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Instructions Are Full of Bunk, Avers Federal Judge

Dicta Editorial Board

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Instructions Are Full of Bunk, Avers Federal Judge

The most inefficient discharge of duty in the administering of justice is the charge to the jury because of the concept of legal technical phraseology, according to Judge T. Blake Kennedy, United States District Judge for Wyoming. Urging simplification of instructions, Judge Kennedy, who spoke before the Federal Judicial Conference of the Tenth Circuit, held in Denver, stated that ninety per cent of the instructions given to a jury are couched in legal phraseology which is of no value to the layman.

As a result the jury either disregards the instruction or becomes confused in analyzing it. Hence most instructions become merely excess effort on the part of the judge in an attempt to discharge his duty. To escape reversal judges are prone to give approved instructions. Many of these instructions are meaningless to a jury, as for example the accepted definition of "proximate cause."

The ideal instructions should outline clearly the issues of facts made by the case. Then the decision of the issues could be left to the jury. The instructions should be concise, pertinent to the fact in issue, and brief. If instructions are so framed, the jury can function much more readily and better.

Technical instructions, on the other hand, which properly state the law in abstract form are of no value to a jury. Instructions should be made applicable to the facts in the given case.

Judge Kennedy, who is noted for the type of instructions which he gives in a case, doubted if there is much hope at the present time of returning to a practical basis because of the concepts and decisions which surround the giving of instructions. However, he pointed out, most juries soon settle down to decide whether the facts actually happen as charged in an indictment or in a complaint or whether they did not, independently of the instructions.

In the opinion of Judge Kennedy, the giving of instructions has failed of its purpose because of the error and abuse which have crept into our conceptions of the proper functions of a jury. Some of the errors and misconceptions are: (1) that the jury is merely an adjunct to the judge instead of a separate and distinct component part of the judicial system; (2) that the average juror or layman is less capable of analyzing the facts than is a judge, whereas some jurors are markedly adept in such work which is obviously not dependent upon legal training; (3) that trial judges frequently comment in too great detail on the evidence,

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thereby invading the function of the jury; (4) that trial judges frequently give erroneous impressions to a jury which are difficult to overcome; and (5) that lengthy charges are of value, whereas they are not, especially if couched in legal language, since the jury soon becomes inattentive. Judge Kennedy pointed out that judges are too apt to be apprehensive that the jury will not discharge its duties, and this fact together with the lack of time in which a judge has to prepare instructions in an involved trial, may undo much good that instructions would otherwise accomplish.

This lack of time in which to prepare instructions is particularly dangerous if a judge is inclined to be a free talker, since loose and ill-considered instructions creep in, resulting in reversal in an appellate court.

On the whole, Judge Kennedy believes that there is "more unadulterated bunk" in jury instructions than in any other phase of jurisprudence. In many cases a jury often makes up its mind by the process of elimination, rather than by aid of instructions. A set of good instructions, Judge Kennedy concluded, was one that was brief and concise, clearly defined the issues, was as free as possible from legal phraseology, and aided the jury to solve its problems, but did not in effect solve these problems for the jury.

This is a summary of the remarks of Judge Kennedy, who spoke at the judicial conference. The judge did not prepare a written address for this occasion. Other speeches at the conference appeared in the July issue of DICTA, 12 *Rocky Mountain Law Review* 1, and 26 *A. B. A. Journal* 592. It is planned to make this conference an annual affair to bring about open discussions on federal procedure by practicing lawyers. This plan is in accordance with the Administrative Office Act, which provides that there shall be held annually in each federal circuit a conference of all circuit and district judges in the circuit, with participation by representatives of the bar for the purpose of considering the state of the business of the courts and devising ways and means of improvement.

LAVERY APPOINTED A. B. A. EDITOR

Urban A. Lavery has just been appointed managing editor of the American Bar Association to succeed Joseph R. Taylor, who retired last fall. Mr. Lavery attended the University of Denver Law School for a short time a number of years ago. He served as legislature draftsman for the Illinois Constitutional Convention, and as annotator on several Illinois publications. For a number of years he was counsel for various governmental agencies, and for a time was employed in the editorial department of the West Publishing Company.

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