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Pre-Trial Education of Jurors

Although the Jury system stands as one of the firmest pillars of a democratic body politic, it contains obvious defects which can and should be eliminated¹. Many trial lawyers feel that verdicts of juries are unpredictable; that one never knows what reaction a jury will have to a certain set of facts; that juries sometimes go "wild"; that they attach importance to minor or insignificant items of evidence and thereby lose sight of the real issue involved². Part of the tendency to return arbitrary or capricious verdicts might be explained by the fact that they are never called on to give reasons for their conduct. Moreover, at their best juries are limited by the fallibilities of the men and women who compose them. But added to the obvious faults of the jury inherent in the system are others which may be eliminated. One such difficulty is that the trial procedure is so foreign to the uninitiated that even an intelligent juror is apt to be bewildered³. It is unfortunate, therefore, that a recent attempt on the part of an alert trial judge to meet this latter situation by distributing a "jury primer" to prospective jurors has been invalidated by the Illinois Supreme Court.⁴

Need for a Jury Handbook

Most people called for jury service have never been in court before. The maze of procedure involved in every criminal trial may confuse even the most intelligent juror. He needs guidance. The courts and legislatures have recognized this need by requiring instructions to the jury on the law of the case. But these instructions since they come at the close of the evidence and are limited to the law applicable to the particular case, give the juror little or no help in understanding the evidence as it is presented. They do not serve to eliminate the initial confusion of the juror caused by his lack of familiarity with trial practice.

In order to correct this situation it has been suggested that jurors be educated before trial concerning court room procedure, jury duties and responsibilities. A method for doing so is the distribution of a hand-

¹ "The Jury System is the very cornerstone of American Democracy. It lies at the very foundation of the freedom and liberty of a free people." Sherry, *Juries in Criminal Cases* (1944) 11 *Law Soc. J.* 192.

² Interesting in this connection are the remarks of Dean John H. Wigmore (1925) 20 *Ill. L. Rev.* 106.

³ As early as 1925 a "Jurors Catechism" was adopted in New York and Kansas. Maine was not far behind. These handbooks were of two kinds, some in question and answer form, others in narrative form similar to the *Jury Primer*. Knabe, *Juror's Handbook* (1944) 5 *Ala. L.* 195; Richardson, *The Jury and Methods of Increasing its Efficiency* (1928) 14 *Am. B. Ass'n. J.* 410; Bishop, *Let Us Really Instruct Our Jurors* (1945) 20 *Calif. S. B. J.* 99; Barnes, *Standard Charges To Jury* (1946) 20 *Fla. L. J.* 60; Coffin, *Jury Trial Tragic But Not Entirely Hopeless* (1941) 25 *J. Am. Jud. Soc.* 13; Parker, *Improvement of Jury System Must Come* (1942) 26 *J. Am. Jud. Soc.* 71; Caplin, *Standardized Jury Instructions In Illinois* (1947) 1 *Lawyer & Law Notes*, No. 3, p. 6; Comment (1925) 11 *Am. B. Ass'n. J.* 373, 401; Comment (1929) 15 *Am. B. Ass'n. J.* 257; Comment (1945) 24 *Neb. L. Rev.* 195; Note (1930) 9 *Tex. L. Rev.* 37.

⁴ *People v. Schoos*, ——— *Ill. ———*, 78 N.E. (2d) 245 (1948). The primer used by the judge for this purpose has been published in this *Journal*. See Miner, J. H., *The Jury Problem* (1946) 37 *Journal of Criminal Law and Criminology*.

book to prospective jurors when they are called for jury service. It does not supplant the instructions regarding the particular case facts but is intended merely as a general guide to give the jury some idea of their duties and of the legal procedures involved in criminal cases. The technique has been successfully used by many courts in the United States.⁵ Some courts, notably the federal judiciary, have officially adopted a pamphlet of directions to be given to prospective jurors;⁶ others have allowed interested organizations such as the Junior Chamber of Commerce to prepare and issue the pamphlets.⁷ The advantage of having a pamphlet prepared and issued by the court is obvious. If prepared by the court it is authoritative and the jurors are more likely to give heed to what it says than to one prepared by an unofficial body. Moreover, if it is prepared and issued under court supervision, any prejudicial material may be corrected on appeal, because the pamphlet, unlike one issued by outside organizations, becomes a part of the record of the case. All who have used this method of informing the jury praise its results.⁸

