experts.

In instructing the jury as to expert testimony, it is improper to charge that the jury should consider the skill of the expert, and value his testimony accordingly, as this gives undue prominence to the skill of the expert, and ignores his credibility as exhibited by his conduct on the witness stand.[309] So, an instruction which ignores the opportunities of the expert for knowledge, his aptitude, and his skill, and which places too much stress upon his experience, is also erroneous.[310]

§ 246. Instructions with regard to hypothetical questions.

It is proper to instruct the jury to disregard the evidence (opinions) of expert witnesses, based upon hypothetical questions, if the jury should find the hypothesis involved in the questions to be not in accordance with the facts.[311] So t is always proper and commendable to instruct the jury not to take for granted the truth of the statements contained in the hypothetical questions asked the witnesses, and that they should carefully scrutinize the evidence, and determine from it what, if any, statements are not true.[312] There is some contrariety of opinion as to whether the jury may be directed to disregard the opinion of an expert if any of the facts stated in the hypothetical case are not fully proved. In one case it was said: "It is true, as a general rule, that, where the opinion of an expert is founded upon a hypothetical case, his opinion cannot be considered of material value unless the hypothetical case put to him is fully sustained by the evidence. Yet exceptions to this rule may arise, where the

[309] Blough v. Parry, 144 Ind. 463.
[310] Cuneo v. Bessoni, 63 Ind. 524.
[311] Loucks v. Chicago, M. & St. P. Ry. Co., 31 Minn. 526.
[312] Guetig v. State, 66 Ind. 107; Goodwin v. State, 96 Ind. 550.

hypothetical case is susceptible of division, and a part of it only is sustained by the evidence."[313] And in another case (citing the one mentioned as authority) it was held not improper to instruct "that the facts stated in a hypothetical case need not necessarily be always fully proven to give value to the testimony of an expert."[314] The following instruction has been sustained in two decisions: "An opinion based upon an hypothesis wholly incorrectly assumed, or incorrect in its material facts, and to such an extent as to impair the value of the opinion, is of little or no weight."[315] On the other hand, an instruction that, "if one fact supposed to be true, included in the question, is untrue, not supported by the evidence, then the opinion of the expert would be valueless," has been approved,[316] and the following instruction condemned: "If the facts stated as a basis for the hypothetical question propounded to the medical experts in this case were not substantially correct, as shown by the evidence introduced on the trial of the case, then the opinion given by the experts, based upon such assumed state of facts, is entitled to but little or no weight, as may be determined from the evidence. That is to say, the hypothetical facts upon which the question is based must be substantially correct to entitle the conclusion drawn by the expert to have any considerable weight." In condemning this instruction, the reviewing court said this instruction is erroneous as conveying the impression "that the opinion of the expert might have some weight, even though the jury should find that the facts assumed as a basis for the opinion were incorrect. * * * The sole value of the opinion must, of necessity, depend upon the correctness of the statement of facts upon which it is

[313] Eggers v. Eggers, 57 Ind. 461.
[314] Epps v. State, 102 Ind. 539.
[315] Guetig v. State, 66 Ind. 94; Goodwin v. State, 96 Ind. 550.
[316] People v. Foley, 64 Mich. 148.

based. If that is incorrect, then the opinion can have no weight or value whatever."[317] Under this rule, it has been held that if "there is evidence * * * tending to prove all the material elements contained in the said question hereinafter set forth, and asked the expert witness," it is not error to refuse an instruction that, "if you find the evidence * * * does not fully sustain the facts inquired in the hypothetical question, you [the jury] will not give the answers to such questions any effect."[318] It has been held proper to instruct that the facts stated in the hypothetical question asked an expert must be substantially proven to entitle his opinion to any weight.[319] And the jury may be instructed that, if the question asked the expert does not contain sufficient facts upon which the witness can form an intelligent opinion, his testimony is thereby weakened, if not wholly destroyed.[320]

§ 247. Miscellaneous instructions.

If the opinions of experts are manifestly in conflict with the established facts of the case, they cannot overcome such facts, and the jury may be so instructed.[321] So, where a witness testified to seeing a note signed, there was no error in instructing that expert evidence as to the handwriting should not overcome the testimony of a credible witness who testified from personal knowledge.[322] It is error to instruct that the way for the accused "to contradict the testimony of experts is by the introduction of testimony of the same class of men,—that is, of experts,—to show the thing to be

[317] Hall v. Rankin, 87 Iowa, 261.
[318] Turnbull v. Richardson, 69 Mich. 400.
[319] Hovey v. Chase, 52 Me. 304.
[320] Quinn v. Higgins, 63 Wis. 664.
[321] Treat v. Bates, 27 Mich. 390; Brown v. Busch, 45 Pa. 61.
[322] Bruner v. Wade, 84 Iowa, 698.

different; and, as a principle of law, you have no right to disregard the testimony of credible witnesses,—experts,—if the witnesses are credible, and substitute for them your own opinions or notions, without proof." Such an instruction in effect tells the jury that the accused, no matter what his financial circumstances are, must employ experts on penalty that the testimony of the experts for the state shall be considered binding upon the jury.[323] Where the question being considered is whether a defect in a plank was obvious, and whether proper inspection of the plank would have disclosed the defect, it is proper to instruct the jury that they have "a right, from all the circumstances in the case, and from their inspection of the piece exhibited, to determine what, in all probability, the other side or end of the plank would show if produced; that the jurymen had a right to use their experience of lumber of this kind, and supply, as far as that experience and their good judgment went, the missing portion of the plank; that they were not restricted to the testimony of witnesses; that they might use their own intelligence, and their own experience with lumber, and the knowledge which they brought with them into the jury room; and that it was their duty to use that information as much as the information they got from the witnesses."[324]

§ 248. Necessity of requesting instructions.

Where the court, on request, charges correctly as to expert testimony, and counsel desire fuller instructions, they should request them.[325] So, a charge to the effect that the jury will be governed by the weight of the evidence, without calling special attention to the testimony of experts, is not er-

[323] People v. Vanderhoof, 71 Mich. 158.

[324] Lafayette Bridge Co. v. Olsen (C. C. A.) 108 Fed. 335.

[325] Bertody v. Ison. 69 Ga. 317.

roneous, especially where no request, written or verbal, is made calling attention to that species of evidence.[326]

VII. TESTIMONY OF IMPEACHED WITNESSES

§ 249. Propriety and necessity of instructions on this subject

Instructions on the law as to the impeachment of witnesses are always proper, where evidence tending to impeach a witness has been introduced,[327] but should be refused unless there is evidence on which to base them.[328] In the giving of instructions as to the modes of impeachment, it is error to state a certain mode of impeachment, when there is no evidence on which to base it.[329] The court may, of its own motion, instruct on the subject of impeachment, and it is apprehended a refusal to give such an instruction when warranted by the evidence, and when a proper request has been made, would be erroneous.[330] Whether a failure to give such instructions, in the absence of a request, would be erroneous, seems to be in some doubt. Of course, error could hardly be assigned to a mere omission to give such an instruction in jurisdictions when there is no statutory requirement that the court shall substantially state the law governing the case, whether requested or not.[331] In one state it is held not error for the court to fail to state to the jury the

326 City of Atlanta v. Champe, 66 Ga. 660.

327 Ford v. State, 92 Ga. 459.

328 Cauley v. State, 92 Ala. 71. Compare Sanders v. Illinois Cent. R. Co., 90 Ill. App. 582.

329 City Bank of Macon v. Kent, 57 Ga. 284.

330 Ohio & M. Ry. Co. v. Craucher, 132 Ind. 275; Harris v. State, 96 Ala. 24; Rose v. Otis, 18 Colo. 59. In this case it was held that evidence that a witness had made a statement out of court different from that given by him when testifying tends to impeach him, and that, when requested, the court should instruct the jury to consider this in estimating what his testimony would be worth.

331 See ante, §§ 127-133, "Necessity of Request as Foundation for Error."

effect of impeaching evidence as to the credibility of a witness, where no instruction on that question is asked. It was said that the impeachment of a witness does not constitute a defense, but merely relates to the credibility to be given to the testimony, and that the failure to instruct as to the effect of an effort to impeach does not constitute a failure to state the issues of the case.[332] In another case in this state it was held that a correct charge in relation to impeachment of a witness, and the manner in which an impeached witness may be sustained, is not erroneous because it fails to state particular rules on the subject of impeachment, in the absence of a request for more particular instructions.[333] In another state, where the court is required to instruct the jury to the extent of fully covering the substantial issues made by the evidence, whether requested or not, it has been held not a ground for reversal that the court did not, of its own motion, instruct the jury as to what constituted impeachment, by contradictory statements made under oath. The appellate court considered that this was a minor point, which the trial court need not charge on unless requested.[334] In other jurisdictions it has been held that, where a witness is impeached, it is the duty of the court to instruct the jury as to the application of the impeaching evidence.[335] Where no evidence tending to impeach any wit-

[332] State v. Kirkpatrick, 63 Iowa, 554.

[333] Wheelwright v. Aiken, 92 Ga. 394.

[334] Thomas v. State, 95 Ga. 484; Merchants' & Planters' Nat. Bank v. Trustees of the Masonic Hall, 62 Ga. 272. See, also, Lewis v. State, 91 Ga. 168, where it was held that a correct charge having been given on the manner in which the jury should deal with impeaching evidence, and the effect of such evidence, a failure to state the rules laid down in the statutes as to the modes of impeachment was not a ground for reversal, in the absence of requests for such instructions.

[335] Wolfe v. State, 25 Tex. App. 698; State v. Davis, 78 N. C. 433; Herstine v. Lehigh Valley R. Co., 151 Pa. 244; Henderson v. State,

ness in any of the modes prescribed by law was introduced, a failure to instruct as to the impeachment of witnesses is not erroneous.[336] It is often proper to give an instruction limiting the effect of impeaching testimony to the sole purpose of impeachment.[337] Unless the jury can use impeaching testimony for some purpose injurious to defendant, it is not necessary to limit its effect by an instruction.[338]

§ 250. What instructions proper.

The jury may properly be instructed that they "'should consider' the impeaching evidence introduced, in estimating the weight which ought to be given to the testimony of the witness, and should also, for the same purpose, take into consideration the fact, if they should so find it, that the moral character of any witness had been successfully impeached."[339] That, in connection with impeaching evidence, it is proper "for you [the jury] to consider whether they [the impeached

1 Tex. App. 432. In the latter case, "the verdict depended on the evidence of the prosecuting witness alone, and the defense, after laying the proper predicate, proved that on several occasions she had made statements materially conflicting with her testimony at the trial. The court should, as part of the law applicable to the case, have given in charge to the jury the legal principles controlling the application and effect of the impeaching evidence." But in another Texas case it was said that to give such a charge would not be necessary or proper except under extraordinary or peculiar circumstances. Thurmond v. State, 27 Tex. App. 371. And, in another, that "it is only when a witness has been properly impeached" that such a charge is necessary. In this case it was held that an attempted impeachment by a single witness was not enough to render an instruction on impeachment necessary. Rider v. State, 26 Tex. App. 334.

336 Freeman v. State, 112 Ga. 48.

337 Bondurant v. State, 125 Ala. 31. See, generally, as to instructions limiting the effect of evidence, post, § 353.

338 Blanco v. State (Tex. Cr. App.) 57 S. W. 828.

339 Smith v. State, 142 Ind. 288.

witnesses] have been supported by evidence of good character for truth and veracity, whether they have been corroborated by other truthful witnesses, and whether their testimony is consistent with other facts in the case, which have been proven to your satisfaction."[340] That the jury are to determine the credibility of a witness against whom impeaching evidence has been introduced, under all the facts and circumstances as proved, and that, if he "gave a fair, candid, and honest statement of the whole transaction in controversy, they should not disregard his testimony."[341] That, "where it is shown that the reputation for truth of a witness is bad, his evidence is not necessarily destroyed, but it is to be considered under all the circumstances described in the evidence, and given such weight as the jury believe it entitled to, and to be disregarded if they believe it entitled to no weight."[342] Where the reputation of witnesses among their neighbors, for truth, is impeached, and the testimony of witnesses to the effect that they are acquainted with the character of the impeached witnesses, for truth in their neighborhood, and that, from this acquaintance thus derived, they would believe those witnesses under oath, although, as they said, they had never heard that character spoken of, is then received, a charge to the jury that they may weigh this testimony, in their estimate of the credibility of the impeached witnesses, is not erroneous.[343] So it has been held not improper to instruct that, "if a witness has come upon the stand, and testified to a different state of facts here to what he testified upon the preliminary trial, you have the right to look to this evidence as evidence tending to impeach the wit-

[340] Haymond v. Saucer, 84 Ind. 3.
[341] McCasland v. Kimberlin, 100 Ind. 121.
[342] State v. Miller, 53 Iowa, 210.
[343] Taylor v. Smith, 16 Ga. 7.

ness who has made such conflicting statements,[344] or that, "if you believe, from the evidence, that any witness, before testifying in this case, has made any statements out of court concerning any of the material matters, materially different and at variance with what he or she has stated on the witness stand, then the jury are instructed by the court that these facts tend to impeach either the recollection or the truthfulness of the witness, and the jury should consider these facts in estimating the weight which ought to be given to his or her testimony, and, if the jury believe from the evidence that the moral character of any witness or witnesses has been successfully impeached on this trial, then that fact should also be taken into consideration in estimating the weight which ought to be given to the testimony of such witness or witnesses;"[345] or "that certain other evidence introduced tends to sustain the evidence, or that there is evidence tending in both directions, when such is the case;"[346] that "they [the jury] are at liberty to disregard the statements of such witnesses (if any there be) as may have been successfully impeached, either by direct contradiction, * * * unless the statements of such witnesses have been corroborated by other evidence, which has not been impeached."[347] An

[344] Harris v. State, 96 Ala. 27.

[345] Smith v. State, 142 Ind. 288.

[346] Harris v. State, 96 Ala. 27.

[347] Miller v. People, 39 Ill. 463; White v. New York C. & St. L. R. Co., 142 Ind. 648; Harper v. State, 101 Ind. 113; State v. Ormistop, 66 Iowa, 143. In this case, the following instruction was approved: "If you believe from the evidence that any witness has been successfully impeached, either by reason of bad reputation for truth and veracity, or by reason of statements made out of court conflicting with statements made on the witness stand, or you so find that any witness has willfully sworn falsely in regard to any matter or thing material to the issues in the case, you will be justified in disregarding the whole testimony of such witness, except in so far as you

instruction concerning the various modes of impeaching witnesses, and telling the jury that it does not follow that, because a witness may be impeached, his testimony should be entirely excluded from consideration; that in such case it is for the jury to decide for themselves what weight shall be given to the testimony of such witnesses, taking into consideration all corroborating circumstances and testimony, if any exist, is not objectionable in that it assumes that witnesses have been impeached, and that it withdraws from the jury the right to give full credence to the testimony of such witnesses.[348] In relation to corroborating testimony, the following charge has been approved: "The corroboration ought to be sufficient to satisfy the jury of the truth of the evidence of the accomplice. If the jury are satisfied that he speaks the truth in some material part of his testimony, in which they see him confirmed by unimpeachable evidence, this may be a ground for their believing that he also speaks the truth in other parts, as to which there may be no confirmation; but the corroboration ought to be as to some fact or facts connecting the prisoner with the offense, the truth or falsehood of which would go to prove or disprove the offense charged against the prisoner."[349] Where evidence of contradictory statements made out of court has been introduced, it has been held not improper, in a jurisdiction where the court may charge on the weight of the evidence, to instruct that "the law regards this kind of impeaching testimony as uncertain and somewhat unreliable."[350] "If the jury believe that the witnesses have made sworn contradictory state-

may find it corroborated by other credible evidence in the case, or by facts and circumstances proved on the trial."

[348] McDermott v. State, 89 Ind. 187. This instruction is not objectionable, as assuming that any witness had been impeached.

[349] Jackson v. State, 64 Ga. 345.

[350] State v. Roberts, 63 Vt. 139.

ments upon matters material to the issue in this case, then the testimony of said witnesses may be wholly disregarded and rejected by the jury, * * * and, before they should receive and base a verdict upon it, they should carefully scrutinize the testimony."[351] An instruction that the force and effect of certain testimony is to show that a certain witness has told things out of court different from in court, and that it therefore becomes a matter for their consideration, when weighing his testimony, how much credit they will give to a witness who stated things in that way, and that the only question is whether such testimony goes to the credibility of the witness, and which leaves entirely to the jury the question as to whether the witness made contradictory statements, is not objectionable as a charge on the effect of the evidence.[352] An instruction "that the jury were not to arbitrarily reject the testimony of the convict witnesses simply because they were convicts, but that their testimony should be considered and weighed in accordance with the rules of evidence," is not erroneous as "in effect telling that they are to disregard the fact that certain witnesses have been convicted of a felony, in weighing their testimony."[353]

§ 251. What instructions erroneous.

It is error to instruct the jury that a witness is impeached, and is not to be believed.[354] An instruction pregnant with disparaging suggestions, not based upon the evidence, and invading the province of the jury by undertaking to fix for them the probative value of impeaching testimony, is er-

[351] McConkey v. Com., 101 Pa. 420.
[352] Parnell v. State (Ala.) 29 So. 860.
[353] People v. Putman, 129 Cal. 258.
[354] East Mt. L. Coal Co. v. Schuyler, 3 Leg. Gaz. (Pa.) 106; Harris v. State, 96 Ala. 27.

roneous.[356] So it is erroneous to instruct that, "if any witness, having testified in the cause, had been impeached to their satisfaction, they should disregard his testimony."[357] It is proper to refuse an instruction that, "against the credibility of any witness, it is a strong circumstance, weighing heavily, that he is ascertained to have sworn falsely in regard to some material fact,"[358] or that his testimony should be considered with "great distrust."[359] So, it is proper to refuse to instruct that the jury cannot convict on the testimony of a witness against whom impeaching testimony has been offered,[360] especially where there has been some corroborating testimony.[361] So, it is proper to refuse to instruct that "proof of contradictory statements, declarations, or testimony on material points by a witness may be sufficient to raise a reasonable doubt in the minds of the jury of the truth of the witness' testimony, and, if the jury have such a reasonable doubt of the truth of her testimony, then they should reject her testimony, and should not consider it against the defendant in making up their verdict;"[362] or that, where a witness for the prosecution is impeached by proof of his contradictory declarations on a material point, it is error to instruct that the jury must believe a witness for the state, unless they believe that the contradicting witness is entitled to more weight and credit than said witness for the state;[363] or that "the testimony of a witness for the prosecution, who is shown

[356] Strong v. State (Neb.) 84 N. W. 410; Tarbell v. Forbes, 177 Mass. 238.
[357] Chester v. State, 1 Tex. App. 703.
[358] Paul v. State, 100 Ala. 136.
[359] Tarbell v. Forbes, 177 Mass. 238.
[360] Spicer v. State, 105 Ala. 123.
[361] Gilyard v. State, 98 Ala. 59.
[362] Green v. State, 97 Ala. 59.
[363] Corley v. State, 28 Ala. 22.

to be unworthy of credit, is not sufficient to justify a conviction without corroborating evidence, and such corroborating evidence, to avail anything, must be of a fact tending to show the guilt of the defendant;"[364] or that "the jury should throw aside the testimony of such witness [who had been successfully impeached], and not consider it, except in so far as it may be sustained or corroborated by other testimony in the case;"[365] or that "the testimony of an impeached witness is to be taken with great care by the jury, and, unless fully corroborated, the jury will be justified in giving to it no weight whatever, and it is only on such points as such witness may be corroborated that the witness is entitled to credence and weight with the jury;"[366] or that, "when a witness was heard by a jury, who was neither impeached nor

[364] Moore v. State, 68 Ala. 360; Horn v. State, 98 Ala. 23; Ray v. State, 50 Ala. 104. Contra, Cohen v. State, 50 Ala. 108. A curious state of affairs is presented by these last two cases. They were decided by the same tribunal, and are in direct conflict, yet the last in point of time was decided within a few days after the former, without any reference or allusion thereto. Though "the character of a witness is assailed, or he is otherwise impeached as being unworthy of credit, it is entirely within the province of the jury, as the exclusive judges of the facts, to say what degree of weight or credibility shall be given to his testimony. It does not lie in the mouth of any court to instruct the jury, as matter of law, that they cannot convict on such testimony unless it is corroborated; * * * an instruction by the court defining the effect to be given their statements is an infringement upon the jury's province." Osborn v. State, 125 Ala. 106, citing Jordan v. State, 81 Ala. 20; Lowe v. State, 88 Ala. 8; Moore v. State, 68 Ala. 360; Grimes v. State, 63 Ala. 166; Addison v. State, 48 Ala. 478.

[365] Addison v. State, 48 Ala. 478.

[366] Green v. Cochran, 43 Iowa, 544. Contra, White v. Cook, 73 Ga. 169, where the following charge was approved: "Witnesses may be impeached by the proof of contradictory statements. Witnesses, when impeached, should not be believed unless corroborated. It is for you to say whether any attempt at impeachment has been successful."

contradicted, whose story was credible, and in whose manner there was nothing to shake their confidence, they were bound to believe him."[367] An instruction: "If the jury believe from the evidence in this case that the reputation of any witness in this case for truth and veracity in the neighborhood where they reside is bad, then the jury have a right to disregard his whole testimony, and treat it as untrue,— * * * that is, * * * to treat it as untrue, except where it is corroborated by other credible evidence, or by facts and circumstances proved on the trial,"—is erroneous.[368] A charge that, "while it is the province of the jury to pass upon the credibility of a witness, nevertheless the law furnishes to juries certain rules to guide them in determining whether or not a witness spoke the truth, and the law authorizes a jury to discard altogether the testimony of a witness who has been impeached," is properly refused as calculated to mislead the jury to believe that the credibility of the testimony referred to is to be tested alone by the extent to which the general credibility of the witnesses has been impeached. Whether a jury is authorized to discard altogether the testimony of a witness who has been impeached depends not alone upon the fact of impeachment, but upon that fact, considered in connection with other facts

[367] State v. Smallwood, 75 N. C. 104; Noland v. McCracken, 18 N. C. 594. Contra, Rowland v. Plummer, 50 Ala. 182, where a similar charge was approved. This decision is palpably erroneous. The reviewing court considered that this was not a charge on the "effect of the evidence," but it is hard to conceive on what they based their opinion. According to this decision, the jury would be bound to believe the testimony of an unimpeached and uncontradicted witness, though it was in contradiction of some well-known natural or physical law. See, also, Smith v. State, 63 Ga. 168, where a charge similar to that set out in the text was approved.

[368] Higgins v. Wren, 79 Minn. 462.

in evidence.[369] Since a witness can be impeached only in one way,—by a direct attack upon his testimony and character,[370]—it is erroneous to instruct that "a witness may be just as effectually impeached * * * by his manner of testifying, his feelings towards the parties, his want of intelligence, or the want of means of knowing the facts of which he testifies."[371] So it is also erroneous to instruct that "if you believe from the evidence that either one or more of the witnesses has ill-will or unkind feelings to prisoner, that is one of the methods of impeaching a witness, and that weakens the testimony of the witness."[372] It is error to instruct the jury "that when a party introduces a witness on the stand, he thereby indorses his credibility;"[373] or that, "where a defendant puts a witness on the stand, it is a declaration upon his part that the witness is a truthful one."[374] It is sufficient to say that a party cannot impeach his own witness.[375] By introducing the witness, the party represents him to be truthful, but does not warrant him to be so, under the penalty that, if he swear falsely, it shall be evidence against the defendant upon the issue on trial. A party cannot foresee that his witness will swear falsely, or prevent him from doing so.[376] After correctly instructing the jury as to how a witness may be impeached, it is not improper for the court to say to the jury that "it would be a virtual disregard of a juror's duty to arbitrarily disregard the evidence of a witness."[377] An instruction that deprives a defendant of the

[369] Osborn v. State, 125 Ala. 106.
[370] Hansell v. Erickson, 28 Ill. 259.
[371] Chicago West Division Ry. Co. v. Bert, 69 Ill. 388.
[372] Skipper v. State, 59 Ga. 63.
[373] Jarnigan v. Fleming, 43 Miss. 710.
[374] State v. Brown, 76 N. C. 225.
[375] Jarnigan v. Fleming, 43 Miss. 710.
[376] State v. Brown, 76 N. C. 225.
[377] State v. Sutfin, 22 W. Va. 771.

right of the jury to consider, for what it is worth, evidence affecting the credibility of the prosecuting witness, is erroneous.[378] An instruction that, although the jury "may believe from the evidence, beyond a reasonable doubt, that the witness for the state may have a bad reputation for truth and veracity, still you may give full faith and credit to his testimony, and convict the defendant on the testimony of said witness without corroboration," is erroneous, because it practically instructs the jury to give full faith and credit to the testimony of the impeached witness, and to convict on it without corroboration, and does not even require, as a prerequisite, that they should believe the testimony.[379] Where there was no corroboration of a witness whose testimony at the trial was contrary to that given by him before the grand jury, it was error to charge that, if the witness had been impeached and restored to the confidence of the jury, he should be believed in preference to the impeaching testimony.[380]

VII. APPLICATIONS OF THE MAXIM, "FALSUS IN UNO, FALSUS IN OMNIBUS."

§ 252. Propriety or necessity of instructing as to this maxim.

Before an instruction as to this maxim can be given, there must be a sufficient basis in the testimony to warrant the giving of it.[381] If there is no evidence on which such an instruction can be based, it need not be given when requested,[382] and, in fact, to give such an instruction, when not warranted by the evidence, is erroneous.[383] There must be

[378] Dean v. State, 130 Ind. 237.

[379] Snyder v. State, 78 Miss. 366.

[380] Plummer v. State, 111 Ga. 839.

[381] State v. Palmer, 88 Mo. 568; White v. Maxcy, 64 Mo. 552; Ingalls v. State, 48 Wis. 647; James v. Mickey, 26 S. C. 270.

[382] State v. McDevitt, 69 Iowa, 549; Ingalls v. State, 48 Wis. 647.

[383] Kay v. Noll, 20 Neb. 380. See, also, White v. Maxcy, 64 Mo. 552.

something in the appearance of the witness, or in his demeanor while testifying, or some inconsistency between his testimony and that of other witnesses, or with physical facts, which leads to the conclusion that the witness is untruthful, in order to justify an instruction on this subject.[384] The fact that the evidence was directly conflicting is sufficient to justify the giving of the instruction.[385] The fact that a witness is not directly impeached does not preclude the court from instructing upon the maxim, because a witness may be discredited or impeached for the purposes of the maxim by being contradicted by other witnesses, or by facts and circumstances proved.[386] But where a witness corrects a misstatement of fact before leaving the stand, the maxim under consideration has no application, and the court should not instruct upon it.[387] According to a number of decisions, the propriety of giving an instruction on this maxim in any particular case must be left largely to the judgment and discretion of the trial court;[388] and others hold that under no circumstances can the court be required to give such an instruction,[389] and that it makes no difference that there is evidence to which such instruction would be applicable.[390] In other

[384] Hansberger v. Sedalia Electric Ry., Light & Power Co., 82 Mo. App. 566, wherein an instruction that the jury "were the sole judges of the weight and importance" of the testimony, and that, if they believed, "from all they had seen and heard at the trial," that any witness had willfully sworn falsely, they were at liberty to entirely disregard the testimony of such witness, was held erroneous, as too broad.

[385] State v. Hale, 156 Mo. 102.

[386] Sanders v. Illinois Cent. R. Co., 90 Ill. App. 582.

[387] Kay v. Noll, 20 Neb. 388.

[388] Paddock v. Somes, 51 Mo. App. 320; State v. Hickam, 95 Mo. 322; McCormick v. City of Monroe, 64 Mo. App. 197.

[389] State v. Banks, 40 La. Ann. 736; James v. Mickey, 26 S. C. 270.

[390] Paddock v. Somes, 51 Mo. App. 320; State v. Hickam, 95 Mo. 322.

decisions it has been held that, where the facts in evidence warrant it, the refusal or failure to give such an instruction is reversible error.[391]

§ 253. Instructing that jury "may" or "should" disregard evidence.

The credibility of a witness who knowingly testifies falsely as to one or more material facts is wholly a matter for the jury. They may believe or disbelieve his testimony as to other facts, according as they deem it worthy or unworthy of belief.[392] There is no rule of law by virtue of which the evidence may be withdrawn from the consideration of the jury,[393] or which prevents their giving credit to such a witness if, as a matter of fact, they do believe him.[394] In view of these principles, if the facts and circumstances of the case warrant it, the court may properly charge the jury that, if a witness has willfully and knowingly sworn to an untruth material to the issue, they "may" disregard the whole of his testimony.[395] And the jury may further be instructed that,

[391] Gillett v. Wimer, 23 Mo. 77; State v. Dwire, 25 Mo. 553; State v. Perry, 41 W. Va. 641; Plummer v. State, 111 Ga. 839.

[392] Schuek v. Hagar, 24 Minn. 339.

[393] State v. Williams, 47 N. C. 257.

[394] Fisher v. People, 20 Mich. 135.

[395] Paulette v. Brown, 40 Mo. 53; Britton v. City of St. Louis, 120 Mo. 437; State v. Thomas, 78 Mo. 341; State v. Beaucleigh, 92 Mo. 490; McFadin v. Catron, 120 Mo. 252; Gerdes v. Christopher & Simpson Architectural Iron & Foundry Co. (Mo.) 27 S. W. 615; Hansberger v. Sedalia Electric Ry., Light & Power Co., 82 Mo. App. 566; White v. Lowenberg, 55 Mo. App. 69; Kelly v. United State Exp. Co., 45 Mo. 428; Seligman v. Rogers, 113 Mo. 642; Millar v. Madison Car Co., 130 Mo. 517; State v. Duncan, 116 Mo. 288; State v. Van Sant, 80 Mo. 71; Hart v. Hopson, 52 Mo. App. 177; Fraser v. Haggerty, 86 Mich. 521; Barrelle v. Pennsylvania Ry. Co., 21 N. Y. St. Rep. 109; East St. Louis Connecting Ry. Co. v. Allen, 54 Ill. App. 32; Atkins v. Gladwish, 27 Neb. 841; State v. Thompson, 21 W. Va. 746; People v. Strong, 30 Cal. 156; Minich v. People, 8

while they may reject the whole of such testimony, they are not bound to do so, but may give it such weight as they think it entitled to.[396] "An instruction properly stating the rule arising from the maxim, *'Falsus in uno, falsus in omnibus,'* is proper where the defense is an alibi, and the testimony of the witnesses directly conflicts."[397]

The following forms of instruction on this head have been approved, and are believed to be worthy models for imitation: "If the jury believe that any witness in this case has knowingly sworn falsely to any material matter in this case, then you are instructed that this would justify you in disregarding the testimony of such witness entirely."[398] "If the jury believe from the evidence that any witness who has testified in this case has knowingly and willfully testified falsely to any material facts in this case, they may disregard the whole testimony of such witness, or they may give such weight to the evidence of such witness on other points as they may think it entitled to. The jury are the exclusive judges of the weight of the testimony."[399]

An instruction that, "if any witness has made statements out of court different and contradictory from those made in court in this case, then you may disregard the whole testimony of such witness or witnesses, if you see proper to do so," not even qualified by requiring the statements out of or in court to be material, is erroneous, as inducing the jury not to believe anything a witness might say, if some one testified that he anywhere in his testimony contradicted anything he had

Colo. 452; Mead v. McGraw, 19 Ohio St. 61; Dean v. Blackwell, 18 Ill. 336. Contra, Barnett v. Com., 84 Ky. 449.

[396] State v. Meagher, 49 Mo. App. 589; State v. Thompson, 21 W. Va. 746.

[397] State v. Johnson, 91 Mo. 439.

[398] Atkins v. Gladwish, 27 Neb 841.

[399] State v. Thompson, 21 W. Va. 746.

said outside.[400] An instruction that, "if they believe from the evidence that any witness has willfully sworn falsely to any material matter in this case, or that the testimony of such witness is unreasonable, or that the testimony of any witness is colored or biased on account of relationship of the witness to the defendant, or if, from any reason arising out of the evidence, they may believe the testimony of any witness is untrue, then they may disregard the whole testimony of such witness, if they see proper to do so," is rendered erroneous by the use of the disjunctives, especially where the instruction is manifestly aimed at a particular witness. It is tantamount to telling the jury to disbelieve the witness.[401]

"A limitation upon the giving of it [such instruction] is that it is error to single out a particular witness, and to direct such a cautionary instruction, although couched in proper terms, against his testimony."[402] The giving of such an instruction has been repeatedly condemned,[403] and held a good ground for reversal,[404] and the refusal of such an instruction has, of course, been held proper.[405] A general instruction on the subject applicable to any and all the witnesses should be given;[406] and the reason for this is that an instruction applying this maxim to the testimony of a particular witness tends to convey to the minds of the jurors the impression that the testimony of the particular witness

[400] McDonald v. State (Miss.) 28 So. 750.

[401] Jeffries v. State (Miss.) 28 So. 948.

[402] State v. Meagher, 49 Mo. App. 589; People v. Arlington, 131 Cal. 231. See ante, § 109, "Singling Out and Giving Undue Prominence to Issues, Theories, and Evidence."

[403] State v. Meagher, 49 Mo. App. 589; State v. Stout, 31 Mo. 406; Argabright v. State, 49 Neb. 760; State v. Kellerman, 14 Kan. 135.

[404] State v. Stout, 31 Mo. 406.

[405] Fraser v. Haggerty, 86 Mich. 521; State v. Kellerman, 14 Kan. 135.

[406] Argabright v. State, 49 Neb. 760.

is disbelieved by the judge, and is to be disregarded, which question is within their province, and not within his.[407] It has been held, though, that an instruction that, "if you find that either one of these parties—the complaining witness or the defendant—has falsely and intentionally testified," etc., does not convey any impression as to which of the parties the judge was disposed to believe, and is not improper.[408] An instruction that, "if the jury believe from the evidence that a particular witness has willfully sworn falsely on this trial as to any matter or thing material to the issues in this case, then the jury are at liberty to disregard his entire testimony, except in so far as it has been corroborated by other credible evidence, or by facts and circumstances proved on the trial," is not erroneous, as misleading and singling out a particular witness, though it would be good practice to add "that the same rule would apply to any other witness who has willfully sworn falsely concerning any material matter in controversy."[409] This case is nevertheless clearly erroneous, within the rule laid down by the preceding decisions, and is also in violation of another rule governing instructions on this maxim.[410]

The next question to be considered in this connection is the propriety of an instruction that the jury "should" or "must" disregard the testimony of a witness "who has knowingly and willfully testified" falsely in regard to a material matter. According to some decisions, an instruction to this effect is proper.[411] In accordance with this view, it has been

[407] State v. Meagher, 49 Mo. App. 589.
[408] State v. Sexton, 10 S. D. 127.
[409] Bunce v. McMahon, 6 Wyo. 24.
[410] See post, § 256.
[411] Hale v. Rawallie, 8 Kan. 136; State v. Kellerman, 14 Kan. 135; Hargraves v. Miller's Adm'x, 16 Ohio, 338; Gannon v. Stevens, 13 Kan. 461; Stoffer v. State, 15 Ohio St. 47. See, also, Day v. Crawford, 13 Ga. 513; State v. Hale, 156 Mo. 102.

held that, where a fact is sworn to by a single witness, who plainly perjured himself, it is error to leave such fact to the jury, and that the court should instruct the jury to disregard the testimony.[412] So, an instruction that the jury "might exercise a sound discretion, reject part of a witness' testimony, which they did not believe, and act on such part as they did believe," is held to be erroneous.[413] And it was also held erroneous to refuse a charge that, "if the jury believe * * * that the witness, B., has testified falsely in respect to any material fact, it is their duty to disregard the whole of her testimony," the court saying that it would not be sufficient to charge that the jury "are authorized to disregard" such evidence.[414] This line of decisions is clearly against the weight of authority, and some of them have been expressly overruled; the view taken by the majority of decisions being that, in instructing as to this maxim, it is not proper for the court to charge that the jury should or must disregard the entire testimony of a witness who has knowingly and willfully sworn falsely to a material fact.[415]

[412] Dunlop v. Patterson, 5 Cow. (N. Y.) 243.

[413] State v. Jim, 12 N. C. 508.

[414] Campbell v. State, 3 Kan. 488.

[415] Shellabarger v. Nafus, 15 Kan. 547, overruling all prior Kansas decisions to the contrary; State v. Potter, 16 Kan. 80; Greer v. Higgins, 20 Kan. 425; McCraney v. Crandall, 1 Iowa, 117; Hall v. Renfro, 3 Metc. (Ky.) 51; Letton v. Young, 2 Metc. (Ky.) 558; Reynolds v. Greenbaum, 80 Ill. 416; Blanchard v. Pratt, 37 Ill. 245; Meixsell v. Williamson, 35 Ill. 529; Lewis v. Hodgdon, 17 Me. 273; State v. Stout, 31 Mo. 406; Senter v. Carr, 15 N. H. 351; Dunn v. People, 29 N. Y. 523; White v. State, 52 Miss. 216; Callanan v. Shaw, 24 Iowa, 441; State v. Williams, 47 N. C. 257; State v. Cushing, 29 Mo. 215; Knowles v. People, 15 Mich. 408; Finley v. Hunt, 56 Miss. 221; Fisher v. People, 20 Mich. 147; People v. Oldham, 111 Cal. 648; People v. Strong, 30 Cal. 156; Higbee v. McMillan, 18 Kan. 133; Mead v. McGraw, 19 Ohio St. 55; Lowe v. State, 88 Ala. 8; Schuek v. Hagar, 24 Minn. 339; People v. O'Neil, 109 N. Y. 251; People v. Sprague, 53 Cal. 495.

"Whether the jury should disregard the whole of the testimony of a witness in such a case is a matter resting entirely with them. * * * The jury ought to be allowed to weigh every portion of the testimony of every witness, and to give to each portion of the testimony just such consideration as it is entitled to, considering all the facts and circumstances of the case. * * * No inflexible rule of law should be interposed between the witness and the jury, commanding the jury to take all, or to exclude all, of his testimony."[416] Accordingly, it has been held erroneous to give the following instructions: "If you believe from the evidence that any witness has knowingly and willfully testified falsely to any material fact, you should totally disregard all the testimony of any such witness;"[417] or "that, if they [the jury] believe any witness has sworn falsely and knowingly as to any material fact, they are bound to disregard his testimony altogether."[418] It has been held, however, that if no objection is taken to an erroneous instruction of this kind, the error is waived.[419] Though the reason given for an instruction is erroneous, yet if the instruction, as a whole, is correct, the reason may be disregarded. Thus, if, after the court charged the jury that they should compare the witnesses one with the other, to see if there were any contradictions, and to see whether the witness was unreliable, in which event his testimony should have no weight, he concluded by saying, in that connection, "because the rule of law is that, where a witness is false in one particular, he is false in all," the latter clause will be deemed immaterial. In effect, the charge is "that, if the witness was found unreliable,

[416] Shellabarger v. Nafus, 15 Kan. 547.
[417] Higbee v. McMillan, 18 Kan. 133.
[418] Letton v. Young, 2 Metc. (Ky.) 565.
[419] State v. Potter, 16 Kan. 99.

—that is, if no confidence whatever could be put in his statements,—then no weight should be given to any of his testimony."[420] In California, by statute, the court is expressly authorized to instruct "that a witness false in one part of his testimony is to be distrusted in others."[421]

§ 254. Omitting element of intent in charging.

Instructions as to the maxim under consideration should embody the element of intent.[422] And an instruction that the jury may conclude that the entire testimony of a witness is false if they believe that he has sworn falsely upon any one point is properly refused as not distinguishing between testimony which is false merely, and testimony which is knowingly and willfully false,[423] for the rule is not applicable to a case of mere mistake.[424] A false statement by a witness, though it may affect his credibility, does not require that his entire testimony should be discarded by the jury, unless it was known by him to be false, or was made

[420] State v. Littlejohn, 33 S. C. 599.

[421] Code Civ. Proc. Cal. § 2061, subd 3. Where the court has instructed, in the language of the statute, that "a witness false in one part of his or her testimony, as the case may be, is to be distrusted in others," the court may further charge: "And if you find that any witness in this case has willfully testified falsely to any material matter in the case, you have a right to entirely disregard and cast aside the testimony of such witness." People v. Arlington, 131 Cal. 231. Where the defendant has requested an instruction that, if the jury believe that any witness "examined during the progress of this trial, has willfully sworn falsely as to any material matter, then it is your duty to * * * distrust the entire evidence of such witness," it is not error for the court to add to such instruction the admonition to scan closely the testimony of such witness. People v. Harlan (Cal.) 65 Pac. 9.

[422] Gottlieb v. Hartman, 3 Colo. 53.

[423] Skipper v. State, 59 Ga. 63.

[424] State v. Lett, 85 Mo. 52.

with intent to deceive or mislead.[425] Therefore an instruction that, if "any witness has sworn falsely in regard to any material fact in issue, they are at liberty to disregard his entire evidence," is erroneous for omitting the word "willfully" or "knowingly," or words of similar import.[426] So, an instruction that, if the jury "believe that any of the witnesses swore falsely or were mistaken, then they are at liberty to disregard the whole or any part of such witnesses' testimony, is erroneous.[427] An instruction that, "if the circumstances respecting which testimony is discordant be immaterial, and of such a nature that mistakes may easily exist, and be accounted for in a manner consistent with the utmost good faith and probability, there is much reason for indulging the belief that the discrepancies arise from the infirmity of mind, rather than from deliberate error. If, however, a witness, with intent to deceive, falsely testifies as to a material fact, which the witness knows to be absolutely false, then you can apply to the testimony of the witness the maxim, '*Falsus in uno, falsus in omnibus.*' If you find that either one of these parties—the complaining witness or the defendant—has falsely and intentionally testified to a material fact in this case, which is not true, that this has been done intentionally, falsely, knowing it to be untrue, you are at liberty to apply

[425] Childs v. State, 76 Ala. 93.

[426] Iron Mountain Bank of St. Louis v. Murdock, 62 Mo. 70; State v. Brown, 64 Mo. 367; Smith v. Wabash, St. L. & P. Ry. Co., 19 Mo. App. 120; Paulette v. Brown, 40 Mo. 52; Evans v. St. Louis, I. M. & S. Ry. Co., 16 Mo. App. 522; People v. Strong, 30 Cal. 156; Blitt v. Heinrich, 33 Mo. App. 243; Cahn v. Ladd, 94 Wis. 134; Little v. Superior Rapid Transit Ry. Co., 88 Wis. 402; Skipper v. State, 59 Ga., 63; State v. Lett, 85 Mo. 52; Jennings v. Kosmak, 20 Misc. Rep. (N. Y.) 300; Childs v. State, 76 Ala. 93; Grimes v. State, 63 Ala. 166; McLean v. Clark, 47 Ga. 25; White v. State, 52 Miss. 216. Compare People v. Righetti, 66 Cal. 185.

[427] State v. Elkins, 63 Mo. 159.

this maxim to such testimony,"—in effect cautions the jury that, in the absence of motive and willful intent to deceive, by testifying falsely to a material fact known at the time to be absolutely false, discrepancies, though material, should be attributed to mistake, misapprehension, or the infirmity of the mind, and, when thus accounted for, the maxim, "False in one thing, false in all things," should not be applied, and such an instruction is clearly within the discretion of the court to give. It is not necessary to add to such an instruction the phrase, "unless corroborated by other credible evidence in the cause, or by facts and circumstances proved at the trial."[428]

§ 255. Omitting element of materiality of testimony in charging.

The maxim is not applicable unless the false testimony relates to some material matter, and therefore in instructing as to this maxim it is error to omit the element of materiality.[429] Where the court instructs that, if the jury believe any witness has willfully sworn falsely as to any of the facts mentioned in the other instructions as bearing upon the claim sued on or the defense thereto, they may entirely disregard his testimony, the instruction is not objectionable

[428] State v. Sexton, 10 S. D. 127.

[429] McLean v. Clark, 47 Ga. 25; Coggins v. Chicago & A. R. Co., 18 Ill. App. 620; White v. State, 52 Miss. 216; Moresi v. Swift, 15 Nev. 215; Peak v. People, 76 Ill. 289; Pierce v. State, 53 Ga. 365; Cobb v. State, 115 Ala. 18; West Chicago St. R. Co. v. Raftery, 85 Ill. App. 319. An instruction that, if the jury believe that any witness has willfully sworn falsely as to any of the facts mentioned in the instructions, they may, etc., is erroneous, as being too restrictive, since, if any witness swears falsely to any material fact, whether mentioned in the instructions or not, the jury should disregard his testimony. Hansberger v. Sedalia Electric Ry., L. & P. Co., 82 Mo. App. 566.

as not confining the false swearing to material facts. So, instructions that the jury may entirely disregard the testimony of any witness whom they may believe to have sworn falsely as to any fact in the case has been held not objectionable as failing to restrict its effect to false testimony regarding material matters.[430] But an instruction that the testimony of one credible witness is entitled to more weight than the testimony of many others has been held bad, as amounting to an instruction that the testimony of such a witness is entitled to more weight than the others, upon the theory that such other witnesses have testified untruthfully, without limiting such untruthfulness to facts or questions material to the issue.[431]

§ 256. Instructions making corroboration a condition of belief.

According to some decisions, it is proper to charge that, if a witness has willfully sworn falsely as to any material matter, the jury are at liberty to disregard his testimony unless corroborated by other credible evidence.[432] It has also been held that an instruction that the jury may disregard the whole testimony of a witness who has willfully and knowingly sworn falsely as to one matter was erroneous because the words "unless corroborated" were omitted.[433] And in another case the rule was laid down that, if there is no evidence tending to corroborate a witness, it is not error to in-

[430] People v. Ah Sing, 95 Cal. 654.

[431] West Chicago St. R. Co. v. Raftery, 85 Ill. App. 319.

[432] Bevelot v. Lestrade, 153 Ill. 632; Faulkner v. Territory, 6 N. M. 464; Rider v. People, 110 Ill. 13; Robertson v. Monroe, 7 Ind. App. 470; Bunce v. McMahon, 6 Wyo. 24; Walker v. Haggerty, 30 Neb. 120; Blotcky v. Caplan, 91 Iowa, 352; Bowers v. People, 74 Ill. 418; Lyts v. Keevey, 5 Wash. 606; Sanders v. Illinois Cent. R. Co., 90 Ill. App. 582.

[433] Peak v. People, 76 Ill. 289; Meixsell v. Williamson, 35 Ill. 529.

struct that, if the jury believe that a witness has willfully sworn falsely upon any material point, they have the right to disregard his entire testimony.[434] On the other hand, authority is not wanting for the position that an instruction that the jury may disregard the testimony of any witness who has willfully testified falsely to a material fact is rendered erroneous by the addition of the words, "unless corroborated," or words of similar import, on the ground that the province of the jury is thereby invaded.[435] Although the decisions maintaining this doctrine are in the minority, it is believed that they are correct. It has been well said that "it is true, as a legal proposition, that, if a witness has willfully sworn falsely as to a material fact, the jury are at liberty to disregard his entire testimony, notwithstanding he may have been corroborated as to that or any other fact to which he testified."[436] If the jury believe a witness has willfully falsified in any particular, they are not required to credit him in other matters, unless convinced that he has, as to such matters, sworn truly. As they know he will not be restrained by his oath, they must judge for themselves how

[434] Howard v. McDonald, 46 Ill. 123.

[435] State v. Musgrave, 43 W. Va. 672; Brown v. Hannibal & St. J. R. Co., 66 Mo. 600; Wastl v. Montana Union R. Co., 17 Mont. 213. See, also, Minich v. People, 8 Colo. 452, where the court said: "We are told that this instruction is wrong, because it did not contain a qualification concerning corroborating testimony. It is said that, if a witness willfully testifies falsely to a material fact, but his testimony as to other material matters is supported by corroborating proofs or circumstances, the jury should be told that they need not discard it in so far as it relates to such other matters. This position would perhaps be correct should a court assume the doubtful authority of directing the jury that they must disregard the entire evidence of a witness willfully testifying falsely to one material fact; but it is not correct in cases like the present, where the court simply suggests that the jury may disregard, or that they are at liberty to disregard, the testimony of such witness."

[436] Brown v. Hannibal & St. J. R. Co., 66 Mo. 599.

far, if at all, corroboration in some particulars renders it safe to believe him. The court cannot require them to credit testimony, under any circumstances, against their own conclusions from it.[437] An instruction that the jury may reject all testimony of witnesses, etc., unless corroborated "by the statements of other credible witnesses," was held erroneous on the ground that corroboration by any credible evidence, or by facts fairly inferable therefrom, is sufficient.[438] It has been held improper to instruct the jury that a witness who has willfully testified falsely to a material matter is entitled to no credit unless corroborated;[439] or is "not to be believed in anything he swears to, unless corroborated."[440] In support of these conclusions it is said: "It is true, as a general rule, that, when a witness deliberately and knowingly swears falsely in regard to one material fact, the jury are not bound to believe him in any of his statements unless he is corroborated; but it is wrong to say that the jury are not at liberty to believe him. The maxim, *'Falsus in uno, falsus in omnibus,'* does not operate to preclude the jury from believing the witness if they choose to do so. The jury may believe any competent witness, though in many instances they ought not."[441] There are, however, a number of decisions which take the opposite view. Thus it has been held proper to charge that, if a witness has willfully sworn falsely in reference to any material transaction, the jury should "give no weight" to such testimony unless corroborated,[442] or to dis-

[437] Hamilton v. People, 29 Mich. 174.

[438] F. Dohmen Co. v. Niagara Fire Ins. Co., 96 Wis. 38.

[439] Senter v. Carr, 15 N. H. 351.

[440] Mercer v. Wright, 3 Wis. 645.

[441] Mercer v. Wright, 3 Wis. 645.

[442] State v. McCartey, 17 Minn. 76 (Gil. 54). In this case it was further held proper to refuse an instruction not to consider such witness' testimony at all.

regard the evidence unless corroborated;[443] and it has been held error to fail to charge in a proper case that, if a witness willfully and knowingly swear falsely as to a material matter, his testimony ought to be disregarded entirely unless corroborated.[444] So it has also been held that, if a witness knowingly and willfully swears falsely to a material matter, his testimony should be rejected entirely unless corroborated by the facts and circumstances of the case, or other credible evidence, and that it is not proper to charge that credit may be given to such a witness, without also stating the necessity for corroboration.[445] And in another case, decided by the same court, a request for an instruction that, if a witness was guilty of knowing and willful perjury in one particular, or upon one point, the jury were to conclude that he is false in the whole of his statements, was held to have been properly refused, because no allowance was made for corroboration.[446]

IX. Relative Force of Positive and Negative Testimony.

§ 257. In jurisdictions where charge on weight of evidence is improper.

It is stated as a rule of evidence, by Greenleaf, "that the positive testimony of one credible witness to a fact is entitled to more weight than that of several others [equally credible] who testify negatively, or * * * to circumstances merely persuasive in their character," from which a negative will be inferred.[447] And the rule as stated is well supported both by the older and by the more recent decisions.[448] As was

[443] Machette v. Wanless, 2 Colo. 169.
[444] Plummer v. State, 111 Ga. 839.
[445] Pierce v. State, 53 Ga. 365.
[446] Ivey v. State, 23 Ga. 576.
[447] 3 Greenl. Ev. § 375.
[448] Kennedy v. Kennedy, 2 Ala. 616; Hinton v. Cream City R. Co.,

said in a well-considered decision of recent date: "When one witness swears positively that he saw or heard a fact, and another, who was present, merely swears that he did not see or hear it, and the witnesses were equally faithworthy, the general principles would, in ordinary cases, create a preponderance in favor of the affirmative, where the position can be reconciled with the negative."[449] There is much conflict of authority as to whether an instruction embodying this principle should be given to the jury; but this is easily understood if reference is had to another principle governing instructions which is treated in another part of this vol-

65 Wis. 337; State v. Chevallier, 36 La. Ann. 83; Isaacs v. Skrainka, 95 Mo. 517; Henze v. St. Louis, K. C. & N. Ry. Co., 71 Mo. 639; Au v. New York, L. E. & W. R. Co., 29 Fed. 72; Rhodes v. United States (C. C. A.) 79 Fed. 744; Frizell v. Cole, 42 Ill. 362.

[449] State v. Chevallier, 36 La. Ann. 84. Exceptions to rule: "Evidence of a negative nature may, under particular circumstances, not only be equal, but superior, to positive evidence. This must always depend up the question whether the negative testimony can be attributed to inattention, error, or defect of memory, and whether the witnesses had equal means and opportunities for ascertaining the facts to which they testify and exercised the same. Suppose six persons, whose sense of hearing is excellent, and who are otherwise equally competent, were placed in a room and told to watch whether the clock found in it strikes, or not, the hour; that, faithful to their instructions, they had so watched when the large hand passed over twelve, and had so continued watching for five minutes or more, and that, when interrogated, two were to swear that the clock had struck, and four that it had not, it is manifest that it could not be claimed that the preponderance should be in favor of the testimony of the affirming witnesses. The principle is further inapplicable where a negative depends on the establishment of an opposite fact, such as an alibi, for instance. 1 Starkie, Ev. § 82, p. 516. [See, also, Atkinson v. State, 112 Ga. 411.] It has been often held that it is not true, as a matter of law, that negative evidence may not be sufficient to overbalance positive testimony. Campbell v. New England Mut. Life Ins. Co., 98 Mass. 381; Coughlin v. People, 18 Ill. 266; Reeves v. Poindexter, 53 N. C. 308." State v. Chevallier, 36 La. Ann. 83.

ume.[450] It may be stated, without fear of contradiction, that such an instruction is on the weight of the evidence, and, as we have shown in another part of this work, there are statutes or organic provisions in most jurisdictions which prohibit the trial court from commenting on the evidence or expressing any opinion as to its weight. The decisions show, with few exceptions, that such an instruction is not permissible in jurisdictions where charging on the weight of the evidence is prohibited, and that they will be sustained if correctly drawn and applicable to the facts in jurisdictions where there is no such limitation on the power of the trial judge. In Arkansas, Illinois, Indiana, Missouri, and Texas, the giving of such an instruction is erroneous;[451] the view being taken that it is not the province of the court to tell the jury which evidence is the strongest, or entitled to the

[450] See chapter 4, "Charging on the Weight of the Evidence."

[451] Arkansas: Keith v. State, 49 Ark. 439. See, also, Sibley v. Ratliffe, 50 Ark. 477, in which a request for an instruction attempting to apply the rule as to positive and negative testimony was condemned as falling short of stating the full position, but the court, citing Keith v. State, supra, said: "It may be doubted whether, if proper in any case to instruct the jury on the weight to be given to evidence, it cannot be said to be error to refuse to do so."

Illinois: Preston v. Moline Wagon Co., 44 Ill. App. 342; Louisville, N. A. & C. Ry. Co. v. Shires, 108 Ill. 619; Rockwood v. Poundstone, 38 Ill. 201; Frizell v. Cole, 42 Ill. 362. See, also, Atchison, T. & S. F. R. Co. v. Feehan, 149 Ill. 202, where a request for an instruction as to the relative weight of positive and negative testimony was refused, because, as drawn, it was not applicable to the facts of the case. Compare Chicago & N. W. Ry. Co. v. Dunleavy, 129 Ill. 132, which is apparently in conflict with the other Illinois decisions.

Indiana: Ohio & M. Ry. Co. v. Buck, 130 Ind. 300; Louisville, N. A. & C. Ry. Co. v. Stommel, 126 Ind. 35.

Missouri: State v. Kansas City, Ft. S. & M. R. Co., 70 Mo. App. 634; Chubbuck v. Hannibal & St. J. R. Co., 77 Mo. 591; Milligan v. Chicago, B. & Q. R. Co., 79 Mo. App. 393.

Texas: Sparks v. Dawson, 47 Tex. 138; Haskew v. State, 7 Tex. App. 107.

most weight,[452] and that the credibility of witnesses and the weight to be given their testimony are always questions for the jury.[453] In Illinois alone, among these jurisdictions, has any instruction bearing on this question been approved, but there was nothing in it authorizing the jury to give more weight to positive than to negative testimony, and it was therefore not objectionable to the rule against charging on the weight of the evidence. The instruction is as follows: "When one witness testifies that a certain fact took place, or that certain words were spoken, and several other witnesses, equally credible, testify that they were present at the time and place where the fact took place, or where the words were spoken, and had the same means of information, and further testify that such fact did not exist, or that the words were not spoken, it is their province to weigh the testimony, and give a verdict according to the weight of testimony, as it may preponderate on either side."[454] In Georgia, although the court is prohibited from charging on the weight of the evidence, an instruction that, everything else being equal, "positive testimony is to be believed rather than negative testimony," has been approved.[455] So, where only one witness was sworn for the state and one for defendant, and the testimony of defendant's witness was in part positive and in part negative, a charge on the rule as to positive and negative testimony, as to the negative part of such witness' testimony, was held proper.[456] So, where witnesses in behalf of the state swore positively to the commission of the crime, and the evidence in behalf of the defendant consisted of testimony tending to show an alibi, and to impeach the state's

[452] Louisville, N. A. & C. Ry. Co. v. Shires, 108 Ill. 617.
[453] Louisville, N. A. & C. Ry. Co. v. Stommel, 126 Ind. 35.
[454] Frizell v. Cole, 42 Ill. 362.
[455] Atlanta & W. P. R. Co. v. Newton, 85 Ga. 517.
[456] Neill v. State, 79 Ga. 779.

witnesses, it was held that a charge on the law as to the relative value of positive and negative testimony was not applicable.[457] After explaining to the jury the difference between positive and negative testimony, the court may designate certain testimony as not positive.[458] In Kansas it was held to be the duty of the court, upon request, to call the attention of the jury to the relative value of positive evidence that signals were given by a railway train approaching a crossing, and merely negative testimony that they were not given.[459] In Alabama it was held, without deciding on the propriety of instructing on this rule, that a failure of a request to hypothesize equal means of knowledge on the part of the witnesses whose testimony the court is asked to compare, and to draw certain conclusions from the comparison for the enlightenment of the jury, warrants its refusal.[460]

§ 258. In jurisdictions where charge on weight of evidence is permitted.

In Wisconsin, Utah, Pennsylvania, and in the federal courts, where charging on the weight of the evidence is permissible, instructions embodying this rule are authorized.[461] It has been held, however, that such an instruction may with equal propriety be refused.[462] And although the court did

[457] Atkinson v. State, 112 Ga. 411.

[458] Knight v. Thomas (Me.) 7 Atl. 538.

[459] Missouri Pac. Ry. Co. v. Moffatt, 56 Kan. 667.

[460] Louisville & N. R. Co. v. Miller, 109 Ala. 500.

[461] Hildman v. City of Phillips, 106 Wis. 611; Hinton v. Cream City R. Co., 65 Wis. 337; Olsen v. Oregon Short Line & U. N. Ry. Co., 9 Utah, 129; Hess v. Williamsport & N. B. R. Co., 181 Pa. 492; Urias v. Pennsylvania R. Co., 152 Pa. 326; Au v. New York, L. E. & W. R. Co., 29 Fed. 72; Rhodes v. United States (C. C. A.) 79 Fed. 741; Denver & R. G. R. Co. v. Lorentzen (C. C. A.) 79 Fed. 291.

[462] Olsen v. Oregon Short Line & U. N. Ry. Co., 9 Utah, 129. Compare Urias v. Pennsylvania R. Co., 152 Pa. 326, where it was held

not state any reason for its holding, it is sanctioned by the rule that it is entirely within the discretion of the trial judge whether he shall express an opinion as to the weight of the evidence, even in jurisdictions where such a charge is permissible, and that he can under no circumstances be required to do so.[463]

§ 259. What instructions proper.

In jurisdictions where an instruction on this rule is permissible, the following instructions have been approved: "The positive testimony of one credible witness to a fact is entitled to more weight than the testimony of several witnesses, equally credible, who testify negatively, or to collateral circumstances merely persuasive in their character, from which a negative may be inferred."[464] "Where there is a conflict of testimony, and one testifies positively to a thing within his peculiar knowledge or information, and the testimony of the other is a mere denial of that which is not within his peculiar knowledge or information, the positive testimony will generally prevail over the negative testimony; but it is alway a question for the jury to determine whether the witness who testifies about a given fact, although it may be in denial of it, had the opportunity of knowing, seeing, and hearing as well as the other witness had."[465] Where much of the testimony was of a negative character, "that it

that, in case of "conflicting testimony as to whether a bell was rung or not before a train approached a grade crossing, the court should positively call the attention of the jury to the difference between positive and negative testimony upon a question of this kind." See, also, Hildman v. City of Phillips, 106 Wis. 611, wherein it was held error to refuse to give an instruction as to the relative weight to be given positive and negative testimony.

[463] See chapter 4, "Charging on the Weight of Evidence."

[464] Hinton v. Cream City R. Co., 65 Wis. 337.

[465] Au v. New York, L. E. & W. R. Co., 29 Fed. 72.

was for the jury to consider how much this testimony was worth as against positive testimony, and that, ordinarily, the evidence of a witness who swears positively to a thing, or emphatically says that he saw something, is more valuable than that of witnesses who say they did not see."[466] On the other hand, it was held, in an action for injuries caused by a collision at a grade crossing, that where five persons on the locomotive testified positively that lights were displayed, the bell rung, and whistle blown, and two persons on the track testified that they did not see the light, nor hear the bell or whistle, an instruction that most of plaintiff's testimony was negative, that his witnesses merely testified that they did not see any lights or hear any bell or whistle, "negative testimony of this kind has much less weight than positive testimony," was erroneous, as being inadequate and too meager.[467] Where the plaintiff testified that, after the accident, she said to the conductor, "It is all your fault," and the conductor denied that she made such remark to him, it is error to instruct that the presumption is that the plaintiff made the remark, rather than that she did not, though the jury are also told that it is for them to say whether it is of any importance.[468] So, an instruction "that the positive testimony of a witness to the existence of a certain thing, and the testimony of another witness that such a thing does not exist, are equally credible," was held erroneous, as a misstatement of the rule.[469] And an instruction as follows: "It is sometimes said that affirmative testimony is of more value than negative testimony. But I charge you that, where one man affirms a fact and another positively denies it, the denial is not negative testimony, within the rule just stated,"

[466] Rhodes v. United States (C. C. A.) 79 Fed. 740.
[467] Hess v. Williamsport & N. B. R. Co., 181 Pa. 492.
[468] Metropolitan R. Co. v. Martin, 15 App. D. C. 552.
[469] Smith v. Milwaukee Builders' & Traders' Exchange, 91 Wis. 360.

—was condemned on the ground that such a denial was clearly negative testimony.[470] On the other hand, an instruction "that negative testimony was confined to that of a witness who, though present at a transaction, says that he did not see or did not hear," was erroneous, because testimony positive in form may amount merely to negative testimony.[471]

X. Manner of Testifying, Bias, Etc.

§ 260. In general.

It is proper to instruct that the jury may consider any bias, feeling, or partiality exhibited by the witnesses.[472] An instruction that the jury are the judges of the weight to be given to the testimony of a witness from his manner of testifying, as from his evasiveness when questioned by one party, and his willingness to answer questions favorable to the other, is proper.[473] The conduct of a witness on the stand may be properly commented upon by the court as affecting the credibility of the witness.[474] So, where witnesses exhibit much feeling, the trial judge has a right to notice and comment upon a fact so transpiring in the presence of the court and jury.[475] The demeanor and conduct

[470] Kelley v. Schupp, 60 Wis. 86.

[471] Smith v. Milwaukee Builders' & Traders' Exchange, 91 Wis. 360.

[472] Felker v. State, 54 Ark. 489; State v. Bohan, 19 Kan. 35; Young v. Gentis, 7 Ind. App. 199; State v. Nat, 51 N. C. 115; People v. Cronin, 34 Cal. 192; People v. Wheeler, 65 Cal. 77; State v. Streeter, 20 Nev. 403; Bevelot v. Lestrade, 153 Ill. 625; Klepsch v. Donald, 4 Wash. 436; Goodwine v. State, 5 Ind. App. 63; Little v. McGuire, 43 Iowa, 450; State v. Hogard, 12 Minn. 293 (Gil. 191); State v. Hymer, 15 Nev. 51; State v. Fiske, 63 Conn. 392; State v. Adair, 160 Mo. 391. Contra, Oliver v. State (Tex. Cr. App.) 42 S. W. 554; Isham v. State (Tex. Cr. App.) 41 S. W. 622.

[473] Brown v. Stacy, 5 Ark. 403.

[474] State v. Adair, 160 Mo. 391; People v. Benc, 130 Cal. 159; Morton v. O'Connor, 85 Ill. App. 273.

[475] State v. Nat, 51 N. C. 114.

of the defendant in a criminal case during the progress of the trial, and while he is not on the witness stand, are no part of the evidence in the case, and it is substantial error to instruct the jury that they have a right, in determining the degree of credibility that shall be accorded to the testimony of defendant, to consider his demeanor and conduct on the witness stand and during the trial. It is easily conceivable that various circumstances, not growing out of the orderly development of the trial, may arise which will cause an innocent man to do things indicative, to an ordinary observer, of guilt.[476] Instructions upon this subject, as in other cases, must not be confused and misleading,[477] and must not invade the province of the jury.[478]

XI. Unsworn Statement of Defendant in Criminal Cases.

§ 261. In general.

In a number of states, the defendant in a criminal case is authorized to make an unsworn statement before the jury. This statement, though not under oath, though the accused is not subject to cross-examination, and though he is not,

[476] Purdy v. People, 140 Ill. 46; Vale v. People, 161 Ill. 309.

[477] Morton v. O'Connor, 85 Ill. App. 273, wherein an instruction set out was condemned upon this ground.

[478] Morton v. O'Connor, 85 Ill. App. 273; People v. Benc, 130 Cal. 159. In this last case a charge that "the degree of credit due to a witness should be determined by his character and conduct, by his demeanor on the stand, his relation to the controversy and the parties, his hopes, his fears, his bias, and his partiality, the reasonableness of the statements he makes, the strength or weakness of his recollection, viewed in the light of all the testimony, the facts, and circumstances in the case," is not erroneous in that it tells the jury how they should determine the degree of credit due to a witness, and therefore constitutes an invasion of the province of the jury, as such an instruction cannot do any harm, for it merely tells the jury to do certain things, which jurors would evidently do without being so told.

strictly speaking, a witness, is in the nature of evidence, and is to be considered by the jury in connection with all the evidence.[479] The law allows such weight to be given to the statement as the jury may consider to be due to it, and it cannot be assumed by the judge, on submitting it, that it is not to be believed.[480] "In determining the credit to which they [the jury] may think it entitled, they are not to be precluded by any artificial rule from giving full weight to every consideration, or to any feature of such statement, which may tend in any way to produce belief or disbelief, either of the statement itself, or of the evidence of witnesses to which it relates."[481] A charge that "the law declares, in all criminal cases in this state, defendant shall make to the court and jury just such statement in his defense as he thinks proper to make. Such statement is not to be under oath, and is to have just such force and effect only as the jury think proper to give it; but the jury may believe it in preference to the sworn testimony, if they think proper to believe it, provided the defendant shall not be subject to cross-examination, except by his own consent,"—is not erroneous because of the use of the word "shall" instead of the words "shall have the right to," and so calculated to raise the impression in the minds of the jury that the defendant is required to

[479] People v. Arnold, 40 Mich. 715; Beasley v. State, 71 Ala. 328. Compare Vaughn v. State, 88 Ga. 731, in which it was said that "the jury trying a criminal case are sworn to give a true verdict according to evidence. It is important for them not to confound the prisoner's statement with the evidence, or the evidence with the statement. * * * The jury are to deal with it on the plane of statement, and not on the plane of evidence, and may derive from it such aid as they can in reaching the truth. The law fixes no value upon it. It is a legal blank. The jury may stamp it with such value as they think belongs to it."

[480] People v. Arnold, 40 Mich. 715.

[481] De Foe v. People, 22 Mich. 226.

make a statement.[482] So the jury may properly be told that the statement of the prisoner is entitled to such weight as the jury may think it worthy of;[483] and they may also be instructed that they may give the unsworn statement of defendant more weight than the sworn testimony of unimpeached witnesses, if they honestly believe it to be entitled to such weight.[484] The jury's attention may also be called to the fact that the defendant's statement is not made under oath, and that his failure to tell the truth will not subject him to any penalty.[485] In regard to such statement it has been held improper for the judge to say that "he did not think such statement would warrant them in setting aside unimpeached sworn evidence;"[486] or that "his statement, to avail him, must be in those parts that are in conflict with the evidence * * * in material matters;"[487] or that the jury should not receive such statement unless corroborated.[488] It is, of course, proper to refuse a request that defendant's statement "is to be given no less credence on account of its not being made under oath."[489] A charge that certain matters bearing upon the guilt of defendant are to be determined by the jury under the evidence, and that "the reasonable doubt that is spoken of * * * should arise out of the case, either from the testimony in the case, or from the lack of testimony, or from a conflict of testimony," is not erroneous as excluding from the jury the prisoner's state-

[482] Smith v. State, 94 Ga. 591, 22 S. E. 214.

[483] Blackburn v. State, 71 Ala. 319; Durant v. People, 13 Mich. 355; Poppell v. State, 71 Ga. 277.

[484] Harrison v. State, 83 Ga. 129; People v. Jones, 24 Mich. 226.

[485] Poppell v. State, 71 Ga. 276.

[486] Durant v. People, 13 Mich. 351.

[487] Lovejoy v. State, 82 Ga. 87.

[488] People v. Arnold, 40 Mich. 710.

[489] Blackburn v. State, 71 Ala. 319.

ment.[490] And an instruction that the issues are to be determined "by looking to the testimony of the witnesses that have sworn in the case" was held not erroneous, even though the defendant has made a statement giving his version of the transaction, and denying his guilt. It is said, however, to be the better practice in such case to authorize the jury to consider his statement in connection with the evidence, and to give it such force as they think it is entitled to receive.[491]

XII. IDENTITY OF DEFENDANT.

§ 262. In general.

Where the identity of the defendant with the person who committed the crime is in issue, it would seem that a special instruction as to weighing the evidence upon this issue is unnecessary, the question being sufficiently covered by the usual instructions as to the presumption of innocence, and the necessity of establishing guilt beyond a reasonable doubt. It is not unusual, however, to give special instructions upon this head. Where the court has charged the jury "that, if they shall be satisfied, from the evidence, of the defendant's guilt to a moral certainty, and beyond a reasonable doubt," they must convict him, it is error to add, "although they may not be entirely satisfied from the evidence that the defendant, and no other or different person, committed the alleged offense," as the last clause is repugnant to the first, which states the law. The jury ought always to be entirely satisfied.[492] It is error to instruct that the jury are not legally bound to acquit the defendant, because they may not be entirely satisfied that the defendant, and no other person, committed the alleged offense.[493] In a prosecution for an as-

490 Vaughn v. State, 88 Ga. 731.
491 Sledge v. State, 99 Ga. 684.
492 People v. Phipps, 39 Cal. 326; People v. Kerrick, 52 Cal. 446.
493 People v. Brown, 56 Cal. 405; People v. Carrillo, 70 Cal. 643.

sault, a request for an instruction that the defendant is entitled to an acquittal if there is any probability that the prosecuting witness is mistaken as to his identity is properly refused, though a reasonable doubt of identity entitles to an acquittal.[494] So it is proper to refuse an instruction that "the identity of the accused must be established to an absolute moral certainty, and every fact and circumstance must be established to the same degree of certainty as the main fact which these independent circumstances, taken together, tend to establish. If this certainty is not proven, then the jury must acquit the defendant."[495] An instruction that the jury should feel "an abiding confidence and full faith" that the witnesses were not mistaken in the fact of such identification by personal recognition is erroneous and properly refused,[496] and an instruction containing the statement that "the law books are full of cases of mistaken identity" is bad, as being argumentative.[497] Though the presumption of identity of person from identity of name is disputed, yet, if defendant offers no evidence to disprove such presumption, the jury may be instructed that "identity of person is presumed from identity of name," and the failure to instruct that this presumption is only *prima facie* is not prejudicial error.[498] Where witnesses positively identify defendant as one of the persons participating in the crime charged, the defendant is not entitled to an instruction that such testimony is but a mere matter of opinion. An instruction that "the jury are to fully consider all the circumstances and conditions under which these witnesses claimed to have seen the defendant at the time of the crime, as well as the circumstances

[494] Booker v. State, 76 Ala. 22.
[495] People v. Nelson, 85 Cal. 421.
[496] Hughes v. State, 75 Ala. 35.
[497] Hughes v. State, 75 Ala. 35.
[498] People v. Riley, 75 Cal. 98.

of his subsequent identification, claimed to have been made by them," and that they are "not bound by the fact that these witnesses testified that the defendant was one of the criminals, and it is left for the jury to say what weight it would give to this testimony thus considered, and, taken in connection with the evidence introduced by the defendant in support of an alibi," is as favorable as defendant is entitled to.[499]

XIII. Evidence of Character.

§ 263. Rules governing this class of evidence.

In determining the guilt or innocence of the accused in a criminal case, proof of his good character should always be taken into consideration,[500] without reference to the apparently conclusive or inconclusive character of the other evidence.[501] "The good character of the party accused, satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted to the consideration of the jury, together with the other facts and circumstances of the case. The nature of the charge, and the evidence by which it is supported, will often render such ingredient of little or no avail; but the more correct course seems to be not in any case to withdraw it from consideration, but to leave the jury to form their conclusion, upon the whole of the evidence,

[499] State v. Powers, 72 Vt. 168.

[500] State v. Henry, 50 N. C. 65; Creed v. People, 81 Ill. 569; State v. Tarrant, 24 S. C. 593; Stewart v. State, 22 Ohio St. 478; Kistler v. State, 54 Ind. 400; McQueen v. State, 82 Ind. 74; Holland v. State, 131 Ind. 572; People v. Mead, 50 Mich. 228; State v. Lindley, 51 Iowa, 344; State v. Horning, 49 Iowa, 158; Hammond v. State, 74 Miss. 214; People v. Bell, 49 Cal. 485; People v. De La Cour Soto, 63 Cal. 165; State v. McMurphy, 52 Mo. 251; State v. McNamara, 100 Mo. 107; State v. Porter, 32 Or. 135; Remsen v. People, 57 Barb. (N. Y.) 324; Edgington v. United States, 164 U. S. 361.

[501] Kistler v. State, 54 Ind. 400.

whether an individual whose character was previously unblemished has or has not committed the particular crime for which he is called upon to answer."[502] Evidence of the good character of the prisoner is of value, not only in doubtful cases, but also when the testimony tends very strongly to establish the guilt of the accused.[503] Such evidence is not a mere makeweight thrown in to assist in the production of a result that would happen at all events, but it is positive evidence, and may of itself, by the creation of a reasonable doubt, produce an acquittal.[504] Evidence of the general character of the accused, having reference and analogy to the charge, is competent as original testimony,[505] and its effect as primary evidence should not be denied by an instruction.[506] The reason for this is obvious. To hold that a man's general good character is only evidence in cases where there is doubt is equivalent to holding that he shall derive no benefit from it as evidence in a criminal case; for if the jury entertain a reasonable doubt as to his guilt, they will give him the benefit of such doubt, and acquit, aside from proof of his good character.[507]

§ 264. Instructions limiting effect of evidence to doubtful cases improper.

Keeping in view these principles, it has been almost uniformly held erroneous for the court, by its instructions, to limit the consideration of such evidence to cases where the other evidence leaves a doubt in the minds of the jury as to

[502] Roscoe, Cr. Ev. (Ed. 1846) 97.

[503] Remsen v. People, 43 N. Y. 6, reversing 57 Barb. (N. Y.) 324.

[504] Heine v. Com., 91 Pa. 145; Remsen v. People, 43 N. Y. 6; People v. Bell, 49 Cal. 485; Felix v. State, 18 Ala. 725; People v. Friedland, 2 App. Div. (N. Y.) 332; State v. Porter, 32 Or. 135.

[505] Felix v. State, 18 Ala. 725.

[506] People v. Friedland, 73 N. Y. St. Rep. 516, 37 N. Y. Supp. 974.

[507] Felix v. State, 18 Ala. 725.

the defendant's guilt.[508] Thus it has been held improper to instruct that evidence of good character is of no weight except in a doubtful case.[509] Or "that, in a plain case, a good character would not help a prisoner; but, in a doubtful case, he had a right to have it cast into the scales and weighed in his behalf."[510] Or "that good character may have its weight in a doubtful case, and it may have its weight in any case to this extent: that * * * if there is a question of doubt, it may determine the matter in his favor."[511] Or "if a man is guilty, his previous good character has nothing to do with the case, but, if you have doubt as to his guilt, then character steps in and aids in determining that doubt."[512] Or "that good character is always of importance, and is evidence to be duly considered by the jury, and may turn the scale where there is a reasonable doubt as to the degree or grade of the crime."[513] Or that, "where the evidence, outside of the presumption of good character, is clear and explicit, on which no doubt can be cast, good character will only cause the jury to hesitate and think about the mat-

[508] Jupitz v. People, 34 Ill. 516; State v. Henry, 50 N. C. 65; State v. Sauer, 38 Minn. 438; State v. Holmes, 65 Minn. 230; Heine v. Com., 91 Pa. 145; Ryan v. People, 19 Abb. Pr. (N. Y.) 232; Com. v. Cleary, 135 Pa. 64; Stewart v. State, 22 Ohio St. 478; Harrington v. State, 19 Ohio St. 268; Felix v. State, 18 Ala. 725; State v. Northrup, 48 Iowa, 585; State v. Kinley, 43 Iowa, 296; Epps v. State, 19 Ga. 102; Holland v. State, 131 Ind. 568; Hammond v. State, 74 Miss. 214; Com. v. Carey, 2 Brewst. (Pa.) 406; Donaldson v. State, 10 Ohio Cir. Ct. R. 613; Remsen v. People, 43 N. Y. 6; People v. Friedland, 73 N. Y. St. Rep. 516; People v. Hancock, 7 Utah, 170; Cancemi v. People, 16 N. Y. 501; Com. v. Leonard, 140 Mass. 473. Contra, Com. v. Webster, 5 Cush. (Mass.) 295.

[509] Jupitz v. People, 34 Ill. 516.

[510] State v. Henry, 50 N. C. 65.

[511] State v. Sauer, 38 Minn. 438.

[512] Heine v. Com., 91 Pa. 145.

[513] Com. v. Cleary, 135 Pa. 64.

ter."[514] Or that "evidence of previous good character may be considered by you in connection with all the other evidence given in the cause in determining whether the defendant would likely commit the crime with which he is charged; and if you find from all the evidence in the cause, independent of the evidence of his good character, that there is a reasonable doubt, then you should give him the benefit of his good character, and acquit him. * * * If, however, you should find from all the evidence given in the cause, independent of the evidence of previous good character, that the defendant did commit the crime, or was present, aided or abetted, encouraged, counseled, directed, and assisted in the same, evidence of previous good character would not avail him anything, and you should find him guilty." The effect of such instruction is to deprive the accused of the benefit of evidence of good character.[515] Or "that good character should only be received as a circumstance in cases where a crime is sought to be solely established by circumstantial evidence."[516] So, in a very recent decision, the following instruction was condemned as prohibiting the consideration of evidence of good character, unless the other evidence generated a reasonable doubt: "That [evidence of good character] is a legitimate subject for you to take into consideration, but it goes only to this extent: If an act which the law makes an offense has been actually committed,—if you are satisfied beyond a reasonable doubt that the prohibited act was committed,—it makes no difference what the character of the man is. It

[514] People v. Hancock, 7 Utah, 170.

[515] Holland v. State, 131 Ind. 568.

[516] State v. Kinley, 43 Iowa, 296. See, also, Stover v. People, 56 N. Y. 315, where it was held that good character is to be considered on the question of credibility of direct evidence of guilt, the same as upon proof of circumstances tending to show it, or the inferences to be drawn from such circumstances.

is not the subject of your investigation. But if the evidence should leave your minds in such a state that you cannot say that you are satisfied beyond a reasonable doubt, and if you find that the defendant has borne hitherto an unblemished character,—such a character as makes the act inconsistent with his history and standing,—that circumstance should turn the scale in his favor. At such a time, the influence of a good character ought to weigh very strongly in behalf of a person accused."[517] It has been held, however, that, although an instruction "that the good character of the defendant can only be taken into consideration when the jury have a reasonable doubt" of his guilt, is improper, a conviction will not be reversed therefor when defendant was clearly guilty according to his own testimony.[518]

§ 265. Instructing that evidence of good character may create reasonable doubt.

In one state, the rule is well settled that "evidence of the good character of the accused should go to the jury as any other fact, and its influence in the determination of the case should be left to the jury, without any intimation from the court of its value."[519] According to these decisions, the court should not charge that evidence of good character may of itself be sufficient to create a reasonable doubt. In other

[517] State v. Holmes, 65 Minn. 230.

[518] State v. Slingerland, 19 Nev. 135.

[519] Coleman v. State, 59 Miss. 490; Powers v. State, 74 Miss. 777; Hammond v. State, 74 Miss. 214; Wesley v. State, 37 Miss. 327. See, also, Briggs v. Com., 82 Va. 554, where it was held proper to refuse a charge that, "if accused be proved of good character as a man of peace, the law says that such good character may be sufficient to create a reasonable doubt of his guilt, although no such doubt would have existed but for such good character;" and to instruct that the character of the accused, good or bad, when proved, may always be received and weighed in favor of or against him, as the case may be.

jurisdictions it has been held proper to give such an instruction,[520] and error to refuse it.[521] The defendant is entitled to have the jury distinctly instructed that good character may of itself create a doubt, where otherwise none would exist.[522] In one case, the reviewing court said that it was not sufficient for the trial judge to instruct the jurors that "the good character of the defendant is a circumstance * * * for their consideration," because this was only equivalent to the admission of the testimony as to character.[523] It has been held, however, that a refusal to give such an instruction is not prejudicial, where the court instructs that "evidence of the defendant's good character must be considered in connection with all the evidence in the case, and if, then, the jury have a reasonable doubt of the defendant's guilt, they must acquit."[524] There is some conflict of authority as to whether it is proper to instruct that good character, if established, is sufficient to raise a doubt as to the prisoner's guilt. In Pennsylvania, where an instruction on the weight of the evidence is permissible, a charge to this effect has been approved.[525] In another jurisdiction, where it is not permissible to charge on the weight of the evidence, it has been held proper to refuse such an instruction, the court saying that, "while such evidence is admissible for the purpose of generating a reasonable doubt of guilt, its suffi-

[520] Stephens v. People, 4 Parker, Cr. R. (N. Y.) 396; Lowenberg v. People, 5 Parker, Cr. R. (N. Y.) 414.

[521] People v. Bell, 49 Cal. 489; People v. Doggett, 62 Cal. 27.

[522] People v. Elliott, 163 N. Y. 11.

[523] People v. Bell, 49 Cal. 485. In People v. Elliott, 163 N. Y. 11, where the court merely charged that good character should weigh when a man is charged with crime, and left it to the jury to say what weight should he given it, it was held error to refuse defendant's request to charge distinctly that good character might create a reasonable doubt.

[524] People v. Bowman, 81 Cal. 566.

[525] Com. v. Carey, 2 Brewst. (Pa.) 406.

ciency is a question for the decision of the jury."[526] So, a requested instruction that the jury may consider defendant's character for the purpose of accepting or rejecting his statement, and weighing it as against, and as corroborative of, sworn evidence, and that, whenever the case is doubtful, character should control the jury in favor of the innocence of the prisoner, was held properly refused as argumentative, and as stating the law too favorably for the accused.[527] The refusal of a requested instruction to the effect that, if evidence of defendant's good character raises a doubt of his guilt, the jury might acquit him, though the other evidence shows him guilty beyond a reasonable doubt, was also held proper. The two clauses of this instruction are contradictory.[528]

§ 266. Instructions as to effect of evidence of good character in cases of great and atrocious criminality.

In the Webster Case, Chief Justice Shaw charged the jury as follows: "Where it is a question of great and atrocious criminality; the commission of the act is so unusual, so out of the ordinary course of things, and beyond common experience; it is so manifest that the offense, if perpetrated, must have been influenced by motives not frequently operating upon the human mind,—that evidence of character, and of a man's habitual conduct under common circumstances, must be considered far inferior to what it is in the instance of accusations of a lower grade."[529] But the doctrine announced in this case has received very little sanction from others. While the strength of the presumption of innocence arising from evidence of good character will vary according

[526] Booker v. State, 76 Ala. 22; Barnett v. State, 83 Ala. 40.
[527] Johnson v. State, 95 Ga. 499.
[528] State v. Bryant, 134 Mo. 246.
[529] Com. v. Webster, 5 Cush. (Mass.) 324.

to the attending circumstances of each case, there is no reason why the presumption should not be as strong in the case of an accusation of a great offense.[530] Evidence of good character is not only of value in prosecutions for minor offenses, but is entitled to be considered when the crime charged is atrocious.[531] And, in accordance with this view, it was held erroneous to charge that, "where it is a question of great and atrocious criminality, * * * evidence of character, and of a man's habitual conduct under common circumstances, must be considered far inferior to what it is in the instance of accusations of a lower grade."[532]

§ 267. Instructing that evidence of good character cannot avail against clear proof of guilt.

Although evidence of good character is always to be considered in determining the question of guilt or innocence, yet, if the proof of guilt is clear and convincing, proof of previous good character cannot be looked to as a ground of acquittal, and the jury may be so instructed.[533] Accordingly, the following instructions on this head have been approved: "If you should believe the defendant guilty, you must so find, notwithstanding his good character."[534] "If the jury is satisfied of the prisoner's guilt from all the other facts and circumstances detailed in evidence, his good char-

[530] Harrington v. State, 19 Ohio St. 264; Cancemi v. People, 16 N. Y. 501; Remsen v. People, 43 N. Y. 9.

[531] Remsen v. People, 43 N. Y. 9.

[532] Cancemi v. People, 16 N. Y. 501.

[533] Edmonds v. State, 34 Ark. 720; State v. McMurphy, 52 Mo. 251; State v. Porter, 32 Or. 135; Jackson v. State, 76 Ga. 562; State v. Vansant, 80 Mo. 70; McQueen v. State, 82 Ind. 74; Wesley v. State, 37 Miss. 327; People v. Sweeney, 133 N. Y. 609; People v. Hammill, 2 Parker, Cr. R. (N. Y.) 223; State v. Douglas (Kan.) 24 Pac. 1118; People v. Mitchell, 129 Cal. 584. Compare State v. Lindley, 51 Iowa, 344.

[534] People v. Samsels, 66 Cal. 99.

acter cannot be looked to as a ground of acquittal."[535] "Evidence of good character is, in law, to be considered by the jury, in all doubtful cases, of great weight. Yet, if the proof of guilt is direct and clear, it is entitled to little consideration."[536] "Evidence as to good character can have little practical effect against direct and satisfactory evidence as to guilt, and it cannot turn the scale against conclusive evidence."[537] If the evidence is convincing beyond a reasonable doubt, it is the duty of the jury to convict, notwithstanding good reputation.[538] "The defendant has introduced evidence before you tending to show his good character for peace and quietness. If, in the present case, the good character of the defendant for these qualities is proven to your satisfaction, then such fact is to be kept in view by you in all your deliberations, and it is to be considered by you in connection with the other facts in the case; and if, after a consideration of all the evidence in the case, including that bearing upon the good character of the defendant, the jury entertain a reasonable doubt as to defendant's guilt, then I charge you it is your duty to acquit him. But if the evidence convinces you, beyond a reasonable doubt, of defendant's guilt, you must so find, notwithstanding his good character." Such an instruction is not open to the interpretation that the jury must be convinced beyond a reasonable doubt of defendant's guilt from the evidence taken in the case, excluding from their minds the evidence offered in reference to defendant's good character.[539] "If, from the whole testimony, they believe defendant is guilty, then his previous good character neither justifies, mitigates, nor ex-

[535] State v. McMurphy, 52 Mo. 251.
[536] Creed v. People, 81 Ill. 569.
[537] State v. Spooner, 41 La. Ann. 780.
[538] People v. Mead, 50 Mich. 233.
[539] People v. Mitchell, 129 Cal. 584.

cuses the offense."[540] "Proof of the good character of the party charged with crime, if there is doubt of his guilt upon the evidence, may afford good ground for a presumption of innocence, but will not be available to overcome or set aside satisfactory proof of criminality."[541] Previous good character is of great importance, but evidence thereof is not to overcome the conclusion which properly follows if the jury are satisfied beyond a reasonable doubt that the defendant is guilty.[542] "If you shall conclude from all the evidence that the defendant is guilty, you should not acquit him because you may believe that he has heretofore been a person of good repute."[543] "The good character of a person accused of a crime, when proven, is of itself a fact in the case; it is a circumstance tending in a greater or less degree to establish his innocence; it must be considered in connection with all the other facts and circumstances of the case. But if, after full consideration of all the evidence adduced, the jury believe the defendant to be guilty of any degree of crime, they should so find, notwithstanding proof of good character."[544] "The defendant in this case has offered evidence tending to show his character as a peaceable, law-abiding citizen. The defendant has a right to show his previous good character as a circumstance tending to show the improbability of his guilt, or that he would commit such a crime. If, however, you believe from the evidence, beyond a reasonable doubt, that the defendant committed the crime in question, as charged in the indictment, then it would be your duty to find the defendant guilty, even though the evidence satisfied your minds that defendant, previous to the

[540] State v. Jones, 78 Mo. 282.
[541] United States v. Smith, 2 Bond, 323, Fed. Cas. No. 16,322.
[542] Com. v. Eckerd, 174 Pa. 137.
[543] State v. Vansant, 80 Mo. 70.
[544] People v. Smith, 59 Cal. 601.

commission of the alleged crime, had sustained a good reputation as a peaceable and law-abiding citizen." The court need not add to such an instruction the words, "The court further instructs you that proof of good character may be sufficient of itself to create a reasonable doubt of defendant's guilt, although no such doubt would have existed but for such good character."[545] So it has been held not erroneous to charge that evidence of the good character of the defendant can have but little or no effect where the facts constituting the crime are clearly proved, if the jury are also told that this is not such a case, but that this evidence is to be considered with all the other evidence in determining whether there is a reasonable doubt of his guilt.[546] But in one very recent case it was held error to refuse an instruction that the jury might, in the exercise of a sound discretion, give the defendant the benefit of previous good character, no matter how conclusive other testimony might appear to be, and to leave it to the jury to say what weight good character should have in determining defendant's guilt or innocence.[547]

§ 268. Other instructions as to character.

The court may properly inform the jury that good character is of importance to a person charged with a crime, and that they have the right to consider whether a person would be less liable to be guilty of crime than a person of bad habits and character;[548] but an instruction that good character raises a strong presumption of innocence is erroneous,

[545] State v. Porter, 32 Or. 135.

[546] State v. Leppere, 66 Wis. 355.

[547] People v. Elliott, 163 N. Y. 11, reversing 43 App. Div. (N. Y.) 621.

[548] People v. Harrison, 93 Mich. 597.

and is properly refused.[549] And so an instruction that the reasonable effect of proof of defendant's good character is to raise a presumption that he was not guilty of the crime charged.[550] Instructions should not be given which tend to impress the jury with the belief that evidence of good character is of no value;[551] as, for instance, "that the respondent had the right to put his good reputation before them for their consideration, 'as a kind of makeweight in his favor, if there is a pinch in the case.' "[552] But an instruction that the accused had introduced some evidence of good character, and authorizing the jury to consider it, is not erroneous because of the use of the word "some."[553] Where there is evidence tending to show the previous good reputation of the defendant as a peaceable citizen, an instruction that "no inference can be drawn by a jury, of the intention which induced the commission of the offense, from the previous character of the prisoner. His intention can only be determined by his acts. The law will imply a malicious intention,"—is erroneous.[554] So, where it has been sought to impeach a witness both by disproving facts testified to by him, and also by proof of contradictory statements, and to sustain him by evidence of good character, it is error to limit the effect of such sustaining evidence by charging that, If a fact or facts testified to by a witness be disproved to the satisfaction of the jury, then evidence of general good character should not be treated as re-establishing such disproved facts.[555] An instruction that, "if the jury, from

549 Wayne v. Winter, 6 McLean, 344, Fed. Cas. No. 17,304.

550 Moran v. State, 11 Ohio Cir. Ct. R. 464.

551 State v. Daley, 53 Vt. 442; People v. Pedro, 19 Misc. Rep. (N. Y.) 300.

552 State v. Daley, 53 Vt. 442.

553 Keys v. State, 112 Ga. 392.

554 People v. Casey, 53 Cal. 360.

555 McEwen v. Springfield, 64 Ga. 159.

all the evidence in this cause, have any doubt of the defendant's guilt, and further believe from the evidence that the defendant has for a long time and now possesses a good moral character for peace, sobriety, and honesty, then such fact of good character, coupled with the presumption of innocence which the law invokes, is sufficient upon which to find a verdict of not guilty," is erroneous, and is properly refused.[556] Where defendant asks an instruction that "the good character of the defendant for honesty and integrity is a fact in the case, to be considered by you in connection with all the other evidence in the case," and the court adds the following, "But such fact, like all others, must be proven by competent evidence," such instruction is correct.[557] An instruction that: "Proof of the good character of the person charged with the offense is always allowed in this class of cases, and the weight to be given to it is to be determined by the jury. It is all-important in doubtful cases. Where the evidence, outside of the presumption of good character, is clear and explicit, on which no doubt can be cast, good character will only cause the jury to hesitate and think about the matter. The jury will always remember that a man has to commit his first crime; he cannot commit all the crimes, if he does commit many, at once. He has to break over the rules of good conduct for the first time some time in his life,"—is erroneous as limiting the effect of good character to doubtful cases.[558] Where defendant introduces evidence of good character, which the prosecution does not attempt to rebut, it has been held prejudicial error for the court to instruct that, while the law permits him to make such proof, the people are prohibited

[556] State v. McNamara, 100 Mo. 100.
[557] People v. Velarde, 59 Cal. 457.
[558] People v. Hancock, 7 Utah, 170.

from showing his bad character.[559] But the court may instruct "that it is competent for the prisoner to avail himself of his former good character, if it existed, by proof of the fact; and, if he offers no such testimony, it is not competent for the government to show it was not good, if there is no intimation that an inference prejudicial to the accused should be drawn by the jury from his omission to offer such testimony."[560] An instruction is proper which charges, in effect, that the proof of good character was not necessarily a bar to the conviction; that it created a presumption in favor of the prisoner, but that such presumption could be overcome by evidence of crime; and, as illustrative of that principle, said that positive evidence, if believed by the jury, would overcome the presumption arising from good character, if the court has already, in substance, charged that the defendant was presumed to be innocent; that, in case they had a reasonable doubt as to her guilt, they should acquit, although the evidence and circumstances pointed to the guilt of the prisoner, and that good character might be sufficient to raise such a doubt.[561] An instruction that "a witness may be discredited by showing that such witness had been living a life of moral turpitude, or of committing immoral acts, the effect and weight of such evidence in all cases to be determined by the jury," though technically incorrect, was held not error.[562]

§ 269. Necessity of instructions on character.

