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Leo Carlin
West Virginia University College of Law

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RELATION BETWEEN SEPARATE INSTRUCTIONS TO THE JURY

LEO CARLIN*

Although instructions to the jury may be, and usually are, under the local practice, drafted and proposed by counsel, still they are read to the jury by the court and purport to be, and by adoption are, instructions by the court. Most instructions, separately, do not purport nor intend to instruct the jury as to all the law of the case needing exposition, but only as to particular phases of the law. Hence most instructions, although sufficiently intelligible standing alone, are incomplete in the sense that additional instructions may be necessary or expedient to inform the jury fully as to the whole law of the case. Corollary to these observations, results the familiar rule that instructions are to be read and construed as a whole; and out of this rule, comes the salutary doctrine that an instruction which is merely incomplete, even as to the particular phase of law with which it is peculiarly concerned, will be aided by another instruction which supplies the missing element.[1] Hence two incomplete instructions, each, alone, bad because of its incompleteness, may supplement each other, each supplying to the other a missing element. So it can be said that what

*Professor of Law, West Virginia University.

[1] State *v.* Prater, 52 W. Va. 132, 43 S. E. 230 (1902); State *v.* Cottrill, 52 W. Va. 363, 43 S. E. 244 (1902).

amounts to a fault in one instruction may be corrected by what is said in another instruction. But the rule operates only when the correction is by way of supplement, and not when it is by way of contradiction. Wherefore, if an instruction is bad because of something which it contains—a misstatement of the law, for instance—rather than because of something which it merely lacks, it cannot be aided by another instruction which contradicts the bad matter. When two instructions are merely incomplete, but mutually helpful, it will be presumed that the jury gave united effect to them both. However, if two instructions are contradictory, it is impossible to give effect to them both; and while the result of giving effect to the good one would be to nullify the bad one, it might be impossible to determine which one the jury followed.[2]

The doctrine that an incomplete instruction may be aided by another instruction has usually been qualified by one prominent exception, namely, that a binding instruction must be complete within itself and cannot be aided by way of supplement or otherwise by another instruction.[3]

A binding instruction is one which enumerates certain hypotheses upon finding the truth of which the jury are told that they must find for (or against) a stated party. It may be very complex or it may be very simple, depending upon the circumstances. Usually, when propounded by the

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2 McKelvy *v.* Chesapeake & Ohio R. Co., 35 W. Va. 500, 14 S. E. 261 (1891); Osborne *v.* Francis, 38 W. Va. 312, 18 S. E. 591, 45 Am. St. Rep. 859 (1893); Cobb *v.* Dunlevie, 63 W. Va. 398, 60 S. E. 384 (1908); Producers Coal Co. *v.* Mifflin Coal Mining Co., 82 W. Va. 311, 95 S. E. 948 (1918). For numerous cases from other jurisdictions, see 14 R. C. L. 813; 38 Cyc. 1782 *et seq.*

"It has also been held that where there are inconsistent expressions in instructions it is to be presumed that those last used were accepted by the jury as controlling." 14 R. C. L. 815, citing State *v.* Yanz, 74 Conn. 177, 50 Atl. 37, 92 Am. St. Rep. 205, 54 L. R. A. 780 (1901). But this view certainly is greatly in the minority and it is believed that the presumption is unwarranted.

3 Shaffer *v.* Consolidation Coal Co., 151 S. E. 326 (W. Va. 1929); Freeman *v.* Monongahela Valley Traction Co., 98 W. Va. 311, 128 S. E. 129 (1924); Evans *v.* Kirson, 88 W. Va. 343, 106 S. E. 647 (1921). Only a few of the later West Virginia cases are cited. For cases in accord from other states, see 38 Cyc. 1787.

plaintiff, it is complex, and when propounded by the defendant (unless based on an affirmative defense), it is simple; because the plaintiff ordinarily has the burden of establishing affirmatively all the material elements of his cause, which are multiple, while a wholly sufficient defense may be established by contradicting a single one of those elements. Of course, the process may be reversed where the declaration is confessed because the general issue is not pleaded and the defendant relies on an affirmative plea. A court is not warranted in telling the jury, through the medium of a binding instruction, that they must find for (or against) a stated party, unless the instruction contains every hypothesis, affirmative or negative in character, based on the evidence and the pleadings, upon which, nothwithstanding other matters in the instruction, the jury might find otherwise.

When the true nature of a binding instruction is comprehended, it seems entirely logical to reach the conclusion that, if it is incomplete in any of its elements, it cannot be supplemented by another instruction. To permit such a result would essentially be to permit an instruction which, although usually described as incomplete, is really bad because of a statement which it contains, to be cured by an instruction containing a contradictory statement. A binding instruction lacking a necessary hypothesis is something more, and worse, than a merely incomplete instruction. It not only lacks something which is necessary—the omitted hypothesis—but it also contains something which is wrong —a positive direction to find a certain way on an insufficient number of hypotheses. To permit the jury to seek the missing hypothesis in some other instruction and so take it into consideration would be to contradict the mandate of the binding instruction which tells them to find a verdict on what is stated in it. Properly analyzed, the question is whether a bad (not merely incomplete) instruction can be cured by one which contradicts it. Wherefore the situation

must be governed by the rule which applies to inconsistent instructions.[4]