A second objective of the handbook is to give a "pep talk" to the jurors. Most prospective jurors when faced with their first call for duty view it as a bleak and depressing prospect and only later on, if they have not begged off, do they realize the important role they play in a real, live drama. The handbook informs them in advance of the opportunity which is presented them. The juror is "playing a part he can seldom hope to play in daily life, elevated a little above the world, hearing the tale, seeing strangers forfeit their privacy, watching a contest and at the same time participating in it in the most special and privileged way."⁹

Use of the Jury Handbook in Illinois

Judge Julius H. Miner, sitting on the Criminal Court of Cook County, Chicago, Illinois, prepared a *Jury Primer* for criminal trials.¹⁰ In *People v. Schoos*¹¹ Judge Miner distributed the *Jury Primer* to

⁵ Parts of California, Georgia, Florida, Kansas, Michigan, Maine, New York, Ohio, Texas and the Federal Courts. Richardson, *loc. cit. supra* note 3.

⁶ Chief Justice Harlan F. Stone appointed a committee to study the jury problem. The committee drew up a "Handbook for Petit Jurors Serving in the District Courts of the United States" and the Judicial Conference of Senior Circuit Judges authorized its publication. Brennan, *Federal Jurors* (1944) 5 Ala. L. 354.

⁷ Notably Georgia and Florida. Eastman, *History of Trial By Jury* (1944) 3 Nat. Bar. J. 87.

⁸ *Supra* note 3. Its usefulness is not subject to statistical proof, but those familiar with its use report that it has met with considerable success. Some highly respected authority has endorsed the use of the Jury Handbook. The *Handbook for Petit Jurors Serving in the District Courts of the United States* has been adopted by the federal courts with its use optional to the presiding judge. But as bench and bar become familiar with its advantages, its use will very likely become automatic. The American Bar Association has recommended the handbook, and many local bar associations have put the recommendation into practice. Improvement in jury service has followed wherever the handbook has been introduced. Not only has the juror been able to understand more clearly what is happening during the course of the trial, but more prospective jurors have been willing to serve. Judges and attorneys have benefitted mutually, and greater justice has undoubtedly resulted.

⁹ *Life in the Box*, New Yorker, April 19, 1947.

¹⁰ Miner, J. H., *The Jury Problem* (1946) 37 J. Crim. L. & Criminology 1, reprinted (1946) 41 Ill. L. Rev. 183.

¹¹ *Supra* note 4.

prospective jurors before examination on voir dire, and addressed them the next day asking them if they had read the pamphlet.¹² Nothing was stated in regard to the particular case and no instructions were given, other than an explanation of the pamphlet. All oral statements were made a part of the record. The defendant objected to the use of the *Jury Primer* and requested that the panel be dismissed. The objection was overruled and upon conviction defendant appealed to the Supreme Court of Illinois.

In reversing the trial judge, the Supreme Court seemed to base its decision upon four grounds: (1) The pamphlet is ambiguous in many places and is prejudicial to the defendant; (2) There is no common law authority for the judge to educate the jurors; (3) Such a practice is contrary to the statutes of Illinois; (4) To allow such a practice would lead to chaos in the administration of the criminal law.

