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Practice and Procedure—Instruction to Juries—Credibility of Witnesses

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terest must be settled so as to promote public policy, or as is often said, to do the greatest good for the greatest number with the sacrifice of as few interests as possible. This, in the last analysis, is the true solution of the problem. As population becomes denser the public has an increasing interest that the productiveness of each parcel of realty be increased. To impose the burden contended for, namely, make premises "child proof," upon the ownership of realty would directly thwart the public interest. In some cases indeed, it might discourage any improvement. From these considerations of public interest, coupled with the fact that courts have always been reluctant to impose new burdens upon the ownership of reality, we conclude that no such duty is justifiable. Why should the duty be thrust upon the landowner rather than upon the parent or guardian who is undoubtedly in a better position to know the peculiar proclivities of the child. While the numerical weight of authority still supports the Stout Case, the more recent decisions show a tendency in the direction of absolving the landowner from liability. The fact that some of the courts which first adopted the so-called Turntable Doctrine have more recently taken express precautions to limit it specifically to turntables, show that they regard it as an unwarranted transgression upon established common law rules. If, as Judge Denman points out in Dobbins v. Missouri etc. R. Co., 91 Tex. 60, 41 S. W. 62, there is a necessity for any such duty in the case of a reservoir, or a turntable, etc., the state legislature should regulate the situation under the broad arm of police power, rather than to require the courts to usurp well founded principles of law.

—M. H. M.

Practice and Procedure—Instruction to Juries—Credibility of Witnesses.—The West Virginia decisions would appear to be in some confusion on the subject of instructions to juries regarding credibility of witnesses, or at least it would seem that they are not clear to everyone, such instructions having been the cause of a number of reversals in recent years.

In the recent case of State v. Powers in a trial for larceny the Court instructed the jury that "they are the sole judges of the

\[12 \text{ 11 Harv. L. Rev. 349, 363.}
\[13 \text{ 46 Am. L. Rev. 282.}
\[1 \text{ 113 S. E. 913 (W. Va. 1922).}
weight of testimony of any witness who has testified before them . . . . and in ascertaining such weight, they have a right to take into consideration the credibility of such witness, as disclosed from his evidence, his manner of testifying and demeanor upon the witness stand, and his apparent interest, if any, in the result of the case. And if the jury believe that any witness has testified falsely as to any material fact they have the right to disregard all the testimony of such witness." This instruction was assigned as an error by the defendant. The Court dismissed the assignment of error without discussion. The defendant cited three cases in support of his point. In the first of these the Court instructed the jury that "it is the sole judge of the evidence and that it might believe or refuse to believe any witness." On appeal it was held that this instruction was objectionable because it permitted the jury to reject testimony arbitrarily, and that a jury cannot without reason refuse consideration of testimony.

In the second case cited by defendant the Court instructed the jury "that they are the sole judges of the evidence and that they may believe or refuse to believe any witness and that when passing upon credibility of witnesses they may take into consideration his interest" etc. The court held this to be bad.

The third case cited by the defendant is State v. Long. Here the instruction was "The Court instructs the jury that they are the sole judges of the evidence and of the weight to be given thereto and that they may believe or refuse to believe any witness or any part of his evidence, and that when passing upon the credibility of any witness they might take into consideration" etc. The giving of this instruction was held to be reversible error.

The instruction that the jury "are the sole judges of the evidence and that they may believe or refuse to believe any witness" was approved in two former West Virginia cases. But as is pointed out in State v. Long, supra, the Court later changed its view and disapproved that instruction in State v. McCausland and held likewise in State v. Lutz.

It would appear that there is a literal distinction between the instruction given in the Powers Case and that given in the Long Case, in that the latter instruction would give the jury an absolute and arbitrary right to disregard evidence, while the former

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2 State v. McCausland, 82 W. Va. 525, 98 S. E. 933 (1918).
3 State v. Ringer, 84 W. Va. 546, 100 S. E. 413 (1919).
would do so only for cause. But is this a distinction that would be noticed by a jury so as to change the manner in which they would regard any given testimony? Rather, are not the instructions so substantially alike that a reversal is not justified, even though the former be the more correct? Does not either accomplish the purpose of an instruction?