In case defendant has produced evidence to show good character, he is entitled, on request, to an instruction stating

[559] People v. Marks, 90 Mich. 555.
[560] State v. Tozier, 49 Me. 404.
[561] People v. Brooks, 61 Hun, 619, 15 N. Y. Supp. 362.
[562] Wheeler v. State, 112 Ga. 43.

the effect of such evidence,[563] but, in the absence of a request, it has been held that no instruction on this subject need be given;[564] and if defendant asks an improper instruction on the subject of character, he cannot complain if none at all is given. The law requiring the court to declare the law applicable to the case, whether proper instructions are asked for or not, does not comprehend such merely collateral matters;[565] and a refusal to give a proper instruction on good character is not error, though an improper one has been asked and refused.[566] It has also been held that, if a charge as to good character is not sufficiently specific, error cannot be predicated thereon unless a more specific charge is requested.[567] So, instructions on good character which have already been given in substance may properly be refused.[568] Where the court has charged that, "if the evidence satisfies you in this case that this defendant is a man of good character and of peaceable habits, why, you should take that into consideration with all the other evidence in the case, and all the surrounding facts and circumstances, and give it just such weight as you think it is justly and properly entitled to," and that "a reasonable doubt may arise out of the evidence of good character, where a party charged with a criminal offense offers evidence tending to show that he has heretofore borne a good character. That, in itself, will sometimes create in the minds of a jury that reasonable doubt, to the benefit of which I have already told you the defendant is entitled if it exists in this case,"—it is not error to refuse to

[563] State v. Swain, 68 Mo. 605; People v. Elliott, 163 N. Y. 11, reversing 43 App. Div. (N. Y.) 621.

[564] State v. McNamara, 100 Mo. 107; State v. Peterson, 38 Kan. 205.

[565] State v. McNamara, 100 Mo. 100.

[566] State v. McNamara, 100 Mo. 100.

[567] Franklin v. State, 69 Ga. 36. See, also, Keys v. State, 112 Ga. 392.

[568] People v. Johnson, 61 Cal. 142; Com. v. Wilson, 152 Mass. 12.

charge that "evidence of good character, of itself, tends to prove that the defendant is not guilty of the offense charged."[569] Where the only evidence of the character of defendant is that he is a quiet and peaceable man, and there is no attempt at impeachment of the defendant, and, consequently, evidence of his character for veracity could not have been introduced by him, an instruction that the jury "may look to the fact, if it be a fact, that defendant is a man of good character, in determining what weight they will give to the testimony of the defendant," and "that, in the light of the argument of counsel for the prosecution that the defendant's testimony is not to be believed because of his interest, and that, therefore, the defendant would willfully testify falsely in the case, the jury may look to the fact, if it be a fact, that the defendant is a man of good general character, in determining what weight the jury will give defendant's testimony," is abstract.[570] So, where no evidence of defendant's bad character is adduced, the court does not err in failing to instruct the jury that evidence of defendant's bad character goes only to his credibility as a witness, and is not evidence of his guilt.[571]

XIV. Conflicting Evidence.

§ 270. In general.

The court need not call attention to a conflict in the evidence, unless a request for an instruction of that character has been made.[572] Nevertheless, if there is a conflict in the evidence, it is not improper to state rules for weighing such testimony.[573] Thus it has been held proper to instruct:

569 People v. Spriggs, 58 Hun (N. Y.) 603, 11 N. Y. Supp. 433.
570 Bodine v. State (Ala.) 29 So. 926.
571 State v. Furgerson, 162 Mo. 668.
572 Balph v. Liberty Nat. Bank, 179 Pa. 430.
573 Steen v. Sanders, 116 Ala. 155; Young v. State, 2 Yerg. (Tenn.)

"It is the duty of the jury to look at all the material evidence in the case in order to determine what is the real and true state of facts; and they will weigh all the evidence in the case, so as to reconcile all the evidence where it may seem to conflict, or apparently conflict, if you can do so. You will not capriciously reject any evidence, but reconcile it all, if you can do so;"[574] but that, if this cannot be done, they may believe or disbelieve any witnesses, according as they may or may not consider them entitled to credit;[576] and that the jury must decide who of the witnesses is entitled to the greater credit.[577] It is proper to charge the jury that, "in considering and weighing the evidence, you should use the same judgment, reason, common sense, and general knowledge of men and affairs as you have in every-day life.[578] So it is proper to instruct "that the credibility of the witnesses is a question exclusively for the jury, and the law is that, where a number of witnesses testify directly opposite to each other, the jury is not bound to regard the weight of evidence as equally balanced. The jury have the right to determine, from the appearance of witnesses on the stand, their manner of testifying, and their apparent candor and fairness, their apparent intelligence, and from all the other surrounding circumstances appearing on the trial, which witnesses are more worthy of credit, and to give credit accordingly."[579] On the other hand, in case the evidence is conflicting, it is not proper to charge that the jury should endeavor to reconcile

292; McGhee v. Smith, 6 Heisk. (Tenn.) 316; Farley v. Ranck, 3 Watts & S. (Pa.) 554.

574 Steen v. Sanders, 116 Ala. 155.

576 Liverpool & L. & G. Ins. Co. v. Ende, 65 Tex. 118.

577 Rideus v. State, 41 Tex. 200.

578 Morrison v. State (Fla.) 28 So. 97.

579 Horton v. Com. (Va.) 38 S. E. 184.

the evidence with the theory of defendant's innocence;[580] or that the case depends solely on the veracity of a designated witness;[581] or that the jury must believe the testimony of a particular witness.[582] Where the plaintiff and principal defendant contradicted each other, it is not error to refuse to instruct that, "in estimating the value of the plaintiff's services, the jury are not bound by his testimony, even though it is not contradicted or controlled by the evidence. Upon such questions, the jury are to be guided by their own skill and knowledge, as well as by the testimony which is given by witnesses at the trial."[583] So it is error to instruct the jury that, if there is a conflict in the evidence of the witnesses, and the jury cannot reconcile that evidence, they 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, since the credibility of the witnesses, and the weight to be given the evidence of each, is a matter which must be left solely to the jury.[584]

XV. Comparison of Number of Witnesses.

§ 271. What instructions proper.

The court may ignore the fact that more witnesses testify for one side than for the other.[585] The court should not tell the jury that a preponderance of the evidence is to be determined by a count of the witnesses on each side, though the jury may be told that the fact of numbers is not to be

580 People v. Madden, 76 Cal. 521.
581 Fullam v. Rose, 160 Pa. 47.
582 State v. Parker, 66 N. C. 624.
583 Wyman v. Whicher (Mass.) 60 N. E. 612.
584 Southern Mut. Ins. Co. v. Hudson, 113 Ga. 434.
585 McIntosh v. McIntosh, 79 Mich. 198.

ignored in determining the preponderance of the evidence.[586] It is proper to instruct that, "in summing up the testimony upon any given question, you should not alone count witnesses. It is not always the most satisfactory; neither is it the most certain of the truth. The questions are: What did the witness swear to? How much did he know? Was he positive, or uncertain and equivocating? What were his means of knowledge of the transactions or matters he testified about? What is the character of the witness for truthfulness? Is he credible?"[587] And an instruction "that the jury are not to be swayed by the number of witnesses, but by the quality of the testimony," has been approved.[588] So, also, it has been held that the court may tell the jury that, "other things being equal, the greater number of witnesses would carry the greater weight,"[589] or that "a case might arise wherein a jury would be justified in finding a verdict for the defendant upon the testimony of one witness, against the testimony of any greater number of witnesses."[590] An instruction that "the weight of evidence does not depend upon the number of witnesses to a given fact, but it depends upon the amount of credit that you will give to the testimony of one or all of the witnesses in the case," is not error, in that it tells the jury that the number of witnesses cuts no figure on the question of preponderance of evidence; where the court has also charged in this connection that the manner of the witnesses on the stand, their apparent interest in the case, their means and opportunities of observing the facts to which they testified, and the probability of their statements, are all to be considered in determining whether they testified correctly

[586] Christman v. Ray, 42 Ill. App. 111; State v. Bohan, 19 Kan. 35.
[587] State v. Bohan, 19 Kan. 35.
[588] Divver v. Hall, 20 Misc. Rep. (N. Y.) 677.
[589] Spensley v. Lancashire Ins. Co., 62 Wis. 453.
[590] People v. Chun Heong, 86 Cal. 329.

or not; and that, "in considering the question of the alleged negligence of the defendant, you are to take into consideration all of the evidence, the number, character, and appearance of the witnesses, the interest, if any, which any of them may have in the event of the suit, the manner of their giving their testimony, their apparent fairness and candor, and the probability, in connection with all of the evidence and the circumstances surrounding the matters testified to, of the truth of the matters testified to by the several witnesses."[591]

§ 272. What instructions improper.

The court should not instruct that a witness on one side will offset the testimony of a witness on the other, if of equal credibility. The question of credibility is one of fact for the jury, and the court should not in any way intimate an opinion as to the effect of the testimony of competent witnesses.[592] An instruction that the jury are to determine the preponderance of the evidence by counting the witnesses for and against a proposition of fact invades the province of the jury.[593] The jury are to determine, not only the credibility of the witnesses, but the weight which should be given to the testimony of each witness, for there are other considerations than that of credibility which affect the question of weight,

[591] Hardy v. Milwaukee St. Ry. Co., 89 Wis. 183.

[592] Wastl v. Montana Union R. Co., 17 Mont. 213; Mariner v. Pettibone, 14 Wis. 195; Thomas v. Paul, 87 Wis. 607; Kuehn v. Wilson, 13 Wis. 117; Bierbach v. Goodyear Rubber Co., 54 Wis. 213; Ely v. Tesch, 17 Wis. 209; Sickle v. Wolf, 91 Wis. 396; Childs v. State, 76 Ala. 93; Dorgan v. State, 72 Ala. 173; Armstrong v. State, 83 Ala. 49; Alabama Fertilizer Co. v. Reynolds, 79 Ala. 497; Amis v. Cameron, 55 Ga. 449; Salter v. Glenn, 42 Ga. 64; Kelley v. Louisville & N. R. Co., 49 Ill. App. 304; Christman v. Ray, 42 Ill. App. 111; Johnson v. People, 140 Ill. 350, criticising dictum in McFarland v. People, 72 Ill. 368.

[593] Bierbach v. Goodyear Rubber Co., 54 Wis. 213.

and the jury may well understand the word "credible" to refer merely to the integrity of the witness.[594] The jury should also take into consideration the opportunities of the witnesses for knowing the facts to which they testified,[595] their appearance and demeanor on the stand, their interest, prejudice, or bias, and whether their statements were positive or equivocating,[596] and the probability or improbability of the truth of their several statements, in view of all the other evidence, facts, and circumstances proved on the trial.[597] If the preponderance of evidence were to be determined solely by the number of credible witnesses, a litigant could hardly fail in any case if he should be fortunate enough to have the greater number of credible witnesses.[598] It is therefore erroneous to instruct the jury that the preponderance of evidence is to be determined by the number of witnesses on each side, if all are equally credible;[599] or "that one credible witness is worth more than many witnesses who, the jury may and do believe, have knowingly testified untruthfully upon any material point in issue, and are not corroborated by other credible witnesses;"[600] or that, "if you should find that three witnesses are of equal credibility and weight, and the two latter conflict with the former on the facts of the case, you may disregard the evidence of the former;"[601] or "that, if the testimony of the two parties conflicts in regard to the warranty, and neither is corroborated

[594] Bierbach v. Goodyear Rubber Co., 54 Wis. 213; Wastl v. Montana Union R. Co., 17 Mont. 216.

[595] Bierbach v. Goodyear Rubber Co., 54 Wis. 213; Robertson v. Monroe, 7 Ind. App. 470.

[596] State v. Bohan, 19 Kan. 35.

[597] Robertson v. Monroe, 7 Ind. App. 470.

[598] Wastl v. Montana Union R. Co., 17 Mont. 216.

[599] Wastl v. Montana Union R. Co., 17 Mont. 216.

[600] Henderson v. Miller, 36 Ill. App. 232.

[601] Childs v. State, 76 Ala. 93.

by other testimony, so far as that testimony so conflicts, the plaintiff must fail;"[602] or that, "if one witness swears to the existence of a fact, and another witness, of equal credibility, swears that the fact is not true, then the fact is not proved, unless there is other satisfactory proof of the fact;"[603] or that the jury should acquit where there are two witnesses on each side, in case they are of equal credibility;[604] or that, if the jury consider the witnesses equally credible, "the greater number of witnesses on one side or the other would be entitled to the greater weight;"[605] or that of two witnesses, "of equal credibility, the one offsets the other," and the jury should find for defendant unless further evidence by other witnesses for plaintiff or circumstances proved gave the ver- contradict each other, * * * the evidence is balanced dict for plaintiff;[606] or that, when two witnesses "directly unless there is some other witness or some other circumstances" in evidence corroborating one side or the other;[607] or that, if two witnesses, whose statements conflict, are of equal credit, the statement of a third witness corroborating plaintiff's witness creates a preponderance of testimony for plaintiff "unless there is some fact or evidence tending to corroborate the defendant;"[608] or to instruct in a case where plaintiff alone testified in his own behalf, and two witnesses testified for defendant, that the jury should find for defendant if defendant's two witnesses were credible, and their testimony was not successfully impeached.[609] So it is error

[602] Kuehn v. Wilson, 13 Wis. 117.
[603] Dorgan v. State, 72 Ala. 174.
[604] Armstrong v. State. 83 Ala. 49.
[605] Bierbach v. Goodyear Rubber Co., 54 Wis. 213.
[606] Johnson v. People, 140 Ill. 350, disapproving dictum in McFarland v. People, 72 Ill. 368; Thomas v. Paul, 87 Wis. 607.
[607] Sickle v. Wolf, 91 Wis. 396.
[608] Ely v. Tesch, 17 Wis. 209.
[609] Kelley v. Louisville & N. R. Co., 49 Ill. App. 304.

to charge that, "in the absence of any corroborating circumstance, if all the witnesses were surrounded by the same circumstances, and were alike in everything but numbers, the evidence of two would overcome the evidence of one, and the jury were bound to believe the two in preference to the one;"[610] or that "the preponderance of the evidence is determined by the number of witnesses on each side, where the opposing witnesses are equally credible, and equally well corroborated, and have no greater interest in the result of the suit."[611] And it has been held proper to refuse a charge "that a preponderance of the evidence does not necessarily mean a majority of witnesses, and that the evidence of one credible witness may be taken and given credence by the jury in preference to the evidence of a number of witnesses that the jury believe are swearing to falsehoods."[612]

610 Amis v. Cameron, 55 Ga. 449.
611 Christman v. Ray, 42 Ill. App. 111.
612 Trott v. Wolfe, 35 Ill. App. 163.

CHAPTER XXVI.

CAUTIONARY INSTRUCTIONS ON ABSENCE OF ALLOWABLE EVIDENCE.

I. Failure to Produce Evidence Within Power of Party.

§ 273. In Civil Cases.
274. In Criminal Cases.

II. Failure of Party to Testify.

§ 275. In Civil Cases.
276. In Criminal Cases.
277. Same—What Instructions Proper.

I. Failure to Produce Evidence Within Power of Party.

§ 273. In civil cases.

The court may properly comment on the failure to call a witness to testify as to a material fact peculiarly within the knowledge of the witness.[1] If any fact appears in the case made by plaintiff, which, though not conclusive, tends to establish a preponderance of evidence against defendant, and the latter has it in his power to contradict such fact, the court may comment on the failure of defendant to call witnesses to disprove or explain such fact.[2] But where, irrespective of the testimony which may be given by witnesses whom defendant fails to call, defendant has sufficiently met the case made by plaintiff, and it does not appear that such witnesses are more under the control of defendant than of plaintiff, or more in the interest of defendant, it is error to instruct that the failure of the defendant to produce such

[1] Ripley v. Second Ave. R. Co., 8 Misc. Rep. (N. Y.) 449.
[2] Flynn v. New York El. R. Co., 50 N. Y. Super. Ct. 375.

witnesses may be considered by the jury in forming their conclusion.[3] So, where a party fails to call one of two favorably disposed witnesses, it is error to charge that the jury may infer that the testimony of the witness who took the stand, as to matters within the knowledge of the witness not called, was untrue.[4] It is error to comment on the omission to call a witness who has no other or better knowledge of the matter in dispute than those who are produced and give evidence,[5] or upon the failure to produce a witness summoned at a former trial, if it appears that on such former trial the witness testified to his lack of memory on the point in controversy.[6] An instruction on the effect of failure to produce evidence within the power of a party is sufficiently definite and intelligible when it announces the presumption of law to be that the evidence, if produced, would be prejudicial to the party.[7] So, a request for an instruction that if, upon conflicting testimony, the jury find that a party has purposely withheld material evidence in his control, they might draw therefrom an inference unfavorable to his claim, is sufficiently complied with by submitting the fact for consideration.[8]

§ 274. In criminal cases.

The court may properly charge "that, when a man has evidence at hand by which he could prove a given fact material

[3] Flynn v. New York El. R. Co., 50 N. Y. Super. Ct. 375.

[4] Brown v. Town of Swanton, 69 Vt. 53. In this case it was said: "If it is ever fair to assume from the failure to produce one of two favorably disposed witnesses that the testimony given by the other is false, it must be in view of a variety of circumstances which it is the province of the jury to pass upon."

[5] Fitzpatrick v. Woodruff, 47 N. Y. Super. Ct. 436.

[6] Fitzpatrick v. Woodruff, 47 N. Y. Super. Ct. 436.

[7] Nicol v. Crittendon, 55 Ga. 497.

[8] Sherlock v. German-American Ins. Co., 21 App. Div. (N. Y.) 18.

to his defense, and does not use it, it is for the jury to say whether it should be considered against him or not," and, on the other hand, may properly refuse an instruction that a "failure of the prisoner to produce evidence is not to be considered by the jury."[9] For the same reason, it is erroneous to instruct that the jury cannot consider the failure of the prosecution to call a witness.[10] It has also been held erroneous to charge that defendant's failure to show where he was on the day the crime was committed, by some witness, renders what was not absolute before a certainty.[11] The law attributes no such consequences to the omission of a prisoner, upon the trial of a capital offense, to produce proof of his whereabouts upon the day when the crime charged was committed.[12] According to some decisions, the court may properly charge that, if a strong case is made out against defendant, and it is within his power to produce countervailing evidence other than his own testimony, they may consider his failure to do so in determining his guilt or innocence.[13] The instructions approved in these decisions limit

[9] Brulo v. People, 16 Hun (N. Y.) 119.

[10] State v. Smallwood, 75 N. C. 104.

[11] Gordon v. People, 33 N. Y. 501.

[12] Gordon v. People, 33 N. Y. 501.

[13] Com. v. Costley, 118 Mass. 1, in which the court said: "Evidence having been introduced, strongly tending to show that the homicide was committed by the defendant in Norfolk, the jury were rightly instructed that, if they thought that, if it had been committed elsewhere, the defendant would have the means of showing it by other witnesses, they might consider the absence of evidence that it was committed in another county." State v. Grebe, 17 Kan. 458, where the following instruction was approved: "Where evidence which would rebut or explain certain facts and circumstances of a grave and suspicious nature is peculiarly within the defendant's knowledge and reach, and he makes no effort to procure it, the jury may properly take such fact into consideration in determining the prisoner's guilt or innocence; but no inference of guilt

the failure to produce evidence to the testimony of witnesses other than defendant himself, and this would certainly seem to be the proper course, inasmuch as it is generally considered erroneous to comment adversely on defendant's failure to testify. This view is supported by a case in which the jury were told "that the failure of a defendant to produce evidence which it was in his power to produce, to meet the evidence adduced by the commonwealth, was a competent and proper matter for them to weigh in considering the question of his guilt." The reviewing court held that this instruction was erroneous, because the jury "were not told that this last remark did not apply to his [defendant's] own testimony, but merely to his failure to produce other witnesses."[14] And an instruction that, "when all the circumstances proved raise a strong presumption of the guilt of the accused, his failure to offer any explanation, where it is in his power to do so, tends to confirm the presumption of his guilt," has also been condemned.[15] On the other hand, Chief Justice Shaw charged the jury in the Webster Case as follows: "When pretty stringent proof of circumstances is produced, tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence, and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would tend to sustain, the charge; but this is to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused, not ac-

is to be drawn from the omission of the defendant and his wife to testify."

[14] Com. v. Harlow, 110 Mass. 411.

[15] Doan v. State, 26 Ind. 498.

cessible to the prosecution."[16] This instruction, as is seen, does not limit the failure to produce countervailing evidence to testimony of other witnesses than defendant, and to that extent is against the weight of authority. In one other decision, a charge was given which seems to be subject to the same objection. The jury were told, in effect, that where the only direct evidence of defendant's guilt was the testimony of an accomplice, who testified that he and defendant stayed at a certain house on the night of the crime; that they left the house, and, after committing the crime, returned and stayed there all night,—the jury might consider, as a circumstance corroborating the testimony of the accomplice, defendant's failure to produce any evidence that he was not at the house mentioned on the night of the crime.[17] Where no evidence of dying declarations is introduced, it is proper to refuse an instruction drawing inferences from the fact that a written dying declaration in the possession of the prosecution has not been given in evidence. In such case, an instruction to view with distrust secondary evidence would be abstract.[18]

II. Failure of Party to Testify.

§ 275. In civil cases.

The privilege of a party to testify in his own behalf is a personal one, of which he may avail himself or not, at his election; and some cases hold that it is not proper for the court, in any manner, to call the attention of the jury to the fact that a party has failed to take the stand in his own behalf,[19] but the weight of authority is against this

[16] Com. v. Webster, 5 Cush. (Mass.) 316.
[17] People v. Dyle, 21 N. Y. 578.
[18] People v. Brown, 130 Cal. 591.
[19] Moore v. Wright, 90 Ill. 470.

view.[20] Thus it has been held proper for the presiding judge to instruct the jury, in case of defendant's failure to testify, that they might infer that his evidence would not have benefited his case, the court saying: "It is an inference so naturally arising to a jury themselves possessing ordinary sense and acumen, that such a remark might be hardly necessary; but it is clearly within the discretion of the judge in remarking on the evidence which had been adduced, and that which had not been adduced."[21] Failure of a party to testify, when, by testifying, he might exonerate himself from liability sought to be established against him, is a probative fact, and the court, while it should take care not to give specific directions as to the effect of such fact, may charge "that the fact that the defendant did not appear to testify in the case was a matter they might consider and give such weight to it as they thought it might deserve."[22] So, the following form of instruction has been approved in a recent decision: "The court instructs you that, if you find there are material and important circumstances appearing in evidence against the defendant, and you further find that defendant has not satisfactorily explained said circumstances by other evidence, then the fact that he was not a witness in his own behalf may be considered in evidence against him, and you are to give it just such weight as it is entitled to when considered with the other evidence in the case."[23] So it has been held that, where the plaintiff was fully informed as to the nature of the transaction out of which the cause of action arose, and failed to

[20] Union Bank v. Stone, 50 Me. 595; Miller v. Dayton, 57 Iowa, 423; Brooks v. Steen, 6 Hun (N. Y.) 516; Blackwood v. Brown, 29 Mich. 483; Tufts v. Hatheway, 4 Allen (N. B.) 62.

[21] Tufts v. Hatheway, 4 Allen (N. B.) 62.

[22] Union Bank v. Stone, 50 Me. 595.

[23] Miller v. Dayton, 57 Iowa, 423.

appear and testify at the trial, it was proper for the court to submit to the jury the plaintiff's absence as a circumstance for them to consider, and to instruct them that, if they found such absence to be of a suspicious character, it would throw suspicion upon his case.[24] It has also been held that the court may properly charge that the jury are at liberty to draw unfavorable inferences against the defendant for failure to testify as a witness in explanation of material transactions, if they believe them to be within his knowledge.[25] But if there is no evidence that a party has any knowledge concerning one of the vital points in the case, it is error for the court to assume that, if such party had made himself a witness, and told the truth, he would have established the issue on such point in favor of his adversary. Under a rule permitting such an instruction, it would be dangerous for a man to fail to put himself on the stand.[26] So, a request for an instruction that plaintiff's failure to testify on a former trial of the action as to certain facts was a suspicious circumstance, which the jury should consider in testing their credibility, because the issues were the same upon the former trial as in the case at bar, was held properly refused.[27]

§ 276. In criminal cases.

In most jurisdictions, the defendant in a criminal case is made a competent witness in his own behalf by statutory provisions, but it is optional whether he shall testify. With the exception of one English decision, construing a provision that the accused in a criminal case "shall be competent, but not compellable," to testify,[28] the writer has been able to

[24] Brooks v. Steen, 6 Hun (N. Y.) 516.
[25] Blackwood v. Brown, 29 Mich. 483.
[26] Emory v. Smith, 54 Ga. 273.
[27] Brady v. Cassidy, 9 Misc. Rep. (N. Y.) 107.
[28] Kops v. Reg. [1894] App. Cas. 650.

find no case which authorizes the trial judge to comment unfavorably on the failure of a defendant to testify. "Neither the prosecuting officer nor the judge has the right to allude to the fact that a person has not availed himself of this statute, and it would be the duty of the court promptly to interrupt a prosecuting counsel who should so far forget himself and the duties of his office as to attempt to make use of the fact in any way, to the prejudice of a person on trial. An allusion by the judge to the fact, unexplained, cannot but be prejudicial to a person on trial, and a provision intended for his benefit will prove a trap and a snare. It is an intimation to the jury of the effect upon his mind of the omission of the accused to explain, by his own oath, suspicious and doubtful facts and circumstances, as affecting the question of guilt or innocence."[29] It has been held, however, that, where an allusion to defendant's failure to testify has been made, the error is cured if the court, on its attention being called to it, states to the jury that there was no law requiring the prisoner to be sworn, and no inference to be drawn against him from the fact of his not having been sworn.[30] Nevertheless, if the defendant becomes a witness in his own behalf, he is made competent for all purposes in the case. If, by his own testimony, he can explain and rebut a fact tending to show his guilt, if innocent, and he fails to do so, the same presumption arises from his failure that would arise from a failure to give the explanation by another witness, if in his power so to give it, and the jury may be so instructed.[31] Under a statute providing that defendant's failure to testify shall not "be referred to by any attorney in

[29] Ruloff v. People, 45 N. Y. 213. But see State v. Wines (N. J. Sup.) 46 Atl. 702.

[30] Ruloff v. People, 45 N. Y. 213.

[31] Stover v. People, 56 N. Y. 320. See, also, Brashears v. State, 58 Md. 563.

the case, nor be considered by the court or jury before whom the trial takes place," the court is not at liberty to make any comments whatever, whether favorable or otherwise, on defendant's failure to testify.[32] And the same is the case under a statute providing that, "on the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offenses, the person so charged shall, at his request, but not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against the defendant, nor shall such neglect be alluded to or commented upon by the prosecuting attorney or by the court." This statute goes further than the statutes of some other states, in that it prohibits not only the prosecuting attorney, but the court, from making comment. The trial court is forbidden to hint at the existence of a law giving the defendant the right to testify, and such statute seems calculated to protect the interests of the accused, as the granting of a request that "the failure of defendant to testify cannot be taken into consideration by the jury" would many times do harm by calling the attention of the jury to the failure of the defendant to avail himself of his statutory privilege.[33] On the other hand, a statute providing that "defendants in all criminal proceedings shall be competent witnesses in their own behalf, but cannot be called as witnesses by the state, and, should a defendant not elect to become a witness, that fact shall not have any weight against him on the trial, nor shall the attorney or attorneys for the state during the trial refer to the fact that the defendant did not testify in his own behalf, and, should he do so, such attorney or attorneys will be guilty of a misdemeanor, and defendant shall for that cause alone be

[32] State v. Robinson, 117 Mo. 649.

[33] State v. Pearce, 56 Minn. 226.

entitled to a new trial," does not prohibit the court from telling the jury that such failure raised no presumption against the defendant;[34] and the jury may be so instructed where the statute provides that, "on a trial of all indictments, complaints, and other proceedings against a person charged with the commission of an offense, the person so charged shall, at his own request, but not otherwise, be a competent witness; but his neglect or refusal to testify shall not create any presumption against him, nor shall any reference be made to, nor any comment be made upon, such neglect or refusal."[35] In some jurisdictions, the statutes make it the duty of the court to instruct the jury that no inference of defendant's guilt is to be drawn from the fact of his not testifying;[36] and this the court must do, whether requested or not.[37] In other jurisdictions, while it is proper for the court to give a charge of this nature, it is not bound to do so, in the absence of a request therefor.[38] Where a defendant avails himself of his right to testify, a request to instruct the jury that the defendant is under no obligation to testify, and that his failure to do so will not create any presumption against him, is properly refused, as having no application to the case.[39] According to some decisions, a request to instruct that the fact that defendant "does not testify in this cause is not to be considered unfavorably to

[34] State v. Weems, 96 Iowa, 426; Fulcher v. State, 28 Tex. App. 465; Pearl v. State (Tex. Cr. App.) 63 S. W. 1013.

[35] Sullivan v. State, 9 Ohio Cir. Ct. R. 652.

[36] Linbeck v. State, 1 Wash. 336; State v. Cameron, 40 Vt. 555.

[37] See decisions in preceding note.

[38] Grubb v. State, 117 Ind. 277; People v. Flynn, 73 Cal. 511; Metz v. State, 46 Neb. 547; Foxwell v. State, 63 Ind. 539; Felton v. State, 139 Ind. 531; Matthews v. People, 6 Colo. App. 456; Torey v. State (Tex. Cr. App.) 56 S. W. 60.

[39] Williams v. People, 166 Ill. 132.

him by the jury" should be granted,[40] and that this is especially true after a codefendant has testified, and the court has charged as to the statute making defendants competent witnesses in their own behalf;[41] or where counsel has made comments on defendant's failure to testify.[42]

§ 277. Same—What instructions proper.

The following instructions have been held proper and sufficient: "That the fact that the defendant went voluntarily before the grand jury, and told his story, but has not taken the witness stand here, should not raise any presumption against him," and that "the jury are not to assume that he would deny or admit any of the evidence, but that the jury must consider that evidence as it stands, unaffected by the fact that the defendant does not take the stand."[43] Where the court has instructed that defendant "has a right to go upon the witness stand and testify in his own behalf if he chooses to do so. If he does not choose to do so, the law expressly provides that no presumption adverse to him is to arise from the mere fact that he does not place himself upon the witness stand. So, in this case, the mere fact that this defendant has not availed himself of the privilege which the law gives him should not be permitted by you to prejudice him in any way,"—it is not error to refuse to instruct that the jury are absolutely bound by their own

[40] Haynes v. State (Miss.) 27 So. 601; Farrell v. People, 133 Ill. 244; People v. Rose, 52 Hun (N. Y.) 33; State v. Landry, 85 Me. 95; State v. Carr, 25 La. Ann. 408; State v. Goff, 62 Kan. 104; State v. Evans, 9 Kan. App. 889; Matthews v. People, 6 Colo. App. 456; People v. Flynn, 73 Cal. 513; Foxwell v. State, 63 Ind. 539; Metz v. State, 46 Neb. 547. Contra, State v. Robinson, 117 Mo. 663; State v. Pearce, 56 Minn. 226.

[41] Farrell v. People, 133 Ill. 244.

[42] People v. Rose, 52 Hun (N. Y.) 33.

[43] People v. Fitzgerald, 20 App. Div. (N. Y.) 139.

oaths to see that they do not allow their minds to be prejudiced in the slightest degree against the defendant by the fact that he did not testify in his own behalf.[44] "That the defendant has a right to decline going upon the stand, and that his refusal to testify can in no case be considered as evidence of his guilt or innocence."[45] It has been held that it is not erroneous to employ the words, "no inference of guilt should arise in the minds of the jury," instead of the words, "no inference of guilt shall arise," etc.[46] And a charge that "there is no presumption to be taken against a defendant by reason of the fact that he does not take the witness stand," and that defendant could say to the prosecution: "Prove your case against me. It is my judgment that the situation is such that I am not bound to take the witness stand, and the law gives me that right, and the law gives me that privilege,"—has been held not erroneous, as conveying an insinuation that it would be detrimental to defendant's interest to take the stand.[47] So it is proper to charge that a failure to testify is "not even a circumstance against him [defendant], and no presumption of guilt can be indulged in by the jury on account of such failure on his part."[48] It has also been held that, where the court has charged that the jury were not to consider defendant's failure to testify as a circumstance against him, a refusal to further instruct that the jury were not to think of it was proper.[49] And where a charge of this nature has been given,

[44] People v. Watson, 54 Hun (N. Y.) 637.

[45] May v. People, 8 Colo. 226.

[46] State v. Krug, 12 Wash. 288.

[47] People v. Hayes, 140 N. Y. 496.

[48] Fulcher v. State, 28 Tex. App. 465.

[49] State v. Cameron, 40 Vt. 555, in which it was said: "Such instructions would not be sensible. The jury could not think of the charge without thinking of the subjects of the charge, and one of the subjects of the charge was respondent's omission to testify."

it has been held not erroneous to charge, in addition, that the evidence of the state had not been contradicted. It was considered on appeal that the jury could not thereby have obtained the impression that they could consider the fact that the respondent had not testified as evidence against him.[50] On the other hand, where this charge has been given, it is erroneous to instruct the jury that the failure of a defendant to produce evidence which it was in his power to produce, to meet the evidence adduced by the state, is a proper matter for them to consider.[51] Where there is no direct evidence to convict the accused of the crime charged, it is error to instruct that "his mere silence * * * would justify a strong inference that he could not deny the charge, and therefore would not go upon the stand." And the court says, further, that such an inference is natural and irresistible, and that no instruction will prevent honest jurymen from making the inference.[52] An instruction that "you all know that the intent is a simple mental operation, and we cannot, unless the defendant himself speaks,—it is not possible to,—give any direct, positive proof of the intent of any person in the commission of any act. You cannot look into the human mind and see what its workings are. The prosecution can never in any case, unless the defendant himself sees fit to speak, give any direct or positive evidence of the intent,"—is not erroneous as announcing to the jury "that any presumption should be indulged against the defendant because he did not give evidence as a witness in the cause."[53]

Such a charge would be violated by the jurors bearing it in mind to follow it. It was the duty of the jury to think on this subject enough to see they did not allow it to prejudice the respondent."

[50] State v. O'Grady, 65 Vt. 66.

[51] Com. v. Harlow, 110 Mass. 411.

[52] State v. Wines (N. J. Sup.) 46 Atl. 702.

[53] People v. Morton, 72 Cal. 62.

CHAPTER XXVII.

CAUTIONARY INSTRUCTIONS ON THE DEFENSE OF ALIBI.

§ 278. Propriety or Necessity of Instructions on this Subject.
279. Instructions Tending to Discredit this Defense—View that Such Instructions are Improper.
280. Same—The Contrary View.
281. Instructions Embodying the Doctrine of Reasonable Doubt as Applicable to this Defense.
282. What Instructions Proper Where Burden of Proof is on Defendant to Establish Alibi.
283. What Instructions Proper Where Burden of Proof Is not on Defendant to Establish Alibi.
284. Instructions as to the Effect of an Unsuccessful Attempt to Prove Alibi.
285. Miscellaneous Instructions on this Subject.

§ 278. Propriety or necessity of instructions on this subject.

Where there is direct and positive evidence of an alibi, the court may instruct the jury to consider such evidence in connection with other evidence given on other points of the case, showing the physical impossibility of the defense of alibi being true;[1] but of course there should be no instruction on an alibi as a defense where there is no evidence to warrant it.[2] Accordingly, an instruction on the subject of alibi, in a prosecution for murder, may properly be re-

[1] State v. Standley, 76 Iowa, 215.

[2] State v. Jackson, 95 Mo. 623; State v. Seymour, 94 Iowa, 699; Burger v. State, 83 Ala. 36; State v. Murray, 91 Mo. 95. There is no necessity for an instruction as to the defense of alibi, where there was no suggestion from any of the witnesses that defendant was absent at the time of the alleged assault. Johnson v. State (Tex. Cr. App.) 58 S. W. 105. See, also, Benavides v. State (Tex. Cr. App.) 61 S. W. 125.

fused where the testimony in support of the defense is vague and inconclusive, and such testimony is not supported by any evidence that the witness knew when the deceased was killed.[3] Where there is no testimony, in a prosecution for murder, as to the whereabouts of defendant for about thirty minutes before the commission of the crime, and for about fifteen minutes after its commission, and defendant was in the vicinity of the crime, a failure to instruct on alibi is not error, in the absence of any request for such an instruction.[4] Where one is jointly prosecuted with others, on the theory that they all conspired together to commit the crime, and this theory is supported by evidence, it is proper to refuse to direct the jury to acquit him if they should find that he was not actually present participating in the crime. Of course it is not true that a co-conspirator must be acquitted because he establishes an alibi, though it is equally true that, if the evidence tends to show that there was no conspiracy, and that the alleged co-conspirator was not present at the commission of the crime, an instruction on the defense of alibi would be proper.[5] Where one is indicted as a principal offender for a murderous assault, an instruction "that all persons are principals who are guilty of acting together in the commission of an offense," and that, if the jury believe that others than defendant assaulted the prosecuting witness, "then you must not convict this defendant for their act, unless you are satisfied that defendant was present, and, knowing their unlawful intent, aided them by his acts in committing such assault; and if, upon this issue, you have a reasonable doubt, then you should give him the benefit of the doubt, and acquit him," sufficiently presents

[3] State v. Murray, 91 Mo. 95.
[4] State v. Seymour, 94 Iowa, 699.
[5] State v. Johnson, 40 Kan. 266.

the issue of alibi.[6] If, however, there is substantial evidence to support the defense of alibi, it is always erroneous to refuse an instruction as to this defense.[7] Whether or not it is necessary to instruct in relation to alibi, in the absence of request for special instructions on that subject, and exceptions saved, does not seem to be well settled. There is much conflict of authority on this question. In a number of jurisdictions, a failure of the court to instruct as to this defense of its own motion cannot be assigned as error. The defendant must ask a special charge on the subject.[8] Where the court has charged that the jury shall consider all the facts in the case in determining the guilt or innocence of the defendant, a failure to instruct that, as the defendant relies upon an alibi, he should establish the defense by a preponderance of evidence, is not prejudicial to defendant. Under a general instruction as to reasonable doubt on the facts, the defendant obtains all the consideration to which he is entitled of the defense of alibi. On the other hand, it has been held in one state that, where the evidence is mainly circumstantial, and there is evidence tending to show that at the time of the commission of the crime defendant was absent a distance of three-quarters of a mile, and asleep, it was reversible error not to instruct fully on the issue of alibi, and an examination of this case discloses that no re-

[6] Benavides v. State (Tex. Cr. App.) 61 S. W. 125.

[7] State v. Kelly, 16 Mo. App. 213; Jones v. State, 30 Tex. App. 345; State v. Porter, 74 Iowa, 623; State v. Conway, 55 Kan. 323; Lee v. State, 34 Tex. Cr. App. 519; Wiley v. State, 5 Baxt. (Tenn.) 662; Quintana v. State, 29 Tex. App. 401; Long v. State, 11 Tex. App. 381; Long v. State (Fla.) 28 So. 775; Rountree v. State (Tex. Cr. App.) 55 S. W. 827; Padron v. State (Tex. Cr. App.) 55 S. W. 827.

[8] Com. v. Boschino, 176 Pa. 103; Goldsby v. United States, 160 U. S. 70; State v. Peterson, 38 Kan. 205. See, also, State v. Sutton, 70 Iowa, 268.

quest for such an instruction was made.[9] It has been held, however, in this state, that, where the question of personal identity and the fact of alibi in a criminal case are virtually the same defense, the omission of the court to instruct separately on alibi is not error.[10] In one state it is said that the court should instruct the jury on the subject of alibi, where this is the sole defense;[11] and in a case where alibi is the only defense interposed, the omission of the court to instruct on alibi, exception being taken in the motion for new trial, is cause for reversal;[12] and that, when the defendant relies upon the evidence going to prove an alibi, the trial court should usually charge upon that theory.[13] Nevertheless, the rule seems to be settled that an omission to charge with reference to an alibi is not reversible error unless the charge be excepted to because of such omission, or unless specific instructions on that subject are requested and refused.[14] But if exceptions are duly saved to the court's omission to instruct on this subject, or a special request for such an instruction is made and refused, this will be ground for reversal.[15]

§ 279. Instructions tending to discredit this defense—View that such instructions are improper.

Although the defense of alibi is often attempted to be sus-

[9] Fletcher v. State, 85 Ga. 666. Compare Boothe v. State, 4 Tex. App. 202.

[10] Dale v. State, 88 Ga. 552.

[11] Deggs v. State, 7 Tex. App. 359; Ninnon v. State, 17 Tex. App. 650.

[12] Arismendis v. State (Tex. Cr. App.) 60 S. W. 47.

[13] Quintana v. State, 29 Tex. App. 401; McGrew v. State, 10 Tex. App. 539.

[14] Quintana v. State, 29 Tex. App. 401; Anderson v. State, 34 Tex. Cr. App. 546; Clark v. State, 18 Tex. App. 468; Ayres v. State, 21 Tex. App. 399; McAfee v. State, 17 Tex. App. 131.

[15] Conway v. State, 33 Tex. Cr. App. 327; Bennett v. State (Tex. App.) 15 S. W. 405; Rountree v. State (Tex. Cr. App.) 55 S. W. 827.

tained by false and perjured testimony, and the jury may and should scan the testimony carefully for the purpose of determining the truth or falsity of such defense, yet the defense intrinsically is not a suspicious one, but, on the contrary, is as honorable and satisfactory as any which the law permits, and it is error for the court to charge that an alibi is a defense which the law looks upon with suspicion.[16] As Judge Thompson points out, although the "defense is disparaged by writers on evidence, and, in popular speech, it is often called 'a rogue's defense,' * * * it is often the only defense of an innocent man; * * * and it is a defense of so complete a nature that, to the precise extent to which it is supported by evidence," the case of the prosecution is overthrown.[17] It has accordingly been held, in a prosecution for larceny, that an instruction that, "where property has been stolen, and recently thereafter the same property, or any part thereof, is found in the possession of another, such person is presumed to be the thief, and, if he fails to account for his possession of such property in a manner consistent with his innocence, this presumption becomes conclusive against him, and in such cases the law further presumes that the thief resorted to and made use of all the means necessary to gain access to and possession of such stolen property," is erroneous if there is evidence of an alibi, as such instruction in effect tells the jury that "it is true there is evidence of an alibi, but you need pay no attention to that; and if you find that defendant had the stolen

[16] State v. Jaynes, 78 N. C. 504; Line v. State, 51 Ind. 174; Dawson v. State, 62 Miss. 241; People v. Lattimore, 86 Cal. 403; Sater v. State, 56 Ind. 378; Albin v. State, 63 Ind. 598; Walker v. State, 37 Tex. 366; People v. Kelly, 35 Hun (N. Y.) 295; Spencer v. State, 50 Ala. 124; Williams v. State, 47 Ala. 659; State v. Lewis, 69 Mo. 92; Simmons v. State, 61 Miss. 243; State v. Sidney, 74 Mo. 390; State v. Chee Gong, 16 Or. 534.

[17] 2 Thompson, Trials, § 2433.

property in his possession recently after the theft, then return a verdict of guilty."[18] So it is error to tell the jury that the defense of an alibi is to be viewed with peculiar suspicion and distrust;[19] or to assume that the defense of alibi is "frivolous and unfounded;" as by refusing to give an instruction upon the only defense presented, viz., alibi;[20] or to instruct that the defense "is very often resorted to by guilty persons, as well as innocent ones, and one in which perjury, mistake, and deception are often committed;"[21] or that "the law regards evidence to prove an alibi among the weakest and most unsatisfactory of all kinds of evidence;"[22] or that an alibi is a species of defense "which the law always looks upon with suspicion;"[23] or that "an alibi is a species of defense often set up in criminal cases, and one which seems to figure * * * in this" case;[24] or that "the defense of an alibi is one that is easily fabricated, and is often attempted by contrivance, subornation, and perjury;"[25] or that "evidence given in support of it [an alibi] should be scrutinized otherwise or differently from that given in support of any other issue in the cause."[26] It has been held that an instruction vicious in this respect is not cured by another instruction

[18] State v. Sidney, 74 Mo. 390.

[19] Simmons v. State, 61 Miss. 243.

[20] State v. Lewis, 69 Mo. 92.

[21] State v. Chee Gong, 16 Or. 534.

[22] Williams v. State, 47 Ala. 659.

[23] Spencer v. State, 50 Ala. 124; People v. Kelly, 35 Hun (N. Y.) 295. In this last case the court said: "The defense is as honorable, and, when clearly proved, as satisfactory, as any defense which the law permits."

[24] Walker v. State, 37 Tex. 366.

[25] Nelms v. State, 58 Miss. 362; Dawson v. State, 62 Miss. 241. This precise charge was given in the Webster Case by Chief Justice Shaw, and sustained. Com. v. Webster, 5 Cush. (Mass.) 295, 318.

[26] People v. Lattimore, 86 Cal. 403; Dawson v. State, 62 Miss. 241; Line v. State, 51 Ind. 174; Sater v. State, 56 Ind. 382.

declaring that such defense, when "established by the evidence, * * * is a good and complete legal defense."[27] But in one case it was held that such an instruction would not be ground for reversal if the remaining portion of the charge was such that, when given as a whole, an intelligent jury could not have been misled by it.[28]

§ 280. Same—The contrary view.

There are a number of decisions in which a different view has been taken as to what instructions may be given on this subject. Thus, the following instructions have been upheld: "That the defense of alibi is one easily manufactured, and jurors are generally and properly advised by the courts to scan the proofs of an alibi with care and caution."[29] That "evidence to establish an alibi, like any other evidence, may be open to special observation. Persons may perhaps fabricate it with greater hopes of success or less fear of punishment than most other kinds of evidence; and honest witnesses often mistake dates and periods of time, and identity of people seen, and other things about which they testify."[30] "That the jury should consider the evidence of an alibi with great caution; that the law so considered it, for the reason that it was so easily manufactured; but that an alibi, when once established to the satisfaction of the jury, was as good as any other evidence."[31] That the jury "are to carefully scrutinize any evidence in relation to an alibi. An alibi is a defense which is easily proven, and hard to disprove.

[27] Dawson v. State, 62 Miss. 241.

[28] People v. Lattimore, 86 Cal. 403.

[29] State v. Blunt, 59 Iowa, 468; Rowland v. State, 55 Ala. 210.

[30] People v. Wong Ah Foo, 69 Cal. 180. See, also, People v. Lee Gam. 69 Cal. 552.

[31] Provo v. State, 55 Ala. 222.

Therefore you will be careful and cautious in examining evidence in regard to an alibi."[32]

§ 231. Instructions embodying the doctrine of reasonable doubt as applicable to this defense.

If evidence offered to establish an alibi, standing alone (especially when this is the sole defense raised),[33] or in connection with all the other evidence,[34] is sufficient to create in the minds of the jury a reasonable doubt as to the defendant's guilt, he is entitled to an acquittal, and the jury may be so instructed,[35] and if there is evidence on which to base such an instruction, its refusal is error,[36] and ground

[32] State v. Wright, 141 Mo. 333.

[33] Walker v. State, 42 Tex. 360; State v. Hardin, 46 Iowa, 623; State v. Kelly, 16 Mo. App. 213; State v. Emory, 12 Mo. App. 593; Howard v. State, 50 Ind. 190; People v. Nelson, 85 Cal. 421; McLain v. State, 18 Neb. 154; Wiley v. State, 5 Baxt. (Tenn.) 662; State v. Lewis, 69 Mo. 92; State v. Taylor, 118 Mo. 167; Caldwell v. State, 28 Tex. App. 566; Walker v. State, 6 Tex. App. 576. Compare Mullins v. People, 110 Ill. 46, where it was held that it is not quite correct to say that, when the jury have considered all the evidence offered on the point made as to the alibi, if they have a reasonable doubt as to whether "defendant was in some other place when the offense was committed," they should acquit. "A better expression of the law would be, when the jury have considered all the evidence, as well that touching the question of the alibi, as the criminating evidence introduced by the prosecution, then, if they have any reasonable doubt of the guilt of the accused, they should acquit; otherwise not."

[34] Watson v. Com., 95 Pa. 418; Pollard v. State, 53 Miss. 421; Sheehan v. People, 131 Ill. 22; Landis v. State, 70 Ga. 651; Dawson v. State, 62 Miss. 244; Binns v. State, 46 Ind. 312; Chappel v. State, 7 Cold. (Tenn.) 92; Pate v. State, 94 Ala. 18.

[35] Walker v. State, 6 Tex. App. 576; People v. Nelson, 85 Cal. 421; Howard v. State, 50 Ind. 190; Caldwell v. State, 28 Tex. 566; Stevens v. State (Tex. Cr. App.) 59 S. W. 545; Long v. State (Fla.) 28 So. 775.

[36] Binns v. State, 46 Ind. 312; Wiley v. State, 5 Baxt. (Tenn.) 662; Long v. State (Fla.) 28 So. 775.

for reversal.[37] An instruction gave the defendant the full benefit of the evidence as to alibi, which told the jury that defendant was not bound to prove an alibi, but, if his evidence raised a reasonable doubt in their minds as to his complicity in the crime, they must acquit him.[38] So it has been held that an instruction that "the commission of a crime implies the presence of the defendant at the necessary time and place, and evidence of the absence of the defendant is always a defense, and, if a reasonable doubt is created by this evidence, it is the duty of the jury to acquit the defendant," as amended by the court by inserting after the word "always" the words "admitted to establish," is a correct statement of the law, and properly given.[39] And an instruction that: "If the defendant was, at the time of such killing, at another and different place from that at which such killing was done, and therefore was not and could not have been the person who killed the deceased, if he was killed. Now, if the evidence raises in your minds a reasonable doubt as to the presence of the defendant at the place where the deceased was killed (if killed), at the time of such killing, you will find him not guilty,"—has been held a correct and sufficient charge on the subject of alibi.[40] An instruction that "the defendant could not be guilty as charged unless he was present at the commission of the offense, if any, and, if you have a reasonable doubt of the defendant being present at the killing of said decedent, if any, then you will acquit him, * * * is a distinct, clear, and substantive charge upon the law of alibi, disconnected from and independent of any other part of the charge," and it cannot be objected that

[37] State v. Lewis, 69 Mo. 92.

[38] State v. Miller, 156 Mo. 76, 56 S. W. 907.

[39] People v. Nelson, 85 Cal. 421.

[40] Walker v. State, 6 Tex. App. 576.

the court did not charge in the usual form,—that defendant "relies in this case upon the defense of alibi, which means that he was not present at that particular time and place, and therefore, if you find he was not present, find him not guilty."[41] So, according to the rule stated, it has been held erroneous to refuse an instruction "that, if the jury had a reasonable doubt that the defendant was absent at the time the homicide was committed, they should acquit him;"[42] or "that, if the proof of alibi raised a reasonable doubt of the defendant's guilt, he must be acquitted;"[43] or that it is not necessary that "defendants shall prove an alibi beyond a reasonable doubt,—that it is sufficient if the evidence offered to prove it raises a reasonable doubt in the mind of the jury whether or not the accused was at the scene of the crime and participated therein, and that in such cases it is the duty of the jury to acquit."[44] Where the court instructs: "An alibi is a defense which is established by showing that the person charged with the crime was at some place other than that where the crime was committed, at such a time that he could not have been at the place of the crime at the time of its commission. If the evidence offered to establish an alibi fails to show the accused at the place claimed at such a time that he could not have been where the crime was committed at the time of its commission, the alibi fails. In other words, if the accused might have been at the place he claims at the time shown, and yet might have been at the place of the crime at the time of its commission, there is no alibi,"—the jury are in effect told that the state

41 Stevens v. State (Tex. Cr. App.) 59 S. W. 545. See, also, Benavides v. State (Tex. Cr. App.) 61 S. W. 125.

42 State v. Taylor, 118 Mo. 167.

43 Wiley v. State, 5 Baxt. (Tenn.) 662.

44 Long v. State (Fla.) 28 So. 775.

must establish the guilt of the respondent beyond a reasonable doubt to entitle it to a conviction, and that, if the evidence in support of the alibi, in connection with the other evidence, raised in their minds a reasonable doubt as to his guilt, he was entitled to an acquittal; and it is not error to refuse to instruct "that, if they were satisfied, by a fair balance of the testimony, that he was at another place at the time of the burglary, the verdict should be not guilty."[45] It is erroneous to instruct that, if the doubt of defendant's guilt or innocence only arises from the consideration of evidence tending to prove an alibi, he is not entitled to the benefit of that doubt;[46] or that the defense of alibi must be proved beyond a reasonable doubt;[47] or "not beyond a reasonable doubt, but by the preponderance of the testimony;"[48] or that the defendant was not to have the benefit of any doubt in regard to the alleged alibi, unless the jury should find as a fact that he was at another place than the place where the crime was committed, when it occurred.[49] So it is not accurate to say that the defense of alibi merely tends to cast a reasonable doubt on the case made by the state; but it has been held that this error is cured by an instruction that, "the law being that, when the jury have considered all the evidence, as well that touching the question of the alibi as the criminating evidence introduced by the prosecution, then if

[45] State v. Powers, 72 Vt. 168.

[46] State v. Waterman, 1 Nev. 553.

[47] State v. Watson, 7 S. C. 65; Meyers v. Com., 83 Pa. 144; Landis v. State, 70 Ga. 651; Gutirrez v. State (Tex. Cr. App.) 59 S. W. 274.

[48] State v. Anderson, 59 S. C. 229, 37 S. E. 820, wherein such instruction was held erroneous, as requiring too great a degree of proof; but the error was held cured by the further instruction that it was the duty of the state to prove every material allegation beyond a reasonable doubt, and that the defendant was entitled to the benefit of any reasonable doubt growing out of all the testimony.

[49] People v. Fong Ah Sing, 64 Cal. 253.

they have any reasonable doubt of the guilt of the accused of the offense with which he stands charged, they should acquit; otherwise not."[50] It is also erroneous to so instruct the jury as to take away from their consideration the evidence of an alibi, unless it is sufficient to establish that defense, or to assume in the instruction that, unless the evidence to prove an alibi produces conviction in the minds of the jury that defendant was not present at the commission of the offense, it cannot avail;[51] or to state that, when the defense of an alibi is set up, the jury should "bear in mind that the proof necessary to establish the alibi must be proven with as much certainty as the state would have to establish the guilt of the accused;"[52] or to state that the defense must be fully and satisfactorily established to the satisfaction of the jury before it was a good and complete defense;[53] or that, if the evidence satisfied the minds of the jury that the defendant was not at the place of the alleged crime at the time it was committed, the jury should acquit.[54] It has been held, however, that an instruction that, if it be established to the entire satisfaction of the jury that the defendant was in another place at the time the alleged crime was committed, it follows that he could not have been at the place where the crime was committed, is not erroneous, in the absence of a request for a more specific charge.[55] So, where the court instructed that "it need not be established beyond a reasonable doubt, but it should be established to the satisfaction of the jury," and the court answered a request for a charge that "if, taking the whole case

[50] Sheehan v. People, 131 Ill. 22.

[51] Walker v. State, 42 Tex. 360. See, also, State v. McGarry, 111 Iowa, 709.

[52] Chappel v. State, 7 Cold. (Tenn.) 92.

[53] Dawson v. State, 62 Miss. 244.

[54] Howard v. State, 50 Ind. 190.

[55] People v. O'Neil, 59 Cal. 259.

together,—taking the evidence for the prosecution and the evidence respecting the alibi,—they have any doubt of the guilt of the prisoner, they must acquit," by saying, "I have so charged already," this was held equivalent to saying that his intention was to so instruct the jury, and, if the jury could have misunderstood the charge, its adoption by the court of the correct rule must have removed the erroneous impression.[56] A charge: "Unless the evidence proves beyond a reasonable doubt that the defendant was not only present at the killing, but that he had knowledge of the unlawful intent of those who actually committed the homicide, if that has been shown, and that he aided or encouraged them in the killing, then you should acquit him. If the evidence raises in your minds a reasonable doubt as to the presence of the defendant at the time and place of the killing, then you should acquit him,"—is to the effect that, if the jury entertain a reasonable doubt as to the presence of the defendant at the time and place of the killing, they should give defendant the benefit of such reasonable doubt, and acquit him, and does not place the burden upon the accused of showing his defense beyond a reasonable doubt.[57] A charge to the jury "that, if there is any evidence before you that raises in your minds a reasonable doubt as to the presence of the defendant at the time and place where the crime is charged to have been committed, you will acquit the defendant," is correct in form.[58] An instruction that "among other defenses set up by defendant is what is known in legal

[56] People v. Stone, 117 N. Y. 480. In this case, two of the judges dissented, and apparently with good reason. The action of the court was certainly not equivalent to giving the requested instruction, and even then it is doubtful whether it would have been sufficient to correct the erroneous impression given by the other instruction.

[57] Gutirrez v. State (Tex. Cr. App.) 59 S. W. 274.

[58] State v. Adair, 160 Mo. 391.

phraseology as an alibi; that is, that, if the offense was committed as alleged, then the defendant was, at the time of the commission thereof, at another and different place from that where such offense was committed, and therefore was not, and could not have been, the person who committed the same. Now, if the evidence raises in your minds a reasonable doubt as to the presence of the defendant at the place where the offense was committed at the time of the commission thereof, you will find the defendant not guilty,"—is not objectionable on the ground that it requires the introduction of exculpatory evidence, and is calculated to impress the jury that, without such evidence, the guilt of accused is established beyond a reasonable doubt.[59] In some decisions it has been held that it is not erroneous to charge that, where an alibi is not complete, it cannot avail the defendant, where the court further declares that, if there is a reasonable doubt of the prisoner's guilt, the jury must acquit.[60] So it has also been held that, where evidence has been introduced tending to show that the defendant was at a place other than the place where the crime was committed, at the time of its commission, but where the exact time of the commission of the crime is not shown, but it is shown to have been committed during a night or a part of a night, it is proper to instruct that evidence of an alibi must cover the whole of such time.[61] The weight of authority, however, is to the effect that the defendant is deprived of the benefit of a reasonable doubt by an instruction that, "in order to support an alibi, it was essential that the testimony should so cover the whole time involved in the transaction as to render it impossible for the defendant to have committed the offense charged against

[59] Villereal v. State (Tex. Cr. App.) 61 S. W. 715.

[60] State v. Reitz, 83 N. C. 634; People v. Worden, 113 Cal. 569. See, also, State v. McGarry, 111 Iowa, 709.

[61] West v. State, 48 Ind. 483.

him;"[62] or by an instruction that, "in order to make the defense of an alibi successful, * * * it is essential that the evidence to establish this defense should cover and account for the whole time of the transaction in question, or at least so much of it as to render it impossible that the defendant could have committed the offense."[63] An instruction that, "to render proof of an alibi satisfactory, the evidence must cover the whole time of the transaction in question, so as to render it impossible that defendant, setting up such defense, could have committed the act," has been condemned, on account of the last clause contained therein. The reviewing court did not consider the first clause of this instruction erroneous, and so far this case is in conflict with the preceding ones.[64] It has, however, been held proper to refuse an instruction that, in order to support an alibi, "it is not necessary that the evidence in support of an alibi should cover every moment of time in which the offense was committed, but it is only necessary to create a reasonable doubt that the defendant was there; and if, under all the evidence, there is any reasonable probability that the defendant was not present when the deceased was killed, then they must find him not guilty."[65]

§ 282. What instructions proper where burden of proof is on defendant to establish alibi.

In some jurisdictions, the burden of proof as to an alibi is upon the party who sets up that defense,[66] and he must

[62] Pollard v. State, 53 Miss. 421; Stuart v. People, 42 Mich. 260; Kaufman v. State, 49 Ind. 248.

[63] Albritton v. State, 94 Ala. 76; Beavers v. State, 103 Ala. 36. To the same effect, see McAnally v. State, 74 Ala. 9.

[64] Wisdom v. People, 11 Colo. 170.

[65] Pate v. State, 94 Ala. 14.

[66] Holley v. State, 105 Ala. 100; Pellum v. State, 89 Ala. 28; State

prove it by a preponderance of the evidence.[67] According to this view, it has been held proper to instruct that "the defendant is not required to prove an alibi beyond a reasonable doubt, but it is sufficient if you are satisfied by a preponderance of evidence that defendant" was at another place than the place of the alleged crime at the time it was said to be committed;[68] or that, where the accused relies upon or attempts to prove an alibi in his defense, the burden of proving the alibi rests upon him, but upon other questions in the case the burden still rests upon the commonwealth;[69] or that the burden of proof is on the defendant to establish the fact that he was not present, by a preponderance of evidence;[70] or that the jury should acquit if they found the

v. Maher, 74 Iowa, 77; State v. McGarry, 111 Iowa, 709; State v. Hamilton, 57 Iowa, 598; State v. Northrup, 48 Iowa, 583; State v. Johnson, 72 Iowa, 393; State v. Reed, 62 Iowa, 40; State v. Kline, 54 Iowa, 185; State v. Rowland, 72 Iowa, 327; Rudy v. Com., 128 Pa. 500; Ackerson v. People, 124 Ill. 563; Thompson v. Com., 88 Va. 45; State v. Drawdy, 14 Rich. (S. C.) 87. See, also, Rayburn v. State (Ark.) 63 S. W. 356.

[67] State v. Ward, 61 Vt. 155; State v. Northrup, 48 Iowa, 583; State v. Red, 53 Iowa, 71; State v. Hardin, 46 Iowa, 623; State v. Rowland, 72 Iowa, 327; State v. Reed, 62 Iowa, 40.

[68] State v. Kline, 54 Iowa, 185.

[69] Thompson v. Com., 88 Va. 45.

[70] State v. Hamilton, 57 Iowa, 598.

An instruction that the testimony in support of the defense of alibi, "to be entitled to weight, must be such as to show that, at the very time of the commission of the crime, the defendant was at another place so far away, or under such circumstances, that he could not have been at the place where the crime was committed. The burden of establishing this defense by a preponderance of the credible testimony is upon the defendant. If he has so established it, he is entitled to an acquittal. If, however, the defendant has failed to establish this defense by a preponderance of the credible testimony, then he is not entitled to an acquittal upon this ground, nor to have it considered by you as a basis of a reasonable doubt," —is erroneous, for though the evidence offered in support of the

alibi "supported by a fair preponderance of the evidence;"[71] or that the evidence to prove an alibi must outweigh the evidence to show the respondent at the place of the crime, and, if so established, they should acquit;[72] or that the burden of proof is on defendant to establish by preponderance of evidence his defense of alibi, but that the burden of proof is on the state to establish beyond a reasonable doubt that the crime charged was in fact committed, and that, if the entire evidence upon the whole case raises a reasonable doubt as to defendant's guilt, then the jury should acquit.[73] The doctrine that the burden of proof rests upon the defendant of course carries with it the further principle that an alibi must be established by a preponderance of the evidence, for no fact can be established by any less evidence, and such principle does not abrogate the doctrine of reasonable doubt.[74] An instruction that "the burden of showing an alibi is on the defendant, but if, on the whole case, the testimony raises a reasonable doubt that the defendant was present when the crime was committed, he should be acquitted; but the jury should scrutinize the testimony of witnesses, to see if some of them may or may not be mistaken as to dates and times when they saw the defendant," does not shift the burden upon the defendant to prove his innocence. The burden to

alibi does not amount to a preponderance, yet such evidence is for the consideration of the jury; and if, upon the whole case, including that part pertaining to the alibi, they have a reasonable doubt of defendant's guilt, he should be acquitted. State v. McGarry, 111 Iowa, 709.

71 State v. Johnson, 72 Iowa, 393.

72 State v. Ward, 61 Vt. 155.

73 State v. Van Winkle, 80 Iowa, 15. See, also, Long v. State (Fla.) 28 So. 775.

74 State v. Ward, 61 Vt. 155; State v. Red, 53 Iowa, 71. See, also, State v. McGarry, 111 Iowa, 709. For a forcible statement of the contrary view, see Johnson v. State, 21 Tex. App. 380.

show the defendant's presence and participation in the crime is still upon the state, when the evidence is considered as a whole, including that introduced by the defendant on the question of alibi.[75] Where the view is taken that the burden of proof is on the defendant to prove an alibi, it has been held that an instruction "that it is the duty of defendant, in proving an alibi, to reasonably satisfy the jury that he was elsewhere at the time of the commission of the offense," sufficiently presents such view.[76] And it has also been held, where this view is taken, that it is proper to refuse an instruction that the defendant was not required to establish the defense of an alibi, which he had set up, to the reasonable satisfaction of the jury;[77] or that the jury should be "fully satisfied" of the truth of the alibi.[78]

§ 283. What instructions proper where burden of proof is not on defendant to establish alibi.

In a number of jurisdictions, the burden of proving an alibi is not imposed on defendant, it being considered that the doctrine of reasonable doubt prevents the imposition of

[75] Rayburn v. State (Ark.) 63 S. W. 356. In this case, the court expressed a preference for a statement as follows: "That, where the defendant sought to establish the fact that he was at a particular place at any given time, and wished them to take it as an affirmative fact proved, the burden of proof was upon him, and, if he failed in maintaining that burden, the jury could not consider it as a fact proved in the case; that the burden, however, was upon the government to show that the defendant was present at the time of the commission of the offense, and, as bearing upon that question, the jury were to consider all the evidence offered by the defendant tending to prove an alibi; and if, upon all the evidence, the jury entertained a reasonable doubt as to the presence of the defendant at the fire, they were to acquit."

[76] Pellum v. State, 89 Ala. 28.

[77] Holley v. State, 105 Ala. 100.

[78] State v. Henry, 48 Iowa, 403.

such burden,[79] and, under this view, it is, of course, erroneous to instruct that the burden of proof is on the defendant to make out the defense of an alibi;[80] or that an alibi must be proved by evidence which outweighs that given for the state;[81] or that testimony adduced to prove an alibi should not be considered unless it has established the alibi by a preponderance of evidence.[82] Such instructions seem plainly inconsistent with the rule that the jury must give the defendant the benefit of every reasonable doubt.[83] It has been held that an instruction that an alibi is a good defense, if proved to the satisfaction of the jury, is proper, and does not convey any intimation that the burden of proving it rests upon the defendant.[84] An instruction that defendant "may establish any fact essential to his defense by merely a preponderance of evidence" is not a good form, as in some cases it may lead the jury to infer that no evidence on the part of the defendant of a fact would be sufficient to raise a reasonable doubt of his guilt, unless he actually proved the fact by a preponderance of evidence. But such an instruction will not work a reversal if the only harmful effect it could have is in relation to the defense of alibi, and the court charges that, "where evidence has been offered by the de-

[79] State v. Miller, 156 Mo. 76; State v. Howell, 100 Mo. 628, overruling State v. Jennings, 81 Mo. 185; State v. Josey, 64 N. C. 56; Gallaher v. State, 28 Tex. App. 247; Toler v. State, 16 Ohio St. 585; State v. Taylor, 118 Mo. 170; Johnson v. State, 21 Tex. App. 368; State v. Starnes, 94 N. C. 973; Walters v. State, 39 Ohio St. 215; French v. State, 12 Ind. 670; State v. Chee Gong, 16 Or. 534; People v. Pearsall, 50 Mich. 233.

[80] State v. Chee Gong, 16 Or. 534.

[81] French v. State, 12 Ind. 670.

[82] Walters v. State, 39 Ohio St. 215; State v. Howell, 100 Mo. 628; State v. Anderson, 59 S. C. 229.

[83] Johnson v. State, 21 Tex. App. 380. But see the preceding section.

[84] State v. Starnes, 94 N. C. 973.

fendant for the purpose of proving an alibi,—that is to say, that the defendant was in another place at the time of the alleged act of murder, and was distant from the scene of the killing charged, at the time, and therefore could not have participated in it; if, from the whole case, and a consideration of all the testimony, the evidence in this behalf produced be sufficient to create a reasonable doubt as to whether the defendant was present at the time and place of the murder, —he should be acquitted."[85] And an instruction that the defendant may establish any fact essential to his defense by a preponderance of evidence does not necessarily import that he must prove the alibi by a preponderance of evidence; and any apparent error in such instruction is cured if the jury are explicitly charged that the defendant must be acquitted in case of a reasonable doubt as to his presence at the time and place of the crime.[86] The fact that the court erroneously charges the jury that the defendant must prove his defense by a preponderance of the evidence is not error, where the jury are also instructed that they must give the defendant the benefit of every reasonable doubt.[87] So an instruction that, "if the jury believe and find from the evidence that the defendant was not present at the place and time the alleged rape is stated to have been committed, by the prosecuting witness, but that the defendant, at the time of the alleged rape, was elsewhere, at another and different place than where the alleged rape is stated to have taken place, then you should acquit the defendant," has been held not objectionable, as conveying the idea that alibi must be made out by a preponderance of the evidence.[88] An instruction "that

[85] People v. Tarm Poi, 86 Cal. 225.
[86] People v. Chun Heong, 86 Cal. 330.
[87] State v. Taylor, 57 S. C. 483.
[88] State v. Johnson, 91 Mo. 439.

the defense [of alibi], if made out, was perfect, and was conclusive of respondent's innocence, and that they must be satisfied of respondent's guilt by proofs beyond reasonable doubt, but that, as the proof of the alibi was in conflict with the direct proof offered by the prosecution, they should weigh the testimony thereof in connection with the other testimony in the case, and consider it as met or explained by evidence of the defense, and determine whether, in view of all the testimony, the witnesses to the alibi were mistaken, or that they were able to say from the testimony of the prosecution, as explained by that of the defense, that there was no reasonable doubt that respondent was guilty," is erroneous, as likely to convey the impression that the alibi must be affirmatively shown.[89]

§ 284. Instructions as to the effect of an unsuccessful attempt to prove alibi.

The authorities are not agreed as to what instructions may properly be given as to the effect of an unsuccessful attempt to prove an alibi, and often in the same jurisdictions the decisions are not always harmonious. It has been held erroneous to instruct that, "if the proof of an alibi," which, if true, "would work a complete destruction of the charges against the defendants, should turn out to be false and manufactured, the legal presumption is that the evidence introduced by the state, and upon which it bases a claim for the conviction of the defendants, whether weak or strong, is true;"[90] or that an unsuccessful attempt to prove an alibi implies "the truth and relevancy of the facts alleged" against defendant;[91] or that a failure to prove an alibi "ought to

[89] People v. Pearsall, 50 Mich. 233.
[90] Sawyers v. State, 15 Lea (Tenn.) 695.
[91] State v. Collins, 20 Iowa, 85.

raise a strong presumption against the *bona fides* of the defense;"[92] or "that an unsuccessful attempt to prove an alibi is always a circumstance of great weight against the defendant."[93] It has also been held erroneous to charge that the "failure to prove the defense of alibi satisfactorily is a circumstance unfavorable to the defendant."[94] On the other hand, an instruction "that an unsuccessful attempt to prove an alibi in a criminal case is a circumstance to be weighed against the defendant" has been approved in one decision,[95] and held not reversible error in another.[96] It has been held erroneous to instruct that a failure to prove an alibi may be properly considered in connection with any other evidence in the case tending to prove guilt.[97] Or that it is "essential to the successful proof of an alibi that it should cover the whole time of the transaction in question, and when it fails to do so it is regarded as the most suspicious of evidence; that the witnesses all testified to having retired by ten o'clock, and it was for the jury to say whether the prisoner might have left, or did leave, his bed, commit the deed, and return before the alarm of fire was given."[98] Or that an alibi, if proved, "constitutes a complete defense; if not proved, * * * the attempt to manufacture evidence is a circumstance which always bears against the prisoner. No innocent person is driven to manufacture evidence."[99] It has been held not improper, however, to instruct in effect that, if the defendant makes a corrupt attempt to manufacture a false

[92] Com. v. Fisher, 15 Phila. (Pa.) 387.

[93] People v. Malaspina, 57 Cal. 628; State v. Josey, 64 N. C. 59; Miller v. People, 39 Ill. 458; State v. Collins, 20 Iowa, 85; Albritton v. State, 94 Ala. 76.

[94] Adams v. State, 28 Fla. 551; Prince v. State, 100 Ala. 144.

[95] Kilgore v. State, 74 Ala. 5.

[96] Jackson v. State, 117 Ala. 155.

[97] Parker v. State, 136 Ind. 284.

[98] State v. Jaynes, 78 N. C. 504.

[99] Turner v. Com., 86 Pa. 54.

alibi, it may be considered as a circumstance against him.[100] On the other hand, it has been held erroneous to instruct that, if the jury found defendant guilty of falsity in alleging his alibi, such falsity should be considered as additional evidence of his guilt.[101] An instruction: "The defendant pleads specially an alibi. He has attempted to prove that he was not present at the place where the crime was committed"—is erroneous, as discrediting the defense of alibi, and the injurious effect of this charge is not remedied by an additional instruction that, if the jury believe the plea of alibi, they are not authorized to convict.[102]

§ 285. Miscellaneous instructions on this subject.

It has been held proper to instruct that "the defense of an alibi is a legitimate defense, and is in fact, when thoroughly proved, the most logical defense that can be possibly introduced,"[103] and error to refuse an instruction that "the defense of an alibi, as it is called, is as legitimate a defense as any other defense. You are to give the same credit to witnesses who testify concerning it as to those who testify to anything else."[104] An instruction that "one defense in this case is what is known in law as an 'alibi,'—that is, that the defendants were not present at the time and place of the commission of the offense charged in the indictment, if any such offense has been committed, but that they were at that time at another and different place,"—is not erroneous on

[100] Com. v. McMahon, 145 Pa. 413; Pilger v. Com., 112 Pa. 220. Compare Turner v. Com., 86 Pa. 54, wherein the instruction condemned implied that a mere failure to establish an alibi was sufficient to show an attempt to manufacture evidence.

[101] State v. Byers, 80 N. C. 426.

[102] Kimbrough v. State, 101 Ga. 583.

[103] People v. Burns, 59 Cal. 359.

[104] People v. Hare, 57 Mich. 505.

the ground that it classes alibi as a defense. Though it is true that, in order to convict the defendants, it devolves upon the state to prove their presence at the time and place of the commission of the offense, yet, in order to overcome the case made out by the state against them, they assume the burden of showing such a state of facts as will raise in the minds of the jury a reasonable doubt as to their presence at the time and place of the commission of the offense, and to this extent an alibi is a defense.[105] An instruction: "An alibi is a defense which is established by showing that the person charged with the crime was at some place other than that where the crime was committed, at such time that he could not have been at the place of the crime at the time of its commission. If the evidence offered to establish an alibi fails to show the accused at the place claimed at such a time that he could not have been where the crime was committed at the time of its commission, the alibi fails. In other words, if the accused might have been at the place he claims at the time shown, and yet might have been at the place of the crime at the time of its commission, there is no alibi,"—is a correct statement of law as to what constitutes an alibi.[106] An instruction "that if, after considering all the facts and circumstances in proof, they [the jury] had no reasonable doubt of the presence of plaintiffs in error at the house of K. at the time of the assault, then the defense of alibi had not been made out, and was unavailing," has been held proper, and not in conflict with the rule as to reasonable doubt.[107] An instruction that, "if the evidence of an alibi has introduced in the minds of the jury a doubt as to whether or not the defendant was at or about the place when the alleged rob-

[105] State v. Hale, 156 Mo. 102, 56 S. W. 881.
[106] State v. Powers, 72 Vt. 168.
[107] Aneals v. People, 134 Ill. 401.

bery is said to have been committed, you will acquit the defendant," is properly refused, since the doubt justifying the acquittal must be a reasonable one.[108] An instruction that, if the jury entertain a reasonable belief that, at the time deceased was killed, the accused was at his own home, and not at the place of the killing, they should acquit, is not a sufficient charge *per se* on the subject of alibi, but, when followed by a sufficient charge on the doctrine of reasonable doubt, the entire context will be a sufficient charge on the subject of alibi.[109] In a prosecution for theft of cattle, it is error, in a charge in reference to alibi, to require the absence of the accused, not only from the place of the original taking, but from the possession of the cattle while being driven from the place of taking.[110] Error cannot be predicated of a charge that "to make an alibi available as a defense within itself, it must be so strong as to preclude the idea of the party's being at the place where the crime was committed at the time the crime was committed."[111] "Where the evidence tends to prove an alibi, the use of the words 'possible' and 'impossible,' as applied to the ability of the defendant to have been at a certain place, other than where the crime was committed, and at the place where the crime was committed at the time of its commission, is erroneous."[112] The jury may be instructed "that the state must establish the guilt of the respondent beyond a reasonable doubt to entitle it to a conviction, and that, if the evidence in support of the alibi, in connection with the other evidence, raised in their minds a reasonable doubt as to his guilt, he was entitled to an acquittal. * * * It is proper to thus

[108] Gibbs v. State, 1 Tex. App. 12.
[109] Boothe v. State, 4 Tex. App. 202.
[110] Thompson v. State (Tex. Cr. App.) 57 S. W. 805.
[111] Simpson v. State, 78 Ga. 91.
[112] Snell v. State, 50 Ind. 516.

submit the question of the alibi, instead of treating it as an independent issue."[113] Where, at the preliminary examination, the accused permits testimony of a false alibi, and also allows his counsel, before the state has opened its case, to introduce evidence of such alibi, the judge may say that the people claim that the defendant intends to set up an alibi.[114]

[113] State v. Powers, 72 Vt. 168.

[114] People v. Connor, 56 Hun (N. Y.) 644.

CHAPTER XXVIII.

CAUTIONARY INSTRUCTIONS ON REASONABLE DOUBT.

§ 286. Necessity of Instructions on this Subject.
287. Repetition of Instructions on Reasonable Doubt Unnecessary.
288. Necessity of Defining Reasonable Doubt.
289. Statutory Definitions.
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291. Defining as a Doubt Which would Cause a Reasonable Man to Pause and Hesitate in the Graver Transactions of Life.
292. Defining as a Doubt One the Absence of Which Would Cause a Reasonably Prudent Man to Act in His Own Most Important Affairs.
293. Absence of Reasonable Doubt as Equivalent to "Moral Certainty," or "Reasonable and Moral Certainty."
294. Absence of Reasonable Doubt as Equivalent to an "Abiding Conviction to a Moral Certainty."
295. Negative Definitions.
296. Not a Doubt as to Law.
297. Not a Doubt Raised by Argument of Counsel.
298. Entire Satisfaction of Guilt as Equivalent to Absence of Reasonable Doubt.
299. Probability of Innocence may Create Reasonable Doubt.
300. A Doubt Arising from the Evidence or Want of Evidence.
301. Doctrine Applicable Only to Evidence Considered as a Whole.
302. Same—Contrary View.
303. As to Number of Jurors Who must Entertain a Reasonable Doubt in Order to Acquit.
304. Must not Disbelieve as Jurors What They Would Believe as Men.
305. Better that Guilty Escape than that Innocent be Punished.
306. Applying Doctrine to Degrees of Crime.
307. Instructions Bad as Requiring too High a Degree of Proof to Overcome a Reasonable Doubt.
308. Instructions Bad as Requiring too High a Degree of Proof of Innocence.

309. Sufficiency of Instructions Taken as a Whole.
310. Reasonable Doubt in Civil Cases.
311. Miscellaneous Cases.

§ 286. Necessity of instructions on this subject.

It is error to refuse a request to charge that the burden is upon the state to show every element of the crime alleged against the defendant beyond a reasonable doubt.[1] A mere definition of reasonable doubt is insufficient.[2] Though requests are not in all respects such as the trial judge should give, yet, if they call his attention to the fact that the accused rests his defense largely on the theory of reasonable doubt, he should state the principle of reasonable doubt to the jury substantially and clearly.[3] If, however, the evidence is such as does not suggest a doubt, and guilt is clearly proved, a failure of the court to instruct on reasonable doubt on request will be harmless error, and not ground for reversal.[4] Whether the court should charge on this subject, in the absence of request, depends both on the facts of the case and the statutes of the state in which the question arises. If the evidence suggests no doubt, it would, of course, be no ground for reversal that the court gave no instructions on this subject on its own motion. In some jurisdictions, the court is, in criminal cases, required by statute to instruct the jury fully on all the law pertinent to the case,

[1] Elmore v. State, 92 Ala. 51; Lane v. State, 85 Ala. 11; Reeves v. State, 29 Fla. 527; People v. Cohn, 76 Cal. 386; Compton v. State, 110 Ala. 24; People v. Cheong Foon Ark, 61 Cal. 527; Black v. State, 1 Tex. App. 369; Treadway v. State, 1 Tex. App. 669; May v. State, 6 Tex. App. 191; Crane v. State, 111 Ala. 45; Madden v. State, 67 Ga. 151; State v. Fannon, 158 Mo. 149.

[2] State v. Fannon, 158 Mo. 149.

[3] Madden v. State, 67 Ga. 151.

[4] Seiler v. State, 76 Ga. 103; Sulter v. State, 76 Ga. 105; Pilkinton v. State, 19 Tex. 214; Van Brown v. State, 34 Tex. 186. See, also, Reg. v. Riendeau, 9 Rap. Jud. Que. B. R. 147.

and under a statute of this nature it is apprehended the court should instruct on reasonable doubt, though no special request is made therefor, if the evidence is such that a reasonable doubt may arise from it.[5] Where a statute provides that the court shall instruct the jury, in felony cases, to acquit if they have a reasonable doubt of defendant's guilt, a failure to so instruct will work a reversal in any case in which there is a conflict of evidence, or in which the evidence does not clearly establish the guilt of the defendant.[6] This statute, however, does not require an instruction on reasonable doubt in misdemeanor cases, unless requested, but it is error not to give such an instruction when asked.[7] In another jurisdiction, where a statute provides that, if there is a reasonable doubt of the degree of the crime of which the defendant is guilty, he must be convicted of the lower offense, the jury must be instructed that, if they have a reasonable doubt as to the degree of the offense, they should only convict of the lower degree.[8] In concluding this branch of the subject, it may be said that, if there is any doubt of defendant's guilt arising from the evidence, it is the better practice to give an instruction on this subject, even though not requested, and though there is no statutory provision requiring such an instruction.[9]

§ 287. Repetition of instructions on reasonable doubt unnecessary.

Where a correct instruction has been given on the subject

[5] Richardson v. State, 70 Ga. 825. A number of other states besides Georgia have statutes like the one mentioned in the text.

[6] Lindsay v. State, 1 Tex. App. 327; Spears v. State, 2 Tex. App. 244; Robinson v. State, 5 Tex. App. 519; Hutto v. State, 7 Tex. App. 44; Priesmuth v. State, 1 Tex. App. 481; Goode v. State, 2 Tex. App. 520.

[7] May v. State, 6 Tex. App. 191; Treadway v. State, 1 Tex. App. 669; Goode v. State, 2 Tex. App. 520.

[8] State v. McCarty, 73 Iowa, 51; State v. Wood, 46 Iowa, 116.

[9] Lawless v. State, 4 Lea (Tenn.) 173.

of reasonable doubt, the court may properly refuse a requested instruction on that subject, though it be correct.[10] Therefore, where the jury had been instructed to acquit if they had a reasonable doubt of defendant's guilt on the whole evidence, it was proper to refuse an instruction "that every material fact in the indictment must be established beyond a reasonable doubt."[11] So it is proper to refuse to instruct that a mere preponderance of evidence would not justify an acquittal where the court had charged fully on the doctrine of reasonable doubt, and the burden of proof or presumption of innocence.[12] Where the court charged, "The defendant in a criminal case is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt, and, in case you have a reasonable doubt as to the defendant's guilt, you will acquit him, and say by your verdict, 'Not guilty,'" a failure to instruct, "You are further charged that the burden of proof never shifts from the state to the defendant, but is upon the state throughout to establish every constituent element of the offense," is not erroneous.[13] It has also been held that, after the court has charged the jury that they must find according to the facts of the case, it is not error to refuse to charge that they must acquit the defendant if they have a reasonable doubt, etc., because this would be to repeat the charge, but the propriety of this holding is questionable.[14]

[10] McClernand v. Com. (Ky.) 12 S. W. 148; State v. Roberts, 15 Or. 187; State v. Anderson, 10 Or. 448; People v. Cowgill, 93 Cal. 596; People v. Lenon, 79 Cal. 625; Gardiner v. State, 14 Mo. 97; State v. Walen, 98 Mo. 222; State v. Miller, 53 Iowa, 154; State v. Brewer, 98 N. C. 607; Patterson v. Com., 86 Ky. 313; White v. State, 11 Tex. 769; State v. Wright, 141 Mo. 333.

[11] State v. Whalen, 98 Mo. 222.

[12] People v. Rodley, 131 Cal. 240; Clark v. State (Tex. Cr. App.) 59 S. W. 887.

[13] Lewis v. State (Tex. Cr. App.) 59 S. W. 886.

[14] White v. State, 11 Tex. 769.

The general instruction upon reasonable doubt which is usually given need not be repeated in each instruction which relates to the elements of the crime or the facts of the case.[15] An instruction that "defendant is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt, and, in case of a reasonable doubt in your minds as to defendant's guilt, you will acquit him, and say by your verdict, 'Not guilty,'" is a sufficient application of the law of reasonable doubt to the different phases of the evidence; and it is not incumbent on the court to attach to each clause of his charge the law of reasonable doubt.[16] Where the court, at the conclusion of its charge, instructs on reasonable doubt, it is not necessary, when charging on a particular theory of the defense, to give, in immediate connection therewith, a charge on reasonable doubt.[17] It is not necessary to repeat in each successive instruction the doctrine of reasonable doubt.[18]

§ 288. Necessity of defining reasonable doubt.

In a number of decisions, the reviewing courts have said that it would be better practice not to attempt any definition of this term.[19] One court expressed its views as follows:

[15] State v. Cross, 68 Iowa, 180; State v. Hennessy, 55 Iowa, 299; State v. Murdy, 81 Iowa, 603.

[16] Edens v. State (Tex. Cr. App.) 55 S. W. 815; Powell v. State, 28 Tex. App. 393; Tate v. State, 35 Tex. Cr. App. 231; Robinson v. State (Tex. Cr. App.) 63 S. W. 869.

[17] Ford v. State (Tex. Cr. App.) 56 S. W. 338.

[18] McCulley v. State, 62 Ind. 428; Steiner v. People, 187 Ill. 244.

[19] Hamilton v. People, 29 Mich. 194; People v. Stubenvoll, 62 Mich. 329; McKleroy v. State, 77 Ala. 95; Miles v. United States, 103 U. S. 304; State v. Reed, 62 Me. 142; State v. Rounds, 76 Me. 124; Mickey v. Com., 9 Bush (Ky.) 593; State v. Kearley, 26 Kan. 87; State v. Mosley, 31 Kan. 358; State v. Sauer, 38 Minn. 439; Com. v. Tuttle, 12 Cush. (Mass.) 502.

"If a jury cannot understand their duty when told they must not convict when they have a reasonable doubt of the prisoner's guilt, or of any fact essential to prove it, they can very seldom get any help from such subtleties as require a trained mind to distinguish."[20] And in another case it was said: "The term 'reasonable doubt' is almost incapable of any definition which will add much to what the words themselves imply. In fact, it is easier to state what it is not, than what it is; and it may be doubted whether any attempt to define it will not be more likely to confuse than to enlighten a jury. A man is the best judge of his own feelings, and he knows for himself whether he doubts, better than any one else can tell him."[21] Where, while the jury were out deliberating upon their verdict, the jury sent word to the court, through the sheriff, that they desired an additional charge upon the meaning of reasonable doubt, and the court called the jury into the court room, and asked them verbally whether they desired an additional charge upon the meaning of the two words, "reasonable doubt," and the jury, through their foreman, said that they did, a verbal instruction "that the two words, 'reasonable doubt,' were words of common use, and the jury could understand them as easily as the court, and the court had a reasonable doubt as to whether or not he could, under the law, charge them as to their meaning," was not error.[22] Nevertheless, most courts

[20] Hamilton v. People, 29 Mich. 194.

[21] State v. Sauer, 38 Minn. 439. In People v. Stubenvoll, 62 Mich. 329, it is said: "Language within the comprehension of persons of ordinary intelligence can seldom be made plainer by further definition or refining. All persons who possess the qualifications of jurors know that a 'doubt' is a fluctuation or uncertainty of the mind arising from defect of knowledge, or of evidence, and that a doubt of the guilt of the accused, honestly entertained, is a 'reasonable doubt.'"

[22] Lenert v. State (Tex. Cr. App.) 63 S. W. 563.

attempt to define the meaning of the term, but the definitions are almost innumerable, and far from harmonious. Definitions which have been approved in some jurisdictions have in others been held so erroneous as to necessitate a reversal. It has been held to be the duty of the court to explain to the jury what is meant by the term "reasonable doubt" when requested, and a refusal to do so is reversible error.[23] But the courts all agree that error cannot be assigned to a failure to give this instruction, unless a request therefor has been made.[24] Even where the court gives a definition, and it is not full enough, or is inadequate, counsel cannot complain of it unless he has requested a more specific instruction.[25] Accordingly, it was held that, where the court defined a reasonable doubt as a "doubt which a reasonable man, of sound judgment, without bias, prejudice, or interest, after calmly, conscientiously, and deliberately weighing all the testimony, would entertain as to the guilt of the prisoner," the counsel should have asked, at the time, such additional instruction as he desired, the definition being inadequate.[26]

§ 289. Statutory definitions.

If the term "reasonable doubt" is defined by statute, an instruction defining it in the exact language of the statute will be sufficient,[27] and will convey the meaning of the term better than a more labored effort to explain it.[28] So, if the

[23] People v. Lachanais, 32 Cal. 434.

[24] State v. Smith, 65 Conn. 283; People v. Waller, 70 Mich. 237; People v. Flynn, 73 Cal. 511; People v. Ahern, 93 Cal. 518; People v. Gray, 66 Cal. 277; Winn v. State, 82 Wis. 571; Butler v. State, 7 Baxt. (Tenn.) 35; Colee v. State, 75 Ind. 512; State v. Johnson, 19 Wash. 410.

[25] State v. Reed, 62 Me. 129; People v. Sheldon, 68 Cal. 434.

[26] State v. Reed, 62 Me. 129.

[27] Massey v. State, 1 Tex. App. 564; Chapman v. State, 3 Tex. App. 67; Bland v. State, 4 Tex. App. 15; Ham v. State, 4 Tex. App. 545.

[28] Massey v. State, 1 Tex. App. 564.

court instructs substantially in the language of the statute, there can be no ground of complaint.[29]

§ 290. Defining as a doubt for which reasons based on evidence can be given.

In a number of jurisdictions, instructions defining a reasonable doubt as one for which reasons based upon the evidence can be given have been approved,[30] and the rule expressed as follows: "A doubt for which some good reason, arising from the evidence, can be given;"[31] "a doubt for which a good reason can be given, which reason must be based on the evidence, or the want of evidence;"[32] "the doubt must be a reasonable doubt, not a conjured-up doubt,—such a doubt as you might conjure up to acquit a friend,—but one that you could give a reason for;"[33] "such a doubt that the reason for it can be examined and discussed."[34] "If the jury believe that the evidence, upon any essential point in the case, admits of any reasonable doubt, a doubt consistent with reason, the prisoner is entitled to the benefit of it."[35] So it has been held that an instruction that a reasonable doubt is "a doubt arising out of the facts and circumstances of the case, in maintaining which you can give some good reason," although not strictly accurate, is not necessarily erroneous.[36]

[29] Bramlette v. State, 21 Tex. App. 611.

[30] United States v. Jackson, 29 Fed. 504; United States v. Johnson, 26 Fed. 682; United States v. King, 34 Fed. 302; Vann v. State, 83 Ga. 44; People v. Guidici, 100 N. Y. 503. See, also, State v. Neel (Utah) 65 Pac. 494.

[31] People v. Guidici, 100 N. Y. 503; United States v. Johnson, 26 Fed. 682.

[32] United States v. Jackson, 29 Fed. 504.

[33] Vann v. State, 83 Ga. 44.

[34] State v. Rounds, 76 Me. 123.

[35] State v. Meyer, 58 Vt. 457.

[36] People v. Stubenvoll, 62 Mich. 329.

A number of decisions maintain that instructions like those preceding are misleading and erroneous.[37] In one of these decisions it is said that defining a doubt as one for which a reason can be given is erroneous, because every reason, whether based on substantial grounds or not, does not constitute a reasonable doubt, in law.[38] Definitions of reasonable doubt should not be risked on criminal trials, and the juror should be allowed to have his own conception of what a reasonable doubt is to him,—not the prosecutor or the court; and he should not be under any legal compulsion to have to give, or be able to formulate and state, the reason which may raise a reasonable doubt in his mind and conscience; but an instruction to the jury "that, while it is true that the state must make out its case beyond a reasonable doubt, yet it is also true that the doubt which should induce a jury to withhold a verdict of guilty must be a reasonable one,—must be a doubt for which a reason can be given,—which reasonable doubt arises out of all the evidence in the case or the want of evidence," will not work a reversal.[39]

Instructions to the jury "that if, after considering all of the evidence, they could give a reason, arising out of any reasonable aspect of the facts proven, for acquitting the defendant, then they should acquit him," and "that if, after considering all the evidence in the case, the mind of the jury is left in a state of confusion as to any fact necessary to constitute the defendant's guilt, then they must find him not guilty," are properly refused.[40]

[37] Cowan v. State, 22 Neb. 519; Carr v. State, 23 Neb. 749; Morgan v. State, 48 Ohio St. 371; Ray v. State, 50 Ala. 104; State v. Lee (Iowa) 85 N. W. 619; Thomas v. State, 126 Ala. 4; Klyce v. State. 78 Miss. 450; Avery v. State, 124 Ala. 20, 27 So. 505; Bodine v. State (Ala.) 29 So. 926.