The largest portion of the court's opinion is concerned with "prejudicial statements" contained in the *Jury Primer*.¹³ In the view of the court these statements seem to be of two kinds; those from which inferences may be drawn by the prospective jurors which will prejudice the defendant's case, and those which are highly controversial matters unnecessary for a jury's consideration. Illustrative of the "prejudicial statements" pointed out by the court is the statement in the *Jury Primer* that "The People of the State of Illinois are the real complainants in all criminal cases, and not the individual who claims to have been robbed, attacked or otherwise injured But crimes are committed against all the people of the State and all the people are virtually interested in the enforcement of law and order, and in the protection of life, liberty and property." The Supreme Court deemed the statement not entirely correct; for the People are really the "arbiters, umpires, the judges — to see the accused gets a fair trial."¹⁴

Another statement from the primer which the Supreme Court considered objectionable was: "Each lawyer may object to certain questions, or to certain answers or to certain procedure, if he believes them to be improper for any legal reason. When the judge sustains the objection it means he agrees with the lawyer making the particular objection, and if he overrules the objection it means he disagrees." The court said that jurors are apt to reach the conclusion that the judge favors that side whose objections he sustains more often. It would seem, however, that if a juror reached this erroneous conclusion he might be more apt to do so simply from observing the trial proceeding and without reading the pamphlet. The quoted portions of the pamphlet and other examples used by the court might well be subject to the criticism leveled at them by the court if the statements are read alone. But read in their context the connotation is not the same. Moreover, lawyers judges and others who are in the habit of hunting hidden meanings and are used to the technicalities of the law will find meaning in the abstract statements which a layman would never impute to them.¹⁵

¹² The pamphlet was distributed with the consent of the Chief Justice of the Criminal Court of Cook County, Harold G. Ward.

¹³ *Supra* note 4.

¹⁴ *Supra* note 4 at 247, 248.

¹⁵ The other statements objected to by the court were: "The State's Attorney and his assistants represent the People of the State of Illinois in the prosecution

Other objections of the court were concerned with the pamphlet's discussions of "Reasonable Doubt," "Credibility of Witnesses," "An Alibi" and "An Accomplice." It is said that even if these discussions are technically correct they are highly controversial matters and should be omitted from a jury primer. It is difficult to see, however, how a pamphlet could be constructed to carry out the purposes of the *Jury Primer* and at the same time conform with the views of the court as expressed in the opinion. In order to avoid statements which might be construed as "prejudicial" when taken out of their text and scrutinized by lawyers and judges, and at the same time discuss no "controversial" points, would require nothing short of super-human effort. Even if a primer could be prepared with no "prejudicial" statements, to omit discussion of the "controversial" matters would rob the primer of most of its value.

The second point used by the court in invalidating Judge Miner's action was that there is no common law authority for giving the jury a preliminary course in their duties and responsibilities.¹⁶ There the judge-jury relationship was one of cooperation between the two branches of the judicial process. The judge gave assistance to the jury at every stage of the trial where his experience in court room practice could be of help.¹⁷ Moreover, there were not two separate entities in a trial, one to propound the law, the other to decide the facts, each distinct from

of all criminal cases. The police generally get the complaints and make the arrests. Police officials, crime detection laboratories and other agencies investigate and gather the evidence; the State's Attorney analyzes and presents the evidence at the trial. The jury passes upon the sufficiency of the evidence. The judge instructs the jury as to the law. To insure an orderly society for the safety, comfort, happiness and well being of all the people, it is essential to maintain these law enforcing agencies and to co-ordinate and harmonize their efforts for our common good." p. 6. "The purpose of questioning of prospective jurors by the prosecuting attorney and defense counsel is to ascertain their fairness and their competence to pass upon the guilt or innocence of the defendant." p. 7. The former, according to the court, gives the juror the impression he is required to convict the defendant if humanly possible. The latter presumes the defendant is guilty rather than innocent as required by law.

¹⁶For good discussions of the powers of judges at common law see: Eastman, *History of Trial By Jury* (1944) 3 Nat. B. J. 87; Sheldon, *Relation of Judge and Jury* (1916) 3 Vir. L. Rev. 275.

