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American Bar Association Section of Antitrust Law: Jury Instructions in Criminal Antitrust Cases

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JURY INSTRUCTIONS IN CRIMINAL ANTITRUST CASES. By *The American Bar Association Section of Antitrust Law.* New York: Record Press. 1965. Pp. xvi, 537. $9.75.

This is a most useful compilation of instructions given by thirty-one federal judges in thirty-three different criminal antitrust suits in twenty-two different districts of the United States courts during the period 1923-1964, commencing with *United States v. Trenton Potteries Co.*[1] It has been prepared by a committee under the direction of Victor H. Kramer, former Chief of the Civil Litigation Section of the Antitrust Division, Department of Justice, who is now practicing in Washington, D.C. He has had the assistance of a dozen other lawyers working in the field, and the result is a valuable handbook indeed.

As the editors explain in their introduction, the volume contains about half of the jury charges given in Sherman Act criminal cases since 1923. Careful editing has pruned away most repetition. The editors have inserted within the charges explanatory captions keyed to an index of legal categories, and have supplied separate tables classifying the cases by subject-matter and commodity, the names of the judges presiding, and the respective judicial districts. The canons for selection from the available material, where alternatives existed, were clarity, succinctness, and most recent date (as evidenced by Judge Van Dusen's charge in *United States v. Johns-Manville Co.*[2] The editors have also included charges which contain the only available instruction on a particular substantive question of antitrust law.

The volume thus contains for antitrust lawyers the best collection of pronouncements from judge to jury on the substantive law that must instruct and contain the jury's deliberations. The instructions are clothed in the common sense, work-a-day terms necessary for what Judge Frank called jury-made law, as contrasted with judge-made law.[3] From the point of view of the concepts which lurk in their verbiage, the instructions are spongy and intractable material, but that is the price one must pay for the jury trial protected by the seventh amendment. Balzac, who was not acquainted with the Bill of Rights, looked on the jury as "twelve men chosen to decide who has the better lawyer." However, in many criminal antitrust cases a jury may be the only common-sense safeguard of the rights of businessmen caught in the Byzantine complexities of the Sherman, Clayton, and Robinson-Patman laws, with their innumerable decisional glosses. It is an unsatisfactory method, as Judge Frank pointed out;[4]

1. Cr. No. 32-566, S.D.N.Y. 1922.
2. Cr. No. 21-118, E.D. Pa. 1962.
3. FRANK, LAW AND THE MODERN MIND 174 (1930).
4. FRANK, COURTS ON TRIAL 108-25 (1949).

yet for needless and wrongly motivated prosecutions, the grand jury may be an ineffective screen, leaving the petit jury as the only protection of the citizen.

The difficulty of the method is illustrated in this book. For instance, the dominating concept of "reasonable doubt" is not very satisfactorily defined, the best treatment being that in *United States v. American Tobacco Co.*,[5] in which Judge Ford spoke in terms of "an abiding conviction to a moral certainty of the truth of the charge under consideration."[6] Some may think this an overstatement. Apart from the comic definition of the term "reasonable doubt" as "any doubt that is reasonable" (which one does sometimes find), I have wondered why it is so hard to make clear to laymen the exact nature of the concept, and why so many judges find it necessary to define the phrase in its own terms. The Supreme Court remarked in *Miles v. United States*[7] that attempts to explain "reasonable doubt" do not usually result in making it any clearer to the jury; surely it should be possible to say that a reasonable doubt is an uncertainty or question that survives the application of rational analysis to the evidence. Yet perhaps these terms suffer from being more complicated than the words defined—like Sir Thomas Browne's translation of *festina lente* as "celerity contempered with cunctation."

It is gratifying to find Judge Lindley expressing the view that aid to the jury can be given more efficiently by an oral charge which describes the legal questions involved "in as simple terms as possible,"[8] avoiding legal terminology. In instructions to the jury, simplicity and articulation are the two cardinal points. Vagueness and misunderstanding arise as much from lack of clear and articulate structure in the charge as from verbosity and complexity. For instance, the following colloquy at the end of a long charge can only have left the jury mystified:

> Mr. Rothbard: I ask your Honor to say to the jury that if the jury find the defendants Delta Fish Company and Busky participated under such circumstances as to furnish reasonable grounds for apprehending a design to do bodily harm or cause substantial economic loss, and that there was reasonable ground for believing the danger imminent and that such design would be accomplished, they must be acquitted.
>
> The Court: I have given that in substance, except only your limitation that if they went into it is not correct.
>
> Mr. Rothbard: I did not say that. I said participated.
>
> The Court: If they participated at any time, no. If they parti-

5. Cr. No. 6670, E.D. Ky. 1940.

6. SECTION OF ANTITRUST LAW, AMERICAN BAR ASS'N, JURY INSTRUCTIONS IN CRIMINAL ANTITRUST CASES 164 (1965) (hereinafter cited as JURY INSTRUCTIONS).

7. 103 U.S. 304, 312 (1880).

8. JURY INSTRUCTIONS 128-29.

> cipated from beginning to end under those circumstances.
>
> Mr. Rothbard: That is what I meant.
>
> The Court: Then they are not guilty, but if at any time their participation continued without those circumstances, it is a different situation.[9]

The only hope of a jury so instructed is to be allowed to take a written copy of the instructions with them to the jury room, as Judge Eschbach permitted in *United States v. Standard Oil Co. (Ind.),*[10] and as Judge Caffrey in Massachusetts did with a civil antitrust case. But other judges, like Judge Van Dusen in the *Johns-Manville* case, are disinclined to follow this practice, believing that it would tend to distract the jury's deliberations into the semantics of the judge's particular phraseology and destroy the Olympian perspective of the entire case which their collective memory is supposed to furnish.

This last is the greatest delusion of the whole business, and yet—so hard is our predicament—the jury system does offer the best safeguard against abuses in antitrust enforcement through the criminal law. For the better operation of that system this manual of instructions is an excellent tool.

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9. *Id.* at 61-62.

10. *Id.* at 437, quoting the charge to the jury in United States v. Standard Oil Co. (Ind.), Cr. No. 2199, N.D. Ind. 1958.