[38] Ray v. State, 50 Ala. 104.

[39] Klyce v. State, 78 Miss. 450.

[40] Bodine v. State (Ala.) 29 So. 926.

§ 291. Defining as a doubt which would cause a reasonable man to pause and hesitate in the graver transactions of life.

In a number of cases, reasonable doubt has been defined as "one arising from a candid and impartial investigation of all the evidence, and such as, in the graver transactions of life, would cause a reasonable and prudent man to hesitate and pause," and instructions in this language approved.[41] In approving an instruction in this language, it was said by one court: "The language under consideration does not declare that the doubt, being defined, is one upon which a reasonable man would act. The jury are thereby informed that it is such a doubt as would cause a reasonable and prudent man to hesitate and pause. There is a vast difference between hesitating or pausing and acting. The doubt which leads a man to hesitate or pause may be very far from being such a doubt as would control his action; and we think that if, in the important transactions of life, a doubt arises in the mind of a reasonable and prudent man which would not lead him to hesitate, or to pause and consider of his future action,

[41] May v. People, 60 Ill. 119; Miller v. People, 39 Ill. 457; Dunn v. People, 109 Ill. 635; Connaghan v. People, 88 Ill. 460; Minich v. People, 8 Colo. 454; Spies v. People, 122 Ill. 1; Com. v. Miller, 139 Pa. 77; Willis v. State, 43 Neb. 102; Carr v. State, 23 Neb. 749; State v. Pierce, 65 Iowa, 89. A reasonable doubt is such as would cause a juror to hesitate and to refrain from acting were it a grave business matter involved. State v. Dickey (W. Va.) 37 S. E. 695. An instruction: "A reasonable doubt is such a doubt as exists in the mind of a reasonable man after a full, free, and careful examination and comparison of all the evidence. It must be such a doubt as would cause a careful, considerate, and prudent man to pause and consider before acting in the grave and most important affairs of life,"—is not objectionable as making the verdict of the jury depend upon a mere preponderance of the evidence, and any attempt to define reasonable doubt will not escape criticism. State v. Crockett (Or.) 65 Pac. 447.

that doubt is not such a reasonable doubt as would justify the jury, in a criminal case, in returning a verdict of acquittal."[42]

§ 292. Defining as a doubt one the absence of which would cause a reasonably prudent man to act in his own most important affairs.

To understand the instructions on this head, the writer has thought it best to set out the rules of evidence laid down by text writers. Starkie says: "A juror ought not to condemn unless the evidence exclude from his mind all reasonable doubt as to the guilt of the accused, and, as has been well observed, unless he be so convinced by the evidence that he would venture to act upon that conviction in matters of the highest concern and importance to his own interests."[43] And in Greenleaf's work on Evidence the following statement is made: "The jury should be persuaded of the guilt of the prisoner before they find him guilty to the same extent, and with the same certainty, that they would have in the transaction of their own most important concerns,—* * * the certainty men would require in their own most important concerns."[44] Some decisions distinctly and unequivocally repudiate these rules, at least so far as stating them by way of instruction is concerned.[45] Accordingly, the following instructions have been disapproved and held reversible error: It is the jury's duty to convict if they are "satisfied of the guilt of the defendant to such a moral certainty

[42] Minich v. People, 8 Colo. 440, 455.

[43] Starkie, Ev. (9th Ed.) 865.

[44] 3 Greenl. Ev. (14th Ed.) § 29, note (a).

[45] People v. Bemmerly, 87 Cal. 121; People v. Wohlfrom (Cal.) 26 Pac. 236; People v. Brannon, 47 Cal. 96; Jane v. Com., 2 Metc. (Ky.) 30; Ray v. State, 50 Ala. 104; State v. Oscar, 52 N. C. 305; People v. Lenon, 79 Cal. 625; Territory v. Bannigan, 1 Dak. 451; State v. Crawford, 34 Mo. 200.

as would influence the minds of the jury in the important affairs of life;"[46] that the jury should convict if it be proven to their satisfaction "that there is that degree of certainty in the case that they would act on it in their own grave and important concerns;"[47] or that, "to exclude the rational doubt, the evidence should be such as that men of fair, ordinary capacity would act upon in matters of high importance to themselves."[48] The view taken by these decisions is that instructions of this nature deprive the defendant of the benefit of a reasonable doubt, by lessening the quantum of evidence necessary to a conviction, and that men frequently act in their most important affairs upon a mere preponderance of evidence.[49] Thus it has been said: "It is a mistake to say that there cannot remain a reasonable doubt, when even the evidence is such that a man of prudence would act upon it in his own affairs of the greatest importance."[50] "Men frequently act in their own grave and important concerns without a firm conviction that the conclusion they act upon is correct; but, having deliberately weighed all the facts and circumstances known to them, they form a conclusion, upon which they proceed to act, although they may not be fully convinced of its correctness."[51] There are, however, many decisions which hold that instructions embodying this rule are correct, and may properly be given.[52] Thus, the follow-

[46] People v. Brannon, 47 Cal. 96.

[47] Jane v. Com., 2 Metc. (Ky.) 30.

[48] State v. Oscar, 52 N. C. 305.

[49] People v. Brannon, 47 Cal. 96.

[50] People v. Bemmerly, 87 Cal. 121.

[51] Jane v. Com., 2 Metc. (Ky.) 30.

[52] State v. Nash, 7 Iowa, 347; State v. Ostrander, 18 Iowa, 435; State v. Schaffer, 74 Iowa, 704; Polin v. State, 14 Neb. 540; Carr v. State, 23 Neb. 749; State v. Kearley, 26 Kan. 77; Stout v. State, 90 Ind. 1; Jarrell v. State, 58 Ind. 293; Heyl v. State, 109 Ind. 589; Lawhead v. State, 46 Neb. 607; Emery v. State, 92 Wis. 146; Ander-

ing instructions, substantially the same, but differing in language, have been approved: "To exclude such doubt, the evidence must be such as to produce in the minds of prudent men such certainty that they would act on the conviction, without hesitation, in their own most important affairs."[53] "If you are not, then, so satisfied and convinced of defendant's guilt that you would act upon that conviction in matters of highest importance to yourselves, you should give the defendant the benefit of your doubt, and acquit."[54] "Evidence is sufficient to remove reasonable doubt when it is sufficient to convince the judgment of ordinarily prudent men of the truth of a proposition with such force that they would act upon that conviction, without hesitation, in their own most important affairs."[55] The following instruction attempting to state this rule has been condemned as not sufficiently clear and intelligible: "The words 'reasonable doubt' mean what they imply; that is, that the doubt must be a reasonable one,—such a doubt as might exist in the mind of a man of ordinary prudence, when he was called upon to determine which of two courses he would pursue in a matter of grave importance to himself, when two courses are open to him, and the taking of one would lead to a different result from the taking of the other, and it would be impossible for him to determine as to which of the two results would be most advantageous to him."[56] There is also a class of cases in which instructions using the words "important affairs" have been sustained;[57] as that the jury, in order to

son v. State, 41 Wis. 430; Com. v. Miller, 139 Pa. 77. See State v. Dickey (W. Va.) 37 S. E. 695; State v. Neel (Utah) 65 Pac. 494.

[53] State v. Kearley, 26 Kan. 77.

[54] State v. Schaffer, 74 Iowa, 704.

[55] Jarrell v. State, 58 Ind. 293. An instruction in Stout v. State, 90 Ind. 1, almost identical with the above, was approved.

[56] State v. Bridges, 29 Kan. 138.

[57] United States v. Wright, 16 Fed. 112.

render a verdict of guilty, must find the facts to be established to such a degree of certainty as they would regard as sufficient in the important affairs of life.[58] So the court may instruct that, "by 'reasonable doubt,' I do not mean any fanciful conjecture or strained inference, but I mean such a doubt as a reasonable man would act upon, or decline to act upon, when his own concerns were involved,—a doubt for which a good reason can be given, which reason must be based on the evidence, or the want of evidence."[59] But an instruction, after stating that accused is entitled to the benefit of a reasonable doubt, that "the doubt must not be a mere possible doubt, but it must be a doubt sustained by the evidence, upon a review of all the facts and circumstances of the case, such as a reasonable man would act upon in any of the important concerns of life," is erroneous, as calculated to mislead.[59a] And an instruction that a reasonable doubt is "such as you would be willing to act upon in more weighty and important matters relating to your own affairs," if it stand alone, is questionable.[59b] These decisions, however, are clearly against the weight of authority. A larger number of decisions hold that such instructions are too narrow, and fall short of stating the rule.[60] They hold that a juryman in a criminal c. . must use all the reason, prudence, and judgment which a man would exercise in the "most important" affairs of life, and that an instruction authorizing the use of any less degree of reason, prudence, and

[58] United States v. Wright, 16 Fed. 112.

[59] United States v. Jackson, 29 Fed. 503.

[59a] Bray v. State, 41 Tex. 560.

[59b] State v. Neel (Utah) 65 Pac. 494.

[60] Bradley v. State, 31 Ind. 492; Com. v. Miller, 139 Pa. 77; Palmerston v. Territory, 3 Wyo. 333; State v. Dineen, 10 Minn. 407 (Gil. 325); Emery v. State, 92 Wis. 146; Anderson v. State, 41 Wis. 430; Jenkins v. State, 35 Fla. 737; State v. Shettleworth, 18 Minn. 208 (Gil. 191).

judgment is erroneous;[61] that the certainty of guilt "must be such a certainty as would justify to the mind action, not only in matters of importance, but in those involving the highest import, involving the dearest interests."[62] In accordance with these views, the following instructions have been condemned: "It is such a doubt as would influence and control you in your actions in any of the important business transactions of life."[63] "The proof is deemed sufficient when the evidence is sufficient to impress the judgment of ordinarily prudent men with a conviction on which they would act in an important affair of their own."[64] The following instructions have also been condemned, probably for the same reasons: "The jury must determine that fact according to the evidence, and just as they would determine any fact in their own private affairs."[65] "If the same quantity and quality of evidence offered here was offered to a reasonably careful business man, as to important business transactions, and it would induce him to act in his important business matters, there cannot be said to be a reasonable doubt."[66]

§ 293. Absence of reasonable doubt as equivalent to "moral certainty," or "reasonable and moral certainty."

In one case the court was asked to charge that the defendant could not be convicted unless the jury were satisfied by the evidence, to a moral certainty, that the defendant was guilty. The reviewing court sustained a refusal of this instruction, saying: "We know of no case by which a charge

[61] Emery v. State, 92 Wis. 146.
[62] Bradley v. State, 31 Ind. 492.
[63] Com. v. Miller, 139 Pa. 77.
[64] Palmerston v. Territory, 3 Wyo. 333.
[65] Territory v. Lopez, 3 N. M. (Gild.) 156, 3 N. M. (Johnson) 104.
[66] State v. Shettleworth, 18 Minn. 208 (Gil. 191).

like the one asked has ever been recognized as a legal charge, —no one in which such a charge was ever before asked. Its very novelty was a sufficient reason for its refusal. It is a maxim of the law that 'the old way is the safe way.' "[67] If the court, as may be inferred from this language, intended to condemn this instruction purely on the ground of its novelty, it was in error. There are a number of cases, some of which are prior in point of time, where instructions substantially the same have been given or approved. Thus, in an English case, the absence of reasonable doubt was declared to be "such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt."[68] In the Webster Case the jury were instructed that "it is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say that they feel an abiding conviction, to a moral certainty, of the truth of the charge."[69] So, in other cases, the following instructions have been approved: "A juror is understood to entertain a reasonable doubt when he has not an abiding conviction, to a moral certainty, that the party accused is guilty."[70] "Unless the evidence against the prisoner should be such as to exclude, to a moral certainty, every hypothesis but that of his guilt of the offense imputed to him, they must find him [the defendant] not guilty."[71] Instructions substantially the same as these have been upheld in a number of

[67] McAlpine v. State, 47 Ala. 78. It will be seen from an examination of other Alabama cases cited in this section that this case is in direct conflict with them.

[68] Reg. v. Sterne, Surrey Sum. Ass. 1843, cited in 3 Greenl. Ev. § 29.

[69] Com. v. Webster, 5 Cush. (Mass.) 295, 320.

[70] State v. Vansant, 80 Mo. 72.

[71] Riley v. State, 88 Ala. 193.

other cases,[72] and their refusal held erroneous.[73] So, in some cases, instructions have been approved which are the same in substance as those just cited, except that they use the expression, "to a reasonable and moral certainty," instead of "to a moral certainty."[74] It has accordingly been held proper to instruct that "a reasonable doubt arises when the evidence is not sufficient to satisfy the minds of the jury, to a moral or reasonable certainty, of the defendant's guilt."[75] It is not proper, however, to instruct that "persons sometimes say they are morally certain of the existence of a fact or facts, but have not the evidence to prove it. This is the condition of mind one is in when convinced beyond a reasonable doubt."[76] An instruction that "a reasonable doubt is an impression, after a full comparison and consideration of all the evidence, that does not amount to a certainty that the charge against the accused is true," is vicious in that it imports that the jury cannot convict unless they reach a conclusion, amounting to a certainty, without any qualification whatever,—an absolute certainty,—that the charge against the accused is true, thus requiring an impossibility. There can be no such thing as absolute certainty. The jury may be convinced to a moral certainty, and hence those who have undertaken to define a reasonable doubt usually qualify the word "certainty" by employing the word "moral," or some equivalent word or phrase.[77]

[72] People v. Padillia, 42 Cal. 536; McKleroy v. State, 77 Ala. 95; Coleman v. State, 59 Ala. 52; Turbeville v. State, 40 Ala. 715; Lowe v. State, 88 Ala. 8. See, also, Gray v. State (Fla.) 28 So. 53.

[73] Williams v. State, 52 Ala. 411.

[74] Dunn v. People, 109 Ill. 635, 645; Com. v. Costley, 118 Mass. 1, 24; Sullivan v. State, 52 Ind. 309; Com. v. Webster, 5 Cush. (Mass.) 295, 320.

[75] Sullivan v. State, 52 Ind. 309.

[76] Heldt v. State, 20 Neb. 492.

[77] State v. Powers, 59 S. C. 200.

§ 294. Absence of reasonable doubt as equivalent to an "abiding conviction to a moral certainty."

It has also been held not improper to instruct that the state of mind excluding a reasonable doubt "is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge;"[78] or that "a juror is understood to entertain a reasonable doubt when he has not an abiding conviction, to a moral certainty, that the party accused is guilty as charged."[79] On the other hand, it has been held proper to state to the jury the converse of this proposition,—"that if, after a careful consideration and examination of all the evidence in the case, they still have an abiding confidence, to a moral certainty, that the defendant is guilty, this is sufficient to authorize them to find him guilty."[80] An instruction that, "by a reasonable doubt is meant a doubt based on reason, and which is reasonable in view of all the evidence; and if, after an impartial consideration and comparison of all the evidence in the case, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial consideration and comparison of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in more weighty and important matters relating to your own affairs, you have no reasonable doubt. It must be a real, substantial doubt, and not one that is merely possible or imaginary. It should come to the mind spontaneously, and should fairly, naturally, and reasonably arise out of the evi-

[78] Com. v. Webster, 5 Cush. (Mass.) 295, 320; State v. McCune, 16 Utah, 170.

[79] State v. Vansant, 80 Mo. 67, 72.

[80] McKee v. State, 82 Ala. 32.

dence as given in the case," is not erroneous.[81] An instruction that "if, after a careful comparison of the evidence and a full consideration of the whole case, your minds are brought to an abiding conviction beyond a reasonable doubt," etc., is not faulty for failure to use the words "to a moral certainty."[82] The instruction requires and implies moral certainty.

§ 295. Negative definitions.

In defining reasonable doubt, many definitions of a negative nature have been approved. Thus it has been held proper to tell the jury that a reasonable doubt "is not mere possible doubt, because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt."[83] "A serious, substantial, and well-founded doubt, and not the mere possibility of a doubt."[84] "Not a possible doubt, not a conjectural doubt, not an imaginary doubt, not a doubt of the absolute certainty of the guilt of the accused, because everything relating to human affairs, and depending upon moral evidence, is open to conjectural or imaginary doubt, and because absolute certainty is not required by law."[85] "The doubt which requires an acquittal must be actual and substantial, not mere possibility or speculation. It is not a mere possible doubt, because everything relating to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt."[86] "That which amounts to mere possibility only, or to conjecture or

[81] State v. Neel (Utah) 65 Pac. 494.

[82] State v. Van Tassel, 103 Iowa, 6.

[83] Charge of Chief Justice Shaw in Com. v. Webster, 5 Cush. (Mass.) 295.

[84] Smith v. People, 74 Ill. 144; Minich v. People, 8 Colo. 454; Earll v. People, 73 Ill. 334; Kennedy v. People, 40 Ill. 488.

[85] Dunn v. People, 109 Ill. 635.

[86] Little v. State, 89 Ala. 99.

supposition, is not what is meant by a reasonable doubt."[87] "Not a mere possible doubt, nor is it a captious or imaginary doubt."[88] "Not a vague or uncertain doubt."[89] It "should grow out of the evidence in the case, and not be merely speculative, conjectural, or imaginary."[90] "A substantial doubt of defendant's guilt, with a view to all the evidence in the case, and not a mere possibility of defendant's innocence."[91] "A real, substantial, well-founded doubt, arising out of the evidence in the cause, and not a mere possibility that the defendant is innocent."[92] "Not a far-fetched one [doubt]; it is not a speculative one; it is not an arbitrary one; but it is just what it assumes to be,—a reasonable doubt."[93] A "real and substantial, and not an imaginary or speculative, doubt."[94] Not a "fanciful conjecture or strained inference."[95] "Not a mere imaginary, captious, or possible doubt, but a fair doubt, based upon reason and common sense, and growing out of the testimony in the case."[96] "Not a mere guess—a mere surmise—that one may not be guilty of what is charged."[97] Not "a mere misgiving of the imagination, suggestion of ingenuity, or sophistry, or misplaced sympathy."[98] Not "a doubt suggested by the ingenuity of coun-

[87] Cicely v. State, 13 Smedes & M. (Miss.) 202.
[88] People v. Dewey, 2 Idaho, 79.
[89] State v. Dickey, 48 W. Va. 325.
[90] State v. Krug, 12 Wash. 288.
[91] State v. David, 131 Mo. 380, 33 S. W. 28. To the same effect, see State v. Duncan, 142 Mo. 456; State v. Fisher, 162 Mo. 169; State v. Adair, 160 Mo. 391; State v. Holloway, 156 Mo. 222, 56 S. W. 734; State v. Cushenberry, 157 Mo. 168.
[92] State v. Blunt, 91 Mo. 503.
[93] McGuire v. People, 44 Mich. 286.
[94] United States v. Keller, 19 Fed. 633.
[95] United States v. Jackson, 29 Fed. 503.
[96] State v. McCune, 16 Utah, 170.
[97] United States v. Johnson, 26 Fed. 682.
[98] State v. Murphy, 6 Ala. 846.

sel, or by your own ingenuity, not legitimately warranted by the testimony, or one born of a merciful inclination or disposition to permit the defendant to escape the penalty of the law, or one prompted by sympathy for him, or those connected with him."[99] Not "a doubt generated by sympathy for the accused."[100] Not "a doubt produced by undue sensibility in the mind of any juror, in view of the consequences of his verdict."[101] "The doubt * * * must be real, not captious or imaginary."[102] So it has been held proper to instruct that, "if there be any reasonable hypothesis,—not a mere possible one,—any reasonable hypothesis upon which the conduct of the defendant can be explained consistently with his innocence," this should create a reasonable doubt. This charge is not objectionable on the ground that it assumes the guilt of the defendant, and imposes on him the burden of proof to show that his conduct was reasonable and proper, and that he did not commit the crime he is charged with, instead of being upon the prosecution to show that all his acts and conduct have been inconsistent with his innocence.[103] It is proper to instruct that the "mere possibility that the defendant may be innocent will not warrant a verdict of not guilty."[104] Or that they "should not go beyond the evidence to hunt for doubts, nor * * * entertain such doubts

[99] United States v. Harper, 33 Fed. 471.

[100] State v. Robinson, 27 S. C. 615.

[101] State v. Potts, 20 Nev. 389; Spies v. People, 122 Ill. 1; Watt v. People, 126 Ill. 9.

[102] State v. Ostrander, 18 Iowa, 437, 459; People v. Finley, 38 Mich. 482. But see Smith v. State, 9 Tex. App. 150; State v. Swain, 68 Mo. 605, in which the use of these words is condemned. The Missouri court, in passing on this question, said: "It is better to adhere to well-settled instructions than to attempt new departures and experiments in criminal procedure."

[103] People v. Winters, 93 Cal. 277.

[104] See State v. Vansant, 80 Mo. 67, 72.

as are merely chimerical, or based on groundless conjecture."[105] Or that, though "the defendant is entitled to the benefit of any doubts they [the jury] might entertain of his guilt, they must be reasonable doubts, not 'a may be so,' or 'a might be so.'"[106] An instruction that "the state is not required to prove defendant's guilt beyond all doubt, but only to prove guilt beyond a reasonable doubt," is not ambiguous or misleading.[107] An instruction, in defining reasonable doubt, that the jury "should not create sources of material doubt by resorting to trivial or fanciful suppositions or remote conjectures as to a probable state of facts differing from that established from the evidence," is not erroneous as impliedly authorizing the jury to create such doubt in that manner, provided "the probable state of facts" did not differ from that established by the evidence.[108]

The following negative definitions have been held erroneous: "It is not a reasonable doubt, which may be raised by conjecturing something for which there is no foundation nor suggestion in the evidence adduced."[109] An instruction that, "if the jury believe from the evidence that the defendant is guilty as charged in the indictment, beyond a reasonable doubt, they must not acquit him because there may be a mere probability of the defendant's innocence, unless such probability be a reasonable probability from all the evidence," is erroneous because of the incompatibility between belief in defendant's guilt beyond a reasonable doubt and probabil-

[105] See State v. Pierce, 65 Iowa, 89, 90; State v. Elsham, 70 Iowa, 531.

[106] Giles v. State, 6 Ga. 276, 284.

[107] Littleton v. State (Ala.) 29 So. 390.

[108] McArthur v. State, 60 Neb. 390.

[109] Densmore v. State, 67 Ind. 306, in which the reason assigned was that this definition excludes all reasonable doubts arising from lack or want of evidence.

ity of his innocence.[110] "A reasonable doubt is not probability only, or conjecture, or supposition. The doubt which should properly induce a jury to withhold a verdict of guilty should be such a doubt as would reasonably arise from the testimony before them." This was held erroneous, as imposing on the jury the obligation to convict, although the evidence might preponderate in favor of the accused.[111] An instruction to the jury that, "while it is true they are not authorized to convict unless, from all the evidence, they believe, beyond every reasonable doubt, that defendant is guilty, still this does not mean that they must know he is guilty, for mathematical certainty is not required in any case; but if they, from a full and fair comparison of all the evidence in the case, believe he is guilty, then this is sufficient, and you should convict him," is incurably erroneous. The conclusion deduced from the attempted definition of "reasonable doubt" is that it is a mere matter of belief.[112]

§ 296. Not a doubt as to law.

In those jurisdictions where juries are judges of the law in criminal cases, it is held that the reasonable doubt which entitles the defendant to an acquittal is not a doubt as to the law.[113] It was accordingly held proper to refuse an instruction "that, if they entertained a doubt as to the law, the prisoner is just as much entitled to the benefit of those doubts as if they applied to the facts; that if they entertain a reasonable doubt as to whether the evidence is applicable to the law as given them in charge, the prisoner is entitled to the benefit of that doubt, and it would be their duty to acquit."[114]

110 Smith v. State, 92 Ala. 30.
111 Browning v. State, 30 Miss. 657, 672.
112 Jeffries v. State (Miss.) 28 So. 948.
113 Oneil v. State, 48 Ga. 66; State v. Meyer, 58 Vt. 457, 463.
114 Oneil v. State, 48 Ga. 66.

Or that, "if the jury entertain the slightest doubt upon the questions of law presented by the court, the prisoner is entitled to the benefit of such doubt, and in no instance are they permitted to apply any rule of law more prejudicial to the prisoner than that laid down by the court."[115]

§ 297. Not a doubt raised by argument of counsel.

The court cannot submit a case to the jury upon the relative strength of the arguments of the respective counsel, and it is proper to refuse an instruction or to strike out a clause giving the defendant the benefit of any doubt created by argument of counsel, as it renders the rule as to reasonable doubt doubtful of comprehension.[116]

§ 298. Entire satisfaction of guilt as equivalent to absence of reasonable doubt.

There is some conflict of authority on this question. In one jurisdiction it is settled law that a conviction cannot be had unless the jury are "entirely satisfied" of defendant's guilt;[117] and it has accordingly been held reversible error in that jurisdiction to give the following instructions: "You are not legally bound to acquit him (the defendant) because you may not be entirely satisfied that the defendant and no other person committed the alleged offense."[118] "All that is necessary in order to justify the jury in finding the defendant guilty is that they shall be satisfied from the evidence of the defendant's guilt to a moral certainty, and beyond a reasonable doubt, although they may not be entirely satisfied from

[115] State v. Meyer, 58 Vt. 457.

[116] People v. Ammerman, 118 Cal. 23. See, also, Horton v. Com. (Va.) 38 S. E. 184.

[117] People v. Phipps, 39 Cal. 326, overruling People v. Cronin, 34 Cal. 191. See, also, other California decisions cited in this section.

[118] People v. Brown, 59 Cal. 345.

the evidence that the defendant and no other person committed the alleged offense."[119] The court, in condemning this latter instruction, said in one of these cases that this instruction, "in effect, assigns a lower grade to moral certainty beyond a reasonable doubt than is given to it by the law, and permits the jury to convict without being entirely satisfied that the defendant is guilty of the offense charged. When the jury are satisfied to a moral certainty and beyond a reasonable doubt, they are entirely satisfied. The truth of any fact which is to be proven by evidence cannot be established beyond the possibility of a doubt, and yet the jury may be entirely satisfied of its truth. Anything short of entire satisfaction on the part of the jury of the truth of the charge necessarily implies, in case of a conviction, that, in their opinion, the charge is sustained by a mere preponderance of evidence," which is not sufficient for a conviction.[120] An instruction: "But if, upon a full and fair consideration of all the evidence in the case, you are fairly and clearly satisfied that the defendant committed the crime charged against him, you should find him guilty by your verdict, notwithstanding the proof of his good character,"—sufficiently conveys the idea that the jury must be "entirely satisfied of the defendant's guilt."[121] In another jurisdiction, a different view of the law is taken, and it has been held proper to instruct the jury that they "must be satisfied, from the evidence, of the guilt of the defendant, beyond a reasonable doubt, before the jury can legally find him guilty of the crime charged against him; but in order to justify the jury in finding the defendant guilty of said crime, it is not necessary that the jury should be satisfied, from the evidence, of his guilt, beyond the possi-

[119] People v. Kerrick, 52 Cal. 446; People v. Padillia, 42 Cal. 535; People v. Phipps, 39 Cal. 326.

[120] People v. Padillia, 42 Cal. 535, 540.

[121] People v. Ribolsi, 89 Cal. 492.

bility of a doubt. All that is necessary in order to justify the jury in finding the defendant guilty is that they shall be satisfied, from the evidence, of the defendant's guilt, to a moral certainty and beyond a reasonable doubt, although it may not be entirely proven that the defendant, and no other or different person, committed the alleged offense. And if the jury are satisfied from the evidence, beyond a reasonable doubt, that the defendant committed the crime charged against him, they are not legally bound to acquit him because they may not be entirely satisfied that the defendant, and no other person, committed the alleged offense."[122] In sustaining this instruction it was said: "If a man believes that a defendant may possibly be innocent, he cannot be said to be 'entirely satisfied' of his guilt, and yet he may be satisfied of it beyond a reasonable doubt, and may convict."[123]

§ 299. Probability of innocence may create reasonable doubt.

It is too plain for argument that a probability of innocence will create a reasonable doubt of defendant's guilt; hence it will be error to refuse an instruction that "a probability of the defendant's innocence is a just foundation for a reasonable doubt of his guilt, and therefore for his acquittal;"[124] or that, "if there is a probability of defendant's innocence," the jury must acquit.[125] And for the same reason it is

[122] State v. Nelson, 11 Nev. 334, 340, following People v. Cronin, 34 Cal. 191, which was afterwards overruled; State v. Bryan, 19 Nev. 365.

[123] State v. Nelson, 11 Nev. 334.

[124] Cohen v. State, 50 Ala. 108; Bain v. State, 74 Ala. 38, overruling Williams v. State, 52 Ala. 411, and distinguishing Ray v. State, 50 Ala. 104, where a charge in the same language, prefixed by the assertion that "a reasonable doubt has been defined to be a doubt for which a reason could be given," was held erroneous because it defined a reasonable doubt as one for which a reason can be given.

[125] Shaw v. State, 125 Ala. 80.

erroneous to instruct that "a reasonable doubt is not probability only, or conjecture, or supposition. The doubt which should properly induce a jury to withhold a verdict of guilty should be such a doubt as would reasonably arise from the testimony before them."[126] It is manifestly impossible that a probability of innocence and the absence of any reasonable doubt of guilt can be coexistent. The word "probability," in itself, imports a preponderance of the evidence.

§ 300. A doubt arising from the evidence or want of evidence.

It is usual to instruct the jury that a reasonable doubt must arise from the evidence,[127] or "from the evidence or the want of evidence."[128] And in one case it was held error to instruct that "a reasonable doubt is one suggested by, or arising out of, the proof made," on the ground that such instruction excluded all reasonable doubt that might arise from lack of evidence or want of evidence.[129] And an instruction "that the defendant is presumed to be innocent, and it devolves upon the state to prove his guilt beyond a reasonable doubt, and, unless the state has established the guilt of the defendant, as charged in the indictment, to your satisfaction beyond a reasonable doubt, you should give the defendant the benefit of such doubt, and return a verdict of not guilty; but such a doubt, to authorize an acquittal on that ground alone, should be a substantial doubt of guilt arising from the evidence in the case, and not a mere possibility of innocence,"—is not objectionable on the ground that it does not allow an acquittal on account of any reasonable doubt arising

[126] Browning v. State, 30 Miss. 656.

[127] Bowler v. State, 41 Miss. 570; Cicely v. State, 13 Smedes & M. (Miss.) 202.

[128] Langford v. State, 32 Neb. 782; Earll v. People, 73 Ill. 329, 334; United States v. Jones, 31 Fed. 718.

[129] Densmore v. State, 67 Ind. 306.

from any lack of sufficiency in the evidence, as, where the sufficiency of evidence is considered, the jury cannot avoid considering its insufficiency.[130] Where there is positive testimony that the offense charged was committed, and also testimony to the contrary, it is not error to instruct that, "if you have a reasonable doubt of the guilt of defendant from the evidence, you will acquit," as in such a case the doubt must be engendered by the testimony, and not by a want of evidence.[131] So, in one case it was said that a party who desires an instruction that reasonable doubt may arise from "want of evidence" should ordinarily ask it.[132] The following instructions on this head have been approved: "The doubt which should properly induce a jury to withhold a verdict of guilty should be such a doubt as would reasonably arise from the evidence before them."[133] "An actual, substantial doubt, arising from the evidence or the want of evidence."[134] "An actual, substantial doubt of guilt arising from the evidence or want of evidence in the case."[135] "A reasonable doubt means, in law, a serious, substantial, and well-founded doubt, and not the mere possibility of a doubt, and the jury have no right to go outside of the evidence to search for or hunt up doubts, in order to acquit defendant, not arising from the evidence or want of evidence."[136] So, an instruction that the jury are not at liberty to go outside of the evidence in the case to find a reason for doubting the guilt or innocence of the defendant is not objectionable as

[130] State v. Cushenberry, 157 Mo. 168, wherein the reason assignd was that, whenever the su cienecy of the evidence is considered, necessarily you must consider its insufficiency.

[131] Whitesides v. State (Tex. Cr. App.) 58 S. W. 1016.

[132] Herman v. State, 75 Miss. 340.

[133] Cicely v. State, 13 Smedes & M. (Miss.) 202.

[134] Langford v. State, 32 Neb. 782.

[135] Ferguson v. State, 52 Neb. 432.

[136] Earll v. People, 73 Ill. 329, 334.

excluding a doubt founded upon the knowledge of natural laws inconsistent with the hypothesis of guilt contended for by the prosecution, when there is nothing in the record to indicate that the prosecution contended for any hypothesis inconsistent with natural law, or that evidence of any natural law would have been relevant or material.[137] It has been held improper to instruct that the evidence "includes not only the sworn testimony of the witnesses who have testified, but all the circumstances surrounding the tragedy;"[138] or that "reasonable doubts usually arise from either want of evidence, or where there was a conflict of evidence," in a case where the question of the doubt did not arise from either of these causes, but turned solely upon the internal credibility of an explanation which the defendant had given of the circumstances against him, when they were first brought to his notice.[139] It is proper to refuse a request that the jury should know to a moral certainty that they have all the facts before them before they can convict, and that if they feel, after considering the evidence, that some important matter of proof has been omitted, and their minds were not satisfied, this was a reasonable doubt, upon which they should acquit.[140]

§ 301. Doctrine applicable only to evidence considered as a whole.

The reasonable doubt which will justify and require an acquittal must be as to the guilt of the defendant, when the whole evidence is considered. The law does not require the jury to believe that every fact in the case has been proved beyond a reasonable doubt before they can find accused guilty. The reasonable doubt which will work an acquittal

[137] People v. Donguli, 92 Cal. 607.
[138] Long v. State, 23 Neb. 33.
[139] McElven v. State, 30 Ga. 869.
[140] Gray v. State (Fla.) 28 So. 53.

must not be as to any particular fact in the case.[141] An instruction requiring an acquittal upon a reasonable doubt resting upon a part of the evidence, considered separately from the whole evidence, was properly refused.[142] In this connection, it will, according to the weight of authority, be sufficient to charge that the jury should acquit if, upon the whole evidence, they have a reasonable doubt of defendant's guilt. It is not necessary to charge that the jury must be satisfied beyond a reasonable doubt of each material fact before they can convict. The former instruction includes the latter, and is a sufficient direction that each material fact must be established beyond a reasonable doubt, while the latter is objectionable as singling out some particular fact for the consideration of the jury, and as diverting their attention from a consideration of the evidence, taken as a whole.[143]

[141] Weaver v. People, 132 Ill. 536; Crews v. People, 120 Ill. 317; State v. Hayden, 45 Iowa, 11; State v. Hennessy, 55 Iowa, 299; Davis v. People, 114 Ill. 98; McCullough v. State, 23 Tex. App. 626; Barker v. State, 126 Ala. 69. See, also, Bodine v. State (Ala.) 29 So. 926.

[142] Liner v. State, 124 Ala. 1.

[143] State v. Stewart, 52 Iowa, 284; State v. Hayden, 45 Iowa, 11; Nix v. State, 97 Ga. 211; Weaver v. People, 132 Ill. 536; State v. Dunn, 18 Mo. 419; State v. Crawford, 34 Mo. 200; People v. Milgate, 5 Cal. 127; State v. Schoenwald, 31 Mo. 155; State v. Felter, 32 Iowa, 49; State v. Schaffer, 74 Iowa, 704; Barker v. State, 126 Ala. 69; State v. Perigo, 80 Iowa, 37; United States v. Zes Cloya, 35 Fed. 493; Acker v. State, 52 N. J. Law, 259; State v. Curran, 51 Iowa, 112; McCullough v. State, 23 Tex. App. 626; Carr v. State, 84 Ga. 250, 10 S. E. 626; State v. Maloy, 44 Iowa, 104; Thurmond v. State, 27 Tex. App. 347; Lyons v. People, 137 Ill. 602. In Jolly v. Com., 22 Ky. Law Rep. 1622, 61 S. W. 49, it was said that while an instruction that, "If the jury entertain a reasonable doubt as to any facts necessary to constitute defendant's guilt, they must acquit him," may not be misleading, it would be better to charge, in the language of the statute, that, "if there be a reasonable doubt of the defendant being proven to be guilty, he is entitled to an acquital."

"It is not incumbent upon the court to carve the case or the evidence into different propositions, and apply the rule to one or more of them severally.[144] As an illustration of this principle, we set out the following instructions, which were held properly refused for the foregoing reasons: "If the jury have a reasonable doubt whether the circumstances were such as to impress the mind of a reasonable man that he was in great danger of great bodily harm at the time of the killing, they must give the prisoner the benefit of the doubt, and acquit him."[145] "If you have any reasonable doubt as to whether the declarations were made at the time when R. felt that death was impending and certain to follow almost immediately, and after he had despaired of life, or whether his declarations have been detailed to you by witnesses substantially as they were made, you should give the defendant the benefit of the doubt."[146] "If they [the jury] have any reasonable doubt as to whether defendant, at the time of the shooting, was under reasonable apprehension and honest fear that deceased intended and was about to inflict upon him great bodily harm, and that he fired the shots under that belief, and in self-defense, then the jury must acquit."[147] In a prosecution for larceny it is proper to refuse to instruct that "the jury cannot convict unless they believe from the evidence, beyond a reasonable doubt, that the defendant had in his possession the identical money" stolen from the prosecuting witness, as such possession is not necessarily an ingredient of the offense, and it is not required that the jury must believe, beyond a reasonable doubt, every fact introduced in evidence.[148] The defendant is entitled to "a rea-

144 Carr v. State, 84 Ga. 250.
145 Allen v. State, 60 Ala. 19.
146 Leigh v. People, 113 Ill. 372.
147 Crews v. People, 120 Ill. 317.
148 Barker v. State, 126 Ala. 69.

sonable doubt upon every and any question of fact in the cause."[149] A charge to the jury that, "if they have a reasonable doubt as to the defendant's guilt, arising out of any part of the evidence, then they must acquit the defendant," pretermits all reference to a consideration of the whole evidence by the jury, and is misleading.[150] Where the court charges "that, upon all the evidence in the case, the jury must be satisfied, beyond a reasonable doubt, of the defendant's guilt," and that it is not necessary that they should find defendant's evidence as to commission of the crime by a third person "true beyond a reasonable doubt, but that they should consider it in connection with the rest of the testimony upon the general question as to his guilt," it is not error to omit to charge "that it was not necessary to the defendant's defense that the jury be convinced that the third person committed the crime, and that their failure to believe his evidence regarding the third person would bear only upon his credit as a witness generally, and that it would be sufficient if that evidence raised a reasonable doubt in their minds as to the defendant's guilt."[151] Where an indictment charges, in four different counts, four different degrees of a crime, it is not error to refuse to charge "that, if you are reasonably doubtful as to the proof in this case of any material allegation of the indictment, you must acquit the defendant," as the jury in such case could not convict unless they believed the averments of all the counts, although they contain different and inconsistent material averments,—a condition the office of separate counts in an indictment was designated, among other

[149] Acker v. State, 52 N. J. Law, 259.

[150] Gordon v. State (Ala.) 30 So. 30. See, also, Bodine v. State (Ala.) 29 So. 926.

[151] State v. Totten (Vt.) 47 Atl. 105.

things, to prevent. [152] An instruction that the rule requiring the jury to be satisfied of defendant's guilt beyond a reasonable doubt "does not require that the jury should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt. It is sufficient if, taking the evidence all together, the jury are satisfied, beyond a reasonable doubt, that defendant is guilty,"—is not erroneous.[153] So, instructions "that they should weigh all the evidence and reconcile it, if possible, but, if there be irreconcilable conflict in the evidence, they ought to take that evidence which they think worthy of credit, and give it just such weight as they think it entitled to," and, "in weighing the evidence, each piece and all the evidence should be weighed with all the other evidence, and you should make up your verdict from due consideration of the whole of the evidence. If the jury, after considering all the evidence, have a reasonable doubt of defendant's guilt, arising out of any part of the evidence, they should find him not guilty. But this does not mean that you have got to find every single item of testimony to be true before you can convict. If, after weighing all the evidence, you have a reasonable doubt as to any of the elements which constitute any offense charged in this indictment, then you are bound to acquit. It does not mean that you have got to believe every word of the testimony in order to convict,"—are proper.[154]

§ 302. Same—Contrary view.

There are, however, a number of decisions in which it has been held erroneous to refuse to instruct that a reasonable doubt as to a particular fact essential to constitute guilt au-

[152] Littleton v. State (Ala.) 29 So. 390.
[153] Gott v. People, 187 Ill. 249.
[154] Bondurant v. State, 125 Ala. 31.

thorizes an acquittal. Thus, a number of decisions hold it proper and necessary, on request, to give an instruction applying the doctrine of reasonable doubt to the defense of alibi.[155] So, in one case it was held erroneous to refuse an instruction that, "if the jury are not satisfied, beyond a reasonable doubt, that the accused knew that the goods were stolen, he is entitled to an acquittal."[156] The court should not select each fact constituting the offense, and instruct the jury that, if they have a reasonable doubt as to that fact, they should acquit. It is enough to tell the jury that if, upon the whole case, they have a reasonable doubt of the guilt of the accused, he should be acquitted.[157]

§ 303. As to number of jurors who must entertain a reasonable doubt in order to acquit.

To entitle defendant to an acquittal, there must be a reasonable doubt of his guilt entertained by the whole jury, and not by any one member thereof. It is therefore erroneous to instruct that, "if any one of the jury entertain a reasonable doubt as to the sufficiency of the proof to establish any material averment in the indictment, you must give the defendant the benefit of the doubt, and acquit the defendant," and a request for such an instruction is properly refused.[158] This proposition is too plain to admit of controversy. An acquittal or conviction can only be had where all the jury agree; and while a reasonable doubt in the minds of one or more jurors would and does authorize a disagreement and mistrial, it would be folly to say that a majority, or even a minority, of the jurors who have an abiding conviction of

[155] See ante, § 282.

[156] Com. v. Leonard, 140 Mass. 473.

[157] State v. Dunn, 18 Mo. 419.

[158] State v. Rorabacher, 19 Iowa, 155. An instruction the same in substance was condemned for the same reason in State v. Witt, 34 Kan. 488. See, also, Littleton v. State (Ala.) 29 So. 390.

defendant's guilt must adopt the views of the juror or jurors who claim to have a reasonable doubt of his guilt.[159] As has been well said: "Each juror, under his oath, must vote according to his own conviction, and the doubt with which he has to do is the doubt in his own mind."[160] And it has been held proper to instruct that "in case any one of the jurors entertains a reasonable doubt as to the guilt of the defendant, he ought not to find the defendant guilty; yet such doubt in the mind of one or more of the jurors ought not to control the action of the other jurors, so as to compel them to give a verdict of acquittal."[161] Nevertheless it has been held proper to refuse an instruction embodying this principle in the following language: "If any juror entertain a reasonable doubt of defendant's guilt, he is not required to surrender his convictions because other jurors entertained no such doubts," the court taking the view that there is no necessity for stating such a simple proposition in connection with the ordinary charge in regard to reasonable doubt.[162] So it is proper to refuse an instruction that each individual juror must be convinced beyond a reasonable doubt of defendant's guilt before uniting in a verdict of guilty, since such instruction would be misleading.[163] An instruction: "You cannot convict the defendant unless each of you is entirely satisfied from the evidence before you that defendant is guilty beyond all reasonable doubt. In determining the question,

[159] See State v. Witt, 34 Kan. 488; Littleton v. State (Ala.) 29 So. 390.

[160] State v. Sloan, 55 Iowa, 217.

[161] Fassinow v. State, 89 Ind. 235.

[162] State v. Hamilton, 57 Iowa, 596. The refusal of an instruction to the same effect was held proper in State v. Fry, 67 Iowa, 475; State v. Williams, 13 Wash. 335; State v. Robinson, 12 Wash. 491; State v. Penney (Iowa) 84 N. W. 509.

[163] Davis v. State, 63 Ohio St. 173. Contra, McGuire v. State, 2 Ohio Cir. Dec. 318.

it is the duty of each juror to decide the matter for himself, and not to compromise or sacrifice his views or opinions of the case in deference to the views or opinions of others,"—is properly refused, as a juror should not be entreated not to sacrifice his individual opinion. To allow such an entreaty to prevail would be to deprive litigants of the average common sense and judgment of "twelve good men and true."[164] In another case it was held reversible error to refuse an instruction that, "if any one of the jury, after having duly considered all the evidence, and after having consulted with his fellow jurymen, should entertain such reasonable doubt, the jury cannot, in such case, find the defendant guilty"[165]

[164] People v. Rodley, 131 Cal. 240.

[165] Castle v. State, 75 Ind. 146, in which it was said: "Each juror should feel the responsibility resting upon him, as a member of the body, and should realize that his own mind must be convinced of the defendant's guilt beyond a reasonable doubt before he can consent to a verdict of guilty." See, also, Aszman v. State, 123 Ind. 347, where it was held erroneous to refuse an instruction that, "so long as you, or any one of you, have a reasonable doubt as to the existence of any of the several elements necessary to constitute the several crimes above defined, the accused cannot be convicted of such crime," unless it had already charged as to the individual responsibility of jurors. An instruction: "Where a criminal cause is tried by a jury, the law contemplates the concurrence of twelve minds in the conclusion of guilt, before a conviction can be had. Each juror must be satisfied beyond a reasonable doubt of the defendant's guilt before he can, under his oath, consent to a verdict of guilty. Each juror should feel the responsibility resting upon him as a member of the body, and should realize that his own mind must be convinced beyond a reasonable doubt of the defendant's guilt before he can consent to a verdict of guilty. If any one of the jury, after having duly considered all of the evidence, and after having consulted with his fellow jurymen, entertain such reasonable doubt, the jury cannot, in such case, find the defendant guilty," —was held properly refused as inaccurate and misleading; and an instruction "that if, from all the evidence in the case, you each believe, as jurors, beyond a reasonable doubt, that the defendant committed the acts of which she is accused, in manner and form

While, as we have already seen, a defendant is not entitled to an acquittal unless a reasonable doubt of his guilt is entertained by the whole jury, it has nevertheless been held erroneous to charge that "a reasonable doubt is such a doubt as fairly and naturally arises in the minds of the whole jury, after fully and carefully weighing and considering all the evidence which has been introduced."[166] This instruction was condemned on the ground that it was liable to convey the impression that, unless such doubt was shared by all the jurors, there should be a conviction.[167] The following instruction was condemned for the same reason: "While each juror must be satisfied of the defendant's guilt beyond a reasonable doubt, to authorize a conviction, such reasonable doubt, unless entertained by all the jurors, does not warrant an acquittal."[168] In another jurisdiction this decision has been criticised, and a similar instruction—"If any of the jurors entertain a reasonable doubt as to whether defendant's guilt has been established, you cannot convict the defendant, but you cannot acquit unless all the jurors entertain a reasonable doubt"—upheld.[169] An instruction that if any one of the jurors, after having duly considered all the evidence, and after having consulted with his fellow jurymen, should entertain a reasonable doubt of the defendant's guilt, in such case they cannot find the defendant guilty, has been held im-

as charged in the indictment," sufficiently advised the jury as to their individual responsibility, and that each of them must be so convinced before he could consent to a verdict of conviction.

[166] State v. Stewart, 52 Iowa, 284. An instruction the same in substance and almost identical in language was held to have been properly refused in State v. Sloan, 55 Iowa, 217, for the same reason.

[167] State v. Stewart, 52 Iowa, 284.

[168] Stitz v. State, 104 Ind. 359. See, also, State v. Tettaton, 159 Mo. 354.

[169] State v. Rogers, 56 Kan. 362.

proper, as authorizing an acquittal in case a single juror entertained a doubt of defendant's guilt.[170] It is not the duty of the court to address its instructions to each one of the jurors as individuals, and therefore, if the court has instructed on reasonable doubt generally, it is proper to refuse to instruct that "the law requires that no man shall be convicted of a crime until each and every one of the jury is satisfied by the evidence in the case, to the exclusion of all reasonable doubt, that the defendant is guilty as charged; * * * or, if any one of the jury, after having fully considered all of the evidence, and after having consulted with his fellow jurymen, and candidly considered their views with the purpose of reaching a just conclusion, should entertain such reasonable doubt, the jury cannot, in such case, find the defendant guilty."[171]

§ 304. Must not disbelieve as jurors what they would believe as men.

In defining and explaining reasonable doubt, it has been held proper to instruct a jury that they "are not at liberty to disbelieve as jurors, if from the evidence you believe as men;"[172] or that "you are not at liberty to disbelieve as jurors if, from all the evidence, you believe as men. Your oath imposes on you no obligation to doubt, when no doubt would exist if no oath had been administered;"[173] or that "you should be convinced as jurors where you would be convinced as citizens, and you should doubt as jurors only where you would doubt as men," where this sentence is used in connection with the evidence, and when the jury are instructed

[170] State v. Taylor, 134 Mo. 109, 151.

[171] State v. Cushing, 17 Wash. 544.

[172] Spies v. People, 122 Ill. 1.

[173] Bartley v. State, 53 Neb. 310; Carrall v. State, 53 Neb. 431; Leisenberg v. State, 60 Neb. 628.

that they should be convinced from the evidence.[174] So, the following instruction on this head has also been approved: "Jurors are not artificial beings, governed by artificial or fine-spun rules; but they should bring to the consideration of the evidence before them their every-day common sense and judgment, as reasonable men; and those just and reasonable inferences and deductions which you, as men, would ordinarily draw from facts and circumstances proven in the case, you should draw and act on as jurors."[175]

§ 305. Better that guilty escape than that innocent be punished.

In a number of cases the court has been requested to charge the jury that it is better for a specified number of guilty persons to escape than for one innocent person to be punished, and, without any exception, such an instruction has always been refused.[176] These decisions unite in declaring that there is no such rule or policy known to the law. As was well said in one case: "It is not within the purpose of the law that any guilty person should escape, or any innocent one be convicted."[177] At most, the proposition is nothing more than a maxim, and probably as fallacious as the common run of maxims are.[178] So, a refusal to charge that "the

[174] McMeen v. Com., 114 Pa. 300. See, also, Com. v. Harman, 4 Pa. 269; State v. Dickey, 48 W. Va. 325.

[175] State v. Elsham, 70 Iowa, 531.

[176] People v. Ebanks, 117 Cal. 652; Territory v. Burgess, 8 Mont. 57; Coleman v. State, 111 Ind. 563; Adams v. People, 109 Ill. 444; Garlick v. State, 79 Ala. 265; Carden v. State, 84 Ala. 417; Ward v. State, 78 Ala. 441; Seacord v. People, 121 Ill. 623; State v. Tettaton, 159 Mo. 354.

[177] Adams v. People, 109 Ill. 444.

[178] "The well-known and well-worn maxim is doubtless creditable to humanity, but we are not aware that it has been adopted by courts as a legal proposition to be incorporated in a charge to a jury in a criminal trial. Like most other maxims, it has a true as

jury have a right to consider that innocent men have been convicted, and to consider the danger of convicting an innocent man in weighing the evidence to determine whether there is reasonable doubt as to defendant's guilt," is proper.[179]

§ 306. Applying doctrine to degrees of crime.

"In the trial of a criminal case, the defendant is entitled to the benefit of any reasonable doubt in the mind of the jury in regard to any * * * grade or degree of the offense charged in the indictment. * * * 'And where there is a reasonable doubt of the degree of the offense which the defendant has committed, he shall only be convicted of the lower degree.' "[180] It has therefore been held proper to charge, in a murder case, that "if the jury believe from all the evidence in the case, beyond a reasonable doubt, that the defendants are guilty of murder in the first degree or second degree, * * * but have a doubt as to the degree of offense of which the defendants are guilty, the jury will give them the benefit of such doubt, and find them guilty of the less offense."[181] So it has been held that "an instruction that, if the jury believe, from the evidence, beyond a reasonable doubt, that the defendant is not guilty of murder in the

well as a false side, and may be tortured and construed to work harm as well as good. Fortunately, and to the credit of humanity, it is hardly required as a shield against injustice or prejudice, for a sense of justice and fair play is almost instinctive in the mind of man; and experience has shown that juries are much more inclined to show mercy towards the guilty than to punish the innocent." Territory v. Burgess, 8 Mont. 57, 78.

[179] People v. Machado (Cal.) 63 Pac. 66.

[180] Payne v. Com., 1 Metc. (Ky.) 370; White v. State, 23 Tex. App. 154.

[181] State v. Anderson, 86 Mo. 309. See, also, Clark v. Com. (Ky.) 63 S. W. 740.

first degree, but that the elements of murder in the second degree, stated therein to the jury, existed, then they should find him guilty of murder in the second degree, must be construed as applying the 'reasonable doubt' to both degrees of murder, and cannot be prejudicial, if the jury is subsequently instructed that they should not find the defendant guilty of murder if they entertain a reasonable doubt as to whether he was guilty of murder in either the first or second degree, and the conviction is of murder in the first degree."[182] "If, on a trial for murder, the fact of the killing is admitted, and the defense rests on the question of the grade of the offense, or whether the defendant was justified in killing on the ground of self-defense, instructions on his behalf on the question of reasonable doubt, framed so broad as to include the fact of killing * * * should be refused."[183] Instructions in such a case should apply only to the grade of the offense and the fact of justification.[184] In one state it has been held that the law should be charged, not only upon the general question, but also as between the different degrees of culpable homicide.[185]

§ 307. Instructions bad as requiring too high a degree of proof to overcome a reasonable doubt.

The following instructions have been held bad, as requiring too high a degree of proof of guilt to overcome a reasonable doubt: "That the jury must be convinced * * * to an absolute moral certainty in order to convict."[186] That

[182] People v. Chun Heong, 86 Cal. 329.
[183] People v. Williams, 32 Cal. 280.
[184] People v. Williams, 32 Cal. 280.
[185] Murray v. State, 1 Tex. App. 417; Blake v. State, 3 Tex. App. 581.
[186] People v. Hecker, 109 Cal. 451.

the jury must acquit "unless the evidence * * * is sufficiently strong to remove every supposition or hypothesis but that of his [defendant's] guilt,"[187] or so strong "as to exclude to a moral certainty every supposition or hypothesis but that of guilt."[188] That the jury should acquit if they could "infer any reasonable theory or hypothesis of the defendant's innocence, * * * although there may be stronger probabilities of his guilt than of his innocence."[189] That "evidence to induce or authorize a conviction should not be a mere preponderance of probabilities, but should be so strong and convincing as to lead the mind to the careful and guarded conclusion that the defendant cannot, consistently with any reasonable hypothesis, be innocent."[190] That "the jury ought to acquit the defendant if, after a rational sifting and weighing of the whole evidence in this case, they are not individually certain that he is guilty," and "the jury are the sole determiners of the questions of fact; and if, according to the evidence against the defendant, he would be guilty, but, according to the evidence in his favor, he would be innocent, and the jury cannot tell where the truth indubitably lies, this would furnish a just ground for a reasonable doubt, and the defendant ought to be acquitted," as, under such instructions, "any possible, speculative, or imaginary doubt would have been sufficient to prevent a conviction."[191] That there must be a "certainty" of defendant's guilt.[192] A charge which requests an acquittal if there is any doubt of

[187] Blackburn v. State, 86 Ala. 598; Simmons v. State (Ala.) 29 So. 929. But see People v. Smith, 162 N. Y. 520, reversing 37 App. Div. 280.

[188] Harvey v. State, 125 Ala 47.

[189] State v. Tettaton, 159 Mo. 354.

[190] Bodine v. State (Ala.) 29 So. 926.

[191] Ross v. State, 92 Ala. 76.

[192] State v. Powers, 59 S. C. 200, holding that the word "certainty" should have been modified by the words "reasonable and moral."

the defendant's guilt which is not purely speculative doubt requires a higher degree of proof and conviction of the mind of the defendant's guilt than the law requires.[193] It is error to instruct: "If the state of the case is such that, after an entire comparison, consideration, weighing, and sifting of all the evidence, it leaves the minds of the jury in that condition that they cannot say they have an abiding and absolute belief of the guilt of the defendants, they ought to find them not guilty."[194] That "if the testimony is so conflicting that, after weighing it all, the jury is still in doubt as to whether the defendant did or did not commit the offense, they must acquit," because of the omission of the word "reasonable," as expressive of the doubt requiring an acquittal.[195] That "the only just foundation for a verdict of guilty in this case is that the entire jury shall fully and perfectly believe that the defendant is guilty as charged in this indictment, to the exclusion of every reasonable doubt of his guilt; and if the state has failed to furnish this full measure of proof, and to impress the minds of the jury with such full and perfect belief of the defendant's guilt, the jury ought to find him not guilty," as leading the jury to require "a higher measure of proof of guilt than the law exacts, in that it requires that the jury shall fully and perfectly believe the defendant guilty, to the exclusion of every reasonable doubt of his guilt; and that, if the prosecution has failed to furnish this full measure of proof, and to impress the minds of the jury with such full and perfect belief of his guilt, he should be acquitted." An instruction "that the only just foundation for a verdict of guilty in this case is that the entire jury shall fully and perfectly believe that the defendant is guilty as charged in this indictment, to

193 Perry v. State, 91 Ala. 83.
194 Whatley v. State, 91 Ala. 108.
195 McClellan v. State, 117 Ala. 140.

the exclusion of every reasonable doubt of his guilt," is misleading where the indictment contains three counts charging the commission of the offense in a different manner, and only expressly charging the highest grade of the offense.[196] It is error to instruct that "the proof must do more than reasonably satisfy the jury of the guilt of the defendant,—it must go to the extent of satisfying the jury of his guilt beyond all reasonable doubt or supposition of innocence."[197] So, an instruction requiring "clear and distinct proof" of guilt has been held to require a higher degree of proof than is necessary to convince "beyond a reasonable doubt."[198]

§ 308. Instructions bad as requiring too high a degree of proof of innocence.

On the other hand, the following instructions have been held bad as requiring too high a degree of proof of innocence: "That a preponderance of evidence is necessary in order to raise a reasonable doubt of defendant's guilt."[199] That "can the facts and circumstances you find from the evidence to be true exist, and can you, in view of these facts and circumstances, reasonably conclude that the defendant is innocent? If so, you should find him not guilty; otherwise you should find him guilty."[200] That, "if you believe from the testimony, beyond a reasonable doubt, that the defendant did not take the property fraudulently, but took the property under an honest claim of right, he would not be guilty of theft, and you should acquit him."[201] That, "if you have a

[196] Lundy v. State, 91 Ala. 100.

[197] Brown v. State (Ala.) 29 So. 200.

[198] Griffith v. State, 90 Ala. 583.

[199] State v. Porter, 64 Iowa, 237; People v. Elliott, 80 Cal. 296.

[200] McMillan v. State, 7 Tex. App. 142, in which it was said that the jury need never conclude, reasonably or otherwise, that the defendant is innocent, but only that the evidence fails to establish his guilt.

[201] Lewis v. State, 29 Tex. App. 105.

reasonable doubt that the animal slaughtered by defendant was not the property of [the prosecutor], you will find the defendant not guilty," since such instruction requires the jury to believe the innocence of defendant beyond a reasonable doubt.[202] That, to entitle the defendant to an acquittal, the jury must be satisfied that the felonious intent did not exist.[203] That, if the jury thought that defendant did not commit the crime alleged, they should give him the benefit of the doubt.[204] An instruction which says that, if the jury believe "from the evidence" all the facts material to defendant's guilt, instead of requiring the jury to believe such things beyond a reasonable doubt, is erroneous;[205] or which says that "all that is required to enable a jury to return a verdict is, after a comparison and consideration of all the testimony, to believe conscientiously that it establishes the guilt of defendant."[206] So it is reversible error to instruct that a reasonable doubt "is doubt engendered by the investigation of the whole proof, and an inability, after such investigation, to let the mind rest easily upon the certainty of guilt or innocence," since such instruction requires defendant to prove his innocence.[207]

§ 309. Sufficiency of instructions taken as a whole.

Where the instructions, taken as a whole, clearly present the law to the jury, minor errors in one instruction will not be ground for reversal.[208] Thus, where the court, after cor-

202 Landers v. State (Tex. Cr. App.) 63 S. W. 557.
203 Best v. State, 155 Ind. 46.
204 State v. Raymond, 53 N. J. Law, 260.
205 Arnold v. Com., 21 Ky. Law Rep. 1566, 55 S. W. 894.
206 Ellerbee v. State (Miss.) 30 So. 57.
207 State v. Moss, 106 Tenn. 359.
208 Bartley v. State, 53 Neb. 310. See, also, post, c. 32, "Appellate Review of Instructions."

rectly instructing the jury on the subject of reasonable doubt, said, "But mere probabilities of innocence or doubts, however reasonable, which beset some minds on all occasions, should not prevent a verdict" of guilty, it was held that this could not have misled the jury, though the latter instruction was somewhat ambiguous.[209] And where the whole of the charge as to reasonable doubt contains a sufficiently accurate statement of the law upon that subject, a statement that "mere possible doubts, however reasonable, which beset some minds on all occasions, should not prevent a verdict of guilty," though to be condemned as being meaningless and tending to confusion, will not constitute prejudicial error.[210] So, where a paragraph of a charge fully and explicitly stated the degree of proof required to convict, and the following paragraphs failed to instruct that the jury find beyond a reasonable doubt, it was held that, taking the instructions together, no doubt could have existed in the minds of the jury that their finding must be beyond a reasonable doubt.[211] An instruction requiring "the jury to find the issues on the evidence introduced by the state" will not be ground for reversal where the remaining instructions require the jury to find defendant guilty upon the evidence beyond a reasonable doubt, and to acquit if, on the whole evidence, they have a reasonable doubt of his guilt.[212] So, an instruction as to the degrees of the offense of homicide, and stating that, should the jury entertain a reasonable doubt as to which of the grades of crime named the defendant may be guilty, or if any, they will give him the benefit of such doubt, and acquit him of the higher offense, and find him guilty of the lower of-

[209] People v. Lee Sare Bo, 72 Cal. 623. See, also, People v. Kernaghan, 72 Cal. 609.

[210] People v. Chun Heong, 86 Cal. 329.

[211] State v. Rainsbarger, 79 Iowa, 745; Steiner v. People, 187 Ill. 244.

[212] State v. Jackson, 99 Mo. 60.

fense only, is not prejudicially erroneous, as assuming that they cannot find him not guilty, where it appears from the general tenor of the charge, and from the instruction as to the form of the verdict, that the jury were expressly told that they could bring in a verdict of acquittal.[213] An instruction that, in order to find the defendant guilty of negligent homicide, the jury must believe, beyond a reasonable doubt, the facts on which this defense is based, is not error, where the court elsewhere gave a charge on reasonable doubt in connection with negligent homicide.[214] Where the court charges that "it devolves upon the prosecution to establish the guilt of the defendant to your satisfaction, beyond a reasonable doubt, before you are authorized to find a verdict against him," and that "all persons charged with a criminal offense are presumed to be innocent until the jury are satisfied beyond a reasonable doubt of their guilt," and that, "if you have a reasonable doubt as to the guilt or innocence of the defendant, you should give him the benefit of the doubt, and acquit him," and repeats the words "beyond a reasonable doubt" some fifteen times, an instruction that, "if you are satisfied that the defendant is guilty of the offense charged, and that he committed it in the nighttime, —that is, between sunset of one day and sunrise of the next, —you should find him guilty of burglary in the first degree," is not erroneous on the ground that it omits the words "beyond a reasonable doubt," and leaves the jury to be simply "satisfied" of the defendant's guilt, no matter whether they entertained a reasonable doubt of his guilt or not.[215] So, where the instructions repeatedly stated that the defendant must be acquitted if the jury had a reasonable doubt as to

[213] People v. Ah Gee Yung, 86 Cal. 144.

[214] Spears v. State (Tex. Cr. App.) 56 S. W. 347.

[215] People v. Flynn, 73 Cal. 511. See, also, Steiner v. People, 187 Ill. 244.

his guilt, or of a single fact necessary to establish his guilt, it was not reversible error to charge that the jury must be "satisfied" of the truth of a certain fact presented in defense.[216] Even the fact that the court erroneously charged that defendant must make out his defense by a preponderance of the evidence has been held not reversible error, where the court also charged that the jury must give the defendant the benefit of every reasonable doubt.[217]

§ 310. Reasonable doubt in civil cases.

In civil cases, the doctrine of reasonable doubt usually has no application. The verdict must be given in favor of the party whose cause of action or defense is sustained by the preponderance of the evidence. While there are a few cases holding that, where the proof of a crime is involved in a civil action, its existence must be proved beyond a reasonable doubt, the great majority of courts refuse to recognize any difference between this and any other class of civil actions. It is therefore erroneous, in a civil case, to charge that the plaintiff must make out his case beyond a reasonable doubt, and proper to refuse such instruction.[218] It has been held that an instruction that "fraud is never presumed, but the burden rests upon one charging fraud to make it out by clear and convincing evidence," is not objectionable as conveying an impression that fraud must be proved beyond a reasonable doubt.[219]

§ 311. Miscellaneous cases.

The instructions given upon reasonable doubt must, of

[216] People v. Flannelly, 128 Cal. 83.

[217] State v. Taylor, 57 S. C. 483.

[218] Seymour v. Bailey, 76 Ga. 338; Reeves v. Graffling, 67 Ga. 514.

[219] Wallace v. Mattice, 118 Ind. 59; Stevens v. Stevens, 127 Ind. 560.

course, not be misleading. This is a common fault, and, upon this ground, the refusal of many requests has been sustained, and, upon the other hand, it has been the cause of many reversals.[220] An instruction that "a reasonable doubt may exist, although the evidence reasonably satisfies the jury that the defendant is guilty," is argumentative and misleading.[221] It was proper to refuse an instruction "that, upon the trial of a criminal case, if a reasonable doubt of any fact necessary to convict the prisoner is raised in the mind of the jury by the evidence itself, or by the ingenuity of the counsel, upon any hypothesis consistent therewith, that doubt is decisive of the prisoner's acquittal."[222] Instructions that "a reasonable doubt is a doubt growing out of the evidence, for which a reason may be given," and "a reasonable doubt is such a doubt, growing out of the evidence, as would occur to the mind of a reasonable man," are calculated to confuse and mislead, as to give a reason for the existence of a mental condition is to state why it exists, and, in that sense, a reason may be given for any degree of doubt; and a reason is nevertheless a reason, though it be based upon mere conjecture, or on matters disconnected from the evidence, and improper to be considered by the jury.[223] A charge which instructs the jury "that, unless you believe from the evidence, beyond a reasonable doubt, that the defendant killed the deceased with malice aforethought, and under a formed design, you cannot convict the defendant of murder in either degree," is properly refused, as misleading the jury to believe that premeditation was a necessary ingredient of murder in the second degree, whereas malice which may arise on the instant,

[220] People v. Smith, 162 N. Y. 520; Wilson v. State (Ala.) 29 So. 569; Horton v. Com. (Va.) 38 S. E. 184; Avery v. State, 124 Ala. 20.

[221] Brown v. State (Ala.) 29 So. 200.

[222] Horton v. Com. (Va.) 38 S. E. 184.

[223] Avery v. State, 124 Ala. 20, 27 So. 505.

and without deliberation, when concurring with an intention to kill, may constitute that offense.[224] An instruction "to take this case, bring your intelligence to the consideration of it, and let your common sense and your best judgment control you in its determination," is not objectionable on the ground that it gives the impression to the jury that they might disregard the instructions as to the law. The fair meaning of this language was simply that the jury, having the evidence and the instruction of the court as to the law before them, should exercise their best judgment in coming to a conclusion.[225] Where the court charges that "defendant in a criminal case is presumed to be innocent until his guilt is established by competent evidence beyond a reasonable doubt, and, if you have a reasonable doubt as to his guilt, you will give him the benefit of such doubt," the jury cannot be misled by the omission of the word "doubt" after "reasonable."[226] An instruction which contains the clause, "after considering all the evidence, the jury have a reasonable doubt as to the defendant's guilt of manslaughter, arising out of any part of the evidence, then you should find the defendant not guilty of any offense," is properly refused, as by the omission of the word "if," or its equivalent, what is apparently intended to state the hypothesis as to reasonable doubt is converted into an improper assertion that "the jury have a reasonable doubt," etc.[227] The following charge has been approved: "If, upon the entire case, you have a reasonable doubt of defendant being proven guilty, or as to any fact necessary to establish his guilt, you should acquit him; or, if you have such doubt as to the degree of the of-

[224] Wilson v. State (Ala.) 29 So. 569.
[225] People v. Kelly, 132 Cal. 430.
[226] Toler v. State (Tex. Cr. App.) 56 S. W. 917.
[227] Wilson v. State (Ala.) 29 So. 569.

fense, you will find him guilty of manslaughter only."[228] An instruction that, "in case of a reasonable doubt, whether defendant's guilt is satisfactorily shown, he is entitled to an acquittal," is not erroneous.[229] Where the court stated to the jury, clearly and specifically, each fact essential to be proven by the state; that, unless the jury believed from the evidence, beyond a reasonable doubt, each of such facts, they must acquit the defendant; that nothing was to be presumed or taken by implication against the defendant; that the law presumed him innocent of the crime charged until he was proven guilty, beyond a reasonable doubt, by competent evidence; that, if the evidence in the case left upon the minds of the jury any reasonable doubt of defendant's guilt, the law made it their duty to acquit him; that the jury must determine the question of his guilt from all the evidence in the case; that unless the jury could say, after a careful consideration of all the evidence in the case, that every essential fact was proved beyond a reasonable doubt, they should find a verdict of not guilty,—the jury was fully informed as to their duties and province in respect to matters of fact, and it was proper to refuse an instruction that "the jury are the sole judges of the facts, and every fact essential to the proof of the offense alleged."[230] A charge that "if, after considering all the evidence in the case, the mind of the jury is left in a state of confusion as to any fact necessary to constitute the defendant's guilt, then they must find him not guilty," is properly refused.[231] An instruction, "If there is no evidence to support any of the counts,

[228] Clark v. Com. (Ky.) 63 S. W. 740, wherein the court said that this instruction should have been given instead of the one which was given, which the court pronounced unintelligible.

[229] People v. Wynn, 133 Cal. 72.

[230] State v. Simas, 25 Nev. 432.

[231] Bodine v. State (Ala.) 29 So. 926.

then you should acquit," is erroneous, since one cannot be convicted simply because there is evidence to support some of the counts.[232] An instruction that, "if one set or chain of circumstances leads to two opposing conclusions, one or the other of such conclusions must be wrong, and therefore, in such a case, if you have a reasonable doubt as to which of said conclusions the chain of circumstances leads, a reasonable doubt would thereby be created, and you should give the defendant the benefit of such doubt and acquit him," is properly refused, as both of these "opposing conclusions might lead to defendant's guilt."[233]

[232] State v. Tulip, 9 Kan. App. 454, 60 Pac. 659.
[233] People v. Clarke, 130 Cal. 642.

CHAPTER XXIX.

CAUTIONARY INSTRUCTIONS ON CIRCUMSTANTIAL EVIDENCE.

§ 312. When Necessary or Proper.
313. Instructing that Circumstantial Evidence must be Equal to Testimony of One Eye-witness.
314. Instructing that Proof must be Inconsistent with Any Other Reasonable Conclusion than that of Guilt.
315. Instructing that Circumstantial Evidence must Exclude to a Moral Certainty Every Hypothesis but that of Guilt.
316. Instructing that Circumstantial Evidence must Exclude Every "Possible" Hypothesis Except that of Guilt.
317. Instructing that Circumstances must be Absolutely Incompatible with Innocence.
318. Instructing that Circumstantial Evidence should Produce Nearly the Same Degree of Certainty as Direct Evidence.
319. Instructing that Each Link in the Chain of Circumstantial Evidence must be Proved Beyond Reasonable Doubt—Instruction Approved.
320. Same—Contrary View.
321. Instructing that Jury Need not be Satisfied Beyond a Reasonable Doubt of Each Link.
322. Instructing that Circumstantial Evidence Alone may Warrant Conviction
323. Instructions Disparaging Circumstantial Evidence.
324. Miscellaneous Instructions on Circumstantial Evidence.

§ 312. When necessary or proper.

Where circumstantial evidence alone is relied on for conviction, instructions as to the law governing this class of evidence should be given to the jury. In jurisdictions where the statutes require the trial court to give to the jury all the law applicable to a case, whether requested or not, the court is bound to instruct the jury on the law of circumstantial

evidence, both when a request for such instruction is made and when there is no request. The omission and the refusal to give such instructions are equally erroneous,[1] and are generally a ground for reversal;[2] and in one state no objection or exception is necessary to save the error for review.[3] So, if a request for an instruction on circumstantial evidence is made, the court is bound to instruct on the subject, though the requested instruction is erroneous.[4] The omission to charge on the nature and conclusiveness of circumstantial evidence is not cured by the giving of an instruction on reasonable doubt.[5] But in one case it was held that, although

[1] Struckman v. State, 7 Tex. App. 581; Hunt v. State, 7 Tex. App. 212; Polanka v. State, 33 Tex. Cr. App. 634; McCamant v. State (Tex. Cr. App.) 37 S. W. 437; Robertson v. State (Tex. Cr. App.) 26 S. W. 728; Lopez v. State (Tex. Cr. App.) 40 S. W. 595; Alderman v. State (Tex. Cr. App.) 23 S. W. 685; Montgomery v. State (Tex. Cr. App.) 20 S. W. 926; Scott v. State (Tex. Cr. App.) 23 S. W. 685; Smith v. State, 28 Tex. App. 309; Navarrow v. State (Tex. App.) 17 S. W. 545; Daniels v. State (Tex. App.) 14 S. W. 395; Deaton v. State (Tex. App.) 13 S. W. 1009; Green v. State (Tex. Cr. App.) 34 S. W. 283; Poston v. State (Tex. Cr. App.) 35 S. W. 656; Martin v. State, 32 Tex. Cr. App. 441; Crowley v. State, 26 Tex. App. 578; Crowell v. State, 24 Tex. App. 404; Boyd v. State, 24 Tex. App. 570; Willard v. State, 26 Tex. App. 126; Childers v. State, 37 Tex. Cr. App. 392; Scott v. State (Tex. App.) 12 S. W. 504; State v. Moxley, 102 Mo. 374; State v. Donnelly, 130 Mo. 642; Hamilton v. State, 96 Ga. 301; People v. Scott, 10 Utah, 217; United States Exp. Co. v. Jenkins, 64 Wis. 542.

[2] Willard v. State, 26 Tex. App. 126; Crowley v. State, 26 Tex. App. 578; Montgomery v. State (Tex. Cr. App.) 20 S. W. 926; Poston v. State (Tex. Cr. App.) 35 S. W. 656; Deaton v. State (Tex. App.) 13 S. W. 1009; Navarrow v. State (Tex. App.) 17 S. W. 545; Scott v. State (Tex. Cr. App.) 23 S. W. 685; Polanka v. State, 33 Tex. Cr. App. 634; Hanks v. State (Tex. Cr. App.) 56 S. W. 922.

[3] Polanka v. State, 33 Tex. Cr. App. 634; Montgomery v. State (Tex. Cr. App.) 20 S. W. 926.

[4] People v. Scott, 10 Utah, 217.

[5] Struckman v. State, 7 Tex. App. 581; Hamilton v. State, 96 Ga. 301.

the court failed to charge specially as to circumstantial evidence, this was not ground for new trial, when the court did very fully and liberally to defendant instruct as to reasonable doubt, and the amount and character of testimony necessary to a conviction.[6] And in another case it was held that an instruction that, if the jury were satisfied beyond a reasonable doubt that a crime had been committed, and if, from all the circumstances proven connected with the commission of the alleged crime, the jury were satisfied of defendant's guilt beyond a reasonable doubt, they should return a verdict accordingly, sufficiently expressed the rule that circumstantial evidence must exclude every reasonable hypothesis except that of guilt, in order to justify a conviction.[7] In jurisdictions where the court is not bound to give all the law applicable to a case of its own motion, the refusal of a request for an instruction on circumstantial evidence is erroneous, where this is the only evidence in the case on which to base a conviction.[8] But where the court, at the instance of the state, instructs the jury as to the right to convict upon circumstantial evidence, and thereafter gives all the instructions asked by the defendant in respect to such evidence, the latter has no cause of complaint that the first instructions failed to give any rules for weighing and determining the effect of circumstantial testimony, or to suggest the need of extra caution respecting such testimony.[9] Instructions on the weight and effect of

[6] Barrow v. State, 80 Ga. 191.

[7] Tatum v. State (Neb.) 85 N. W. 40.

[8] Territory v. Lermo, 8 N. M. 566; Wantland v. State, 145 Ind. 38. Compare State v. Roe, 12 Vt. 93, where it was held that, as to circumstantial evidence, it rests in the discretion of the trial judge to what extent he will go in laying down to the jury the approved rules for weighing such evidence. In this case the trial court refused an instruction on the subject.

[9] State v. Ingram, 16 Kan. 14.

circumstantial evidence should not be given, where proof of guilt is not dependent upon circumstantial evidence, but rests on direct and positive testimony.[10] It is not error to omit to give the jury a charge explaining the rules governing in cases of circumstantial evidence, where the evidence relied upon for a conviction is wholly circumstantial.[11] If there is direct evidence to prove that defendant committed the crime charged, the court may properly refuse to give instructions based on the hypothesis that the case is purely one of circumstantial evidence, and stating the rules as to the weight and conclusiveness of such evidence.[12] No instruction on circumstantial evidence is necessary when defendant confesses his guilt.[13] Proof of confessions by defendant

[10] Purvis v. State, 71 Miss. 706; State v. Fairlanb, 121 Mo. 137; Ellis v. State, 33 Tex. Cr. App. 86; Clore v. State, 26 Tex. App. 624; Leeper v. State, 29 Tex. App. 154; Conners v. State, 31 Tex. Cr. App. 453; Rodgers v. State, 36 Tex. Cr. App. 563; Campbell v. State, 35 Tex. Cr. App. 160; Moore v. State, 97 Ga. 759; Granado v. State, 37 Tex. Cr. App. 426; Evans v. State (Tex. Cr. App.) 31 S. W. 648; White v. State, 32 Tex. Cr. App. 625; Blanton v. State (Tex. Cr. App.) 26 S. W. 624; Vaughan v. State, 57 Ark. 1; Colter v. State, 37 Tex. 284.

[11] Jones v. State, 23 Tex. App. 501; Stone v. State, 22 Tex. App. 185; Coleman v. State, 87 Ala. 14; Rains v. State, 88 Ala. 91; Weathersby v. State, 29 Tex. App. 278; Dunn v. State (Tex. Cr. App.) 63 S. W. 571. See, also, Beason v. State (Tex. Cr. App.) 63 S. W. 633. Contra, see State v. Andrews, 62 Kan. 207, wherein it was held error to refuse an instruction on circumstantial evidence, where the evidence of defendant's guilt was partly circumstantial.

[12] Cotton v. State, 87 Ala. 75; Rains v. State, 88 Ala. 91; Upchurch v. State (Tex. Cr. App.) 39 S. W. 371; State v. Donnelly, 130 Mo. 642; Weathersby v. State, 29 Tex. App. 278; Wilson v. State (Ala.) 29 So. 569; People v. Lem Deo, 132 Cal. 199; Thomas v. State (Tex. Cr. App.) 62 S. W. 919.

[13] Albritton v. State (Tex. Cr. App.) 26 S. W. 398; Jackson v. State (Tex. Cr. App.) 62 S. W. 914. Where the record in a prosecution for murder shows that defendant made a confession admitting his presence and participation in the death of deceased, but claimed

obviates the necessity of stating the law applicable to circumstantial evidence,[14] even though such proof is made by the testimony of an accomplice,[15] unless the evidence shows him utterly unworthy of belief, and his testimony is the only positive evidence given.[16] When there is testimony to show that defendant confessed his guilt, it is, of course, proper to refuse an instruction that the evidence in the case is purely circumstantial.[17] So, instructions as to the weight of circumstantial evidence are properly refused when defendant's guilt is testified to positively by eye-witnesses,[18] and it makes no difference that such witness is the prosecuting witness in the case,[19] or an accomplice in the commission of the crime charged.[20] Where the only issue was whether the stolen property belonged to the prosecutor, and he testified that it did, a failure to charge on circumstantial evidence is not error.[21] But though the court may not be

that he participated because coerced to do so, the case is taken out of the realm of circumstantial evidence, and it is consequently not error for the court to fail to charge thereon.

[14] White v. State, 32 Tex. Cr. App. 625; Langdon v. People, 133 Ill. 382; State v. Robinson, 117 Mo. 649; Carr v. State, 24 Tex. App. 562; Perry v. State, 110 Ga. 234; Ricks v. State (Tex. Cr. App.) 56 S. W. 928.

[15] Wampler v. State, 28 Tex. App. 352; Vaughan v. State, 57 Ark. 1.

[16] State v. Donnelly, 130 Mo. 642.

[17] Green v. State, 97 Ala. 59.

[18] Purvis v. State, 71 Miss. 706; Camphell v. State (Tex. Cr. App.) 38 S. W. 171; Thompson v. State, 33 Tex. Cr. App. 217; Jones v. State, 31 Tex. Cr. App. 177; Evans v. State (Tex. Cr. App.) 31 S. W. 648; Gibbs v. State (Tex. Cr. App.) 20 S. W. 919; Adams v. State, 34 Tex. Cr. App. 470.

[19] Evans v. State (Tex. Cr. App.) 31 S. W. 648. See, also, Granado v. State, 37 Tex. Cr. App. 426; Gann v. State (Tex. Cr. App.) 59 S. W. 896.

[20] Thompson v. State, 33 Tex. Cr. App. 217. See, also, Thomas v. State (Tex. Cr. App.) 62 S. W. 919.

[21] Gann v. State (Tex. Cr. App.) 59 S. W. 896.

compelled to charge on circumstantial evidence, where there is direct evidence of guilt, it is proper to do so where the evidence in the case was largely circumstantial.[22]

§ 313. Instructing that circumstantial evidence must be equal to testimony of one eye-witness.

According to one text writer (Mr. Starkie): "In no case, as it seems, ought the force of circumstantial evidence, sufficient to warrant conviction, be inferior to that which is derived from the testimony of a single witness, the lowest degree of direct evidence."[23] In a number of decisions, the correctness of this rule is denied; it being held that the test of the sufficiency of circumstantial evidence to warrant a conviction in a criminal case is not whether it produces as full a conviction as would be produced by the positive testimony of an eye-witness, but whether it satisfies the mind of the jury of the defendant's guilt, to the exclusion of every reasonable doubt.[24] Whether considered correct as a rule of evidence or not, the courts are all agreed that it should not be given to the jury in the shape of an instruction, and, though often requested, the trial courts have invariably refused to give instructions which in effect state the rule given by Mr. Starkie, and such refusal has invariably been sustained on appeal.[25] Thus, the refusal of the following instructions has been held proper: "Before the jury

[22] Rountree v. State (Tex. Cr. App.) 58 S. W. 106.

[23] Starkie, Ev. p. 578.

[24] Banks v. State, 72 Ala. 522; Thornton v. State, 113 Ala. 43; Foulk v. State, 52 Ala. 415.

[25] Bland v. State, 75 Ala. 574; Mickle v. State, 27 Ala. 20; Banks v. State, 72 Ala. 522; Thornton v. State, 113 Ala. 43; Cicely v. State, 13 Smedes & M. (Miss.) 202; Jane v. Com., 2 Metc. (Ky.) 30; State v. Carson, 115 N. C. 743; State v. Allen, 103 N. C. 433; State v. Gee, 92 N. C. 756; State v. Norwood, 74 N. C. 248; Rea v. State, 8 Lea (Tenn.) 363.

can convict the defendants, they must be as well satisfied from the combination of circumstances that the defendant did the killing, as though an eye-witness had testified before them that the defendants did the killing."[26] That, to authorize conviction, "circumstantial evidence should be just as clear and convincing as where the facts are testified to by eye-witnesses."[27] That "the strength of circumstantial evidence must be equal to the strength of one credible eye-witness."[28] On the other hand, it has been held proper to instruct "that, where the evidence is entirely circumstantial, yet is not only consistent with the guilt of defendant, but is inconsistent with any other rational conclusion, the law makes it the duty of the jury to convict, notwithstanding such evidence may not be as satisfactory to their minds as the direct testimony of credible eye-witnesses."[29] In commenting on this (Starkie's) rule, it was said in a well-reasoned case: "Under the operation of this rule, the juror would be compelled to act, not upon the direct effect which the evidence has produced in his mind. He would be not only required to inquire into the state of his mental convictions, to ascertain whether the evidence offered in support of the prosecution had excluded from his mind all reasonable doubt; he would be forced to go further, and to institute a comparison between the degree of conviction produced by the evidence and that which would be the result of the testimony of one direct witness; for that would be the standard by which he would have to determine the degree of certainty in the proof which would authorize conviction or require an

[26] Banks v. State, 72 Ala. 522.

[27] Thornton v. State, 113 Ala. 43.

[28] State v. Carson, 115 N. C. 743.

[29] State v. Slingerland, 19 Nev. 135, People v. Cronin, 34 Cal. 202; People v. Daniels (Cal.) 34 Pac. 233.

acquittal. We have daily experience that the same evidence, in judicial proceedings, does not invariably produce the same degree of conviction in different minds. Hence we may well conclude that the legitimate force of the direct evidence of a single witness would be differently estimated by persons whose minds were differently constituted. The practical application of the principle contained in the instruction would, in effect, be to adopt a standard for estimating the force of this species of evidence, which would differ with the varying mental organization of each juror. Its practical effect, in all probability, would be, on the one hand, to lead to convictions in cases where, by the use of the more intelligible and safe rule, acquittals would follow; and, on the other, to produce acquittals, where, by the same test, the parties would merit conviction."[30] So, in another case, the reviewing court, in sustaining the refusal of such an instruction, gave the following reasons: "The instruction only says, in a different form, that the jury ought not to convict unless every reasonable doubt was excluded, and is therefore unnecessary. If it means more, it would require a certainty which would exclude circumstantial evidence altogether; and the danger is that, to many minds, it would appear to fairly imply the higher degree of certainty."[31]

§ 314. Instructing that proof must be inconsistent with any other reasonable conclusion than that of guilt.

Mr. Greenleaf says that, "where a criminal charge is to be proved by circumstantial evidence, the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with every other rational conclusion."[32] And in a well-considered Indiana decision it is said: "The true test by which

[30] Cicely v. State, 13 Smedes & M. (Miss.) 211, 212.
[31] Rea v. State, 8 Lea (Tenn.) 363
[32] 1 Greenleaf, Ev. § 34.

to determine the value of circumstantial evidence, in respect to its sufficiency to warrant a conviction in a criminal case, is not whether the proof establishes circumstances which are consistent, or which coincide with the hypothesis of the guilt of the accused, but whether the circumstances, satisfactorily established, are of so conclusive a character, and point so surely and unerringly to the guilt of the accused, as to exclude every reasonable hypothesis of his innocence. The force of circumstantial evidence being exclusive in its character, the mere coincidence of a given number of circumstances with the hypothesis of guilt, or that they would account for, or concur with, or render probable the guilt of the accused, is not a reliable or admissible test, unless the circumstances are to such a degree of cogency and force as, in the order of natural causes and effect, to exclude, to a moral certainty, every other hypothesis except the single one of guilt. * * * The proof must not only coincide with the hypothesis of guilt, but it must be inconsistent with every other rational conclusion."[33] Instructions stating the substance of this rule are very frequently given to the jury where circumstantial evidence is relied on for a conviction. Thus, in one jurisdiction where the court is required in all trials of felony to state in its charge all the law applicable to the case, the court is bound to instruct the jury, in substance, that, where circumstantial evidence is relied on for a conviction, the circumstances must be such as to exclude every other reasonable hypothesis except that of guilt,[34] and a failure to give this instruction is held to be reversible er-

[33] Cavender v. State, 126 Ind. 48; Stout v. State, 90 Ind. 1; Binns v. State, 66 Ind. 428; Sumner v. State, 5 Blackf. (Ind.) 579.

[34] Smith v. State, 35 Tex. Cr. App. 618; Hunt v. State, 7 Tex. App. 212; Smith v. State, 7 Tex. App. 332; Jones v. State, 34 Tex. Cr. App. 490; Harris v. State, 34 Tex. Cr. App. 494.

ror.[35] So, whether the court is or is not required to instruct on its own motion on all the law applicable to a case, the refusal to give an instruction to this effect, when requested, is erroneous, where circumstantial evidence alone is relied on.[36] There is some difference of opinion as to whether error in omitting or refusing an instruction to this effect may be cured by other instructions given. According to some decisions, an ordinary charge as to the law of reasonable doubt is not sufficient.[37] But in one case it was held not error to refuse such an instruction, where the court sufficiently charged as to reasonable doubt, and also instructed that the burden of proof rested on the state.[38] And in another it was held not error to refuse an instruction "that, before the defendant could be convicted on circumstantial evidence, the circumstances should all concur to show that he committed the crime, and must all be inconsistent with any other rational conclusion," where the court charged that: "You are instructed that circumstantial evidence is to be regarded by the jury in all cases, and is many times quite as conclusive in its convincing power as direct and positive evidence of eye-witnesses. When it is strong and satisfactory, the jury should so consider it, neither enlarging nor belittling its force. It should have its just and fair weight with you; and if, when it is all taken as a whole, and fairly and candidly weighed, it convinces the guarded judgment, you should convict, and on such conviction you are not to fancy situations or circumstances which do not appear in the evi-

[35] Harris v. State, 34 Tex. Cr. App. 494.

[36] Wantland v. State, 145 Ind. 38; Kollock v. State, 88 Wis. 663; People v. Dick, 32 Cal. 216. See, also, Tatum v. State (Neb.) 85 N. W. 40; State v. Andrews (Kan.) 61 Pac. 808.

[37] Hunt v. State, 7 Tex. App. 212; Smith v. State, 7 Tex. App. 382.

[38] Jones v. State, 61 Ark. 88. See, also, Tatum v. State (Neb.) 85 N. W. 40.

dence, but you are to make those just and reasonable inferences from circumstances proven which the guarded judgment of a reasonable man would ordinarily make under like circumstances. * * * And if, in connection with the positive evidence before you, you then have no reasonable doubt as to the defendant's guilt, you should convict him, but, if you then entertain such doubt, you should acquit him."[39] The following charges have been held proper on this head: That, to justify a conviction upon circumstantial evidence alone, "the facts relied upon must be absolutely incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt."[40] That, "when a conviction is sought alone upon circumstantial testimony, the circumstances, taken together, must be such as to be incapable of explanation upon any other rational hypothesis but that of defendant's guilt."[41] That the jury must "find the guilt of defendant beyond a reasonable doubt, and that the facts and circumstances tending to prove his guilt were not only consistent with any rational theory but that of the guilt of the defendant," and that "the proven facts must be inconsistent with any rational hypothesis consistent with his innocence."[42] "That the testimony must not only be consistent with the guilt of the defendants, but inconsistent with any other rea-

[39] State v. Seymour, 94 Iowa, 699.

[40] Hunt v. State, 7 Tex. App. 212; Smith v. State, 7 Tex. App. 382.

[41] Crutchfield v. State, 7 Tex. App. 65; Irvin v. State, 7 Tex. App. 109.

[42] State v. David, 131 Mo. 380. Compare State v. Taylor, 111 Mo. 538, where the following instruction, "Before you can convict on circumstantial evidence, it must be of such character and weight as to exclude all reasonable hypothesis of defendant's innocence," was held bad, as being too meager, and as failing, too, to state the rule in such a way as to make it a safe guide for the jury.

sonable supposition."[43] That "the circumstances must be proved to your entire satisfaction, and, when the circumstances are established, they must point conclusively to the person charged, and must be inconsistent with any other reasonable hypothesis."[44] That, to warrant a conviction, "each fact necessary to establish guilt of the accused must be proved by competent evidence beyond a reasonable doubt, and the facts and circumstances proved should not only be consistent with guilt of the accused, but inconsistent with any other reasonable hypothesis or conclusion than that of guilt, and producing in your minds a reasonable and moral certainty that the accused committed the offense."[46] That, to authorize conviction on circumstantial evidence, "each of the circumstances should not only be consistent with the defendant's guilt, but they must be inconsistent with any other rational conclusion or reasonable hypothesis, and such as to leave no reasonable doubt."[47] A charge that circumstantial evidence must produce, "in effect, a reasonable and moral certainty that the accused, and no other person, committed the offense charged; but in such case it is not sufficient that the circumstances coincided with, accounted for, and therefore rendered probable, the guilt of defendant. They must exclude to a moral certainty every other reasonable hypothesis,"—is not error.[48] It will be no-

[43] State v. Davenport, 38 S. C. 348, in which the reviewing court said that, while this was a slight departure from the words generally used, it was not error.

[44] State v. Milling, 35 S. C. 16.

[45] Baldez v. State, 37 Tex. Cr. App. 413.

[46] Chitister v. State, 33 Tex. Cr. App. 635.

[47] State v. Asbell, 57 Kan. 398.

[48] Gonzales v. State (Tex. Cr. App.) 57 S. W. 667.

ticed that in all these instructions the word "reasonable" or "rational" is used to qualify the word "conclusion" or "hypothesis." While there are a few decisions in which instructions omitting these words have been approved,[49] there are others in which a refusal of requested instructions has been upheld, because these words were omitted from the instructions.[50] Thus it was held proper to refuse an instruction that the jury should acquit unless the evidence was "such as to exclude every hypothesis but that of guilt."[51] An instruction that "the humane provision of the law is that a conviction should not be had on circumstantial evidence, unless it excludes to a moral certainty every reasonable hypothesis but that of the defendant's guilt," has been held properly refused on account of the word "humane," which was thought to render the instruction argumentative.[52] So it has been held improper to instruct the jury to convict if the facts and circumstances cannot be reasonably accounted for by any other reasonable hypothesis than that of defendant's guilt. In condemning this instruction, the court said: "If this were the law, the more mysterious and obscure the crime, the more difficult it would be for one environed by suspicious but inconclusive circumstances, and who was charged with its perpetration, to defend himself; for the verdict would not depend upon the strength of the evidence against him, but upon the fact that the jury could not satisfactorily account for the crime."[53]

[49] Black v. State, 1 Tex. App. 368; Riley v. State, 88 Ala. 188; Mose v. State, 36 Ala. 212; Coleman v. State, 59 Ala. 52.