It is not clear from the Illinois Cases what common law is to be followed in criminal cases. Some of the cases have held the common law of England governs, *People v. Kelley*, 347 Ill. 221, 179 N. E. 898 (1931); *George v. People*, 167 Ill. 447, 47 N. E. 741 (1897); *People v. Bruner*, 343 Ill. 146, 175 N. E. 400 (1931); *People v. Ernest*, 306 Ill. 452, 138 N. E. 116 (1923). Others have held that the common law of Virginia controls, *People v. Callopy*, 358 Ill. 11, 192 N. E. 634 (1934); *Sinopoli v. Chicago Railways Co.*, 316 Ill. 609, 147 N. E. 487 (1925). The last two cases have been criticised, and it has been argued that the statements requiring reference to the common law of Virginia were unnecessary. Comment (1935) 29 Ill. L. Rev. 911, 916. Ill. Rev. Stat. (1947) c. 28, § 1 provides in effect that the common law of England so far as it is applicable and of a general nature shall be the rule of decision and shall be considered as existing in full force until repealed by legislative enactment.

¹⁷Gray, J. in *Capital Traction Co. v. Hof*, 174 U. S. 1, 13 (1899): " 'Trial by Jury', in the primary and usual sense of the term by a jury of twelve men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and enter judgment and issue execution on their verdict, but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them in the law and advise them on the facts."

the other; but the court and jury were a unit, the jury aiding the court in deciding the facts and the judge aiding the jury.¹⁸ Although it is nowhere specifically stated that the judge has the power to educate the jurors in court room procedure, it has long been customary for judges to address the jurors telling them substantially the same things contained in the *Jury Primer*.¹⁹ Moreover, as previously noted, the handbook for jurors is not a recent innovation, but has been used in at least nine states and in the federal courts.²⁰ The fact that similar handbooks have apparently never been held invalid by courts of other jurisdictions lends strong support to the position that their use is within the broad discretion of the trial court.²¹

The third ground for the Supreme Court's reversal is that the action was contrary to the statute setting forth qualifications of jurors²² and the rule of court that instructions must be in writing.²³ It is said that to distribute the pamphlet is to obtain jurors by that method and thereby add to the qualification requirements of the statute. However, this is not strictly true. The distribution of the pamphlet comes after the juror has qualified under the statute. Moreover, failure of a juror to read the pamphlet would not disqualify him from serving on the jury. It is merely an aid for those who wish to use it. The *Jury Primer* would violate the rule that instructions be in writing only if the word "instructions" is construed to include remarks on information given jurors before they are sworn in. Judge Miner attempted to foreclose this avenue of attack by stating specifically in the preface to the handbook that "None of these principles is to be regarded by prospective jurors as 'instructions' of law to be applied by them in any case in which they may serve."²⁴ There apparently are no previous cases construing the rule in this connection. However, other cases construing the term have usually viewed "instructions" as statements of the law applicable to the case made by the judge at the close of the evidence. Preliminary remarks to the jury before the trial, other oral statements made during the course of the trial or, as in this case, a printed pamphlet describing the trial procedure, are not usually con-

¹⁸ 3 Blackstone, Commentaries on the Laws of England (Wendell's 2nd ed. 1847) 374; Dicey, Law of the Constitution (8th ed. 1915) 389-390; Chittys, General Practice (2nd Am. ed. 1836) 913; Hale, History of Common Law of England (4th ed. 1792) 291; Pound, Spirit of the Common Law (1921) 124.

¹⁹ *Blackshear v. State*, 126 Tex. Crim. App. 417, 76 S. W. (2d) 601 (1934); *Thomas v. State*, 97 Tex. Crim. App. 432, 262 S. W. 84 (1924); *People v. Tennant*, 32 Cal. App. (2d) 155, 112 P. (2d) 62 (1941).

²⁰ *Supra* note 6 and 7.

²¹ *People v. Fisher*, 340 Ill. 216, 244, 172 N. E. 743, 755 (1930) (oral instructions before trial not error); *Blackshear v. State*, 126 Tex. Crim. App. 417, 76 S. W. (2d) 601 (1934) (judge's lecturing to jury before trial not error); *Thomas v. State*, 97 Tex. Crim. App. 432, 262 S. W. 84 (1924) (same); *People v. Tennant*, 32 Cal. App. (2d) 1, 88 P. (2d) 937 (1939) (same); *People v. Cowan*, 44 Cal. App. (2d) 155, 112 P. (2d) 62 (1941) (pamphlet distributed to jurors before trial not prejudicial error).

