Wyoming Law Journal

Volume 8 | Number 2 Article 7

December 2019

Instruction to Jury to Insure Racial Impartiality

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INSTRUCTION TO JURY TO INSURE RACIAL IMPARTIALITY

Commeting on civil rights legislation during the post Civil War era, Mr. Justice Bradley stated that the colored man may be receiving more consideration through legislation than that given to the white man.[1] When a man emerges from slavery, and, by the aid of legislation, shakes off the inseparable concomitants of that state, there comes a time when he must take the rank of a mere citizen, or a free man, and be protected only in the same manner as other men are protected.[2] Is the Negro today still a special subject of legislation and court protection? Must the legislatures and courts forever provide special protection for the former slave and the minority races? The courts have a duty to protect members of minority groups, who must look to them for affirmative relief. Can this duty be fulfilled by apprising the jury of the defendants' equality?

Just a hundred years ago, the Illinois Supreme Court in *Campbell v. People*,[3] held that a colored defendant, in a prosecution for murder, was entitled to an instruction to the jury apprasing his equality with white men. The evidence tended to show that a homicide had been committed in self-defense. The defense requested this instruction:

> "It is the duty of the jury to consider the prisoner's case as if he were a white man, for the law is the same, there being no distinction in its principles in respect of color."

The instruction was refused below. The refusal of this instruction was held to be reversible error, for, said the Supreme Court, as plain as the law of equality may be, the defendant is entitled to have it declared to the jury by the court.

The Civil War has been fought, the Thirteenth, Fourteenth, and Fifteenth Amendents have been added to the Federal Constitution, and a hundred years have elapsed since that early Illinois decision; and again that Court in *People v. Kirkendoll*[4] declared the allowance of an equality instruction to be the law. The defense, in a prosecution for rape, established a nearly perfect alibi, with no contradictory evidence being offered. The defense requested and was refused the following instruction which was almost identical with that involved in the original Illinois case:

> "It is the duty of the jury to consider the prisoner's case as if he were a white man, for the law is the same as to both white and colored men, there being no distinction in principle in respect to color."

The Court held that the defendant was entitled to this instruction, and ordered a new trial. It would seem this instruction was necessary to balance the prejudice against the defendant, for, in the absence of the instruction, the verdict was clearly contrary to the evidence.

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1. Civil Rights Cases, 109 U.S. 3, S.Ct. 18, 27 L.Ed. 835 (1883).
2. Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution.
3. 16 Ill. 17, 61 Am. Dec. 49 (1854)
4. 415 Ill. 404, 114 N.E.2d 459 (1953).

The issue has not been confined to Illinois, although cases from other states are rare. The Georgia Supreme Court[5] upheld the cautioning of a jury "that the law knows no creed or condition, no color, no nationality"; and, in effect, the jury was instructed that every defendant, whether he be rich or poor, high or low, should be tried with perfect impartiality. This instruction may be preferred in form to the Illinois practice, since it does not single out a particular race or class, although it be given with the intent of overcoming prejudice against a colored defendant.

The acceptance of these instructions has not been adhered to by all courts. They have been held to be argumentative, and to invade the province of the jury. For example, the Supreme Court of Alabama in *Pope v. State*[6] considered that the following instruction was properly refused:

> "The court charges the jury that they have a right in considering the evidence to take into consideration the traits, characteristics, and peculiarities of the white man and the negro man, but outside of that they must not let their verdict be influenced in the slightest degree by the fact that the deceased was a white man and the accused a negro."

The instruction was held to be argumentative, giving "undue prominence" to certain facts. Was the undue prominence in the instruction of greater weight than the prejudice against the defendant would justify? There was no comment upon the point during the course of the trial, and thus nothing to give rise to the need for this instruction.

In *Dolan v. State*,[7] an earlier Alabama case, where the question concerned liability of a white man for a crime against the person of a negro, the following instruction was given on that point:

> ". . . that it is just as much the duty of a jury to convict a white man of the murder of a colored man as it would be the duty of the jury to convict a colored man for the murder of a white man. . . ."

The giving of this instruction was allowed by the Supreme Court of Alabama. That court also allowed the following instruction regarding the credibility of negro witnesses:

> "Some argument has been made as to the color of the witnesses. It is immaterial whether the witnesses were white or black, and, if you believe beyond a reasonable doubt that black witnesses are telling the truth, it is as much your duty to convict upon their evidence as though they were white."

Counsel for the defense had raised the question of credibility of colored witnesses. The defendant was a white man, and all of the state's witnesses were negroes. The law is well stated in the instruction that equal weight is to be given to colored witnesses, as would be given to white witnesses.

5. Brown v. State, 105 Ga. 40, 31 S.E. 557 (1898).
6. 168 Ala. 33, 53 So. 292 (1910).
7. 81 Ala. 11, 1 So. 707 (1887).

This case was dsitinguished by the court in the *Pope* case; saying that, the instructions in the *Dolan* case were given to counteract argument upon the question of color, not arising in the *Pope* case.

The appraising of the gravity of the crime by a white man against a negro, approved by the court in the *Dolan* case, points to the heart of the equality problem. The instruction is necessary to curb the jury from exercising prejudice against the colored race by excusing the white defendant, the same as an instruction is needed to curb a jury from giving undue prominence to the fact that a defendant may be a colored man, in determining his guilt. The only difference lies in the fact that in the case of a white defendant the colored man is only indirectly affected. Nevertheless it is the prejudice against the colored man which must be overcome.

Credibility of a witness may be impeached in some jurisdictions on account of religious views;[8] however, a witness cannot be discredited merely because of his race or color.[9] In the absence of stautory regulation,[10] race or natonality is an immaterial factor in determining competency of witnesses.[11] A Federal Court[12] said that no witness is to be discredited merely because of his color, and it upheld the trial court in giving the following instruction:

> ". . . both white men and Indians lie, and that the evidence of both is entitled to the same credit, and such credibility is to be determined by the same rules of law. . . ."