[50] Crawford v. State, 112 Ala. 1; People v. Strong, 30 Cal. 151. See, also, State v. Glass, 5 Or. 81.

[51] Crawford v. State, 112 Ala. 1.

[52] Dennis v. State, 112 Ala. 64.

[53] Webb v. State, 73 Miss. 456.

§ 315. Instructing that circumstantial evidence must exclude to a moral certainty every hypothesis but that of guilt.

The jury may properly be instructed that, before they can convict the defendant in cases depending on circumstantial evidence, the evidence should be such as to exclude to a moral certainty every hypothesis save that of guilt.[54] The use of the word "absolute" before the word "certainty" has been held to vitiate the instruction, and to make its refusal proper, on the ground that the word "absolute" suggests a degree of certainty greater than moral certainty.[55] An instruction that "the hypothesis contended for by the prosecution must be established to an absolute moral certainty, to the entire exclusion of any other hypothesis being true, or the jury must find the defendant not guilty," was held properly refused. "Absolute moral certainty excludes not only reasonable doubt, but all doubt. It describes a fixed and uncompromising attitude of the mind, of which men are not capable in any of the situations of life. It means such a degree of certainty as precludes the possibility of error or mistake, and as presupposes the infallibility of witnesses and jurors."[56]

§ 316. Instructing that circumstantial evidence must exclude every "possible" hypothesis except that of guilt.

An instruction which requires acquittal "unless the evi-

[54] Mose v. State, 36 Ala. 211; Black v. State, 1 Tex. App. 368; People v. Dick, 32 Cal. 214; People v. Anthony, 56 Cal. 397. See, also, ante, c. 28, "Cautionary Instructions on Reasonable Doubt."

[55] People v. Davis, 64 Cal. 440; State v. Glass, 5 Or. 73.

[56] State v. Glass, 5 Or. 82.

dence should be such as to exclude to a moral certainty every possible hypothesis but that of guilt," is erroneous, and properly refused. "A doubt which requires an acquittal must be 'actual and substantial, not mere possibility or speculation.' It is not a mere possible doubt, because everything relating to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt." Conviction resting on human testimony can never attain the certainty of mathematical demonstration, or repel all possible doubt of its correctness. A rule so exacting would paralyze the punitive arm of the law. In giving an instruction to the jury that the evidence, to authorize conviction, should be so strong as to lead the mind to the conclusion that the accused cannot be guiltless, the court should explain that it is moral and not mathematical certainty of proof which the law requires.[57]

§ 317. Instructing that circumstances must be absolutely incompatible with innocence.

The following instructions have been held erroneous and properly refused: "That, to justify the inference of legal guilt from circumstantial evidence, the existence of inculpatory facts must be absolutely and to a demonstration incompatible with the innocence of the accused."[58] That, to convict on circumstantial evidence, the facts and circumstances "must be absolutely incompatible with the innocence of the accused."[59] That, to warrant conviction on circumstantial evidence alone, the facts and circumstances must be

[57] Mose v. State, 36 Ala. 211, 231; Coleman v. State, 59 Ala. 52. And see, generally, ante, c. 28.

[58] People v. Bellamy, 109 Cal. 610.

[59] Cornish v. Territory, 3 Wyo. 95. See People v. Neufeld, 165 N. Y. 43, wherein such an instruction was given.

such "as are absolutely inconsistent, upon any reasonable hypothesis, with the innocence of the accused."[60] These instructions all require too high a degree of proof. In effect, they direct the jury that defendant cannot be convicted if there is a "possible" doubt of his guilt. "Absolute, metaphysical, and demonstrative certainty is not essential to proof by circumstances. It is sufficient if they produce moral certainty, to the exclusion of every reasonable doubt."[61]

§ 318. Instructing that circumstantial evidence should produce nearly the same degree of certainty as direct evidence.

According to some decisions, it is not improper to charge the jury that, "in order to convict, the circumstantial evidence should be such as to produce nearly the same degree of certainty as that which arises from direct testimony, and to exclude a rational probability of innocence."[62] Commenting on this instruction, the reviewing court said in one of these decisions: "It was but another mode of telling the jury that, although, as a general rule, circumstantial evidence, in the nature of things, may not be so entirely satisfactory proof of a fact as the positive testimony of credible eyewitnesses, yet they must convict if they were satisfied of the guilt of the defendant, to the exclusion of all rational probabilities."[63] The reasoning is not very satisfactory. As guilt must be established beyond a reasonable doubt in all cases, it would seem that circumstantial evidence should be such as to produce the same degree of certainty as that which arises

[60] Carlton v. People, 150 Ill. 181.

[61] Carlton v. People, 150 Ill. 181, 191; 1 Starkie, Ev. § 79.

[62] People v. Cronin, 34 Cal. 191; State v. Nelson, 11 Nev. 334; State v. Bryan, 19 Nev. 365.

[63] People v. Cronin, 34 Cal. 191.

from direct testimony, or, in other words, the probative force of the two kinds of evidence must be identical.

§ 319. Instructing that each link in the chain of circumstantial evidence must be proved beyond reasonable doubt —Instruction approved.

In a number of jurisdictions, the rule is laid down that, when the state relies on circumstantial evidence to convict the defendant, each fact in a chain of facts from which the main fact in issue is to be inferred must be proved by competent evidence, and by the same weight and force of evidence as if each were the main fact in issue.[64] The same rule has been variously expressed as follows: "The several circumstances upon which the conclusion depends must be fully established by proof. They are facts from which the main fact is to be inferred; and they are to be proved by competent evidence, and by the same weight and force of evidence, as if each one were itself the main fact in issue."[65] When independent facts and circumstances are relied upon to identify the accused as the person committing the offense charged, and, taken together, are regarded as a sufficient basis for a presumption of his guilt to a moral certainty or beyond a reasonable doubt, each material independent fact or circumstance necessary to complete such chain or series of independent facts, tending to establish a presumption of guilt, should be established to the same degree of certainty as the main fact which these independent circumstances, taken to-

[64] Harrison v. State, 6 Tex. App. 42; Brookin v. State, 26 Tex. App. 121; Johnson v. State, 18 Tex. App. 385; Scott v. State, 19 Tex. App. 325; People v. Stewart, 75 Mich. 21; People v. Anthony, 56 Cal. 397.

[65] Com. v. Webster, 5 Cush. (Mass.) 295, 317.

gether, tend to establish,—that is, each essential, independent fact in the chain or series of facts relied upon to establish the main fact must be established to a moral certainty, or beyond a reasonable doubt.[66] It has accordingly been held proper to instruct that "each circumstance essential to the conclusion of the defendant's guilt should be fully established in the same manner and to the same extent as if the whole issue rested upon it. You must be satisfied that each link in the chain of circumstances essential to that conclusion sought to be established by the prosecution has been fully proved beyond a reasonable doubt, and to your entire satisfaction; otherwise, you must acquit."[67] That, "when the evidence against the defendant is made up wholly of a chain of circumstances, and there is a reasonable doubt as to one of the facts essential to establish guilt, it is the duty of the jury to acquit."[68] That, to warrant a conviction "on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proved beyond a reasonable doubt."[69] So it has been held error to refuse an instruction that, "in order to convict the defendant upon that class of evidence [circumstantial], you must be satisfied, beyond any reasonable doubt, that each material fact or necessary link in the chain has been proven; and, if you have any reasonable doubt about any one of the necessary facts or links constituting the chain of circumstances, then you should acquit the defendant."[70] Or to refuse an instruction that "each fact in any chain of facts from which the defendant's guilt is to be inferred must be proved by the same weight, degree, and force of evidence as if it were the main

[66] People v. Phipps, 39 Cal. 333; People v. Ah Chung, 54 Cal. 398.
[67] People v. Ah Chung, 54 Cal. 398.
[68] People v. Anthony, 56 Cal. 397.
[69] Brookin v. State, 26 Tex. App. 121.
[70] People v. Stewart, 75 Mich. 21.

fact of the defendant's guilt itself. All of such facts must be consistent each with all of the others, and with the defendant's guilt, and all, taken together, must be so strong as to exclude, to a moral certainty, every reasonable hypothesis but that of the defendant's guilt."[71] Yet an instruction that the jury should acquit "if a single circumstance proven is inconsistent with the guilt of the accused" was held to be properly refused, the court saying: "There is a distinction between the circumstances proven and a necessary link in the chain of circumstances."[72]

§ 320. Same—Contrary view.

In a number of jurisdictions, such instructions are considered erroneous. Thus, in one state it was held proper in a number of decisions to refuse an instruction that, "if there is a single link wanting in the chain of circumstantial evidence, the jury are bound to acquit the defendant," on the ground that it is misleading.[73] In one of these decisions the court said: "We have found no rule of law which declares that circumstantial evidence necessarily consists of links, or which prescribes any definite number of circumstances as necessary to the sufficiency of circumstantial proof."[74] In another state an instruction that, "as the evidence in the case is wholly circumstantial, you must be satisfied beyond a reasonable doubt of each necessary link in the chain of circumstances to establish the defendant's guilt," was refused on the ground that it is a reasonable doubt arising from a consideration of all the evidence in the case which warrants acquittal. This reason is about as good as can be

[71] Johnson v. State, 18 Tex. App. 385.

[72] People v. Willett, 105 Mich. 110.

[73] Tompkins v. State, 32 Ala. 569; Wharton v. State, 73 Ala. 366; Grant v. State, 97 Ala. 35; Harvey v. State, 125 Ala. 47.

[74] Tompkins v. State, 32 Ala. 569, 573.

given. The weight of authority is to the effect that the reasonable doubt which warrants an acquittal must arise from the evidence considered in its entirety, and not from isolated facts or circumstances.[75] In another jurisdiction it was held proper to refuse an instruction that "every link of the chain of circumstances must be so complete and consistent with the guilt of defendant as to exclude every reasonable hypothesis of his innocence, and so perfect and complete as to establish his guilt to a moral certainty." The reviewing court said: "The circumstances might point to two persons as the guilty parties; the defendant being one of the two. One or more of the circumstances proved might have no reference whatever to the defendant, or to the crime charged, or form no part of 'the chain,' or not point to any particular fact connected with the crime, and the jury be therefore justified in not considering it at all."[76] So, an instruction that, if there was any one single fact proved to the satisfaction of the jury which was inconsistent with defendant's guilt, that was sufficient to raise a presumption of doubt, and the jury should acquit, was held properly refused, as it permitted the consideration of different facts as distinct and independent propositions.[77] It was also properly refused because it did not restrict the jury to the consideration of the material facts upon which defendant's guilt must be predicated.[78] Even in cases where the court has not been called upon to approve or condemn instructions of this character, the likening of circumstantial evidence to a chain has been condemned. Thus, in one case it was said: "It is incorrect to speak of a body of circumstantial evidence as a chain, and allude to

[75] State v. Hayden, 45 Iowa, 11. See, also, Smith v. State (Neb.) 85 N. W. 49.

[76] Timmerman v. Territory, 3 Wash. T. 445.

[77] Smith v. State (Neb.) 85 N. W. 49.

[78] Smith v. State (Neb.) 85 N. W. 49.

the different circumstances as the links constituting such chain; for a chain cannot be stronger than its weakest link, and, if one link fails, the chain is broken. This figure of speech may perhaps be correctly applied to the ultimate and essential facts necessary to conviction in criminal cases, since if one be omitted, or be not proven beyond a reasonable doubt, an acquittal must follow. It is not true, however, that each and every of the minor circumstances introduced to sustain these ultimate facts must be proven with the same degree of certainty. Some of these circumstances may fail of proof altogether, and be discarded from consideration by the jury, yet the ultimate fact to establish which they were presented may be shown beyond a reasonable doubt. The evidence in cases similar to the one before us has been more aptly likened to a cable. One, two, or a half-dozen strands may part, yet the cable still remains so strong that there is scarcely a possibility of its breaking."[79] "The cable metaphor * * * illustrates the force of circumstantial evidence more clearly, perhaps, than does the chain comparison. In the cable simile, the circumstances which tend to establish the ultimate circumstances or facts are aptly compared with the strands of a cable. All such evidentiary matters going to prove such ultimate circumstances or facts need not be established beyond a reasonable doubt, and still each ultimate fact or circumstance must be proved beyond a reasonable doubt."[80] "Ordinarily, in a case resting in circumstances, a linked arrangement of fact to fact is observable in a part or parts of the evidence. But a guilty person is more commonly hemmed in by a throng of circumstances than inclosed by facts arranged chainwise. Release from a chain comes when the weakest link gives way; but escape from a crowd does

[79] Clare v. People, 9 Colo. 122.

[80] State v. Gleim, 17 Mont. 17, 28, 29. See, also, Rayburn v. State (Ark.) 63 S. W. 356.

not necessarily depend on the presence or absence of one or another, or even, perhaps, the greatest number, of the individuals composing it. * * * The fault in the instruction lies in its tendency to lead the jury to regard all the facts as disposed in a chain, every link in which, if such were the case, would need to be proved beyond a reasonable doubt."[81]

§ 321. Instructing that jury need not be satisfied beyond a reasonable doubt of each link.

In one jurisdiction it was held not erroneous to give the following instruction: "The rule requiring the jury to be satisfied of a defendant's guilt beyond a reasonable doubt, in order to warrant a conviction, does not require that the jury should be satisfied, beyond a reasonable doubt, of each link in the chain of circumstances relied upon to establish the defendant's guilt. It is sufficient if, taking the testimony altogether, the jury are satisfied beyond a reasonable doubt."[82] In other jurisdictions, the giving of instructions the same in substance has been held reversible error, and their refusal proper.[83] The objection to such an instruction is that the metaphor used is liable to confuse and mislead, since a chain cannot be stronger than its weakest link, and, if the chain meant is the chain of the ultimate and essential facts necessary to conviction, the instruction would, of course, be erroneous. What is usually meant by such an instruction is that every minor circumstance tending to prove ultimate facts need not be proven beyond a reasonable doubt, but this

[81] Leonard v. Washington Territory, 2 Wash. T. 397.

[82] Bressler v. People, 117 Ill. 422, 438.

[83] Graves v. People, 18 Colo. 181; Clare v. People, 9 Colo. 122; Marion v. State, 16 Neb. 349; Leonard v. Washington Territory, 2 Wash. T. 381; State v. Gleim, 17 Mont. 17; State v. Young, 9 N. D. 165, 82 N. W. 420.

the jury may not understand without explanation.[84] The proposition which the court doubtless intended to announce is that it was not necessary for the state to have proven, beyond a reasonable doubt, every circumstance on which a conviction depended. This would have been, in our judgment, good law. But while such was the purpose which the court sought to accomplish, it is exceedingly doubtful if the language employed did not mislead the jury. The metaphor used is inaccurate, and liable to misconstruction. [85] "The jury are quite as likely to have applied that portion of the instruction referring to the links to those facts which the law requires to be established beyond a reasonable doubt to warrant conviction as to those evidentiary matters which go to prove such facts, and one or more of which may fail, while the ultimate fact might still be sufficiently established."[86] Where, however, the court instructs: "The guilt of the defendant shall be established to your satisfaction, beyond a reasonable doubt, before you can convict him, but it does not require that each circumstance in the chain of evidence shall be established to your satisfaction beyond a reasonable doubt. It is sufficient if, on the whole case, you are satisfied beyond a reasonable doubt, although the individual circumstances may not themselves be so established;" and the defendant's attorney argued: "This is a case depending on a chain of circumstantial evidence. No chain is stronger than its weakest link. If any link in this chain is weak or broken by the evidence of defendant, then the entire chain is broken and destroyed, and you should acquit the defendant,"—it is proper for the

[84] Clare v. People, 9 Colo. 122; Marion v. State, 16 Neb. 349; Leonard v. Washington Territory, 2 Wash. T. 397.

[85] Clare v. People, 9 Colo. 122.

[86] Graves v. People, 18 Colo. 181; State v. Gleim, 17 Mont. 17.

court to charge, in order that the jury might not get an erroneous impression of the force and effect to be given circumstantial evidence, as follows: "We often speak of a chain of circumstantial evidence. This is an expression used in these instructions, and found in the law books. It is a metaphor used to convey an idea. It is not strictly accurate. It is more accurate to speak of the series of facts given in evidence in a circumstantial evidence case, not as links in a chain, but as threads or strands making a rope or cord of evidence. The individual fibers may be of very small strength, in themselves unable to sustain any weight of consequence, but when sufficiently numerous, and properly intertwined with others of like kind, may make the strongest cordage,—cordage sufficient to hold the largest ship in the greatest storm."[87]

§ 322. Instructing that circumstantial evidence alone may warrant conviction.

There is no impropriety in instructing the jury that "they may, from circumstantial evidence alone, find the defendant guilty, when the facts established are inconsistent with any other theory than that of his guilt."[88] Or that, if the evidence of the defendant's guilt is convincing, the jury are bound to convict her, though there were no eyewitnesses to the fact.[89] But it is erroneous to instruct that, "when direct evidence cannot be produced, minds will form their judgments on circumstances, and act on the probabilities of the case." The law requires the jury to be convinced of defendant's guilt, and does not permit the jury to act upon evidence insufficient to produce belief or conviction.[90]

[87] Rayburn v. State (Ark.) 63 S. W. 356.
[88] State v. Hill, 65 Mo. 87.
[89] Com. v. Harman, 4 Pa. 269.
[90] People v. O'Brien, 130 Cal. 1.

§ 323. Instructions disparaging circumstantial evidence.

The court may properly refuse instructions, the tendency of which is to disparage the force and effect of circumstantial evidence. It has therefore been held proper to refuse the following instruction: "Circumstantial evidence ought to be received with great caution, especially where an anxiety is naturally felt for the detection of great crimes;" and, "The jury, upon circumstantial evidence, and where such evidence is less conclusive than the positive and direct evidence of one witness, who testifies to the fact, must acquit the defendant."[91] An instruction that defendant cannot be convicted upon circumstantial evidence alone in a case where the state might have produced eyewitnesses was properly refused, where the eyewitnesses were unfriendly to the state.[92]

§ 324. Miscellaneous instructions on circumstantial evidence.

Where the evidence is merely circumstantial in its character, an instruction that the jury must find the defendant guilty if they believe the evidence is erroneous as being an invasion of the province of the jury.[93] In a case depending wholly upon circumstantial evidence, the court may instruct that each necessary fact must be proved beyond a reasonable doubt; that all the facts must be conclusive in their nature, leading to the conclusion, with moral certainty, that defendant, and no other person, committed the crime, and that if they, from the evidence or the want of evidence, could account for the facts and circumstances in evidence upon any theory or hypothesis consistent with the innocence of accused, then to acquit.[94] So it has been held erroneous to refuse an

[91] Brown v. State, 23 Tex. 195.
[92] McCandless v. State (Tex. Cr. App.) 62 S. W. 745.
[93] Sims v. State, 43 Ala. 33; State v. Dixon, 104 N. C. 704.
[94] Crow v. State, 33 Tex. Cr. App. 264.

instruction: "The jury must find the defendant not guilty if the conduct of said defendant, upon a reasonable hypothesis, is consistent with innocence."[95] An instruction that circumstantial evidence must produce, "in effect, a reasonable and moral certainty" of defendant's guilt, has been held not erroneous for using this phrase instead of the phrase, "the effect of a reasonable and moral certainty."[96] So, an instruction that "circumstantial evidence * * * consists in this: that, where there is no satisfactory evidence of the direct fact, certain facts which are assumed to have stood around or been attendant on the direct fact are proved, from the existence of which the direct fact may be inferred," has been held not erroneous, since the word "assumed" is clearly used in the sense of "claimed."[97] It has been held that an instruction that, in cases of circumstantial evidence, the time, place, manner, opportunity, motive, and conduct must concur in pointing to the prisoner as the guilty agent, is not improperly modified by charging that all these circumstances, or such of them as may be proved with other facts, if any, must so concur.[98] Where a full and correct charge on the law of circumstantial evidence has been given, the giving of a further instruction that, "if the circumstances are such as to carry conviction to your minds, beyond a reasonable doubt, that the defendant is guilty, and are such as the defendant might explain away, and he fails so to do, then you would be authorized to find the defendant guilty," does not warrant a new trial.[99] In charging as to the rules to govern in considering circumstantial evidence, the court may direct the attention of the jury to the circumstances

[95] Howard v. State, 108 Ala. 571.
[96] Loggins v. State, 32 Tex. Cr. App. 364.
[97] Jenkins v. State, 62 Wis. 49.
[98] Sutton v. Com., 85 Va. 128.
[99] Wells v. State, 99 Ga. 206.

relied upon by the state, if at the same time it is left to the jury to determine whether or not the circumstances are shown to exist.[100] In charging on circumstantial evidence, it was held not reversible error to tell the jury that those who declare it to be cruel and criminal to convict on circumstantial evidence are knaves or fools.[101] The jury may properly be instructed, where the evidence is all circumstantial, that defendant's innocence must be presumed until his guilt is established by convincing evidence beyond a reasonable doubt.[102] An inaccurate statement in a charge as to the distinction between direct and circumstantial evidence is not ground for reversal, where the court correctly instructs the jury on the legal definition of both classes of evidence, and also instructs that defendant is to have the benefit of any reasonable doubt.[103] An instruction on circumstantial evidence that, "if it is of such a character as to exclude every reasonable supposition or hypothesis, other than that of the defendant's guilt, then and in that event it should be given the same weight by you as direct evidence," was held not to be an unconditional direction to the jury to give the same weight to circumstantial evidence as to direct evidence.[104] So, in several cases it was held that an instruction that, "if circumstantial evidence is of such a character as to exclude every reasonable hypothesis other than that of defendant's guilt, it is entitled to the same weight as direct evidence," was not erroneous, as meaning not that circumstantial evidence is entitled to the same weight as direct evidence, but that, when a defendant's guilt is established by circumstantial, it is the same as if it were established by direct, evi-

[100] Koerner v. State, 98 Ind. 7.
[101] Hickory v. United States, 151 U. S. 303.
[102] Gilmore v. State, 99 Ala. 154.
[103] Roberts v. State, 83 Ga. 369.
[104] Davis v. State, 51 Neb. 301.

dence.[105] It has been held that an instruction that "there is nothing in the nature of circumstantial evidence that renders it less reliable than other classes of evidence" contains a correct statement of the law, and is free from legal exception.[106] So, the following instruction has been approved: "For the practical purposes of the trial, there is no difference between what is called circumstantial and what is called direct evidence." That the only question is, does the evidence show defendant's guilt beyond a reasonable doubt?[107] An instruction, given at defendant's request: "That, to warrant a conviction on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proven by competent evidence beyond a reasonable doubt, and all the facts necessary to such conclusion 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, leading, on the whole, to a satisfactory conclusion, 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, but they must exclude every other reasonable hypothesis. No other conclusion but that of the guilt of the accused must fairly and reasonably grow out of the evidence, but the facts must be absolutely incompatible with innocence, and incapable of explanation upon any other reasonable hypothe-

[105] Reynolds v. State, 147 Ind. 3. See, also, to same effect, Longley v. Com. (Va.) 37 S. E. 339; People v. Neufeld, 165 N. Y. 43.

[106] People v. Urquidas, 96 Cal. 239; People v. Morrow, 60 Cal. 142.

[107] State v. Rome, 64 Conn. 329.

sis than that of guilt,"—is a sufficient charge on circumstantial evidence.[108] An instruction, in a criminal prosecution, "to the effect that, in a case of circumstantial evidence, where the criminative circumstances are either denied by the defendants or are explained in such a way as to render their guilt doubtful, it is the duty of the jury to acquit the accused," is erroneous in requiring an acquittal wherever the accused denies such circumstances, without reference to the credibility of the denial, and ought to be refused.[109] On a trial for homicide, an instruction that "circumstantial evidence was to be regarded by the jury in all cases, and that, when it was strong and satisfactory, the jury should so consider it, neither enlarging nor belittling its force, and that they should make those reasonable inferences from circumstances proven which the guarded judgment of a reasonable man should ordinarily make under like circumstances," is properly given.[110] Where the court is prohibited from charging the jury with respect to matters of fact, an instruction: "Though in human judicature, imperfect as it must necessarily be, it sometimes happens that error has been committed from a reliance on circumstantial evidence, yet this species of evidence, in the opinion of all those who are most conversant with the administration of justice, and most skilled in judicial proceedings, is not only proper and necessary, but it is sometimes even more satisfactory than the testimony of a single individual, who swears that he has seen a fact committed. Even persons professing to have been eye-witness of that to which they may testify may speak falsely,"—is reversible error, as a charge on the relative

[108] Villereal v. State (Tex. Cr. App.) 61 S. W. 715.

[109] Long v. State (Fla.) 28 So. 775.

[110] Smith v. State (Neb.) 85 N. W. 49.

value of direct and circumstantial evidence.[111] Where, in a murder case, the trial court, in charging the jury upon the competency and meaning of circumstantial evidence, remarks that "many, probably a majority of, convictions of crime are had upon circumstantial evidence," such remark will not constitute reversible error if the question of defendant's guilt is submitted to the jury with full and fair instructions as to their duties and exclusive rights in its determination.[112] Where charges upon circumstantial evidence have once been approved by the court of last resort, they should not thereafter be tampered with by the trial court.[113]

[111] People v. O'Brien, 130 Cal. 1.
[112] Funk v. United States, 16 App. D. C. 478.
[113] Melver v. State (Tex. Cr. App.) 60 S. W. 50.

CHAPTER XXX.

CAUTIONARY INSTRUCTIONS ON PRESUMPTIONS OF LAW AND FACT.

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§ 343. In General.

I. Introductory Statement.

§ 325. In general.

Where the circumstances proved are of such a character that the law itself raises a presumption, the court may properly instruct the jury to draw such inferences.[1] Presumptions of fact, however, should be left to the exclusive consideration of the jury.[2] It is not proper for the court to instruct the jury that a certain fact is to be presumed by them from the proof made of another or other facts.[3] The court

[1] Herkelrath v. Stookey, 63 Ill. 486; Glover's Adm'rs v. Duhle, 19 Mo. 360; Weil v. State, 52 Ala. 19; Peterson's Ex'rs v. Ellicott, 9 Md. 52; Union Mut. Life Ins. Co. v. Buchanan, 100 Ind. 81; People v. Carrillo, 54 Cal. 63; Heldt v. Webster, 60 Tex. 207; Oliver v. State, 17 Ala. 587.

[2] Newman v. McComas, 43 Md. 70; Dickson v. Moody, 2 Smedes & M. (Miss.) 17; Heldt v. Webster, 60 Tex. 207; Graff v. Simmons, 58 Ill. 440; Graves v. Colwell, 90 Ill. 612; People v. Gastro, 75 Mich. 127; Sheaham v. Barry, 27 Mich. 217; Justice v. Lang, 52 N. Y. 323; Stokes v. Johnson, 57 N. Y. 673; People v. Walden, 51 Cal. 588.

[3] Weil v. State, 52 Ala. 19; Cox v. Knight's Adm'r, 49 Ala. 173; Stone v. Geyser Quicksilver Min. Co., 52 Cal. 35; People v. Walden, 51 Cal. 588; People v. Carrillo, 54 Cal. 63; Beers v. Housatonuc R. Co., 19 Conn. 570; Mayer v. Wilkins, 37 Fla. 244; Pittsburgh, Ft. W. & C. R. Co. v. Callaghan, 157 Ill. 406; Ashlock v. Linder, 50 Ill. 169; City of Columbus v. Strassner, 138 Ind. 301; Fulwider v. Ingels, 87 Ind. 414; Cook v. Brown, 39 Me. 443; Walkup v. Pratt, 5 Har. & J. (Md.) 57; Newman v. McComas, 43 Md. 70; Wilson v. Smith, 10 Md. 67; Peterson's Ex'rs v. Ellicott, 9 Md. 52; People v. Gastro, 75 Mich. 127; Richards v. Fuller, 38 Mich. 653; Dickson v. Moody, 2 Smedes & M. (Miss.) 17; Glover's Adm'rs v. Duhle, 19 Mo. 360; Omaha Fair & Exposition Ass'n v. Missouri Pac. Ry. Co.,

must not instruct as to what inferences of fact the jury are to draw from the evidence.[4] "When a judge instructs a jury that a given fact will be presumed, he must be understood to mean that the fact is to be taken as established,—a result which cannot be reached except in those cases in which the presumption is said to be of law, and therefore conclusive, otherwise than by weighing the evidence, and therefrom determining the existence or nonexistence of the fact."[5] The following cases will serve to illustrate the principle stated: Where there is conflicting evidence as to the legality of a sale, it is error to instruct that, if a sale is shown, it is presumed to be legal.[6] To instruct that an assignment is fraudulent if the insolvent, previous thereto, obtained credit on false representations as to his finances, is erroneous, since the question of fraudulent intent is for the jury alone.[7] Upon the question of the incorporation of a company, it is error to charge that the mere execution of a deed to the company by one party, and of a new deed in confirmation by the devisee of that party, would not be sufficient proof of

42 Neb. 535; Gilbertson v. Forty-Second Street, M. & St. N. Ave. R. Co., 14 Misc. Rep. (N. Y.) 527; State v. Cardwell, 44 N. C. 245; Wenrich & Co. v. Heffner, 38 Pa. 207; Farmers' & Merchants' Bank v. Harris, 2 Humph. (Tenn.) 311; Johnson v. State, 2 Humph. (Tenn.) 283; Neideiser v. State, 6 Baxt. (Tenn.) 499; Claxton v. State, 2 Humph. (Tenn.) 181; Augusta Mfg. Co. v. Vertrees, 4 Lea (Tenn.) 75; Clifford v. Lee (Tex. Civ. App.) 23 S. W. 843; Stooksbury v. Swan, 85 Tex. 563; Hanna v. Hanna, 3 Tex. Civ. App. 51; Reynolds v. Weinman (Tex. Civ. App.) 33 S. W. 302; Frishy v. Withers, 61 Tex. 134; Hammond v. Coursey, 2 Posey, Unrep. Cas. (Tex.) 29.

[4] Union Mut. Life Ins. Co. v. Buchanan, 100 Ind. 63; Louisville, N. A. & C. Ry. Co. v. Falvey, 104 Ind. 409; Coleman v. State, 111 Ind. 563; Continental Life Ins. Co. v. Yung, 113 Ind. 159; Ellis v. Spurgin, 48 Tenn. 74.

[5] Stooksbury v. Swan, 85 Tex. 563.

[6] Reynolds v. Weinman (Tex. Civ. App.) 33 S. W. 302.

[7] Mayer v. Wilkins, 37 Fla. 244.

user of franchises to establish the incorporation. The jury should have been left to draw their own inference.[8] An instruction that, if the engine which caused the injury complained of was marked with the name of defendant's company, and also with the words, "Chicago Switching Association," there was no presumption as to which corporation or association had its management, is erroneous, as invading the province of the jury, and should be refused.[9] "In a suit on a bond given in compromise of a bastardy proceeding, conditioned, among other things, 'that the said S. should not, by his misconduct, give the plaintiff legal cause for divorce,' an instruction to the jury: 'If you find that he (the defendant), after their said marriage, sought the society of prostitutes and women of bad repute for chastity, or that he went into a private bedroom with a woman of bad repute for chastity, or a prostitute, in the nighttime, and remained there for some time, no one else being present, then, and in either event, your verdict should be for the plaintiff,'—is erroneous, because it imposes upon the jury an inference made by the court."[10] An instruction was asked that the jury ought to presume the grant of letters testamentary upon their finding certain facts stated in it, and in which all the facts were not presented, among which was not included the proof on the opposite side that the records of the orphans' court did not show the granting of such letters, and the declarations and admissions of the widow of the deceased, who was named as executrix in the will, and of parties claiming under her, that no such letters had been granted. It was held that this instruction was calculated to mislead the jury, and its imperative direction to the jury would be fatal, if there were no

[8] Augusta Mfg. Co. v. Vertrees, 4 Lea (Tenn.) 75.

[9] Pittsburgh, Ft. W. & C. Ry. Co. v. Callaghan, 157 Ill. 406.

[10] Stanley v. Montgomery, 102 Ind. 102.

other objection.[11] It will be seen that this subject is intimately connected with matters treated in other chapters of this book.[12]

II. Presumption of Innocence.

§ 326. Necessity of giving instructions.

It is an elementary principle of criminal law that the accused is presumed to be innocent until his guilt has been proven beyond a reasonable doubt. It is always error to refuse to embody this principle in proper form in the charge to the jury.[13] If, however, an instruction substantially embodying the principle is given, the court may properly decline to give any further instructions on the subject. Thus, where the court charged: "The defendant began on his trial with the presumption of innocence in his favor, and that presumption remains until removed by sufficient proof,"—it was not error to decline a request that "the defendant is presumed to be innocent, and that presumption remains with and fully protects him until it is removed by the proof."[14] And it is not error to refuse an instruction that the legal presumption of innocence is to be regarded by the jury as a matter of evidence, where they have been charged that the

[11] Wilson v. Smith, 10 Md. 67.

[12] See ante, c. 2, "Province of Court and Jury," and ante, c. 3, "Invading Province of Jury."

[13] Coffee v. State, 5 Tex. App. 545; Hutto v. State, 7 Tex. App. 44; Hampton v. State, 1 Tex. App. 652; Mace v. State, 6 Tex. App. 470; Long v. State, 23 Neb. 33; Houston v. State, 24 Fla. 356; Long v. State (Fla.) 28 So. 775; Long v. State, 46 Ind. 583; Line v. State, 51 Ind. 172; Castle v. State, 75 Ind. 146; Aszman v. State, 123 Ind. 347; Farley v. State, 127 Ind. 419; Salm v. State, 89 Ala. 56; Reeves v. State, 29 Fla. 527.

[14] Smith v. State, 63 Ga. 170.

law presumes every man innocent until he is proven guilty by proper legal evidence, and that, if they have any reasonable doubt as to the guilt of defendant arising from the evidence, they should acquit.[15] Where the accused is either guilty or entirely innocent, a refusal to instruct that a failure to prove a motive for the commission of the crime would raise a strong presumption that the accused was innocent is proper, the court instructing that the absence of motive would be a circumstance for the jury to consider. The defendant is presumed innocent in any case.[16] So, when such an instruction is given, the court may properly refuse an instruction that the mere returning of an indictment raises no presumption of the guilt of the accused, and that there can be no conviction until they are satisfied, beyond a reasonable doubt, of his guilt, without reference to the nature of the indictment.[17] An instruction that, "where there are two presumptions,—one in favor of innocence, and the other in favor of a criminal course,—the one in favor of innocence must prevail," may be properly refused. The only presumption in a criminal case is of innocence of the defendant until guilt is established beyond a reasonable doubt, and it is sufficient if the court has so charged the jury. There cannot be two presumptions in a criminal case. The accused is presumed to be innocent until his guilt is established beyond any reasonable doubt, and, if the court so charges, the defendant cannot complain.[18] Where the jury have been told that there is a legal presumption of innocence which entitled the accused to an acquittal unless overcome by the evidence, a refusal to repeat the idea in different language,

[15] Wooten v. State, 24 Fla. 335; State v. Hudspeth (Mo.) 60 S. W. 136.

[16] State v. Nordstrom, 7 Wash. 513.

[17] Aszman v. State, 123 Ind. 347.

[18] People v. Douglass, 100 Cal. 1.

suggested by counsel for the accused, though such language may have more definitely impressed such idea upon the minds of the jurors, is not reversible error. This is in accordance with the general rule that, though it is advisable to give special instructions requested on leading points in the case, if such instructions are more specific than the general charge covering the same points, yet the refusal of the request will not work a reversal if the general charge can be understood by persons of ordinary comprehension.[19] But an instruction that the fact that an indictment was found by the grand jury, and the indictment itself cannot be considered, is objectionable in form, and the court should have given in lieu thereof defendant's request for an instruction that the indictment is a mere formal charge against defendant, and is not, of itself, any evidence of defendant's guilt.[20] A charge "that defendant is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt, and, if you have a reasonable doubt of his guilt, you will find him not guilty," renders it unnecessary to give a requested charge "that the burden is upon the state throughout to establish every constituent element of the offense, and never shifts from state to defendant."[21] And the accused cannot complain of the failure of the court to further charge "that the burden of proof never shifts from the state to the defendant, but is upon the state throughout to establish every constituent element of the offense."[22] Although it has been held in one state that, if the jury is told that the defendant must be proved guilty beyond a reasonable doubt, an instruction as to the presumption of innocence is unnecessary,[23] the

[19] Murphy v. State (Wis.) 83 N. W. 1112.
[20] State v. Hollingsworth, 156 Mo. 178.
[21] Huggins v. State (Tex. Cr. App.) 60 S. W. 52.
[22] Lewis v. State (Tex. Cr. App.) 59 S. W. 886.
[23] State v. Heinze, 2 Mo. App. Rep'r, 1314.

weight of authority is to the effect that instructions on the question of reasonable doubt, though correctly given, cannot be regarded as covering the subject of the presumption of innocence, and that it is error to refuse a separate instruction on the latter subject.[24]

There is some conflict of opinion as to whether the court is bound to give an instruction on this presumption, in the absence of a request. In one state it has been said that it is always advisable to give in charge to the jury the presumption of innocence, but it was held that an omission to do so, when not asked, was not ground for reversal.[25] In another state it was held that, where the jury were instructed orally by agreement, and no request was made for such an instruction, and the court's attention was not called to its omission to charge on this subject, there was no error.[26] In another state the decisions do not seem to be entirely harmonious. The earlier decisions hold, without qualification, that the failure of the court to instruct the jury on the presumption of innocence, whether requested or not, is reversible error.[27] Later decisions qualify this rule. In one of them it is said that a conviction will not necessarily be reversed in every case where, there being no request for an instruction on the point, and the court's attention not being called thereto, the jury is not informed in so many words that the presumption of innocence remains with the accused until he is proved guilty.[28] And in this case and others it was held, if an in-

[24] Coffin v. United States, 156 U. S. 432; Cochran v. United States, 157 U. S. 286; People v. Macard, 73 Mich. 15; Vaughan v. Com., 85 Va. 671; McMullen v. State, 5 Tex. App. 577; Black v. State, 1 Tex. App. 368.

[25] Hutto v. State, 7 Tex. App. 44; Frye v. State, 7 Tex. App. 94.

[26] Williams v. People, 164 Ill. 481.

[27] People v. Potter, 89 Mich. 353; People v. Murray, 72 Mich. 10; People v. De Fore, 64 Mich. 701; People v. Macard, 73 Mich. 15.

[28] People v. Granely, 91 Mich. 646.

struction on the subject of reasonable doubt was given, a conviction would not be reversed for failure to instruct on the presumption of innocence, in the absence of a request for such instruction.[29] So, in one state it has been held that, where the court omits to instruct, as required by statute, that "defendant is presumed to be innocent until the contrary is proved," exception must be taken to such omission before the jury retire to consider their verdict, in order to make the error available.[30]

§ 327. What instructions proper or sufficient.

The following instructions on this presumption have been approved: That "the defendant is presumed to be innocent."[31] That "the accused must be presumed innocent until his guilt is established by legal evidence."[32] That the presumption of innocence prevails throughout the trial, and that it is the duty of the jury, if possible, to reconcile the evidence with this presumption.[33] That "the law raises no presumption against the prisoner, but every presumption of the law is in favor of his innocence."[34] That "the accused is always presumed to be innocent until his guilt is established by competent evidence beyond a reasonable doubt."[35] That "the law considers everybody innocent until the contrary is proven beyond a reasonable doubt."[36] That, "in the absence of evidence to the contrary, the law presumes every one innocent;

[29] People v. Ostrander, 110 Mich. 60; People v. Smith, 92 Mich. 10; People v. Granely, 91 Mich. 646.

[30] Murray v. State, 26 Ind. 141.

[31] Line v. State, 51 Ind. 172; Long v. State, 46 Ind. 582.

[32] Mace v. State, 6 Tex. App. 470.

[33] Castle v. State, 75 Ind. 146.

[34] Territory v. Burgess, 8 Mont. 57.

[35] Templeton v. State, 5 Tex. App. 398.

[36] State v. Duck, 35 La. Ann. 764; Gallaher v. State, 28 Tex. App. 247.

and this legal presumption of innocence is a matter of evidence, to the benefit of which the party accused is entitled."[37] So, on a trial for murder, where it was admitted that defendant was guilty of manslaughter, but the theory of the defense was that he was innocent of the higher offense charged, because of a want of criminal intent, a charge which gives to defendant the benefit of the presumption of innocence of such intent, and the benefit of any reasonable doubt the jury might entertain as to the intent with which he acted, is not open to the objection that the court did not instruct the jury that the presumption of innocence was with the defendant.[38] Where the court, after instructing on the presumption of innocence, tells the jury that the law should be fearlessly administered, and that they will fail in their duty if they fail to convict on proof of defendant's guilt beyond a reasonable doubt, there is no prejudicial error, although the latter part of the instruction is in bad taste.[39] An instruction: "The defendant, at the outset of this trial, is presumed to be an innocent man. He is not required to prove himself innocent, or to put in any evidence at all upon that subject until the prosecution has proven to your satisfaction, and beyond all reasonable doubt, that he is guilty. Now, in considering the testimony in the case, you must look at that testimony, and view it in the light of that presumption, which the law clothes him with, that he is innocent, and it is a presumption that abides with him throughout the trial of the case, until the evidence convinces you to the contrary beyond all reasonable doubt,"—does not tend to convey the impression that the presumption of innocence ceases to operate at the close

[37] Garrison v. State, 6 Neb. 285.

[38] People v. Harper, 83 Mich. 273.

[39] People v. Bowers (Cal.) 18 Pac. 660.

of the evidence of the prosecution, or at any time before the jury have finally determined upon a verdict.[40]

On the other hand, the following instructions have been disapproved: That "the defendant, though indicted for perjury, is just as innocent of the crime as though not indicted."[41] That "the prisoner is presumed to be innocent until his guilt is established by competent evidence. After the guilt of a prisoner, for crime, is established by such evidence, then such presumption of innocence no longer pertains."[42] That "the prisoner comes to trial presumed to be innocent, and this presumption extends to the close of the trial, and the jury should endeavor to reconcile all the evidence with this presumption." In condemning this instruction, the court took the view that it was no more the duty of the jury to endeavor to acquit the defendant than to convict him.[43] An instruction, "The defendant entered upon this trial with the presumption of innocence in his favor, and that presumption continues till the state shall satisfy you beyond any reasonable doubt of the defendant's guilt," while open to criticism as possibly suggesting that only the evidence of the state is to be weighed, is not erroneous, especially if followed by instructions that "it is incumbent on you to consider the testimony without passion and without prejudice, for the purpose of determining whether the defendant is guilty or not. He is entitled to the benefit of

[40] People v. Arlington, 131 Cal. 231.

[41] Sanders v. People, 124 Ill. 218.

[42] Stapp v. State, 1 Tex. App. 734, in which case the court said: "The law is that 'a defendant in a criminal cause is presumed to be innocent until his guilt is established by legal evidence, and, in case of reasonable doubt, * * * is entitled to be acquitted.'"

[43] Barker v. Com., 90 Va. 820. Compare Castle v. State, 75 Ind. 146.

any reasonable doubt existing in the evidence in this case. If, after a full consideration of the testimony, you shall have any reasonable doubt of his guilt, you will give him the benefit of that doubt by an acquittal." Such instructions clearly indicate that the jury are to look to the entire evidence.[44] A request for an instruction that defendant is presumed to be innocent until proven guilty beyond a reasonable doubt, and that it is the duty of the jury to give the defendant the benefit of this presumption and to acquit him "unless they feel compelled to find him guilty," and unless the evidence convicts him of guilt beyond a reasonable doubt, is properly modified by striking out the words "unless they feel compelled to find him guilty."[45]

If an erroneous instruction is given on this presumption, it will not be ground for reversal if no prejudice could have resulted. Thus, an instruction: "Where there is a serious conflict in the testimony as to the commission of an offense like that in this case, evidence of the previous good character of the defendant should be considered by the jury, in connection with all the other evidence given on the trial, in determining whether the defendant would be likely to commit, and did commit, the offense in question; that, in doubtful cases, evidence of good character is conclusive in favor of the party accused; and if, from the evidence, you find the facts and circumstances proved or relied on to establish the defendant's guilt are in doubt, or that the intent of the defendant to commit the crime is in doubt, then, if the prisoner has by evidence satisfied you that he was a man of good character up to the time of the alleged offense in this case, the presumption of the law is that the alleged crime is so inconsistent with the former life and character of the defendant that he could

[44] Murphy v. State, 108 Wis. 111.

[45] State v. Stubblefield, 157 Mo. 360.

not have intended to commit such a crime, and it would be your duty to give the defendant the benefit of that presumption, and acquit him,"—though it may be erroneous, since evidence of good character should be considered in connection with the other evidence, cannot possibly harm the defendant if all the evidence is in favor of his previous good character.[46]

An instruction that "the jury are to presume the defendant innocent until his guilt is established" is not inconsistent with another instruction that "every man is presumed to be sane, and to intend the natural and ordinary consequences of his acts."[47]

III. Presumption that One Intends Natural Consequences of His Acts.

§ 328. In general.

It has been held proper, in a number of cases, to instruct the jury that, where a person voluntarily and willfully does an act, he is presumed to intend all the natural, probable, and usual consequences of his act.[48] Thus, in a prosecution for assault with intent to murder, it is not error to instruct that defendant is presumed to have intended the natural and proximate consequences of his acts.[49] So, when a homicide or an assault was committed with a deadly weapon, and the act was done willfully or intentionally, an instruction that the defendant must be presumed to have intended to cause death, which is the ordinary and probable consequence of such an act, has been sustained.[50] The following instruction has also been approved: "The law presumes that every sane person contemplates the natural and ordinary consequences of his own voluntary acts, until the contrary appears, and,

[46] Territory v. Burgess, 8 Mont. 57.

[47] Greenley v. State, 60 Ind. 141.

[48] Com. v. Webster, 5 Cush. (Mass.) 305; State v. Shelledy, 8 Iowa, 485; People v. Langton, 67 Cal. 427.

[49] Krchnavy v. State, 43 Neb. 337.

[50] State v. Dickson, 78 Mo. 438; State v. Wisdom, 84 Mo. 177.

when one man is found to have killed another by acts, the natural and ordinary consequence of which would be the death, if the facts and circumstances of the homicide do not of themselves, or the evidence otherwise, show that it was not done purposely, or create a reasonable doubt thereof, it is to be presumed that the death of the deceased was designed by the slayer."[51] So it is not error to refuse to charge that a knowing and willful violation of a penal statute is necessary to a conviction. The prisoner is conclusively presumed to have known of the statute he was violating.[52]

There is another line of cases, however, in which a contrary view is taken, and it is held improper to instruct that a person is presumed to intend the natural consequences of his own voluntary acts. The jury is permitted to draw that inference if it sees fit, and it is proper to tell them so, but it is improper to tell them that they must do so.[53] Accordingly, on a murder trial, a charge that "the law presumes that a sane man intends the natural and probable consequences of any act which he willfully and deliberately does" is erroneous.[54] It has even been held improper to charge in the language of a statute which expressly provides that "the intention to commit an offense is presumed whenever the means used is such as would ordinarily result in the commission of the forbidden act;"[55] or in the language of another statute, which provides that, "when an injury is caused by violence to the person, the intent to injure is presumed, and it rests with the person inflicting the injury to show the acci-

[51] Achey v. State, 64 Ind. 59. See, also, Cotton v. State, 32 Tex. 626; Jackson v. People, 18 Ill. 270.

[52] Whitton v. State, 37 Miss. 379.

[53] People v. Willett, 36 Hun (N. Y.) 500.

[54] Rogers v. Com., 96 Ky. 24.

[55] Black v. State, 18 Tex. App. 124.

dent or innocent intention."[56] These decisions rest upon the principle that the presumption declared by the statute is overcome by the presumption of innocence and the rule as to reasonable doubt. On a prosecution for assault with intent to murder, a charge that selects a portion only of the facts disclosed by the testimony, and states that, if these facts are proved, "the law presumes that the act was malicious," and that defendant "intended to kill," is erroneous, because it shifts the burden of proof, and ignores the recognized distinction between civil and criminal cases, in the measure of proof.[57] Intent being an essential element of crime, an instruction declaring that, when a crime is committed, the law presumes the intent, is absurd and meaningless.[58]

IV. Presumption of Malice.

§ 329. In general.

The existence of malice is almost invariably a question of fact, and hence a question exclusively within the province of the jury to determine. It is therefore error for the court to take this question from the jury by instructing, in effect, that malice does or does not exist.[59] Thus, in an action for malicious prosecution, it is error to instruct that the law presumes malice from a want of probable cause,[60] though it

[56] Thomas v. State, 16 Tex. App. 535; Burney v. State, 21 Tex. App. 572.

[57] Ogletree v. State, 28 Ala. 693.

[58] State v. Painter, 67 Mo. 84.

[59] Kingsbury v. Garden, 45 N. Y. Super. Ct. 224; Thorp v. Carvalho, 14 Misc. Rep. (N. Y.) 554; Ellis v. Simonds, 168 Mass. 316; Hirsch v. Feeney, 83 Ill. 548; Harpham v. Whitney, 77 Ill. 32; Hidy v. Murray, 101 Iowa, 65; Moody v. Deutsch, 85 Mo. 237; Ritter v. Ewing, 174 Pa. 341; Stewart v. Sonneborn, 98 U. S. 189.

[60] McClafferty v. Philp, 151 Pa. 86; Malone v. Murphy, 2 Kan. 250; Frankfurter v. Bryan, 12 Ill. App. 549; Bishop v. Bell, 2 Ill. App. 554; Smith v. King, 62 Conn. 515; Bell v. Pearcy, 27 N. C.

is proper to instruct that the jury may infer malice from want of probable cause.[61] It is, of course, error to instruct that malice cannot be inferred by the jury from want of probable cause.[62] It is proper to instruct that malice may be inferred from a willful, wanton, and inexcusable act.[63] An instruction that a malicious intent need not be proved by direct testimony, and that, if the jury found that the natural and probable results of an act would be to injure or destroy the property of another, no motive appearing from the evidence, malice may be implied, if the circumstances show a wicked, depraved, and wanton spirit, is not misleading, especially when followed by others, treating the subject fully and liberally.[64] So it has been held proper to instruct that "the law itself implies or presumes malice from the commission of any unlawful or cruel act, however suddenly done. Hence, when a homicide is committed without any or without considerable provocation, the law implies or infers malice. * * * Generally speaking, if the killing of a person grow out of a state of sudden mental agitation, produced by whatever cause, or is the sudden rash condition of a mind incapable, from any cause, of deliberation or reflection, malice will be presumed or implied. So, also, when a human being is killed, and no circumstances are in proof to justify or extenuate such killing, the law, from such killing alone, will

83; Greer v. Whitfield, 4 Lea (Tenn.) 85; Griffin v. Chubb, 7 Tex. 603; Schofield v. Ferrers, 47 Pa. 194; Gee v. Culver, 12 Or. 228.

[61] Shaul v. Brown, 28 Iowa, 45; Bradley v. Morris, 44 N. C. 397; Hogg v. Pinckney, 16 S. C. 387. Contra, Biering v. Galveston First Nat. Bank, 69 Tex. 599, holding that such charge was on the weight of the evidence.

[62] Lunsford v. Dietrich, 93 Ala. 565.

[63] State v. Enslow, 10 Iowa, 115; Mosely v. State, 28 Ga. 190; State v. Williamson, 68 Iowa, 351.

[64] People v. Keeley, 81 Cal. 210.

imply or infer malice."[65] An instruction that malice may be inferred from the use of a deadly weapon is proper and usual;[66] but an instruction that, if certain enumerated acts were proved, the act in question was malicious, is erroneous.[67] In a prosecution for malicious wounding, a refusal to instruct that "malice cannot be inferred" is not error.[68]

V. Presumption from Unexplained Possession of Recently Stolen Property.

§ 330. View that presumption is a presumption of law.

In his work on evidence, Mr. Greenleaf makes the following statement: "Possession of the fruits of crime recently after its commission is *prima facie* evidence of guilty possession, and, if unexplained either by direct evidence, or by the attending circumstances, or by the character and habits of life of the possessor, or otherwise, it is taken as conclusive."[69] In accordance with this rule are a number of decisions to the effect that the presumption of guilt growing out of the recent possession of stolen property is a presumption of law, and, in the absence of other rebutting evidence, must be met by proof on the part of the accused accounting for his possession in a manner consistent with his innocence, or it will become conclusive against him; that it is not a mere presumption of fact, to be weighed with other evidence in the case.[70] It has been held proper, where this view prevails, to

[65] Kemp v. State, 13 Tex. App. 562.

[66] Jenkins v. State, 82 Ala. 25; State v. Zeibart, 40 Iowa, 173; State v. Talbott, 73 Mo. 351.

[67] Ogletree v. State, 28 Ala. 693.

[68] Walker v. Com., 7 Ky. Law Rep. 44.

[69] 1 Greenl. Ev. § 34.

[70] State v. Kelly, 73 Mo. 608; State v. Good, 132 Mo. 114; Belote v. State, 36 Miss. 120. See, also, Unger v. State, 42 Miss. 642; State v. Butterfield, 75 Mo. 297; State v. Kelly, 57 Iowa, 644; United States v. Wiggins, 14 Pet. (U. S.) 334.

instruct the jury that, "where property has been stolen, and recently thereafter the same property, or any part thereof, is found in the possession of another, such person is presumed to be the thief, and, if he fails to account for his possession of such property in a manner consistent with his innocence, this presumption becomes conclusive against him."[71] In the case in which this instruction was approved, no evidence was submitted as to the good character of defendant. It has been held that such an instruction would be too narrow where such evidence is given, and that the evidence of good character should be submitted to the jury together with that of recent possession, the view being taken that such evidence may be sufficient to rebut the presumption of guilt.[72] Where the fact of the larceny is not disputed, and it appears that the property was found in defendant's possession shortly after its disappearance, an instruction making his possession a presumption of guilt against him, to be rebutted by him, but not beyond a reasonable doubt, and requiring conviction unless it be rebutted by certain designated kinds of evidence, or by the combined weight of one or more of the kinds of evidence "just mentioned," is proper.[73]

§ 331. View that presumption is a presumption of fact.

The great weight of authority repudiates the conception that the presumption, if any, arising from the unexplained possession of recently stolen property, is a presumption of law.[74] "Any presumption that may be drawn from such

[71] State v. Kelly, 75 Mo. 608.

[72] State v. Kennedy, 88 Mo. 341; State v. Crank, 75 Mo. 406; State v. Sidney, 74 Mo. 390; State v. Kelly, 57 Iowa, 646.

[73] State v. Good, 132 Mo. 114.

[74] Stover v. People, 56 N. Y. 315, Gablick v. People, 40 Mich. 293; Engleman v. State, 2 Ind. 91, Hall v. State, 8 Ind. 439; Smith v. State, 58 Ind. 340, Howard v. State, 50 Ind. 190; State v. Hale, 12

possession is a presumption of fact merely; in other words, it is only an inference that one fact may exist from the proof of another, and does not amount to a rule of law."[75] The possession of recently stolen property may or may not be a criminating circumstance, and whether it is or not depends upon the facts and circumstances connected with such possession. It is a circumstance to be considered by the jury in connection with all the other evidence in the given case, in determining the guilt or innocence of the accused, and its weight, as evidence, like that of any other fact, is to be determined by them alone.[76] "It is obvious that a party cannot, as a matter of law, be adjudged guilty of larceny upon proof that property has been stolen and recently thereafter found in his possession, in the absence of any explanation. Such proof shows a strong probability of guilt; but it is for the jury to determine its force, after due consideration of the kind of property, the length of time that may have elapsed between the taking and finding it in the possession

Or. 352; State v. Maloney, 27 Or. 53; Tucker v. State, 57 Ga. 503; Parker v. State, 34 Ga. 263; Griffin v. State, 86 Ga. 257; Lehman v. State, 18 Tex. App. 174; Lockhart v. State, 29 Tex. App. 35; Cook v. State, 16 Lea (Tenn.) 461; Underwood v. State, 72 Ala. 220; Orr v. State, 107 Ala. 35; Robb v. State, 35 Neb. 285; Thompson v. People, 4 Neb. 529; McLain v. State, 18 Neb. 154; Grentzinger v. State, 31 Neb. 460; State v. Merrick, 19 Me. 398; Com. v. McGorty, 114 Mass. 299; Brooke v. People, 23 Colo. 375; State v. Hodge, 50 N. H. 510; Baker v. State, 80 Wis. 416; People v. Ah Ki, 20 Cal. 178; People v. Noregea, 48 Cal. 123; Malachi v. State, 89 Ala. 134.

[75] State v. Walters, 7 Wash. 251; Smith v. State, 58 Ind. 340; State v. Hodge, 50 N. H. 510; Graves v. State, 12 Wis. 591; Ingalls v. State, 48 Wis. 656; State v. Snell, 46 Wis. 524; Bishop, Cr. Proc. § 745; Whart. Cr. Ev. § 758.

[76] State v. Walters, 7 Wash. 251; People v. Chambers, 18 Cal. 383; People v. Ah Ki, 20 Cal. 178; People v. Noregea, 48 Cal. 123; State v. Humason, 5 Wash. 499; Watkins v. State, 2 Tex. App. 73.

of the accused, and the probability, from the character of the property and other circumstances of the case, that the accused, if innocent, could show how he acquired possession."[77]

§ 332. Same—What instructions proper.

Even where it is held that this presumption is merely one of fact, there is great conflict of authority as to what instructions on the subject may properly be given. In California it was held error to instruct the jury that possession of recently stolen property, unexplained, is of itself sufficient to authorize a conviction.[78] But in Illinois and New York, an instruction to that effect has been sustained.[79] So, according to the Illinois decisions, the jury may be told that "the possession of stolen property soon after the commission of a theft is *prima facie* evidence of the guilt of the person in whose possession it is found."[80] But in Alabama and Nebraska such an instruction has been condemned.[81] In one of these cases it was said: "Whether it was *prima facie* or conclusive was solely for the jury to determine, unaided by any suggestions of the court upon that proposition of fact."[82]

[77] Stover v. People, 56 N. Y. 317.

[78] People v. Ah Ki, 20 Cal. 178; People v. Chambers, 18 Cal. 383; People v. Levison, 16 Cal. 98.

[79] Keating v. People, 160 Ill. 483; Smith v. People, 103 Ill. 82; Goldstein v. People, 82 N. Y. 231.

[80] Keating v. People, 160 Ill. 483; Smith v. People, 103 Ill. 82. In Hix v. People, 157 Ill. 382, it was held that an instruction "that the possession of property recently stolen is of itself prima facie evidence that the person in whose possession the property is found is the actual thief, and, unless this presumption is rebutted, * * * [the jury should] find the defendant guilty," is erroneous as directing the jury to find defendant guilty without submitting an hypothesis based on the evidence embodying all the facts necessary to establish guilt.

[81] Orr v. State, 107 Ala. 35; Dobson v. State, 46 Neb. 250.

[82] Dobson v. State, 46 Neb. 250.

§ 333. Same—Instructing that possession of recently stolen property raises presumption of guilt.

of guilt, and the following instructions have been approved:

In some jurisdictions the jury may be instructed that possession of recently stolen property is presumptive evidence "Whenever it is established that a larceny has been committed, and the stolen goods are immediately afterwards found in the possession of a person, that fact is presumptive evidence that the person is guilty of the larceny of the character charged to have been committed."[83] "That possession of stolen property immediately after the theft, if an unsatisfactory account of it is given, 'affords presumptive evidence of guilt,'" the whole matter of the degree of force the presumption ought to have been submitted to the jury as a matter of fact.[84] That "the possession of property, proven to have been recently stolen, is evidence from which the jury may infer that the person in whose possession such property is found is guilty of the theft, provided that such possession is not explained; and so, when a certain amount of property is proven to have been stolen at the same time, and soon thereafter a portion of such stolen property is found in possession of the defendant, such possession, if unexplained, is evidence from which the jury may infer that the defendant is guilty of the larceny of the entire amount of property then proven to have been stolen."[85] Where property, when stolen, was all in a valise, and of necessity was taken at the same time, and by the same person, an instruction that, if defendant was, within a few hours after the larceny was committed, found in possession of part of the stolen property, the pre-

[83] Tucker v. State, 57 Ga. 503. See, also, McLain v. State, 18 Neb. 154.

[84] Com. v. McGorty, 114 Mass. 299.

[85] State v. Henry, 24 Kan. 460.

sumption would arise that he stole all described in the indictment was proper.[86] The court may instruct "that the jury could consider the fact of the recent possession of stolen goods, unexplained, if they were satisfied from the evidence that such was the fact, as a circumstance showing that the party having such possession was the thief."[87] So it has been held proper to refuse a charge that the fact that defendant had in his possession a portion of certain money, alleged to belong to the prosecuting witness, raised no presumption that he received it, knowing it to have been stolen, if it was stolen, because it states the law incorrectly, and because the recent possession of stolen property does impose on the possessor the onus of explaining the possession.[88] An instruction that unexplained possession of recently stolen property is presumptive evidence of guilt, and that, if the jury is satisfied, from all the evidence, that the possession was a guilty possession, he should be convicted, is erroneous, since under it the defendant could be convicted of receiving stolen property knowing it to have been stolen, —a crime with which he was not charged.[89] In some jurisdictions, an instruction that "possession of recently stolen property is presumptive evidence of the guilt of the possessor" is considered to trench on the province of the jury, and should not be given.[90] It has also been held that an instruction that, "when the state relies upon the possession of

[86] State v. Wilson, 95 Iowa, 341.

[87] Shepperd v. State, 94 Ala. 104.

[88] Martin v. State, 104 Ala. 71.

[89] State v. Tucker, 76 Iowa, 232.

[90] Pollard v. State, 33 Tex. Cr. App. 197; Baker v. State, 80 Wis. 416; McCoy v. State, 44 Tex. 616; Hannah v. State, 1 Tex. App. 578; Foster v. State, 1 Tex. App. 363; Alderson v. State, 2 Tex. App. 10. See, also, Sartorius v. State, 2 Cushm. (Miss.) 602.

recently stolen property as a presumption of guilt," etc., is erroneous, as leading the jury to infer that guilt will be presumed from such possession.[91]

§ 334. Same—Instructing that possession of recently stolen property is strong evidence of guilt.

The following instructions, similar to the ones already mentioned in this section, have also been held erroneous: "That the possession of stolen property, supported by other circumstances and other evidence tending to show guilt, is a strong circumstance in the case."[92] That "such possession, if proven to the satisfaction of the jury, and unexplained by the defendant, supported by other circumstances tending to show guilt, is a strong circumstance tending to show guilt."[93] That "the possession of stolen property, supported by other evidence tending to show guilt, is a strong circumstance tending to show guilt."[94] "That the possession of recently stolen property is regarded in law as a criminating circumstance, tending to show that the possessor stole the property, unless the facts and circumstances surrounding or connected with said possession, or other evidence, explains or shows said possession might have been acquired honestly."[95] "Whether the possession is strong evidence, or only slight evidence, tending to show guilt, is a matter for the jury to pass upon, and not a question for the court to determine."[96]

[91] Lockhart v. State, 29 Tex. App. 35.

[92] People v. Ah Sing, 59 Cal. 400.

[93] People v. Titherington, 59 Cal. 598; State v. Sullivan, 9 Mont. 174.

[94] People v. Cline, 74 Cal. 575.

[95] State v. Walters, 7 Wash. 246.

[96] People v. Ah Sing, 59 Cal. 400.

§ 335. Same—Instructing that burden of explaining possession is on defendant.

In some jurisdictions, the court may instruct that the possession of recently stolen property casts on defendant the burden of explaining how he got it.[97] In others, the giving of such an instruction has been held erroneous.[98] But an instruction that the burden is on defendant to give a satisfactory explanation of his possession of recently stolen property will not be ground for reversal, where the court, on exception being taken to such instruction, further tells the jury that it had repeatedly stated in its charge that defendant should be acquitted if the jury had any reasonable doubt as to his guilt.[99]

§ 336. Instructions as to defendant's explanation of possession.

Any explanation which the party in whose possession the property is found may give at the time as to the nature and extent of his possession, and how he came by it, is admissible in evidence either for or against him. And if the explanation, when testified to before the jury, seems to them to be reasonable, and is not shown to be false, the presumption against the accused from his possession is rebutted, and the jury are not justified in convicting without further evidence against him.[100] The statement of a defendant with regard to the character of his right to the property, when first found in possession of stolen property, and explanatory of his possession of it, if reasonable and probable, devolves the *onus*

[97] Cooper v. State, 87 Ala. 135; State v. Garvin, 48 S. C. 258.

[98] Robb v. State, 35 Neb. 285; Brooke v. People, 23 Colo. 375; Griffin v. State, 86 Ga. 257; Lehman v. State, 18 Tex. App. 176; Martinez v. State, 41 Tex. 164. See, also, Blankenship v. State, 55 Ark. 244.

[99] Brooke v. People, 23 Colo. 375.

[100] Perry v. State, 41 Tex. 483, 486.

upon the state to show that such explanation is false.[101] The defendant is entitled to an instruction to this effect as a part of the law of the case,[102] and a failure or refusal to give such instruction, when warranted by the evidence, is erroneous;[103] but such error is not ground for reversal where there is no probability that the charge would have affected the verdict in any way.[104] Of course, no instruction of this nature should be given if the evidence does not warrant it.[105] It has been held that, if the court gives a full charge as to circumstantial evidence, a special charge asked by defendant on the possession of property recently stolen need not be given.[106] Where the court instructs, in a prosecution for larceny of a horse, "If you entertain a reasonable doubt whether the defendant got the said horse from a certain person for the purpose of pawning him or borrowing money, and giving the horse as security for its payment, then find him not guilty," it is proper to refuse to instruct "that when the defendant, when first accused of the theft of the horse, gave a statement that was reasonable, and probably true, it was the duty of the state to show that said statement was false, and, unless so shown, it was their duty to acquit."[107] It is proper to instruct that the explanation of one charged with larceny as to his possession of stolen property may be shown to be false by circumstantial evidence, if there is evi-

[101] Miller v. State, 18 Tex. App. 38; Garcia v. State, 26 Tex. 209; Galloway v. State, 41 Tex. 289; Johnson v. State, 12 Tex. App. 385; Sitterlee v. State, 13 Tex. App. 587; Perry v. State, 41 Tex. 483.

[102] Miller v. State, 18 Tex. App. 38; Sullivan v. State, 18 Tex. App. 623; Schultz v. State, 20 Tex. App. 308; Wright v. State, 35 Tex. Cr. App. 470.

[103] Hyatt v. State, 32 Tex. Cr. App. 580; Windham v. State, 19 Tex. App. 413.

[104] Teague v. State (Tex. Cr. App.) 20 S. W. 367.

[105] Wilson v. State (Tex. Cr. App.) 34 S. W. 284; Conners v. State, 31 Tex. Cr. App. 453; Baldwin v. State, 31 Tex. Cr. App. 589.

[106] Bonners v. State (Tex. Cr. App.) 35 S. W. 650.

[107] Gilmore v. State (Tex. Cr. App.) 33 S. W. 120.

dence on which the instruction can be based.[108] An instruction that, "if you believe, from the evidence in this case, that the property alleged to have been stolen was so stolen, and recently thereafter was found in the possession of the defendant, and that the defendant, when thus found in the possession of the same, gave an explanation of his said possession which appears reasonable and probably true, then, before you will be warranted in finding a verdict of guilty in this case, you must be satisfied from the evidence, beyond a reasonable doubt, that the other testimony in the case establishes the falsity of the explanation so made by the defendant," is equivalent to telling the jury that, if the defendant was found in the recent possession of the stolen horse, and he gave an account of his possession, and the state showed its falsity, this circumstance alone authorized the jury to convict the defendant, and is a charge upon the weight of the evidence.[109] So, an instruction that, "if you believe from the evidence that the property alleged in the indictment to have been stolen (if stolen) was recently thereafter found in the possession of the defendant, and that the circumstances connected with his possession when first called upon were of such a character as to demand of him an explanation of his possession, and he failed or refused to make such explanation, and that, before you would be warranted in finding him guilty from such circumstances of possession alone, you must be satisfied that his possession was personal, was recent, was exclusive, was unexplained, and that it involved a distinct and conscious assertion of property by the defendant," amounts to telling the jury that they are authorized to

[108] Franklin v. State, 37 Tex. Cr. App. 312.

[109] McCarty v. State, 36 Tex. Cr. App. 135; Wilson v. State (Tex. Cr. App.) 34 S. W. 284.

find the defendant guilty by the mere fact of being found in possession of stolen property recently after its being stolen, and is erroneous if the possession is connected with circumstances giving character to it.[111] An instruction: "The jury are instructed that, where a burglary is connected with a larceny, mere possession of stolen goods, without any other evidence of guilt, is not to be regarded as *prima facie* or presumptive evidence of the burglary; but where goods have been feloniously taken by means of a burglary, and they are immediately or soon thereafter found in the actual or exclusive possession of a person, who gives a false account, or who refuses to give any account, of the manner in which the goods came into his possession, proof of such possession and guilty conduct is evidence tending to prove not only that he stole the goods, but that he made use of the means by which access to them was obtained. There should be some evidence of guilty conduct, besides the bare possession of the stolen property, before the presumption of burglary is superadded to that of larceny,"—is proper as a statement of a legal principle in the abstract.[112]

§ 337. Miscellaneous instructions.

It is not improper to instruct that "the possession of stolen property is not alone sufficient to convict. It is merely a guilty circumstance which, taken in connection with other testimony, is to determine the question of guilt."[113] So, an instruction that, "if the defendants were found in possession of any part of the property described in the indictment soon after such property was stolen, such possession, unless satis-

[111] Pace v. State (Tex. Cr. App.) 31 S. W. 173.

[112] Taylor v. Territory (Ariz.) 64 Pac. 423. In this case, however, the reviewing court hold that the instruction was applicable to the evidence.

[113] People v. Rodundo, 44 Cal. 541.

factorily explained, was a circumstance to be considered, in connection with other suspicious facts, in determining their guilt or innocence," has been held proper.[114] An instruction that "the presumption that the possessor of recently stolen property is the thief is not a presumption of law, and a weak one of fact. It is not at all conclusive, and of itself is not sufficient for conviction,"—is properly refused, as invading the province of the jury to weigh the evidence.[115] So, an instruction that "you are at liberty to consider the several statements made by the defendant as to the manner in which he came in possession of it (stolen property) in order to enable you to arrive at the guilt or innocence of the defendant, and, if said statements appear to be reasonable and consistent, it is a circumstance in his favor, but, if the said statements are unreasonable and false, it is a circumstance against him," is erroneous for the same reason.[116] It has been held not prejudicial error to refuse an instruction that possession of stolen goods is only presumptive evidence of guilt, where an instruction is given that the jury may consider defendant's testimony and his theory accounting for his possession, and that, if the evidence in his behalf raises a reasonable doubt in their minds as to his guilt, he should be acquitted.[117] An instruction that unexplained recent possession, "without other circumstances tending to show felonious intention, * * * does not amount to proof, beyond a reasonable doubt, of a larceny committed by the defendant," is properly refused as an invasion of the province of the jury.[118]

[114] People v. Fagan, 66 Cal. 534.

[115] Reed v. State, 54 Ark. 621.

[116] Merrltt v. State, 2 Tex. App. 182.

[117] People v. Walters, 76 Mich. 195.

[118] Underwood v. State, 72 Ala. 220.

VI. PRESUMPTIONS AS TO SANITY.

§ 338. Scope of article.

There is much conflict in the cases as to the burden of proof upon the question of insanity as a defense to crime, and as to the quantum of proof necessary to successfully maintain the burden. These questions are not regarded as being within the scope of this work. Very many requests and instructions have been condemned because placing the burden of proof upon the wrong party, or requiring too great a quantum of evidence to sustain the burden. Such instructions are erroneous merely because they state an incorrect proposition of law. It is beyond the scope of this book to consider the correctness of the law announced in the instructions, as such questions are not peculiar to instructions, but are the same, however they arise,—whether in the instructions, the pleadings, or otherwise.

§ 339. Presumption that all men are sane.

In a criminal case, it is proper to instruct that "every man is presumed to be sane, and to intend the natural and usual consequences of his own acts."[119] An instruction that the law presumes a man to be sane until the contrary is shown, and imposing the burden of proving insanity as a defense to crime on those who assert it, is not erroneous.[120] It is proper for the court to refuse to charge that the prosecution must affirmatively establish, as part of their case, that defendant was sane, whenever the defense is insanity, since sanity is presumed, and the burden is on the defendant to overcome

[119] Sanders v. State, 94 Ind. 147; Guetig v. State, 66 Ind. 94; State v. Reddick, 7 Kan. 152; State v. Bruce, 48 Iowa, 533; State v. Pagels, 92 Mo. 300.

[120] State v. Clevenger, 156 Mo. 190, 56 S. W. 1078; State v. McCoy, 34 Mo. 534; State v. Pagels, 92 Mo. 300.

that presumption in the first instance.[121] An instruction that the law presumes every man to be sane, and that insanity can be proved only by clear and unexceptional evidence, asserts a correct legal proposition, and is not erroneous as shifting from the court to the jury the question of the competency of the evidence.[122]

§ 340. Conflicting presumption of innocence.

A charge that "the presumption of innocence is so far of greater strength than that of sanity that, when evidence appears tending to prove insanity, it compels the prosecution to establish, from all the evidence, mental soundness beyond a reasonable doubt," is erroneous.[123]

§ 341. Presumption as to continuance of insanity.

In a prosecution defended on the ground of insanity, a refusal to instruct that insanity of a permanent type, proved to have once existed, is presumed to have continued, is error.[124] An instruction that "insanity, when once shown to exist in an individual, is presumed to continue until the contrary is shown by the evidence," is not erroneous because omitting the words "beyond a reasonable doubt," where there is a following instruction that "evidence rebutting * * * the presumption of sanity need not, to entitle defendant to acquittal, preponderate in his favor."[125] In a criminal trial, where insanity is relied on as a defense, it is proper to refuse to instruct the jury that, if the defendant was in-

[121] People v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162.

[122] Dominick v. Randolph, 124 Ala. 557.

[123] Guetig v. State, 66 Ind. 94.

[124] State v. Wilner, 40 Wis. 304.

[125] Grubb v. State, 117 Ind. 277.

sane a short time before the commission of the act, the presumption is that he was insane when he committed it.[126]

§ 342. Presumption that defendant is feigning insanity.

Where the judge charged that, if the jury found that the prisoner was watching to see whether he was observed, and regulating his conduct accordingly, it would raise a strong presumption that the prisoner was feigning insanity, it was held there was no error.[127]

VII. Presumption Arising from Flight.

§ 343. In general.

The flight of a person suspected or charged with crime is a circumstance which the jury are authorized to consider, with other evidence in the cause,[128] as tending in some degree to prove a consciousness of guilt.[129] The court may give the jury certain instructions on this subject, provided there is evidence on which to base them. The jury may be told that "evidence tending to prove flight has been offered, and may be considered by them as a circumstance bearing on the guilt of the accused, with all the other evidence in the case."[130] The following instructions similar to the one set out have also been approved: "If you find from the evidence that defendant did thus attempt to escape from custody, this is a circumstance to be considered by you, in connection with all the other evidence, to aid you in determining the question of his guilt or innocence."[131] That if the

[126] People v. Smith, 57 Cal. 130.

[127] McKee v. People, 36 N. Y. 113.

[128] State v. Thomas, 58 Kan. 805; Anderson v. State, 104 Ind. 467.

[129] People v. Giancoli, 74 Cal. 642.

[130] State v. Thomas, 58 Kan. 805.

[131] Anderson v. State, 104 Ind. 467.

defendant, shortly after the homicide, "concealed himself, or fled from the neighborhood where deceased was slain, then that circumstance might be considered by you with the other testimony in the case, as bearing upon the question of defendant's guilt."[132] "Flight raises the presumption of guilt; and if you believe, from the evidence, that the defendant, after having shot and killed M., as charged in the indictment, fled the country, and tried to avoid arrest and trial, you may take that fact into consideration in determining his guilt or innocence."[133] "That it is allowed to be proved, when a party attempts to escape or get out of the way of the arresting officer; that is only a circumstance which is allowed to be considered by the jury, like other circumstances, looking to all the surroundings * * * at the time."[134] That "the flight of a person immediately after the commission of a crime, or after a crime has been committed with which he is charged, is a circumstance to be weighed by the jury as tending in some degree to prove a consciousness of guilt, * * * and if you [the jury] find, from the evidence in this case, that the deceased was killed as charged in the indictment, and that, immediately after such killing, the defendant left and escaped, * * * it is a circumstance to be weighed by you. * * * It is not sufficient, of itself, to establish the guilt of the defendant."[135] That "the flight of a person immediately after the commission of a crime, or after a crime is committed with which he is charged, is a circumstance in establishing his guilt, not sufficient,

[132] People v. Ramirez, 56 Cal. 533.

[133] State v. Gee, 85 Mo. 647.

[134] Smith v. State, 63 Ga. 170.

[135] People v. Bushton, 80 Cal. 160. In this case it was held that the instruction was not vicious as assuming that the crime charged against the defendant was admitted.

of itself, to establish his guilt, but a circumstance which the jury may consider in determining the probabilities for or against him,—the probability of his guilt or innocence. The weight to which that circumstance is entitled is a matter for the jury to determine in connection with all the facts called out in the case."[136] An instruction that "the law recognizes another proposition as true, and it is that 'the wicked flee when no man pursueth, but the innocent are as bold as a lion.' That is a self-evident proposition, that has been recognized so often by mankind that we can take it as an axiom, and apply it in this case,"—is erroneous, as being equivalent to a direction to the jury that the presumption of guilt arising from flight was so conclusive that it was the jury's duty to act on it as axiomatic proof.[137] An instruction "that flight is very slight evidence of guilt in any case, and ought not to weigh anything when satisfactorily explained," was held properly refused, as trenching on the province of the jury.[138] A requested instruction in defendant's behalf, in a prosecution for murder, that, if his flight was caused by fear of violence at the hands of the deceased's friends, this would not be a circumstance to be considered against him, is properly refused, as being an invasion of the province of the jury.[139] And for the same reason the following instruction was held properly refused: "Flight is not evidence of guilt unless the defendant fled from a sense of guilt; and, if defendant voluntarily surrendered herself for trial, this explained away her flight, and it will not be weighed against

[136] People v. Forsythe, 65 Cal. 101.

[137] Hickory v. United States, 160 U. S. 408.

[138] Smith v. State, 63 Ga. 170. "Whether a given fact is evidence or not is for the court, but whether it is slight, or what weight it should have, is for the jury."

[139] Miller v. State, 107 Ala. 40. This instruction was also deemed abstract.

her."[140] It is likewise proper to refuse an instruction that flight "is by no means an inference of guilt. Many men are naturally of weak nerve and timid, and under certain circumstances the most innocent person might seek safety in flight." These were considerations which it was the province of counsel, and not of the court, to present to the jury.[141] An instruction is not erroneous that, "when a crime has been committed, and the person accused thereof knows he is accused, and then flees or conceals himself, such conduct is evidence of consciousness of guilt, and, in connection with other proof, may be the basis from which guilt may be inferred."[142] A charge that, "though evidence tending to show flight is a matter to be considered by the jury, yet it is of weak and inconclusive character," is erroneous, in assuming that the flight was caused by fear of violence of the person named.[143] Where the court did not instruct that any presumption of guilt arose from the defendant having left the state, a failure to instruct as to the presumptions from flight was not error.[144]

[140] Thomas v. State, 107 Ala. 13.
[141] People v. Giancoli, 74 Cal. 642.
[142] Com. v. Boschino, 176 Pa. 103.
[143] Bodine v. State (Ala.) 29 So. 926.
[144] State v. Thompson, 155 Mo. 300.

CHAPTER XXXI.

OTHER CAUTIONARY INSTRUCTIONS.

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I. Caution against Sympathy or Prejudice.

§ 344. Propriety and necessity of instructions on this subject.

The decisions are all agreed that the trial judge may caution the jury not to allow sympathy or prejudice to influence them in making up their verdict.[1] As regards the necessity of giving such instructions, there is some diversity of opinion. A request for a caution of this nature may, of course, be refused, if there is nothing in the circumstances of the case which would make it proper.[2] And authority is not wanting for the position that it is within the court's discretion whether such an instruction shall be given in any case.[3] In one decision it was said: The trial judge "is in a position to observe and know whether the situation is such as to render such cautionary instructions necessary to a due administration of justice, and if, in his opinion, they are not, his refusal to give them cannot ordinarily be assigned for error," —and the refusal of such an instruction was sustained.[4] On the other hand, it has been said in one decision that such an instruction, if asked, should be given in most cases, as it cannot harm or be of undue advantage to either party; but a refusal of such an instruction was sustained because the reviewing court thought no prejudice had resulted therefrom.[5] So in another decision it was said that a case might readily be supposed "where such admonition to a jury would be not only proper, but necessary."[6]

[1] Birmingham Fire Ins. Co. v. Pulver, 126 Ill. 329; Wood v. State, 64 Miss. 776; Smith v. State, 4 Neb. 278; State v. Petsch, 43 S. C. 132; Blizzard v. Applegate, 77 Ind. 526.

[2] Central Branch Union Pac. R. Co. v. Andrews, 41 Kan. 371.

[3] Birmingham Fire Ins. Co. v. Pulver, 126 Ill. 329; State v. Talbott, 73 Mo. 347, 357.

[4] Birmingham Fire Ins. Co. v. Pulver, 126 Ill. 339.

[5] Doyle v. Dobson, 74 Mich. 567.

[6] Blizzard v. Applegate, 77 Ind. 526.

§ 345. What instructions may be given.

In cautioning the jury on this subject, it has been held proper to instruct that "you will allow no false sympathy to sway you from a proper discharge of your duty;"[7] or that "no consideration of feeling or sympathy for the injured person or the defendant, or family of either, or relatives, should control the jury" in determining their verdict;[8] or that the jury should not be influenced by any supposed hardships of the case;[9] or should not be controlled in making up their verdict by any fear as to what the punishment may be;[10] or should not "lose their heads, and return a verdict for a lady on general principles;"[11] or "should consider the case without regard to the difference in race or color of the parties;"[12] or "that it was of no consequence whether defendant was married or single;"[13] or that the jury should not "allow any considerations of public policy or over-anxiety to enforce the law to influence them in the * * * decision of the case;"[14] or to "caution the jury not to be influenced by pub-

[7] Smith v. State, 4 Neb. 277.

[8] Wood v. State, 64 Miss. 761.

[9] Davis v. Kingsley, 13 Conn. 285. In this case the court said: "Justice, as well as law, requires that he who has assumed an obligation for another should faithfully fulfill it; and although, as men, jurors may sympathize with those who suffer, yet as honest men, bound by oath to administer judgment according to law and evidence, they were properly cautioned by the presiding judge against the appeal made to their feelings by the counsel for the defendants."

[10] Coyle v. Com., 100 Pa. 574; Brantley v. State, 87 Ga. 149; Wilson v. State, 69 Ga. 240. It is not error to tell the jury that they have nothing to do with the question of punishment. Clarey v. State (Neb.) 85 N. W. 897.

[11] Bingham v. Bernard, 36 Minn. 114.

[12] Lunsford v. Walker, 93 Ala. 36.

[13] People v. Young, 65 Cal. 225.

[14] State v. Talbott, 73 Mo. 347.

lic opinion, whether for or against accused, and to state to them that they had nothing to do with the pleasure or displeasure of the public."[15] So an instruction that: "You have no right to act upon your sympathies without any proof; but if the proof happened to concur with your sympathies, you are not to disregard the proof because of that fact. You are to be governed by the proof in the case,"—has been approved.[16] And in cautioning the jury against sympathy or prejudice, a remark by the court that the crime of which defendant was accused was a dastardly one was held not reversible error.[17] Questions of mercy are not for the jury, but for the executive, in the exercise of the pardoning power; and it is not error to tell the jury so in the instructions.[18] Thus, an instruction that: "Mercy does not belong to you. No question of mercy, sentiment, or anything else resides with you, except the question as to whether or not you believe from the evidence, beyond a reasonable doubt, that the defendant is guilty,"—is not erroneous.[19] In a case involving the fitness of an applicant for a liquor license, it was held proper to refuse an instruction that, "in passing upon this case, * * * it is your duty not to allow yourselves to be influenced by the presence of a lobby in the court room opposed to the granting of the plaintiff's petition," on the ground that it is calculated to prejudice the jury against the parties opposing the grant of the license.[20]

II. Burden of Proof.

§ 346. Propriety and necessity of giving instructions.

Though the court is not always required to charge on the

[15] McTyier v. State, 91 Ga. 254.
[16] Shehan v. Barry, 27 Mich. 217.
[17] State v. McCarter, 98 N. C. 637.
[18] Dinsmore v. State (Neb.) 85 N. W. 445.
[19] Avery v. State, 124 Ala. 20.
[20] Lynch v. Bates, 139 Ind. 206.

burden of proof, the propriety of doing so depending on the state of the evidence, the mere fact "that the evidence upon an issue which is submitted to the jury is conflicting does not make it improper for the court to give a charge informing the jury as to which party has the burden of proving the issue submitted to them."[21] But the trial court is not bound to instruct the jury in regard to the burden of proof, unless a proper instruction on the subject is asked.[22] It will, however, usually be error to neglect or refuse to give an instruction on this subject when requested.[23] Thus it is error in a criminal case to refuse an instruction that "the burden of proof to show the truth of the charge is at all times on the state;"[24] or to refuse an instruction that the burden of proof is on the state to prove beyond a reasonable doubt every element of the crime of which the defendant may be convicted.[25] And in civil cases, as jurors generally understand that the

[21] Chittim v. Martinez (Tex.) 58 S. W. 948. But see Macon v. Paducah St. Ry. Co. (Ky.) 62 S. W. 496.

[22] Miles v. Strong, 68 Conn. 273; McKinney v. Guhman, 38 Mo. App. 344; Maynard v. Fellows, 43 N. H. 255; Conway v. Jefferson, 46 N. H. 521; Duncombe v. Powers, 75 Iowa, 185; Martin v. Davis, 76 Iowa, 762; Anderson v. Baird, 19 Ky. Law Rep. 444, 40 S. W. 923; In re Bromley's Estate, 113 Mich. 53; Small v. Williams, 87 Ga. 681; Hunter v. McElhaney, 48 Mo. App. 234; Mitchell v. Mitchell, 18 Wkly. Notes Cas. (Pa.) 439; Gulf, Colorado & Santa Fe Ry. Co. v. McCarty, 82 Tex. 608; Smith v. Chicago, M. & St. P. Ry. Co., 60 Iowa, 512; Cooper v. Lee, 1 Tex. Civ. App. 9; Frye v. Ferguson, 6 S. D. 392.

[23] Black v. State, 1 Tex. App. 369; Stevens v. Pendleton, 94 Mich. 405.

[24] Black v. State, 1 Tex. App. 369; Phillips v. State, 26 Tex. App. 228. It will also be error to give an instruction calculated to leave the impression on the minds of the jury that the state had made out its case, and that, unless evidence of defendant raised in their minds a reasonable doubt, they should convict. Snyder v. State, 59 Ind. 105.

[25] People v. Cohn, 76 Cal. 386.

burden of proof is upon plaintiff in all cases, a request, where the burden shifts to the defendant, that they may be instructed accordingly, should be granted.[26] It has been held, however, that, if the evidence conclusively proves a fact, it is not error for the court to refuse to charge the jury upon which party the burden of proof originally rested.[27] So, where a proper instruction as to the burden of proof has been given, a requested instruction, which adds nothing to the force of the one already given, may rightfully be refused.[28] The court need not repeat instructions already given on this subject.[29] Thus, in a criminal case, where the court instructed that the jury must believe the defendant guilty beyond a reasonable doubt, or acquit, an instruction as to the burden of proof is unnecessary, and should not be given.[30] Where the court in its main charge instructs that "the defendant in a criminal case is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt; and in case you have a reasonable doubt as to the defendant's guilt, you will acquit him," it is not error to refuse a request to charge "that the burden of proof never shifts from the state to the defendant, but is upon the state throughout to establish every constituent element of the offense,"—at least, it is not such error as is calculated to injure the rights of defendant.[31] The usual charge on reasonable doubt makes unnecessary a charge that the burden is upon the state throughout to establish every constituent element of the offense.[32]

[26] Stevens v. Pendleton, 94 Mich. 405.

[27] In re Yetter's Estate v. Zorick, 55 Minn. 452.

[28] State v. McDonald, 65 Me. 465.

[29] Houston & T. C. R. Co. v. Dotson, 15 Tex. Civ. App. 73.

[30] State v. Hollingsworth, 156 Mo. 178.

[31] Lewis v. State (Tex. Cr. App.) 59 S. W. 886. The controversy was apparently held in 80 Tex. App. 541, but it did not appear that the court charged upon reasonable doubt.

[32] Huggins v. State (Tex. Cr. App.) 60 S. W. 52.

§ 347. Propriety and sufficiency of particular instructions.

In instructing the jury as to the burden of proof, it is material error to place the burden of proof on the wrong party, since it is calculated to mislead the jury.[33] Thus it was error, in a case of criminal libel, to charge that it was incumbent on defendant to satisfy the jury that the libel was not published with his knowledge or authority, and, unless he had so satisfied them, they should find him guilty, since this puts the burden of proof upon the defendant to show his innocence, contrary to the rule of reasonable doubt and the presumption of innocence.[34] But instructions to the effect that the plaintiff must make out his case as pleaded, and that, in the absence of such proof, the jury must find for the defendant, does not change the burden of proof from the defendant to the plaintiff.[35] The jury may properly be instructed, on this subject, that the party holding the affirmative of the issue must prove it by a preponderance of the testimony, and that, if their minds are in equipoise upon the evidence, they should find against such party.[36] The jury may also be instructed that the burden is on defendant to prove his answer by a preponderance of the evidence;[37] and this will be a sufficient instruction on the subject when no further instruction is requested.[38] It is proper to refuse to charge, in an action for personal injuries, that the burden is "on the plaintiff to establish the material allegations in his petition by the pre-

[33] Woodson Machine Co. v. Morse, 47 Kan. 429; Pennington v. Woodall, 17 Ala. 685; State v. Crossley, 69 Ind. 203; Wildey v. Crane, 69 Mich. 17; State v. Grinstead, 62 Kan. 593.

[34] State v. Grinstead, 62 Kan. 593.

[35] Clifton v. Sparks, 25 Mo. App. 383.

[36] Lockhart v. Camfield, 48 Miss. 491. Meyer v. Blackemore, 54 Miss. 575. See, also, Buckingham v. Harris, 10 Colo 455.

[37] Kepler v. Jessup, 11 Ind. App. 241.

[38] Nichol v. Laumeister, 102 Cal. 658.

ponderance of the evidence; and unless you believe from the evidence that, by a preponderance of the evidence, plaintiff has established the facts which the court has charged you are material to his recovery, you will return your verdict for the defendant," as such charge requires the plaintiff to prove all the grounds of negligence relied upon.[39]

A requested instruction that the burden of proof is on the plaintiff to establish the allegations of his declaration is properly modified by adding that such allegations may be established by testimony presented on behalf of the defendant, or by the defendant's admissions, if the jury find such testimony or admissions.[40] An instruction that "while, as a matter of law, the burden of proof is upon the plaintiff, and it is for him to prove his case by a preponderance of the evidence, still, if the jury find that the evidence bearing upon the plaintiff's case preponderates in his favor, although slightly, it would be sufficient for the jury to find the issues in his favor," is not erroneous as excluding from consideration the evidence introduced by defendant.[41]

III. Degree of Proof Necessary in Civil Cases.

§ 348. Necessity and sufficiency of preponderance of evidence to sustain a verdict.

The jury may properly be instructed that a party must make out his case by a preponderance of the evidence,[42] or that all disputed facts are to be determined by the prepon-

[39] Houston & T. C. R. Co. v. Patterson (Tex. Civ. App.) 57 S. W. 675.

[40] Hartman v. Ruby, 16 App. Cas. (D. C.) 45.

[41] West Chicago St. R. Co. v. O'Connor, 85 Ill. App. 278.

[42] De Hart v. Board Com'rs Johnson Co., 143 Ind. 363; Chapman v. McAdams, 1 Lea (Tenn.) 500; Cunningham v. Stein, 109 Ill. 375; Altschuler v. Coburn, 38 Neb. 881.

derance of evidence.[43] In giving an instruction of this nature, the use of the word "testimony" instead of "evidence" will not be a ground of reversal;[44] nor will the use of the word "proof" instead of "evidence," as they are often used indifferently, as synonymous with each other.[45] Except in one jurisdiction,[46] it is a well-settled rule that the jury in a civil case are to decide facts upon the preponderance of the evidence, even though the evidence does not show such facts

[43] Roe v. Bacheldor, 41 Wis. 360.

[44] Jones v. Gregory, 48 Ill. App. 228; Mann v. Higgins, 83 Cal. 66.

[45] Flores v. Maverick (Tex. Civ. App.) 26 S. W. 316.