²² Ill. Rev. Stat. (1947) c. 78, §2.

²³ Rule 27 of the Supreme Court Rules of Practice, Ill. Rev. Stat. (1947) c. 110, §259.27, requires that "in criminal cases the court shall give instructions to the jury in accordance with section 67 of the Civil Practice Act." Ill. Rev. Stat. (1947) c. 110, §191. Section 67 in part provides that "the court shall give instructions to the jury only in writing and only as to the law of the case."

²⁴ Julius H. Miner, *The Jury Problem* (1946) 37 J. Crim. L. & Criminology 1, 5.

sidered "instructions."²⁵ The Supreme Court in the instant case did not classify the pamphlet and Judge Miner's remarks as instructions but merely stated that they were such "for all practical purposes."²⁶

Mixed in with the "instruction" argument is the Supreme Court's statement that the powers of the trial judge in Illinois are limited. This is inferred from the fact that the judge does not have the power to comment on the evidence. However, such a conclusion does not necessarily follow; for the restriction on the trial judge's power to comment on the evidence is statutory in Civil Cases²⁷ and by rule of the Supreme Court in criminal cases.²⁸ These limitations do not deprive the trial judge of all his powers, but only of the power to comment on the evidence.²⁹

The last affirmative ground for the Supreme Court's overruling the use of the "Jury Primer" was that to allow a judge to institute such a procedure would create chaos in the administration of the criminal law. It is said that permitting one judge to prepare a jury primer would encourage others to do the same, and that innumerable primers would be used in Illinois. However, such a bleak picture overlooks

²⁵ *People v. Horn*, 309 Ill. 23, 140 N. E. 16 (1923); *People v. Winchester*, 352 Ill. 237, 185 N. E. 580 (1933) (it is not error to give oral directions to jurors that evidence is admissible for only a limited purpose); *People v. Bydaleck*, 381 Ill. 330, 45 N. E. (2d) 849 (1943), *affirming* 313 Ill. App. 631, 40 N. E. (2d) 595 (1942) (court's oral direction to jury as to the form of verdict to be used was not an "instruction" required by statute to be in writing); *State v. Howland*, 157 Kan. 11, 128 P. (2d) 424 (1944) (oral directions to jurors to disregard evidence need not be in writing; construing a similar statute). *But see* *People v. Cheney*, 368 Ill. 131, 13 N. E. 2 (d) 171 (1938) (litigant entitled to have oral instructions of judge given in connection with admission of evidence in writing and presented to jury at the end of trial if so requested).

People v. Fisher, 340 Ill. 216, 244, 172 N. E. 743, 755 (1930), is a case involving oral directions on the law to the jury before examination on voir dire. The court held that this was not reversible error because nothing prejudicial was said, no objection was made to the entire instructions, only one of the jurors present served on the trial, and defendant's preemptory challenges were not exhausted. The court in dicta said: "Such practice on the part of the court is not to be commended, and should be indulged, if at all, with great caution . . . It cannot be doubted that, after the jury is accepted and sworn to try a case, there can, in this state, be no oral instructions to the jury as to the law governing that case, since the statute requires that instructions to petit jurors be in writing." The instant case can be distinguished on the ground that the pamphlet was given to prospective jurors before they were sworn, and was not on the law governing that case. In any event it is merely dicta which the court need not have followed in this case.

Under a statute similar to the Illinois statute Texas has held it was not error to lecture to the jury before trial. *Blackshear v. State*, 126 Tex. Crim. App. 417, 76 S. W. 2(d) 601 (1934) (court's lecturing the jury panel and also special veniremen as to their duties held not prejudicial); *Thomas v. State*, 97 Tex. Crim. App. 432, 262 S. W. 34 (1924) (same). Also see *People v. Tennant*, 32 Cal. App. 2(d) 1, 88 P. 2(d) 937 (1939); *People v. Cowan*, 44 Cal. App. 2(d) 155, 112 P. 2(d) 62 (1941).

