UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 52 | Number 4 Article 2

3-1-1974

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NORTH CAROLINA JURY INSTRUCTION PRACTICE —IS IT TIME TO GET THE JUDGE OFF THE TIGHTROPE?

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North Carolina jury instruction practice is unique.[1] In North Carolina the trial judge is required to "declare and explain the law arising on the evidence given in the case,"[2] a rule that has been interpreted as compelling a summary of the evidence.[3] A number of other

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This article was prepared in cooperation with the North Carolina Law Center. With the support of the Law Center, the author, in December 1972, sent a questionnaire to each North Carolina Superior Court judge asking for information about the judge's jury instruction practice and for his attitudes on the state's rules. Thirty-five judges responded. Their answers are referred to in the article and cited as Questionnaire to Superior Court Judges. A copy of the questionnaire and all of the completed questionnaires are on file with the author at the University of North Carolina School of Law.

1. This article is intended to deal only with the judge's final charge to the jury before it begins its deliberations. The article does not consider the special problems that arise from instructions given by the court during the course of the trial or after the jury has begun its consideration of the evidence.

2. N.C.R. CIV. P. 51(a) provides:

> In charging the jury in any action governed by these rules, no judge shall give an opinion whether a fact is fully or sufficiently proved, that being the true office and province of the jury, but he shall declare and explain the law arising on the evidence given in the case. The judge shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; provided, the judge shall give equal stress to the contentions of the various parties.

N.C. GEN. STAT. § 1-180 (1969) provides:

> No judge, in giving a charge to the petit jury in a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury, but he shall declare and explain the law arising on the evidence given in the case. He shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; provided the judge shall give equal stress to the State and defendant in a criminal action.

Section 1-180 formerly applied to both criminal and civil cases. In 1967, the North Carolina Rules of Procedure were adopted (effective January 1, 1970), and rule 51 now governs jury instructions in civil cases. The courts have treated decisions under section 1-180 prior to 1970 as authoritative in civil matters now covered by rule 51. *See, e.g.*, Investment Properties of Asheville, Inc. v. Norburn, 281 N.C. 191, 188 S.E.2d 342 (1972).

3. *E.g.*, Eastern Carolina Feed & Seed Co. v. Mann. 258 N.C. 771, 129 S.E.2d 488 (1963); Sugg v. Baker, 258 N.C. 333, 128 S.E.2d 595 (1962); Morris v. Tate, 230 N.C. 29, 51 S.E.2d 892 (1949); State v. Friddle, 223 N.C. 258, 25 S.E.2d 751 (1943).

The exact extent of the required summary is not clear. Both rule 51 and section 1-180 provide that the evidence need be stated only "to the extent necessary to explain

states permit their judges to summarize the evidence;[4] no other state requires it. In addition, North Carolina lawyers are not required to offer requests for instructions on essential or "substantive" features of the case.[5] Except in the instance of an insignificant misstatement of fact, errors concerning instructions are automatically preserved for appeal, whether or not counsel has objected.[6] Although a few other

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the application of the law thereto," *see* note 2 *supra*. An idea of what this means is given in State v. Friddle, *supra*:

> The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and on the other, and to bring into view the relation of the particular evidence adduced to the particular issue involved . . . . The judge should segregate the material facts of the case, array the facts on both sides, and apply the pertinent principles of law to each, so that the jury may decide the case according to the credibility of the witnesses and the weight of the evidence.

223 N.C. at 261, 25 S.E.2d at 753.

A few cases have indicated that recapitulation may be dispensed with where the facts are simple. *E.g.*, Duckworth v. Orr, 126 N.C. 674, 36 S.E. 150 (1900). *See also* Morris v. Tate, *supra*, where the court referred to the above rule, but held that the facts were not sufficiently simple to dispense with a recapitulation, despite the fact that the only issue for the jury was the credibility of the witnesses.

4. *See, e.g.*, Haines v. Goodlander, 73 Kan. 183, 84 P. 986 (1906); Kelley v. City of Boston, 201 Mass. 86, 87 N.E. 494 (1909); Wilson v. Syer, 116 Vt. 342, 75 A.2d 677 (1950).

5. McCall v. Gloucester Lumber Co., 196 N.C. 597, 146 S.E. 579 (1929); Durham Constr. Co. v. Wright, 189 N.C. 456, 127 S.E. 580 (1925). The attorneys must request charges on "subordinate" features of the case. *See, e.g.*, State v. Johnson, 193 N.C. 701, 138 S.E. 19 (1927); Koutsis v. Waddel, 10 N.C. App. 731, 179 S.E.2d 797 (1971). One question in the Questionnaire to Superior Court Judges asked for the frequency with which lawyers requested charges on subordinate features of the case. Two judges responded that such requests are often made, sixteen responded that they are sometimes made, and seventeen responded that they are rarely made. With regard to requests for instructions on substantive features, three judges responded that such requests are often made, twenty responded that they are sometimes made, and eleven responded that they are rarely made.