[46] The Rule in Alabama: In Alabama the rule seems to be well settled, against the weight of authority, that the jury are not compelled to find according to the mere preponderance of the evidence, unless it produces a reasonable conviction or satisfaction of the mind. Street v. Sinclair, 71 Ala. 110; Wilcox, Gibbs & Co. v. Henderson, 64 Ala. 535. A mere preponderance of evidence is not sufficient to authorize a verdict for plaintiff, unless it is sufficient to "satisfy" the minds of the jury. Acklen's Ex'r v. Hickman, 60 Ala. 568. "No matter what might be * * * if it [the evidence] failed to produce a rational belief in the minds of the jury as to the existence of the fact, it could not in any sense be said to be proved. * * * In the absence of legal presumption, it is for the jury alone to determine upon the amount of evidence required." Mays v. Williams, 27 Ala. 267. In accordance with these views, it has been held that it is error to instruct the jury, as matter of law, either that they must find according to the preponderance of the evidence, or that they cannot so find. Vandeventer v. Ford, 60 Ala. 610. Or that "in civil cases all that is required is that the proof shall preponderate in favor of one party or the other, and the jury must find according to the preponderance of the proof." Mays v. Williams, 27 Ala. 267. Or that "a preponderance of evidence, merely, inclining the minds of the jury to sustain the plaintiff's claim, cannot be regarded as sufficient." Acklen's Ex'r v. Hickman, 60 Ala. 568. So it has been held improper to charge that conviction should be produced in the minds of the jury after weighing all the evidence, and not by deciding on the preponderance. The process of weighing is the finding of an equilibrium or preponderance. Vandeventer v. Ford, 60 Ala. 610. The measure of proof in all civil actions is to reasonably satisfy the jury. Charges which require

to their satisfaction,[47] and that their verdict should be for the party in whose favor the evidence preponderated.[48] It is therefore proper to instruct that the jury should find for plaintiff if there is a preponderance of evidence in his favor;[49] or that "if the testimony of the plaintiff outweighs that of the defendant, if only enough to turn the scales, your verdict must be for the plaintiff;"[50] or that they should find for defendant, where the burden of proof is on plaintiff, unless the evidence preponderates in plaintiff's favor;[51] or that the defendant is entitled to a verdict if his plea appears to be sustained by the preponderance of the evidence.[52] In giving instructions of this character, it will not be proper to substitute the word "weight" for the word "preponderance." "Pre-

satisfaction beyond reasonable doubt exact too high a degree of proof, and should never be given. Decatur Car-Wheel & Mfg. Co. v. Mehaffey (Ala.) 29 So. 646. An instruction that "the 'preponderance of evidence' does not mean that the plaintiff must produce a greater number of witnesses than the defendant. It is sufficient to entitle her to a verdict that you are reasonably satisfied, from all the evidence, that the allegations of the complaint are true,"—is not open to the objection that it does not assert that if the jury are reasonably satisfied, from a fair preponderance of the evidence, the verdict shall be for plaintiff. Louisville & N. R. Co. v. White, 100 Fed. 239, 40 C. C. A. 352.

[47] Stratton v. Central City Horse Ry. Co., 95 Ill. 25.

[48] Clark v. Cassidy, 62 Ga. 407; Mead v. Husted, 52 Conn. 57; Ottawa, O. & F. R. V. R. Co. v. McMath, 4 Bradw. (Ill.) 356; American Cent. Ins. Co. v. Rothchild, 82 Ill. 166; Johnson v. People, 140 Ill. 350; Simmons v. Insurance Co., 8 W. Va. 474; Shinn v. Tucker, 37 Ark. 580; Dockery v. Tyler Car & Lumber Co. (Tex. Civ. App.) 34 S. W. 660; Telford v. Frost, 76 Wis. 172; Southwestern Telegraph & Telephone Co. v. Newman (Tex. Civ. App.) 34 S. W. 661; Callison v. Smith, 20 Kan. 28.

[49] Mead v. Husted, 52 Conn. 57.

[50] Telford v. Frost, 76 Wis. 172. This instruction simply requires the jury to weigh the evidence, and leaves them free to do so.

[51] Southwestern Telegraph & Telephone Co. v. Newman (Tex. Civ. App.) 34 S. W. 661.

[52] Shinn v. Tucker, 37 Ark. 580.

ponderance" is something more than "weight." It is superiority of weight,—outweighing.[53] If the answer admits the allegations of the petition, and sets up a recoupment and counter claim, it is not improper to instruct the jury that, unless the defendant does prove such defense by a preponderance of the evidence to the satisfaction of the jury, the jury will find for the plaintiff.[54] It has also been held improper to refuse an instruction that, if the evidence preponderates against the plaintiff, the jury should find for the defendant.[55] It has been held objectionable to tell the jury to decide according to what they find the preponderance of the evidence to be, on the ground that it furnishes the jury no rule in the event that they find the evidence equally balanced.[56] But a judgment for plaintiff will not, for that reason, be reversed, because such instruction does not authorize a verdict for the plaintiff unless there is a preponderance of evidence in his favor, and because the fact of their finding for him raises the presumption that they regarded the evidence as preponderating in his favor.[57] It is likewise improper to instruct "the jury that, to justify a verdict in favor of the plaintiff, the preponderance of testimony in his favor must be such 'as clearly outweighs the evidence on the other side.'" This instruction might mislead the jury to believe that plaintiff's case must be fully and abundantly established, and so as to be easily apparent to any and every one, and in a doubtful case is ground for reversal.[58] In explaining what is meant

[53] Shinn v. Tucker, 37 Ark. 580.

[54] Procter v. Loomis, 35 Mo. App. 482.

[55] Simmons v. Insurance Co., 8 W. Va. 474.

[56] Southwestern Telegraph & Telephone Co. v. Newman (Tex. Civ. App.) 34 S. W. 661; Dockery v. Tyler Car & Lumber Co. (Tex. Civ. App.) 34 S. W. 660.

[57] Dockery v. Tyler Car & Lumber Co. (Tex. Civ. App.) 34 S. W. 660.

[58] Callison v. Smith, 20 Kan. 28. See, also, post, § 352.

by "preponderance of evidence," there is no error in telling the jury that, when a party introduces evidence that satisfies the jury that "more likely than not" a certain state of facts exists, he has established his case by a preponderance of the evidence.[59] Nor can error be predicated of the following definition: "Preponderance, of course, means the most weight; but it is an abstract idea to talk about weighing the testimony between two such men as these parties. I can tell you a sure test as to where the weight of testimony is in this case: It is just what you believe to be the truth. If you believe that defendant promised to repay this money, then the weight of the testimony is on the side of the plaintiff."[60] An instruction that: "You must find that the plaintiff has maintained the burden of proving every essential fact by the greater weight of evidence; that is, that the theory submitted to you for your adoption upon the part of the plaintiff is more probable than the theory advanced upon the part of the defendants. So, if you reach that conclusion,—that the plaintiff has maintained the burden of proof placed upon her by law,—she has established her case by a greater weight of evidence. All that means is that the theory presented to you by the plaintiff must be more acceptable, more probable, and more consistent with your experience than the theory advanced by the defendants. If it is not, she fails,"—is erroneous. A theory may be more acceptable, probable, and consistent than another, and yet be unsupported by a preponderance of the evidence. The burden of proof is not sustained by proving such a theory.[61] An instruction that the jury are at liberty to decide that the preponderance of evidence is on the side which, in their judgment, is sustained by the more intelligent, the better informed, the more credible, and the more

[59] Groesbeck v. Marshall, 44 S. C. 538.
[60] Thomas v. Paul, 87 Wis. 607.
[61] Rommeney v. City of New York, 49 App. Div. (N. Y.) 64.

disinterested witnesses, whether these are the greater or the smaller number, has been held erroneous as amounting to a direction that the preponderance of evidence is with the side upon which the more intelligent and better informed witnesses testified.[62]

§ 349. What instructions proper where evidence equally balanced.

In civil cases, where the evidence is equally balanced, the verdict of the jury must be against the party on whom rests the burden of proof;[63] and an instruction to that effect is, of course, proper,[64] and should be given on request. It has been held in some cases, though, that, when the jury are instructed that a preponderance of the evidence is necessary to entitle the plaintiff to recover, the inference is that, if the evidence is equally balanced, the verdict should be for the other side, and such instruction is not erroneous because it does not expressly state such proposition.[65] But in another case an instruction that, if the proof preponderated in favor of the plaintiff, the verdict should be in his favor, but, if the jury found a preponderance the other way, their verdict should be for the defendant, was held erroneous for not instructing the jury how to find if the evidence was equally balanced. The view taken was that, if the jury considered the evidence equally balanced, they could have found no verdict at all; but the court considered that the error was not prejudicial and refused to reverse the case.[66] Since it is unjust to charge a defendant with liability when the preponderance

[62] Chicago City Ry. Co. v. Keenan, 85 Ill. App. 367.

[63] Vandeventer v. Ford, 60 Ala. 610; Jarrell v. Lillie, 40 Ala. 271; Lindsey v. Perry, 1 Ala. 203.

[64] Jones v. Angell, 95 Ind. 376; City Bank's Appeal from Com'rs, 54 Conn. 273.

[65] Harper v. State, 101 Ind. 109; Blitt v. Heinrich, 33 Mo. App. 245.

[66] City Bank's Appeal from Com'rs, 54 Conn. 273.

of the evidence merely inclines the minds of the jury to the side of plaintiff, it is error to charge that, if the evidence is equally balanced, the jury must find for the plaintiff.[67] Where the case as submitted to the jury does not consist solely of issues upon the declaration, but also includes affirmative issues raised by the defendant, it is error to instruct that plaintiff is bound to make "out its case by a preponderance of the evidence upon every material point;" and that "if, in weighing the evidence, the jury think that the evidence upon any point necessary to a recovery by the plaintiff is evenly balanced, or preponderates ever so slightly in favor of the defendant, they [the jury] should find for the defendant." Under such instruction, plaintiff can recover only by having every point or issue found in its favor, and that, of course, includes those as to which the burden of proof is on the defendant; and so the instruction seems to throw the burden of proof even as to them on the plaintiff.[68] In replevin by the mortgagee of personalty against the mortgagor, an instruction that, if the jury have a doubt as to the preponderance of the evidence, they should give the plaintiff the benefit of the doubt, is erroneous, since it authorizes the jury to find for plaintiff if a single doubt as to the greater weight of the testimony for defendant had arisen during the progress of the trial, although stronger doubt as to the opposite view might have necessarily been engendered in their minds from a consideration of the whole testimony.[69]

§ 350. Instructions requiring too high a degree of proof—That evidence must "satisfy" jury.

It is error for a court to charge a jury so as to mislead

[67] Jarrell v. Lillie, 40 Ala. 271.

[68] Richelieu Hotel Co. v. International Milltary Encampment Co., 140 Ill. 248.

[69] Grant v. Rowe, 83 Mo. App. 560.

them into the belief that more stringent proof is necessary than the law requires.[70] Instructions that the plaintiff is bound to prove his case to the "satisfaction" of the jury by a clear preponderance of the evidence are erroneous, and may, of course, be properly refused as requiring too high a degree of proof for the maintenance of an issue in a civil cause.[71] Such an instruction might be understood to mean a higher degree of proof than is furnished by a preponderance of the evidence. This is especially so when the language is often repeated.[72] The following instructions are also erroneous for the same reason: That one upon whom is the burden of proof "must satisfactorily prove by a preponderance of evidence" all the necessary facts;[73] that, before the jury can find defendant guilty (in an action of trespass), they must be "satisfied from a preponderance of the evidence;"[74] that a party must establish the material allegations of his pleading "to the satisfaction of the jury;"[75] that the plaintiff must establish his case "to the full satisfaction of the jury, by clear and convincing proof;"[76] that the jury must be "well satis-

[70] Watkins v. Wallace, 19 Mich. 57.

[71] Mitchell v. Hindman, 150 Ill. 538; Gooch v. Tobias, 29 Ill. App. 268; Balohradsky v. Carlisle, 14 Ill. App. 289; Fernandes v. McGinnis, 25 Ill. App. 165; Stratton v. Central City Horse Ry. Co., 95 Ill. 25; Protection Life Ins. Co. v. Dill, 91 Ill. 174; Lowery v. Rowland, 104 Ala. 420; Miller v. Barber, 66 N. Y. 558; McGill v. Hall (Tex. Civ. App.) 26 S. W. 132; Fordyce v. Beecher, 2 Tex. Civ. App. 29; Oury v. Saunders, 5 Tex. Civ. App. 310; Feist v. Boothe (Tex. Civ. App.) 27 S. W. 33; Grigg v. Jones (Tex. Civ. App.) 26 S. W. 885; Finks v. Cox (Tex. Civ. App.) 30 S. W. 512; Pierpont Mfg. Co. v. Goodman Produce Co. (Tex. Civ. App.) 60 S. W. 347; Ruff v. Jarrett, 94 Ill. 475; Ottawa, O. & F. R. V. R. Co. v. McMath, 4 Ill. App. 356.

[72] McBride v. Banguss, 65 Tex. 174.

[73] Bauchwitz v. Tyman, 11 Ill. App. 186.

[74] Wollf v. Van Housen, 55 Ill. App. 295.

[75] McGill v. Hall (Tex. Civ. App.) 26 S. W. 132.

[76] Gage v. Louisville, N. O. & T. Ry. Co., 88 Tenn. 724.

fied," etc.;[77] that the jury must be "thoroughly satisfied" of a fact in dispute;[78] that a fact must be proved "to your entire satisfaction, * * * by testimony in which you have implicit confidence;"[79] that "the law requires the plaintiff to make clear and satisfactory proof of the contract, as claimed by him; therefore, if you believe the evidence in this case is such as to leave the real terms of the contract between the parties in doubt, the plaintiff cannot recover;"[80] that a party alleging a fact "must prove it by a preponderance of the evidence, so clear and cogent that it leaves the mind well satisfied that the charge is true;"[81] "that the jury must be satisfied by the preponderance of the evidence, to a reasonable certainty, that a fact exists, before they can find such fact."[82] It has been held, though, that an instruction that the jury "should be satisfied by a clear preponderance of proof" is not misleading when given with one that "this is a civil action, and it is not required in a civil action to establish the facts beyond a reasonable doubt, * * * but a fair preponderance of proof is all that is required."[83] And where a charge that, before plaintiffs could recover, the jury must be satisfied from the evidence that defendant's negligence caused the fire, and that plaintiffs were not guilty of contributory negligence, was qualified as follows: "And the destruction of the cotton by fire under this clause may be shown by circum-

[77] Monaghan v. Agricultural Fire Ins. Co. of Watertown, 53 Mich. 238.

[78] O'Donohue v. Simmons, 58 Hun (N. Y.) 467.

[79] Ott v. Oyer's Ex'x, 106 Pa. 7, in which it was said that this was equivalent to directing the jury that there must be no doubt in their minds.

[80] White v. Gale, 14 Ill. App. 274.

[81] Hutchinson Nat. Bank v. Crow, 56 Ill. App. 558.

[82] Pelitier v. Chicago, St. P., M. & O. Ry. Co., 88 Wis. 521.

[83] Hart v. Niagara Fire Ins. Co., 9 Wash. 620.

stantial evidence sufficient in your opinion to justify the belief that the fire was caused by a spark or cinders coming from defendant's engine,"—it was held that this latter clause sufficiently indicated to the jury that by the word "satisfied" nothing more was meant than opinion or belief; and the charge as an entirety did not present reversible error.[84] On an issue as to undue influence, an instruction that "the law presumes in favor of honesty and fair dealing, and whoever asserts the contrary must prove it to your satisfaction, by a preponderance of the evidence," does not impose the burden of proving undue influence beyond a reasonable doubt. The instruction requires of contestants "only 'a preponderance of the evidence.' The phrase 'to your satisfaction' informed the jurors that they were the judges as to where the preponderance lay."[85]

§ 351. Same—Other instructions requiring too high a degree of proof.

In a civil case, it is error to instruct, and proper to refuse to instruct, that the plaintiff must make out his case by a "clear preponderance" of the evidence. A "mere preponderance" is enough,[86] and the use of the word "clearly" is misleading.[87] " 'Clearly convinced,' as applied to the measure of proof required, [also] lays down too exacting a rule."[88] So

[84] Martin v. Missouri Pac. Ry. Co., 3 Tex. Civ. App. 133.

[85] Surber v. Mayfield (Ind.) 60 N. E. 7.

[86] McDeed v. McDeed, 67 Ill. 545; Bitter v. Saathoff, 98 Ill. 266; Prather v. Wilkens, 68 Tex. 187; Chicago & E. I. R. Co. v. Storment, 90 Ill. App. 505.

[87] Prather v. Wilkens, 68 Tex. 187.

An instruction requiring "clear" proof of fraud is not misleading where the court, in other instructions, plainly charged that only a preponderance of evidence was necessary to establish fraud. Stocks v. Scott, 188 Ill. 266, affirming 89 Ill. App. 615.

[88] Wilcox v. Henderson, 64 Ala. 535. An instruction that fraud

it is erroneous to instruct that a fact must be "clearly and fairly proved;"[89] or proved "clearly and with certainty,"[90] or "with certainty,"[91] or "clearly proved;"[92] or that the jury must be "conclusively convinced,"[93] or merely "convinced;"[94] or that the jury must have "an abiding conviction;"[95] or that the case must be free from doubt;[96] or that the plaintiff must prove his case by a "fair preponderance" of the evidence;[97] or that, in order "to establish a charge of fraud, the facts

must be proved by "clear and convincing evidence" is incorrect. A preponderance of the evidence is sufficient. Smith v. Edelstein, 92 Ill. App. 38.

[89] Hall v. Wolff, 61 Iowa, 559.

[90] Howand v. Zimpelman (Tex.) 14 S. W. 59. In this case, the court said that the word "certainty" meant beyond a reasonable doubt.

[91] First Nat. Bank of Marshall v. Myer, 23 Tex. Civ. App. 302.

[92] Lehman v. Kelly, 68 Ala. 192; McLeod v. Sharp, 53 Ill. App. 406. Compare Edwards v. Whyte, 70 Ala. 365, where, in a suit for breach of contract, to which the defense was a rescission, it was held that instructions that defendant must prove the rescission, "to the satisfaction of the jury, by clear and satisfactory testimony," were not erroneous; that, when fairly construed, they did not call for a higher degree of proof than to the satisfaction of the jury.

[93] Hiester v. Laird, 1 Watts & S. (Pa.) 245; Greathouse v. Moore (Tex. Civ. App.) 23 S. W. 226.

[94] Merchants' Loan & Trust Co. v. Lamson, 90 Ill. App. 18.

[95] Battles v. Tallman, 96 Ala. 403.

[96] Whitney v. Clifford, 57 Wis. 156. To the same effect is Harris v. Russell, 93 Ala. 59, where an instruction that, the burden being on plaintiffs to make out their case to the satisfaction of the jury, they must find for defendants, if they are left in doubt as to any of the facts, was held erroneous, as exacting too high a measure of proof, and as calculated to make the jury understand that the evidence must be certain beyond doubt. See, also, Spencer v. Daggett, 2 Vt. 92, where it was held proper to refuse an instruction that, if the jury doubted about the fact of defendant's liability, they must find for him.

[97] B. Lantry Sons v. Lowrie (Tex. Civ. App.) 58 S. W. 837; Cabell v. Menczer (Tex. Civ. App.) 35 S. W. 206. But see Bryan v. Chicago, R. I. & P. Ry. Co., 63 Iowa, 464, where it was held that, in charging

must be such that they are not explicable on any other reasonable hypothesis;"[98] or, in an action for wrongful attachment, that "the burden of proof is on the plaintiff to show that the attachment was sued out by the defendant wrongfully, maliciously, and without probable cause, and of the existence of these elements she must reasonably satisfy the minds of the jury; and if the evidence leaves them confused or uncertain as to the existence of such elements, then the plaintiff is not entitled to recover;"[99] or that the plaintiff must prove his case by "downright evidence;"[100] that if the evidence leaves a fact "in a state of doubt and uncertainty," it "cannot be regarded as established by the testimony."[101] Charges requiring satisfaction beyond a reasonable doubt exact too high a degree of proof, and should never be given in civil actions. Proof which reasonably satisfies the jury is all that is required.[102]

§ 352. Instructing that preponderance is determinable by number of witnesses.

An instruction which gives the jury to understand, or which is liable to give the jury to understand, that the preponderance of the evidence is to be determined by the number of witnesses testifying on each side, is erroneous.[103] Hence an instruction that the preponderance of testimony "does

a jury that they are to decide on the fair preponderance of the evidence, no error is committed by the use of the word "fair;" that it means no more than the charge would have meant without it. To the same effect is Jamison v. Jamison (Iowa) 84 N. W. 705.

[98] Phoenix Ins. Co. v. Moog, 87 Ala. 335.

[99] Brown v. Master, 104 Ala. 451.

[100] Roe v. Bacheldor, 41 Wis. 360.

[101] Rowe v. Baber, 93 Ala. 422.

[102] Decatur Car Wheel & Mfg. Co. v. Mehaffey (Ala.) 29 So. 646. As to the exceptional rule prevailing in Alabama, see ante, § 349.

[103] Howlett v. Dilts, 4 Ind. App. 23.

necessarily consist in the number of witnesses," etc., instead of "does not necessarily consist," etc., must be condemned; for although the omission of the word "not" might have been accidental, yet it cannot be said that the jury did not understand the instruction just as it reads, and resolve the conflict of evidence upon that basis.[104] The jury may properly be instructed that the preponderance of evidence is to be determined, not alone from the number of the witnesses, but also from their respective opportunities of seeing, knowing, or remembering what they testify to, the probability of its truth, their relation to the parties, their interest, if any, in the result, and their demeanor while testifying.[105] But it has been held that a judgment should not be reversed merely because of a refusal to give such an instruction.[106] An instruction which tells the jury that the preponderance of evidence does not consist merely in the number of witnesses testifying, and enumerates the circumstances which may be considered in determining where the preponderance lies, is erroneous and misleading, where it wholly omits from the enumeration the question of the relative number of witnesses.[107]

IV. Limiting Consideration of Evidence to Purpose for which Admitted.

§ 353. In general.

It is the well-settled practice that where evidence is admissible for some purposes, but not for others, the court should not for that reason exclude it from the jury.[108] When evidence of this nature is admitted, it is, of course, proper for

[104] Illinois Cent. R. Co. v. Zang, 10 Ill. App. 594.

[105] Meyer v. Mead, 83 Ill. 19. Compare Chicago City Ry. Co. v. Keenan, 85 Ill. App. 367.

[106] Greeley, S. L. & P. Ry. Co. v. Yount, 7 Colo. App. 189.

[107] Hays v. Johnson, 92 Ill. App. 80.

[108] Farwell v. Warren, 51 Ill. 467.

the court to explain to the jury the purpose for which it was admitted, and direct them not to consider it for any other purpose.[109] But in giving these instructions, care should be exercised so as not to withdraw the evidence from the consideration of the jury, nor to restrain them from giving it, in connection with the other evidence in the case, such weight in respect to the matter which it proves, in the light of reason and good sense, they may as thus advised believe it deserves.[110]

§ 354. In criminal cases.

Subject to a few exceptions and limitations, it may be stated as a general rule that in criminal cases, where evidence competent for one purpose, but for no other, is admitted, the court should, on or without request, limit the jury's consideration of such evidence to that purpose alone for which it was admitted;[111] and in one state it has been held that ex-

[109] Giddings v. Baker, 80 Tex. 308; Missouri Pac. R. Co. v. Johnson, 72 Tex. 95; Harrington v. State, 19 Ohio St. 264; People v. Gray, 66 Cal. 271; Engers v. State (Tex. Cr. App.) 26 S. W. 987; Short v. State (Tex. Cr. App.) 29 S. W. 1072; Winfrey v. State (Tex. Cr. App.) 56 S. W. 919.

[110] Harrington v. State, 19 Ohio St. 264.

[111] State v. Lavin, 80 Iowa, 555; State v. Marshall, 2 Kan. App. 792; McCall v. State, 14 Tex. App. 353; Paris v. State, 35 Tex. Cr. App. 82; Martin v. State, 36 Tex. Cr. App. 125; Golin v. State, 37 Tex. Cr. App. 90; Proctor v. State, 37 Tex. Cr. App. 366; Thornley v. State (Tex. Cr. App.) 35 S. W. 982; Engers v. State (Tex. Cr. App.) 26 S. W. 987; Rogers v. State, 26 Tex. App. 404; Long v. State, 11 Tex. App. 381; State v. Collins, 121 N. C. 667; State v. Lull, 37 Me. 246; Fossdahl v. State, 89 Wis. 482; Kollock v. State, 88 Wis. 663; Com. v. Tadrick, 1 Pa. Super. Ct. 555; Gills v. Com. (Ky.) 37 S. W. 269. Contra, People v. Gray, 66 Cal. 271, and Long v. State, 95 Ind. 481, in both of which cases it was held that error could not be predicated of a failure to limit the effect of evidence, in the absence of a request for an instruction of that nature.

ceptions are unnecessary to obtain a review of the error.[112] But a recent enactment in this state seems to have changed the rule.[113] Thus, where the declarations or admissions of one of two defendants is admitted in evidence, the jury should be told that such declarations or admissions are evidence only against the defendant who made them.[114] On the trial of an accomplice, the court should instruct that the jury must limit its consideration of the confessions of the principal to the question of his guilt.[115] So, where evidence is adduced of other crimes committed by defendant, in order to show motive or guilty intent, the court should properly instruct the jury with reference to the purpose and object of such testimony.[116] The jury should be instructed to consider evidence introduced to affect the credibility of the defendant for that specific purpose alone,[117] as, for instance, evidence that de-

[112] Paris v. State, 35 Tex. Cr. App. 82; Thornley v. State (Tex. Cr. App.) 35 S. W. 982; Burks v. State, 24 Tex. App. 326.

[113] Magee v. State (Tex. Cr. App.) 43 S. W. 512.

[114] Kollock v. State, 88 Wis. 663; State v. Collins, 121 N. C. 667; Short v. State (Tex. Cr. App.) 29 S. W. 1072. In this last case, two defendants were tried together for unlawfully killing the hogs of another, and it was shown that one defendant, in the absence of the other, had said that he intended to kill the hogs, and there was no evidence of any conspiracy between the defendants at the time of the making of the declaration. It was held that a failure to charge that such declaration should not be permitted to affect the absent defendant was error.

[115] Thomas v. State (Tex. Cr. App.) 62 S. W. 919.

[116] Kollock v. State, 88 Wis. 663; Francis v. State, 7 Tex. App. 501; Taylor v. State, 22 Tex. App. 530; Wheeler v. State, 23 Tex. App. 598; Mayfield v. State, 23 Tex. App. 645; Martin v. State (Tex. Cr. App.) 35 S. W. 976; Davidson v. State, 22 Tex. App. 382; Long v. State, 11 Tex. App. 381; Barton v. State, 28 Tex. App. 483; Thornley v. State (Tex. Cr. App.) 35 S. W. 981; McCall v. State, 14 Tex. App. 358; Mask v. State, 34 Tex. Cr. App. 136; Com. v. Tadrick, 1 Pa. Super. Ct. 555. Compare Shipp v. Com., 101 Ky. 518.

[117] Coker v. State, 35 Tex. Cr. App. 57; Golin v. State, 37 Tex. Cr.

fendant has been charged with other crimes,[118] or that he has been convicted of other crimes,[119] or evidence that defendant had attempted to suborn a witness,[120] or evidence tending to show that he is guilty of the crime of which he is charged.[121] When a document is read to a jury for a specific, lawful purpose, which is also evidence of facts not admissible, it is the duty of the court to instruct them to disregard every other consideration than the one for which it was admitted.[122] Whenever extraneous matter is admitted in evidence for a specific purpose incidental to, but which is not admissible directly to prove, the main issue, and which might tend, if not explained, to exercise a wrong, undue, or improper influence upon the jury as to the main issue, the court should so limit and restrict it that such unwarranted results cannot ensue.[123] In Texas a failure to limit the effect of evidence not proper for consideration on some points of the case is not error in trials for misdemeanors, as distinguished from felony cases, unless a request for such an instruction has been made.[124] Where there is evidence that the accused has made contradictory and incriminating statements with respect to matters bearing on the crime, it is proper to refuse to instruct "that they could only be considered in so far as they affected the credibility of the defendant; but this was not a request to instruct that evidence of

App. 90; Engers v. State (Tex. Cr. App.) 26 S. W. 987; Jenkins v. State, 1 Tex. App. 346.

[118] Oliver v. State, 33 Tex. Cr. App. 541.

[119] Hutton v. State (Tex. Cr. App.) 33 S. W. 969; Fossdahl v. State, 89 Wis. 482; Mahoney v. State, 33 Tex. Cr. App. 388.

[120] Owens v. State, 35 Tex. Cr. App. 345.

[121] Paris v. State, 35 Tex. Cr. App. 82.

[122] State v. Lull, 37 Me. 246.

[123] Davidson v. State, 22 Tex. App. 372.

[124] Duke v. State, 35 Tex. Cr. App. 283; Paris v. State, 35 Tex. Cr. App. 82.

defendant's bad character went only to his credibility as a witness, and was not evidence of his guilt, * * * because any and all statements shown to have been made by defendant tending to show his connection with the homicide were admissible, however inconsistent they may have been, and regardless of any tendency that they may have had to discredit him as a witness before the jury.[125] A failure to limit the effect of the testimony of a witness for the prosecution in contradiction of a witness for defendant is not error, where the contradiction is more apparent than real.[126] Where evidence is admissible solely to contradict or impeach a witness, it is not error to so limit the effect of the evidence by the charge to the jury.[127] And generally, where testimony is introduced for the purpose of discrediting a witness, the omission to instruct the jury not to consider the evidence for any other purpose than that for which it was admitted is error.[128] But if the purpose of admitting the evidence objected to is clearly apparent,[129] or the jury "could not possibly have concluded it was [admitted] for any other purpose" than the one for which it was admitted, the failure of the court to restrict the effect of such evidence is not error.[130] Thus, where witnesses admit that they have been previously indicted for various felonies, a failure of the court to limit the effect of such admissions to questions affecting their credibility is not error, in view of the fact that such admissions cannot be con-

[125] State v. Furgerson, 162 Mo. 668.

[126] Massingill v. State (Tex. Cr. App.) 63 S. W. 315.

[127] Winfrey v. State (Tex. Cr. App.) 56 S. W. 919.

[128] Rogers v. State, 26 Tex. App. 404; Gills v. Com. (Ky.) 37 S. W. 269.

[129] State v. Gaston, 96 Iowa, 505; Moseley v. State, 36 Tex. Cr. App. 578.

[130] Holly v. Com. (Ky.) 36 S. W. 532; Magee v. State (Tex. Cr. App.) 43 S. W. 512.

sidered for any other purpose.[131] So, failure to limit testimony as to the good reputation of the prosecuting witness for truth and veracity is not error, if the testimony shows that the jury could not have considered it for any other purpose than to affect the credibility of said witnesses. It is only where testimony might be used for some other purpose than to discredit the witness that it is necessary for the court to limit the same for the purposes for which it was introduced.[132] It is not necessary to instruct that evidence of contradictory statements of a witness can be considered only for the purpose of affecting the credibility of the witness, where such evidence did not tend to establish the guilt of defendant.[133] It may be stated generally that, unless testimony impeaching witnesses for defendant can be used for some purpose injurious to defendant, it is not necessary to limit its effect by an instruction.[134] It is proper to charge that, "where a witness testifies for one side, it is competent for the other side to introduce another witness to swear that on a particular occasion, that witness made statements different from the statements that he made on the stand, * * * and that is done for the purpose of tending to show (and it is for you to give the evidence such weight as it is entitled to), he is not worthy of credit, and that is the purpose for which it was introduced." That, however, does not show that the contradictory statements of the witness made to the impeaching witness are true or untrue, but such statements are declarations made out of court, and not original evidence.[135]

[131] Gann v. State (Tex. Cr. App.) 59 S. W. 896.
[132] Ogle v. State (Tex. Cr. App.) 58 S. W. 1004.
[133] Ross v. Com. (Ky.) 59 S. W. 28.
[134] Blanco v. State (Tex. Cr. App.) 57 S. W. 828.
[135] Bondurant v. State, 125 Ala. 31.

§ 355. In civil cases.

In civil cases the decisions are not harmonious as to the necessity of giving an instruction of this nature, in the absence of a request. According to some decisions, if a party desires to have the effect of the evidence properly limited, he must ask for an appropriate instruction.[136] It is fatal error to refuse an instruction, in a negligence case, that evidence of precautions taken after the accident cannot be considered as evidence of negligence.[137] In other decisions, in which the reports did not disclose whether any requests for instructions limiting the effect of evidence had been made, it was held erroneous not to give such instructions.[138] Where a fact is testified to by plaintiff's witnesses on rebuttal which is properly a fact in chief, but the court admits the testimony on the ground that it contradicts a witness for defendant, and affects his credibility, the court should instruct the jury clearly as to what use to make of it.[139] Where evidence is only admissible as bearing upon the credibility of the testimony of a witness, but the court charges that whatever weight is to be given to the evidence upon any point the jury will have a right to consider, there is error.[140] Where evidence is admitted which is competent only upon one issue in the case, it is error to refuse a request for an instruction so limiting the consideration of such evidence.[141]

136 Schlicker v. Gordon, 19 Mo. App. 479; Puth v. Zimbleman, 99 Iowa, 641; Babb v. Ellis, 76 Mo. 459; Lipprant v. Lipprant, 52 Ind. 273; Missouri Pac. R. Co. v. Johnson, 72 Tex. 95. See, also, Farwell v. Warren, 51 Ill. 467.

137 Anson v. Evans, 19 Colo. 274.

138 McDermott v. Hannibal & St. J. R. Co., 87 Mo. 285; Weir v. McGee, 25 Tex. Supp. 20; Marks v. Culmer, 6 Utah, 419.

139 Barlow Bros. Co. v. Parsons, 73 Conn. 696.

140 Worthing v. Worthing, 64 Me. 335.

141 Triolo v. Foster (Tex. Civ. App.) 57 S. W. 698.

V. CAUTIONS AS TO ARGUMENTS OF COUNSEL.

§ 356. What comments on legitimate argument proper.

It is the privilege of parties to be heard at the bar through their counsel,[142] and a wide latitude is given to the latter in making their argument to the jury.[143] It is their privilege in argument to refer to the evidence, and to make such deductions as they think are justified.[144] It is therefore improper for the trial judge, in charging the jury, to make any statements, the tendency of which is to disparage or discredit arguments which are within the law and facts of the case. It is erroneous to instruct the jury on this head that they should not consider any law that had been addressed to them by counsel, whether applicable to the facts or not,[145] or that they should give no consideration to arguments of counsel.[146] So it has been held improper to refuse, as unduly limiting the effect of legitimate argument, a charge that "whatever may have been said or claimed by counsel * * * in their arguments to the court should have no influence whatever with the jury in determining the facts in the case, except so far as the testimony, when considered altogether, may show the statement to have been true;" and that "the jury should not be influenced by anything but the testimony in the cause, with whatever light may have been reflected thereon by the arguments and analysis of counsel, and the law as it has been given you in charge by the court, and from these alone endeavor to arrive at the very truth, regardless of re-

[142] State v. O'Neal, 29 N. C. 252; Garrison v. Wilcoxson, 11 Ga. 154.

[143] State v. O'Neal, 29 N. C. 252.

[144] People v. Hite, 8 Utah, 461.

[145] Reeves v. State, 34 Tex. Cr. App. 483; Reeves v. State, 34 Tex. Cr. App. 483.

[146] Garrison v. Wilcoxson, 11 Ga. 154.

sults."[147] On the other hand, a charge "that the attorneys on either side are not supposed to be impartial, and that the jury are to take their statements both on the law and facts guardedly," has been upheld.[148] And a statement by the judge in charging that he could not "do anything towards brushing away the sophistries of counsel" was held not improper, where there was nothing to indicate a personal application of the words to any particular counsel, and the words were spoken when he was stating exactly and fully the restrictions of the law upon the judge endeavoring to comment upon the facts in evidence.[149] So, where counsel expressed strongly his belief in his client's innocence, it was held that an instruction that "what counsel said in their argument, and what they believed," was to have no influence with the jury whatever, was not erroneous, it being apparent from the context that the words referred solely to counsel's statement as to his belief in defendant's innocence.[150] It has also been held that the court may, after instructing the jury correctly upon a matter presented by counsel, add that, as a general rule, it is the fairest and best way for a jury to decide cases mainly upon the grounds taken and discussed by counsel in the argument.[151]

§ 357. Correcting erroneous or improper argument.

It is the duty of the court to keep counsel within the boundaries of legitimate argument,[152] and a refusal to grant instructions to obviate prejudice caused by improper argu-

[147] People v. Hite, 8 Utah, 477.

[148] State v. Jones, 29 S. C. 201.

[149] State v. Way, 38 S. C. 347.

[150] Smith v. State, 95 Ga. 472. See, also, Roe v. State, 25 Tex. App. 33.

[151] Melvin v. Bullard, 35 Vt. 268.

[152] People v. Lange, 90 Mich. 454; Evans v. Town of Trenton, 112 Mo. 390; State v. Johnson, 23 N. C. 354.

ment is reversible error.[153] Any misrepresentation of law by counsel, whether in a civil or criminal case, should be corrected, though admitted to be law by the parties or their counsel;[154] and the court should also correct statements made by counsel of matters as proved which are not based on any evidence in the case.[155] Where counsel states "that on a former trial a verdict had been rendered for plaintiff," the impropriety is cured by an instruction that the jury "had nothing to do with the former trial."[156] In a case where it was held proper for counsel to read extracts from a law book to the jury by way of illustration, it was held that an instruction "that such course was improper, and would not have been permitted if it had been objected to; that it was calculated to, and might, mislead the jury," should not have been given.[157] If it is improper for counsel to read law books to the jury, the court may properly charge that any matter read to them from law books must not be considered by them for any purpose.[158] If extracts from reported cases are read by counsel on the question of the measure of damages, the error is cured by an instruction that the jury are to determine the case upon the evidence, uninfluenced by damages given

[153] State v. McCartney, 65 Iowa, 522; Brow v. State, 103 Ind. 133.

[154] State v. Johnson, 23 N. C. 354; Gregory's Adm'r v. Ohio River R. Co., 37 W. Va. 606.

[155] Birmingham Nat. Bank v. Bradley, 116 Ala. 142; State v. O'Neal, 29 N. C. 252; Nelson v. Welch, 115 Ind. 270; Melvin v. Easley, 46 N. C. 386.

[156] Chesebrough v. Conover, 140 N. Y. 382.

[157] People v. Anderson, 44 Cal. 65.

[158] Morehouse v. Remson, 59 Conn. 392. See, also, Jones v. State, 65 Ga. 510, in which it was held that, where counsel read extracts from "Phillips' Remarkable Cases of Circumstantial Evidence," it was not error to charge "that the jury must not be influenced, guided by, or accept as law in this case any imaginary cases taken from works of romance."

in other cases.[159] An argument prejudicial to a party will not be held to have been cured by an instruction that the jury must disregard it, where the verdict indicates that the argument was more effective than the instruction.[160] A repetition by counsel of excluded testimony is cured by an instruction which explicitly defines the issues, and directs the jury not to consider such excluded testimony.[161] Where counsel improperly attacks the credibility of a witness, on whose testimony alone the defense depends, by the suggestion that such witness has been tampered with, the error is not cured by an instruction that the jury are to decide the case on the evidence, and what the witnesses say, and not on what counsel say.[162]

§ 358. At what stage of trial correction made.

It will, in general, be sufficient to correct an improper statement made by counsel in argument in giving the charge to the jury.[163] It is said, however, in one case, that "it may be laid down as law, and not merely discretionary, that where the counsel grossly abuses his privilege, to the manifest prejudice of the opposite party, it is the duty of the judge to stop him then and there, and, if he fails to do so, * * * it is good ground for a new trial."[164] Where the jury return a verdict of guilty, but, on being polled, three of them refuse

[159] City of Evansville v. Wilter, 86 Ind. 414.

[160] Galveston, H. & S. A. Ry. Co. v. Kutac, 72 Tex. 643.

[161] Talmage v. Smith, 101 Mich. 370.

[162] Sullivan v. Deiter, 86 Mich. 404.

[163] Melvin v. Easley, 46 N. C. 386; State v. O'Neal, 29 N. C. 251. In this last case it was said that there was no obligation on the judge to interrupt counsel in stating their conclusions; that it is the right and duty of the trial judge to correct the mistake, and that he might do it at the moment, or wait till he charges the jury,—perhaps the most appropriate time.

[164] Jenkins v. North Carolina Ore Dressing Co., 65 N. C. 564.

to concur in the verdict, it is too late for the court to say that counsel improperly represented that the opinion of the court must have been against the defendant. Such misrepresentation should be corrected when it is made.[165]

VI. Miscellaneous Late Cases.

§ 359. In general.

In a prosecution for murder, it was proper to refuse charges asked by the defendant to the effect "that, the greater the crime, the stronger is the proof required for conviction."[166] An instruction that the jury are not to consider the result of a former trial of the case is clearly correct.[167] In an action for personal injuries, an instruction "that you [the jury] must not compromise between the questions of liability and amount of damages; that is, if, after due consideration of the evidence and instructions, * * * based upon a view as to the preponderance of the evidence, some of you should believe the defendant not guilty, and others * * * believe the defendant guilty, and plaintiff entitled to substantial damages, you must not, in such event, merely as a matter of compromise, * * * bring in a verdict for some unsubstantial amount,"—being, in effect, that the verdict must be either not guilty, or for substantial damages,—was erroneous.[168] Where defendant requested that the court charge the jury that they must be governed by the law as given by the court in its charge, "and that they would not be justified in finding a verdict contrary to the law as laid down in the instruction," and the court's charge contained no similar instruction, it was error to refuse the request.[169] The

165 State v. Caveness, 78 N. C. 484.
166 State v. Johnson, 104 La. 417.
167 Travelers' Ins. Co. v. Parker, 92 Md. 22.
168 Guaranty Const. Co. v. Broeker, 93 Ill. App. 272.
169 Chicago & E. I. R. Co. v. Stonecipher, 90 Ill. App. 511.

court may rightfully instruct the jury to take the law from the court, and to disregard a case read in their hearing by counsel.[170] Where the evidence tends to show the commission of a crime on a particular date, it is proper for the court to charge that every circumstance pointing to motive and intent may be considered with relation to any particular date on which an alleged crime may have been committed, on the assumption that the jury may find the crime to have been committed on a different date.[171] An instruction that "a witness is only valuable to the extent that his evidence establishes some material fact or circumstance which aids in making clear and plain to your minds some question involved in this litigation" is erroneous, as it is not incumbent on litigants to make points involved clear and plain.[172]

§ 360. Duty and conduct of jury.

An instruction that the jury, in deliberating upon the case, are "not to refer to or discuss any matter or issue not in evidence before you; neither shall you separate from each other, nor talk with any one not of your jury; and a violation of this injunction will be punished severely by the court,"—is not only not objectionable as a threat, but is to be heartily commended as a warning to the jury not to consider any issue not in evidence before them.[173] An instruction asked, stating that each juror should decide for himself on his oath as to what his verdict should be, and should not yield his deliberate conscientious convictions as to what the verdict should be, either at the instance of a fellow juror, or at the instance of a majority, nor yield his honest convictions for

[170] Hyde v. Town of Swanton, 72 Vt. 242.
[171] State v. Cunningham, 111 Iowa, 233.
[172] Endowment Rank of K. P. v. Steele (Tenn.) 63 S. W. 1126.
[173] Villereal v. State (Tex. Cr. App.) 61 S. W. 715.

the sake of unanimity, or to avert the disaster of a new trial, is properly refused, as incorrectly stating the duty and obligation of a juror.[174] An instruction that, if the jury find for the plaintiff, they must not assess damages by adding the amounts they individually think should be awarded, and dividing the amount so obtained by the number of jurors, unless they thereafter agree upon such amount as a just sum under the evidence, is erroneous, as tending to induce the jury to reach a verdict in the manner censured by the instruction.[175] An instruction that the court does not intimate, "or mean to give, or wish to be understood as giving, an opinion as to what the proof is or what it is not, or what the facts are in this case, or what are not the facts therein. It is solely and exclusively for the jury to find and determine the facts, and this they must do from the evidence, and, having done so, then apply to them the law as stated in these instructions,"—is not erroneous, as impressing the jury with the idea that they are independent of the court and the law.[176] An instruction that the jury are to "consider, first, the defendant's affirmative defense, and, if it is supported by the evidence, to find for the defendant. They are then instructed that, if they do not find it supported by the evidence, to consider plaintiff's complaint, and, if they found it supported by evidence, to find for plaintiff,"—is a correct instruction as to the burden of proof upon the facts alleged in the complaint and answer, respectively, and is not unfavorable to defendant.[177] An instruction admonishing the jury that they are to ignore any language, employed by the court in discussing questions

[174] Horton v. United States, 15 App. D. C. 310.

[175] West Chicago St. R. Co. v. Dougherty, 89 Ill. App. 362.

[176] North Chicago St. R. Co. v. Kaspers, 186 Ill. 246, 57 N. E. 849, affirming 85 Ill. App. 316.

[177] Chicago, I. & E. Ry. Co. v. Patterson, 26 Ind. App. 295.

of law with counsel, which may have indicated his opinion as to the facts, as it was the duty of the court to declare the law, and of the jury to determine the facts according to their best judgment, regardless of any consideration other than that of doing even-handed justice between the parties to the suit, is erroneous, in that it leaves them to determine the facts according to their own best judgment, regardless of any consideration other than that of doing even-handed justice between the parties.[178]

§ 361. Corroboration of witnesses.

Where the unsworn testimony of a child is received in evidence under a statute which provides that no person shall be convicted on such testimony unsupported by other evidence, it is reversible error to refuse to charge that, before a conviction can be had, the evidence not only must tend to support, but "must support, the story of the witness."[179] Where, on trial for perjury, an instruction was given: "There must be the direct testimony of at least one credible witness, and that testimony, to be sufficient, must be positive and directly contradictory of the defendant's oath. In addition to such testimony, there must be either another such witness or corroborating circumstances established by independent evidence, and of such a character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence; otherwise, the defendant must be acquitted,"—and in another instruction the court said: "The additional evidence must be at least strongly corroborative of the testimony of the accusing witness,"—it was proper to refuse to instruct, on the question of corroboration, that "there must be something in the corroborative evidence which

[178] Chicago North Shore St. Ry. Co. v. Hebson, 93 Ill. App. 98

[179] People v. Gralleranzo, 54 App. Div. (N. Y.) 360.

makes the facts sworn to by defendant not true if the corroborative evidence be true also. If the corroboration does not go to that extent, the defendant must be acquitted."[180]

[180] People v. Rodley, 131 Cal. 240.

CHAPTER XXXII.

APPELLATE REVIEW OF INSTRUCTIONS.

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363. Same—Digest of Decisions.
364. Necessity of Exceptions.
365. Same—Digest of Decisions.
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V. Construction of Instructions.

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391. Error Cured by Other Instructions or Construction as a Whole.

I. Exceptions and Objections Below.

§ 362. Objections not raised below.

It is a general rule of appellate practice that errors predicated upon instructions will not be considered upon appeal unless first called to the attention of the court below. Objections based upon the giving or refusal of instructions cannot be raised for the first time on appeal. The reason of the rule is to give the trial court an opportunity to correct its own inadvertent errors, thus obviating the delay and expense of an appeal,[1] and to prevent a party from speculating on the chances of a verdict in his favor notwithstanding the error, knowing in the meanwhile that a verdict and judgment against him could be reversed.[2] The reports abound in illustrations of this rule. Thus, for example, the sending of written communications to the jury room,[3] or making an oral modification of a written instruction,[4] is not available as error, where such action is objected to for the first time on appeal. So, error in failing to define terms used in instructions,[5] or in assuming facts to be uncontroverted which are

[1] State v. Fenlason, 78 Me. 495.

[2] State v. Beaird, 34 La. Ann. 104.

[3] Thorp v. Riley, 57 N. Y. Super. Ct. 589; Boss v. Northern Pac. R. Co., 2 N. D. 128.

[4] Louisville & N. R. Co. v. Hall, 91 Ala. 112.

[5] Cogswell v. West St. & N. E. Electric Ry. Co., 5 Wash. 46; Texas & P. Ry. Co. v. O'Donnell, 58 Tex. 27; People v. Flynn, 73 Cal. 511; Johnson v. Missouri Pac. Ry. Co., 96 Mo. 340.

in fact controverted,[6] will be deemed waived or abandoned if not called to the attention of the trial court. In this connection, a distinction must be observed between the giving of erroneous instructions and the failure to give correct and adequate instructions. In the former case the objection is sufficiently called to the attention of the trial court by a single objection and exception, and it is not necessary to request and submit a correct instruction to be given in place of the erroneous one.[7] But in the case of a mere failure to give correct instructions covering the case the error is not available on appeal, in the absence of a request by the appellant for a proper instruction.[8] Thus a mere exception to the charge as given is insufficient to call the attention of the trial court to its failure to define the meaning of terms used therein.[9] So a general exception to the whole charge raises no question as to the omission of a proper instruction, or the want of modification

[6] State v. Fenlason, 78 Me. 495.

[7] Allis v. Leonard, 58 N. Y. 288.

[8] Mead v. State, 53 N. J. Law, 601. For a full discussion and collection of authorities on the necessity of requesting instructions, see ante, c. 13, "Requests for Instructions." Excepting to instructions given will not raise the objection that they do not fully state the law on all the issues. Additional instructions covering the omitted points should be asked. Jones v. Hathaway, 77 Ind. 14; Adams v. Stringer, 78 Ind. 175; Davis v. Roosvelt, 53 Tex. 305. If a party desires more definite and comprehensive instructions upon a point, it is his duty to prepare and submit instructions, which meet his desires, to the trial court. Eichel v. Senhenn, 2 Ind. App. 208. A general exception that all the issues are not covered by a charge that a certain issue is the only issue in the case is insufficient, in the absence of any request for further instructions. Newton v. Whitney, 77 Wis. 515.

[9] Texas & P. Ry. Co. v. O'Donnell, 58 Tex. 27. In People v. Flynn, 73 Cal. 511, the failure to define the term "reasonable doubt," and in Johnson v. Missouri Pac. Ry. Co., 96 Mo. 340, the failure to define the meaning of "reasonable care and diligence," was held not to be error, in the absence of a request for a definition.

of one given,[10] or as to the sufficiency or explicitness of those given. The necessary supplementary instructions must be asked.[11] As has been seen elsewhere, either party has a right, upon request, to a charge upon any material point in the case; but in the absence of any request the points to be covered by the charge are discretionary with the court, and in the absence of a request a mere failure to charge upon any point is not error.[12] A request to charge must specifically call to the attention of the court the point sought to be made, in order to make its refusal available on appeal.[13]

§ 363. Same—Digest of decisions.

Giving erroneous instructions.

An objection to erroneous instructions cannot be taken for the first time on appeal.

Colorado.

Dawson v. Coston, 18 Colo. 493; Denver & Rio Grande R. v. Ryan, 17 Colo. 98; Wray v. Carpenter, 16 Colo. 271; McFeters v. Pierson, 15 Colo. 201; Brewster v. Crossland, 2 Colo. App. 446.

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[10] Kellogg v. Chicago & N. W. Ry. Co., 26 Wis. 223. "Where a charge to the jury is susceptible of two constructions,—the one warranted by the case, the other erroneous,—a party cannot take advantage of his exception, without presenting the modification necessary to free the charge from ambiguity." Springsteed v. Lawson, 14 Abb. Pr. (N. Y.) 328, 23 How. Pr. (N. Y.) 302.

[11] Jones v. Hathaway, 77 Ind. 14; Adams v. Stringer, 78 Ind. 175. "The appellate court will not reverse on account of a charge which asserts a correct legal proposition, although it may be objectionable from its generality. It is the duty of the party, in such case, to ask more specific and definite instructions." Hutchinson v. Dearing, 20 Ala. 798. A defendant cannot complain that an instruction was not sufficiently certain and specific, when the attention of the court below was called to it, and no more specific instruction was requested. People v. Olsen, 80 Cal. 122.

[12] Mead v. State, 53 N. J. Law, 601. And see chapter 13, "Requests for Instructions."

[13] McDonald v. Johnson, 46 N. Y. St. Rep. 838, 19 N. Y. Supp. 443. See, also, Staser v. Hogan, 120 Ind. 125.

Florida.

Jones v. Greeley, 25 Fla. 629.

Georgia.

Chattahoochee Brick Co. v. Sullivan, 86 Ga. 50; Ricks v. State, 16 Ga. 600.

Illinois.

McDaneld v. Logi, 143 Ill. 487; Atchison, T. & S. F. R. Co. v. Feehan, 47 Ill. App. 66; Lake Erie & W. R. Co. v. Rosenberg, 31 Ill. App. 47; Peck v. Boggess, 1 Scam. (Ill.) 281.

Indiana.

Hindman v. Troxell, 15 Ind. 123; State v. Manly, 15 Ind. 8; Fleming v. Potter, 14 Ind. 486; Ridge v. Sunman, 14 Ind. 540; Little v. Norris, 14 Ind. 375; Daily v. Nuttman, 14 Ind. 339; Lomax v. Strange, 14 Ind. 21; Boxley v. Carney, 14 Ind. 17; Carpenter v. O'Neal, 14 Ind. 19.

Iowa.

State v. Callahan, 96 Iowa, 304; Peet v. Chicago, M. & St. P. Ry. Co., 88 Iowa, 520; Bellows v. Litchfield, 83 Iowa, 36; Seekel v. Norman, 71 Iowa, 264; Kirk v. Litterst, 71 Iowa, 71; Norris v. Kipp, 74 Iowa, 444.

Kansas.

Kansas Farmers' Fire Ins. Co. v. Hawley, 46 Kan. 746; State v. Probasco, 46 Kan. 310; Connor v. Wilkie, 1 Kan. App. 492.

Kentucky.

Jeffries v. Com., 9 Ky. Law R. 875, 7 S. W. 396; Lanham v. Com., 3 Bush, 528.

Louisiana.

Stewart v. Harper, 16 La. Ann. 181; State v. Sheard, 35 La. Ann. 543.

Maine.

Pope v. Machias Water Power & Mill Co., 52 Me. 535.

Maryland.

Franklin v. Claflin, 49 Md. 24; Worthington v. Tormey, 34 Md. 182; Newman v. McComas, 43 Md. 70.

Massachusetts.

Rawson v. Plaisted, 151 Mass. 71; Burr v. Joy, 151 Mass. 295.

Michigan.

People v. Caldwell, 107 Mich. 374; People v. Raher, 92 Mich. 165; Fraser v. Haggerty, 86 Mich. 521.

Minnesota.

Lawrence v. Bucklen, 45 Minn. 195; Shatto v. Abernethy, 35 Minn. 538; Evans v. St. Paul & S. C. R. Co., 30 Minn. 489; State v. Brin, 30 Minn. 522.

Missouri.

State v. Bayne, 88 Mo. 604; Carlisle v. Keokuk Northern Line Packet Co., 82 Mo. 40; Walsh v. Allen, 50 Mo. 181; Lohart v. Buchanan, 50 Mo. 201; Connelly v. Shamrock Benev. Soc., 43 Mo. App. 283; Ritzenger v. Hart, 43 Mo. App. 183; Lafayette Mut. Bldg. Ass'n v. Kleinhoffer, 40 Mo. App. 388; Wheeler v. Metropolitan Mfg. Co., 23 Mo. App. 190; Naughton v. Stagg, 4 Mo. App. 271.

Montana.

Gum v. Murray, 6 Mont. 10.

Nebraska.

Downing v. Glenn, 26 Neb. 323; Omaha, N. & B. H. R. Co. v. O'Donnell, 22 Neb. 475; Schreckengast v. Ealy, 16 Neb. 510.

New Mexico.

Territory v. O'Donnell, 4 N. M. 196.

New York.

Broyer v. Ritter, 13 N. Y. Supp. 574.

North Carolina.

McFarland v. Southern Improvement Co., 107 N. C. 368; Lytle v. Lytle, 94 N. C. 522; Ray v. Lipscomb, 48 N. C. 185.

Oklahoma.

Carter v. Missouri Min. & Lumber Co. (Okl.) 41 Pac. 356.

South Carolina.

Fleming v. Fleming, 33 S. C. 505.

Tennessee.

Knoxville Iron Co. v. Dobson, 15 Lea (Tenn.) 409; Knoxville v. Bell, 12 Lea (Tenn.) 157; East Tennessee, V. & G. R. Co. v. Toppins, 10 Lea (Tenn.) 63; Malone v. Searight, 8 Lea (Tenn.) 95; Hayes v. Cheatham, 6 Lea (Tenn.) 9; Hatton v. Stewart, 2 Lea (Tenn.) 236.

Texas.

Yoakum v. Mettasch (Tex. Civ. App.) 26 S. W. 129; Leeper v.

State, 29 Tex. App. 63; Cook v. State, 22 Tex. App. 511; Hill v. State, 22 Tex. App. 579; Haynes v. State, 2 Tex. App. 84; Thatcher v. Mills, 14 Tex. 13. But see Hollingsworth v. Holshousen, 17 Tex. 41.

Wisconsin.

Tomlinson v. Wallace, 16 Wis. 224; Bogert v. Phelps, 14 Wis. 88; Graves v. State, 12 Wis. 591.

Objections to the substance of instructions, as that they state the law erroneously, Bourke v. Van Keuren, 20 Colo. 95; Bergh v. Sloan, 53 Minn. 116; Williamson v. State, 30 Tex. App. 330; Hollinger v. Canadian Pac. R. Co., 20 Ont. App. 245; or inadequately, Davis v. Roosevelt, 53 Tex. 305; Box v. Kelso, 5 Wash. 360; Goldhammer v. Dyer, 7 Colo. App. 29; or are not warranted by the issues in the case, Shaw v. New York & N. E. R. Co., 150 Mass. 182; Stoner v. Devilbiss, 70 Md. 144; State v. Fenlason, 78 Me. 495; or that the issues are stated erroneously, Milmo v. Adams, 79 Tex. 526; or that questions of law are submitted to the jury, Stansbury v. Fogle, 37 Md. 369; Freckling v. Rolland, 33 N. Y. Super. Ct. 499; or that the province of the jury is invaded, Atchison, T. & S. F. R. Co. v. Worley (Tex. Civ. App.) 25 S. W. 478; or that the evidence does not support the instruction, Newman v. McComas, 43 Md. 70; Worthington v. Tormey, 34 Md. 182,—cannot be raised for the first time on appeal.

Error in the statement of evidence cannot be raised for the first time on appeal. Rumph v. Hiott, 35 S. C. 444; State v. Davis, 27 S. C. 609; Muetze v. Tuteur, 77 Wis. 236. A request for a correct statement is necessary. Arnstein v. Haulenbeek, 16 Daly (N. Y.) 382.

Objections to the form of instructions, as that they are misleading, Pellum v. State, 89 Ala. 28; Quinby v. Carhart, 133 N. Y. 579; or are ambiguous, People v. Olsen, 80 Cal. 122; Holm v. Sandberg, 32 Minn. 427; Box v. Kelso, 5 Wash. 360; or contradictory, Williams v. Southern Pac. R. Co., 110 Cal. 457; Sierra Union Water & Min. Co. v. Baker, 70 Cal. 572; or that two instructions were written on the same sheet, Davenport v. Cummings, 15 Iowa, 219; or that the word "Given" was not written in the margin of two instructions given to the jury, Knight v. Chicago, R. I. & P. Ry. Co., 81 Iowa, 310; or that the court failed to number and sign instructions, Moffatt v. Tenney, 17 Colo. 189; or that the instructions are too general, People v. Olsen, 80 Cal. 122; Hutchinson v. Dearing, 20 Ala. 798; Rogers v. Wallace, 10 Or. 387,—are unavailing when raised for the first time in the appellate court.

§ 364. Necessity of exceptions.

The proper method of calling the attention of the trial court to the errors complained of is by objecting to its action, and then, if it fails to correct its error, as by overruling the objection, the party should note an exception.[14] But, as Judge Thompson says in his work on Trials, "the objection spoken of * * * very frequently takes, at the outset, the form of an exception, the party or his counsel notifying the court that he excepts to the opinion and direction of the court."[15] It is an almost universal rule that an exception must be saved, in order to authorize a review on appeal of the action of the trial court, either in giving an erroneous instruction or in refusing a correct instruction.[16] In strict prac-

[14] "By a principle of the common law, the record is deemed to be in the breast of the judge until the close of the term, and until that time the trial court has the power to rectify its own error, upon discovering it, by setting aside the judgment and granting a new trial, although the error was not excepted to at the time; but, on appeal from an order refusing a new trial, the appellate court can, as a general rule, consider no objection which is not based upon some exception taken at the trial." 2 Thompson, Trials, § 2395.

[15] 2 Thompson, Trials, § 2395.

[16] See cases collected in digest note, infra, § 366. An erroneous modification of a requested instruction is unavailable as a ground for reversal, in the absence of an exception. Tracey v. State, 46 Neb. 361. Failure of the judge to sign the instructions, as required by statute, is not ground for reversal, in the absence of exceptions. Tyrree v. Parham's Ex'r, 66 Ala. 424; Jones v. Greeley, 25 Fla. 629; Southern Exp. Co. v. Van Meter, 17 Fla. 783.

A failure to except to an omission to number instructions waives the error. Moffatt v. Tenney, 17 Colo. 189; Jolly v. State, 43 Neb. 857; Smith v. State, 41 Neb. 277; Cunningham v. Seattle Electric Railway & Power Co., 3 Wash. 471; Gibbs v. Wall, 10 Colo. 153.

An omission to mark instructions "Given" or "Refused," when this is required by statute, is not one that can be taken advantage of, unless exceptions to such omission have been duly saved. Tryee v. Parham's Ex'rs, 66 Ala. 424; Holley v. State, 75 Ala. 20; City of Chadron v. Glover, 43 Neb. 734; Omaha & F. Land & Trust Co.

tice, this rule is applicable both to civil and criminal cases.[17] But criminal cases are to be found in which instructions were reviewed on appeal although no exception thereto was saved below;[18] and in several states the rule has been expressly changed by statute. Thus, in Texas exceptions are not prerequisite to a review of the charge, either in a civil [19] or a criminal [20] case, excepting prosecutions for misdemeanors, in which case exceptions are necessary.[21] So, in Alabama [22] and Montana [23] exceptions are unnecessary, either to the giv-

v. Hansen, 32 Neb. 449; Tagg v. Miller, 10 Neb. 442; Jolly v. State, 43 Neb. 857; Fry v. Tilton, 11 Neb., 456; Knight v. Chicago, R. I. & P. Ry. Co., 81 Iowa, 310; Fish v. Chicago, R. I. & P. Ry. Co., 81 Iowa, 280; Barnewall v. Murrell, 108 Ala. 366.

[17] 2 Thompson, Trials, § 2395, citing Murray v. State, 26 Ind. 141; Bills v. City of Ottumway, 35 Iowa, 107; Krack v. Wolf, 39 Ind. 88.

[18] In People v. Leonardi, 143 N. Y. 360, it was held that, in capital cases, an exception is not a prerequisite to a review on appeal of erroneous instructions, and in Thompson v. People, 4 Neb. 524, an instruction on the trial of an indictment for larceny was reviewed without any exception having been saved. See, also, Schlencker v. State, 9 Neb. 300; People v. Pallister, 138 N. Y. 601.

[19] Rev. St. art. 1318; Atchison, T. & S. F. Ry. Co. v. Click, 5 Tex. Civ. App. 224; Landes v. Eichelberger, 2 Willson, Civ. Cas. Ct. App. § 135; Missouri Pac. Ry. Co. v. Martin, 2 Willson, Civ. Cas. Ct. App. § 656.

[20] Hill v. State, 35 Tex. Cr. App. 371.

[21] McMillan v. State, 35 Tex. Cr. App. 370; Patterson v. State (Tex. Cr. App.) 29 S. W. 272; Moore v. State (Tex. Cr. App.) 28 S. W. 686; Heitzelman v. State (Tex. Cr. App.) 26 S. W. 729; Otto v. State (Tex. Cr. App.) 25 S. W. 285; Garrett v. State (Tex. Cr. App.) 25 S. W. 285; Kennedy v. State (Tex. Cr. App.) 24 S. W. 650; Nance v. State (Tex. Cr. App.) 22 S. W. 44; Anderson v. State, 34 Tex. Cr. App. 96; Purcelly v. State, 29 Tex. App. 1; Garner v. State, 28 Tex. App. 561; Mixon v. State, 28 Tex. App. 347; Comer v. State, 26 Tex. App. 509; Burns v. State, 23 Tex. App. 641; White v. State, 23 Tex. App. 154.

[22] Whitaker v. State, 106 Ala. 30. Formerly the rule was otherwise. See Alabama G. S. R. Co. v. Tapia, 94 Ala. 226; Tennile v. Walshe, 81 Ala. 160.

[23] Gassert v. Bogk, 7 Mont. 585.

ing or refusal of instructions. In Pennsylvania the charge filed is made part of the record, and error may be assigned without exceptions.[24] In California the rule is the same in criminal cases as to charges requested by either party, but the statute does not apply to the charge which the court may give of its own motion.[25] In New York the appellate division or general term has power to reverse a judgment and grant a new trial for errors in the charge, even in the absence of any exception;[26] but no such power exists in the

[24] Janney v. Howard, 150 Pa. 339; Grugan v. City of Philadelphia, 158 Pa. 337.

[25] People v. Hart, 44 Cal. 598.

[26] Dovale v. Ackerman, 11 Misc. Rep. 245, 33 N. Y. Supp. 13; Whitman v. Johnson, 10 Misc. Rep. (N. Y.) 725; Benedict v. Johnson, 2 Lans. (N. Y.) 94; De Lavalette v. Wendt, 11 Hun (N. Y.) 432; Pettis v. Pier, 4 Thomp. & C. 690; Wehle v. Haviland, 42 How. Pr. (N. Y.) 399; Whittaker v. Delaware & H. Canal Co., 49 Hun (N. Y.) 400; Gowdey v. Robbins, 3 N. Y. Ann. Cas. 231. In Lattimer v. Hill, 8 Hun (N. Y.) 171, the general term is quoted as saying: "If the charge is erroneous, it is the duty of the court to grant a new trial, as the failure to except did not injure the plaintiff." This case is cited in most of the later decisions as an authority that a reversal may be had upon erroneous instructions to the jury, though no exceptions have been taken. In Gillett v. Trustees of Village of Kinderhook, 77 Hun (N. Y.) 604, the judgment was reversed, in the absence of exceptions, for the reason that, during the trial, and on the submission of the case to the jury, an improper rule of damages was adopted. In Jacobs v. Sire, 4 Misc. Rep. (N. Y.) 398, where the instructions given to the jury upon the question of exemplary damages were erroneous, the general term of the superior court held that it was called upon to rectify the damage by ordering a new trial, and that its power to do so did not depend upon an exception having been taken. The court of appeals has several times affirmed the power of the general term to reverse, in the absence of exception. See Roberts v. Tobias, 120 N. Y. 1; Standard Oil Co. v. Amazon Ins. Co., 79 N. Y. 506; Hamilton v. Third Ave. R. Co., 53 N. Y. 25. The doctrine that Code Civ. Proc. § 999, was intended to authorize a motion to set aside a verdict on the minutes, on the ground of an error in the charge to which no exception was taken, and which, if the attention of the trial judge had been di-

court of appeals, and that court will not reverse for such errors in the absence of an exception.[27] To justify a reversal in the absence of an exception, it must be "evident that the court misunderstood the law, and, as a consequence, misdirected and misled the jury in the general effect of the charge."[28] In Ohio, although exception to the charge or to the refusal to charge on certain points is general, the reviewing court will look to the whole record to see if error intervened to the prejudice of the party complaining of the instructions.[29]

rected to it by an exception, might have been corrected at the trial, was questioned in Robson v. New York Cent. & H. R. Co., 21 Hun (N. Y.) 387, but the case was decided upon other grounds. In Richardson v. Van Voorhis, 20 N. Y. St. Rep. 667, there is a dictum that section 999 does not relieve a party from taking exceptions to the admission or rejection of evidence, or to the incorrect statements that may appear in the charge. In Donahue v. New York Cent. & H. R. Co., 15 Misc. Rep. (N. Y.) 256, it was held that the court has power to grant a new trial, with or without an exception, for a misdirection of the court to the jury respecting a question of law. The court refused to express an opinion as to whether such ground of error could be reached under section 999. In Swartout v. Willingham, 31 Abb. N. C. (N. Y.) 66, it was held that a motion under section 999 does not raise the question whether the court's instructions to the jury were erroneous, for, though a verdict upon erroneous instructions may be contrary to law, it is an error for which the court and not the jury are responsible, and must be pointed out by exception (following Richardson v. Van Voorhis, supra).

[27] Roberts v. Tobias, 120 N. Y. 1; Hamilton v. Third Ave. R. Co., 53 N. Y. 25; Standard Oil Co. v. Amazon Ins. Co., 79 N. Y. 506. In Vermilyea v. Palmer, 52 N. Y. 471, there is the following dictum in a decision of the court of appeals: "So, if the court should mislead the jury by an erroneous charge upon the law, the error might, if fatal or important, be available in this court without an exception." But the doctrine here suggested has not been followed in the later decisions, as appears from the cases above cited.

[28] Ackart v. Lansing, 6 Hun (N. Y.) 476.

[29] Little Miami R. Co. v. Fitzpatrick, 42 Ohio St. 318; Weybright v. Fleming, 40 Ohio St. 52; Baker v. Pendergast, 32 Ohio St. 494; Marietta & C. R. Co. v. Strader, 29 Ohio St. 448.

§ 365. Same—Digest of decisions.

Exceptions to erroneous instructions necessary.

Arkansas.

Frauenthal v. Bridgeman, 50 Ark. 348.

California.

Williams v. Southern Pac. R. Co., 110 Cal. 457; Merguire v. O'Donnell, 103 Cal. 50; Sharp v. Hoffman, 79 Cal. 404; Carpenter v. Ewing, 76 Cal. 487; Sierra Union Water & Min. Co. v. Baker, 70 Cal. 572; Clark v. His Creditors, 57 Cal. 639; Chester v. Bower, 55 Cal. 46; Russell v. Dennison, 45 Cal. 337; Lightner v. Menzel, 35 Cal. 452; Holverstot v. Bugby, 13 Cal. 43.

Colorado.

Moffatt v. Tenney, 17 Colo. 189; Wray v. Carpenter, 16 Colo. 271; Price v. Buchanan, 12 Colo. 366; Gilpin v. Gilpin, 12 Colo. 504; Patrick Red Sandstone Co. v. Skoman, 1 Colo. App. 323; Gibbs v. Wall, 10 Colo. 153.

Florida.

McSwain v. Howell, 29 Fla. 248; Phillips v. State, 28 Fla. 77; White v. State, 26 Fla. 602; Jacksonville, T. & K. W. Ry. Co. v. Hunter, 26 Fla. 308; Jones v. Greeley, 25 Fla. 629; Emerson v. Ross' Ex'x, 17 Fla. 122.

Illinois.

West Chicago St. R. Co. v. Martin, 154 Ill. 523; Willard v. Petitt, 153 Ill. 663; East St. Louis Electric Ry. Co. v. Stout, 150 Ill. 9; England v. Vandermark, 147 Ill. 76; Indianapolis, B. & W. Ry. Co. v. Rhodes, 76 Ill. 285; Emory v. Addis, 71 Ill. 273; Toledo, P. & W. Ry. Co. v. Miller, 55 Ill. 448; Phillips v. Abbott, 52 Ill. App. 328; Gulliver v. Adams Exp. Co., 38 Ill. 503; Sedgwick v. Phillips, 22 Ill. 183; Buckmaster v. Cool, 12 Ill. 74; McClurkin v. Ewing, 42 Ill. 283.

Indiana.

Lowell v. Gathright, 97 Ind. 313; Coffeen v. McCord, 83 Ind. 593; City of Evansville v. Thacker, 2 Ind. App. 370.

Iowa.

Leach v. Hill, 97 Iowa, 81; Dean v. Zenor, 96 Iowa, 752; State v. Black, 89 Iowa, 737; Stanhope v. Swafford, 80 Iowa, 45; Gray v. Chicago, M. & St. P. Ry. Co., 75 Iowa, 100; Duncombe v. Powers, 75 Iowa, 185; Lewis v. Lewis, 75 Iowa, 669; Norris v. Kipp, 74 Iowa,

444; Paddleford v. Cook, 74 Iowa, 433; Arneson v. Thorstad, 72 Iowa, 145; Kirk v. Litterst, 71 Iowa, 71; May v. Wilson, 21 Iowa, 79; Wilcox v. McCune, 21 Iowa, 294; Morse v. Close, 11 Iowa, 93.

Kansas.

Werner v. Jewett, 54 Kan. 530; Russell v. Bradley, 47 Kan. 438; Kansas Farmers' Fire Ins. Co. v. Hawley, 46 Kan. 746; State v. Probasco, 46 Kan. 310; Missouri Pac. Ry. Co. v. Johnson, 44 Kan. 660; Kansas Pac. Ry. Co. v. Little, 19 Kan. 267; Barlow v. Emmert, 10 Kan. 358; Joseph v. First Nat. Bank of Eldorado, 17 Kan. 256; Norton v. Foster, 12 Kan. 44; City of Wyandotte v. Noble, 8 Kan. 444.

Kentucky.

Jackson v. Com., 12 Ky. Law Rep. 575, 14 S. W. 677.

Maine.

Dugan v. Thomas, 79 Me. 221.

Maryland.

Norfolk & W. R. Co. v. Hoover, 79 Md. 253; Baltimore & O. R. Co. v. Shipley, 31 Md. 368; Baltimore & O. R. Co. v. Resley, 14 Md. 424. But see Dunham v. Clogg, 30 Md. 284.

Massachusetts.

McCart v. Squire, 150 Mass. 484.

Michigan.

McKinnon v. Atkins, 60 Mich. 418.

Minnesota.

Anderson v. St. Croix Lumber Co., 47 Minn. 24; Smith v. Bean, 46 Minn. 138; Lawrence v. Bucklen, 45 Minn. 195; State v. Hair, 37 Minn. 351; Mackey v. Fisher, 36 Minn. 348; Spencer v. St. Paul & S. C. R. Co., 22 Minn. 29.

Mississippi.

Georgia Pac. Ry. Co. v. West, 66 Miss. 310; Bourland v. Board Sup'rs, Itawamba County, 60 Miss. 1001; Fisher v. Fisher, 43 Miss. 212; Smokey v. Johnson, 4 So. 788.

Missouri.

State v. Hilsabeck, 132 Mo. 348; State v. Pollard, 132 Mo. 288; State v. Paxton, 126 Mo. 500; State v. Cantlin, 118 Mo. 100; State v. Kennade, 121 Mo. 405; State v. Patrick, 107 Mo. 147; Haniford v. City of Kansas, 103 Mo. 172; State v. Griffin, 98 Mo. 672; Lefkow v. Allred, 54 Mo. App. 141; Shannon v. Hannibal & S. J. Ry. Co.,

54 Mo. App. 223; McDonald v. Cobb, 44 Mo. App. 167; Ritzenger v. Hart, 43 Mo. App. 183; Wright v. Gillespie, 43 Mo. App. 244; Morgan v. Rice, 35 Mo. App. 591.

Montana.

Kelley v. Cable Co., 7 Mont. 70; Territory v. Hart, 7 Mont. 489; Woods v. Berry, 7 Mont. 196; McKinney v. Powers, 2 Mont. 466; Davis v. Germaine, 1 Mont. 210.

Nebraska.

Jolly v. State, 43 Neb. 857; Herzog v. Campbell, 47 Neb. 370; City of Kearney v. Smith, 47 Neb. 408; Romberg v. Hediger, 47 Neb. 201; Gravely v. State, 45 Neb. 878; Omaha Fire Ins. Co. v. Dierks, 43 Neb. 473; City of Chadron v. Glover, 43 Neb. 732; Rea v. Bishop, 41 Neb. 202; Bouvier v. Stricklett, 40 Neb. 792; Glaze v. Parcel, 40 Neb. 732; Rector v. Canfield, 40 Neb. 595; American Bldg. & Loan Ass'n v. Mordock, 39 Neb. 413; Richardson & Boynton Co. v. Winter, 38 Neb. 288; Levi v. Fred, 38 Neb. 564; Roach v. Hawkinson, 34 Neb. 658; Zimmerman v. Klingeman, 31 Neb. 495; Downing v. Glenn, 26 Neb. 323; Schroeder v. Rinehard, 25 Neb. 75; Heldt v. State, 20 Neb. 492; Nyce v. Shaffer, 20 Neb. 507; Tagg v. Miller, 10 Neb. 442; Scofield v. Brown, 7 Neb. 221; Smith v. State, 4 Neb. 277; Gibson v. Sullivan, 18 Neb. 558.

Nevada.

Lobdell v. Hall, 3 Nev. 507.

New Jersey.

Packard v. Bergen Neck Ry. Co., 54 N. J. Law, 553.

New Mexico.

Territory v. O'Donnell, 4 N. M. 196.

New York.

Wheeler v. Sweet, 137 N. Y. 435; People v. Buddensieck, 103 N. Y. 487; Cram v. Gas Engine & Power Co., 75 Hun, 316; Borley v. Wheeler & Wilson Mfg. Co., 58 Hun, 605; 12 N. Y. Supp. 45; Murray v. Usher, 46 Hun, 406; Stoothoff v. Long Island R. Co., 32 Hun, 437; Smith v. Gebhardt, 56 N. Y. St. Rep. 904; People v. Noonan, 38 N. Y. St. Rep. 854; Simmons v. Central New England & W. R. Co., 51 N. Y. St. Rep. 937; Thorp v. Riley, 57 N. Y. Super. Ct. 589; Schaff v. Miles, 10 Misc. Rep. 395; Clark v. Smith, 7 Misc. Rep. 572; Van Doren v. Jelliffe, 1 Misc. Rep. 354; Smith v. Matthews, 9 Misc. Rep. 427.

North Carolina.

Chemical Co. of Canton v. Johnson, 101 N. C. 223; Ware v. Nesbit, 94 N. C. 664; White v. Clark, 82 N. C. 6.

Ohio.

Everett v. Sumner, 32 Ohio St. 562; Berry v. State, 31 Ohio St. 219; Adams v. State, 25 Ohio St. 584; Kline v. Wynne, 10 Ohio St. 223.

Oklahoma.

Berry v. Smith, 2 Okl. 345.

Oregon.

Kearney v. Snodgrass, 12 Or. 311.

South Carolina.

McPherson v. McPherson, 21 S. C. 267; Sullivan v. Sullivan, 20 S. C. 511.

Washington.

Cunningham v. Seattle Electric Ry. & Power Co., 3 Wash. 471; State v. Williams, 13 Wash. 335; Seattle & M. Ry. Co. v. Gilchrist, 4 Wash. 509; Johnson v. Tacoma Cedar Lumber Co., 3 Wash. 722; Brown v. Forest, 1 Wash. T. 201; Smith v. United States, 1 Wash. T. 262.

Wisconsin.

Hawley v. Harran, 79 Wis. 379; Manegold v. Grange, 70 Wis. 575; Tomlinson v. Wallace, 16 Wis. 224; Bogert v. Phelps, 14 Wis. 88.

United States.

Tucker v. United States, 151 U. S. 164; Hedden v. Iselin, 142 U. S. 676; Gibbs v. Consolidated Gas Co. of Baltimore, 130 U. S. 396; Stewart v. Wyoming Cattle Ranche Co., 128 U. S. 383; Hanna v. Maas, 122 U. S. 24; Cohen v. West Chicago St. Ry. Co. (C. C. A.) 60 Fed. 698; Little Rock Granite Co. v. Dallas County (C. C. A.) 66 Fed. 522; Sutherland v. Round (C. C. A.) 57 Fed. 467; Colorado Cent. Consolidated Min. Co. v. Turck (C. C. A.) 54 Fed. 262.

Exceptions to refusal of instructions necessary.

California.

People v. Northey, 77 Cal. 618; Leahy v. Southern Pac. R. Co., 65 Cal. 151.

Illinois.

East St. Louis Electric Ry. Co. v. Stout, 150 Ill. 9; Burns v.

People, 126 Ill. 282; Krug v. Ward, 77 Ill. 603; Phillips v. Abbott, 52 Ill. App. 328; McPherson v. Hall, 44 Ill. 264; Burkett v. Bond, 12 Ill. 87.

Indiana.

Horner v. Hoadley, 97 Ind. 600; Stewart v. Murray, 92 Ind. 543.

Iowa.

State v. Brewer, 70 Iowa, 384.

Kansas.

Keeling v. Kuhn, 19 Kan. 441.

Massachusetts.

Bonino v. Caledonio, 144 Mass. 299.

Nebraska.

City of Omaha v. McGavock, 47 Neb. 313; City of Kearney v. Smith, 47 Neb. 408.

Texas.

Shaw v. State (Tex. Cr. App.) 33 S. W. 1033; Ward v. State (Tex. Cr. App.) 29 S. W. 274.

Wisconsin.

Thrasher v. Postel, 79 Wis. 503.

United States.

Little Rock Granite Co. v. Dallas County (C. C. A.) 66 Fed. 522.

§ 366. Sufficiency of exceptions.

Two simple rules determine the sufficiency of exceptions to present for review on appeal the giving or refusal of instructions. The first is that the exceptions must be specific; the second, which is perhaps but an application of the first, is that the exceptions must be taken to the instructions, or portion or portions complained of, separately, and not *en masse*, or to the charge as a whole. The decisions upon these two propositions will be considered in order.

(1) The rule that exceptions must specifically point out the alleged error complained of results naturally from the principle already considered, that only such errors will be considered on appeal as were called to the attention of the

trial court.[30] "A party excepting must make his exception so specific that the matter relied on as error will be apparent to his adversary, and to the primary court. For his adversary, having his attention directed to the special matter relied on as erroneous, has the right and privilege of waiving such matter, rather than, by insisting on it, incur the hazard and delay of an appeal to a superior tribunal. The court, having its attention directed to the erroneous matter, might be satisfied of the error, into which it may have fallen through inadvertence, and could voluntarily correct it by a reversal of its rulings, and thus protect the party excepting from all injury."[31] Accordingly, an exception generally "to the ruling of the court in not permitting the cause to go to the jury upon the questions of fact involved" is insufficient, where no particular question of fact is specified.[32] So is an exception "to such portions of a charge" as are variant from the requests made, the variance not being pointed out.[33] An objection to the whole of an instruction defining the duty an employer owes to an employe as to the safety of the place for working is insufficient to raise the point that the word "rea-

[30] Supra, § 363.

[31] Irvin v. State, 50 Ala. 181. See, also, Jacobs v. Mitchell, 2 Colo. App. 456. An exception to a charge of the court should point to the very error complained of, that, if committed inadvertently, it may be corrected. Ellis v. People, 21 How. Pr. (N. Y.) 356. Exceptions to the charge which do not clearly and specifically point out the objectionable part cannot be sustained. Washington & G. R. Co. v. Varnell, 98 U. S. 479; Connecticut Mut. Life Ins. Co. v. Union Trust Co., 112 U. S. 250; Burton v. West Jersey Ferry Co., 114 U. S. 474. In Texas, "all that is required is that general exception be taken at the time, with a request for time to prepare a bill containing the specific objections, to be prepared before the verdict is returned, in order that the court may have an opportunity to correct the charge, if so desired." Phillips v. State, 19 Tex. App. 158, 165.

[32] Guggenheim v. Kirchhofer (C. C. A.) 66 Fed. 755.

[33] Beaver v. Taylor, 93 U. S. 46.

sonably" was omitted before the word "safe."[34] No question as to the correctness of the instructions is presented for review by an exception to the verdict or findings as being contrary to the instructions or unsupported by the evidence.[35] Failure to comply with a statute requiring the word "given" to be written in the margin is not available error under a general exception.[36] An exception to the entire charge on the ground that the court presented the case in a manner calculated to prejudice the jury against the accused should indicate some particular in which harm was done.[37] Additional illustrations of the rule might be multiplied almost without end.[38] Upon obvious principles, only those grounds of ex-

[34] Western Coal & Min. Co. v. Ingraham (C. C. A.) 70 Fed. 219. A simple exception to an instruction that a passenger was not guilty of contributory negligence, unless he knew of the danger in time to get out and avoid the injury, by remaining in a caboose after the train broke loose, and the conductor, who had sent back to flag another train, had told him it was following, and he had better watch out for it, and, if he saw it, get out of the way, is too general. Newport News & M. & V. Co. v. Pace, 158 U. S. 36, 39 L. Ed. 887, 15 Sup. Ct. 743.

[35] Floyd v. Ricks, 11 Ark. 454; Britt v. Aylett, 11 Ark. 475; Carlson v. Dow, 47 Minn. 335.

[36] The exception must assign that specific ground. Omaha & F. Land & Trust Co. v. Hansen, 32 Neb. 449.

[37] State v. Varner, 115 N. C. 744.

[38] The following cases present good illustrations of the rule: Western Coal & Min. Co. v. Ingraham (C. C. A.) 70 Fed. 219; Allis v. United States, 155 U. S. 117; People v. Upton, 29 N. Y. St. Rep. 777; Greene v. Duncan, 37 S. C. 239; Dobson v. Cothran, 34 S. C. 518; State v. Davenport, 38 S. C. 348; Hamilton v. Great Falls St. Ry. Co., 17 Mont. 334; Shober v. Wheeler, 113 N. C. 370; Benson v. Lundy, 52 Iowa, 265; People v. Thiede, 11 Utah, 241; Holman v. Herscher (Tex.) 16 S. W. 984. See, also, the cases collected in digest note infra, § 368. Objections that the court below did not review and analyze the evidence, and did not instruct the jury sufficiently as to the rules for weighing the value of testimony, are not sufficiently specific. Grantz v. Price, 130 Pa. 415. A general exception to a charge that testimony of any witnesses found by the

ception will be considered on appeal which were stated to the trial court.[39]

In a few states the rule requiring exceptions to be specific does not prevail.[40] In Iowa, before the Code, a general exception was not sufficient, but under the Code where exceptions are taken to instructions to the jury at the time they are given, the ground of exception need not be stated;[41] but if the exceptions are not taken until after verdict, then the Code expressly requires that the exception shall specify the part of the instruction objected to, and the ground of the objection.[42]

jury to have sworn falsely may be disregarded unless corroborated is not sufficiently explicit as an exception to the court's omission of the words "knowingly and willfully." Dallemand v. Janney, 51 Minn. 514. "A general objection will be insufficient where the special point of the objection insisted upon is such that, if it had been specifically pointed out at the trial, it might have been obviated, or where the general objection was calculated to divert the attention from the special objection on which the party intended to rely." Therefore, a general objection to an instruction waives the right to assert its inconsistency with other instructions. Matthews v. Clough (N. H.) 49 Atl. 637.

[39] Price v. Burlington, C. R. & N. R. Co., 42 Iowa, 16; Sanford v. Gates, 38 Kan. 405; Richmond v. Second Ave. R. Co., 76 Hun (N. Y.) 233; Phipps v. Pierce, 94 N. C. 514; Cole v. Curtis, 16 Minn. 182 (Gil. 161); Grier v. Hazard, Hazard & Co., 39 N. Y. St. Rep. 74. So, an exception to one instruction raises no question as to another instruction, which was not excepted to. Ryall v. Central Pac. R. Co., 76 Cal. 474. See, also, Varnum v. Taylor, 10 Bosw. (N. Y.) 148.

[40] Williams v. Com., 80 Ky. 313; McCreery v. Everding, 44 Cal. 246; Shea v. Potrero & B. V. R. Co., 44 Cal. 414; Woods v. Berry, 7 Mont. 195; Sexton v. School Dist. No. 34, 9 Wash. 5; City of Cincinnati v. Anderson, 19 Ohio Cir. Ct. R. 603, 10 Ohio Cir. Dec. 522 (construing Rev. St. § 5298).

[41] Van Pelt v. City of Davenport, 42 Iowa, 308; Hale v. Gibbs, 43 Iowa, 380; Johnson v. Chicago, R. I. & P. R. Co., 51 Iowa, 25; Williams v. Barrett, 52 Iowa, 637.

[42] Miller v. Gardner, 49 Iowa, 234; Byford v. Girton, 90 Iowa, 661; Benson v. Lundy, 52 Iowa, 265. See, also, infra, this section, as

(2) Under the rule above mentioned, that exceptions should be taken separately to the specific instructions or parts of the charge claimed to be erroneous,[43] it is held that a general exception to the whole charge only raises the question as to its correctness as a whole.[44] If the charge consists of a

to exceptions to refusal of instructions. An exception after verdict, which specifies, as the objection, that the instructions are "not applicable, and are not the law applicable to the case," is not specific enough. Miller v. Gardner, supra.

[43] See cases collected in digest note, infra, § 368.

[44] Florida: May v. Gamble, 14 Fla. 467.

Idaho: Snyder v. Viola Min. & Smelting Co., 2 Idaho, 771.

Iowa: Eddy v. Howard, 23 Iowa, 175.

Kansas: Hentig v. Kansas Loan & Trust Co., 28 Kan. 617; Wheeler v. Joy, 15 Kan. 389; Ferguson v. Graves, 12 Kan. 39.

Nebraska: Redman v. Voss, 46 Neb. 512.

New York: Cronk v. Canfield, 31 Barb. 171.

Ohio: Weber v. Wiggins, 11 Ohio Cir. Ct. R. 18.

Wisconsin: Buffalo Barb Wire Co. v. Phillips, 67 Wis. 129.

An objection to "each and every" part of a charge, or substantially to that effect, will be overruled unless the charge or part to which such exception is directed is wholly erroneous. Mayberry v. Leech, 58 Ala. 339; Cavallaro v. Texas & P. Ry. Co., 110 Cal. 348; Moore v. Moore (Cal.) 34 Pac. 90; Edwards v. Smith, 16 Colo. 529; Keith v. Wells, 14 Colo. 321; McAllister v. Engle, 52 Mich. 56; Shull v. Raymond, 23 Minn. 66; Foster v. Berkey, 8 Minn. 351 (Gil. 310); Caldwell v. Murphy, 11 N. Y. 416; Jones v. Osgood, 6 N. Y. 233; Piper v. New York Cent. & H. R. R. Co., 89 Hun (N. Y.) 75; Banbury v. Sherin, 4 S. D. 88; Block v. Darling, 140 U. S. 234; Scoville v. Salt Lake City, 11 Utah, 60; Meeker v. Gardella, 1 Wash. 139; Yates v. Bachley, 33 Wis. 185; Luedtke v. Jeffery, 89 Wis. 136. Contra, Dady v. Condit, 188 Ill. 234, reversing 87 Ill. App. 250; Kansas Pac. R. Co. v. Nichols, 9 Kan. 235; Lorie v. Adams, 51 Kan. 692. The addition of such words as "specifically," People v. Bristol, 23 Mich. 118; or "severally and separately," Syndicate Ins. Co. v. Catchings, 104 Ala. 176; Kirby v. State, 89 Ala. 63; Edgell v. Francis, 86 Mich. 232; or "every line, sentence, and paragraph," Danielson v. Dyckman, 26 Mich. 169,—adds nothing to the force of such an exception, and it will nevertheless be overruled if any portion of the charge

series of distinct propositions or instructions, any one of which is correct, a general exception to the whole charge must be overruled.[45] And the same rule applies where the exception is to the whole or a part of the charge, which part itself contains more than one proposition.[46] Where, however, the whole charge or part excepted to amounts merely to the assertion of a single proposition, a general exception is sufficient to present the question of the correctness of such proposition.[47]

These principles apply to the erroneous refusal of instruc-

is correct. Western Assur. Co. of Toronto v. Polk (C. C. A.) 104 Fed. 649; Beals v. Cone, 27 Colo. 473.

[45] It is only to this extent that the court will examine the instructions under a general exception to the whole charge. Oltmanns v. Findlay, 47 Neb. 289; City of Omaha v. McGavock, 47 Neb. 313. See, also, cases collected in digest note, infra, § 368.

[46] Alabama: Rice v. Schloss, 90 Ala. 416; Dick v. State, 87 Ala. 61.

Colorado: Beals v. Cone, 27 Colo. 473.

Florida: John D. C. v. State, 16 Fla. 554.

Georgia: Small v. Williams, 87 Ga. 681.

Minnesota: Main v. Oien, 47 Minn. 89.

New York: Board of Water Com'rs v. Burr, 35 N. Y. Super. Ct. 523.

Oregon: Langford v. Jones, 18 Or. 307.

Utah: Beaman v. Martha Washington Min. Co. (Utah) 63 Pac. 631.

Vermont: Dickerman v. Quincy Mut. Fire Ins. Co., 67 Vt. 609.

Washington: Hughes v. Heyman, 22 Wash. Law Rep. 737; Rush v. Spokane Falls & N. Ry. Co. (Wash.) 63 Pac. 500.

Wisconsin: Corcoran v. Harran, 55 Wis. 120.

An exception to so much of the charge as is inclosed in brackets (Tucker v. Salem Flouring Mills Co., 15 Or. 581), or to so much as is not inclosed in brackets (Crosby v. Maine Cent. R. Co., 69 Me. 418), must be overruled, unless the whole of the designated parts is erroneous. See, also, Bouck v. Enos, 61 Wis. 660; Bigelow v. West Wis. Ry. Co., 27 Wis. 478; Stroud v. State, 55 Ala. 77.

[47] Smith v. Matthews, 9 Misc. Rep. (N. Y.) 427; Nickum v. Gaston, 24 Or. 380; Boyce v. Wabash Ry. Co., 63 Iowa, 70; Requa v. Holmes, 16 N. Y. 193; Haun v. Rio Grande W. Ry. Co., 22 Utah, 346.

tions, as well as to the giving of erroneous instructions. Therefore, a general exception to a refusal of a request to charge which contains several instructions or propositions must be overruled, if any one of them is properly refused.[48] But if all the instructions asked were proper, and in such form that they should all have been given, then a general exception to the refusal to charge will be sufficient.[49] There would seem to be less reason for applying the rule to the case of a refusal of a request for several specific instructions than exists in the case of errors in instructions given. In the former case it might well be held that the attention of the court was sufficiently directed to the alleged errors by a general exception, and this is the rule in a few states.[50]

In the federal courts, the practice is governed by a rule of the supreme court,[51] which directs: "The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury, in trials at common law, upon any general exception to the whole of such charge; but the party excepting shall be required to state distinctly the several matters of

[48] See cases collected in digest note, infra, § 368.

[49] Strohn v. Detroit & M. R. Co., 23 Wis. 126; Ocheltree v. McClung, 7 W. Va. 232. It has been held, however, that, when only one of plaintiff's requests was refused, a general exception is sufficient. Sellers v. Hancock, 42 S. C. 40. Where a requested instruction contains propositions which might properly be given, but in connection with other propositions which should be refused, the whole instruction is properly refused, and a general exception is of no avail. People v. Holms, 6 Parker, Cr. R. (N. Y.) 25; Marshall v. Oakes, 51 Me. 308.

[50] See Weber v. Kansas City Cable Ry. Co., 100 Mo. 194. In Iowa, provided the exception is taken at the time a request for several instructions is refused, a general exception will be sufficient to raise the question of error in refusing any one of them. Eyser v. Weissgerber, 2 Iowa, 463, 486; Davenport Gas Light & Coke Co. v. City of Davenport, 13 Iowa, 229; Williamson v. Chicago, R. I. & P. R. Co., 53 Iowa, 126; Harvey v. Tama County, 53 Iowa, 228.

