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## CRIMINAL LAW AND PROCEDURE - INSTRUCTION AS TO THE REASONABLE DOUBT OF EACH JUROR

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CRIMINAL LAW AND PROCEDURE — INSTRUCTION AS TO THE REASONABLE DOUBT OF EACH JUROR — The accused in a criminal prosecution requested, in addition to a general charge on reasonable doubt, an instruction stating, "The court instructs the jury that if after the consideration of the whole case, any juror entertains a reasonable doubt of the defendant's guilt it is the duty of such juror so enertaining such doubt, not to vote for a verdict of guilty, or be influenced in so voting for the single reason that a majority of the jury might be in favor of a verdict of guilty." This instruction was refused and the defendant appealed from his conviction. *Held*, it was reversible error to refuse this instruction since it was not covered in substance by the instructions given upon reasonable doubt. *State v. Keller*, (S. D. 1933) 250 N. W. 37.

It is a settled rule that a criminal jury must believe the accused guilty beyond reasonable doubt in order to convict him,<sup>1</sup> but there has been little uniformity in the presentation of this rule to the jury by way of court instructions.<sup>2</sup> The principal case raises a question as to the necessity of giving not only a general charge upon reasonable doubt but also, upon request, an instruction that each juror should himself be free from a reasonable doubt in order to vote for a verdict of guilty. Each juror should be certain in his own mind of the defendant's guilt or the verdict would not be truly unanimous,<sup>3</sup> but such an instruction embodies danger in that it stresses the importance of each juror's opinion so as possibly to militate against the free joint deliberation in the jury room which is essential.<sup>4</sup> In view of such danger and the fact that the instruction is of little value since an ordinary juror would naturally know that he was violating his duty in yielding a sincere conviction to the opinion of the others,<sup>5</sup> the utility of such a charge may well be doubted. The opinions on the point afford little aid to the lawyer due to detailed differences of the instructions in each case. However, three distinct policies may be said to appear, some courts tending to hold such an instruction improper,<sup>6</sup> many indicating that it is proper but need not be given though requested,<sup>7</sup> and a few holding, with the instant case, that it is necessary

<sup>1</sup> 16 C. J. 778; 8 R. C. L. 218 (1915); 23 AM. AND ENG. ENCYC. LAW, 2d ed., 948 (1903).

<sup>2</sup> 2 BRICKWOOD'S SACKETT, INSTRUCTIONS, 3rd ed., 1699 (1908); 23 AM. AND ENG. ENCYC. LAW, 2d ed., 955 (1903); 16 C. J. 988; 8 R. C. L. 220 (1915).

<sup>3</sup> 16 C. J. 780 cites many cases to this effect.

<sup>4</sup> 16 C. J. 1029 cites many cases indicating the necessity for deliberation among jurors with the present theory of jury trial in criminal cases.

<sup>5</sup> The needlessness of such an instruction caused one of the justices here to dissent in the face of two earlier decisions. *State v. Wilcox*, 48 S. D. 289, 204 N. W. 369 (1925), and *State v. Smith*, 56 S. D. 238, 228 N. W. 240 (1929).

<sup>6</sup> *People v. McNabb*, 63 Cal. App. 755, 219 Pac. 1028 (1923); *Hall v. State*, 78 Fla. 420, 83 So. 513 (1919); *State v. Boyles*, 34 Idaho 283, 200 Pac. 125 (1921).

<sup>7</sup> *Burk v. State*, 16 Ala. App. 110, 75 So. 702 (1917); *State v. Murphy*, 154 La. 190, 97 So. 397 (1923); *State v. Shaw*, 59 Utah 536, 205 Pac. 339 (1922).

when requested.<sup>8</sup> It would seem most desirable to leave the matter to the discretion of the trial judge, requiring him to emphasize the necessity of free joint deliberation if he rendered such an instruction.<sup>9</sup>

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<sup>8</sup> *State v. Warrick*, 96 W. Va. 722, 123 S. E. 799 (1924).

<sup>9</sup> Such an instruction would state not only that each juror should be free from a reasonable doubt, but also that he should first discuss freely with the other jurors. *State v. Shaw*, 59 Utah 536, 205 Pac. 339 (1922), and *State v. Warrick*, 96 W. Va. 722, 123 S. E. 799 (1924) suggest the ideal type of "individual juror" instruction.