The West Virginia Supreme Court of Appeals has frequently said that a binding instruction lacking a necessary element cannot be aided by another instruction.[5] However, cases may be noted where the principle seems to have been obscured, if not submerged, by the prominence given to that other doctrine, that instructions are to be read together and considered as a whole. For example, in *Bartlett* v. *Bank of Mannington,*[6] it would seem that the court committed error through misapplication of the latter principle to the exclusion of the former. In that case, a binding instruction was given on behalf of the plaintiff. Apparently, it lacked an element (described as the defendant's theory of defense) necessary in it as a binding instruction and therefore was not merely incomplete but positively bad. The court, adverting to the fact that the record failed to show, as it should have done, that no other instructions were given, says:

> "Its (the instruction's) omission of the defendant's theory is unobjectionable, if the court gave one submitting that theory. Instructions are to be read and considered as a whole, and if, being so read, they correctly state the law, the inconsistency or conflict of the opposing theories does not vitiate them, for that is an element or factor in almost every jury trial."

A similar view seems to have been taken in the dissenting opinion in the very recent case of *Shaffer* v. *Consolidated Coal Company,*[7] although the majority opinion expressly recognizes and applies the orthodox rule.

In the Bartlett Case, the court, seeming to have lost sight of the significance of a binding instruction, held that the

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[4] The fact that the situation involves inconsistent instructions has been recognized by the Illinois and Indiana courts. Illinois Iron & Metal Co. *v.* Weber, 196 Ill. 526, 63 N. E. 1008 (1902); Lake Shore & M. S. R. Co. *v.* Richards, 40 Ill. App. 560 (1892); Chicago *v.* Fields, 139 Ill. App. 250 (1908); Belvidere City R. Co. *v.* Bute, 128 Ill. App. 620 (1906); Osber *v.* Zadek, 120 Ill. App. 444 (1905); Nickey *v.* Steuder, 164 Ind. 189, 73 N. E. 117 (1905).

[5] See cases cited in n. 3.

[6] 77 W. Va. 329, 87 S. E. 444 (1915).

[7] N. 3 *supra.*

instruction was sufficient on the assumption that other instructions may have been given which supplied the defendant's theory of its case. Such reasoning would have been logical if the court had been dealing with an instruction which was not binding. But the instruction being a binding one, incapable of being aided by another one, it would seem that, lacking a necessary element, it should have been held bad whether other instructions were given or not.

Another very recent case, *Shumaker* v. *Thomas*,[8] in which the court departs from the general rule as frequently stated in prior decisions, is interesting because it may indicate an intention of the court to establish an exception rather than to indulge in a departure from the rule. The intention of the court in this respect is not clear, because it does not indicate that it is conscious of any unusual situation or is aware that its statements need reconciliation with anything that has been said in other cases. The court says:

> "Plaintiff's instruction No. 1, after reciting, as a preamble, the city ordinance fixing the speed limit of all vehicles at 10 miles per hour on approaches to bridges, directed the jury to find for the plaintiff, if they believe from the evidence that he was struck while the truck was being operated on the approach to the bridge in excess of 10 miles per hour, in a reckless, careless and negligent manner, and that the driving of the truck in excess of 10 miles per hour, in a reckless, careless, and negligent manner, was the proximate cause of the collision, *'the plaintiff himself being without fault at the time of receiving the injury. . .'*[9]
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> "The defendants assert that each instruction ignores the defense of contributory negligence, or at least, as such defense was presented therein by recital only, the jury may have understood the court to mean that the plaintiff was without fault. The latter point of criticism would merit serious consideration, if there had been no other instructions fairly presenting the defense to the jury, but several other instructions,

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[8] 151 S. E. 178 (W. Va. 1929).
[9] Italics ours.

> given at the instance of the defendants, told the jury to find for the defendants, notwithstanding negligence on their part, if the jury believed from the evidence that the plaintiff himself was guilty of negligence contributing approximately to his injury. The instructions, therefore, in our opinion, considered as a whole, clearly submitted to the jury the issue of contributory negligence."

It will be noted that this instruction does not ignore the question of contributory negligence, but presents it to the jury in the form of an ambiguity. The phrase, "the plaintiff himself being without fault at the time of receiving the injury," may be taken, as the defendants argue, as an assertion by the court that the plaintiff was without fault; or it may be taken to have the meaning as if it read, "provided that the plaintiff (or the jury finding that the plaintiff) himself was without fault at the time of receiving the injury." If it be given the former meaning, the instruction would be bad because there was evidence tending to prove that the plaintiff was guilty of contributory negligence, and the question was one of fact for the jury to decide. On the other hand, if the phrase be given the alternative meaning, the instruction is sufficient, because it would direct the jury to consider the question of contributory negligence. Hence reference to other instructions would be necessary, not for the purpose of supplying an absolute omission, but for the purpose of explaining an ambiguity in the binding instruction. Does this case warrant a modification of the general rule, to the effect that, while another instruction cannot supply an essential element omitted from a binding instruction, yet it may lend aid by way of explaining an ambiguity?