[51] See rule 8 of supreme court rules in 100 Mo. 194.

law in such charge to which he excepts, and those matters of law, and those only, shall be inserted in the bill of exceptions, and allowed by the court." A similar rule exists in the circuit court of appeals. The rule is mandatory.[52] The rule has sometimes been held to be even stricter than as here laid down, and it has been held that a general exception to an entire charge containing several propositions is insufficient to raise any question on appeal, either as to the sufficiency or insufficiency of the instructions.[53]

§ 367. Same—Digest of decisions.

Exceptions must specify error particularly.

California.

Frost v. Grizzly Bluff Creamery Co., 102 Cal. 525; Gillaspie v. Hagans, 90 Cal. 90.

Colorado.

City of Denver v. Hyatt, 63 Pac. 403.

District of Columbia.

Thomas v. Presbrey, 23 Wash. Law Rep. 123; Bell v. Sheridan, 21 D. C. 370.

Georgia.

Whelan v. Georgia Midland & G. R. Co., 84 Ga. 506; Fordham v. State, 112 Ga. 228; Barber v. State, 112 Ga. 584; Central of Georgia Ry. Co. v. Bond, 111 Ga. 13.

Indiana.

Baker v. McGinniss, 22 Ind. 257.

Iowa.

Davenport Gas Light & Coke Co. v. City of Davenport, 13 Iowa, 229; Abbott v. Striblen, 6 Iowa, 191.

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[52] Price v. Pankhurst, 10 U. S. App. 497, 53 Fed. 312.

[53] State v. Staley, 14 Minn. 105 (Gil. 75); Baldwin v. Blanchard, 15 Minn. 489 (Gil. 403); Judson v. Reardon, 16 Minn. 431 (Gil. 387); Ferson v. Wilcox, 19 Minn. 449 (Gil. 388).

Kansas.

Stith v. Fullinwider, 40 Kan. 74; State v. Gurnee, 14 Kan. 111; Sanford v. Gates, 38 Kan. 405.

Louisiana.

State v. Chopin, 10 La. Ann. 458.

Massachusetts.

Rock v. Indian Orchard Mills, 142 Mass. 522; Emmons v. Alvord, 177 Mass. 466.

Michigan.

Keystone Lumber & Salt Mfg. Co. v. Dole, 43 Mich. 370.

Minnesota.

Elmborg v. St. Paul City Ry. Co., 51 Minn. 70; Dallemand v. Janney, 51 Minn. 514; Bishop v. St. Paul City Ry. Co., 48 Minn. 26; Larrabee v. Minnesota Tribune Co., 36 Minn. 141; Clapp v. Minnneapolis & St. L. R. Co., 36 Minn. 6; Hunter v. Jones, 13 Minn. 307 (Gil. 282); Dodge v. Chandler, 9 Minn. 97 (Gil. 87); Foster v. Berkey, 8 Minn. 351 (Gil. 310).

New Hampshire.

Matthews v. Clough, 49 Atl. 637.

New York.

Mattice v. Wilcox, 147 N. Y. 624; Grier v. Hazzard, Hazzard & Co., 39 N. Y. St. Rep. 74; Ellis v. People, 21 How. Pr. 356; Wyman v. Hart, 12 How. Pr. 122; Pratt v. Foote, 9 N. Y. 463.

North Carolina.

Kendrick v. Dellinger, 117 N. C. 491; Everett v. Williamson, 107 N. C. 204; Dugger v. McKesson, 100 N. C. 1; Leak v. Covington, 99 N. C. 559; Sellers v. Sellers, 98 N. C. 13; Boggan v. Horne, 97 N. C. 268; Williams v. Johnston, 94 N. C. 633; State v. Gardner, 94 N. C. 953.

Ohio.

Moody v. Thomas, 1 Disn. 294; Serviss v. Stockstill, 30 Ohio St. 418.

Oregon.

Kearney v. Snodgrass, 12 Or. 317.

Pennsylvania.

Grantz v. Price, 130 Pa. 415.

South Carolina.

Davis v. Elmore, 40 S. C. 533; Norton v. Livingston, 14 S. C. 178.

Texas.

Quintana v. State, 29 Tex. App. 401.

Vermont.

Goodwin v. Perkins, 39 Vt. 598.

Washington.

Maling v. Crummey, 5 Wash. 222.

Wisconsin.

Corcoran v. Harran, 55 Wis. 120; Hamlin v. Haight, 32 Wis. 237.

United States.

Newport News & M. V. Co. v. Pace, 158 U. S. 36; Cleveland, C., C. & St. L. Ry. Co. v. Zider, 61 Fed. 908.

The objection that instructions were given at an improper time is not raised by a general exception to all the instructions. City of Topeka v. Heitman, 47 Kan. 739. "An assignment of error to the effect that the charge of the court is conflicting, coupled with a failure to point out or suggest the precise nature of the conflict, no exception upon this ground being made upon the trial, and no conflict appearing to the court, is not available." Emerson v. Ross' Ex'x, 17 Fla. 122. An exception to the portions of the charge on the measure of damages is sufficiently specific to raise the question of the correctness of the charge on one element of damages, since the measure of damages is made up of all the elements. Wales v. Pacific Electric Motor Co., 130 Cal. 521. A mere exception, while it challenges the correctness of an instruction, does not point out specifically wherein it is incorrect. But if instructions are paragraphed, an exception to each separate paragraph may be sufficient. City of Denver v. Hyatt (Colo.) 63 Pac. 403. An objection that an instruction abstractly correct was inapplicable to the case must point out how and why it was inappropriate. Central of Georgia Ry. Co. v. Bond, 111 Ga. 13. An objection that an instruction contains an assumption of fact must call attention to the specific ground of the objection. Emmons v. Alvord, 177 Mass. 466.

Exceptions must be taken separately and not en masse—Instructions given.

Exceptions must be taken separately to each instruction or por-

tion of the charge complained of.[53a] An exception to the "refusal and charge of the court," where the whole charge is contained in the bill of exceptions, and the record shows that six instructions were asked, of which two were given, one declined except as covered by the general charge, is insufficient. Jones v. East Tennessee, V. & G. R. Co., 157 U. S. 682. Where the record reads as follows: "At the time of reading the above instructions to the jury, the defendant duly excepted to all and to each and every one of them,"—it will be presumed that exceptions were duly taken to each of the instructions separately. Atchison, T. & S. F. R. Co. v. Retford, 18 Kan. 245. An exception to several propositions in mass is insuffi-

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[53a] Alabama: Sharp v. Robertson's Ex'rs, 76 Ala. 343; Farley v. State, 72 Ala. 170; Stovall v. Fowler, 72 Ala. 77; Smith v. Sweeney, 69 Ala. 524; South & N. A. R. Co. v. McLendon, 63 Ala. 266; Gray v. State, 63 Ala. 66; Bernstein v. Humes, 60 Ala. 582; South & N. A. R. Co. v. Jones, 56 Ala. 507; Caldwell v. Parmer's Adm'r, 56 Ala. 405; Jacobson v. State, 55 Ala. 151; Holland v. Barnes, 53 Ala. 83; Cohen v. State, 50 Ala. 108; Irvin v. State, 50 Ala. 181.

California: Brown v. Kentfield, 50 Cal. 129; Shea v. Potrero & B. V. R. Co., 44 Cal. 414.

Colorado: Coon v. Rigden, 4 Colo. 275.

Georgia: Central Railroad & Banking Co. v. Ogletree, 97 Ga. 325; Thomas v. State, 84 Ga. 613; Rogers v. Rogers, 74 Ga. 598; Smith v. Atwood, 14 Ga. 402.

Illinois: Haskins v. Haskins, 67 Ill. 446.

Indiana: Sherlock v. First Nat. Bank of Bloomington, 53 Ind. 73.

Kansas: Young v. Youngman, 45 Kan. 65; Fullenwider v. Ewing, 25 Kan. 69; Wheeler v. Joy, 15 Kan. 389.

Maine: State v. Pike, 65 Me. 111; State v. Flaherty (Me.) 5 Atl. 563, 2 New Eng. Rep. 699.

Massachusetts: Hunting v. Downer, 151 Mass. 275.

Michigan: Geary v. People, 22 Mich. 220.

Minnesota: Rheiner v. Stillwater St. Railway & Transfer Co., 31 Minn. 193.

Montana: Gassert v. Bogk, 7 Mont. 585; Alderson v. Marshall, 7 Mont. 288; Woods v. Berry, 7 Mont. 195; Gum v. Murray, 6 Mont. 10; Griswold v. Boley, 1 Mont. 545.

Nebraska: Brooks v. Dutcher, 22 Neb. 644; Dodge v. People, 4 Neb. 220.

New Jersey: Engle v. State, 50 N. J. Law, 272.

New Mexico: Probst v. Trustees of Board of Domestic Missions, 3 N. M. 373.

cient if any one of them is correct.[53b] An exception to a charge in its entirety, and "to the following portions thereof," followed by a series or ten or more propositions embracing substantially all

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New York: People v. Schooley, 89 Hun, 391; Deitch v. Schanning, 38 N. Y. St. Rep. 362; Wallace v. Williams, 37 N. Y. St. Rep. 812; Booth v. Swezey, 8 N. Y. 276.

North Carolina: Hemphill v. Morrison, 112 N. C. 756; Ward v. Albemarle & Raleigh R. Co., 112 N. C. 168; State v. Brabham, 108 N. C. 793; Thompson v. Western Union Tel. Co., 107 N. C. 449; Everett v. Williamson, 107 N. C. 204; State v. McDuffie, 107 N. C. 885; State v. Harrell, 107 N. C. 944; State v. Howell, 107 N. C. 835; State v. Parker, 106 N. C. 711; Lindsey v. Sanderlin, 104 N. C. 331; Carlton v. Wilmington & Weldon R. Co., 104 N. C. 365; McKinnon v. Morrison, 104 N. C. 354; Hammond v. Schiff, 100 N. C. 161; Caudle v. Fallen, 98 N. C. 411; Barber v. Roseboro, 97 N. C. 192; State v. Nipper, 95 N. C. 653; McDonald v. Carson, 94 N. C. 497.

Ohio: Behrens v. Behrens, 47 Ohio St. 323; Powers v. Hazelton & L. Ry. Co., 33 Ohio St. 429; Western Ins. Co. of Cincinnati v. Tobin, 32 Ohio St. 77; Everett v. Sumner, 32 Ohio St. 562; Pittsburgh, Ft. W. & C. Ry. v. Probst, 30 Ohio St. 104; Butcher's Melting Ass'n v. Commercial Bank of Cincinnati, 2 Disn. 46.

South Carolina: Bauskett v. Keitt, 22 S. C. 200; Walker v. Walker, 17 S. C. 338; Paris v. Dupre, 17 S. C. 288; Lanier v. Tolleson, 20 S. C. 62; State v. Gilreath, 16 S. C. 105; Norton v. Livingston, 14 S. C. 177.

Texas: Thompson v. State, 32 Tex. Cr. App. 265; Gonzalez v. State, 30 Tex. App. 203; Graham v. State, 29 Tex. App. 31; Eddy v. Still, 3 Tex. Civ. App. 346.

Utah: Haun v. Rio Grande W. Ry. Co. (Utah) 62 Pac. 908.

Vermont: Goodwin v. Perkins, 39 Vt. 598.

Washington: Patchen v. Parke & Lacy Mach. Co., 6 Wash. 486; Rush v. Spokane Falls & N. Ry. Co. (Wash.) 63 Pac. 500.

Wisconsin: Smith v. Coleman, 77 Wis. 343; Butler v. Carns, 37 Wis. 61; Hamlin v. Haight, 32 Wis. 237.

United States: Holder v. United States, 150 U. S. 91; Block v. Darling, 140 U. S. 234; Burton v. West Jersey Ferry Co., 114 U. S. 474; Connecticut Mut. Life Ins. Co. v. Union Trust Co., 112 U. S. 250; Mobile & M. Ry. Co. v. Jurey, 111 U. S. 584; Washington & G. R. Co. v. Varnell, 98 U. S. 479; Thom v. Pittard (C. C. A.) 62 Fed. 232; St. Louis, I. M. & S. Ry. Co. v. Spencer (C. C. A.) 71 Fed. 93; Price v. Pankhurst, 10 U. S. App. 497.

[53b] Alabama: Mobile & O. R. Co. v. George, 94 Ala. 199; Bell v.

the charge, except the statement of the case, is not available if any one of the portions excepted to is good. Vider v. O'Brien, 10 C. C. A. 385, 18 U. S. App. 711, 62 Fed. 326. In the following cases, the exceptions, though couched in varying language, were held to be substantially to the whole charge, and too general to raise any ques-

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Kendall, 93 Ala. 489; Nelson v. Warren, 93 Ala. 408; Goley v. State, 87 Ala. 57; Black v. Pratt Coal & Coke Co., 85 Ala. 504; Stevenson v. Moody, 83 Ala. 418; East Tennessee, V. & G. R. Co. v. Cary, 81 Ala. 159; Mayherry v. Leech, 58 Ala. 339; Irvin v. State, 50 Ala. 181.

Arkansas: Dunnington v. Frick Co., 60 Ark. 250; Oxley Stave Co. v. Staggs, 59 Ark. 370; Fordyce v. Russell, 59 Ark. 312; Quertermous v. Hatfield, 54 Ark. 16; Atkins v. Swope, 38 Ark. 528; Murphy v. Lemay, 32 Ark. 223.

California: Cavallaro v. Texas & P. Ry. Co., 110 Cal. 348; Cockrill v. Hall, 76 Cal. 192; Ryall v. Central Pac. R. Co., 76 Cal. 474.

Colorado: Wooton v. Seigel, 5 Colo. 424; Kansas Pac. Ry. Co. v. Ward, 4 Colo. 31; Cowell v. Colorado Springs Co., 3 Colo. 82.

District of Columbia: Mackey v. Baltimore, etc., R. Co., 18 Wash. Law Rep. 767.

Florida: Campbell v. Carruth, 32 Fla. 264; Wood v. State, 31 Fla. 221; Smith v. State, 29 Fla. 408; Post v. Bird, 28 Fla. 1; Pinson v. State, 28 Fla. 735; Burroughs v. State, 17 Fla. 643; Dupuis v. Thompson, 16 Fla. 69; John v. State, 16 Fla. 554; May v. Gamble, 14 Fla. 467.

Georgia: Willis v. State, 93 Ga. 208; Ozburn v. State, 87 Ga. 173; Verdery v. Savannah, F. & W. Ry. Co., 82 Ga. 675; Flemister v. State, 81 Ga. 768; Enright v. City of Atlanta, 78 Ga. 288; Blackman v. State, 78 Ga. 592; Malone v. Robinson, 77 Ga. 719; Cobb v. State, 76 Ga. 664.

Illinois: Hickam v. People, 137 Ill. 75; Hayward v. Catton, 1 Ill. App. 577.

Indiana: State v. Gregory, 132 Ind. 387; Sherlock v. First Nat. Bank of Bloomington, 53 Ind. 73; Garrigus v. Burnett, 9 Ind. 528; Kelly v. John, 13 Ind. App. 579; Buchart v. Ell, 9 Ind. App. 353.

Iowa: Hallenbeck v. Garst, 96 Iowa, 509; Reeves v. Harrington, 85 Iowa, 741; Norris v. Kipp, 74 Iowa, 444; Pitman v. Molsherry, 49 Iowa, 339; Ruter v. Foy, 46 Iowa, 132; Moore v. Gilbert, 46 Iowa, 508; Bartle v. City of Des Moines, 38 Iowa, 414; Cook v. Sioux City & P. R. Co., 37 Iowa, 426; Brown v. Scott County, 36 Iowa, 140; Mershon v. National Ins. Co., 34 Iowa, 87; McCaleb v. Smith, 24 Iowa, 591; Redman v. Malvin, 23 Iowa, 296; Carpenter v. Parker, 23 Iowa, 450; Verholf v. Van Houwenlengen, 21 Iowa, 429; Spray v. Scott, 20 Iowa, 473; Shephard v. Brenton, 20 Iowa, 41; Lyons v.

tion unless the charge was wholly erroneous. Jones v. East Tennessee, V. & G. R. Co., 157 U. S. 682; Hallenbeck v. Garst, 96 Iowa, 509; Vider v. O'Brien (C. C. A.) 62 Fed. 326; State v. Wilgus, 32 Kan. 126; Strader v. Marietta & C. R. Co., 2 Cin. R. 268. An ex-

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Thompson, 16 Iowa, 62; Cousins v. Westcott, 15 Iowa, 253; Armstrong v. Pierson, 15 Iowa, 476; Jack v. Naber, 15 Iowa, 450; Davenport Gas Light & Coke Co. v. City of Davenport, 13 Iowa, 229; Loomis v. Simpson, 13 Iowa, 532.

Kansas: Crosby v. Wilson, 53 Kan. 565; Fleming v. Latham & Co., 48 Kan. 773; Ryan v. Madden, 46 Kan. 245; Myer v. Moon, 45 Kan. 580; Stith v. Fullinwider, 40 Kan. 73; Fullenwider v. Ewing, 25 Kan. 69; Bard v. Elston, 31 Kan. 274.

Maine: Crosby v. Maine Cent. R. Co., 69 Me. 418; Macintosh v. Bartlett, 67 Me. 130; Merrill v. Merrill, 67 Me. 70.

Massachusetts: Com. v. Tolman, 149 Mass. 229; Adams v. Inhabitants of Chicopee, 147 Mass. 440; Dwyer v. Fuller, 144 Mass. 420; Curry v. Porter, 125 Mass. 94; Armour v. Pecker, 123 Mass. 143.

Michigan: Edgell v. Francis, 86 Mich. 232; McAllister v. Engle, 52 Mich. 56; Prescott v. Patterson, 49 Mich. 622; Hopkins Mfg. Co. v. Aurora F. & M. Ins. Co., 48 Mich. 148; McKay v. Evans, 48 Mich. 597; Goodsell v. Seeley, 46 Mich. 623; Wheeler & Wilson Mfg. Co. v. Walker, 41 Mich. 239; Lange v. Kaiser, 34 Mich. 317; Danielson v. Dyckman, 26 Mich. 169; Tupper v. Kilduff, 26 Mich. 394; Mandigo v. Mandigo, 26 Mich. 349; People v. Garbutt, 17 Mich. 9.

Minnesota: Main v. Oien, 47 Minn. 89; Russell v. St. Paul, M. & M. Ry. Co., 33 Minn. 210; Shull v. Raymond, 23 Minn. 66; Ferson v. Wilcox, 19 Minn. 449 (Gil. 388); Cole v. Curtis, 16 Minn. 182 (Gil. 161); Castner v. The Steamboat Dr. Franklin, 1 Minn. 73 (Gil. 51).

Montana: Woods v. Berry, 7 Mont. 195.

Nebraska: Bankers Life Ass'n v. Lisco, 47 Neb. 340; Hedrick v. Strauss, 42 Neb. 485; Gillilan v. Rollins, 41 Neb. 540; First Nat. Bank of Denver v. Lowrey, 36 Neb. 290; Walker v. Turner, 27 Neb. 103; Russel v. Rosenbaum, 24 Neb. 769; Brooks v. Dutcher, 22 Neb. 644; Tagg v. Miller, 10 Neb. 442.

New Hampshire: Reynolds v. Boston & M. R. Co., 43 N. H. 580.

New Jersey: Engle v. State, 50 N. J. Law, 272; Oliver v. Phelps, 21 N. J. Law, 597.

New York: Wells v. Higgins, 132 N. Y. 459; Newall v. Bartlett, 114 N. Y. 399; Patton v. Royal Baking Powder Co., 114 N. Y. 1; Stone v. Western Transp. Co., 38 N. Y. 240; Magie v. Baker, 14 N. Y. 435; Oldfield v. New York & H. R. Co., 14 N. Y. 310; Decker v.

ception that "the court erred in giving to the jury instruction No. —, and to the giving of which plaintiff duly excepted," is a general exception, and cannot be considered unless the whole instruction is incorrect. Haun v. Rio Grande W. Ry. Co., 22 Utah, 346.

Mathews, 12 N. Y. 313; Caldwell v. Murphy, 11 N. Y. 416; Howland v. Willetts, 9 N. Y. 170; Acker v. Ledyard, 8 N. Y. 62; Hart v. Rensselaer & S. R. Co., 8 N. Y. 37; Hunt v. Maybee, 7 N. Y. 266; Jones v. Osgood, 6 N. Y. 233; Haggart v. Morgan, 5 N. Y. 422; Cronk v. Canfield, 31 Barb. 171; Robinson v. New York & E. R. Co., 27 Barb. 512; Elton v. Markham, 20 Barb. 343; McBurney v. Cutler, 18 Barb. 203; Fitch v. Livingston, 7 How. Pr. 410; French v. White, 5 Duer, 254; Gundlin v. Hamburg-American Packet Co., 31 Abb. N. C. 437, 8 Misc. Rep. 291; Snell v. Snell, 3 Abb. Pr. 426; East River Bank v. Gedney, 4 E. D. Smith, 582; Carland v. Day, 4 E. D. Smith, 251.

North Carolina: Hooks v. Houston, 109 N. C. 623; Hammond v. Schiff, 100 N. C. 161; Dugger v. McKesson, 100 N. C. 1; Leak v. Covington, 99 N. C. 559; Sellers v. Sellers, 98 N. C. 13; Caudle v. Fallen, 98 N. C. 411; Boggan v. Horne, 97 N. C. 268.

Ohio: Berry v. State, 31 Ohio St. 219; Adams v. State, 25 Ohio St. 584; Wright v. Denham, 2 Cleve. Law Rep. 146.

Texas: Gross v. Hays, 73 Tex. 515; Peace v. State, 27 Tex. App. 83; Cordway v. State, 25 Tex. App. 405.

Utah: People v. Hart, 10 Utah, 204.

Vermont: Rowell v. Fuller's Estate, 59 Vt. 688.

Washington: Lichty v. Tannatt, 11 Wash. 37.

Wisconsin: Green v. Hanson, 89 Wis. 597; Kessler's Estate, 87 Wis. 660; Hulehan v. Green Bay, W. & St. P. R. Co., 68 Wis. 520; C. Aultman & Co. v. Case, 68 Wis. 612; Bouck v. Enos, 61 Wis. 660; Dean v. Chicago & N. W. Ry. Co., 43 Wis. 305; Nisbet v. Gill, 38 Wis. 657; Butler v. Carns, 37 Wis. 61; Sabine v. Fisher, 37 Wis. 376; Musgat v. Wybro, 33 Wis. 515; Strachan v. Muxlow, 31 Wis. 207; Bigelow v. West Wisconsin Ry. Co., 27 Wis. 478; Weisenberg v. City of Appleton, 26 Wis. 56; Heath v. Heath, 31 Wis. 223; Morse v. Gilman, 18 Wis. 373; Tomlinson v. Wallace, 16 Wis. 224; Thrasher v. Tyack, 15 Wis. 256.

United States: Newport News & M. V. Co. v. Pace, 158 U. S. 36; Baltimore & P. R. Co. v. Mackey, 157 U. S. 72; Anthony v. Louisville & N. R. Co., 132 U. S. 172; White v. Barber, 123 U. S. 392; Mobile & M. Ry. Co. v. Jurey, 111 U. S. 584; Worthington v. Mason, 101 U. S. 149; Cooper v. Schlesinger, 111 U. S. 148; Beaver v. Taylor, 93

See, also, Beaman v. Martha Washington Min. Co. (Utah) 63 Pac. 631.

Instructions refused.

A general exception to the refusal of a series of instructions, taken together, and constituting a single request, is improper, and will not be considered if any one of the propositions be unsound.[53c] Illustrations of exceptions held to be too general to present the question of error in refusing any particular instruction will be found in the following cases: Pound v. Port Huron & S. W. Ry. Co., 54 Mich. 13; Read v. Nichols, 118 N. Y. 224; Jumper v. Commercial Bank, 39 S. C. 296. An exception to refusal to give "the four requests as asked for by defendant," without specifying which four of eight requests the court refused, is insufficient. Columbia Mill Co. v. National Bank of Commerce, 52 Minn. 224. Where several distinct requests for instructions to the jury have been presented to the court, most of which were in substance embodied in

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U. S. 46; Johnston v. Jones, 1 Black, 209; Lincoln v. Claflin, 7 Wall. 132; Harvey v. Tyler, 2 Wall. 328; Rogers v. Marshal, 1 Wall. 644; Masonic Benev. Ass'n v. Lyman (C. C. A.) 60 Fed. 498; Walker v. Windsor Nat. Bank (C. C. A.) 56 Fed. 76; Gulf, C. & S. F. Ry. Co. v. Johnson (C. C. A.) 54 Fed. 474; McClellan v. Pyeatt, 50 Fed. 686.

[53c] Alabama: Pearson v. Adams (Ala.) 29 So. 977; Teague v. Lindsey, 106 Ala. 266; Noblin v. State, 100 Ala. 13; Welsh v. State, 97 Ala. 1; Jones v. State, 96 Ala. 102; Nelson v. Warren, 93 Ala. 408; Stitt v. State, 91 Ala. 10; Walker v. State, 91 Ala. 76; Woods v. State, 76 Ala. 35; Stovall v. Fowler, 72 Ala. 77; Smith v. Sweeney, 69 Ala. 524; Williams v. State, 68 Ala. 551; Kilpatrick v. Pickens County, 66 Ala. 422; McGehee v. State, 52 Ala. 224.

Kansas: Fleming v. L. D. Latham & Co., 48 Kan. 773; Bailey v. Dodge, 28 Kan. 72.

Louisiana: Wimbish v. Hamilton, 47 La. Ann. 246.

Massachusetts: Murphy v. McNulty, 145 Mass. 464.

Michigan: Edgell v. Francis, 86 Mich. 232.

Minnesota: Webb v. Fisher, 57 Minn. 441; Delude v. St. Paul City Ry. Co., 55 Minn. 63; Rosquist v. D. M. Gilmore Furniture Co., 50 Minn. 192; Carroll v. Williston, 44 Minn. 287; Ferson v. Wilcox, 19 Minn. 449 (Gil. 388).

New Jersey: Gardner v. State, 55 N. J. Law, 17.

New York: Bishop v. Village of Goshen, 120 N. Y. 337; Caldwell v. Murphy, 11 N. Y. 416; Hunt v. Maybee, 7 N. Y. 266; Jones v. Osgood, 6 N. Y. 233; Barker v. Cunard Steamship Co., 25 Civ. Proc.

the general charge, and one of which was erroneous, an "exception to the refusal of the court to charge the jury as requested" is not sufficient to authorize a review as to the refusal of any of the specific requests. State v. Adamson, 43 Minn. 196. Exceptions to certain "paragraphs" of the charge to the jury are insufficient when much, if not all, of the matter embraced in each paragraph is unobjectionable, and no particular proposition is indicated by the exceptions. Rhelner v. Stillwater St. Ry. & T. Co., 31 Minn. 193. Five distinct requests to charge, separately numbered, were submitted to the court, who ruled upon—denying or modifying—each separately. Counsel "excepted to said refusals and modifications of said instructions as given." It was held that such exception was sufficiently specific, and would be understood as applying to the ruling on each proposition. Schurmeier v. Johnson, 10 Minn. 319 (Gil. 250). See, also, Planters' Bank of Prince George's Co. v. Bank of Alexandria, 10 Gill & J. (Md.) 346.

§ 368. Time of taking exceptions.

It is a general rule that exceptions must be taken to the giving or refusal of instructions at the time they are given or refused. It will be too late if not taken until after the jury have retired,[54] and consequently it will, of course, be

R. 108; Heath v. Glens Falls, S. H. & Ft. E. St. R. Co., 90 Hun, 560; Yale v. Curtiss, 71 Hun, 436; Huerzeler v. Central Crosstown R. Co., 1 Misc. Rep. 136.

Ohio: Powers v. Hazelton & L. Ry. Co., 33 Ohio St. 429; Everett v. Sumner, 32 Ohio St. 562; Voelckel v. Banner Brewing Co., 9 Ohio Cir. Ct. R. 318.

Oregon: Salomon v. Cress, 22 Or. 177.

South Carolina: Stackhouse v. Wheeler, 17 S. C. 105.

Utah: Marks v. Tompkins, 7 Utah, 421.

Wisconsin: Welcome v. Mitchell, 81 Wis. 566.

United States: Bogk v. Gassert, 149 U. S. 17; Phoenix Life Ins. Co. v. Raddin, 120 U. S. 183; Beaver v. Taylor, 93 U. S. 46; City of Key West v. Baer, 66 Fed. 440; Walker v. Windsor Nat. Bank, 56 Fed. 76; McClellan v. Pyeatt, 50 Fed. 686.

[54] Though a statute dispenses with the necessity of taking exceptions to the giving, refusing, or modifying of instructions, the legislature will not be deemed to have intended to do away with the necessity for making objections in some appropriate manner, so as to give to the trial court an opportunity to correct errors. Denver

too late if first taken after verdict,[55] or on motion for a new trial,[56] although in one jurisdiction, at least, the exception will be deemed abandoned, and is unavailable unless

& R. G. R. Co. v. Ryan, 17 Colo. 98. See, also, Wray v. Carpenter, 16 Colo. 271; Keith v. Wells, 14 Colo. 321; City of Durango v. Luttrell, 18 Colo. 124. The objection that special instructions given at the request of the adverse party were not numbered and signed as required by Mills' Ann. Code Colo. § 187, subd. 5, will not be considered on a motion for new trial, or on appeal, unless made in apt time. Moffatt v. Tenney, 17 Colo. 189. Objection to the failure of the court to number its instructions must be taken at the time the charge is given. Gibson v. Sullivan, 18 Neb. 558.

So, the rule is the same in regard to marking instructions "Given" or "Refused." Tagg v. Miller, 10 Neb. 442; Barnewall v. Murrell, 108 Ala. 366; Holley v. State, 75 Ala. 20.

[55] Instructions given:

Alabama: Bynum v. Southern Pump & Pipe Co., 63 Ala. 462.

Idaho: State v. O'Donald (Idaho) 39 Pac. 556.

Massachusetts: Leach v. Woods, 14 Pick. 461; Nixon v. Hammond, 12 Cush. 285; Inhabitants of Buckland v. Inhabitants of Charlemont, 3 Pick. 173.

Minnesota: Barker v. Todd, 37 Minn. 370.

North Carolina: State v. Hart, 116 N. C. 976; Tayloe v. Old Dominion Steamship Co., 88 N. C. 15.

Virginia: Washington & N. O. Telegraph Co. v. Hobson, 15 Grat. 122.

West Virginia: Wustland v. Potterfield, 9 W. Va. 438.

United States: Thiede v. Utah, 159 U. S. 510; Michigan Ins. Bank v. Eldred, 143 U. S. 293.

Instructions refused:

North Carolina: State v. Debnam, 98 N. C. 712; Davis v. Council, 92 N. C. 725. But see State v. Varner, 115 N. C. 744.

Failure to mark instructions "Given" or "Refused," as required by statute, cannot be taken advantage of on motion in arrest of judgment. Holley v. State, 75 Ala. 20. Nor for the first time on appeal. Fish v. Chicago, R. I. & P. Ry. Co., 81 Iowa, 280; Knight v. Chicago, R. I. & P. Ry. Co., 81 Iowa, 310.

[56] Instructions given:

Arkansas: Carroll v. Bowler, 40 Ark. 168.

Florida: West v. Blackshear, 20 Fla. 457.

Illinois: Illinois Cent. R. Co. v. Modglin, 85 Ill. 481; Dickhut v. Durrell, 11 Ill. 72. Contra, Collins Ice-Cream Co. v. Stephens, 189

renewed and made the basis of a motion for a new trial.[57] It will be presumed on appeal, in the absence of any showing to the contrary, that the exceptions were taken in proper time.[58] In Indiana, under a statutory provision that the party objecting to the decision of the court must except at the time the decision is made, the rule is stated to be that exceptions to instructions must be taken before the jury have delivered their verdict. Whether this is a more liberal rule than the one above stated is not clear, but it certainly does not restrict the taking of objections to the precise time of the

Ill. 200 (decided under Practice Act, § 53).

Indiana: Louisville, N. A. & C. Ry. Co. v. Hart, 119 Ind. 273; Jaqua v. Cordesman & Egan Co., 106 Ind. 141.

Iowa: Snyder v. Nelson, 31 Iowa, 238; Snyder v. Eldridge, 31 Iowa, 129; Garland v. Wholebau, 20 Iowa, 271; Curtis v. Hunting, 6 Iowa, 536; Whitney v. Olmstead, 5 Iowa, 373; McKell v. Wright, 4 Iowa, 504.

Minnesota: Barker v. Todd, 37 Minn. 370.

Mississippi: Barney v. Scherling, 40 Miss. 320.

Missouri: State v. Meyers, 99 Mo. 107; State v. Rambo, 95 Mo. 462; State v. Hayden, 61 Mo. App. 662; Gordon v. Gordon, 13 Mo. 215.

North Carolina: Harrison v. Chappell, 84 N. C. 258.

North Dakota: Boss v. Northern Pac. R. Co., 2 N. D. 128.

Texas: Vanwey v. State, 41 Tex. 639; Goode v. State, 2 Tex. App. 520; Franklin v. State, 2 Tex. App. 8.

Instructions refused:

Florida: Shepherd v. State, 36 Fla. 374.

North Carolina: State v. Halford, 104 N. C. 874.

Failure to number the instructions, as required by statute, cannot be objected to for the first time on motion for a new trial. Moffatt v. Tenney, 17 Colo. 189.

[57] State v. Grote, 109 Mo. 345; Haynes v. Town of Trenton, 108 Mo. 123; State v. Nelson, 101 Mo. 477. Objection for failure to mark instructions "Given" or "Refused" must be renewed in motion for a new trial. Tagg v. Miller, 10 Neb. 442.

[58] Strickfaden v. Zipprick, 49 Ill. 286; Wakeman v. Lyon, 9 Wend. (N. Y.) 241.

giving of the instructions.[59] In Iowa, by statute, exceptions to either the giving or refusal of instructions may be taken within three days after verdict.[60] In Mississippi, the objection may be taken in a motion for a new trial,[61] and in South Dakota and Illinois the exception may be taken at any time before final judgment is entered.[62] In North Dakota, the judge "has power to extend the time within which exceptions to a charge may be taken, either before or after such time has elapsed."[63]

§ 369. Same—Digest of decisions.

Instructions given must be excepted to before the jury retire.

Alabama.

Reynolds v. State, 68 Ala. 507; City Council of Montgomery v. Gilmer, 33 Ala. 116.

California.

Garoutte v. Williamson, 108 Cal. 135; Mallett v. Swain, 56 Cal. 171.

Colorado.

McFeters v. Pierson, 15 Colo. 201; Taylor v. Randall, 3 Colo. 399; Smith v. Cisson, 1 Colo. 29.

Florida.

Gibson v. State, 26 Fla. 109; Baker v. Chatfield, 23 Fla. 540; Baker v. State, 17 Fla. 406; Southern Exp. Co. v. Van Meter, 17 Fla. 783; Coker v. Hayes, 16 Fla. 368. But see Morrison v. State, 28 So. 97.

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[59] Vaughn v. Ferrall, 57 Ind. 182; Wood v. McClure, 7 Ind. 155; Roberts v. Higgins, 5 Ind. 542; Jones v. Van Patten, 3 Ind. 107.

[60] Maxon v. Chicago, M. & St. P. Ry. Co., 67 Iowa, 226; Bailey v. Anderson, 61 Iowa, 749; Harrison v. Charlton, 42 Iowa, 573. Formerly, the practice in Iowa was in accord with the general rule. Rawlins v. Tucker, 3 Iowa, 213.

[61] Barney v. Scherling, 40 Miss. 320.

[62] Uhe v. Chicago, M. & St. P. Ry. Co., 4 S. D. 505; Collins Ice-Cream Co. v. Stephens, 189 Ill. 200.

[63] Lindblom v. Sonstelie (N. D.) 86 N. W. 357 (construing Rev. Code, § 5298).

Illinois.

Illinois Cent. R. Co. v. Modglin, 85 Ill. 481; Armstrong v. Mock, 17 Ill. 166; Hill v. Ward, 7 Ill. 285; Leigh v. Hodges, 4 Ill. 15; Updike v. Armstrong, 4 Ill. 564; Gibbons v. Johnson, 4 Ill. 61; Love v. Moynehan, 16 Ill. 277. But see Collins Ice-Cream Co. v. Stephens, 189 Ill. 200.

Kansas.

Board Com'rs of Allen Co. v. Boyd, 31 Kan. 765; Joseph v. First Nat. Bank of Eldorado, 17 Kan. 256.

Kentucky.

Poston v. Smith's Ex'r, 8 Bush, 589.

Louisiana.

Buel v. New York Steamer, 17 La. 541; Penn v. Collins, 5 Rob. 213.

Maine.

State v. Fenlason, 78 Me. 495; State v. Wilkinson, 76 Me. 817.

Massachusetts.

Mooar v. Harvey, 125 Mass. 574; Lee v. Gibbs, 10 Allen, 248.

Michigan.

Garton v. Union City Nat. Bank, 34 Mich. 279; Doyle v. Stevens, 4 Mich. 87.

Minnesota.

O'Connor v. Chicago, M. & St. P. Ry. Co., 27 Minn. 166.

Missouri.

State v. Westlake, 159 Mo. 669; State v. Reed, 89 Mo. 168; State v. Burk, 89 Mo. 635; Waller v. Hannibal & St. J. R. Co., 83 Mo. 608; State v. Hayden, 61 Mo. App. 662; Gordon v. Gordon, 13 Mo. 215; Dozier v. Jerman, 30 Mo. 216; Powers v. Allen, 14 Mo. 367; Boyse v. Crickard, 31 Mo. 530; Randolph v. Alsey, 8 Mo. 656.

Nebraska.

Schroeder v. Rinehard, 25 Neb. 75; Sherwin v. O'Connor, 24 Neb. 603; Heldt v. State, 20 Neb. 492; Nyce v. Shaffer, 20 Neb. 507; Gibson v. Sullivan, 18 Neb. 558; Warrick v. Rounds, 17 Neb. 412; Omaha & R. D. R. Co. v. Walker, 17 Neb. 432; Black v. Winterstein, 6 Neb. 224.

North Carolina.

Harrison v. Chappell, 84 N. C. 258; State v. Crockett, 82 N. C. 599.

Under the Code, exceptions may he taken at any time. State v. Eliason, 91 N. C. 564; Smith v. Smith, 108 N. C. 365.

Ohio.

Little Miami R. Co. v. Washburn, 22 Ohio St. 324.

Texas.

Mooring v. State, 42 Tex. 85; Martin v. State, 25 Tex. App. 557; Hobbs v. State, 7 Tex. App. 117; Williams v. State, 4 Tex. App. 5; Alderson v. State, 2 Tex. App. 10; Grant v. State, 2 Tex. App. 164; Porter v. State, 1 Tex. App. 477.

Vermont.

State v. Clark, 37 Vt. 471.

West Virginia.

Wickes v. Baltimore & O. R. Co., 14 W. Va. 157; Robinson v. Pitzer, 3 W. Va. 336; Nadenbousch v. Sharer, 2 W. Va. 285.

Wisconsin.

Butler v. Carns, 37 Wis. 61.

United States.

Railway Co. v. Heck, 102 U. S. 120; Barton v. Forsyth, 20 How. 532; United States v. Breitling, 20 How. 252; Phelps v. Mayer, 15 How. 160; MacDonald v. United States (C. C. A.) 63 Fed. 426; Park Bros. & Co. v. Bushnell (C. C. A.) 60 Fed. 583; Bracken v. Union Pac. Ry. Co. (C. C. A.) 56 Fed. 447.

Instructions refused must be excepted to at the time, and before the retirement of the jury.

Florida.

Shepherd v. State, 36 Fla. 374.

Massachusetts.

Reed v. Call, 5 Cush. 14.

Missouri.

Dozier v. Jerman, 30 Mo. 216.

Nebraska.

Tagg v. Miller, 10 Neb. 442.

North Carolina.

Branton v. O'Briant, 93 N. C. 99.

II. RECORD ON APPEAL.

§ 370. Necessity of bill of exceptions.

As a general rule, and in the absence of a controlling statute, the instructions given upon the trial of a case form no part of the record, and consequently cannot be reviewed on appeal unless brought into the record by a formal bill of exceptions.[64] And this is so, although the instructions may be improperly embodied in the record.[65] In several states, however, the instructions are made part of the record by statute, and, where such statutes exist, the instructions may be reviewed without a bill of exceptions.[66] In Indiana, where

[64] See cases collected in digest note, § 372. A charge cannot be proved by witnesses, and an alleged error therein can be examined only by bill of exceptions. State v. McClanahan, 9 La. Ann. 210.

[65] California: People v. Beaver, 83 Cal. 419; People v. Rogers, 81 Cal. 209; People v. Keeley, 81 Cal. 210; People v. January, 77 Cal. 179.

Colorado: Witcher v. Watkins, 11 Colo. 548; Banks v. Hoyt, 11 Colo. 399.

Illinois: Chicago, M. & St. P. Ry. Co. v. Yando, 127 Ill. 214; City Cab Co. v. Taylor, 30 Ill. App. 47; Shedd v. Dalzell, 30 Ill. App. 356; Obermark v. People, 24 Ill. App. 259.

Indiana: Archibald v. State, 122 Ind. 122; Marquadt v. Sieberling, 121 Ind. 307; Louisville, N. A. & C. Ry. Co. v. Wright, 115 Ind. 378; Delhaney v. State, 115 Ind. 499; Whetton v. Clayton, 111 Ind. 360; Hollingsworth v. State, 111 Ind. 289; Brown v. State, 111 Ind. 441.

Iowa: State v. Hall, 79 Iowa, 674.

Kansas: State v. Sipe, 38 Kan. 201; State v. Smith, 38 Kan. 194.

Kentucky: Goldsbury v. May, 1 Litt. 254.

Montana: Scherrer v. Hale, 9 Mont. 63.

Nebraska: Chamberlain v. Brown, 25 Neb. 434; Yates v. Kinney, 23 Neb. 648.

Tennessee: Chesapeake, O. & S. W. R. Co. v. Foster, 88 Tenn. 671.

Utah: People v. Pettit, 5 Utah, 241.

Wisconsin: Collins v. Breen, 75 Wis. 606.

[66] See cases collected in digest note, infra, § 372. Where a statute requires instructions to be filed with the clerk and entered in the

such a statute exists, it is held that instructions may be brought up for review in either of two modes, *i. e.*, under the statute by compliance with its provisions, or by bill of exceptions in the usual way.[67]

§ 371. Same—Digest of decisions.

Instructions must be brought up by bill of exceptions.

Arkansas.

Cheaney v. State, 36 Ark. 74.

Colorado.

Brink v. Posey, 11 Colo. 521; Witcher v. Watkins, 11 Colo. 548; Banks v. Hoyt, 11 Colo. 399; McDonald v. Clough, 10 Colo. 59; Kurtz v. Simonton, 1 Colo. 70.

Florida.

Parrish v. Pensacola & A. R. Co., 28 Fla. 252; Richardson v. State, 28 Fla. 349. See Act of March 2, 1877 (McClellan's Dig. p. 338, §§ 34-36).

Illinois.

City Cab Co. v. Taylor, 30 Ill. App. 47; Liverpool, L. & G. Ins. Co. v. Sanders, 26 Ill. App. 559; Obermark v. People, 24 Ill. App. 259.

Indiana.

Henley v. Bronnenberg (Ind. App.) 31 N. E. 583; Clanin v. Fagan, 124 Ind. 305; Landwerlen v. Wheeler, 106 Ind. 523; Starnes v. Schofield, 5 Ind. App. 4; Steeg v. Walls, 4 Ind. App. 18; Ellebarger v. Swiggett, 1 Ind. App. 598.

Iowa.

Lewis v. May, 22 Iowa, 599; State v. Jones, 11 Iowa, 11; Jordan v. Quick, 11 Iowa, 9; Pierce v. Locke, 11 Iowa, 454; Green v. McFaddin, 5 Iowa, 549; Garber v. Morrison, 5 Iowa, 476; Harmon v. Chandler, 3 Iowa, 150; Ewing v. Scott, 2 Iowa, 447; Claussen v. La Franz, 1

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court journal, they need not be brought up in the bill. Eaton v. Carruth, 11 Neb. 231.

[67] Where it is sought to have instructions reviewed, they must be brought into the record in one or the other of these methods. Clanin v. Fagan, 124 Ind. 304. Either is sufficient: Jeffersonville, M. & I. R. Co. v. Cox, 37 Ind. 325; Newby v. Warren, 24 Ind. 161. Compare Cross v. Pearson, 17 Ind. 612.

Iowa, 226; Parker v. Pierce, 4 G. Greene, 452; Reed v. Hubbard, 1 G. Greene, 153.

Kansas.

Moore v. Wade, 8 Kan. 380.

Kentucky.

Forest v. Crenshaw, 81 Ky. 51.

Maryland.

Sowerwein v. Jones, 7 Gill & J. 335.

Michigan.

Wagar v. Peak, 22 Mich. 368.

Mississippi.

Peden v. State, 61 Miss. 267; Haynie v. State, 32 Miss. 403.

Nevada.

State v. Ah Mook, 12 Nev. 369; State v. Forsha, 8 Nev. 137.

Ohio.

City of Toledo v. Preston, 50 Ohio St. 361.

Pennsylvania.

Yardley v. Cuthbertson, 14 Wkly. Notes Cas. 29.

Tennessee.

Chesapeake, O. & S. W. R. Co. v. Foster, 88 Tenn. 671; Owens v. State, 16 Lea, 1; McGhee v. Grady, 12 Lea, 89; Hardwick v. State, 6 Lea, 229; Huddleston v. State, 7 Baxt. 55; Bass v. State, 6 Baxt. 580.

Texas.

Texas Telegraph & Telephone Co. v. Seiders, 9 Tex. Civ. App. 431; Gulf, C. & S. F. Ry. Co. v. Holt, 1 Willson, Civ. Cas. Ct. App. § 835.

Utah.

People v. Pettit, 5 Utah, 241.

Vermont.

Fletcher v. Howard, 2 Aiken, 115.

Wisconsin.

Collins v. Breen, 75 Wis. 606; Mullen v. Reinig, 68 Wis. 408; Koenigs v. Jung, 73 Wis. 178.

England.

Anderson v. Fitzgerald, 4 H. L. Cas. 484; McAlpine v. Mangnall,

3 C. B. 496, 54 E. C. L. 496. "A charge of the court given to the jury in writing, and filed with the papers in the case, as required by section 266 of the Code, is reviewable on error only when made a part of the record by bill of exceptions." Pettett v. Van Fleet, 31 Ohio St. 536.

Louisiana.

"Although in writing, the judge's charge was not excepted to. We held, in State v. Ricks, 32 La. Ann. 1098, that, where the charge was in writing, and embodied in the record, we would notice errors, under proper assignment thereof, although not presented by bill of exceptions. While not now overruling this opinion, which, however, is contrary to prior authority (10 La. Ann. 450), and therefore to be strictly construed, we deem it proper to say that it is in every way preferable that charges should be excepted to when given, in order that the judge may have an opportunity of explaining or correcting his charge at the time; otherwise, the defendant would be at liberty to take his chances of acquittal on the charge as delivered, and, if convicted, to urge his objection in subsequent proceedings. Only in case of gross and unambiguous error will we sustain objections to the charge not made and presented by bill of exceptions at time of delivery." State v. Beaird, 34 La. Ann. 104.

Statutory changes in rule.

Indiana.

In this state, by statute, instructions are made a part of the record, and it is provided that, if a party wishes to except, it shall be sufficient to write on the margin or at the close of each instruction the words, "Refused and excepted to," or "Given and excepted to," which memorandum must be signed by the judge, and dated. This statute does not apply where the instructions are properly made part of the bill of exceptions. Plank v. Jackson, 128 Ind. 424. But "they must be brought into the record by a bill of exceptions, or signed by the judge, and filed as a part of the record." Clanin v. Fagan, 124 Ind. 304. Where all the instructions are in the record, as provided by Rev. St. Ind. 1881, § 535, it is not necessary that the question of their propriety be presented by bill of exceptions, as provided by Id. § 630, for the presentation of reserved questions of law. Richardson v. Coleman, 131 Ind. 210. See, also, Lower v. Franks, 115 Ind. 334. As it originally stood, the statute required the memorandum to be signed by the party or his attorney. Sutherland v. Hankins, 56 Ind. 343; Maghee v. Baker, 15 Ind. 254; Bush v. Durham, 15 Ind. 252; State v. Rabourn, 14 Ind. 300. And the signature by the judge, which is now required, was insufficient.

Newby v. Warren, 24 Ind. 161; Ledley v. State, 4 Ind. 580. If an instruction asked for is put in writing, signed by the party or his attorney, and an entry made of the exception to its being given or refused, and also signed in the same manner, it becomes part of the record without the authentication of the judge, or being put into a bill of exceptions. Jeffersonville, M. & I. R. Co. v. Cox, 37 Ind. 325.

Iowa.

By statutory provision (Code, § 2789), instructions and the action of the court thereon in giving or refusing them constitute a part of the record, and need not be set out in the bill of exceptions in order to bring them before the supreme court. Roberts v. Leon Loan & Abstract Co., 63 Iowa, 76; Allison v. Jack, 76 Iowa, 205. Where the giving and refusal of instructions and exceptions to such rulings are noted on the margins of the instructions, the supreme court can review such rulings, although they are not preserved by a bill of exceptions. Wells v. Burlington, C. R. & N. R. Co., 56 Iowa, 520. The instructions, when filed, become a part of the record, and may be certified by the clerk. Parker v. Middleton, 65 Iowa, 200. While it is not essential that instructions should be preserved by bill of exceptions when they have been filed and made part of the record, yet it is essential that they be certified by the clerk of the trial court to the supreme court; and, if they cannot be made a part of such transcript, error in the giving of them cannot be considered. Bonney v. Cocke, 61 Iowa, 303. Before the enactment of the statutory provision above referred to, it was held that instructions were not a part of the record unless made so by a bill of exceptions. Parker v. Pierce, 4 G. Greene, 452; Claussen v. La Franz, 1 Iowa, 226; Ewing v. Scott, 2 Iowa, 447; Pierce v. Locke, 11 Iowa, 454.

Kansas.

"In civil actions, the statute seems to provide that instructions reduced to writing and signed by the judge shall, when filed, become a part of the record." State v. Lewis, 10 Kan. 157. "Instructions not embodied in a formal bill of exceptions, nor signed by the judge of the court below, as provided by statute [Gen. St. pp. 682, 686, §§ 276, 303], nor embodied in a case made for the supreme court, as provided by statute [Gen. St. p. 737, §§ 546-549; Laws 1871, p. 274], form no part of the record, and will not be considered by the supreme court." Kshinka v. Cawker, 16 Kan. 63. Instructions given by the court in a criminal case, not preserved by a bill of exceptions, form no part of the record, and cannot be considered on an appeal to the supreme court. State v. Smith, 38 Kan. 194; State v. Ratner, 44 Kan. 429. And see State v. Lewis, 10 Kan. 157. "The charge of

the court in a criminal cause only becomes a part of the record by means of a bill of exceptions." State v. Smith, 38 Kan. 194. In a criminal prosecution, "instructions asked for by the defendant, and refused by the trial court, cannot become a part of the record unless they are embodied in a bill of exceptions." State v. McClintock, 37 Kan. 40.

Texas.

Rev. St. Tex. art. 1318, provides that the charge is to be filed, "and shall constitute a part of the record of the cause, and shall be regarded as excepted to, and subject to revision for errors therein, without the necessity of taking any bill of exceptions." Redus v. Burnett, 59 Tex. 581; Missouri Pac. R. Co. v. Rabb, 3 Willson, Civ. Cas. Ct. App. § 39.

§ 372. What record must show, generally.

Upon appeal or error, the burden of showing reversible error in the proceedings below rests upon the party asserting it, *i. e.*, upon the appellant,[68] and as the appellate court, in examining the case, is confined solely to the matters appearing in the record, it follows that the appealing party must see that the record contains enough to show conclusively that the court below committed error for which the judgment may be reversed.[69] Thus, where the record showed that the court below erred in charging that the jury might take with them into the jury room an account book introduced in evidence, but failed to show that the jury in fact did so, it was held that the record did not show reversible error, as the error was harmless, unless the jury took the book with them into the jury room.[70] So, where the refusal of a request to charge is assigned for error, the record must

[68] See Linton v. Allen, 154 Mass. 432; King v. State (Tex. Cr. App.) 21 S. W. 190; Patchell v. Jaqua, 6 Ind. App. 70. See, also, infra, §§ 375-378, "Presumptions on Appeal."

[69] To authorize a reversal because of the refusal to give a charge, the record must affirmatively show that the charge was correct and justified by the evidence. Wyatt v. Stewart, 34 Ala. 716.

[70] First Nat. Bank of Porter Co. v. Williams, 4 Ind. App. 501.

show a proper formal request.[71] And if a cautionary instruction is requested to counteract improper remarks of counsel in argument, a refusal to so charge will not be reviewed unless the objectionable remarks of counsel are preserved in the bill of exceptions.[72] An appellate court "will not review erroneous instructions upon mere abstract principles of law."[73] Accordingly, the propriety of giving or refusing instructions will not be considered on appeal unless the record shows that the charge or request was relevant and material to some question in the case.[74] Objections to instructions must be raised on appeal by assignment of error,[75] and only the errors assigned will be considered.[76] The record must show that an exception was taken below[77] at the proper time.[78]

[71] Thus, where requests for instructions must be in writing, the bill of exceptions must show that a written request was made. Nickless v. Pearson, 126 Ind. 477.

[72] Kepperly v. Ramsden, 83 Ill. 354.

[73] Yelm Jim v. Territory, 1 Wash. T. 63.

[74] Illinois: Leavitte v. Randolph Co., 85 Ill. 507.
Indiana: Amick v. O'Hara, 6 Blackf. 258.
Iowa: Murphy v. Johnson, 45 Iowa, 57; Kelleher v. City of Keokuk, 60 Iowa, 473.
Texas: Ashworth v. State, 9 Tex. 490; Chandler v. State, 2 Tex. 305; Hill v. Crownover, 4 Tex. 8; Holman v. Britton, 2 Tex. 297.
Virginia: Valley Mut. Life Ass'n v. Teewalt, 79 Va. 421.
Washington Territory: Yelm Jim v. Territory, 1 Wash. T. 63.
United States: New Orleans Ins. Co. v. Piaggio, 16 Wall. 378.

[75] Bender v. Peyton, 4 Tex. Civ. App. 57.

[76] Where the bill of exceptions shows that exception was taken to the giving of instructions, the ruling may be assigned for error, though it does not appear upon what grounds the motion for a new trial was based. "The whole case is put, by the bill of exceptions, on the misdirection of the court, and that is the only question now properly before us." McClurkin v. Ewing, 42 Ill. 283.

[77] Keeling v. Kuhn, 19 Kan. 441; Indianapolis, B. & W. Ry. Co. v.

§ 373. Preserving evidence in record.

As stated in the last preceding section, the record on appeal must show that the instructions or requests presented for review were relevant and material to the issues involved in the trial. This will usually require at least so much of the evidence as the instructions or requests were based upon to be brought up in the bill of exceptions.[79] Where none of the evidence appears in the record, and there is no statement of what it tended to prove, or that it raised the questions on which instructions are based, the appellate court cannot, as a general rule, determine whether there was error

Rhodes, 76 Ill. 285; Toledo, P. & W. Ry. Co. v. Miller, 55 Ill. 448; Buckmaster v. Cool, 12 Ill. 74.

[78] Love v. Moynehan, 16 Ill. 277. See, also, supra, § 369, "Time of Taking Exceptions."

[79] Alabama: Hill v. State, 43 Ala. 335; Morris v. State, 25 Ala. 57; Jones v. Stewart, 19 Ala. 701; Leverett's Heirs v. Carlisle, 19 Ala. 80; Brazier v. Burt, 18 Ala. 201; Dent v. Portwood, 17 Ala. 242; Tharp v. State, 15 Ala. 749; King v. Crocheron, 14 Ala. 822; Peden v. Moore, 1 Stew. & P. 71.

Florida: Blige v. State, 20 Fla. 742; Stewart v. Mills, 18 Fla. 57; Southern Exp. Co. v. Van Meter, 17 Fla. 783; Sherman v. State, 17 Fla. 888; McKay v. Friebele, 8 Fla. 21.

Illinois: Evans v. Lohr, 3 Ill. 511.

Indiana: State v. Bartlett, 9 Ind. 569.

Iowa: Potter v. Wooster, 10 Iowa, 334; Wilcox v. McCune, 21 Iowa, 294.

Massachusetts: Whitehead & A. Mach. Co. v. Ryder, 139 Mass. 366; O'Neil v. Wolffsohn, 137 Mass. 134; Horton v. Cooley, 135 Mass. 589; Salomon v. Hathaway, 126 Mass. 482; Coker v. Ropes, 125 Mass. 577; Canfield v. Canfield, 112 Mass. 233; Foster v. Ropes, 111 Mass. 10; Dale v. Harris, 109 Mass. 193; Milk v. Middlesex R. Co., 99 Mass. 167; Stearns v. Janes, 12 Allen, 582; Tappan v. Burnham, 8 Allen, 65; Wells v. Prince, 15 Gray, 562; Fuller v. Ruby, 10 Gray, 285.

Texas: Holman v. Britton, 2 Tex. 297.

United States: Phoenix Life Ins. Co. v. Raddin, 120 U. S. 183; Jones v. Buckell, 104 U. S. 554; Worthington v. Mason, 101 U. S. 149; Vasse v. Smith, 6 Cranch, 226; Southwestern Virginia Imp. Co. v. Frari (C. C. A.) 58 Fed. 171.

in the rulings of the court as to the instructions or not."[80] And it has accordingly been held that, where the record does not purport to contain all the evidence, the correctness of the court's action in giving or refusing instructions will not be considered on appeal, and error therein is not available as a ground for reversal.[81] Where the charge is objected to on the ground of irrelevancy, all the evidence must be brought up by the bill of exceptions.[82] A judgment will not be re-

[80] Town of Leroy v. McConnell, 8 Kan. 273; State v. English, 34 Kan. 629; Stetler v. King, 43 Kan. 316; Gray v. City of Emporia, 43 Kan. 704; State Ins. Co. v. Curry, 44 Kan. 741; Leavitte v. Randolph County, 85 Ill. 507. As instructions, abstractly correct, may be properly refused if not applicable under the evidence, a party complaining of the refusal to give an instruction must bring before the court on appeal the evidence showing such applicability. Cutter v. Fanning, 2 Iowa, 580; Gover v. Dill, 3 Iowa, 337; Hanan v. Hale, 7 Iowa, 153; Frost v. Inman, 10 Iowa, 587; Wisner v. Brady, 11 Iowa, 248; Paden v. Griffith, 12 Iowa, 272; Wilcox v. McCune, 21 Iowa, 294; Chase v. Scott, 33 Iowa, 309; Auld v. Kimberlin, 7 Kan. 601.

[81] Alabama: Tracey, Irwine & Co. v. Warren, 45 Ala. 408; Green v. Tims, 16 Ala. 541; Brewer v. Strong's Ex'rs, 10 Ala. 961.

Illinois: Love v. Moynehan, 16 Ill. 277.

Indiana: Ward v. State, 52 Ind. 454.

Iowa: State v. Hamilton, 32 Iowa, 572; Nollen v. Wisner, 11 Iowa, 190; Preston v. Walker, 26 Iowa, 205.

Kansas: Hymes v. Jungren, 8 Kan. 392; Board Com'rs Allen Co. v. Boyd, 31 Kan. 765.

Texas: McMullen v. Kelso, 4 Tex. 235; Holman v. Britton, 2 Tex. 297; Chandler v. State, 2 Tex. 305; Hutchins v. Wade, 20 Tex. 7; Fulgham v. Bendy, 23 Tex. 64; Powell v. Terry's Adm'r, 77 Va. 250.

A party seeking the revision of a general affirmative charge must either show that the evidence was conflicting, and the charge an invasion of the province of the jury, or he must set out all the evidence, that the appellate court may be able to determine whether the charge is authorized by it. Gaines v. Harvin, 19 Ala. 491; Owens v. Callaway, 42 Ala. 301; Griffin v. Bland, 43 Ala. 542; Doe d. School Com'rs v. Godwin, 30 Ala. 242; Fleming v. Ussery, 30 Ala. 282; Barnes v. Mohley, 21 Ala. 232; Tracey, Irwine & Co. v. Warren, 45 Ala. 408.

[82] Law v. Merrills, 6 Wend. (N. Y.) 268; United States v. Morgan,

versed for a mere failure to instruct, in the absence of any evidence in the record showing the necessity and propriety of an instruction in regard to the omitted particulars.[83] It has been held that, where the record contains no evidence or statement of facts, the instructions are to be regarded on appeal as abstract propositions, unconnected with the case or the issues, and not affecting the correctness of the judgment.[84]

There are several classes of cases, however, in which error in regard to instructions is available on appeal, notwithstanding that the record does not contain all the evidence. Thus, where instructions are erroneous under any supposable state of facts,[85] or where the pleadings render them necessarily erroneous,[86] or where they are based on incompetent evidence,[87] the error may constitute ground for reversal, although all

11 How. (U. S.) 159; Zeller's Lessee v. Eckert, 4 How. (U. S.) 297; Muirhead v. Muirhead, 8 Smedes & M. (Miss.) 211.

[83] Hedrick v. Smith, 77 Tex. 608. "Where the error complained of is that the court failed to give a special and separate instruction upon a single and collateral fact disclosed by the testimony, the entire testimony should ordinarily be presented, so that the court may see that the fact is of such importance as to require special and separate notice." Head v. Dyson, 31 Kan. 74.

[84] Holman v. Britton, 2 Tex. 297; Salinas v. Wright, 11 Tex. 572; Hollingsworth v. Holshousen, 17 Tex. 41.

[85] Alabama: Peden v. Moore, 1 Stew. & P. 71; Tharp v. State, 15 Ala. 749; Rowland v. Ladiga, 9 Port. 488.

Indiana: Smathers v. State, 46 Ind. 447; Palmer v. Wright, 58 Ind. 486; Eward v. Lawrenceburgh & U. M. R. Co., 7 Ind. 711; Murray v. Fry, 6 Ind. 371; Woodruff v. Garner, 27 Ind. 4; Jolly v. Terre Haute Drawbridge Co., 9 Ind. 417; Ruffing v. Tilton, 12 Ind. 259; New Albany & S. R. Co. v. Callow, 8 Ind. 471; Woolley v. State, 8 Ind. 502; Barlow v. Thompson, 46 Ind. 384; Griffin v. Templeton, 17 Ind. 234; Blizzard v. Bross, 56 Ind. 74.

Iowa: Murphy v. Johnson, 45 Iowa, 57.

[86] Duggins v. Watson, 15 Ark. 118; Robins v. Fowler, 2 Ark. 143; Mason v. McCampbell, 2 Ark. 506; Pfeuffer v. Maltby, 54 Tex. 454.

[87] Lane v. Miller, 17 Ind. 58.

the evidence is not contained in the record. It has been held that, where no question is made on the evidence, it is sufficient to secure a review of instructions to state in the bill of exceptions that the evidence established or tended to prove certain facts, without setting it out *in extenso*.[88]

§ 374. Preserving instructions in record.

In order to make out a case for reversal, the appellant must bring up, in the bill of exceptions, or other authorized manner, the instructions to which he has excepted, and upon which he relies for reversal.[89] So, also, when the refusal of requested instructions is assigned as error, the instructions refused must be embodied in the bill of exceptions.[90] And where the modification of an instruction is excepted to, the bill of exceptions must show what the modifications were,

[88] Illinois: Pennsylvania Co. v. Swan, 37 Ill. App. 85; Schmidt v. Chicago & N. W. Ry. Co., 83 Ill. 405; Leavitte v. Randolph County, 85 Ill. 507.

Iowa: Kelleher v. City of Keokuk, 60 Iowa, 473; Mudge v. Agnew, 56 Iowa, 297.

[89] Arkansas: Cheaney v. State, 36 Ark. 74; Hicks v. Britt, 21 Ark. 422.

California: Freeborn v. Norcross, 49 Cal. 313.

Indiana: McKinsey v. McKee, 109 Ind. 209; Helms v. Wayne Agricultural Co., 73 Ind. 325.

Missouri: Montgomery v. Harker, 81 Mo. 63; Greenabaum v. Millsaps, 77 Mo. 474; Johnson v. Greenleaf, 73 Mo. 671; State v. Shehane, 25 Mo. 565; Hoyt v. Quinn, 20 Mo. App. 72; Davis v. Hilton, 17 Mo. App. 319; Cadmus v. St. Louis Bridge & Tunnel Co., 15 Mo. App. 86.

Nevada: State v. Rover, 11 Nev. 343; State v. Forsha, 8 Nev. 137; State v. Burns, 8 Nev. 251.

Wisconsin: Collins v. Breen, 75 Wis. 606.

[90] State v. Schuessler, 3 Ala. 419; Pierson v. State, 12 Ala. 149; Renshaw v. Switzer, 6 Mont. 464; Kleinschmidt v. McDermott, 12 Mont. 309; Prindeville v. People, 42 Ill. 217; Gill v. Skelton, 54 Ill. 158; Wilmington Coal Min. & Mfg. Co. v. Barr, 2 Ill. App. 84. See, also, Keeling v. Kuhn, 19 Kan. 441.

and also the instruction as modified.[91] The obvious reason is that the court cannot judge of the correctness of instructions given, refused, or modified without having such instructions or modifications before it, and, as has been seen in a previous section, instructions are not ordinarily a part of the record, and therefore are not before the court unless embodied in a bill of exceptions.[92] Where the error complained of is one that might be cured by other instructions in the case, all the instructions must be brought up in the record, so that the court may see that the error was not in fact cured;[94] otherwise there can be no reversal.[95] Thus, where the refusal of an instruction is assigned as error, and the record does not purport to contain all the instructions, such refusal cannot be reviewed on appeal, because, *non con-*

[91] Arkansas: St. Louis, I. M. & S. Ry. Co. v. Hecht, 38 Ark. 357.
Illinois: Boles v. Henney, 32 Ill. 130; Ballance v. Leonard, 37 Ill. 43; Gulliver v. Adams Exp. Co., 38 Ill. 503; Burns v. People, 126 Ill. 285.
Texas: Missouri Pac. Ry. Co. v. Williams, 75 Tex. 4.

[92] See supra, § 370, "Necessity of Bill of Exceptions." "When the bad practice is adopted by the court, of answering the legal propositions submitted by counsel seriatim, and then separately giving what is sometimes called a "general charge," and counsel take an exception to the answers, and not to the general charge, the bill of exceptions does not put the general charge on the record; but when the answers refer to the general charge, so much of the latter as is thus referred to will come up with the answers, and be considered a part of them." Wissler v. Hershey, 23 Pa. 333.

[94] Marshall v. Lewark, 117 Ind. 377; Lake Erie & W. R. Co. v. Carson, 4 Ind. App. 185; Oregon Railway & Navigation Co. v. Galliher, 2 Wash. T. 70.

[95] Board Com'rs of Brown Co. v. Roberts, 22 Kan. 762. "Where all the instructions given to the jury do not appear, there can be no reversal merely because it appears that the court instructed the jury to consider all the facts, and render such a verdict as they should deem just and right." Mitchell v. Tomlinson, 91 Ind. 167.

stat, the instruction may have been refused because already once given.[96] The burden of showing error in such a case can only be sustained by showing either that no instructions were given on the point in question, or that the instructions given upon such point were erroneous.[97] So, where the error alleged is the failure of the lower court to properly and fully instruct the jury, all the instructions given must be set out in the record, for the obvious reason that the court cannot otherwise determine whether the instructions covered the case or not.[98] Where, however, the error committed is one that could not have been cured by other instructions in the case, the court may reverse, although all the instructions are not contained in the record.[99] In the United States supreme

[96] Illinois: Wilmington Coal Min. & Mfg. Co. v. Barr, 2 Ill. App. 84.

Iowa: Moody v. St. Paul & S. C. R. Co., 41 Iowa, 284; State v. Johnson, 19 Iowa, 230; Huff v. Aultman, 69 Iowa, 71; State v. Williamson, 68 Iowa, 351; State v. Stanley, 48 Iowa, 221; State v. Nichols, 38 Iowa, 110; Chase v. Scott, 33 Iowa, 309; Bower v. Stewart, 30 Iowa, 579.

Kansas: Keeling v. Kuhn, 19 Kan. 441; State v. Teissedre, 30 Kan. 476; Wilson v. Fuller, 9 Kan. 176; Norton v. Foster, 12 Kan. 44; Wolfley v. Rising, 12 Kan. 535; Da Lee v. Blackburn, 11 Kan. 190; Shepard v. Pratt, 16 Kan. 209; Ferguson v. Graves, 12 Kan. 39; Pacific R. Co. v. Brown, 14 Kan. 469; Morgan v. Chapple, 10 Kan. 216; Washington Life Ins. Co. v. Haney, 10 Kan. 525; Marshall v. Shibley, 11 Kan. 114; Bard v. Elston, 31 Kan. 274.

Maine: Hearn v. Shaw, 72 Me. 187.

Massachusetts: Linton v. Allen, 154 Mass. 432.

[97] Patchell v. Jaqua, 6 Ind. App. 70; Linton v. Allen, 154 Mass. 434; King v. State (Tex. Cr. App.) 21 S. W. 190.

[98] State v. Hamilton, 32 Iowa, 572; State v. Rhea, 25 Kan. 576; Berrenberg v. City of Boston, 137 Mass. 231.

[99] "This court will not ordinarily reverse on account of erroneous instructions, unless the record contains all those given; but where the instructions given contain errors that could not be cured by others, it may be" otherwise. Meyer v. Temme, 72 Ill. 574. If any

court, the rule has been long established that only so much of the charge as is excepted to should be embodied in the bill of exceptions;[100] and in Massachusetts and Alabama the practice seeems to be the same.[101] "In a motion for a new trial, if the rule *nisi* states the charge differently from the charge itself, as written out by the judge, and sent up with the record, the appellate court will be governed by the charge as written" by the judge.[102]

instruction given is so far erroneous that any modification thereof properly presenting the law would have been in conflict with it, the error will be ground for reversal, although all the instructions are not before the court; but it will be otherwise if there might have been, in another instruction, modifications or limitations such as, with the instruction complained of, would have correctly presented the law. Bland v. Hixenbaugh, 39 Iowa, 532.

[100] Phoenix Life Ins. Co. v. Raddin, 120 U. S. 183, citing Evans v. Eaton, 7 Wheat. (U. S.) 356; Carver v. Jackson, 4 Pet. (U. S.) 1; Crane v. Crane, 5 Pet. (U. S.) 190; Magniac v. Thompson, 7 Pet. (U. S.) 348; Gregg v. Sayre's Lessee, 8 Pet. (U. S.) 244; Stimpson v. Westchester R. Co., 3 How. (U. S.) 553; Zeller's Lessee v. Eckert, 4 How. (U. S.) 289; United States v. Rindskopf, 105 U. S. 418. See, also, Lincoln v. Claflin, 7 Wall. (U. S.) 132; Conrad v. Pacific Ins. Co., 6 Pet. (U. S.) 262, 280. And this practice is enforced by an express rule of court. See Rule 38 of 1832, 6 Pet. (U. S.) iv.; Rule 4 of 1858, 21 How. (U. S.) vi.; and Rule 4 of 1884, 108 U. S. 574.

[101] The bill of exceptions should merely state the rulings upon points of law made at the trial, and not set out the charge at length. Burt v. Merchants' Ins. Co., 115 Mass. 16, quoting with approval remarks of Mr. Justice Story to same effect in Evans v. Eaton, 7 Wheat. (U. S.) 356, 426. "The insertion in the bill of exceptions of the general charge of the court, to which no exceptions were taken, cannot possibly injure the appellant. It furnishes no ground for reversal." Hollingsworth v. Chapman, 54 Ala. 8, citing Grace v. McKissack, 49 Ala. 163.

[102] Alston v. Grantham, 26 Ga. 374.

III. PRESUMPTIONS ON APPEAL.

§ 375. Presumptions against error.

The rules stated in a preceding section as to what the record must contain in order to authorize a review of instructions given or refused are often stated in the language of presumptions. Thus, the rule already stated, that the burden is on the appellant to show affirmatively upon the record the existence of reversible error, is sometimes expressed by saying that there is a presumption against error, and, in the absence of an affirmative showing to the contrary, it will be presumed that the action of the trial court was correct under the circumstances. Accordingly, where the state of the record leaves any room for presumptions, it will be presumed that the court below gave all necessary and proper instructions upon all issues and questions involved,[103] and at the proper time,[104] even though no charge appears in the

[103] City of Lewiston v. Inhabitants of Harrison, 69 Me. 504; Ford v. Ford, 110 Ind. 89; Ogden v. Kelsey, 4 Ind. App. 299; Lehman v. Hawks, 121 Ind. 541; Com. v. Ford, 146 Mass. 131. It will be presumed that the parties had narrowed the issue to the questions stated by the court. Cory v. Silcox, 6 Ind. 39; Legget v. Harding, 10 Ind. 414. To sustain error on the ground that the court neglected to charge upon a question of law arising upon the facts, it must appear, not only that the facts existed, but that the court was distinctly requested to instruct the jury as to the law on that point. Law v. Merrills, 6 Wend. (N. Y.) 268, reversing Id., 9 Cow. (N. Y.) 65; Powell v. Jones, 42 Barb. (N. Y.) 24. Where the record shows an objection to improper statements of counsel in argument to the jury, but not whether the court corrected the statements or not, it will be presumed that the court instructed the jury to disregard them. Fredericks v. Judah, 73 Cal. 604. It will be presumed that the court performed its statutory duty to give general instructions, and likewise that it obeyed the statutory requirement to instruct the jury that, if they should find a general verdict, they must answer special interrogatories. Frank v. Grimes, 105 Ind. 346.

[104] "The presumption, in the absence of anything in the record, is

record.[105] So, where instructions would be correct under a possible state of facts, and the evidence is not all before the court, it will be presumed that the evidence was such as to justify the giving of the instructions.[106] This presumption is rebutted, however, where the record purports to contain all the evidence,[107] or where it is apparent that the instructions would be improper under any possible state of the evidence under the pleadings.[108] Where the record does not contain

that the court below discharged its duty in charging the jury before they were allowed to separate." Linton v. Housh, 4 Kan. 536.

[105] Richardson v. City of Eureka, 96 Cal. 443; Flannery v. Van Tassell, 32 N. Y. St. Rep. 350.

[106] Warbasse v. Card, 74 Iowa, 306. See, also, cases collated in digest note, infra, § 377. An affirmative charge, correct as a legal proposition under any state of facts that could have existed in the case, will be presumed to have been authorized by the evidence, unless the contrary affirmatively appears. Doe d. School Com'rs v. Godwin, 30 Ala. 242; Fleming v. Ussery, 30 Ala. 282; Morris v. State, 25 Ala. 57; Tempe v. State, 40 Ala. 350. Instructions, not abstractly wrong, will be presumed applicable if the evidence is not in the record. Campbell v. Peterman, 56 Ind. 428; Newby v. Rogers, 54 Ind. 193; Overlin v. Kronenberger, 50 Ind. 365; McKinney v. Shaw & Lippencott Mfg. Co., 51 Ind. 219. "A charge instructing the jury that the defendant is liable if the plaintiff's colt was killed 'under the circumstances' testified to by him will be presumed to have been correctly given, when there is nothing in the bill of exceptions showing what the 'circumstances' were." South & North Alabama R. Co. v. Brown, 53 Ala. 651. Where it is assumed that agency has been established, such agency being material, such assumption will be presumed correct, where evidence is not in the record. Bowen v. Pollard, 71 Ind. 177.

[107] Where, upon review by the appellate court, "the bill of exceptions purports to contain all the evidence, an instruction not supported by the evidence thus preserved will not be presumed to have been properly given." St. Louis Drug Co. v. Dart, 7 Mo. App. 590.

[108] Indiana: Cincinnati, H. & I. R. Co. v. Clifford, 113 Ind. 460; Cates v. Bales, 78 Ind. 288.

Iowa: Warbasse v. Card, 74 Iowa, 306; McMillan v. Burlington & M. R. Co., 46 Iowa, 231; State v. Broadwell, 73 Iowa, 765.

all the instructions actually given, a refusal to give instructions will not be reviewed, as it will be presumed that the court properly instructed, of its own motion, on questions arising in the case,[109] and that the charge was correct as a whole.[110] So, instructions which are apparently erroneous

Kentucky: Robards v. Wolfe, 1 Dana, 156.

Mississippi: Kellum v. State, 64 Miss. 226.

Nebraska: Willis v. State, 27 Neb. 98.

Nevada: State v. Loveless, 17 Nev. 424.

Oklahoma: Fisher v. United States, 1 Okl. 252.

[109] Alabama: Cobb v. Malone, 87 Ala. 514.

California: Richardson v. City of Eureka, 96 Cal. 443.

Colorado: Klink v. People, 16 Colo. 467; Halsey v. Darling, 13 Colo. 1.

Indiana: Marshall v. Lewark, 117 Ind. 377; Becknell v. Becknell, 110 Ind. 42; Frank v. Grimes, 105 Ind. 346; Town of Princeton v. Gelske, 93 Ind. 102; Morris v. Stern, 80 Ind. 227; Bowen v. Pollard, 71 Ind. 177; Myers v. Murphy, 60 Ind. 282; Freeze v. De Puy, 57 Ind. 188; Patchell v. Jaqua, 6 Ind. App. 70; Leeper v. State, 12 Ind. App. 638.

Iowa: Huff v. Aultman, 69 Iowa, 71; State v. Williamson, 68 Iowa, 351.

Kentucky: Hunt v. Kemper, 10 Ky. Law Rep. 593, 9 S. W. 803.

Maine: Hewey v. Nourse, 54 Me. 256; Sidensparker v. Sidensparker, 52 Me. 481.

Massachusetts: Linton v. Allen, 154 Mass. 432.

Michigan: People v. Niles, 44 Mich. 606; English v. Caldwell, 30 Mich. 362.

Missouri: Meade v. Weed, 45 Mo. App. 385; Whiting v. City of Kansas, 39 Mo. App. 259; Wilkerson v. Corrigan Consol. St. Ry. Co., 26 Mo. App. 144.

Nebraska: Malcom v. Hanson, 32 Neb. 52.

New Mexico: Lewis v. Baca, 5 N. M. 289, 21 Pac. 343.

New York: Crouse v. Owens, 49 Hun, 610, 3 N. Y. Supp. 863; Flannery v. Van Tassell, 56 Hun, 647, 9 N. Y. Supp. 871.

Ohio: Bean v. Green, 33 Ohio St. 444; Davis v. State, 25 Ohio St. 369.

Texas: Ross v. McGowen, 58 Tex. 603.

Wisconsin: McPhee v. McDermott, 77 Wis. 33; Graves v. State, 12 Wis. 591.

[110] Where a single proposition selected from the charge by bill

will be presumed to have been modified by other instructions so as to be correct, where all the instructions do not appear in the record, provided, of course, the error is such as might have been cured by other instructions.[111] If the error complained of is such that it could not be obviated by other correct instructions, there is no room for this presumption, and it may be proper to reverse, although all the instructions are not in the record.[112] Ordinarily, the refusal of a request to charge is not available as reversible error, in the absence of all the evidence in the record,[113] as it will be presumed,

of exceptions is claimed to be erroneous, and other propositions to which it refers as given and to be given in connection with it, are not found in the record, a reviewing court in support of the judgment will presume that the charge as a whole was a correct statement of the law of the case. Bean v. Green, 33 Ohio St. 444.

[111] California: People v. Von, 78 Cal. 1.

Georgia: Hunt v. Pond, 67 Ga. 578; Bell v. State, 69 Ga. 752; Bray v. State, 69 Ga. 765; Johnson v. Latimer, 71 Ga. 470; Massengill v. First Nat. Bank of Chattanooga, 76 Ga. 341; Trice v. Rose, 80 Ga. 408.

Illinois: Abingdon v. Meadows, 28 Ill. App. 442.

Indiana: Marshall v. Lewark, 117 Ind. 377; Stull v. Howard, 26 Ind. 456.

Iowa: Fernbach v. City of Waterloo, 76 Iowa, 598.

Minnesota: Cogley v. Cushman, 16 Minn. 397 (Gil. 354).

United States: Atchison, T. & S. F. R. Co. v. Howard (C. C. A.) 49 Fed. 206.

Contra: Cox v. People, 109 Ill. 457; Meyer v. Temme, 72 Ill. 574; Schmidt v. Chicago & N. W. R. Co., 83 Ill. 405.

Where the brief does not give the whole of the judge's charge, a detached fragment cannot be held to be erroneous. Sawyer, Wallace & Co. v. Macaulay, 18 S. C. 548. Where it appears that instructions were given which were not before the court, which might have modified or changed those given which are insisted upon as being erroneous, the court cannot presume that there were not other instructions correcting any error in the one relied upon as being erroneous. State v. Stanley, 48 Iowa, 221.

[112] Illinois: Meyer v. Temme, 72 Ill. 574.

[113] See supra, § 373. Error in refusing to instruct that certain

in favor of the trial court, that the state of the evidence was not such as to require the giving of the refused instruction,[114] or, if all the instructions are not brought up, it will be presumed that the instruction was correctly refused because substantially embodied in other instructions given.[115]

evidence constitutes a variance is not available, when the evidence is not in the record. Witz v. Spencer, 51 Ind. 253.

[114] See cases collected in digest note, infra, § 376. "It is settled in this court that, when a charge is asked and refused, it will be presumed to have been abstract, although otherwise unobjectionable, unless the contrary is shown by a statement of the evidence." Turbeville v. State, 40 Ala. 715; Morris v. State, 25 Ala. 57; Leverett's Heirs v. Carlisle, 19 Ala. 80; Wilson v. Calvert, 18 Ala. 274; Brazier v. Burt, 18 Ala. 201; Dent v. Portwood, 17 Ala. 242; Hughes v. Parker, 1 Port. (Ala.) 139; Hill v. State, 43 Ala. 335; Tharp v. State, 15 Ala. 749. "When a charge is requested which, on the facts hypothetically stated, asserts a correct legal proposition, but those facts might be met and avoided by proof of other facts which would render the charge erroneous, if the bill of exceptions does not purport to set out all the evidence, the appellate court will presume * * * that such additional facts were proved." McLemore v. Nuckolls, 37 Ala. 662. Unless the record shows affirmatively that there was evidence tending to prove every fact which an instruction asked for supposes, the appellate court will not reverse for a refusal to give the same. Williams v. Barksdale, 58 Ala. 288; Little v. Martin, 28 Iowa, 558; Amos v. Sinnott, 4 Scam. (Ill.) 440; State v. Robinson, 35 S. C. 340; Pogue v. Joyner, 7 Ark. 463; City of Seattle v. Buzby, 2 Wash. T. 25; Richards v. Fanning, 5 Or. 356; Cresinger v. Welch's Lessee, 15 Ohio, 156; Davis v. State, 25 Ohio St. 369.

[115] Colorado: Klink v. People, 16 Colo. 467.

Georgia: Pace v. Payne, 73 Ga. 675.

Illinois: Hahn v. St. Clair Sav. & Ins. Co., 50 Ill. 526; Chicago, M. & St. P. Ry. Co. v. Yando, 127 Ill. 214; Gill v. Skelton, 54 Ill. 158. See Ives v. Vanscoyoc, 81 Ill. 120; Wilmington Coal Min. & Mfg. Co. v. Barr, 2 Ill. App. 84.

Indiana: Vancleave v. Clark, 118 Ind. 61; Ford v. Ford, 110 Ind. 89; Stott v. Smith, 70 Ind. 298; Delhaney v. State, 115 Ind. 499; Lehman v. Hawks, 121 Ind. 541; Freeze v. De Puy, 57 Ind. 188; Garrett v. State, 109 Ind. 527; Myers v. Murphy, 60 Ind. 282; Coryell v. Stone, 62 Ind. 307; Puett v. Beard, 86 Ind. 104; Clore v. McIntire,

Where an instruction has been asked and refused, and the record states the instruction was given in a modified form, but how modified is not set forth, it will be presumed that, as modified, it embodied the law.[116] Additional illustra-

120 Ind. 262; Lockwood v. Beard, 4 Ind. App. 505; Sexson v. Hoover, 1 Ind. App. 65; Taber v. Ferguson, 109 Ind. 227; Pittsburgh, C. & St. L. R. Co. v. Noel. 77 Ind. 110.

Iowa: Huff v. Aultman, 69 Iowa, 71.

Kansas: Pacific R. Co. v. Nash, 7 Kan. 280; Washington Life Ins. Co. v. Haney, 10 Kan. 525; Marshall v. Shibley, 11 Kan. 114.

Maine: Hearn v. Shaw, 72 Me. 187.

Massachusetts: Linton v. Allen, 154 Mass. 432.

Minnesota: Stearns v. Johnson, 17 Minn. 142 (Gil. 116).

Missouri: Meade v. Weed, 45 Mo. App. 385.

Nebraska: Malcom v. Hanson, 32 Neb. 52.

Ohio: Bolen v. State, 26 Ohio St. 371; Woodward v. Stein, 3 American Law Rec. 352.

Texas: Texas & P. Ry. Co. v. Lowry, 61 Tex. 149.

All the instructions must be embodied in the bill of exceptions, or a judgment will not be reversed for faulty instructions given (Hahn v. St. Clair Sav. & Ins. Co., 50 Ill. 456), for it will be presumed that those given comprised the substance of those refused (Weyhrich v. Foster, 48 Ill. 115). The refusal of the court to modify certain instructions cannot be considered on appeal when all the instructions are not in the record. Lehman v. Hawks, 121 Ind. 541. The rule stated is subject to this exception: that, although the entire charge is not brought up in the record, if a request containing a correct statement of the law applicable to the facts is refused, and the court instructs to the contrary, the presumption in favor of the correctness of the instructions given is overcome. Pace v. Payne, 73 Ga. 670.

116 Smith v. Childress, 27 Ark. 328. Where the record shows that an instruction was asked and given with a statutory modification, but does not show what that statutory modification is or was, it will be presumed by the supreme court that the modification was correct. Wilson v. Fuller, 9 Kan. 176. To the same effect is Clampitt v. Kerr, 1 Utah, 246. Where the record shows that the court refused to give, in the language and form requested, a true and pertinent proposition of law in its charge to the jury, it will be presumed, in the absence of anything appearing in the record to

tions of the presumption against error will be found in the digest note following this section.

Where the record contains enough to show error, but not enough to show affirmatively that such error was corrected or cured in any manner, the presumption against error is rebutted, or does not apply.[117]

§ 376. Same—Digest of decisions.

Charge presumed correct and sufficient.

Unless the record shows the contrary, it will be presumed that the trial court gave all the instructions required by the case, and that such instructions were correct.

Alabama.

Louisville & N. R. Co. v. Orr, 94 Ala. 602; Davis v. Badders, 95 Ala. 348; Cobb v. Malone, 87 Ala. 514; Hyde v. Adams, 80 Ala. 111; Myatts v. Bell, 41 Ala. 222; English's Ex'r v. McNair's Adm'rs, 34 Ala. 40.

Arkansas.

Crisman v. McDonald, 28 Ark. 8.

California.

Harris v. Barnhart, 97 Cal. 546; Richardson v. City of Eureka, 96 Cal. 443; People v. Von, 78 Cal. 1; Carpenter v. Ewing, 76 Cal. 487; Shepherd v. Jones, 71 Cal. 223; California Cent. Ry. Co. v. Hooper, 76 Cal. 404; People v. Bourke, 66 Cal. 455; People v. Gilbert, 60 Cal. 108; People v. Smith, 57 Cal. 130; Hinkle v. San Francisco & N. P. R. Co., 55 Cal. 627; Brown v. Kentfield, 50 Cal. 129; Baldwin v. Bornheimer, 48 Cal. 434; People v. Strong, 46 Cal. 303; People v. Donahue, 45 Cal. 321; People v. Padillia, 42 Cal. 535; People v. Torres, 38 Cal. 141; People v. Dick, 34 Cal. 663; People v. King, 27 Cal. 507; Beckman v. McKay, 14 Cal. 250.

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the contrary, that the same charge was substantially given, though in other language and form. Bolen v. State, 26 Ohio St. 371.

[117] Thus, under a rule that it is fatal error, in a criminal case, to give oral instructions to the jury without the consent of the defendant, and the record shows that oral instructions were given, but fails to show the consent of defendant, the judgment will be reversed. People v. Trim, 37 Cal. 274; People v. Ah Fong, 12 Cal. 345; Territory v. Gertrude, 1 Ariz. 74.

Colorado.

Klink v. People, 16 Colo. 467; Halsey v. Darling, 13 Colo. 1.

District of Columbia.

Bunyea v. Metropolitan R. Co., 8 Mackey, 76.

Florida.

Sammis v. Wightman, 31 Fla. 10; Gibson v. State, 26 Fla. 109.

Georgia.

Pool v. Gramling, 88 Ga. 653; Chattahoochee Brick Co. v. Sullivan, 86 Ga. 50; Christian v. Wahl, 83 Ga. 395; Wilson v. Atlanta & C. Ry. Co., 82 Ga. 386; Carson v. State, 80 Ga. 170.

Illinois.

Chicago, M. & St. P. Ry. Co. v. Yando, 127 Ill. 214; Meyer v. Temme, 72 Ill. 574; Hahn v. St. Clair Sav. & Ins. Co., 50 Ill. 526; De Clerq v. Mungin, 46 Ill. 112; City of Abingdon v. Meadows, 28 Ill. App. 442; Wilmington Coal Min. & Mfg. Co. v. Barr, 2 Ill. App. 84.

Indiana.

Hilker v. Kelley, 130 Ind. 356; Marshall v. Lewark, 117 Ind. 377; Silver v. Parr, 115 Ind. 113; Lower v. Franks, 115 Ind. 334; Cincinnati, H. & I. R. Co. v. Clifford, 113 Ind. 460; Joseph v. Mather, 110 Ind. 114; Unruh v. State, 105 Ind. 117; Johns v. State, 104 Ind. 557; Elkhart Mut. Aid, B. & R. Ass'n v. Houghton, 103 Ind. 286; Kennedy v. Anderson, 98 Ind. 151; Stockton v. Stockton, 73 Ind. 510; Stull v. Howard, 26 Ind. 456; Buntin v. Weddle, 20 Ind. 449; Patchell v. Jaqua, 6 Ind. App. 70; Walter v. Uhl, 3 Ind. App. 219; Gould v. O'Neal, 1 Ind. App. 144.

Iowa.

Munn v. Shannon, 86 Iowa, 363; Johnson v. Knudtson, 82 Iowa, 762; State v. Wyatt, 76 Iowa, 328; Fernbach v. City of Waterloo, 76 Iowa, 598; Warbasse v. Card, 74 Iowa, 306; State v. Broadwell, 73 Iowa, 765; Muir v. Miller, 72 Iowa, 585; Armstrong v. Killen, 70 Iowa, 51; Davis v. Walter, 70 Iowa, 465; State v. Brewer, 70 Iowa, 384; Huff v. Aultman, 69 Iowa, 71; State v. Hunter, 68 Iowa, 447; Holland v. Union County, 68 Iowa, 56; State v. Williamson, 68 Iowa, 351; Leiber v. Chicago, M. & St. P. Ry. Co., 84 Iowa, 97; State v. Hemrick, 62 Iowa, 414; Wood v. Porter, 56 Iowa, 161; McMillan v. Burlington & M. R. Co., 46 Iowa, 231; State v. Moore, 77 Iowa, 449; Blackburn v. Powers, 40 Iowa, 681; Rice v. City of Des Moines, 40 Iowa, 638; Wallace v. Robb, 37 Iowa, 192; Gantz v. Clark, 31 Iowa,

254; Bridgman v. Steamboat Emily, 18 Iowa, 509; Havelick v. Havelick, 18 Iowa, 575; Abrams v. Foshee, 3 Iowa, 274; Mainer v. Reynolds, 4 G. Greene, 187.

Kansas.

Wilson v. Fuller, 9 Kan. 176; Pacific R. Co. v. Nash, 7 Kan. 280; Educational Ass'n v. Hitchcock, 4 Kan. 36; Linton v. Housh, 4 Kan. 536.

Kentucky.

Licking Rolling Mill Co. v. Fischer, 88 Ky. 176; Hunt v. Kemper, 10 Ky. Law Rep. 593, 9 S. W. 803.

Louisiana.

State v. Bird, 38 La. Ann. 497.

Maryland.

Regester v. Medcalf, 71 Md. 528; Baltimore & O. R. Co. v. Resley, 14 Md. 424; Burtles v. State, 4 Md. 273; Bullitt v. Musgrave, 3 Gill, 31; Whiteford v. Burckmyer, 1 Gill, 127.

Massachusetts.

Linton v. Allen, 154 Mass. 432; Khron v. Brock, 144 Mass. 516; Com. v. Ford, 146 Mass. 131.

Michigan.

Stanton v. Estey Mfg. Co., 90 Mich. 12; Kimball v. Macomber, 50 Mich. 362; Kline v. Kline, 49 Mich. 419; Hart v. Newton, 48 Mich. 401; Brown v. Dunckel, 46 Mich. 29; People v. Niles, 44 Mich. 606; Paine v. Ringold, 43 Mich. 341; Farmers' Mut. Fire Ins. Co. v. Gargett, 42 Mich. 289; Cummins v. People, 42 Mich. 142; Hall v. Johnson, 41 Mich. 286; Fowler v. Gilbert, 38 Mich. 292; Wicks v. Ross, 37 Mich. 464; Hayes v. Homer, 36 Mich. 374; Greenlee v. Lowing, 35 Mich. 63; Herbstreit v. Beckwith, 35 Mich. 93; Curley v. Wyman, 34 Mich. 353; English v. Caldwell, 30 Mich. 362; Tupper v. Kilduff, 26 Mich. 394; Cook v. Hopper, 23 Mich. 511; Taff v. Hosmer, 14 Mich. 309; People v. McKinney, 10 Mich. 54.

Minnesota.

Erd v. City of St. Paul, 22 Minn. 443; Siebert v. Leonard, 21 Minn. 442; Stearns v. Johnson, 17 Minn. 142 (Gil. 116); Cogley v. Cushman, 16 Minn. 397 (Gil. 354); Desnoyer v. L'Hereux, 1 Minn. 17 (Gil. 1).