The office of instructions is to aid the jury in arriving at a proper verdict; to instruct and not to confuse and mislead the jury; to enlighten the minds of the jury on the law of the particular case. The decisions in other states on this point are not by any means uniform. In Steber v. Chicago, etc., R. Co. the Court held that "it is error to give instructions which authorize a jury to wholly disregard evidence for speculation and unfounded reasons." In Gibson v. Troutman, the Court held the following charge to be erroneous: "The jury are to judge of the credibility of witnesses and to give such weight to testimony as the jury may think, in the exercise of a sound discretion, that the testimony of any witness or witnesses is entitled to." They said this instruction was too comprehensive and that a jury is only authorized to disbelieve a witness when he is discredited in some of the modes known to the law.

On the other hand, in Comstock v. Whitworth the Court said that an instruction regarding credibility of witnesses was erroneous without the qualification that the jury is the exclusive judge of the weight of the evidence, the credibility of the witnesses and the inferences of fact to be drawn from the proofs. "The jury, and not the court, are the proper and exclusive judges of credibility." The jury "are the exclusive judges of the credibility of the witnesses and of the weight of all and each particular of the testimony." "The jury are the sole judges of the credibility of the witnesses and are not required to believe everything said by any witness." In Money v. Seattle R. & S. Ry. Co. an instruction that the jury were "the sole and exclusive judges of the evidence in the case and of the credibility of witnesses and the weight

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7 State v. Legg, 59 W. Va. 315, 52 S. E. 545 (1906).
9 Higgins v. Whitemore, 118 Va. 414, 52 S. E. 130 (1914).
10 129 Wis. 10, 120 N. W. 502 (1909).
11 9 Ill. App. 94 (1881).
12 75 Ind. 129 (1881).
13 38 N. Y. 1724.
14 Harrison v. Brock, 1 Munf. 22 (Va. 1810).
17 59 Wash. 120, 109 Pac. 307 (1910).
to be attached to the testimony of each” was held to be proper.18
"The remark as to which of the witnesses was entitled to the
most credit, preceded and followed as it was by the explicit declara-
tion that the jury were the sole judges alike of the correctness
and credibility of the witnesses, calls for no interference."19 "It
is error to charge the jury that they are bound to believe a wit-
ness unless he is impeached."20

Now, we have in the United States two distinct lines of decisions,
one upholding an instruction that tells a jury that it may arbi-
trarily disbelieve testimony, the other holding such instruction to
be erroneous. Decisions of either kind have been handed down
in West Virginia at different times. The question then arises as
to which decision is the sounder. From the cardinal principle of
the common law that the jury are the sole judges of the evidence
it would seem to follow that it is entirely within their province to
accept or refuse within their own minds such testimony as they
see fit. Otherwise they are not the sole judges of the evidence. If
this be true, then the West Virginia Court should not reverse a
case because the jury has been instructed that they are the sole
judges of the evidence and that they may believe or refuse to be-
lieve any witness, as it has done in the recent decisions cited.
—R. G. K.

CONSTITUTIONAL LAW—LICENSES.—The petitioner averred that
section 35a of Chapter 32 Code 1913 as amended and re-enacted
by sections 35a and 35b of Chapter 109, Acts 1921, insofar as they
undertake to give the discretion to grant or refuse licenses
are in contravention of the equal protection of the law clause
of the United States Constitution. The section, the constitu-
tionality of which is in question, provides that the coun-
ty court may at its discretion grant or refuse the application
of any person for a license to keep a pool table for public resort.
Held, that the statute does not infringe the equal protection of
the law clause of the Federal Constitution. State, ex rel. Hamrick

Section 35b of Chapter 109, Acts 1921 transfers all powers,
including the discretionary power of section 35a, to the council of

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18 22nd Dec. Dig. 337.
20 State v. Smallwood, 75 N. C. 104 (1876).