The court said that when coupled with a correct statement of the law as to the jury's right to consider the intelligence, appearance, apparent candor, opportunities of knowledge, etc., of each witness, the instruction is proper.

Most courts will not instruct a jury on matters not asserted during the course of trial; but, if an instruction based on unasserted matters is not misleading, it is not reversible error.[13] To insure the availability of an instruction of the type herein considered, it would be well to raise the point during trial if possible. Perhaps it could be done during voir dire examation of jurors.

A search of the cases reveals a striking paucity of litigation involving instructions of the type herein discussed[14] Apparently such instructions are

8. 58 Am. Jur. Witnesses, sec. 675, p. 37.
9. Lodge v. State, 122 Ala. 97, 26 So. 210, 82 Am.St.Rep. 26 (1899).
10. Cf. Birmingham R. Light & P. Co. v. Jung, 11 Ala. 461, 49 So. 434, 18 Am.Cas. 557, 14 L.R.A. 581 (1909), holding that a state statute making persons of color incapable of being witnesses except against each other is repugnant to the 14th Amendment. Cf. Bowlin v. Com. 65 Ky. (2 Bush) 5, 92 Am. Dec. 468 (1867), where the court upheld a law rendering negroes and Indians incompetent as witnesses in cases of the Commonwealth or in civil cases in which only negroes or Indians were parties.
11. 58 Am. Jur. Witnesses, sec. 158, p. 113.
12. Shelp et. al. v. U.S., 81 Fed. 694 (9th Cir. 1887).
13. Chester v. State, 216 Miss. 614, 63 So.2d 99 (1953); State v. Taylor, 236 N.C. 130, 71 S.E.2d 924 (1952); U.S. v. Jonikas, 197 F.2d 675 (7th Cir. 1952); cert. denied, 344 U.S. 877, 73 S.Ct. 172, 97 L.Ed. 679 (1952); People v. Harman, 110 CA 545, 243 P.2d 15 (1952).
14. A search of the form books carrying stock instructions to juries reveals only two examples, which are found in Blashfield's Instructions to Juries, Dewit C. Blashfield, 3 vols. (Gallaghan & Co. 2d Ed. 1916).

not being requested as a safeguard for defendants who belong to minority races. When a colored man is on trial for a crime, his equality is guaranteed under the law; that fact is fundamental. For this reason the effectiveness of the instruction may be doubted. Granted that jurors do not always decide cases according to the law given them, nevertheless there are jurors who make an honest effort to follow the law as given to them by the court in its instructions. On the whole it would seem that as a means of overcoming prejudice, not only in cases of negro defendants and witnesses, but of other minority races and nationalities as well, such instructions are likely to prove beneficial. The great weight of the authorities hereinabove discussed establish that the defendant is entitled to this instruction as a matter of right. Perhaps lawyers should avail themselves of such instructions, in proper cases, much oftener than is the current practice.

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SPECIAL APPEARANCE TO PROTECT PROPERTY IN ATTACHMENT PROCEEDINGS

In an action against a non-resident defendant, begun by a preliminary or concurrent attachment of the non-resident's property located within the state, and where service is procurred by publication or by out of state service, the court merely acquires jurisdiction over the attached property,[1] and not over the person of the defendant.[2] It is generally held that the non-resident may enter a special appearance to object to the court's jurisdiction over the attached property and still limit the liability of the defendant to an *in rem* judgment.[3] There is a split of authority on the effect of an attack on the attachment on other bases than jurisdictional grounds.[4] The problem presented in this note goes one step further than this: can the non-resident defendant appear specially, defend to the merits, and hence not subject to personal liability, but rather limit recovery to the property brought under the jurisdiction of the court by the preliminary attachment?[5]

The leading cases holding that the defendant is an attachment action

1. This particular type of jurisdiction has commonly been called "quasi in rem", but is referred to throughout this article as in rem jurisdiction because its effects and character is typical of the in rem action.
2. Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed 565 (1877); Freeman v. Alderson, 119 U.S. 185, 7 S.Ct. 165, 30 L.Ed. 372 (1886); Clymore v. Williams, 77 Ill. 618 (1875); King v. Vance, 46 Ind. 246 (1874); Epstein v. Salorgne, 6 Mo. App. 352 (1878); Robinson v. Nat. Bank, 81 N.Y. 385 (1880); Bates v. Crow, 57 Miss. 676 (1880).
3. Big Vein Coal Co. v. Read, 229 U.S. 31, 33 S.Ct. 694, 57 L.Ed. 1053 (1913); Davis v. Cleveland, C. C. & St. L. R. Co., 217 U.S. 157, 30 S.Ct. 463, 54 L.Ed. 708, 27 L.R.A. (NS) 823, 18 Ann. Cas. 907 (1909); Meyer v. Brooks, 29 Ore. 203, 44 P. 281, 54 Am. St. Rep. 790 (1896); Adams v. Trepanier Lumber Co., 117 Ohio St. 298, 158 N.E. 541, 55 A.L.R. 1118 (1927); Chubbuck v. Cleveland, 37 Minn. 466, 35 N.W. 362, 5 Am. St. Rep. 864. Likewise in Tabor v. Baer, 107 W.Va. 594, 149 S.E. 675 (1929), a motion to dismiss an attachment case, solely on the ground that no property was attached and the order of publication was insufficient, constituted a special appearance.
5. For other articles on the same problem see: 18 Ford. L. Rev. 73 (1949); 97 U. of Pa. L. Rev. 403 (1949); 25 Iowa L. Rev. 329 (1940).