Mississippi.

Strickland v. Hudson, 55 Miss. 235; Kellum v. State, 64 Miss. 226.

Missouri.

State v. Miller, 100 Mo. 606; State v. Brown, 75 Mo. 317; State v. Mallon, 75 Mo. 355; Cress v. Blodgett, 64 Mo. 449; Simpson v. Schulte, 21 Mo. App. 639; McLain v. Winchester, 17 Mo. 49; Tatum v. Anderson, 8 Mo. App. 574; Meade v. Weed, 45 Mo. App. 385; Whiting v. City of Kansas, 39 Mo. App. 259; Campbell v. Buller, 32 Mo. App. 646; Wilkerson v. Corrigan Consolidated St. Ry. Co., 26 Mo. App. 144; Estes v. Fry, 22 Mo. App. 80; Fink v. Regan, 22 Mo. App. 475; Field v. Crecelius, 20 Mo. App. 302.

Montana.

Territory v. Scott, 7 Mont. 407.

Nebraska.

Malcom v. Hanson, 32 Neb. 52; Willis v. State, 27 Neb. 98; Birdsall v. Carter, 16 Neb. 422.

New Hampshire.

Conway v. Town of Jefferson, 46 N. H. 521.

New Mexico.

Lewis v. Baca, 5 N. M. 289.

New York.

Flannery v. Van Tassell, 56 Hun, 647, 9 N. Y. Supp. 871; Crouse v. Owens, 49 Hun, 610, 3 N. Y. Supp. 863; Vosburgh v. Teator, 32 N. Y. 561; Rumsey v. New York & N. E. R. Co., 63 Hun, 200; New York Marine Bank v. Clements, 6 Bosw. 166; Flannery v. Van Tassell, 32 N. Y. St. Rep. 350; Winterson v. Eighth Ave. R. Co., 2 Hilt. 389.

North Carolina.

State v. Dickerson, 98 N. C. 708; Willey v. Norfolk Southern R. Co., 96 N. C. 408; State v. Nipper, 95 N. C. 653; Cowles v. Richmond & D. R. Co., 84 N. C. 309; Chasteen v. Martin, 84 N. C. 391; State v. Craige, 89 N. C. 475; Honeycut v. Angel, 20 N. C. 306.

Oregon.

Coffin v. Taylor, 16 Or. 375.

Rhode Island.

Heaton v. Manhattan Fire Ins. Co., 7 R. I. 502.

Texas.

King v. State (Tex. Cr. App.) 21 S. W. 190; Seal v. State, 28 Tex. 491.

West Virginia.

Kinsley v. Monongalia County Court, 31 W. Va. 464; Hood v. Maxwell, 1 W. Va. 219.

Wisconsin.

Benton v. City of Milwaukee, 50 Wis. 368; White v. Goodrich Transportation Co., 46 Wis. 493; Darling v. Conklin, 42 Wis. 478; State v. Babcock, 42 Wis. 138; Brabbits v. Chicago & N. W. Ry. Co., 38 Wis. 289; Killips v. Putnam Fire Ins. Co., 28 Wis. 472; Kelley v. Kelley, 20 Wis. 443; Parish v. Eager, 15 Wis. 532; Graves v. State, 12 Wis. 591; O'Malley v. Dorn, 7 Wis. 236; Townsends v. Racine Bank, 7 Wis. 185.

United States.

Ames v. Quimby, 106 U. S. 342; Atchison, T. & S. F. R. Co. v. Howard (C. C. A.) 49 Fed. 206. An oral charge will be presumed correct, but not a written one. Newton v. State, 3 Tex. App. 245.

Presumption of correctness as a whole.

"Where the error alleged is the giving of an instruction, it must appear that such instruction is so full and complete and so manifestly wrong that the whole law applicable to the case could not have been correctly presented to the jury, without a contradiction of that given, before a reversal will be ordered." Morgan v. Chapple, 10 Kan. 216.

Sufficiency of answer to inquiry of jury.

Where the record fails to show upon what point the jury desired further instructions, the answer of the court will be presumed to have been satisfactory and sufficient. Herbstreit v. Beckwith, 35 Mich. 95.

Evidence presumed to support charge.

Where the evidence is not before the supreme court, it will be presumed, in favor of the instruction, that it was adapted to the evidence given on the trial, and was correct.[117a]

[117a] Alabama: Nesbitt v. Pearson's Adm'rs, 33 Ala. 668; McLemore v. Nuckolls, 37 Ala. 662; Tempe v. State, 40 Ala. 350; Wilson v. Calvert, 18 Ala. 274; Moore v. State, 18 Ala. 532; Jones v. Stewart, 19 Ala. 701; Leverett's Heirs v. Carlisle, 19 Ala. 80; McElhaney v. State, 24 Ala. 71; Morris v. State, 25 Ala. 57.

Arkansas: Bach v. Cook, 21 Ark. 571; Duggins v. Watson, 15 Ark. 118; Pogue v. Joyner, 7 Ark. 463.

Indiana: Schoonover v. Irwin, 58 Ind. 287; Franklin Ins. Co. v.

Refused requests presumed unauthorized by evidence.[117b]

"It must be presumed that the court below acted correctly in refusing instructions, * * * unless it appear, by facts or testi-

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Culver, 6 Ind. 137; Beller v. State, 90 Ind. 448; Wright v. Gully, 28 Ind. 475; Black v. Daggy, 13 Ind. 383; Newton v. Newton, 12 Ind. 527; Hoover v. Wood, 9 Ind. 286; Starry v. Winning, 7 Ind. 311; Taber v. Hutson, 5 Ind. 322; Ketcham v. New Albany & S. R. Co., 7 Ind. 391; Ball v. Cox, 7 Ind. 453; Nelson v. Robertson, 7 Ind. 531; Jarvis v. Strong, 8 Ind. 284; Murray v. Fry, 6 Ind. 371; Sloan v. State, 8 Ind. 312; Morton v. Stevens, 5 Ind. 519; Abrams v. Smith, 8 Blackf. 95; Downey v. Day, 4 Ind. 531; Shaw v. State, 4 Ind. 553; Ashby v. West, 3 Ind. 170; Wiley v. Doe, 2 Ind. 230; Harvey v. Laflin, 2 Ind. 477; State v. Beackmo, 8 Blackf. 246; Collis v. Bowen, 8 Blackf. 262; Kinsey v. Grimes, 7 Blackf. 290; Fuller v. Wilson, 6 Blackf. 403; English v. Devarro, 5 Blackf. 588; Rogers v. Lamb, 3 Blackf. 155; Merrick v. State, 63 Ind. 327; Dennerline v. Gable, 73 Ind. 210; City of Indianapolis v. Scott, 72 Ind. 196; Pate v. Tait, 72 Ind. 450; Audleur v. Kuffel, 71 Ind. 543; Shinn v. State, 68 Ind. 423; Higbee v. Moore, 66 Ind. 263; Wilkinson v. Applegate, 64 Ind. 98; Stull v. Howard, 26 Ind. 456; White v. Jackson, 15 Ind. 156; Hand v. Taylor, 4 Ind. 409; Conklin v. White Water Valley Canal Co., 3 Ind. 506; Marquis v. Rogers, 8 Blackf. 118; Davidson v. Nicholson, 59 Ind. 411; Boyd v. Wade, 58 Ind. 138; Lewellen v. Garrett, 58 Ind. 442; Aurora Fire Ins. Co. v. Johnson, 46 Ind. 315; Wade v. Guppinger, 60 Ind. 376; Columbus, C. & I. C. Ry. Co. v. Powell, 40 Ind. 37; List v. Kortepeter, 26 Ind. 27.

Iowa: Rice v. City of Des Moines, 40 Iowa, 638; State v. Hemrick, 62 Iowa, 414; Wallace v. Robb, 37 Iowa, 192; State v. Wyatt, 76 Iowa, 328; Blackburn v. Powers, 40 Iowa, 681; Gantz v. Clark, 31 Iowa, 254; State v. Postlewait, 14 Iowa, 446; McIntosh v. Kilbourne, 37 Iowa, 420; Laughlin v. Main, 63 Iowa, 580; Bridgman v. Steamboat Emily, 18 Iowa, 509; State v. Rice, 56 Iowa, 431; Roby v. Appanoose County, 63 Iowa, 113.

Mississippi: Kellum v. State, 64 Miss. 226; Strickland v. Hudson, 55 Miss. 235.

Nevada: State v. Loveless, 17 Nev. 424.

New Hampshire: Rowell v. Chase, 61 N. H. 135.

Ohio: Cresinger v. Welch's Lessee, 15 Ohio, 156.

Pennsylvania: Gifford v. Gifford, 27 Pa. 202.

United States: Wiggins v. Burkham, 10 Wall. 129.

[117b] Alabama: Gill v. State, 43 Ala. 38; Williams v. Barksdale, 58 Ala. 288.

mony incorporated in the bill of exceptions, that the instructions were relevant or irrelevant to the cause." Shepherd v. McQuilkin, 2 W. Va. 90. "If instructions asked by either party be refused, and he excepts, it devolves upon him to set forth, in his exception, all or so much of the evidence with reference to which it may have been asked as will present the question of law designed to be made, else the appellate court would have to presume, in favor of the judgment, that the instruction was properly refused, unless the instruction con-

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Arkansas: Duggins v. Watson, 15 Ark. 118; Pogue v. Joyner, 7 Ark. 463.

California: California Cent. Ry. Co. v. Hooper, 76 Cal. 404; Carpenter v. Ewing, 76 Cal. 487.

District of Columbia: Oliver v. Cameron, MacArthur & M. 237.

Florida: Sammis v. Wightman, 31 Fla. 45; Myrick v. Merritt, 22 Fla. 335; Livingston v. Cooper, 22 Fla. 292; Blige v. State, 20 Fla. 742; Frisbee v. Timanus, 12 Fla. 537; Tompkins v. Eason, 8 Fla. 14; Burk v. Clark, 8 Fla. 9; Miller v. Kingsbury, 8 Fla. 357; McKay v. Friebele, 8 Fla. 21; Bailey v. Clark, 6 Fla. 516; Proctor v. Hart, 5 Fla. 465; Horn v. Gartman, 1 Fla. 73.

Illinois: Amos v. Sinnott, 5 Ill. 440.

Indiana: Silver v. Parr, 115 Ind. 113; Joseph v. Mather, 110 Ind. 114; Shulse v. McWilliams, 104 Ind. 512; Baltimore & O. & C. R. Co. v. Rowan, 104 Ind. 88; Johns v. State, 104 Ind. 557; Elkhart Mut. Aid, B. & R. Ass'n v. Houghton, 103 Ind. 286; Unruh v. State, 105 Ind. 117; Stout v. Turner, 102 Ind. 418; Blizzard v. Bross, 56 Ind. 74; Jeffersonville, M. & I. R. Co. v. Cox, 37 Ind. 325; Ruffing v. Tilton, 12 Ind. 259; Patchell v. Jaqua, 6 Ind. App. 70; Sheeks v. Fillion, 3 Ind. App. 262; Sandford Tool & Fork Co. v. Mullen, 1 Ind. App. 204; State v. Beackmo, 8 Blackf. 246; Yates v. George, 51 Ind. 324; Walters v. Hutchins' Adm'x, 29 Ind. 136; Coyner v. Lynde, 10 Ind. 282; Powers v. State, 87 Ind. 144; Weir Plow Co. v. Walmsley, 110 Ind. 242; Powell v. Pierce, 11 Ind. 322; New Albany & S. R. Co. v. Callow, 8 Ind. 471; Woolley v. State, 8 Ind. 502; Jolly v. Terre Haute Drawbridge Co., 9 Ind. 417; Griffin v. Templeton, 17 Ind. 234.

Iowa: Little v. Martin, 28 Iowa, 558; Shephard v. Brenton, 20 Iowa, 41; Stier v. City of Oskaloosa, 41 Iowa, 353; State v. Moore, 77 Iowa, 449; State v. Wyatt, 76 Iowa, 328; State v. Daniels, 76 Iowa, 87; Warbasse v. Card, 74 Iowa, 306; State v. Brewer, 70 Iowa, 384; Huff v. Aultman, 69 Iowa, 71; Holland v. Union County, 68 Iowa, 56; State v. Hunter, 68 Iowa, 447; State v. Williamson, 68 Iowa, 351; State v. Goode, 68 Iowa, 593.

Kansas: St. Joseph & D. C. R. Co. v. Orr, 8 Kan. 419; Missouri

tradicts or is inconsistent with the pleadings." Diggins v. Watson, 15 Ark. 118.

Presumption as to treatment of charge by jury—Jury's understanding of charge.

It will be presumed that the jury was capable of understanding, and that they did understand, the charge correctly.

California.

People v. Bagnell, 31 Cal. 409.

Illinois.

Massachusetts Mut. Life Ins. Co. v. Robinson, 98 Ill. 324.

Indiana.

Browning v. Hight, 78 Ind. 257; Union Mut. Life Ins. Co. v. Buchanan, 100 Ind. 63; Louisville, N. A. & C. Ry. Co. v. Falvey, 104 Ind. 409.

Michigan.

Pray v. Cadwell, 50 Mich. 222.

Minnesota.

Siebert v. Leonard, 21 Minn. 442; Erd v. City of St. Paul, 22 Minn. 443.

Texas.

Brunswig v. White, 70 Tex. 504; Ft. Worth & D. C. Ry. Co. v. Greathouse, 82 Tex. 104.

It cannot be assumed as a question of law that a jury understands an instruction given by the court in a sense different from that in which it is commonly understood by those outside the jury box. Peo-

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River, Ft. S. & G. R. Co. v. Owen, 8 Kan. 409; State v. Cassady, 12 Kan. 551; Educational Ass'n v. Hitchcock, 4 Kan. 36.

Maryland: Regester v. Medcalf, 71 Md. 528.

Michigan: Hayes v. Homer, 36 Mich. 374; Curley v. Wyman, 34 Mich. 353; Tupper v. Kilduff, 26 Mich. 394.

Missouri: Colburn v. Brunswick Flour Co., 49 Mo. App. 415; Fink v. Regan, 22 Mo. App. 473; Field v. Crecelius, 20 Mo. App. 302.

Montana: Territory v. Scott, 7 Mont. 407.

Nebraska: Willis v. State, 27 Neb. 98.

North Carolina: State v. Dickerson, 98 N. C. 708.

Ohio: Cresinger v. Welch's Lessee, 15 Ohio, 156; Davis v. State, 25 Ohio St. 369.

Oregon: Richards v. Fanning, 5 Ore. 356.

South Carolina: State v. Robinson, 35 S. C. 340.

ple v. Welch, 49 Cal. 174. "It will be presumed that the jury understood instructions as they commonly impress the mind." Massachusetts Mut. Life Ins. Co. v. Robinson, 98 Ill. 324. The jury will be presumed to have correctly understood the terms "willfully" and "maliciously," used in the instructions without definition, where they were used in their ordinary sense, and the evidence was clear, as it will be presumed to be when it is not all contained in the bill of exceptions. State v. Harkins, 100 Mo. 666. Where the court's charge is susceptible of two interpretations, one of which makes it erroneous, and the other makes it in accordance with law, it will be presumed that the jury, in the light of the whole charge, understood it in the latter sense. Davis v. State, 25 Ohio St. 369. Especially where no objection is made to the charge in the trial court. Erd v. City of St. Paul, 22 Minn. 443; Siebert v. Leonard, 21 Minn. 442. Where a judge told the jury that there was nothing said concerning a particular item, overlooking the fact that there was evidence given regarding such item, it will be assumed, notwithstanding, that the jury had that evidence in mind when considering the verdict. Herst v. De Comeau, 1 Sweeny (N. Y.) 590. If the legal definition of a word or phrase is given, and such word or phrase is used in the questions submitted and answered, it will be presumed, on appeal, that it was used by the court and jury with the meaning indicated by the definition. Mooney v. Olsen, 22 Kan. 69.

Remarks not addressed to jury.

It will not be presumed that the jury heard or was controlled by remarks of the court not addressed to them. Fraim v. National Fire Ins. Co., 170 Pa. 151.

Application of charge.

If the charge contains an abstract proposition of law, having no particular reference to the evidence submitted, it will be presumed, although the language is general, that the jury properly applied it to the case before them. People v. Reynolds, 2 Mich. 422. Objection to generality of instruction applicable to some of the issues, as to burden of proof, not being made, it is presumed, on appeal, to have been applied to proper issues only. Rogers v. Wallace, 10 Or. 387. "Where the issue is distinctly set forth in the pleadings, and the evidence conforms to it, and the record does not show that the plaintiff took any ground inconsistent with the proofs, it is not to be assumed that the jury applied the language of the charge so as to make it cover anything foreign to the issue." Pettibone v. Mac-

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West Virginia: Kinsley v. Monongalia County Court, 31 W. Va. 464.

lem, 45 Mich. 381. Where the charge makes reference to preceding parts of the charge, it will be presumed that the jury considered such preceding parts. Missouri Pac. Ry. Co. v. James (Tex.) 10 S. W. 332.

Presumption that jury considered charge as a whole.

The jury will be presumed to have considered the instruction as a whole, and therefore, if correct as a whole, no error is committed.[117c] Where charge is of excessive length, or involved, the presumption that the jury considered it as a whole may be rebutted.[117d]

Consideration of evidence under charge.

It will not be presumed that the jury disregarded instructions that evidence admitted for one purpose only could be considered for no other purpose. Lawrence v. Towle, 59 N. H. 28. A jury will be presumed to have done their duty, and not to have tampered with certain depositions excluded by the court, but inadvertently taken out upon retiring. Phoenix Ins. Co. v. Underwood, 12 Heisk. (Tenn.) 424. Where evidence was admitted upon condition that the party introducing it would prove another material and connected fact, which he was unable to prove, the jury should disregard such evidence; and, though they were not expressly instructed so to do,

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[117c] Arkansas: Ward v. Blackwood, 48 Ark. 396.

Florida: Andrews v. State, 21 Fla. 598.

Indiana: Pennsylvania Co. v. McCormack, 131 Ind. 250; Boyle v. State, 105 Ind. 469.

Iowa: State v. Williams, 70 Iowa, 52; Davis v. Walter, 70 Iowa, 467; State v. Mahan, 68 Iowa, 304; Gee v. Moss, 68 Iowa, 318.

Michigan: Hart v. Newton, 48 Mich. 401.

South Carolina: Carolina, C. G. & C. Ry. Co. v. Seigler, 24 S. C. 125.

Texas: Continental Ins. Co. v. Pruitt, 65 Tex. 126; Hodges v. State, 22 Tex. App. 415; Missouri Pac. Ry. Co. v. James (Tex.) 10 S. W. 332.

[117d] District of Columbia: United States v. Hamilton, 4 Mackey, D. C. 446.

Indiana: Louisville, N. A. & C. Ry. Co. v. Jones, 108 Ind. 551; Town of Rushville v. Adams, 107 Ind. 475; Conrad v. Kinzie, 105 Ind. 281; Louisville, N. A. & C. Ry. Co. v. Grantham, 104 Ind. 353.

Missouri: Yocum v. Town of Trenton, 20 Mo. App. 489; Kennedy v. Klein, 19 Mo. App. 15; State v. True, 20 Mo. App. 176, 2 Western Rep. 602.

New York: Cumming v. Brooklyn City R. Co., 104 N. Y. 669.

yet, as the proceedings were had in their presence, the court will presume they did disregard it. Inhabitants of Bangor v. Inhabitants of Brunswick, 30 Me. 398.

Presumption as to statement of charge in record.

The statements of a charge to the jury not corrected by the judge on a settlement of the case by him are assumed to be correct. State v. Harden, 11 S. C. 366. Palpably erroneous instruction appearing in the record will not be presumed to be a mere mistake of the clerk who made the transcript. Stott v. Smith, 70 Ind. 298.

Presumption as to requests.

The supreme court will not presume that instructions which appear from the record to have been asked at a former trial were again asked at a subsequent trial. McAlpin v. Ziller, 17 Tex. 508. In Wragge v. South Carolina & G. R. Co., 47 S. C. 105, it was said that it would be assumed that requests were submitted in proper form, in the absence of objection on that ground.

Presumption as to requests and charges being in writing.

Under a statute requiring requests for instructions to be in writing, if the record does not show that the requests were in writing, their refusal is not ground for reversal, as it will be presumed that the requests were oral, and hence properly refused. Louisville & N. R. Co. v. Orr, 94 Ala. 602; Bellinger v. State, 92 Ala. 86; Crosby v. Hutchinson, 53 Ala. 5; Winslow v. State, 76 Ala. 42; Milner v. Wilson, 45 Ala. 478. The contrary ruling in Myatts v. Bell, 41 Ala. 222, is overruled by the above cases. It will be presumed that the instructions were in writing, where written instructions were necessary, and the record shows nothing to the contrary. Citizens' F. & M. Ins. Co. v. Short, 62 Ind. 316; Hardwick v. State, 6 Lea (Tenn.) 229; Meshke v. Van Doren, 16 Wis. 319; Lower v. Franks, 115 Ind. 339. Or it may be presumed that a written charge was waived. Hardwick v. State, 6 Lea (Tenn.) 229. Where the record shows that the court read an extract from the opinion of the court contained in a law periodical, it will be presumed that such extract was transcribed into the written instructions given. Citizens' F. & M. Ins. Co. v. Short, 62 Ind. 316. Where the record does not show what the court said, it will be presumed that oral remarks were not of such character as to come within the rule requiring instructions to be in writing. O'Hara v. King, 52 Ill. 304.

Presumption that charge was taken down by stenographer.

"He asks for a reversal upon the ground that the court orally instructed the jury, and that such instructions, when given, were not

taken down by the phonographic reporter, as contemplated by section 1093 of the Penal Code. If the facts are as contended for by appellant, he has shown reversible error; but he fails in establishing those facts. The minutes of the trial disclose that oral instructions were given to the jury, but we fail to find anything in the record showing that they were not taken down * * * by the phonographic reporter. The legal presumption is that such was the fact, and it is for the defendant to overthrow that presumption." People v. Ludwig, 118 Cal. 328, citing People v. Ferris, 56 Cal. 442. See, also, to the same effect, People v. Bumberger, 45 Cal. 650; State v. Preston (Idaho) 38 Pac. 694.

Presumption as to giving and refusing charges.

Counsel presented to the court thirteen requests to charge. The court, after remarking that there were certain requests to charge, which it would read, read nine, without stating in terms whether it give them to the jury as the law; nor did the court refuse in terms to charge the four requests not read. Held, that the inference was that it was intended to charge the nine requests read, and to refuse to charge the rest. Hynes v. McDermott, 82 N. Y. 41. "Where a number of instructions to the jury are asked for, and the record states an exception to the refusal to give a part of them only, the inference is that the court gave those to which no exception was taken." Hood v. Maxwell, 1 W. Va. 219. Where record does not show reason why an instruction was refused, nor exclude presumption that it was for some other reason than its supposed illegality, the appellate court will presume that ruling was correct. Koile v. Ellis, 16 Ind. 301.

Presumption as to marking "Given" or "Refused."

It will be presumed, nothing appearing to the contrary, that requests were properly marked "Given" or "Refused," as required by statute. Allen v. State, 74 Ala. 557.

Announcing rulings in writing to jury.

Nothing appearing to the contrary, it will be presumed that the court conformed to the law in declaring in writing to the jury his rulings upon requests for instructions as presented, and pronounced the same to the jury as "Given" or "Refused." Jones v. State, 18 Fla. 889.

Presumption that jury requested charge as to form of verdict.

"The statute (Acts 1881, p. 115) authorizes a court in all civil cases, on requests of the jury, to instruct them on the form of their verdict, and such request will be presumed where the court so in-

structs, unless the contrary appears." Pool v. Gramling, 88 Ga. 653.

Presumption that charges were given as asked.

"Where the record contains charges asked by the appellant, but does not show whether they were given or refused, and the refusal of them is not assigned for error, it is to be presumed that they were given as asked." Seal v. State, 28 Tex. 491.

Presumption as to rule of court.

"Where the bill of exceptions shows that an instruction was refused because not presented within the time required by the rule of practice in such court,—that is, before the commencement of the closing address to the jury,—in the absence of any showing to the contrary in the bill of exceptions, it will be presumed there was such a rule of court, in writing, duly published and spread upon the records, and that the instruction was therefore properly refused." Illinois Cent. R. Co. v. Haskins, 115 Ill. 300.

Statements in instructions presumed true.

All statements of fact in instructions given are presumed, prima facie, to be true. Wilson v. Atlanta & C. Ry. Co., 82 Ga. 386; Carson v. State, 80 Ga. 170; Stanton v. Estey Mfg. Co., 90 Mich. 12.

Presumption as to facts proved.

If instructions are not hypothecated on the finding of any fact, the court above should assume as proven every fact which the evidence conduced to prove. Colyer v. Whitaker, 2 A. K. Marsh. (Ky.) 197. Where a verdict is directed by the court, and neither party has asked that the jury be instructed to pass upon any questions, every fact, having the support of sufficient evidence, is presumed to have been found in favor of the successful party. Sutter v. Vanderveer, 122 N. Y. 652, affirming 47 Hun, 366, 14 N. Y. St. Rep. 501.

Presence of counsel or accused.

In a criminal case, it will be presumed, in support of the judgment, unless the record shows the contrary, that further instructions, given after the retirement of the jury, were given in the presence of counsel. Pearce v. Com., 19 Ky. Law Rep. 782, 42 S. W. 107. So it will be presumed that the accused was present. State v. Miller, 100 Mo. 606.

§ 377. Presumption of prejudice.

It is an elementary rule, enforced and applied by all appellate courts, that a judgment will not be reversed because

of errors which did not prejudice the party complaining. Harmless error is never a ground for reversal. This doctrine is, of course, applicable to errors in instructions, as well as to other errors. The particular consideration of harmless and reversible error is reserved for a later section.[118]

As was seen in the preceding section, the burden is on the appellant to show error affirmatively upon the record; but there is considerable conflict in the decisions as to whether he must not go further, and show not only error, but that the error actually or probably operated to his prejudice.

According to one line of cases, error in giving or refusing instructions[119] is presumed to be prejudicial, and the judgment will be reversed unless it affirmatively appears from the record that the error in the particular case was harmless.[120] This appears to be the sound and correct rule. In-

[118] See post, §§ 386-391, "Harmless and Reversible Error."

[119] There is no distinction in law between the giving of erroneous instructions and the withholding of proper instructions. Either, if it works injustice, constitutes error. Greenup v. Stoker, 2 Gilm. (Ill.) 688.

[120] Fick v. Mohr, 92 Ill. App. 280; Bindbeutal v. Street Ry. Co., 43 Mo. App. 463; State v. Taylor, 118 Mo. 153; State v. Forrester, 63 Mo. App. 530; Witt v. State, 6 Cold. (Tenn.) 5; Gulf, C. & S. F. Ry. Co. v. Darton (Tex. Civ. App.) 23 S. W. 89; Sessengut v. Posey, 67 Ind. 408; People v. Smith, 105 Cal. 676; State v. Empey, 79 Iowa, 460; State v. Jacobs, 75 Iowa, 247; Pendleton St. R. Co. v. Stallmann, 22 Ohio St. 1; Haney v. Marshall, 9 Md. 194; Grand Rapids & I. R. Co. v. Monroe, 47 Mich. 152; State v. Ferguson, 9 Nev. 106; Meek v. Pennsylvania Co., 38 Ohio St. 632, 639; Jones v. Bangs, 40 Ohio St. 139; Baldwin v. Bank of Massilon, 1 Ohio St. 141; Lowe v. Lehman, 15 Ohio St. 179; Bissell v. Wert, 35 Ind. 54; Amaker v. New, 33 S. C. 28; Bonham v. Bishop, 23 S. C. 103; Strader v. Goff, 6 W. Va. 258; Nicholas v. Kershner, 20 W. Va. 251; State v. Douglass, 28 W. Va. 298; Dinges v. Branson, 14 W. Va. 100; City of Lafayette v. Ashby, 8 Ind. App. 214, 231; Gillett v. Corum, 5 Kan. 608; Gulf, C. & S. F. Ry. Co. v. Greenlee, 62 Tex. 344; Hudson

structions are presumed to have been followed by the jury, and to have affected the verdict.[121] Therefore, where error is shown, prejudice is also shown unless the record goes further and shows that, notwithstanding the error, the party was not prejudiced.[122]

Other cases, however, take a contrary view, and hold that no presumption of prejudice is raised by the mere presence of error in the record. Under this view, error in the instructions is not ground for reversal unless the appellant shows affirmatively upon the record that the error produced actual, or at least possible or probable, injury.[123]

v. Morriss, 55 Tex. 595; Franklin v. Smith, 1 Posey, Unrep. Cas. (Tex.) 229; Willis v. Kirbie, 1 Posey, Unrep. Cas. (Tex.) 304; Dwyer v. Continental Ins. Co., 57 Tex. 181; Linney v. Wood, 66 Tex. 22; Greene v. White, 37 N. Y. 405; Nicholson v. Conner, 9 Daly (N. Y.) 275; Carlin v. Chicago, R. I. & P. R. Co., 31 Iowa, 370; Potter v. Chicago, R. I. & P. R. Co., 46 Iowa, 399; Roby v. Appanoose County, 63 Iowa, 113; Barnett v. Com., 84 Ky. 449; Terry v. State, 17 Ga. 204; Kendig v. Overhulser, 58 Iowa, 195; Tompkins v. West, 56 Conn. 487; Cox v. People, 109 Ill. 457; Benham v. Cary, 11 Wend. (N. Y.) 83; Tufts v. Seabury, 11 Pick. (Mass.) 142; Potts v. House, 6 Ga. 325; Hastings v. Bangor House Proprietors, 18 Me. 436. See, also, Burkham v. Daniel, 56 Ala. 604.

[121] Lowe v. Lehman, 15 Ohio St. 179; Needham v. People, 98 Ill. 275; Mitchell v. Illinois & St. L. R. & C. Co., 85 Ill. 566; Stanton v. French, 91 Cal. 274; Pettibone v. Maclem, 45 Mich. 381. Obviously, this presumption may work both ways. It may either operate to render certain errors harmless, or to render erroneous instructions reversible, by showing them to have been prejudicial.

[122] Lowe v. Lehman, 15 Ohio St. 179.

[123] See the following cases: Wood v. Porter, 56 Iowa, 161; Noe v. Hodges, 5 Humph. (Tenn.) 103; Burton v. Boyd, 7 Kan. 17; Central Branch Union Pac. R. Co. v. Andrews, 41 Kan. 371; Johnson v. Leggett, 28 Kan. 590; State v. Hill, 39 La. Ann. 927; Salinas v. Wright, 11 Tex. 572; Hollingsworth v. Holshousen, 17 Tex. 41; Loper v. Robinson, 54 Tex. 510; Eyser v. Weissgerber, 2 Iowa, 463; Easley v. Valley Mut. Life Ass'n, 91 Va. 161. See, also, post, §§ 386-391, "Harmless and Reversible Error."

§ 378. Same—Digest of decisions.

View that error is prima facie prejudicial.

Where an instruction is erroneous, and all the evidence is not in the record, the judgment must be reversed, as the court cannot say that the error did no harm. Witt v. State, 6 Cold. (Tenn.) 5; Gulf, C. & S. F. Ry. Co. v. Darton (Tex. Civ. App.) 23 S. W. 89; Baldwin v. Bank of Massilon, 1 Ohio St. 141; Jones v. Bangs, 40 Ohio St. 139; Bissell v. Wert, 35 Ind. 54. Where the evidence is not in the record, the appellate court cannot say that an instruction that an insufficient answer constituted no defense cured the error in overruling a demurrer to such answer. Sessengut v. Posey, 67 Ind. 408. See, also, as to necessity of preserving evidence in record, ante, § 374.

Where erroneous instructions have been given to the jury, the reviewing court cannot affirm the judgment on the ground that there were other correct legal propositions applicable to the case, which, if submitted to the jury, would have caused them to reach the same verdict as if such additional instructions are not given and not asked for, the reviewing court cannot conjecture what effect they would have had upon the minds of the jury. Amaker v. New, 33 S. C. 28, following Bonham v. Bishop, 23 S. C. 103.

Inconsistent instructions will be presumed to have been prejudicial. Grand Rapids & I. R. Co. v. Monroe, 47 Mich. 152; State v. Ferguson, 9 Nev. 106. "Where the instructions to the jury are clearly erroneous and calculated to mislead, to the injury of a party, to sanction the judgment which follows, it should be clear that such a consequence did not in fact ensue from the error." Hudson v. Morriss, 55 Tex. 595; Gulf, C. & S. F. Ry. Co. v. Greenlee, 62 Tex. 344.

A misleading or erroneous charge of the court will be presumed prejudicial unless the contrary appears, for which the evidence itself, and not merely what it tends to prove, must be before the reviewing court. Meek v. Pennsylvania Co., 38 Ohio St. 632, 639. Where an instruction was such that it would permit a conviction upon proof that an act was committed which was not prohibited by law when done, it is erroneous, and, in the absence of evidence to the contrary, it will be presumed that it was prejudicial. State v. Jacobs, 75 Iowa, 247.

Where the record does not show on what the verdict of the jury was based, it cannot be determined that a charge was not prejudicial which submitted to the jury a measure of damages with reference to which there was neither allegation nor proof. Gulf, C. & S. F. Ry. Co. v. Darton (Tex. Civ. App.) 23 S. W. 89.

"Where the evidence is so unsatisfactory on the vital points in the case as to render it extremely doubtful, in the mind of the court, whether the verdict was right, error in giving and refusal to give instructions will be presumed to have been harmful, and will work a reversal." City of Lafayette v. Ashby, 8 Ind. App. 214, 231.

An instruction as to making one a principal in a crime, where there is no evidence upon which to base it, is erroneous, and prejudice will be prima facie presumed, though this presumption may be rebutted by an affirmative showing that it was, in fact, harmless. People v. Smith, 105 Cal. 676.

View that prejudice must be affirmatively shown.

The mere fact that a court refused to give an instruction asked by one of the parties which it might properly have given does not prove that such refusal was an error working substantial injury to the rights of the party asking the instruction. Johnson v. Leggett, 28 Kan. 590. Although it may be error for the court to give as an instruction to the jury an abstract proposition of law that has no application to the case under consideration, yet, unless it be made reasonably to appear that the jury were misled by such instruction, the judgment of the court below will not be reversed for such error. Burton v. Boyd, 7 Kan. 17. "The refusal of the court to charge the jury, in a civil action, that each juror must ultimately act upon his individual judgment, where it does not appear that there was any special necessity for such an instruction, or that any prejudice resulted therefrom, is not reversible error." Central B. U. P. R. Co. v. Andrews, 41 Kan. 371. "It is not every error in the rulings of a judge during the progress of the trial that will justify the setting aside of the verdict. To warrant such action on the part of the court, it must be so grave an error as to induce the belief that, but for its commission, a verdict favorable to the occasion might have been returned." State v. Hill, 39 La. Ann. 927. Actual or possible prejudice must be shown, to authorize a reversal. Salinas v. Wright, 11 Tex. 572; Hollingsworth v. Holshousen, 17 Tex. 41; Loper v. Robinson, 54 Tex. 510; Brighthope Ry. Co. v. Rogers, 76 Va. 443; Baltimore & O. R. Co. v. McKenzie, 81 Va. 71; Preston v. Harvey, 2 Hen. & M. (Va.) 55. Though a doubt as to whether or not injury was done is sufficient to authorize a reversal. Boren v. State, 32 Tex. Cr. App. 637. Where the court instructs on contributory negligence, though that issue is not raised by the pleadings, a reviewing court will presume that the verdict was based on other grounds than contributory negligence, if there was no evidence of such negligence. Eckelund v. Talbot, 80 Iowa, 571. If

an erroneous charge be given as to the mode of computing damages, but no bill of exceptions be filed, showing that the actual damages allowed by the jury were enhanced by applying the erroneous principle of computation, the verdict will not be disturbed. The court will presume, in such case, that the jury did right, notwithstanding the erroneous charge. Noe v. Hodges, 5 Humph. (Tenn.) 103.

If an instruction states facts as established which are admitted or uncontradicted, no presumption of injury arises unless the record shows that such statement is untrue. Wood v. Porter, 56 Iowa, 161. Where it is evident that improper instructions could have reasonably misled the jury to the prejudice of appellant, the judgment will be reversed, but not where the prejudice is not manifest. Eyser v. Weissgerber, 2 Iowa, 463.

IV. Invited Error.

§ 379. Instructions given or refused on party's own motion.

Erroneous instructions given cannot be made available as error in the reviewing court by a party on whose motion they were given. He is bound by the theory of his case as presented by the instructions given at his instance, and, if they are erroneous, he cannot be heard to complain.[124] For the

[124] California: Harrison v. Spring Valley Hydraulic Gold Co., 65 Cal. 376.

Indiana: Minot v. Mitchell, 30 Ind. 228; Cobb v. Krutz, 40 Ind. 323; Pennsylvania Co. v. Roney, 89 Ind. 453; Worley v. Moore, 97 Ind. 15.

Kansas: Ft. Scott, W. & W. Ry. Co. v. Fortney, 51 Kan. 295; Kansas Pac. Ry. Co. v. Cutter, 19 Kan. 83; Greer v. Higgins, 20 Kan. 420; State v. Reddick, 7 Kan. 144; Chicago, K. & W. R. Co. v. Watkins, 43 Kan. 50.

Maine: Robinson v. White, 42 Me. 209.

Maryland: Keener v. Harrod, 2 Md. 63.

Missouri: Musser v. Adler, 86 Mo. 445; Jennings v. St. Louis, I. M. & S. Ry. Co., 99 Mo. 394; Tetherow v. St. Joseph & D. M. R. Co., 98 Mo. 74; Flowers v. Helm, 29 Mo. 324; Chamberlin v. Smith's Adm'r, 1 Mo. 482.

North Carolina: Buie v. Buie, 24 N. C. 87; Moore v. Parker, 91 N. C. 275; McLennan v. Chisholm, 66 N. C. 100.

Pennsylvania: Benson v. Maxwell, 105 Pa. 274; Ritter v. Sieger,

purposes of review, they will be conclusively presumed to be correct.[125] The same rule applies to instructions given

105 Pa. 400; Hubley v. Vanhorne, 7 Serg. & R. 185; Prichett v. Cook, 62 Pa. 193.

South Carolina: Ellen v. Ellen, 16 S. C. 139; Oliver v. Sale, 17 S. C. 587.

Texas: Collins v. State, 5 Tex. App. 38; Hardy v. De Leon, 5 Tex. 211.

Virginia: Richmond & D. R. Co. v. Medley, 75 Va. 499; Murrell v. Johnson's Adm'r, 1 Hen. & M. 450.

United States: Castle v. Bullard, 23 How. 172.

[125] Kansas Pac. Ry. Co. v. Cutter, 19 Kan. 83.

Measure of damages.

"Where a party in a civil action tried before a jury requests the court to instruct as to the measure of damages, and the court gives the instructions prayed for, and the jury, in their special findings, show that the verdict against the defendant embraces only such damages as are included in the instruction requested," the party cannot complain that the instruction is erroneous. Chicago, K. & W. R. Co. v. Watkins, 43 Kan. 50.

Reasonable use.

A party cannot object to an instruction submitting to the jury the question of what constitutes reasonable use, when, by his own request, such question is submitted. Hess v. Newcomer, 7 Md. 325.

Instructions in accord with statement of counsel to jury.

Where counsel for defendant, in addressing the jury, states that, in a certain contingency, they shall find for plaintiff, he cannot object to an instruction in accord with his own statement. Marquette, H. & O. R. Co. v. Marcott, 41 Mich. 433.

Instruction in conformity to plea.

A charge expressing the same idea conveyed by a plea, when taken most strongly against the pleader, cannot be assigned as error, although not correct if made entirely with reference to the evidence adduced. Fort v. Barnett, 23 Tex. 460.

Modifications or additions.

An appellant cannot complain of the result of any of his own modifications or additions to the prayer of the respondent, and can only ask for a reversal of the judgment upon errors found in the additions made by plaintiff to the instructions as modified and amended at the defendant's instance. Calvert v. Coxe, 1 Gill (Md.) 95. And where a party asks an instruction which should not be

by the court which are substantially the same as those requested, although the court may have expressed it in his own language, or made other slight modifications.[126] So, the appellant cannot complain that an instruction was not given which was refused at his request.[127] The practice of giving voluminous instructions in important cases arises as much from the fault of counsel as from the volition of the court, and a party who has submitted more than twenty requests for instructions cannot be heard to complain that the jury have been misled and confused by the length of the instructions.[128]

§ 380. Same error committed by appellant.

A party cannot complain of instructions given at the in-

given at all because there was not sufficient evidence on which to base it, but the same is modified and given, he has no ground of complaint. Ryan v. Donnelly, 71 Ill. 101.

[126] Needham v. King, 95 Mich. 303; Harper v. Morse, 114 Mo. 317; Reardon v. Missouri Pac. Ry. Co., 114 Mo. 384; Ft. Scott, W. & W. Ry. Co. v. Fortney, 51 Kan. 287; Illinois Cent. R. Co. v. Latimer, 128 Ill. 163; Solomon v. Friend, 42 Ill. App. 407; Com. v. Locke, 114 Mass. 288; Dawson v. Williams, 37 Neb. 1; Martin v. Missouri Pac. Ry. Co., 3 Tex. Civ. App. 133; Simpson v. Pegram, 112 N. C. 541; Campbell v. Ormsby, 65 Iowa, 518; Weller v. Hawes, 49 Iowa, 45. Where the court, in modifying an instruction asked, merely employed the language used in another instruction given at the request of the same party, such party will not be heard to complain that the instruction was erroneous. Pierce v. Millay, 62 Ill. 133. A charge cannot be assigned as error where it is the same in substance as one requested by the party complaining, but refused. Galveston, H. & S. A. Ry. Co. v. Smith (Tex. Civ. App.) 24 S. W. 668.

[127] State v. Elliott, 90 Mo. 350; State v. Jackson, 99 Mo. 60.

Withdrawal of instructions.

"A party to a cause, after excepting to an instruction as erroneous, will not be heard to complain because it was afterwards revoked and withdrawn from the jury." Sittig v. Birkestack, 38 Md. 158.

[128] Henke v. Babcock (Wash.) 64 Pac. 755.

stance of his adversary,[129] if instructions substantially the same, and open to the same objections, are given at his own

[129] McGonigle v. Daugherty, 71 Mo. 259; Holmes v. Braidwood, 82 Mo. 610; Crutchfield v. St. Louis, K. C. & N. Ry. Co., 64 Mo. 255; Thorpe v. Missouri Pac. Ry. Co., 89 Mo. 650; Wear v. Duke, 23 Ill. App. 323; Needham v. King, 95 Mich. 303; Baltimore & O. R. Co. v. Resley, 14 Md. 424; O'Neal v. Knippa (Tex.) 19 S. W. 1020; State v. Stewart, 90 Mo. 507; Fairbanks v. Long, 91 Mo. 628; Keen v. Schnedler, 92 Mo. 516; Reilly v. Hannibal & St. J. R. Co., 94 Mo. 600; Hazell v. Bank of Tipton, 95 Mo. 60; Straat v. Hayward, 37 Mo. App. 585; Missouri Pac. Ry. Co. v. Schoennen, 37 Mo. App. 612; Whitmore v. Supreme Lodge, K. & L. of H., 100 Mo. 46; Chicago, S. F. & C. Ry. Co. v. Vivian, 33 Mo. App. 583; M. Forster Vinegar Mfg. Co. v. Guggemos, 98 Mo. 391; Harrington v. City of Sedalia, 98 Mo. 583; Davis v. Brown, 67 Mo. 313; Soldanels v. Missouri Pac. R. Co., 23 Mo. App. 516; City of Rockford v. Falver, 27 Ill. App. 604; Bybee v. Irons, 33 Mo. App. 659; Flint-Walling Mfg. Co. v. Ball, 43 Mo. App. 504.

Instructions not warranted by evidence.

One party cannot complain that instructions given at the request of the other party were not warranted by the evidence, where instructions given at his own request present the same issue. Straat v. Hayward, 37 Mo. App. 585.

Failure to define terms.

A party cannot assign as error the failure of the court to define terms used in the instructions, where he uses the same terms without explanation in his own requests for instructions. Herman v. Owen, 42 Mo. App. 387.

Ignoring issues.

Plaintiff cannot complain that instructions given at the request of defendant ignored the question of negligence, where none of the instructions asked and given at the request of plaintiff submitted that question to the jury. Demetz v. Benton, 35 Mo. App. 559.

Quantum meruit.

An instruction permitting a recovery on a quantum meruit when plaintiff sued on an express contract, though erroneous, cannot be complained of by defendant, where practically the same instruction was given at his own request. O'Neal v. Knippa (Tex.) 19 S. W. 1020.

Negligence.

An instruction that, if defendant was negligent in any of the par-

request. The same rule applies to instructions given by the court of its own motion.[130]

§ 381. Instructions given by consent.

If an instruction is given by consent, such consent makes the instruction the law of the case, and, upon appeal, its correctness cannot be questioned.[131] So, where the judge instructed the jury that he had given them the law as understood and assented to by the counsel, and this statement was acquiesced in by both counsel, it must be regarded as a waiver of all objections to the instruction.[132] And where no exception is taken to the giving of an instruction at the time it is given, and it is recited in the record that it was given by agreement of parties, the appellant is precluded from assigning it as a cause of error, whether it states a correct principle of law or not.[133] So, where the court said, in the presence of the parties, that, "if agreeable, he would instruct the jury orally," and there was no objection, the parties are deemed to have consented to the giving of oral instructions, and cannot assign it as error.[134] When a party waives objections to any request of the opposite party, which the court thereupon gives to the jury, such party cannot afterwards reserve an exception thereto without first obtaining leave of court.[135] But a party is not estopped from alleging error

ticulars charged in the declaration, plaintiff should recover, cannot be complained of where defendant has submitted requests upon that theory, which have been given. Needham v. King, 95 Mich. 303.

[130] Hess v. Newcomer, 7 Md. 325; Silsby v. Michigan Car Co., 95 Mich. 204.

[131] Baugher v. Wilkins, 16 Md. 35; Philadelphia, W. & B. R. Co. v. Harper, 29 Md. 330; Stratton v. Staples, 59 Me. 94; Emory v. Addis, 71 Ill. 273.

[132] Stratton v. Staples, 59 Me. 94.

[133] Emory v. Addis, 71 Ill. 273.

[134] Downey v. Abel, 87 Ill. App. 530.

[135] Oddie v. Mendenhall (Minn.) 86 N. W. 881.

in an instruction as to the construction of a written agreement by the fact that, on the trial, his counsel made a verbal statement, when offering the agreement in evidence, that such was the proper construction.[136]

V. Construction of Instructions.

§ 382. General rules.

The general effect of a charge, rather than casual expressions in it, must govern its interpretation or construction.[137] The charge to the jury should be judged by its general scope and spirit.[138] But "instructions must be considered with reference to the possibilities of their interpretation."[139] The jury cannot assume a state of affairs not consistent with the testimony, and where the jury are charged that, "in passing upon or determining any question of fact that may be involved in this case, you will be governed solely by the evidence introduced. The law will not permit jurors, in the trial of causes, to speculate or engage in mere conjectures, or indulge in inferences not warranted by the evidence, or to be governed by mere sentiment, sympathy, passion, or prejudice, or to be influenced to any extent or in any manner by the financial worth or poverty of either of the parties. But whatever conclusions are reached must be based entirely upon the evidence introduced in this case,"—it cannot be objected to an instruction, in an action for personal injuries, enumerating the elements of damage, that the words, "the loss of his wages," are used without any qualifying clause, the

[136] Hoffman v. Bloomsbury & S. R. Co., 143 Pa. 503, 157 Pa. 174.

[137] Kyle v. Southern Electric Light & Power Co., 174 Pa. 570, 34 Atl. 323.

[138] Paschall v. Williams, 11 N. C. 292. The effect of the instructions, when taken as a whole, must be considered. Wadhams & Co. v. Inman, Poulsen & Co., 38 Or. 143.

[139] State v. Chatham Nat. Bank, 10 Mo. App. 482.

evidence showing that the earning capacity of plaintiff is not lost, but merely diminished.[140] An instruction applicable to the theory upon which the case was tried is not erroneous, though in the abstract it was not clear.[141] An instruction will not receive that construction which the professional mind might assume the court intended, but it must be given that meaning which the language used would reasonably convey to the jury.[142] Where a party, by his counsel, concedes that an instruction given in his favor is erroneous, the court, on appeal, will not look into it to determine whether the concession is properly or improperly made.[143]

§ 383. Reasonable and liberal construction.

"The practical administration of justice should not be defeated by a too rigid adherence to a close and technical analysis of the instructions to the jury."[144] The charge to the jury "must receive a reasonable interpretation."[145] Words contained in an instruction should not be subjected to "a nice criticism * * * when the meaning of the instruction is plain and obvious, and cannot mislead the jury."[146] Hypercritical niceties should be disregarded.[147] "The language should receive a reasonable construction, in view of all the

[140] Southern Pac. Co. v. Hall, 41 C. C. A. 50, 100 Fed. 760; Gray v. State (Fla.) 28 So. 53; Southern Ry. Co. v. Lynn, 128 Ala. 297.

[141] Lingle v. Kitchen, 69 Ind. 349.

[142] State v. Billings, 77 Iowa, 417.

[143] Blackburn v. Morton, 18 Ark. 384.

[144] People v. Bruggy, 93 Cal. 476.

[145] Bliven v. New England Screw Co., 23 How. (U. S.) 420; First Unitarian Soc. of Chicago v. Faulkner, 91 U. S. 415; South & North Alabama R. Co. v. Jones, 56 Ala. 507.

[146] Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, citing Rogers v. The Marshal, 1 Wall. (U. S.) 644, and Evanston v. Gunn, 99 U. S. 660.

[147] Paschall v. Williams, 11 N. C. 292; South & North Alabama R. Co. v. Jones, 56 Ala. 507.

circumstances, and not a strained or forced one."[148] It is not proper to seek after some far-fetched and unusual signification of the language used, and base a reversal thereon. The language should be given its usual and ordinary meaning.[149]

§ 384. Construction to support judgment.

If the language used is capable of different constructions, that one will be adopted which will lead to an affirmance of the judgment, unless it fairly appears the jury were, or at least might have been, misled.[150] Where the charge was proper in one sense, it will be presumed, on appeal, that the judge charged in that sense.[151] Thus, where it does not clearly appear to which of two matters the language of the charge to the jury is applicable, the language will be referred to that matter which would make the charge correct.[152] So, where any remark made by the circuit judge will admit of two constructions,—the one against the law, and the other in conformity with it,—the latter will be adopted.[153] The construction least favorable to the party asking the charge will be adopted by the supreme court.[154]

§ 385. Construction as a whole.

Instructions are to be considered together, to the end that they may be properly understood; and if, when so construed, and as a whole, they fairly state the law applicable to the evi-

[148] Davenport v. Cummings, 15 Iowa, 219.

[149] State v. Huxford, 47 Iowa, 16.

[150] Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282; People v. McCallam, 103 N. Y. 587; Looram v. Second Ave. R. Co., 11 N. Y. St. Rep. 652.

[151] Harding v. New York, L. E. & W. R. Co., 36 Hun (N. Y.) 72.

[152] State v. Gilreath, 16 S. C. 104.

[153] Rome R. Co. v. Sullivan, 14 Ga. 277.

[154] Smith v. State, 88 Ala. 23, 7 So. 103.

dence, there is no available error in giving them,[155] although detached sentences, or separate charges, considered alone, may be erroneous or misleading.[156] A subsequent instruc-

[155] Hoffine v. Ewings, 60 Neb. 729, 84 N. W. 93; Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282; People v. McCallam, 103 N. Y. 587; Webb v. Wight & Weslosky Co., 112 Ga. 432; Fessenden v. Doane, 188 Ill. 228, affirming 89 Ill. App. 229; Ballou v. Andrews Banking Co., 128 Cal. 562; Richard v. State (Fla.) 29 So. 413; People v. Lem Deo, 132 Cal. 199; Com. v. Warner, 13 Pa. Super. Ct. 461; State v. Whorton (Mont.) 63 Pac. 627; Gray v. State (Fla.) 28 So. 53; Howard v. People, 185 Ill. 552; State v. Savage, 36 Or. 191; State v. Lee, 58 S. C. 335, 36 S. E. 706; Spears v. State (Tex. Cr. App.) 56 S. W. 347; Chicago & W. I. R. Co. v. Doan, 93 Ill. App. 247; Johnson v. Johnson, 156 Ind. 592; Gill v. Staylor (Md.) 49 Atl. 650; Southern Ry. Co. v. Lynn (Ala.) 29 So. 573; Decatur Car Wheel & Mfg. Co. v. Mehaffey (Ala.) 29 So. 646; Surber v. Mayfield, 156 Ind. 375; Malott v. Crow, 90 Ill. App. 628; McNulta v. Jenkins, 91 Ill. App. 309; H. B. Claflin Co. v. Omerus, 15 Pa. Super. Ct. 464; Kennard v. State (Fla.) 28 So. 858; Longley v. Com. (Va.) 37 S. E. 339; Texas & P. Ry. Co. v. Wineland, 42 C. C. A. 588, 102 Fed. 673; Johnston v. Hirschberg, 85 Ill. App. 47.

"The entire instructions upon the measure of damages must be taken and read together as one charge to the jury on that question." Malott v. Crow, 90 Ill. App. 628.

[156] Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282; People v. McCallam, 103 N. Y. 587; Webb v. Wight & Weslosky Co., 112 Ga. 432; Wadhams & Co. v. Inman, Poulsen & Co., 38 Or. 143; Com. v. Warner, 13 Pa. Super. Ct. 461; State v. Lee, 58 S. C. 335, 36 S. E. 706; Spears v. State (Tex. Cr. App.) 56 S. W. 347; Chicago & W. I. R. Co. v. Doan, 93 Ill. App. 247; Pittsburgh, C., C. & St. L. Ry. Co. v. Noftsger, 26 Ind. App. 614; Noble v. Bessemer Steamship Co. (Mich.) 86 N. W. 520; Clisby v. Mobile & O. R. Co., 78 Miss. 937; Price v. Coblitz, 21 Ohio Cir. Ct. R. 732, 12 Ohio Cir. Dec. 34; Houston & T. C. Ry. Co. v. Moss (Tex. Civ. App.) 63 S. W. 894; Southern Ry. Co. v. Lynn (Ala.) 29 So. 573; Hearne v. De Young, 132 Cal. 357; City Council of Augusta v. Tharpe (Ga.) 38 S. E. 389; City of Rock Island v. Starkey, 189 Ill. 515; Cleveland, C., C. & St. L. Ry. Co. v. Keenan, 190 Ill. 217; Anderson v. Union Terminal R. Co., 161 Mo. 411; Citizens' St. Ry. Co. v. Merl, 26 Ind. App. 284; McCornick v. Queen of Sheba Gold Min. & Mill. Co. (Utah) 63 Pac. 820; De St. Aubin v. Marshall Field & Co., 27 Colo. 414; Farmers' & Traders' Nat. Bank v. Woodell, 38 Or. 294; Ohliger v. City of Toledo, 20 Ohio

tion will not revoke a previous one by implication.[157] But where a part of a main charge is inconsistent with a request of a party granted at the close of the main charge, the requested instruction must control.[158] The particular consideration of errors cured by other instructions, or by a construction of the charge as a whole, is reserved for consideration in a later section, in connection with the subject of harmless and reversible error.[159]

VI. Harmless and Reversible Error.

§ 386. General rules.

It is a rule of almost universal application that a judgment will not be reversed for errors which did not affect the result prejudicially to the appellant.[160] The doctrine of er-

Cir. Ct. R. 142, 10 Ohio Cir. Dec. 762; Marcom v. Raleigh & A. A. L. R. Co., 126 N. C. 200; Schondorf v. Griffith, 13 Pa. Super. Ct. 580; Smitson v. Southern Pac. Co., 37 Or. 74; People v. Emerson, 130 Cal. 562; Sharer v. Dobbins, 195 Pa. 82; Welsh v. Com. (Ky.) 60 S. W. 185; State v. Miller, 159 Mo. 113; Benedict v. Everard, 73 Conn. 157; Maxon v. Clark, 24 Ind. App. 620; Hulett v. Missouri, K. & T. Ry. Co., 80 Mo. App. 87; Fletcher v. South Carolina & G. E. R. Co., 57 S. C. 205; McGhee v. Wells, 57 S. C. 280; Lewis v. Western Union Tel. Co., 57 S. C. 325. Cases might be multiplied upon this proposition to an almost indefinite extent, but it would serve no useful purpose to do so, as the proposition has never been denied. The cases cited above are late cases applying the rule. A numerous collection of the older cases will be found in 2 Enc. Pl. & Pr. p. 578. See, also, post, §§ 386-391, "Harmless and Reversible Error."

[157] Adams v. Macfarlane, 65 Me. 143.

[158] Goetz v. Metropolitan St. Ry. Co., 54 App. Div. (N. Y.) 365.

[159] See post, chapter 32, vi.

[160] Swinney v. State, 22 Ark. 215; Patterson v. Fowler, 22 Ark. 396; Brooks v. Perry, 23 Ark. 32; Nance v. Metcalf, 19 Mo. App. 183; Gaty v. Sack, 19 Mo. App. 470; Mercer v. Hall, 2 Tex. 284; Robinson v. Varnell, 16 Tex. 382; Salmon v. Olds, 9 Or. 488; Briscoe v. Jones, 10 Or. 63; Strong v. Kamm, 13 Or. 172; Brown v. Forest, 1 Wash. T. 201; State v. Cazeau, 8 La. Ann. 114; State v. Brette,

ror without injury is applied to such cases, and, in the interests of substantial justice, the judgment is affirmed. But, as has been seen, there is some conflict in the cases as to whether or not prejudice will be presumed from the mere fact of an error, the weight of authority being that error is *prima facie* prejudicial and ground for reversal unless it can be seen from the record that it was in fact harmless.[161] However this may be, it can be shown affirmatively, in many cases, that the error did not affect the verdict adversely to the ap-

6 La. Ann. 653; Payne v. Grant, 81 Va. 164; Johnson v. Cox, 81 Ga. 25; Bassett v. Inman, 7 Colo. 270; Wilson v. State, 69 Ga. 226; Welch v. Butler, 24 Ga. 445; Beavers v. Missouri Pac. R. Co., 47 Neb. 761; State v. Price, 75 Iowa, 243; Sharon v. Minnock, 6 Nev. 377; Robinson v. Imperial Silver Min. Co., 5 Nev. 44; Bianchi v. Maggini, 17 Nev. 322; Truckee Lodge, No. 14, I. O. O. F., v. Wood, 14 Nev. 293; Brown v. Lillie, 6 Nev. 244; Richardson v. State, 55 Ind. 381; Harris v. State, 30 Ind. 131; Stewart v. State, 111 Ind. 554, 560; Shryer v. Morgan, 77 Ind. 479, 485; Mooney v. Kinsey, 90 Ind. 33, 35; Simpkins v. Smith, 94 Ind. 470, 473; Jones v. Angell, 95 Ind. 376, 381; Louisville, N. A. & C. Ry. Co. v. Porter, 97 Ind. 267, 269; Froun v. Davis, 97 Ind. 401, 403; Barnett v. State, 100 Ind. 171, 179; Davis v. Reamer, 105 Ind. 318, 323; Atkinson v. Dailey, 107 Ind. 117, 120; Audis v. Personett, 108 Ind. 202, 207; Haxton v. McClaren, 132 Ind. 235, 247; Hummel v. Tyner, 70 Ind. 84; Highee v. Moore, 66 Ind. 263; Salinus v. Wright, 11 Tex. 572; Hollingsworth v. Holshousen, 17 Tex. 41; State v. Tull, 119 Mo. 421; Easley v. Valley Mut. Life Ass'n, 91 Va. 161; Crawford v. Armstrong, 58 Mo. App. 214; Duke of Newcastle v. Broxtowe, 1 Nev. & M. 598, 4 Barn. & Adol. 273; Boren v. State, 32 Tex. Cr. App. 637, 25 S. W. 775; Loper v. Robinson, 54 Tex. 510.

In Georgia, under the act of 1853-54, a new trial must be granted if an erroneous charge is made, although no harm may be done by such error. Shadwick v. McDonald, 15 Ga. 392; Terry v. State, 17 Ga. 204. In Texas, in criminal cases, error in the instructions is ground for reversal, regardless of the question of prejudice. Cook v. State, 22 Tex. App. 511; Clanton v. State, 20 Tex. App. 616; Bravo v. State, 20 Tex. App. 188. Contra, Boren v. State, 32 Tex. Cr. App. 637, holding that a judgment in a criminal case will be reversed for error in the instructions only when the error was harmful, or there is doubt as to whether or not injury was done.

[161] See ante, § 378, "Presumption of Prejudice."

pellant,[162] and, in such cases, the error is harmless, and not ground for reversal.[163] So, also, in many cases, the error is such that it has no tendency to mislead a jury of ordinary capacity, and in such cases, also, the court may properly apply the doctrine of harmless error, and affirm the judgment.[164]

[162] See, for example, post, § 389, "Error in Appellant's Favor," and post, § 390, "Error Cured by Verdict."

[163] Randolph v. Carlton, 8 Ala. 606; Smith v. Houston, 8 Ala. 736; Shepherd v. Nabors, 6 Ala. 631; Porter v. Nash, 1 Ala. 452; Caruthers v. Mardis' Adm'rs, 3 Ala. 599; Hill v. State, 43 Ala. 335; Taylor v. Kelly, 31 Ala. 59; Sims v. Boynton, 32 Ala. 353; Clay v. Robinson, 7 W. Va. 348; Cricket v. State, 18 Ohio St. 9; Myers v. Bank of Tennessee, 3 Head (Tenn.) 330; Douglas v. Neil, 7 Heisk. (Tenn.) 438; David v. Bell, Peck. (Tenn.) 135; Berry v. State, 31 Ohio St. 219; Josephine v. State, 10 George (Miss.) 613; Mannen v. Bailey, 51 Kan. 442; Redden v. Tefft, 48 Kan. 302; People v. Smith, 105 Cal. 676, 39 Pac. 38; Sterling Bridge Co. v. Baker, 75 Ill. 139; Hubner v. Feige, 90 Ill. 208; Rice v. Brown, 77 Ill. 549; United States Exp. Co. v. Backman, 28 Ohio St. 144, 146; Pjarron v. State, 47 Neb. 294; Burbridge v. Kansas City Cable R. Co., 36 Mo. App. 669; Muscoe v. Com., 87 Va. 460; Hadden v. Larned, 87 Ga. 634; Keeler v. Herr, 157 Ill. 57, 41 N. E. 750; Gray v. Troutman, 158 Ill. 171, 41 N. E. 780.

[164] Hollingsworth v. Holshousen, 17 Tex. 41; Fogal v. Page, 59 Hun, 625, 13 N. Y. Supp. 656; Gray v. Troutman, 158 Ill. 171; Knickerbocker Life Ins. Co. v. Trafz, 104 U. S. 197, 26 L. Ed. 708; Titley v. Enterprise Stone Co., 127 Ill. 457, 20 N. E. 71; People v. Marks, 90 Mich. 555; Smith v. King, 62 Conn. 515; Robbins v. Roth, 95 Ill. 464; Texas Cent. Ry. Co. v. Rowland, 3 Tex. Civ. App. 158; Cross v. Lake Shore & M. S. R. Co., 69 Mich. 363; Sheehan v. Dalrymple, 19 Mich. 239; City of Chicago v. Hesing, 83 Ill. 204; Taylor v. Chicago, St. P. & K. C. Ry. Co., 76 Iowa, 753; Vanvalkenberg v. Vanvalkenberg, 90 Ind. 433; Armstrong v. Tait, 8 Ala. 635; City of Indianapolis v. Scott, 72 Ind. 197; People v. Scott, 6 Mich. 287; Continental Ins. Co. v. Horton, 28 Mich. 173; Lindsay v. City of Des Moines, 74 Iowa, 111; Ross v. City of Davenport, 66 Iowa, 548; Rand v. Jones, 4 Willson, Civ. Cas. Ct. App. (Tex.) § 204; Bowden v. Bowden, 75 Ill. 143; Suttie v. Aloe, 39 Mo. App. 38; Wilson v. Trafalgar & Brown Co. Gravel Road Co., 93 Ind. 287, 292; Louisville, N. A. & C. Ry. Co. v. Shanks, 132 Ind. 395; Poland v. Miller, 95 Ind. 387, 390; Stone v. Kaufman, 25 Ark. 187; State v. Price, 75 Iowa,

Upon the other hand, where the error might have misled the jury, and the court cannot see whether it did or not, the rule as to the presumption of prejudice is controlling, but it would seem that, in such case, the court could not properly pronounce the error harmless, and affirm the judgment.[165] Varying expressions, applications, and illustrations of the foregoing rules might be multiplied almost indefinitely. In the following section, the cases are collated in the form of a digest note.[166]

§ 387. Same—Digest of decisions.

Error as to measure of damages is harmless, where the amount of the verdict shows that the jury did not follow the erroneous direction. Keeler v. Herr, 157 Ill. 57.

Error in an instruction as to exemplary damages is harmless to the plaintiff, where the plaintiff was not entitled to even actual damages. Meyers v. Wright, 44 Iowa, 38. An instruction as to the measure of damages cannot be regarded as prejudicial error, where it allows no less than the correct rule would warrant. Hubbell v. Blandy, 87 Mich. 209.

Error as to matters not contested is harmless, and not ground for reversal. Rawson v. Ellsworth, 13 Wash. 667, 43 Pac. 934; Bokien v. State Ins. Co. of Oregon, 14 Wash. 39; Gulf, C. & S. F. Ry. Co. v. Reagan (Tex. Civ. App.) 34 S. W. 796; Consolidated Coal Co. v. Maehl, 31 Ill. App. 252, affirmed 130 Ill. 551.

243; Preston v. Harvey, 2 Hen. & M. (Va.) 55; Brighthope Ry. Co. v. Rogers, 76 Va. 443; Baltimore & O. R. Co. v. McKenzie, 81 Va. 71; Richmond & D. R. Co. v. Norment, 84 Va. 167; Com. v. Lucas, 84 Va. 303; Wager v. Barbour, 84 Va. 419; Muscoe v. Com., 87 Va. 460; Watson v. Com., 87 Va. 608; Converse v. Meyer, 14 Neb. 190, 15 N. W. 340; McKay v. Leonard, 17 Iowa, 569; Clagett v. Conlee, 16 Iowa, 487; Ocheltree v. Carl, 23 Iowa, 394; Hunt v. Chicago & N. W. R. Co., 26 Iowa, 363; How v. Reed, 20 Iowa, 591; Thompson v. Blanchard, 2 Iowa, 44; Blackburn v. Powers, 40 Iowa, 681; State v. Hart, 67 Iowa, 142.

[165] Terry v. Buffington, 11 Ga. 337; Duffany v. Ferguson, 66 N. Y. 482, reversing 5 Hun, 106.

[166] See post, § 387.

Decision based on different grounds.

Error in an instruction is harmless, where the case is decided upon a point or grounds wholly independent of that referred to in the erroneous instruction. Comstock's Appeal, 55 Conn. 214. An instruction outside the evidence is not prejudicial to plaintiff, where the jury find for defendant on another ground. Blatchford v. Boyden, 122 Ill. 657.

The modification of an erroneous request is not reversible error as to the party making the request. Continental Ins. Co. v. Horton, 28 Mich. 173; Shaw v. Camp, 160 Ill. 425, 43 N. E. 608; Sawyer v. Lorillard, 48 Ala. 332. But compare Edgar v. State, 43 Ala. 45; Eiland v. State, 52 Ala. 322.

Immaterial and minor errors which manifestly had no influence upon the decision will not authorize a reversal. Hollingsworth v. Holshousen, 17 Tex. 41; Massachusetts Mut. Life Ins. Co. v. Robinson, 98 Ill. 324; Smith v. King, 62 Conn. 515, 26 Atl. 1059; Strong v. State, 95 Ga. 499; Stein v. Vannice, 44 Neb. 132; Kimble v. Seal, 92 Ind. 276, 284.

Substantial correctness is all that is required. Needham v. People, 98 Ill. 275; Massachusetts Mut. Life Ins. Co. v. Robinson, 98 Ill. 324; Oliver v. State, 39 Miss. 526; Montag v. Linn, 23 Ill. 551.

Mere verbal criticisms and inaccuracies of expression are not ground for reversal unless it appears probable that the jury were misled. Carpenter v. Eastern Transp. Co., 71 N. Y. 574; Pierce v. Hasbrouck, 49 Ill. 23; Labar v. Crane, 56 Mich. 586; Chattanooga, R. & C. R. Co. v. Palmer, 89 Ga. 161; Galveston, H. & S. A. Ry. Co. v. Porfert, 72 Tex. 344; Forgey v. First Nat. Bank of Cambridge City, 66 Ind. 123; Citizens' State Bank v. Council Bluffs Fuel Co., 89 Iowa, 618; Welch v. Miller, 32 Ill. App. 110; O'Connor v. Langdon, 2 Idaho, 803; Harris v. Daugherty, 74 Tex. 1; Suttie v. Aloe, 39 Mo. App. 38; Wilson v. Trafalgar & Brown Co. Gravel Road Co., 93 Ind. 287; Vanvalkenberg v. Vanvalkenberg, 90 Ind. 433, 436; Pittsburgh, C. & St. L. Ry. Co. v. Sponier, 85 Ind. 165, 170; Chambers v. Kyle, 87 Ind. 83, 84; Coppage v. Gregg, 1 Ind. App. 112; Pittsburgh, C., C. & St. L. Ry. Co. v. Welch, 12 Ind. App. 433; Burgess v. Territory (Mont.) 19 Pac. 558.

Inconsistency between instructions is not reversible error unless actually or probably prejudicial. Overland Mail & Exp. Co. v. Carroll, 7 Colo. 43; Nuckolls v. Gant, 12 Colo. 361; Robbins v. Roth, 95 Ill. 464; Bigelow v. Wygal, 52 Kan. 619. Where two paragraphs of a charge are inconsistent, as applied to the facts, and so the jury cannot follow the instructions as a whole, the jury may properly ignore the paragraph which, as applied to the facts of the case, is

incorrect, and follow the correct instruction. Hillebrant v. Green, 93 Iowa, 661.

Error as to penalty of crime.

Error as to the time of imprisonment which the jury may inflict is cured, where the court reduces the verdict to the lowest limit under the statute. State v. Tull, 119 Mo. 421.

Misleading instructions.

Instructions having a tendency to mislead, although correct, constitute reversible error. Pennsylvania Canal Co. v. Harris, 101 Pa. 93; Galveston Land & Imp. Co. v. Levy, 10 Tex. Civ. App. 104; Skinner v. McAllister, 4 Cent. Rep. (Pa.) 750; State v. Cain, 20 W. Va. 679; White v. Thomas, 12 Ohio St. 312; Chicago, B. & Q. R. Co. v. Anderson, 38 Neb. 112; Perot v. Cooper, 17 Colo. 80. Contra, Floyd v. State, 82 Ala. 16. Where an instruction states a proposition of law too broadly, but, as applied to the facts of the case, it is correct, the failure to state the limitations of the principle so laid down will not work a reversal, as any possible misleading tendency can be obviated by asking for an explanatory charge. Anniston City Land Co. v. Edmondson (Ala.) 30 So. 61. "Where an instruction is erroneous, and calculated to mislead the jury, and the verdict would have been different had the instructions not been given, a new trial will be awarded." Blackburn v. Morton, 18 Ark. 384. A verdict will not be set aside because the jurors, or some of them, assert that they misunderstood the charge. Tyler v. Stevens, 4 N. H. 116; Folsom v. Brawn, 25 N. H. 115, 124; Belknap v. Wendell, 36 N. H. 250. A judgment will not be reversed because of an erroneous instruction, if the proper result has been obtained, and the finding of the jury shows that the party complaining of the instruction has not been harmed. Coppage v. Gregg, 1 Ind. App. 112; Bigelow v. Wygal, 52 Kan. 619, 35 Pac. 200; Kansas City, Ft. S. & G. R. Co. v. Hay, 31 Kan. 177; Fogal v. Page, 59 Hun, 625, 13 N. Y. Supp. 656; Keegan v. Kinnare (Ill.) 14 N. E. 14; Lemmon v. Moore, 94 Ind. 40, 43; Pittsburgh, C., C. & St. L. Ry. Co. v. Welch, 12 Ind. App. 433; Williams v. John Davis Co., 54 Ill. App. 198; Liberty Ins. Co. v. Ehrlich, 42 Neb. 553, 60 N. W. 940; Chicago City Ry. Co. v. Hastings, 35 Ill. App. 434, affirmed in 26 N. E. 594; March v. Portsmouth & C. R. R., 19 N. H. 372; Wendell v. Moulton, 26 N. H. 41, 63; Hoitt v. Holcomb, 32 N. H. 186, 207; Kuchenmeister v. O'Connor, 11 Wkly. Law Bul. (Ohio) 120.

Wrong reason for correct instruction.

A correct instruction is not rendered erroneous because an im-

proper reason is given for it. Marion v. State, 20 Neb. 233; Forbes v. Thomas, 22 Neb. 541.

A modification of an instruction which does not change its meaning is, at most, harmless error. Gottstein v. Seattle Lumber & Commercial Co., 7 Wash. 424, 35 Pac. 133.

Meaningless instructions.

"A judgment will not be reversed simply because an instruction given by the trial court is meaningless, but only when it is erroneous, and works injury to the substantial rights of the party complaining." Hentig v. Kansas Loan & Trust Co., 28 Kan. 617; Kimble v. Seal, 92 Ind. 276, 284; Staser v. Hogan, 120 Ind. 207, 225.

Instruction in dead language.

The court will not reverse for an error in a portion of the charge, delivered in a dead language, which there was no probability of its being understood by a country jury. Wenger v. Barnhart, 55 Pa. 300.

Mere repetition of a proposition is not reversible error unless shown to be prejudicial. Dixon v. State, 46 Neb. 298, 64 N. W. 961. This rule has been applied to criminal prosecutions in which the court has repeated instructions cautioning the jury that, in weighing the credibility of witnesses, they should consider the interest of the accused in the result of the prosecution.

Misstatement of testimony.

"A misstatement of the language of a witness by the court in its charge to the jury is no ground for reversal unless such misstatement is as to a material part of his testimony, and probably misleads the jury." Bellew v. Ahrburg, 23 Kan. 287.

Judgment right on whole record.

Error in giving or refusing instructions is harmless, and not ground for reversal, where, upon a whole record, the judgment is right. Davies v. Miller, 1 Call (Va.) 127; Perkins v. Maus, 15 Colo. 262, 25 Pac. 168; Davis v. Liberty & Camden Gravel Road Co., 84 Ind. 36, 42; Western Union Tel. Co. v. Reynolds, 77 Va. 173; Moore v. City of Richmond, 85 Va. 538; Portage Co. Branch Bank v. Lane, 8 Ohio St. 405; Brinson v. Smith, Peck (Tenn.) 194; Graham v. Bradley, 5 Humph. (Tenn.) 476; Gibbons v. Dillingham, 10 Ark. 9; Wood v. Ostram, 29 Ind. 177; Heflin v. Beyis, 82 Ind. 388, 392; Morris v. State, 94 Ind. 565, 569; New v. New, 95 Ind. 366, 367; Low v. Deiner, 111 Ind. 46, 47; Roberts v. Nodwift, 8 Ind. 339; McCall v. Seevers, 5 Ind. 187; Andre v. Johnson, 6 Blackf. (Ind.) 375; Harris v. Doe d. Barnett, 4 Blackf. (Ind.) 369; Brooster v.

State, 15 Ind. 190; Conwell v. Emrie, 4 Ind. 209; Clifton v. Shannon, 4 Ind. 498; Watson v. Allen, 4 Ind. 537; Huff v. Earl, 3 Ind. 306; Manchester v. Doddridge, 3 Ind. 360; Ellison v. Dove, 8 Blackf. (Ind.) 571; Evans v. Merritt, 62 Ark. 228; Mode v. Beasley, 143 Ind. 306, 42 N. E. 727; Harman v. Kelley, 14 Ohio, 502; Wood v. Wylds, 11 Ark. 754; Ingram v. Marshall, 23 Ark. 115; Jordan v. James, 5 Ohio, 88; Guthrie v. Newill, 4 Kan. 188; Doyle v. Dobson, 74 Mich. 562; State v. Forrester, 63 Mo. App. 530; Edmondson v. Machell, 2 Term. R. 4. See, also, post, § 391, "Error Cured by Verdict."

Failure to number instructions.

A statute requiring the court to number its instructions in consecutive paragraphs has been held to be directory, and, if no rights of a party are sacrificed or prejudiced by a failure to comply with the statute, the error, if error it be, will not cause a reversal. Miller v. Preston, 4 Gild. (N. M.) 314.

Presumption as to capacity to commit crime.

In a prosecution of an infant in a jurisdiction in which the common-law rule as to responsibility of infants prevails, an instruction that the prima facie presumption that an infant is not accountable for his acts does not apply in the case of an infant more than eleven years of age will not be assumed to be harmless, though the accused committed the offense charged two months after he became fourteen years of age. Allen v. United States, 150 U. S. 551, 14 Sup. Ct. 196.

Instructions not supported by evidence.

A correct statement of law, though not applicable to the evidence, and irrelevant to the case, is not ground for reversal unless it may have misled the jury to the prejudice of the appellant. Evans v. Howell, 84 N. C. 460; Carstens v. Stetson & Post Mill Co., 14 Wash. 643; Pope v. Pope, 95 Ga. 87; Hummel v. Tyner, 70 Ind. 84; Tumlin v. Parrott, 82 Ga. 732, 9 S. E. 718; Kansas City, Ft. S. & G. R. Co. v. Hay, 31 Kan. 177; Foss-Schneider Brewing Co. v. McLaughlin, 5 Ind. App. 415, 419; Brant v. Gallup, 111 Ind. 487; Evansville & I. R. Co. v. Darting, 6 Ind. App. 375, 376; Parmlee v. Sloan, 37 Ind. 469; McGuire v. State (Tex. Cr. App.) 28 S. W. 345; Simonds v. Clapp, 16 N. H. 222; Nutting v. Herbert, 37 N. H. 346, 354; McCall v. Seevers, 5 Ind. 187; Belden v. Gray, 5 Fla. 504; McNeill v. Arnold, 22 Ark. 477; Milton v. Blackshear, 8 Fla. 161; Stockton v. Stockton, 73 Ind. 510, 514; Hellems v. State, 22 Ark. 207; Schneider v. Hosier, 21 Ohio St. 98; Sullivan v. Finn, 4 G. Greene (Iowa) 544; French v. Millard, 2 Ohio St. 44; Fort Scott, W. & W. R. Co.

v. Kanacker, 46 Kan. 511; Douglas v. Wolf, 6 Kan. 88; Dickson v. Randal, 19 Kan. 214; Chapman v. Stewart, 63 Ill. 332; Mills v. Ashe, 16 Tex. 295; Barker v. Blount, 63 Ga. 423; Cincinnati, N. O. & T. P. Ry. v. Rawson, 16 Wkly. Law Bul. (Ohio) 423; Satchell v. Doran, 4 Ohio St. 542; Wiles v. Trustees of Philippi Church, 63 Ind. 206; Parkhurst v. Masteller, 57 Iowa, 474; Kansas City, Ft. S. & G. R. Co. v. Hay, 31 Kan. 177; Boltz v. Smith, 3 Ind. App. 43; Pogue v. Joyner, 7 Ark. 463; Ohio & M. Ry. Co. v. Stein, 140 Ind. 61; Ames v. Quimby, 106 U. S. 342; State v. Keys, 53 Kan. 674; State v. Donnelly, 130 Mo. 642; Miller v. State, 36 Tex. Cr. App. 47.

Error in abstract charge.

Error in the statement of a rule of law in no way applicable to the facts of the case on trial is not ground for reversal unless the jury may have been misled, and the appellant injured. Steinwehr v. State, 5 Sneed (Tenn.) 586; Wilson v. State, 3 Heisk. (Tenn.) 278; Hudson v. Bauer Grocery Co., 105 Ala. 200; Fitzgerald v. Goff, 99 Ind. 28; Blake v. Hamburg Bremen Fire Ins. Co., 67 Tex. 160; Boyd v. State, 17 Ga. 194; Sheppard v. Peabody Ins. Co., 21 W. Va. 370; People v. Marble, 38 Mich. 117; Jones v. Thurmond's Heirs, 5 Tex. 318; Numan v. Kapp, 5 Bin. (Pa.) 73; Hardy v. De Leon, 5 Tex. 211; Rogers v. Hall, 4 Watts (Pa.) 359; State v. Turner, 35 La. Ann. 1103; Clarke v. Dutcher, 9 Cow. (N. Y.) 674; McClearland v. State, 24 Tex. App. 202; Jordan v. Lang, 22 S. C. 164; Smith v. State, 34 Tex. Cr. App. 265; Hughes v. Parker, 1 Port. (Ala.) 139; Salmons v. Roundtree, 24 Ala. 458; Magee v. Billingsley, 3 Ala. 679; Johnson v. Boyles, 26 Ala. 578; Rolston v. Langdon, 26 Ala. 660. But see Burkham v. Daniel, 56 Ala. 604.

Charge on immaterial issues.

A charge upon an immaterial issue, and which could not have affected the result, is not ground for reversal. Moore v. Moore, 73 Tex. 382; White v. Ross, 35 Fla. 377; Stirling v. Stirling, 64 Md. 138, 21 Atl. 273; Maitland v. Citizens' Nat. Bank, 40 Md. 540; Kugler v. Wiseman, 20 Ohio, 361; McCoy v. State, 15 Ga. 205; Johnson v. State, 30 Ga. 426; Steamboat Albatross v. Wayne, 16 Ohio, 513.

Miscellaneous errors held harmless.

Alamo Fire Ins. Co. v. Schmitt, 10 Tex. Civ. App. 550; Greenwood v. Davis, 106 Mich. 230; Walker v. Collins (C. C. A.) 59 Fed. 70; Texas & P. Ry. Co. v. Reed (Tex. Civ. App.) 32 S. W. 118; Williams v. Conger, 49 Tex. 582; Cortelyou v. McCarthy, 37 Neb. 742, 56 N. W. 620; Rogers v. Rogers, 46 Ind. 1; North River Boom Co. v. Smith, 15 Wash. 138; Jackson v. State, 91 Wis. 253, 64 N. W. 838;

Marsalis v. Patton, 83 Tex. 521; Evans v. State, 95 Ga. 468; Aneals v. People, 134 Ill. 401; State v. Smith, 8 S. D. 547; Union P. Ry. Co. v. Shelley, 49 Kan. 667; Dilly v. Omaha & St. L. Ry. Co., 55 Mo. App. 123; Austin Rapid Transit Ry. Co. v. Grothe, 88 Tex. 262; Fort Worth Pub. Co. v. Hitson, 80 Tex. 216; Saunders v. Payne, 36 N. Y. St. Rep. 733; McCahan v. Wharton, 121 Pa. 424; Wyatt v. Herring, 90 Mich. 581; Chaddick v. Haley, 81 Tex. 617; Graham v. State (Tex. Cr. App.) 24 S. W. 645; Edelin v. Sanders, 8 Md. 118; Transatlantic Fire Ins. Co. v. Bamberger, 11 Ky. Law Rep. 101, 11 S. W. 595; Church v. Rowell, 49 Me. 367; State v. Mayberry, 48 Me. 218; Porterfield v. Com., 91 Va. 801.

Miscellaneous errors held prejudicial.

Brown v. Perez (Tex. Civ. App.) 25 S. W. 980; Kendig v. Overhulser, 58 Iowa, 195; Northern Pac. R. Co. v. Charless, 162 U. S. 359, 16 Sup. Ct. 848.

§ 388. Error harmless in view of evidence.

In determining whether or not instructions are erroneous, and, if erroneous, whether or not the error was prejudicial, the court may look to the evidence brought up in the record.[167] The correctness of an instruction must be determined in connection with the facts of the case as presented by the evidence, and it should be held correct if it would produce the proper result upon the facts of the case, whether technically or abstractly accurate or not.[168] Thus, a refusal

[167] Bradshaw v. Mayfield, 18 Tex. 21; Texas & P. Ry. Co. v. Neill (Tex. Civ. App.) 30 S. W. 369.

[168] Thompson v. Thompson, 9 Ind. 323; Keyser v. Kansas City, St. J. & C. B. R. Co., 56 Iowa, 440; Kettry v. Thumma, 9 Ind. App. 498, 500; Rosenthal, Meyer & Co. v. Middlebrook, 63 Tex. 333; State v. Ellick, 60 N. C. 450; Upson v. Raiford, 29 Ala. 188; Diel v. Camp, 22 Ala. 249; Belote v. State, 36 Miss. 96; Maurer v. Miday, 25 Neb. 575; Lehman v. Warren, 53 Ala. 535; South & North Alabama R. Co. v. Wood, 71 Ala. 215; Fulton Ins. Co. v. Goodman, 32 Ala. 108; Miller v. Jones' Adm'r, 29 Ala. 174; Waters v. Spencer, 22 Ala. 460; Kirkland v. Oates, 25 Ala. 465; Berry v. Hardman, 12 Ala. 604; McBride v. Thompson, 8 Ala. 650; Eskridge v. State, 25 Ala. 30; Noles v. State, 26 Ala. 31; Jones v. Davis, 2 Ala. 730; Lockwood v. Nelson, 16 Ala. 294; Alexander v. Alexander, 71 Ala. 295; Palmore v. State,

to charge on the doctrine of reasonable doubt or error in the charge is not ground for reversal, where the state of the evidence is such as to leave no reasonable doubt.[169] So, where the evidence would not support a verdict and judgment for the appellant, error in the instructions is immaterial as to him, and not ground for reversal.[170] Error in giving or re-

29 Ark. 248; Adams v. State, 22 Ga. 417; Sword v. Keith, 31 Mich. 247; People v. Kelly, 28 Cal. 423; Worden v. Salter, 90 Ill. 160; People v. Scott, 6 Mich. 287; Botsford v. Kleinhans, 29 Mich. 332; City of Wyandotte v. White, 13 Kan. 191; State v. Johnson, 8 Iowa, 525; Cohron v. State, 20 Ga. 752; Moore v. Missouri Pac. Ry. Co., 73 Mo. 438; Brumagim v. Bradshaw, 39 Cal. 24; State v. Rhodes, 44 S. C. 325; Russell v. Phelps, 42 Mich. 378; Angell v. Rosenburg, 12 Mich. 241; Brownlee v. Martin, 21 S. C. 400; Rogers v. Wallace, 10 Or. 387; Williams v. Barksdale, 58 Ala. 288; Stillwell v. Gray, 17 Ark. 473; Souvais v. Leavitt, 50 Mich. 108; Peck v. Carmichael, 9 Yerg. (Tenn.) 325; Skates v. State, 64 Miss. 644; Sykes v. People, 127 Ill. 117; Amos v. Buck, 75 Iowa, 651; Texas & P. Ry. Co. v. Wright, 62 Tex. 515; Bonner v. Moore, 3 Tex. Civ. App. 416; Price v. Johnson County, 15 Mo. 433; Hall v. State, 8 Ind. 439; Fitzpatrick v. State, 37 Ark. 238; Delaware River Steamboat Co. v. Burlington & B. Steam Ferry Co., 81 Pa. 103; State v. Kinkead, 57 Conn. 181; Holterhoff v. Mutual Ben. Life Ins. Co., 3 Am. Law Rec. (Ohio) 272; State v. Robbins, 48 N. C. 249; Casco Bank v. Keene, 53 Me. 103; Blake v. Irish, 21 Me. 450; Merrill v. Inhabitants of Hampden, 26 Me. 234; Boobier v. Boobier, 39 Me. 406; Chicago West Div. Ry. Co. v. Mills, 105 Ill. 63; Collins v. Richmond Stove Co., 63 Conn. 360; State v. Tilly, 25 N. C. 424.

[169] McGuire v. State, 37 Miss. 369; Edelhoff v. State, 5 Wyo. 19.

[170] Carey-Lombard Lumber Co. v. Hunt, 54 Ill. App. 314; Frank v. Williams, 36 Fla. 136, 18 So. 351; Mercer Academy v. Rusk, 8 W. Va. 373; Blackman v. Houssels (Tex. Civ. App.) 35 S. W. 511; Fairfield v. Barrette, 73 Wis. 463, 41 N. W. 624; Malson v. Fry, 1 Watts (Pa.) 433; Jones v. Cherokee Iron Co., 14 Lea (Tenn.) 157; Neddy v. State's Lessee, 8 Yerg. (Tenn.) 249; Wintermute v. Torrent, 83 Mich. 555; Worth v. McConnell, 42 Mich. 473; Williams v. City of Grand Rapids, 59 Mich. 51; Louden v. East Saginaw, 41 Mich. 18; McDonough v. Sutton, 35 Mich. 1; Houghton Co. Sup'rs v. Rees, 34 Mich. 481; Parker v. Fields, 48 Mich. 251; Churchill v. Grohewig, 81 Iowa, 449; Johnson v. Illinois Cent. R. Co., 61 Ill. App. 522; Greer v. Lafayette Co. Bank, 128 Mo. 559; Dwelling House Ins.

fusing instructions is not ground for reversal, where, under the evidence, the result could not have been different had such error not been committed.[171] A misstatement of the

Co. v. Dowdall, 55 Ill. App. 622; Houser v. Lightner, 42 Leg. Int. (Pa.) 289; Texas & P. Ry. Co. v. Nolan, 11 C. C. A. 202, 62 Fed. 552; Turner v. Ft. Worth & D. C. Ry. Co. (Tex. Civ. App.) 30 S. W. 253; Eister v. Paul, 54 Pa. 196; Rose v. Bradley, 91 Wis. 619, 65 N. W. 509; Strawbridge v. Cartledge, 7 Watts & S. (Pa.) 394; Girard Fire & Marine Ins. Co. v. Stephenson, 37 Pa. 293; Mercer Academy v. Rusk, 8 W. Va. 373; Mehurin v. Stone, 37 Ohio St. 49; Harrison v. Morton, 2 Swan (Tenn.) 461; Hatt v. Evening News Ass'n, 94 Mich. 114, 53 N. W. 952; Clymer v. Cameron, 55 Miss. 593, 597; Cowen v. Eartherly Hardware Co., 95 Ala. 324; Collier v. Jenks, 19 R. I. 493; State v. Cunningham, 130 Mo. 507, 32 S. W. 970; Simmon v. Larkin, 82 Ind. 385, 387; Musselman v. Wise, 84 Ind. 248, 252; Newcomer v. Hutchings, 96 Ind. 119, 123; Standard Oil Co. v. Bretz, 98 Ind. 231, 236; Wolfe v. Pugh, 101 Ind. 293, 309; Winchester Wagon Works & Mfg. Co. v. Carman, 109 Ind. 31, 35; State v. Caldwell, 115 Ind. 6, 14; Swaim v. Swaim, 134 Ind. 596, 599. See, also, post, § 390, "Error Cured by Verdict."

[171] Cox v. State, 41 Tex. 1; Miller v. State, 3 Wyo. 657; Board of Sup'rs of Logan Co. v. People, 17 Ill. App. 49; O'Halleran v. Kingston, 16 Ill. App. 659; Carter v. Eames, 44 Tex. 544; Chicago & E. I. R. Co. v. Kneirim, 152 Ill. 458, 39 N. E. 324; Cusick v. Campbell, 68 Ill. 508; Earl's Lessee v. Shoulder, 6 Ohio, 409; Clark v. Moore, 3 Mich. 55; Cummings v. Stone, 13 Mich. 70; Sinclair v. Murphy, 14 Mich. 392; Sheehan v. Dalrymple, 19 Mich. 239; Seymour v. Detroit Copper & Brass Rolling Mills, 56 Mich. 117; Johnston v. Davis, 60 Mich. 56; Schisler v. Null, 91 Mich. 321, 51 N. W. 900; Town of West Covington v. Schultz, 16 Ky. Law Rep. 831, 30 S. W. 410; Jachary v. Pace, 9 Ark. 212; Murphy v. Hagerman, Wright (Ohio) 293; Courcier v. Graham, 1 Ohio, 330, 349; Reed v. McGrew, 5 Ohio, 375, 385; Hughes v. Wheeler, 76 Cal. 230; Farwell v. Salpaugh, 32 Iowa, 582; Chase v. Washburn, 1 Ohio St. 244; Bernard v. Richmond, F. & P. R. Co., 85 Va. 792; Snouffer's Adm'r v. Hansbrough, 79 Va. 166; Hussey v. Moser, 70 Tex. 42; Dawson v. Sparks, 1 Posey, Unrep. Cas. (Tex.) 735; Beaty v. Baltimore & O. R. Co., 6 W. Va. 388; Colvin v. Menefee, 11 Grat. (Va.) 87; First Nat. Bank v. Breese, 39 Iowa, 640; Hayden v. Souger, 56 Ind. 42; Stipp v. Spring Mill & Williams Creek Gravel R. Co., 54 Ind. 16; Morford v. Woodworth, 7 Ind. 83; Bullock v. Smith, 72 Tex. 545, 10 S. W. 687; McCord v. Blackwell, 31 S. C. 125; Dehority v. Paxson,

evidence is harmless error, where the legal effect of the evidence is the same, whatever view of it may be taken.[172] The assumption of facts conclusively proven or admitted, or a failure to require the jury to find such facts, is not reversible error.[173] Where the judgment is for the plaintiff, error in the charge as to the defense, or any particular branch of it, is harmless, and not ground for reversal, if it clearly appears that such defense or branch of it is not sustained by the evidence.[174] But where an erroneous charge may have influ-

97 Ind. 253, 255; Thurston v. Lloyd, 4 Md. 283; Jones v. State, 78 Ind. 217, 219; State v. Cunningham, 130 Mo. 507, 32 S. W. 970; Monroe v. City of Lawrence, 44 Kan. 607, 24 Pac. 1113; People v. Riley, 75 Cal. 98; Lang v. Dougherty, 74 Tex. 226; Tubbs v. Dwelling House Ins. Co., 84 Mich. 646, 48 N. W. 296; Com. v. Bishop, 165 Mass. 148, 42 N. E. 560; Udderzook v. Harris, 140 Pa. 236, 21 Atl. 395; State v. Donnelly, 130 Mo. 642, 32 S. W. 1124; Boyle v. Hazleton, 8 Kulp (Pa.) 239; Cartier v. Douville, 98 Mich. 22, 56 N. W. 1045; Sellers v. State, 99 Ga. 212; West v. State (Tex. Cr. App.) 33 S. W. 227; Harris v. State, 37 Tex. Cr. App. 441; Trexler v. Greenwich Tp., 168 Pa. 214, 31 Atl. 1090.