²⁶ *Supra* note 24, at p. 250.

²⁷ Ill. Rev. Stat. (1947) c. 100, §191; *People v. Kelley*, 347 Ill. 221, 179 N. E. 898 (1931).

²⁸ Ill. Rev. Stat. (1947) c. 110, §259.

²⁹ *People v. Callopy*, 358 Ill. 11, 192 N. E. 634 (1934), held that this section did not require that the judge be allowed to comment on the evidence as he could at common law, but the legislature or the court under its broad rule making power could require all instructions to be in writing. This is not a holding that the other common law powers of the judge, not taken away by statute or rule of the Supreme Court are not to be exercised. Comment (1935) 29 Ill. L. Rev. 911; Note (1933) 6 So. Calif. L. Rev. 56; Note (1932) 18 Va. L. Rev. 780.

the fact that every trial judge abhors the thought of being overruled by a higher court. If he wished to employ a primer he would probably use one whose contents had been approved by the court rather than spend the time and trouble of preparing another pamphlet and consequently take the unnecessary chance that his would be held invalid. It would thus seem that the fear of chaos is more imaginary than real.

The state in its appeal brief advanced the argument that a juror is not disqualified because he has acquired information concerning jury duty and the other subjects discussed in the pamphlet. This information, it is said, is the same as any other information acquired by a juror in the movies, on the street, from friends, or from detective books. In fact, use of the *Jury Primer* is merely a means of complying with the statutory requirement that a juror be "well informed."³⁰ The Supreme Court's answer is that more than informing the juror was attempted here, and since each juror was required to read the pamphlet they were all disqualified.

Article II, section 5 of the Constitution of Illinois, providing that "The right of trial by jury as heretofore enjoyed, shall remain inviolate" is also discussed in the opinion. Although the court's discussion of this point is not very clear, apparently it felt that the primer contaminated the traditional jury trial by reason of Judge Miner's "indoctrination." In other words, since prospective jurors at common law were not given a primer to read, the constitutional provision regarding the right to trial by jury was violated by Judge Miner's doing so in this instance.³¹ And yet, in another part of its opinion, the Supreme Court said that its opinion should not be construed "as indicating or even intimating a viewpoint upon the constitutionality of legislation empowering trial judges to train or indoctrinate prospective jurors by means of a jury primer." Seemingly, therefore, the way remains open for legislative action in Illinois.

The Illinois Supreme Court invalidated the use of the *Jury Primer* because in its view the contents of this primer were prejudicial to the defendant and because any primer instituted by a trial judge is invalid under the laws of Illinois. It might have rested its opinion on the first ground alone and left open the further question until a primer more compatible with its views came before it. However, in view of the rest of the opinion, even if it is considered "obiter," such a move would probably meet with little success. If a jury reform of this order is to come in Illinois it must be from another source. Three possibilities seem to be left open by the court's opinion. First, and least desirable, the pamphlets may be mailed to prospective jurors by a disinterested organization.³² Second, the Supreme Court might under its broad rule making power adopt a suitable pamphlet for use in the trial court.³³

³⁰ Ill. Rev. Stat. (1947) c. 78, §2.

³¹ For Illinois cases interpreting the constitutional provision as requiring only that the essential features of the common law jury system be preserved, see: *Sinopoli v. Chicago Railways Co.*, 316 Ill. 609, 147 N. E. 487 (1925); *People v. Kelley*, 347 Ill. 221, 179 N. E. 898 (1931); *People v. Callopy*, 358 Ill. 11, 192 N. E. 634 (1934).

³² *Supra* note 3.

³³ The Supreme Court has broad rule making power in criminal cases. *People v. Callopy*, 358 Ill. 11, 192 N. E. 634 (1934) *supra* note 29.