[172] Knott v. Dubuque & S. C. Ry. Co., 84 Iowa, 462; West Chicago St. R. Co. v. Martin, 154 Ill. 523, 39 N. E. 140; Kaufman v. Schoeffel, 46 Hun (N. Y.) 571.

[173] Corcoran v. City of Detroit, 95 Mich. 84, 54 N. W. 692; Indianapolis & St. L. R. Co. v. Stout, 53 Ind. 143; Drum v. Stevens, 94 Ind. 181, 184; Tomlinson v. Briles, 101 Ind. 538; Hefling v. Van Zandt, 162 Ill. 162, 44 N. E. 424; St. Louis, A. & T. H. R. Co. v. Holman, 155 Ill. 21, 39 N. E. 573.

[174] Joliet Steel Co. v. Shields, 146 Ill. 603, 34 N. E. 1108; Gulf, C. & S. F. Ry. Co. v. Highy (Tex. Civ. App.) 26 S. W. 737; Pullman Palace Car Co. v. Smith, 79 Tex. 468; Weiden v. Brush Electric Light Co., 73 Mich. 268, 41 N. W. 269; Atchison, T. & S. F. R. Co. v. Love, 57 Kan. 36; City of Clay Centre v. Jevons, 2 Kan. App. 568, 44 Pac. 745; Goodwin v. Kansas City, Ft. S. & M. R. Co., 53 Mo. App. 9; Lindsay v. Kansas City, Ft. S. & M. R. Co., 53 Mo. App. 11; Brentner v. Chicago, M. & St. P. Ry. Co., 68 Iowa, 530; Hilliard v. Johnson (Tex. Civ. App.) 32 S. W. 914. See, also, Louisville, N. A. & C. Ry. Co. v. Wright, 115 Ind. 378. An improper instruction as to the degree of care to be exercised by a person to avoid injury is harmless error, where the evidence shows no contributory negli-

enced the verdict, the judgment must be reversed, although the evidence may be sufficient to support the verdict, or may even preponderate in its favor.[175] So, where an instruction is predicated upon a case which the evidence tends to prove, and is correct, its refusal is ground for reversal, although a verdict for the other party may be sustained by the evidence.[176]

§ 389. Error in appellant's favor.

It is elementary law that a party cannot complain of an instruction, although it may be erroneous, if it is more favorable to him than the law and the evidence warrants.[177] If

gence. Gulf, C. & S. F. Ry. Co. v. Higby (Tex. Civ. App.) 26 S. W. 737. An error in the charge upon contributory negligence by the plaintiff is not material when there was no testimony to show contributory negligence, and no injury resulted. Pullman Palace Car Co. v. Smith, 79 Tex. 468; Weiden v. Brush Electric Light Co., 73 Mich. 268; Louisville, N. A. & C. Ry. Co. v. Wright, 115 Ind. 378; Atchison, T. & S. F. R. Co. v. Love, 57 Kan. 36; City of Clay Centre v. Jevons, 2 Kan. App. 568. Error in defining "fellow servants" is immaterial, where the employe in question was not a fellow servant. Joliet Steel Co. v. Shields, 146 Ill. 603. See, also, Austin Rapid Transit Co. v. Grothe, 88 Tex. 262.

[175] Dwyer v. Continental Ins. Co., 57 Tex. 181; Franklin v. Smith, 1 Posey, Unrep. Cas. (Tex.) 229; Willis v. Kirbie, 1 Posey, Unrep. Cas. (Tex.) 304; State v. Empey, 79 Iowa, 460; People v. Van Zile, 143 N. Y. 368, 38 N. E. 380; What Cheer Coal Co. v. Johnson, 6 C. C. A. 148, 56 Fed. 810. But see Louisville, N. A. & C. Ry. Co. v. Nicholai, 4 Ind. App. 119; Seay v. Diller (Tex.) 16 S. W. 642.

[176] Baltimore & O. R. Co. v. Skeels, 3 W. Va. 556.

[177] Alabama: Wyatt's Adm'r v. Steele, 26 Ala. 640; Courtland v. Tarlton, 8 Ala. 532; Stanley v. Bank of Mobile, 23 Ala. 652; Millard's Adm'rs v. Hall, 24 Ala. 209; Taylor v. Kelly, 31 Ala. 59; Montgomery's Ex'rs v. Kirksey, 26 Ala. 172; Wharton v. Littlefield, 30 Ala. 245; Governor v. Campbell, 17 Ala. 566; Kirkley v. Segar, 20 Ala. 226; Martin v. Nall, 22 Ala. 610; McGonegal v. Walker, 23 Ala. 361; Salmons v. Roundtree, 24 Ala. 458; Kansas City, M. & B. R. Co. v. Crocker, 95 Ala. 412.

the court, in its instruction, assumes a fact to exist that is in favor of the party complaining,[178] or instructs outside of the

California: McNamara v. MacDonough, 102 Cal. 575; McKeever v. Market St. R. Co., 59 Cal. 294; People v. Sternberg, 111 Cal. 3.

Colorado: De St. Aubin v. Field (Colo.) 62 Pac. 199; Patterson v. Hitchcock, 3 Colo. 533; Good v. Martin, 2 Colo. 218; Leitensdorfer v. King, 7 Colo. 436; Smith v. Ramer, 6 Colo. App. 177.

Connecticut: Daggett v. Whiting, 35 Conn. 372.

Florida: Marshall v. State, 32 Fla. 462.

Georgia: McTyier v. State, 91 Ga. 254; Partee v. Georgia R. Co., 72 Ga. 349; Atkins v. Paul, 67 Ga. 97; McCoy v. State, 15 Ga. 205.

Illinois: Morton v. Gateley, 1 Scam. 211; Wabash, St. L. & P. Ry. Co. v. Shacklett, 10 Ill. App. 404.

Indiana: Bissot v. State, 53 Ind. 408; Bronnenberg v. Coburn, 110 Ind. 169, 172; Baltimore & O. R. Co. v. Countryman, 16 Ind. App. 139; Ferguson v. Hosier, 58 Ind. 438; Cline v. Lindsey, 110 Ind. 337, 342; Eddingfield v. State, 12 Ind. App. 312; Barnett v. State, 100 Ind. 171.

Kansas: State v. Dickson, 6 Kan. 309; State v. Potter, 15 Kan. 302; Kansas City, Ft. S. & G. Ry. Co. v. Lane, 33 Kan. 702; Smith v. Brown, 8 Kan. 608.

Maine: Philbrook v. Burgess, 52 Me. 271; Lime Rock Bank v. Hewett, 52 Me. 531; Cunningham v. Horton, 57 Me. 420; Rice v. Wallace, 30 Me. 252; Dunn v. Moody, 41 Me. 239; Staples v. Wellington, 58 Me. 453.

Maryland: Benson v. Atwood, 13 Md. 20; Planters' Bank v. Bank of Alexandria, 10 Gill & J. 346; Mayor & City Council of Baltimore v. Norman, 4 Md. 352; Keener v. Harrod, 2 Md. 63; Greenway v. Turner, 4 Md. 296; Inloes v. American Exch. Bank, 11 Md. 173.

Massachusetts: Com. v. Houle, 147 Mass. 380.

Michigan: Langworthy v. Green Tp., 95 Mich. 93; Bull v. Brockway, 48 Mich. 523; Comstock v. Smith, 20 Mich. 338; Brigham v. Gurney, 1 Mich. 349; Towle v. Ionia, Eaton & Barry Farmers' Mut. Fire Ins. Co., 91 Mich. 219.

Mississippi: Darcy v. Spivey, 57 Miss. 527.

Missouri: Houx v. Batteen, 68 Mo. 84; Mangold v. St. Louis, I. M. & S. R. Co., 24 Mo. App. 52; Vail v. Kansas City, C. & S. Ry. Co., 28 Mo. App. 372; State v. Stewart, 90 Mo. 507; Ball v. City of Independence, 41 Mo. App. 469; Harrington v. City of Sedalia, 98 Mo. 583; State v. Berkley, 109 Mo. 665; State v. Buchler, 103 Mo. 203; State v. O'Gorman, 68 Mo. 179.

issues, but in favor of the party complaining,[179] or requires the adverse party to prove more than he ought to be required to prove in order to make out his case[180] or defense,[181] or

Nebraska: City of Lincoln v. Gillilan, 18 Neb. 114; McCary v. Stull, 44 Neb. 175.

Nevada: State v. Little, 6 Nev. 281.

New Hampshire: March v. Portsmouth Concord R. Co., 19 N. H. 372; Fowler v. Tuttle, 24 N. H. 9.

North Carolina: State v. Alston, 113 N. C. 666; Ray v. Lipscomb, 48 N. C. 185; Cowles v. Hall, 90 N. C. 330; Reynolds v. Magness' Ex'rs, 24 N. C. 26; Lutz v. Yount, 61 N. C. 367.

Ohio: McClintock v. Chamberlin, Wright, 547.

Oregon: Moorhouse v. Donaca, 14 Or. 430.

Pennsylvania: McIlvaine v. McIlvaine, 6 Serg. & R. 559; Collins v. Rush, 7 Serg. & R. 147; Brown v. Caldwell, 10 Serg. & R. 114.

South Carolina: Oliver v. Sale, 17 S. C. 587.

Tennessee: Nashville & C. R. Co. v. Smith, 6 Heisk. 174; McNairy v. Thompson, 1 Sneed, 141.

Texas: Gulf, C. & S. F. Ry. Co. v. Duvall, 12 Tex. Civ. App. 348; Davis v. State, 6 Tex. App. 133; Loggins v. State, 32 Tex. Cr. App. 364; Powell v. State, 5 Tex. App. 234; Templeton v. State, 5 Tex. App. 398; Mercer v. Hall, 2 Tex. 284; Warren v. Smith, 24 Tex. 484; International Building & Loan Ass'n v. Fortassain (Tex. Civ. App.) 23 S. W. 496; Wright v. State, 41 Tex. 246; Barbee v. Hail, 31 Tex. 161; Cocker v. State, 31 Tex. 498.

Virginia: Proctor v. Spratley, 78 Va. 254.

[178] Ferguson v. Hosier, 58 Ind. 438; Greenway v. Turner, 4 Md. 296. "The party appealing cannot, in this court, object to a prayer that it assumes a fact which was admitted at the trial, and which admission was made for his benefit." Inloes v. American Exch. Bank, 11 Md. 173.

[179] Moorhouse v. Donaca, 14 Or. 430.

[180] Houx v. Batteen, 68 Mo. 84; Warren v. Smith, 24 Tex. 484; Baltimore & O. R. Co. v. Countryman, 16 Ind. App. 139; Gulf, C. & S. F. Ry. Co. v. Duvall, 12 Tex. Civ. App. 348; McClary v. Stull, 44 Neb. 175. Where the defense of contributory negligence is not presented by the pleadings, no injury can result to defendant by submitting to the jury the question whether plaintiff was guilty of negligence, as he gets the benefit of a defense which has not been set up. Kansas City, M. & B. R. Co. v. Crocker, 95 Ala. 412.

[181] Daggett v. Whiting, 35 Conn. 372; Harrington v. City of Sedalia, 98 Mo. 583.

improperly submits a question of law to the jury, which should have been decided against the party complaining,[182] or permits a conviction of a lesser offense than the evidence warrants,[183] or eliminates from the case a paragraph of the complaint, defendant appealing,[184] or expresses the opinion that the accused is not guilty of the crime charged,[185] the error is not such as will warrant a reversal. So, a refusal to charge which operates to the benefit of the party complaining is not ground for reversal.[186] Where a plaintiff proposes cor-

[182] Courtland v. Tarlton, 8 Ala. 532; Stanley v. Bank of Mobile, 23 Ala. 652; Millard's Adm'rs v. Hall, 24 Ala. 209; Taylor v. Kelly, 31 Ala. 59; Towle v. Ionia, Eaton & Barry Farmers' Mut. Fire Ins. Co., 91 Mich. 219. "If the court, after deciding a question of law against the plaintiff, refuses to instruct the jury, on his request, that they have nothing to do with the decision of that question, thereby impliedly admitting their right to revise its decision, the refusal of the charge gives the plaintiff an additional chance for a verdict, and is therefore no cause of reversal." Wyatt's Adm'r v. Steele, 26 Ala. 640.

[183] Powell v. State, 5 Tex. App. 234; Templeton v. State, 5 Tex. App. 398; McTyier v. State, 91 Ga. 254; State v. Alston, 113 N. C. 666. See State v. Berkley, 109 Mo. 665. If the instructions complained of relate to a degree of crime inferior to the offense charged in the indictment or information, and inferior to that of which the defendant is guilty, they will be deemed not to have prejudiced the defendant, whether erroneous or not. State v. Dickson, 6 Kan. 209; State v. Potter, 15 Kan. 302; State v. Buchler, 103 Mo. 203. A charge on the lesser offense of fornication is no ground for reversing a conviction of seduction. McTyier v. State, 91 Ga. 254.

[184] Bronnenburg v. Coburn, 110 Ind. 169.

[185] State v. Little, 6 Nev. 281.

[186] Werkheiser v. Werkheiser, 6 Watts & S. (Pa.) 184; Deal v. Bogue, 20 Pa. 228; State v. Parker, 13 Lea (Tenn.) 221; Missouri, K. & T. Ry. Co. v. Cook, 12 Tex. Civ. App. 203; Fort Worth & D. C. Ry. Co. v. Mackney, 83 Tex. 410; State v. Mitchell, 98 Mo. 657; Stennett v. Bradley, 70 Wis. 278. As, for instance, where an instruction given by the court is more favorable to the party complaining than the one refused. State v. Mitchell, 98 Mo. 657; Fort Worth & D. C. Ry. Co. v. Mackney, 83 Tex. 410. Thus, a refusal to instruct that plaintiff must establish his case by a preponderance of the evidence

rect instructions as to certain defenses, asserted by the defendant, but the court says they are not in the case, and refuses to give them, plaintiff is benefited, rather than harmed.[187] It cannot avail a defendant in a criminal case that the court erred in allowing the prosecuting attorney to withdraw a charge after the court has determined to give it, and has so indorsed on the request,[188] if the instruction is as favorable to the prosecution as the law admits of its being, and is correct in every respect.[188] The modification of a requested instruction is harmless error, where, as modified, it requires the other party, in order to sustain his case, to prove more than the instruction, as offered, required.[189] But error in giving confusing and misleading instructions is not cured by the fact that their general tenor is unduly favorable to the appellant.[190]

§ 390. Error cured by verdict.

If a verdict be conformable to the law and the evidence, it will not be set aside merely because the court refused to give instructions which might properly have been given.[191] The refusal of proper instructions is harmless error where the verdict must necessarily have been the same, whether the instructions asked were given or not,[192] and where any other

is harmless to defendant, where the court instructs that plaintiff must establish his case by a "fair" preponderance of the evidence. De St. Aubin v. Marshall Field & Co., 27 Colo. 414.

187 Stennett v. Bradley, 70 Wis. 278.

188 Bonner v. State, 107 Ala. 97.

189 State v. O'Gorman, 68 Mo. 179.

190 Chicago, B. & Q. R. Co. v. Anderson, 38 Neb. 112.

191 Breckenridge v. Anderson, 3 J. J. Marsh. (Ky.) 717; Thomas v. Tanner, 6 T. B. Mon. (Ky.) 61; Randall v. Parramore, 1 Fla. 409; Pritchard v. Myers, 11 Smedes & M. (Miss.) 42. A failure to construe the contract in suit is harmless where the jury properly construe it. Galveston, H. & S. A. Ry. Co. v. Johnson, 74 Tex. 256.

192 May v. Gamble, 14 Fla. 467; Robinson v. Hyer, 35 Fla. 544; Squire Dingee Co. v. McDonald, 61 Ill. App. 607; Avery v. Moore,

verdict would properly have been set aside;[193] where the jury find that the facts on which the instruction was based did not exist;[194] or where the jury find as asked by the instruction.[195]

133 Ill. 74; Musselman v. Pratt, 44 Ind. 126; Rice v. Rice, 6 Ind. 100; Cedar Falls & M. R. Co. v. Rich, 33 Iowa, 113; Olson v. Neal, 63 Iowa, 214; Wiggins v. McGimpsey, 13 Smedes & M. (Miss.) 532; Sullivan v. Jefferson Ave. Ry. Co., 133 Mo. 1; Ryan v. State Bank, 10 Neb. 524; Emerson, Talcott & Co. v. Skidmore, 7 Tex. Civ. App. 641; Douglass v. McAllister, 3 Cranch (U. S.) 298; Pence v. Langdon, 99 U. S. 578. Where defendant is found guilty only of fornication, a refusal to give a correct charge as to rape is harmless error. Jackson v. State, 91 Wis. 253. So, refusal to define murder is harmless when the defendant is convicted only of manslaughter. Parker v. State, 55 Miss. 414.

[193] Cedar Falls & M. R. Co. v. Rich, 33 Iowa, 113.

[194] Baker v. State, 58 Ark. 513; State v. Parish, 83 Ind. 223, 225; Mason v. Sieglitz, 22 Colo. 320; Kimble v. Seal, 92 Ind. 276, 285; National Life, Maturity Ins. Co. v. Whitacre, 15 Ind. App. 506; Chicago & E. I. R. Co. v. Hines, 33 Ill. App. 271, affirmed 132 Ill. 161; Martin v. Town of Algona, 40 Iowa, 390; Seekel v. Norman, 78 Iowa, 254; Clinton Nat. Bank v. Graves, 48 Iowa, 228; Hall v. Ballou, 58 Iowa, 585; Branner v. Stormont, 9 Kan. 51; Perkins v. Hitchcock, 49 Me. 468; Barrett v. City of Bangor, 70 Me. 335; Walker v. Brown, 66 Tex. 556; Anderson v. Thunder Bay River Boom Co., 57 Mich. 216; Gallaway v. Burr, 32 Mich. 332; Tainter v. Lombard, 54 Me. 554; Good v. Knox, 64 Vt. 97; Glass v. Ranwolf, 172 Pa. 655, 37 Wkly. Notes Cas. 428.

Illustrations of rule—Measure of damages.

The refusal of a request for an instruction on exemplary damages furnishes no ground of complaint, where the jury find only actual damages. Texas & P. Ry. Co. v. Watts (Tex.) 18 S. W. 312. So, where the verdict shows that the jury were not brought to a consideration of damages, the plaintiff is not prejudiced by the refusal to give an instruction on the measure of damages. Montgomery v. Willis, 45 Neb. 434; Porter v. Metcalf, 84 Tex. 468.

Advice of counsel as a defense.

Error committed in refusing a charge that advice of counsel would be no defense if the criminal prosecution was commenced by defendants to collect their debt is error without prejudice, where the jury, in answer to a special question, expressly find that the crim-

Where a verdict is clearly right according to the law and the evidence,[196] or is the only one which could have been

inal prosecution was not commenced for that purpose. Gallaway v. Burr, 32 Mich. 332.

Instruction based on nonexisting agreement.

Refusal to give an instruction based upon an oral agreement works no harm, where the jury find that no such agreement had been made. Hall v. Ballou, 58 Iowa, 585.

Effect of misrepresentations.

Where the jury specially find that, at the time of an application for a life insurance policy, the applicant was in good health, and had never had certain diseases inquired about by the examining physician, a refusal to instruct that, if the applicant had such diseases, contrary to representations made by him, he could not recover, is harmless. National Life, Maturity Ins. Co. v. Whitacre, 15 Ind. App. 506.

[195] White v. Chaffin, 32 Ark. 59; Conrady v. Bywaters (Tex. Civ. App.) 24 S. W. 961; Munderbach v. Lutz's Adm'r, 14 Serg. & R. (Pa.) 220; Woodward v. Begue, 53 Ind. 176. See, also, Johnson v. State (Tex. Cr. App.) 35 S. W. 387.

[196] Alabama: Glass v. Memphis & C. R. Co., 94 Ala. 581.

Colorado: Buckey v. Phenicie, 4 Colo. App. 204; Northern Colorado Irrigation Co. v. Richards, 22 Colo. 450.

Florida: Southern Exp. Co. v. Van Meter, 17 Fla. 783; Prescott v. Johnson, 8 Fla. 391.

Georgia: Johnson v. State, 14 Ga. 55; McQueen v. Fletcher, 77 Ga. 445; McCurdy v. Binion, 80 Ga. 691; Fry v. State, 81 Ga. 646; Clay v. Barlow, 73 Ga. 788; Myric v. Hicks, 15 Ga. 155.

Illinois: Parker v. Fisher, 39 Ill. 164; New England Fire & Marine Ins. Co. v. Wetmore, 32 Ill. 221; Dishon v. Schorr, 19 Ill. 59; Newkirk v. Cone, 18 Ill. 449; Elam v. Badger, 23 Ill. 498; Needham v. People, 98 Ill. 275; Squire Dingee Co. v. McDonald, 61 Ill. App. 607; Gray v. Knittle, 56 Ill. App. 302; Ennis v. Pullman's Palace Car Co., 60 Ill. App. 398; East St. Louis Connecting Ry. Co. v. O'Hara, 150 Ill. 580.

Indiana: Musselman v. Pratt, 44 Ind. 126; Poland v. Miller, 95 Ind. 387, 391; Worley v. Moore, 97 Ind. 15; Wilds v. Bogan, 57 Ind. 453; Lafayette & I. R. Co. v. Adams, 26 Ind. 76; Veatch v. State, 60 Ind. 291; Amick v. O'Hara, 6 Blackf. (Ind.) 258; Muirhead v. Snyder, 4 Ind. 486; Rogers v. Maxwell, 4 Ind. 243; Short v. Scott, 6 Ind. 430; Chicago, St. L. & P. R. Co. v. Butler, 10 Ind. App. 244;

found consistent with the evidence,[197] or where an improper instruction could not have influenced the verdict,[198] or where

City of Logansport v. Dunn, 8 Ind. 378; Sherry v. Reynolds, 3 Ind. 201.

Iowa: Bondurant v. Crawford, 22 Iowa, 40; Tuck v. Singer Mfg. Co., 67 Iowa, 576; Dunham v. Dennis, 9 Iowa, 543; Gwinn v. Crawford, 42 Iowa, 63; Hall v. Stewart, 58 Iowa, 681; McGregor v. Armill, 2 Iowa, 30; State v. Hall, 97 Iowa, 400.

Kansas: Head v. Dyson, 31 Kan. 74; Rouse v. Harry, 55 Kan. 589; Atchison, T. & S. F. R. Co. v. Huitt, 1 Kan. App. 781.

Louisiana: Keene v. Lizardi, 8 La. 32.

Maine: Webber v. Read, 65 Me. 564.

Michigan: Kramer v. Gustin, 53 Mich. 291; Marcott v. Marquette, H. & O. R. Co., 49 Mich. 99; Saginaw Union St. Ry. v. Michigan Cent. R. Co., 91 Mich. 657; Morse v. Byam, 55 Mich. 594; Case v. Dewey, 55 Mich. 116; Niagara Fire Ins. Co. v. De Graff, 12 Mich. 124; Clark v. McGraw, 14 Mich. 139; Cook v. Canny, 96 Mich. 398; Finan v. Babcock, 58 Mich. 301.

Minnesota: Dunlap v. May, 42 Minn. 309.

Mississippi: Wilson v. Kohlheim, 46 Miss. 346; Mask v. State, 7 George, 77; Thomas v. State, 61 Miss. 60; Wiggins v. McGimpsey, 13 Smedes & M. 532; Head v. State, 44 Miss. 731; Evan v. State, 44 Miss. 762; Hanks v. Neal, 44 Miss. 212; Memphis & C. R. Co. v. Whitfield, 44 Miss. 466; Hill v. Calvin, 4 How. 231; Josephine v. State, 10 George, 613; Holloway v. Armstrong, 1 George, 504.

Missouri: Otto v. Bent, 48 Mo. 23; Doud v. Reid, 53 Mo. App. 553; Long v. Bolen Coal Co., 56 Mo. App. 605; Vogg v. Missouri Pac. Ry. Co., 138 Mo. 172.

Montana: Neill v. Jordan, 15 Mont. 47; Hogan v. Shuart, 11 Mont. 498.

Nebraska: Meredith v. Kennard, 1 Neb. 312; Lamb v. Hotchkiss, 14 Neb. 102; O'Hara v. Wells, 14 Neb. 403; Stratton v. Dole, 45 Neb. 472.

North Carolina: Cole v. Cole, 23 N. C. 460.

Ohio: Creed v. Commercial Bank of Cincinnati, 11 Ohio, 489.

Pennsylvania: Deford v. Reynolds, 36 Pa. 325; Eldred v. Hazlett's Adm'r, 38 Pa. 16.

South Carolina: State v. Slack, 1 Bailey, 330.

Texas: B. C. Evans Co. v. Reeves, 6 Tex. Civ. App. 254; Galveston, H. & S. A. Ry. Co. v. Chittim (Tex. Civ. App.) 28 S. W. 700; Clarkson v. Whitaker, 12 Tex. Civ. App. 483; City of Galveston v.

the verdict affirmatively shows that the jury were not misled by, or did not follow, the erroneous instruction,[199] the giving of erroneous instructions is harmless error, and not a ground for reversal.[200] Thus, no prejudice results from

Morton, 58 Tex. 409; Galveston, H. & S. A. Ry. Co. v. Johnson, 74 Tex. 256.

Vermont: Sanborn v. Cole, 63 Vt. 600.

Virginia: Binns v. Waddill, 32 Grat. 588.

Washington: Davis v. Gilliam, 14 Wash. 206; Secor v. Oregon Imp. Co., 15 Wash. 35.

West Virginia: Bank of Huntington v. Napier, 41 W. Va. 481.

Wisconsin: Pireaux v. Simon, 79 Wis. 392.

England: Wickes v. Clutterbuck, 2 Bing. 483.

[197] Fitzgerald v. Barker, 96 Mo. 661; Greer v. Lafayette Co. Bank, 128 Mo. 560; Bushey v. Glenn, 107 Mo. 331; Western Union Tel. Co. v. Lowrey, 32 Neb. 732; Knowlton v. Mandeville, 20 Neb. 59; Stratton v. Dole, 45 Neb. 472. See, also, ante, § 389, "Error Harmless in View of Evidence."

[198] Avery v. Moore, 133 Ill. 74; Whitewater R. Co. v. Bridgett, 94 Ind. 216; Lathrop v. Central Iowa Ry. Co., 69 Iowa, 105; Fort Scott, W. & W. Ry. Co. v. Jones, 48 Kan. 51; Josephine v. State, 10 George (Miss.) 613; Houston, E. & W. T. Ry. Co. v. Hardy, 61 Tex. 230; Loustaunau v. Lambert, 1 Tex. Civ. App. 434; Bender v. Peyton, 4 Tex. Civ. App. 57.

[199] Keegan v. Kinnare, 123 Ill. 280; State v. Daugherty, 106 Mo. 182; Brockway v. Patterson, 72 Mich. 122; Woodman v. Davis, 32 Kan. 344; Kirby v. Wilson, 98 Ill. 240.

[200] *In equity causes.*

Misleading or erroneous instructions in an equitable cause constitute no ground for reversal, where the finding of the jury is adopted by the court as in accordance with the evidence. Brandon v. Dawson, 63 Mo. App. 359. See, also, Richardson v. City of Eureka, 110 Cal. 441; Gray v. Troutman, 158 Ill. 171.

Burden of proof.

Where plaintiff, on trial of a traverse to the ground of an attachment, successfully carried the burden of proof, a charge that the burden was on defendant was harmless. Moore v. Brewer, 94 Ga. 260.

Error as to distinct issue.

Where the verdict finds all the issues in favor of the successful party, if the issues are such that a finding of either of them in his

the giving of an erroneous instruction, where the jury find against the hypothesis on which it is predicated,[201] for in

favor entitles him to the judgment rendered, the judgment will not be reversed for error in the instructions of the court relating exclusively to the other. Sites v. Haverstick, 23 Ohio St. 626. "Where part of the defendants pleaded limitation to the several tracts claimed by them and the verdict is general and evidently upon the issue attacking the title of plaintiffs, errors in the charge upon the subject of limitation would be immaterial." Parker v. Chancellor, 78 Tex. 524.

[201] California: People v. Wallace, 101 Cal. 281.

Illinois: Pennsylvania Coal Co. v. Kelly, 156 Ill. 9.

Indiana: Ryan v. Begein, 79 Ind. 356; Louisville & N. R. Co. v. Orr, 84 Ind. 50; Ronan v. Meyer, 84 Ind. 390, 394.

Iowa: National Horse Importing Co. v. Novak, 95 Iowa, 596; White v. Byam, 96 Iowa, 166.

Kansas: McIntosh v. Crawford County Com'rs, 13 Kan. 171; Wilkes v. Wolback, 30 Kan. 375; Edwards v. Porter, 28 Kan. 700.

Michigan: English v. Caldwell, 30 Mich. 362; Guerold v. Holtz, 103 Mich. 118. See, also, White v. Campbell, 25 Mich. 463.

Missouri: Schaefer v. St. Louis & S. Ry. Co., 128 Mo. 64.

Nebraska: Olsen v. Meyer, 46 Neb. 240.

Ohio: Loudenback v. Collins, 4 Ohio St. 251.

South Carolina: Mobley v. Charlotte, C. & A. R. Co., 42 S. C. 306; Devereux v. Champion Cotton Press Co., 17 S. C. 72.

Texas: Vickers v. Kennedy (Tex. Civ. App.) 34 S. W. 458; Goodbar v. City Nat. Bank, 78 Tex. 461.

Vermont: Sanborn v. Cole, 63 Vt. 590.

Wisconsin: Palmer v. Banfield, 86 Wis. 441; Atkinson v. Goodrich Transp. Co. (Wis.) 31 N. W. 164.

United States: Sunset Telephone & Telegraph Co. v. Day (C. C. A.) 70 Fed. 364.

Measure of damages.

Where the jury find against a recovery, error in the instructions on the measure of damages is harmless. Wilkes v. Wolback, 30 Kan. 375; Loudenback v. Collins, 4 Ohio St. 251; Olsen v. Meyer, 46 Neb. 240; McIntosh v. Crawford Co. Com'rs, 13 Kan. 171; White v. Byam, 96 Iowa, 166; Mobley v. Charlotte, C. & A. R. Co., 42 S. C. 306; Devereux v. Champion Cotton Press Co., 17 S. C. 72; National Horse Importing Co. v. Novak, 95 Iowa, 596.

Overpayments.

An instruction not to allow defendant anything overpaid by him

that case the instruction is rendered immaterial, as it could not have affected the verdict or changed the result.[202] So,

is harmless error where the jury find that there was nothing overpaid. Ryan v. Begein, 79 Ind. 356.

Alteration of written instruments.

In an action on a note, the main issue being as to alteration of the date of the note, an erroneous instruction as to the effect of an alteration by a third person will not work a reversal if the jury find that the note was not altered by any one. Vickers v. Kennedy (Tex. Civ. App.) 34 S. W. 458.

Comparative negligence.

Where the jury specially find, in an action for personal injuries, that plaintiff was wholly free from negligence, the submission to the jury of the exploded doctrine of comparative negligence can work no harm. Pennsylvania Coal Co. v. Kelly, 156 Ill. 9, affirming 54 Ill. App. 622.

Usury.

Where the jury find the contract of defendants to be joint, a charge that the jury might find against one, even if a misdirection, was immaterial, as it cannot influence the verdict. Devereux v. Champion Cotton Press Co., 17 S. C. 72.

Exemplary damages.

Where the court erroneously charges that exemplary damages may be given, but the jury do not award exemplary damages, the error is harmless. Kuchenmeister v. O'Connor, 11 Wkly. Law Bul. (Ohio) 120; Freiberg v. Elliott (Tex.) 8 S. W. 322; Taylor, B. & H. Ry. Co. v. Taylor, 79 Tex. 104; Patchell v. Jaqua, 6 Ind. App. 70, 79; Durfee v. Newkirk, 83 Mich. 522.

Treble damages.

The fact that a jury awards a sum under the name of "single damages" does not show that no harm has resulted from an instruction erroneously telling the jury that it is within their power to give treble damages. Jurors may have yielded their claim that the damages should be triple, in consideration of a large sum being awarded as single damages. McLeod v. Ellis, 2 Wash. 117.

[202] Webber v. Read, 65 Me. 564. Where the defendant is convicted of the lower degree of an offense, error in the charge as to the higher offense is harmless, and not ground for reversal. Wickham v. State, 7 Cold. (Tenn.) 525; Rutledge v. State (Tex. Cr. App.) 33 S. W. 347; Blackwell v. State, 33 Tex. Cr. App. 278; State v. Gates, 130 Mo. 351. So, error in the charge as to a lower degree of the

error in leaving a question of law to the jury is harmless, where the jury decide it correctly.[203] Special findings of the jury may frequently show that they were not misled by the giving of an erroneous instruction.[204] It is only where,

offense than that of which defendant is convicted is harmless. State v. Dickson, 6 Kan. 209. Where defendant is convicted under only one count of the indictment, errors in the instructions as to the other counts is harmless. Tigerina v. State, 35 Tex. Cr. App. 302. So, failure to charge as to another offense contained in a different count is not reversible error. Ray v. State, 3 Heisk. (Tenn.) 379, note; Parham v. State, 10 Lea (Tenn.) 502. Error in instructing that the jury may assess a fine at a greater amount than authorized by law is harmless, where they assess the fine at a less amount than authorized by law. Dudney v. State, 22 Ark. 251. Error as to the measure of damages is immaterial where the verdict is for the defendant. Manning v. Union Transfer Co., 7 Mackey, D. C. 214; Sunman v. Clark, 120 Ind. 142. See Porter v. Metcalf, 84 Tex. 468. So, authorizing a verdict for a greater sum than is actually due is harmless, where the verdict is only for the sum actually due, or the plaintiff remits the excess. Saunders v. Flaniken, 77 Tex. 662. See, also, Blaisdell v. Scally, 84 Mich. 149. Errors in the charge relating only to the right of recovery, and not affecting the measure of damages, are harmless to the plaintiff, where the verdict is in his favor. Lasure v. Graniteville Mfg. Co., 18 S. C. 280.

[203] Thornburgh v. Mastin, 93 N. C. 258; Allen v. Duffie, 43 Mich. 1; Moore v. Parker, 91 N. C. 276; Miller v. Eagle Life & Health Ins. Co., 2 E. D. Smith (N. Y.) 268; Cumpston v. McNair, 1 Wend. (N. Y.) 457; Hall v. Suydam, 6 Barb. (N. Y.) 83; Webb v. Portland & K. R. Co., 57 Me. 117; Woodman v. Chesley, 39 Me. 45; Osgood v. Lansil, 33 Me. 360; Pike v. Warren, 15 Me. 390. See, also, Carson v. McCormick Harvesting Mach. Co., 36 Mo. App. 462; Galveston, H. & S. A. Ry. Co. v. Johnson, 74 Tex. 256.

Leaving construction of written instrument to jury.

The error of leaving the effect of a written instrument to be determined by the jury will not warrant reversal if a proper construction of the instrument, in the light of the other facts determined by the verdict, must lead to the same result. Stadden v. Hazzard, 34 Mich. 76; Roberts v. Alexander, 5 Lea (Tenn.) 414.

[204] Bigelow v. Wygal, 52 Kan. 619; Atchison, T. & S. F. R. Co. v. English, 38 Kan. 110; Davis v. Guarnieri, 45 Ohio St. 470; Chicago, K. & W. R. Co. v. Parsons, 51 Kan. 408; Luke v. Johnnycake, 9 Kan.

from the whole case, the jury might have rendered a different verdict, that the giving of improper instructions will be held reversible error.[205]

§ 391. Error cured by other instructions or construction as a whole.

In determining whether or not instructions are erroneous, and, if erroneous, whether or not the error was prejudicial or harmless, all the instructions given must be viewed and construed as a whole.[206] If, when so construed, the instruc-

511; Uhl v. Harvey, 78 Ind. 26, 41; Moore v. Lynn, 79 Ind. 299; Worley v. Moore, 97 Ind. 15, 21; Ricketts v. Harvey, 106 Ind. 564; Woolery v. Louisville, N. A. & C. Ry. Co., 107 Ind. 381; Porter v. Waltz, 108 Ind. 40, 45; Cline v. Lindsey, 110 Ind. 337, 348; Dickey v. Shirk, 128 Ind. 278, 287; Montgomery v. Swindler, 32 Ohio St. 224. Thus, where the jury find, in answer to interrogatories in an action for personal injuries, that plaintiff was not negligent, error in submitting the doctrine of comparative negligence, or in telling the jury that, although negligent, plaintiff may recover because of the willfulness of defendant, can do no harm. Louisville, N. A. & C. Ry. Co. v. Wright, 115 Ind. 378. Where the jury return a special verdict, error in the instructions as to the general rules of law applicable to the case is not ground for reversal. Ward v. Cochran, 18 C. C. A. 1, 71 Fed. 127.

[205] Musselman v. Pratt, 44 Ind. 126.

[206] Alabama: Alabama G. S. R. Co. v. Hill, 93 Ala. 514, 9 So. 722.

Arizona: United States v. Tenney, 11 Pac. 472; United States v. Christofferson, 11 Pac. 480.

California: Monaghan v. Pacific Rolling Mill Co., 81 Cal. 190; Ellis v. Tone, 58 Cal. 289, 297; People v. Kennedy, 55 Cal. 201; People v. Raten, 63 Cal. 421, 424; Dwinelle v. Henriquez, 1 Cal. 387; People v. Bagnell, 31 Cal. 409.

Colorado: McClelland v. Burns, 5 Colo. 390; Thatcher v. Rockwell, 4 Colo. 375, affirmed Dozenback v. Raymer, 13 Colo. 455.

Connecticut: Smith v. King, 62 Conn. 523; Collins v. Richmond Stove Co., 63 Conn. 361.

Georgia: Terry v. Buffington, 11 Ga. 337; Flemister v. State, 81 Ga. 768.

Illinois: Twining v. Martin, 65 Ill. 157; Meyer v. Mead, 83 Ill. 19; Cowen v. People, 14 Ill. 348.

tions are fair and correct as a whole, and justice has been done, it is immaterial that a part or one or more of the instructions, considered separately, are erroneous. In such

Indiana: Wright v. Fanoler, 90 Ind. 492, 494; Nicoles v. Calvert, 96 Ind. 316, 318; Coble v. Eltzroth, 125 Ind. 429, 430; Craig v. Frazier, 127 Ind. 286, 287; Anderson v. Anderson, 128 Ind. 254, 258; McDermott v. State, 89 Ind. 187, 193; Barnett v. State, 100 Ind. 171, 176; Elkhart Mutual Aid Benevolent Relief Ass'n v. Houghton, 103 Ind. 286, 290; Boyle v. State, 105 Ind. 469, 476; Epps v. State, 102 Ind. 539; Heyl v. State, 109 Ind. 589, 593; Clanin v. Fagan, 124 Ind. 304; Story v. State, 99 Ind. 413, 414; Rauck v. State, 110 Ind. 384, 390; Cowger v. Land, 112 Ind. 263; Board Com'rs Jackson Co. v. Nichols, 139 Ind. 611; Newport v. State, 140 Ind. 299; Lehman v. Hawks, 121 Ind. 541; White v. Beem, 80 Ind. 239, 242; Branstetter v. Dorrough, 81 Ind. 527, 529; Louisville & N. Ry. Co. v. Kelly, 92 Ind. 371, 375; Pennsylvania Co. v. Rusie, 95 Ind. 236, 237; Cook v. Woodruff, 97 Ind. 134, 140; Whitesides v. Hunt, 97 Ind. 191, 204; Louisville, N. A. & C. Ry. Co. v. Shanklin, 98 Ind. 573, 576; Walker v. State, 102 Ind. 502, 510; Robinson v. Shanks, 118 Ind. 125, 134; Conway v. Vizzard, 122 Ind. 266, 268.

Iowa: Carter v. Town of Monticello, 68 Iowa, 178; Albertson v. Keokuk & D. M. R. Co., 48 Iowa, 292; Burrows v. Lehndorff, 8 Iowa, 96, 104; Brown v. Bridges, 31 Iowa, 138; State v. Maloy, 44 Iowa, 104; Locke v. Sioux City & P. R. Co., 46 Iowa, 109, 114; State v. Stanley, 48 Iowa, 221; State v. Golden, 49 Iowa, 48; Beazan v. Town of Mason City, 58 Iowa, 233; Gronan v. Kukkuck, 59 Iowa, 18; State v. Shreves, 81 Iowa, 615; Fish v. Chicago, R. I. & P. R. Co., 81 Iowa, 280; Martin v. Murphy, 85 Iowa, 669; Roberts v. Morrison, 75 Iowa, 321; Kohn v. Johnston, 97 Iowa, 99.

Kansas: City of Wyandotte v. White, 13 Kan. 191.

Michigan: Russell v. Phelps, 42 Mich. 378; Welch v. Ware, 32 Mich. 77; Burdick v. Michael, 32 Mich. 246; Anderson v. Walter, 34 Mich. 113; Hart v. Newton, 48 Mich. 401; Coots v. Chamberlain, 39 Mich. 565; Eggleston v. Boardman, 37 Mich. 14; Brown v. McCord & Bradfield Furniture Co., 65 Mich. 360, 32 N. W. 441; Kirchner v. Detroit City R. R., 91 Mich. 400; Souvais v. Leavitt, 50 Mich. 108; McGinnis v. Kempsey, 27 Mich. 363; Daniels v. Clegg, 28 Mich. 32; Greenlee v. Lowing, 35 Mich. 64; People v. Finley, 38 Mich. 482; Lake Superior Iron Co. v. Erickson, 39 Mich. 492; Wheeler & Wilson Mfg. Co. v. Walker, 41 Mich. 239; Driscoll v. People, 47 Mich. 413; People v. Howard, 50 Mich. 239; Kuney v. Dutcher, 56 Mich.

case, the error is harmless, and not ground for reversal.[207] This rule is, of course, always subject to the qualification

308; Watson v. Watson, 58 Mich. 507; Brown v. McCord & Bradfield Furniture Co., 65 Mich. 360.

Missouri: Noble v. Blount, 77 Mo. 235.

Montana: Territory v. Hart, 7 Mont. 489.

Nebraska: St. Louis v. State, 8 Neb. 406; Murphy v. State, 15 Neb. 383; Debney v. State, 45 Neb. 856, 64 N. W. 446; Ford v. State, 46 Neb. 390, 64 N. W. 1082; Gray v. Farmer, 19 Neb. 69; Campbell v. Holland, 22 Neb. 587; Stein v. Vannice, 44 Neb. 132.

New Jersey: Sullivan v. North Hudson Co. R. Co., 51 N. J. Law, 518.

Ohio: Cleveland, C. & C. R. Co. v. Terry, 8 Ohio St. 570.

Oregon: State v. Anderson, 10 Or. 448.

Pennsylvania: Irvin v. Kutruff, 152 Pa. 609; Pennsylvania R. Co. v. Coon, 111 Pa. 430; Carothers v. Dunning, 3 Serg. & R. 373; Little Schuylkill Navigation, Railroad & Coal Co. v. French, 2 Wkly. Notes Cas. 718; Sharer v. Dobbins, 195 Pa. 82.

South Carolina: Hume, Small & Co. v. Insurance Co., 23 S. C. 204; Carolina, Cumberland Gap & C. Ry. Co. v. Seigler, 24 S. C. 132; Jordan v. Lang, 22 S. C. 164; Bauskett v. Keitt, 22 S. C. 191; State v. Martin, 47 S. C. 67; State v. Boyd, 35 S. C. 269.

Tennessee: State v. Cagle, 2 Humph. 414.

Texas: Texas & P. Ry. Co. v. Neill (Tex. Civ. App.) 30 S. W. 369; Gatlin v. State, 5 Tex. App. 531; Moore v. Moore, 73 Tex. 382; Thrasher v. State, 3 Tex. App. 281; St. Louis & S. F. Ry. Co. v. McClain, 80 Tex. 85; Moore v. Moore (Tex.) 11 S. W. 396; Morgan v. Giddings (Tex.) 1 S. W. 369; San Antonio & A. P. Ry. Co. v. Corley (Tex. Civ. App.) 26 S. W. 903; Decatur Cotton Seed Oil Mill Co. v. Johnson (Tex. Civ. App.) 35 S. W. 951; Kauffman v. Babcock, 67 Tex. 241; Brackett v. Hinsdale, 2 Posey, Unrep. Cas. 468; Freiberg v. Johnson, 71 Tex. 558; Rost v. Missouri Pac. Ry. Co., 76 Tex. 168; Baker v. Ashe, 80 Tex. 356; Jobe v. Houston (Tex. Civ. App.) 23 S. W. 408; Johns v. Brown, 1 White & W. Civ. Cas. Ct. App. § 1017; Numsen v. Ellis, 3 Willson, Civ. Cas. Ct. App. § 135.

Washington Territory: City of Seattle v. Buzby, 2 Wash. T. 25; Brown v. Forest, 1 Wash. T. 201.

Wisconsin: Tuckwood v. Hanthorn, 67 Wis. 326.

United States: Magniac v. Thompson, 7 Pet. 348; Empire Spring Co. v. Edgar, 99 U. S. 645; Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978; Butler v. Machen, 13 C. C. A. 197, 65 Fed.

that the jury must not have been misled by the alleged error to the prejudice of the party complaining, and in most cases

901; Northern Pac. R. Co. v. Poirier (C. C. A.) 67 Fed. 881. See, also, § 385, "Construction as a Whole."

[207] Alabama: Southern Ry. Co. v. Lynn, 29 So. 573; Montgomery & E. Ry. Co. v. Stewart, 91 Ala. 421.

Arkansas: Hurley v. State, 29 Ark. 17.

California: People v. Emerson, 130 Cal. 562; Ballou v. Andrews Banking Co., 128 Cal. 562, 61 Pac. 102; Murray v. White, 82 Cal. 119; People v. Lee Chuck, 78 Cal. 317, 20 Pac. 719; People v. Anderson, 105 Cal. 32, 38 Pac. 513.

Colorado: Dozenback v. Raymer, 13 Colo. 451, 22 Pac. 787; Simonton v. Rohm, 14 Colo. 51; Hurd v. Atkins, 1 Colo. App. 449; Coleman v. Davis, 13 Colo. 98.

Florida: Kennard v. State, 28 So. 858.

Georgia: Webb v. Wight & Weslosky Co., 112 Ga. 432; Lukens v. Ford, 87 Ga. 541, 13 S. E. 949; Georgia R. Co. v. Thomas, 73 Ga. 350; Nixon v. State, 75 Ga. 862; Hart v. Thomas, 75 Ga. 529; Central R. Co. v. Mitchell, 63 Ga. 173; Central Railroad & Banking Co. v. Nash, 81 Ga. 581; Mousseau v. Dorsett, 80 Ga. 566; City & Suburban Ry. v. Findley, 76 Ga. 317; Central R. R. v. De Bray, 71 Ga. 408; State v. Southwestern R. R., 70 Ga. 13; Terry v. Buffington, 11 Ga. 337; Flemister v. State, 81 Ga. 768; Phillips v. Ocmulgee Mills, 55 Ga. 633.

Idaho: Territory v. Evans, 2 Idaho, 391.

Illinois: Johnston v. Hirschberg, 85 Ill. App. 47; Chicago & W. I. R. Co. v. Doan, 93 Ill. App. 247; Howard v. People, 185 Ill. 552, 57 N. E. 441; Fessenden v. Doane, 188 Ill. 228, 58 N. E. 974; Toledo, W. & W. Ry. Co. v. Ingraham, 77 Ill. 309; Ritzman v. People, 110 Ill. 363; City of Peoria v. Simpson, 110 Ill. 294; Van Buskirk v. Day, 32 Ill. 260; Morgan v. Peet, 32 Ill. 281; Durham v. Goodwin, 54 Ill. 469; Walker v. Collier, 37 Ill. 362; Yundt v. Hartrunft, 41 Ill. 9; Town of Vinegar Hill v. Busson, 42 Ill. 45; Murphy v. People, 37 Ill. 447; Kennedy v. People, 40 Ill. 488; Howard Fire & Marine Ins. Co. v. Cornick, 24 Ill. 455; Warren v. Dickson, 27 Ill. 115; Springdale Cemetery Ass'n v. Smith, 24 Ill. 480; Lawrence v. Hagerman, 56 Ill. 68; City of Aurora v. Gillett, 56 Ill. 132; Chicago, B. & Q. R. Co. v. Dunn, 61 Ill. 385; Illinois Cent. R. Co. v. Maffit, 67 Ill. 431; Kendall v. Brown, 86 Ill. 387; Terre Haute & I. R. Co. v. Eggmann, 159 Ill. 550, 42 N. E. 970; Williams v. John Davis Co., 54 Ill. App. 198; Smith v. Binder, 75 Ill. 492; Hiner v. Jeanpert, 65 Ill. 428; Gilchrist v. Gilchrist, 76 Ill. 281; Lawrence v. Jarvis, 32 Ill. 304.

Indiana: Lemmon v. Moore, 94 Ind. 40, 43; Citizens' St. Ry. Co.

the rule is stated with this qualification.[208] In determining this point, the rule as to the presumption of prejudice is

v. Mere, 26 Ind. App. 284; Wabash & W. Ry. Co. v. Morgan, 132 Ind. 430; Boyle v. State, 105 Ind. 469, 476; McDermott v. State, 89 Ind. 187; Eggleston v. Castle, 42 Ind. 531; McCaughey v. State, 156 Ind. 41; Cowger v. Land, 112 Ind. 263, 267; Craig v. Frazier, 127 Ind. 286, 287; Boyle v. State, 105 Ind. 469; Branstetter v. Dorrough, 81 Ind. 527, 529; Conrad v. Kinzie, 105 Ind. 281, 286; Indiana, B. & W. Ry. Co. v. Cook, 102 Ind. 133, 138; Atkinson v. Dailey, 107 Ind. 117, 118; Kennedy v. State, 107 Ind. 144, 149; Beugnot v. State, 11 Ind. App. 620; Louisville, N. A. & C. Ry. Co. v. White, 94 Ind. 257, 260; Stout v. State, 96 Ind. 407, 410; Louisville, N. A. & C. Ry. Co. v. Jones, 108 Ind. 551, 567; Rauck v. State, 110 Ind. 384, 390; Deig v. Morehead, 110 Ind. 451, 461; Louisville, N. A. & C. Ry. Co. v. Wright, 115 Ind. 378, 396; Patchell v. Jaqua, 6 Ind. App. 70, 77; Colee v. State, 75 Ind. 511, 515; Lytton v. Baird, 95 Ind. 349, 355; Elkhart Mutual Aid, Benevolent & Relief Ass'n v. Houghton, 103 Ind. 286, 290; Goodwin v. State, 96 Ind. 550; Story v. State, 99 Ind. 413, 414; Gallaher v. State, 101 Ind. 411, 412; Rhodes v. State, 128 Ind. 189, 194; Roots v. Beck, 109 Ind. 472; Louisville, N. A. & C. Ry. Co. v. Wright, 115 Ind. 378; White v. New York, C. & St. L. R. Co., 142 Ind. 648, 42 N. E. 456; Lofland v. Gohen, 16 Ind. App. 67; Sawyer v. State, 35 Ind. 80, 81; Toler v. Keiher, 81 Ind. 383, 389; Cassady v. Magher, 85 Ind. 228, 230; Ryman v. Crawford, 86 Ind. 262, 269; Cooper v. Robertson, 87 Ind. 222, 225; Norris v. Casel, 90 Ind. 143, 147; Ledford v. Ledford, 95 Ind. 283, 286; Daniels v. McGinnis, 97 Ind. 549, 553; Sanders v. Weelburg, 107 Ind. 266, 276; State v. Ruhlman, 111 Ind. 17, 22; State v. Caldwell, 115 Ind. 614; Simmon v. Larkin, 82 Ind. 385, 387; Wales v. Miner, 89 Ind. 118, 128; Norris v. Casel, 90 Ind. 143, 147; Mand v. Trail, 92 Ind. 521, 525; Newcomer v. Hutchings, 96 Ind. 119, 123; Stockwell v. Brant, 97 Ind. 474, 477; Standard Oil Co. v. Bretz, 98 Ind. 231, 236; Perry v. Makemson, 103 Ind. 300, 302; Winchester Wagon Works & Manufacturing Co. v. Carman, 109 Ind. 31, 35; State v. Ruhlman, 111 Ind. 17, 22; Stevens v. Stevens, 127 Ind. 560, 565; Woods v. Board of Com'rs of Tipton Co., 128 Ind.

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[208] Krulder v. Woolveton, 9 Misc. Rep. 359, 29 N. Y. Supp. 696; State v. Brennan, 2 S. D. 384; Louisville & N. R. Co. v. Orr, 94 Ala. 602; Rand v. C. R. Johns & Sons (Tex. App.) 15 S. W. 200; Coble v. Eltzroth, 125 Ind. 429, 25 N. E. 544; Patrick Red Sandstone Co. v. Skoman, 1 Colo. App. 323; State v. Rosener, 8 Wash. 42, 35 Pac. 357; North Chicago St. R. Co. v. Boyd, 156 Ill. 416; Ferris v.

applicable, though, of course, where the whole charge, reasonably construed, has no tendency to mislead, and it does not

289, 292; Haxton v. McClaren, 132 Ind. 235, 247; Louisville, N. A. & C. Ry. Co. v. Nicholai, 4 Ind. App. 119, 127.

Iowa: Hamilton v. State Bank, 22 Iowa, 306; Dixon v. Stewart, 33 Iowa, 125; State v. Pierce, 65 Iowa, 85; Green v. Cochran, 43 Iowa, 544; State v. McClintic, 73 Iowa, 663; Osborne v. Simmerson, 73 Iowa, 509; Knapp v. Sioux City & P. R. Co., 71 Iowa, 41; Riegelmarr v. Todd, 77 Iowa, 696; Albertson v. Keokuk & D. M. R. Co., 48 Iowa, 292; Harrison v. Snair, 76 Iowa, 558; State v. Pugsley, 75 Iowa, 743; State v. Murdy, 81 Iowa, 603; Jamison v. Weaver, 81 Iowa, 212; Helt v. Smith, 74 Iowa, 667.

Kansas: State v. Dickson, 6 Kan. 209; State v. Yarborough, 39 Kan. 588; Caln v. Wallace, 46 Kan. 139; Hays v. Farwell, 53 Kan. 78; Central Branch U. P. R. Co. v. Andrews, 41 Kan. 370, 21 Pac. 272.

Kentucky: Rucker v. Hamilton, 3 Dana, 43.

Louisiana: State v. Hannibal, 37 La. Ann. 619; State v. Ferguson, 37 La. Ann. 51.

Maryland: Gill v. Staylor, 49 Atl. 650.

Michigan: McGinnis v. Kempsey, 27 Mich. 363; Dibble v. Nash, 47 Mich. 589; Frankel v. Coots, 41 Mich. 75; Pray v. Cadwell, 50 Mich. 222; Greenlee v. Lowing, 35 Mich. 64; Driscoll v. People, 47 Mich. 413; Cleveland v. Miller, 94 Mich. 97, 53 N. W. 961.

Minnesota: Spencer v. Tozer, 15 Minn. 146 (Gil. 112).

Mississippi: Hawthorne v. State, 58 Miss. 778; Mask v. State, 7 George, 77; Evans v. State, 44 Miss. 731.

Missouri: State v. Miller, 159 Mo. 113; State v. Mathews, 98 Mo. 125; Reilly v. Hannibal & St. J. R. Co., 94 Mo. 600; State v. Gregory, 30 Mo. App. 582; Chicago, S. F. & C. Ry. Co. v. Vivian, 33 Mo. App. 583; Blaydes v. Adams, 35 Mo. App. 526; Missouri P. R. Co. v. Schoennen, 37 Mo. App. 612; Wallich v. Morgan, 39 Mo. App. 469; Harrington v. City of Sedalia, 98 Mo. 583; Wetzell v. Wagoner, 41 Mo. App. 509; Missouri P. Ry. Co. v. Schoennen, 37 Mo. App. 612; Brooks v. Hannibal & St. J. R. Co., 35 Mo. App. 571; Hunt v. Hunter, 52 Mo. App. 263; Minter v. Kansas City Hardware Co., 50 Mo. App.

Chicago, S. F. & C. R. Co., 51 Mo. App. 297; Bayne v. State, 29 Tex. App. 132; Blaydes v. Adams, 35 Mo. App. 526; Missouri Pac. Ry. Co. v. Schoennen, 37 Mo. App. 612; Hutchins v. Weldin, 114 Ind. 80; People v. Williams, 92 Hun, 354, 36 N. Y. Supp. 511; Spies v. People, 122 Ill. 1; People v. Dimick, 107 N. Y. 13; Lawder v.

appear that the jury were in fact misled, prejudice will not be presumed.[209] Error in a detached clause may be ground

177; Noble v. Blount, 77 Mo. 235; Singer & Talcott Stone Co. v. Sinclair, 10 Mo. App. 593.

Montana: State v. Whorton, 63 Pac. 627.

Nebraska: Sioux City & P. R. Co. v. Finlayson, 16 Neb. 578, 20 N. W. 860; Gray v. Farmer, 19 Neb. 69, 26 N. W. 593; Bartling v.

Hinderson, 36 Kan. 754; Deig v. Morehead, 110 Ind. 451; Kopelke v. Kopelke, 112 Ind. 435; Cooper v. State, 120 Ind. 377, 381; Illinois Cent. R. Co. v. Swearingen, 47 Ill. 206; Scovill v. Glasner, 79 Mo. 449; Muehlhausen v. St. Louis R. Co., 91 Mo. 332; First Nat. Bank of Burlington v. Hatch, 98 Mo. 376; Daniels v. Clegg, 28 Mich. 32; Siebert v. State, 95 Ind. 471, 478; Stout v. State, 96 Ind. 407, 410; Finerty v. Fritz, 6 Colo. 136; Springdale Cemetery Ass'n v. Smith, 24 Ill. 480; Fassett v. Town of Roxbury, 55 Vt. 552; Parker v. Dubuque S. W. R. Co., 34 Iowa, 399; Brown v. Bridges, 31 Iowa, 138; Ferguson v. Beadle, 30 Iowa, 477; Village of Evanston v. Gunn, 99 U. S. 660, 25 L. Ed. 306; Washington & G. R. Co. v. Gladmon, 15 Wall. (U. S.) 401, 21 L. Ed. 114; Carrington v. Pacific Mail Steamship Co., 1 Cal. 475; Hanscom v. Doullard, 79 Cal. 234; Smothers v. Hanks, 34 Iowa, 286; Central Branch Union Pac. R. Co. v. Andrews, 41 Kan. 371; Lauder v. Henderson, 36 Kan. 754; State v. Miller, 35 Kan. 329; Brooks v. Allen, 62 Ind. 401; Hayes v. West, 37 Ind. 21; Bundy v. McKnight, 48 Ind. 502; St. Louis, V. & T. H. R. Co. v. Funk, 85 Ill. 460; Latham v. Roach, 72 Ill. 179; Toledo, W. & W. Ry. Co. v. Ingraham, 77 Ill. 309; Cleveland, C., C. & I. Ry. Co. v. Bates, 91 Ind. 289; People v. Cleveland, 49 Cal. 578; Knowles v. Crampton, 55 Conn. 344; Morehouse v. Remson, 59 Conn. 401; Collins v. Richmond Stove Co., 63 Conn. 361, 363; Smith v. Meldren, 107 Pa. 348; City Bank's Appeal, 54 Conn. 273; O'Hara v. Richardson, 46 Pa. 385; Shimer v. Jones, 47 Pa. 268; Lodge v. Gatz, 76 Ill. 272; Magee v. Billingsley, 3 Ala. 680; Rogers v. Davidson, 142 Pa. 436; Cooper v. Grand Trunk Ry., 49 N. H. 209, 213; Lord v. Lord, 58 N. H. 7, 11; Vaughan v. State, 21 Tex. 752; Young v. Clegg, 93 Ind. 371, 375; Stockwell v. Brant, 97 Ind. 474, 477; Louisville, N. A. & C. Ry. Co. v. Jones, 108 Ind. 551, 567; Ahle v. Lee, 6 Tex. 427; Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282; Sperry v. Miller, 16 N. Y. 407; Heffley v. Poorbaugh (Pa.) 10 Atl. 12; Oxnard v. Swanton, 39 Me. 125; Eckels v. State, 20 Ohio St. 508, 514; Columbus, H. V. & T. Ry. Co. v. Shannon, 4 Ohio Cir. Ct. R. 449; Nelson v. State, 61 Miss. 212.

for reversal, however, where it is such as to render the entire instruction erroneous, but only in such cases.[210]

Each instruction given need not embrace all the issues, or

Behrends, 20 Neb. 211, 29 N. W. 472; Campbell v. Holland, 22 Neb. 587, 35 N. W. 871; City of Lincoln v. Smith, 28 Neb. 762, 45 N. W. 41; Parrish v. State, 14 Neb. 60, 15 Neb. 357; Martin v. State, 30 Neb. 507, 46 Neb. 621; St. Louis v. State, 8 Neb. 406; Omaha & C. B. Ry. & Bridge Co. v. Levinston, 49 Neb. 17.

Nevada: Caples v. Central P. R. Co., 6 Nev. 265; State v. Raymond, 11 Nev. 98; State v. Donovan, 10 Nev. 36; Allison v. Hagan, 12 Nev. 38; State v. Pitchard, 15 Nev. 74; Solen v. Virginia & T. R. Co., 13 Nev. 106.

New York: Goll v. Manhattan Ry. Co., 57 N. Y. Super. Ct. 74, 125 N. Y. 714; Looram v. Second Ave. R. Co., 11 N. Y. St. Rep. 652; Wallace v. Nodine, 57 Hun, 239, 32 N. Y. St. Rep. 657, 10 N. Y. Supp. 919; Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282; Brady v. Cassidy, 9 Misc. Rep. 107, 29 N. Y. Supp. 45.

North Carolina: Lewis v. Albemarle & R. R. Co., 95 N. C. 179.

Oregon: Farmers' & Traders' Nat. Bank v. Woodell, 61 Pac. 837.

Pennsylvania: H. B. Claflin Co. v. Querns, 15 Pa. Super. Ct. 464; Com. v. Warner, 13 Pa. Super. Ct. 461; Totten v. Hicks, 3 Kulp, 60; Linn v. Naglee, 4 Whart. 92; Alexander v. Com., 105 Pa. 1; Horton v. Chevington & Bunn Coal Co., 2 Penny. 43; Lehigh Valley R. Co. v. Brandtmaier, 113 Pa. 610.

South Carolina: McGhee v. Wells, 57 S. C. 280, 35 S. E. 529; State v. Lee, 58 S. C. 335, 36 S. E. 706; State v. Butler, 47 S. C. 25; State v. Williams, 35 S. C. 344; State v. Banister, 35 S. C. 290; Ballou v. Young, 42 S. C. 170.

Texas: Spears v. State (Tex. Cr. App.) 56 S. W. 347; Wood v. Chambers, 20 Tex. 247; Mercer v. Hall, 2 Tex. 284; Robinson v. Varnell, 16 Tex. 382; Street v. State, 7 Tex. App. 5; Rost v. Missouri P. Ry. Co., 76 Tex. 168; Hodges v. State, 22 Tex. App. 415; Fort Worth & D. C. Ry. Co. v. Hogsett, 67 Tex. 685; Jobe v. Houston (Tex. Civ. App.) 23 S. W. 408; St. Louis & S. F. Ry. Co. v. McLain (Tex.) 15 S. W. 789; Pridham v. Weddington, 74 Tex. 354; Ross v. State, 29 Tex. 499.

Utah: McCornick v. Queen of Sheba Gold Min. & Mill. Co., 63

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[209] See ante, §§ 378, 379, "Presumption of Prejudice." See, also, ante, §§ 387, 388, "General Rules."

[210] Cooper v. Smith, 119 Ind. 313, 316.

the whole case, or the whole of any branch of the case.[211] Nor need an instruction contain in itself all the qualifications and conditions necessary to render it correct and applicable to the case at bar.[212] The proper qualification may be made

Pac. 820; Nickles v. Wells, 2 Utah, 167; People v. Sensabaugh, 2 Utah, 473.

West Virginia: Huffman v. Alderson's Adm'r, 9 W. Va. 616.

United States: Evanston v. Gunn, 99 U. S. 660; Gregg v. Moss, 14 Wall. 564, 20 L. Ed. 740; Western Coal & Min. Co. v. Ingraham, 17 C. C. A. 71, 70 Fed. 219.

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[211] Hawkins v. Hudson, 45 Ala. 482; People v. Tamkin, 62 Cal. 468; People v. Morine, 61 Cal. 367; People v. Clark, 84 Cal. 573, 24 Pac. 313; Hayes v. West, 37 Ind. 21; Bundy v. McKnight, 48 Ind. 502; Taylor v. Wootan, 1 Ind. App. 188, 194; Schroeder v. Michel, 98 Mo. 43, 11 S. W. 314; Karle v. Kansas City, St. J. & C. B. R. Co., 55 Mo. 476; Muehlhausen v. St. Louis R. Co., 91 Mo. 332; Dougherty v. Missouri R. Co., 97 Mo. 647; Fletcher v. Milburn Mfg. Co., 35 Mo. App. 321; McKeon v. Citizens' Ry. Co., 43 Mo. 405; Shaw v. Missouri & Kansas Dairy Co., 56 Mo. App. 521; Anderson v. Walter, 34 Mich. 113; Peterson v. Chicago, M. & St. P. Ry. Co., 38 Minn. 511, 39 N. W. 485; Nebraska Nat. Bank v. Burke, 44 Neb. 234; Barringer v. Burns, 108 N. C. 606; Deere v. Wolf, 77 Iowa, 115, 41 N. W. 588; Timins v. Chicago, R. I. & P. Ry. Co., 72 Iowa, 94; Munger v. City of Waterloo, 83 Iowa, 559; Chapin v. Chicago, M. & St. P. Ry. Co., 79 Iowa, 582; Funston v. Chicago, R. I. & P. R. Co., 61 Iowa, 452; Freiberg v. Johnson, 71 Tex. 558; Clisby v. Mobile & O. R. Co., 78 Miss. 937; City of Rock Island v. Starky, 189 Ill. 515, 59 N. E. 971; Ohliger v. City of Toledo, 20 Ohio Cir. Ct. R. 142, 10 Ohio Cir. Dec. 762; Welsh v. Com. (Ky.) 60 S. W. 185; State v. Kyne (Kan. App.) 62 Pac. 728; St. Louis, I. M. & S. Ry. Co. v. Baker, 67 Ark. 531, 55 S. W. 941; Smitson v. Southern Pac. Co., 37 Or. 74.

[212] Taylor v. Wootan, 1 Ind. App. 188, 194; People v. Welch, 49 Cal. 174; Hickenbottom v. Delaware, L. & W. R. Co., 122 N. Y. 91; People v. Clark, 84 Cal. 573; People v. Hurtado, 63 Cal. 288; Rice v. City of Des Moines, 40 Iowa, 638; Gates v. Manny, 14 Minn. 21; People v. Doyell, 48 Cal. 85; People v. Etting, 99 Cal. 577; Perrette v. City of Kansas City, 162 Mo. 238; Farmers' & Traders' Nat. Bank v. Woodell, 38 Or. 294.

in separate instructions.[213] The trial judge cannot be expected to reiterate every qualification and condition with every clause of the charge.[214] "If an instruction contains a complete statement of a proposition of law applicable to the facts in a given case, it will be held good as a part of a series containing the entire law of the case."[215] But so far as an instruction undertakes to state a proposition of law, it must do so completely and correctly.[216] Thus, an instruction which attempts to cover the whole case, and authorizes a finding for one party or the other, according as the jury may determine certain facts, is erroneous if it omits any material issue, and such error is not cured by another instruction, properly submitting the omitted issue.[217]

[213] Bradley v. Lee, 38 Cal. 362; People v. Clark, 84 Cal. 573; Lomhard v. Chicago, R. I. & P. R. Co., 47 Iowa. 494; Stier v. City of Oskaloosa, 41 Iowa, 353; Allen v. Burlington, C. R. & N. R. Co., 57 Iowa, 623; Keech v. Enriquez, 28 Fla. 597; Davis v. Button, 78 Cal. 247; Omaha Fair & Exposition Ass'n v. Missouri Pac. Ry. Co., 42 Neb. 105; Meyer v. Southern Ry. Co. (Mo.) 36 S. W. 367; City Council of Augusta v. Tharpe, 113 Ga. 152; De St. Aubin v. Marshall Field & Co., 27 Colo. 414; West Chicago St. Ry. Co. v. Kromshinsky, 185 Ill. 92, 56 N. E. 1110; Fletcher v. South Carolina & G. E. R. Co., 57 S. C. 205, 35 S. E. 513; Smitson v. Southern Pac. Co., 37 Or. 74; Thackston v. Port Royal & W. C. Ry. Co., 40 S. C. 80.

[214] Watson v. Watson, 58 Mich. 507.

[215] Taylor v. Wootan, 1 Ind. App. 188, 194; Walker v. Collier, 37 Ill. 362; Yundt v. Hartrunft, 41 Ill. 9.

[216] Forsyth v. Bower, 54 Cal. 639; Ottawa, O. & F. R. V. R. Co. v. McMath, 4 Ill. App. 356; Sweet v. Leach, 6 Ill. App. 212; Gale v. Rector, 5 Ill. App. 481; Ohio, I. & W. Ry. Co. v. Kleinsmith, 38 Ill. App. 45. But see Schroeder v. Michel, 98 Mo. 43.

[217] Hohstadt v. Daggs, 50 Mo. App. 240; Grieb v. Caraker, 57 Ill. App. 678; Burlingim v. Baders, 45 Neb. 673; Territory v. Hancock (Ariz.) 35 Pac. 1060; Georgia & A. R. Co. v. Rawson, 112 Ga. 471; Desnoyers Shoe Co. v. Lisman, 85 Mo. App. 340; McVey v. St. Clair Co. (W. Va.) 38 S. E. 648; McNulta v. Jenkins, 91 Ill. App. 309; Norfolk & W. Ry. Co. v. Mann (Va.) 37 S. E. 849; Dobson v. State (Neb.) 85 N. W. 843; State v. Davies, 80 Mo. App. 239.

The general charge must be construed in connection with the special charges, and errors or defects in the general charge may be cured by correct special instructions.[218] But it is usually held that errors in the specific charges are not cured by the correctness of the general charge.[219]

Errors in and objections to particular instructions which, in view of other instructions, or the charge, considered as a whole, could not reasonably have misled the jury, are thereby cured, and are not ground for reversal.[220] But where there

[218] Campbell v. Fisher (Tex. Civ. App.) 24 S. W. 661; Hemmingway v. Garth, 51 Ala. 530; Hammett v. Brown, 60 Ala. 498; Simpson v. Krumdick, 28 Minn. 352; Goldberg v. McCracken (Tex.) 8 S. W. 676; Claflin v. Swoyer, 5 Kulp (Pa.) 107; Missouri, K. & T. Ry. Co. of Texas v. Rodgers, 89 Tex. 675.

[219] Pittsburgh, C. & St. L. Ry. Co. v. Krouse, 40 Ohio St. 223; Baxter v. Waite, 2 Wash. T. 228; Trogdon v. State, 133 Ind. 1, 10; Murray v. Com., 79 Pa. 311; Rice v. Olin, 79 Pa. 391. But see Pierce v. Cloud, 42 Pa. 102.

An obscure answer to a point may be aided by the general charge, but not an erroneous one. Murray v. Com., 79 Pa. 311; Rice v. Olin, 79 Pa. 391.

[220] Dodds v. Estill, 32 Mo. App. 47; Hall v. State, 8 Ind. 439; Abraham v. Wilkins, 17 Ark. 292; People v. Warren, 130 Cal. 683; Warren v. Dickson, 27 Ill. 115; Esty v. Snyder, 41 Ill. 363; Montgomery v. Crossthwait, 90 Ala. 553, 8 So. 498; Sullivan v. People, 31 Mich. 1; People v. Levine, 85 Cal. 39; Deane Steam-Pump Co. v. Green, 31 Mo. App. 269; Hargrave v. State (Tex. Cr. App.) 30 S. W. 444; State v. Jansen, 22 Kan. 498; Porter v. Brown, 55 Ill. App. 142; People v. Clement (Mich.) 86 N. W. 535, 8 Detroit Leg. N. 256; Carson v. McCormick Harvesting Mach. Co., 36 Mo. App. 462; Price v. Coblitz, 21 Ohio Cir. Ct. R. 732, 12 Ohio Cir. Dec. 34; Houston & T. C. Ry. Co. v. Moss (Tex. Civ. App.) 63 S. W. 894; Cederson v. Oregon R. & Nav. Co., 38 Or. 343; North Chicago St. R. Co. v. Boyd, 156 Ill. 416; Davis v. Baker, 88 Ill. App. 251; Hulett v. Missouri, K. & T. Ry. Co., 80 Mo. App. 87, 2 Mo. App. Rep'r, 527; Longley v. Com. (Va.) 37 S. E. 339; Crutcher v. Schick, 10 Tex. Civ. App. 676; Anderson v. Union Terminal R. Co., 161 Mo. 411; Schieffelin v. Schieffelin, 127 Ala. 14; Chicago, I. & E. Ry. Co. v. Patterson, 26 Ind. App. 295; Cahow v. Chicago, R. I. & P. Ry.

is danger that the jury were misled, the error is not cured.[221] "A correct instruction does not necessarily cure an error in another instruction, unless, as a series, the instructions state the law correctly."[222] Mere insufficiency in an instruction correct as far as it goes may be cured by other instructions.[223]

Co. (Iowa) 84 N. W. 1056; Houston & T. C. Ry. Co. v. Shirley (Tex. Civ. App.) 24 S. W. 809; Gardner v. Cooper, 9 Kan. App. 587, 60 Pac. 540; People v. Warren, 130 Cal. 678; Provident Sav. Life Assur. Soc. v. Hadley, 43 C. C. A. 25, 102 Fed. 856; Boldenwick v. Cahill, 187 Ill. 218, 58 N. E. 351; Schmitt & Bro. Co. v. Mahoney, 60 Neb. 20, 82 N. W. 99; Lewis v. Western Union Telegraph Co., 57 S. C. 325, 35 S. E. 556; King v. King, 155 Mo. 406, 56 S. W. 534; Johnson v. International & G. N. R. Co. (Tex. Civ. App.) 57 S. W. 869; State v. Corcoran (Idaho) 61 Pac. 1034; Faxon v. Jones, 176 Mass. 138, 57 N. E. 360; Smith v. King, 62 Conn. 515, 26 Atl. 1059.

[221] Illinois Cent. R. Co. v. Sanders, 58 Ill. App. 117; Toledo, W. & W. Ry. Co. v. Larmon, 67 Ill. 68; State v. Hatcher, 29 Or. 309; People v. Marshall, 112 Cal. 422; Morris v. Gleason, 1 Ill. App. 510; People v. Chew Sing Wing, 88 Cal. 268; Shugart v. Halliday, 2 Ill. App. 45; Sickle v. Wolf, 91 Wis. 396, 64 N. W. 1028; Grieb v. Caraker, 57 Ill. App. 678; Guinard v. Knapp-Stout & Co. Company, 90 Wis. 123; Johnson v. Superior Rapid Transit Ry. Co., 91 Wis. 233, 64 N. W. 753; Fick v. Mohr, 92 Ill. App. 280; Nicholson v. Merritt (Ky.) 59 S. W. 25; Galveston, H. & S. A. Ry. Co. v. English (Tex. Civ. App.) 59 S. W. 626; Ft. Worth & D. C. Ry. Co. v. Peterson, 24 Tex. Civ. App. 548; Endowment Rank, Order of K. P., v. Steele (Tenn.) 63 S. W. 1126; Whedon v. Knight, 112 Ga. 639; San Antonio Traction Co. v. White (Tex.) 61 S. W. 706; State v. Young, 9 N. D. 165, 82 N. W. 420; Louisville & N. R. Co. v. Sullivan Timber Co., 126 Ala. 95; Arnold v. Burgdorf, 85 Ill. App. 537; Balmford v. Peffer, 31 Misc. Rep. 715, 65 N. Y. Supp. 271; Rhyner v. City of Menasha, 107 Wis. 201, 83 N. W. 303.

[222] Chicago North Shore St. Ry. Co. v. Hebson, 93 Ill. App. 98.

An erroneous instruction putting the burden of proof as to a particular defense upon the defendant in a criminal case is not cured by a general charge upon the burden of proof and the doctrine of reasonable doubt. State v. Grinstead (Kan. App.) 61 Pac. 975; People v. Shanley, 49 App. Div. (N. Y.) 56. Contra, State v. Freeman, 100 N. C. 429.

[223] Montgomery v. Knox, 23 Fla. 595; Walker v. Heller, 73 Ind

So, mere ambiguity, uncertainty, or a misleading tendency may be thus cured.[224] Verbal inaccuracies, obscurity, and

46; Jones v. State, 49 Ind. 549; Binns v. State, 66 Ind. 428; Achey v. State, 64 Ind. 56; Western Union Telegraph Co. v. Buskirk, 107 400; Smurr v. State, 88 Ind. 504, 507; Lake Erie & W. R. Co. v. Carson, 4 Ind. App. 185, 189; Keech v. Enriquez, 28 Fla. 597, 10 So. 91; Doherty v. Morris, 17 Colo. 105; Mendenhall v. Stewart, 18 Ind. App. 262; Hickenbottom v. Delaware, L. & W. R. Co., 122 N. Y. 91, 25 N. E. 279; Barringer v. Burns, 108 N. C. 606, 13 S. E. 142; People v. Wallace, 109 Cal. 611, 42 Pac. 159; Smith v. State (Tex. App.) 3 S. W. 684; Johnson v. State, 81 Ala. 54; State v. Calkins, 73 Iowa, 128; Shively v. Cedar Rapids, I. F. & N. W. Ry. Co., 74 Iowa, 169; De Goey v. Van Wyk, 97 Iowa, 491; Wright v. Nipple, 92 Ind. 310, 315; Western Union Telegraph Co. v. Young, 93 Ind. 118, 120; Young v. Clegg, 93 Ind. 371, 375; Stockwell v. Brant, 97 Ind. 474, 477; Louisville, N. A. & C. Ry. Co. v. Grantham, Ind. 549, 552; Chicago, St. L. & P. R. Co. v. Spilker, 134 Ind. 380, 104 Ind. 353, 358; Evansville & T. H. R. Co. v. Talbot, 131 Ind. 221, 224; Pittsburgh, C., C. & St. L. Ry. Co. v. Noftsger, 26 Ind. App. 614; State v. Savage, 36 Or. 191; Hearne v. De Young, 132 Cal. 357; Maxon v. Clark, 24 Ind. App. 620; Parsons v. State (Neb.) 85 N. W. 65; Cook v. State (Miss.) 28 So. 833.

[224] Fitzpatrick v. State, 37 Ark. 238; Burton v. Merrick, 21 Ark. 357; Doty v. O'Neil, 95 Cal. 244; Livermore v. Stine, 43 Cal. 274; People v. Turcott, 65 Cal. 126; People v. Chun Heong, 86 Cal. 329; People v. Hunt, 59 Cal. 430; Gray v. State (Fla.) 28 So. 53; Cleveland, C., C. & St. L. Ry. Co. v. Keenan, 190 Ill. 217, 60 N. E. 107; Tedens v. Sanitary Dist. of Chicago, 149 Ill. 87; Illinois Cent. R. Co. v. Swearingen, 47 Ill. 206; Milling v. Hillenbrand, 156 Ill. 310; Cleveland, C., C. & I. Ry. Co. v. Bates, 91 Ind. 289, 290; Riegelman v. Todd, 77 Iowa, 696; State v. McLafferty, 47 Kan. 140; Gillett v. Corum, 7 Kan. 156; Clark v. Fox, 9 Dana (Ky.) 195; Kennard v. State (Fla.) 28 So. 858; Milligan v. Chicago, B. & Q. R. Co., 79 Mo. App. 393, 2 Mo. App. Rep'r. 459; Meyer v. Southern Ry. Co. (Mo.) 36 S. W. 367; McGrew v. Missouri Pac. Ry. Co., 109 Mo. 582; Suttie v. Aloe, 39 Mo. App. 38; McNichols v. Nelson, 45 Mo. App. 446; Goetz v. Hannibal & St. J. R. Co., 50 Mo. 472; Noble v. Bessemer O. S. Co. (Mich.) 86 N. W. 520, 8 Detroit Leg. N. 244; Hart v. Walker, 100 Mich. 406; Wreggitt v. Barnett, 99 Mich. 477; People v. Ricketts, 108 Mich. 584; Fisher v. People, 20 Mich. 135; Simpson v. Krumdick, 28 Minn. 352; Omaha Fair & Exposition Ass'n

loose expressions in an instruction may be cured by other instructions.[225] But the giving of an instruction announcing an erroneous rule of law is not cured by another instruction, containing a correct statement of the rule.[226] A positively

v. Missouri Pac. Ry. Co., 42 Neb. 105, 60 N. W. 330; Bingham v. Hartley, 44 Neb. 682, 62 N. W. 1089; State v. Ah Mook, 12 Nev. 369; Marcom v. Raleigh & A. A. L. R. Co., 126 N. C. 200, 32 S. E. 423; Bell v. Martin (Tex. Civ. App.) 28 S. W. 108; Schmieg v. Wold, 1 Wash. T. 472; State v. Rosener, 8 Wash. 42, 35 Pac. 357; West v. Milwaukee, L. S. & W. Ry. Co., 56 Wis. 318.

[225] Wilson v. Southern Pac. R. Co., 62 Cal. 164; Stout v. State, 90 Ind. 1, 14; Brown v. State, 105 Ind. 385, 391; Siebert v. State, 95 Ind. 471; Johnson v. Johnson, 156 Ind. 592; Louisville, N. A. & C. Ry. Co. v. Jones, 108 Ind. 551; Cline v. Lindsey, 110 Ind. 337; Louisville, N. A. & C. Ry. Co. v. Wright, 115 Ind. 378; Harger v. Spofford, 46 Iowa, 11; Rogers v. Marshal, 1 Wall. (U. S.) 644; Hill v. Finigan, 77 Cal. 267; Bingham v. Hartley, 44 Neb. 682; Pittsburgh, C. & St. L. R. Co. v. Noel, 77 Ind. 110.

[226] Schieffelin v. Schieffelin (Ala.) 28 So. 687; Mackey v. People, 2 Colo. 13; Toledo, W. & W. Ry. Co. v. Shuckman, 50 Ind. 42; Murray v. Com., 79 Pa. 311; Rice v. Olin, 79 Pa. 391; People v. Marshall, 112 Cal. 422; Sappenfield v. Main St. & A. P. R. Co., 91 Cal. 48; People v. Wong Ah Ngow, 54 Cal. 151; Boswell v. District of Columbia, 21 D. C. 526; Camp Point Mfg. Co. v. Ballow, 71 Ill. 417; Ottawa, O. & F. R. V. R. Co. v. McMath, 4 Ill. App. 356; Gedney v. Gedney, 61 Ill. App. 511; Quinn v. Donovan, 35 Ill. 194; Wabash R. Co. v. Henks, 91 Ill. 406; Illinois Linen Co. v. Hough, 91 Ill. 63; City of Joliet v. Walker, 7 Ill. App. 267; Steinmeyer v. People, 95 Ill. 383; Sweet v. Leach, 6 Ill. App. 212; Gale v. Rector, 5 Ill. App. 481; Shugart v. Halliday, 2 Ill. App. 45; McCrory v. Anderson, 103 Ind. 12, 16; Plummer v. State, 135 Ind. 308; Achey v. State, 64 Ind. 56; Gnetig v. State, 63 Ind. 278; Binns v. State, 66 Ind. 428; Uhl v. Bingaman, 78 Ind. 365, 368; Hudelson v. State, 94 Ind. 426; Horne v. State, 1 Kan. 42; State v. Jones, 36 La. Ann. 204; Baer v. Lisman, 85 Mo. App. 317; Singer Mfg. Co. v. Hudson, 4 Mo. App. 145; State v. Laurie, 1 Mo. App. 371; McBeth v. Craddock, 28 Mo. App. 380; Billups v. Daggs, 38 Mo. App. 367; Hickaur v. Griffin, 6 Mo. 37; State v. McNally, 87 Mo. 644; Glascock v. Chicago & A. R. Co., 69 Mo. 589; Gorstz v. Pinske, 82 Minn. 456; Jensen v. Halstead (Neb.) 85 N. W. 78; Wasson v. Palmer, 13 Neb. 376; Swift & Co. v. Holoubek (Neb.) 84 N. W. 249; Carson v. Stevens, 40 Neb. 112;

erroneous instruction is not cured by another correct, but contradictory, instruction. In such a case it could not be told which instruction the jury followed, and, considered as a whole, the instructions are necessarily confusing and misleading to the jury; but if correct as a whole, and not contradictory, error in part of the instructions is not ground for reversal.[227] Where an instruction is so far erroneous that another correct instruction is necessarily contradictory, the only way to cure the error is to expressly withdraw the erroneous instruction, and substitute therefor the correct in-

Barr v. State, 45 Neb. 458; Richardson v. Halstead, 44 Neb. 606; Clay's Heirs v. Miller, 3 T. B. Mon. (Ky.) 146; Imhoff v. Chicago & M. Ry. Co., 20 Wis. 344; Bruce v. Koch (Tex.) 59 S. W. 540; Mershon v. Bosley (Tex. Civ. App.) 62 S. W. 799; Miller v. Vermurie, 7 Wash. 386, 34 Pac. 108. Whatever is vicious or vaguely worded is not cured by other instructions except in very plain cases,—ones entirely free from doubt. Quirk v. St. Louis United Elevator Co., 126 Mo. 279.

[227] St. Louis S. W. Ry. Co. v. Jagerman, 59 Ark. 98; People v. Thomson, 92 Cal. 506; People v. Etting, 99 Cal. 577; People v. Doyell, 48 Cal. 85; Davis v. Button, 78 Cal. 247; Chidester v. Consolidated People's Ditch Co., 53 Cal. 56; People v. Anderson, 44 Cal. 65; Doty v. O'Neil, 95 Cal. 244; Boswell v. District of Columbia, 21 D. C. 526; Cook v. Woodruff, 97 Ind. 134, 140; Blanchard v. Jones, 101 Ind. 542, 550; Story v. State, 99 Ind. 413; Illinois Linen Co. v. Hough, 91 Ill. 63; Cumins v. Leighton, 9 Ill. App. 186; Quinn v. Donovan, 85 Ill. 194; Clay's Heirs v. Miller, 3 T. B. Mon. (Ky.) 149; Baer, Seasongood & Co. v. Lisman, 85 Mo. App. 317; State v. Brumley, 53 Mo. App. 126; Muehlhausen v. Railroad Co., 91 Mo. App. 332; Burlington First Nat. Bank v. Hatch, 98 Mo. 376; Swan v. Lullman, 12 Mo. App. 584; Roos v. Clark, 14 Mo. App. 594; Whalen v. St. Louis, K. C. & N. Ry. Co., 60 Mo. 323; Goetz v. Hannibal & St. J. R. Co., 50 Mo. 472; Skates v. State, 64 Miss. 644; Sterling v. Callahan, 94 Mich. 536; Gates v. Manny, 14 Minn. 21 (Gil. 13); Richardson v. Halstead, 44 Neb. 606; Wasson v. Palmer, 13 Neb. 376; Rice v. Com., 100 Pa. 32; Missouri, K. & T. Ry. Co. of Texas v. Rodgers, 89 Tex. 675; Baker v. Ashe, 80 Tex. 356; Galveston, H. & S. A. Ry. Co. v. Daniels, 1 Tex. Civ. App. 695; Kankakee Stone

struction.[228] If the erroneous instruction is not withdrawn, it will be presumed that the jury followed the erroneous instruction, and that injury resulted, unless it affirmatively appears that no injury resulted.[229] It is always competent for the judge to withdraw an improper instruction, and substitute therefor a correct instruction, and, if this is done, the error is cured.[230] The express retraction of improper re-

& Lime Co. v. City of Kankakee, 128 Ill. 173, 20 N. E. 670; Pardridge v. Cutler, 168 Ill. 504, 48 N. E. 125.

[228] Clay's Heirs v. Miller, 3 T. B. Mon. (Ky.) 149; Howard v. State, 50 Ind. 190; Glascock v. Chicago & A. R. Co., 69 Mo. 589; Imhoff v. Chicago & M. Ry. Co., 20 Wis. 344; Uhl v. Bingaman, 78 Ind. 365; State v. Jones, 36 La. Ann. 204; Bradley v. State, 31 Ind. 492; Guetig v. State, 63 Ind. 278; Torr v. Torr, 20 Ind. 118; Plummer v. State, 135 Ind. 308; McCrory v. Anderson, 103 Ind. 12, 16; McKelvey v. Chesapeake & O. Ry. Co., 35 W. Va. 500; Chapman v. Erie Ry. Co., 55 N. Y. 579; Sommer v. Gilmore, 168 Pa. 117; Meyer v. Clark, 45 N. Y. 285; Missouri, K. & T. Ry. Co. of Texas v. Rodgers, 89 Tex. 675; Swift & Co. v. Holoubek, 60 Neb. 784; Terre Haute & I. R. Co. v. Pruitt, 25 Ind. App. 227; Willard v. Press Pub. Co., 52 App. Div. 448, 65 N. Y. Supp. 73; Eggett v. Allen, 106 Wis. 633. See, also, State v. Harkin, 7 Nev. 377. An error in the charge is not cured by a retraction of it on exception taken, accompanied by the remark of the judge that he had no doubt of its correctness. Meyer v. Clark, 45 N. Y. 285, reversing 2 Daly, 497. It is error, in a criminal case for the court to place before the jury the probable result of a verdict of guilty, and this, though the mistake be explicitly rectified. Com. v. Switzer, 134 Pa. 383, 26 Wkly. Notes Cas. 46.

[229] Grand Rapids & I. R. Co. v. Monroe, 47 Mich. 152; State v. Ferguson, 9 Nev. 106. But a verdict rendered according to the correct instruction will be sustained. Avery v. New York Cent. & Hudson River R. Co., 26 N. Y. St. Rep. 279, 7 N. Y. Supp. 341.

[230] State v. May, 15 N. C. 328; Sharp v. Kinsman, 18 S. C. 113; Zent v. Watts, 1 N. Y. Supp. 702; Green v. State, 97 Tenn. 50; Yoakum v. Mettasch (Tex. Civ. App.) 26 S. W. 129; State v. Wells, 54 Kan. 161; Sargeant v. Martin, 133 Pa. 122; Pollock v. Brooklyn & C. T. R. Co., 15 N. Y. Supp. 189; Bradstreet v. Rich, 74 Me. 303; City Trust, Safe-Deposit & Surety Co. v. Fidelity & Casualty Co., 58 App. Div. 18, 68 N. Y. Supp. 601; McMahon v. New York News Pub. Co., 51 App. Div. (N. Y.) 488; Desmond-Dunne Co. v. Friedman-Doscher Co., 162 N. Y. 486. Where, upon failure of the jury

marks cures the error unless it appears affirmatively that the retraction was not accepted by the jury.[231]

Under the rule that a party is not entitled to have even a correct request given in the precise language of the request,[232] the refusal of an instruction cannot be complained of if the subject of the request is fully covered by the court in its main charge.[233] And it is immaterial at whose instance the subsequent instruction was given.[234] Of course, the instruction given must be the substantial equivalent of the instruction refused.[235] Failure to charge upon a particular subject is cured by subsequently giving an instruction fully covering the ground.[236] In general, correct abstract instruction will not cure the error in failing to give a concrete instruction on the same subject, applying the law to the facts of the case.[237]

to agree, the special instructions given them are recalled, and, being charged to find for the defendant, they return a verdict accordingly, the special instructions are superseded, and will not be reviewed on error. As the verdict was not found on them, they do not prejudice the plaintiff. Keily v. Hendrie, 26 Mich. 255.

[231] Brooks v. Rochester Ry. Co., 10 Misc. Rep. (N. Y.) 88; State v. McNair, 93 N. C. 628; Reinhold v. State, 130 Ind. 467.

[232] See ante, § 153, "Duty to Follow Language of Request."

[233] State v. La Grange, 94 Iowa, 60; State v. Murphy, 13 Wash. 229, 43 Pac. 44; Brown v. McCord & Bradfield Furniture Co., 65 Mich. 360; State v. Wilson, 2 Scam. (Ill.) 225; Grand Rapids & I. R. Co. v. Cameron, 45 Mich. 451; Davis v. Perley, 30 Cal. 630; Manning v. Dallas, 73 Cal. 420; Marsh v. Cramer, 16 Colo. 331; People v. Fanshawe, 65 Hun, 77, 19 N. Y. Supp. 865; Rockmore v. State, 93 Ga. 123; Parker v. Stafford, 61 Hun, 623, 16 N. Y. 756; Hipes v. State, 73 Ind. 39; Saunders v. Whitcomb, 177 Mass. 457. But see People v. Ramirez, 13 Cal. 173.

[234] Herhold v. City of Chicago, 108 Ill. 467.

[235] Davis v. Moore, 22 Ky. Law Rep. 261, 56 S. W. 991.

[236] Lane v. State (Tex. Cr. App.) 55 S. W. 831; Postal Telegraph Cable Co. v. Douglass, 96 Ga. 816, 22 S. E. 930; Lowrimore v. Palmer Mfg. Co., 60 S. C. 153, 38 S. E. 430; State v. Lee, 58 S. C. 335, 36 S. E. 706; Wells v. Houston, 26 Tex. Civ. App. 629; Camden & Rockland Water Co. v. Ingraham, 85 Me. 179, 27 Atl. 94.

[237] Gorstz v. Pinske, 82 Minn. 456.

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