On appeal, the party assigning a failure to charge as error must set out what he contends the court should have charged. State v. Huntley, 284 N.C. 148, 200 S.E.2d 21 (1973); State v. Wilson, 263 N.C. 533, 139 S.E.2d 736 (1965).

6. N.C.R. Civ. P. 46(c) provides:

> If there is error, either in the refusal of the judge to grant a prayer for instructions, or in granting a prayer, or in his instructions generally, the same is deemed excepted to without the filing of any formal objections.

Although this rule covers only civil cases, the courts have reached the same result in criminal cases. *See, e.g.*, State v. McCoy, 236 N.C. 121, 71 S.E.2d 921 (1952); State v. Butcher, 13 N.C. App. 97, 185 S.E.2d 11 (1971).

The courts often state and occasionally hold that an objection must be made to a misstatement of the evidence or the contentions of the parties in order to preserve error for appeal. The purpose of this rule is to give the trial judge an opportunity to correct his mistake. Cases so holding include State v. Virgil, 276 N.C. 217, 172 S.E.2d 28 (1970); State v. Ritter, 239 N.C. 89, 79 S.E.2d 164 (1953); State v. Lambe, 232 N.C. 570, 61 S.E.2d 608 (1950). The impact of the rule, however, is considerably watered by its corollary rule that a "statement of a material fact not shown in evidence constitutes reversible error" even in the absence of an objection. Piedmont Supply Co. v. Rozzell, 235 N.C. 631, 70 S.E.2d 677 (1952). *See also* Baxley v. Cavenaugh, 243 N.C. 677, 92 S.E.2d 68 (1956); State v. McCoy, *supra*; State v. Butcher, *supra*.

states are similarly generous to their lawyers,[7] the absence of need for request or objection becomes more significant in light of the greater opportunity for error inherent in the requirement of an evidentiary statement. The judge's drafting problem is made even more complex since North Carolina, in accord with many other states,[8] also prohibits its comment on the evidence by the trial judge.[9] Thus the North Carolina trial judge must walk the tightrope between summary and comment without help from the attorneys, either one of whom may be delighted to see him fall.

Despite its difficulty, North Carolina jury instruction practice is not necessarily bad. Certainly uniqueness is not alone cause for condemnation. Arguably, North Carolina may be both instructing its juries more effectively than other jurisdictions and treating its litigants more fairly by not binding them to their attorneys' mistakes. And yet, certainly the practice creates problems that are not encountered in other jurisdictions. The criticism of the practice, which has come from both within[10] and without[11] the state, has not focused on its uniqueness but rather upon the difficulties which result from it.

A comparison of the cases holding that the judge's error was in the nature of a misstatement and those holding that it constituted a statement of a material fact not in evidence reveals that here is very little actual difference in the kind of error made in the two classes of cases. Rather, the basic difference seems one of degree. Serious misstatements are treated as statements of fact not in evidence, and no objection is required. *Compare* State v. Ritter, *supra* (objection required), *with* State v. Butcher, *supra* (no objection required).

7. *See, e.g.*, NEB. REV. STAT. § 25-1139 (1964); IDAHO R. CIV. P. 51; TENN. R. CIV. P. 51.02.

8. *See, e.g.*, ME. REV. STAT. ANN., tit. 14, § 1105 (Supp. 1974); TEX. R. CIV. P. 272.

9. N.C. GEN. STAT. § 1-180 (1969); N.C.R. CIV. P. 51(a).

10. *E.g.*, Ryals v. Carolina Contracting Co., 219 N.C. 479, 485, 14 S.E.2d 531, 535 (1941) (Clarkson, J., dissenting) (discussed more fully *infra*, see text accompanying notes 25-27); Paschal, *A Plea for a Return to Rule 51 of the Federal Rules of Civil Procedure in North Carolina*, 36 N.C.L. REV. 1 (1957). In Justice Clarkson's concurring opinion in Caldwell v. Southern Ry., 218 N.C. 63, 10 S.E.2d 680 (1940), the judge commented:

> Usually a litigant who can find no prejudicial or reversible error cries out C.S., 564 [now N.C.. GEN. STAT. § 1-180 (1969)]. Madame Roland, a famous French lady during the French Revolution, when on the scaffold, looking at the statue to Liberty which stood there, said bitterly, "Oh, liberty, what crimes are committed in thy name." I might paraphrase this quotation by saying: "Oh, C.S. 564, what injustice, by technical, attenuated and cloistered reasoning, is committed in thy name." A court should be slow to "pick up" C.S. 564 to overthrow a verdict of a jury—the palladium of our civil rights," the rock on which free and orderly government is founded.

Id. at 82, 10 S.E.2d at 691. *See also* Comment, *Study of the North Carolina Jury Charge; Present Practice and Future Proposals*, 6 WAKE FOREST INTRA. L. REV. 459 (1970).

11. Wright, *Adequacy of Instructions to the Jury: II*, 53 MICH. L. REV. 813

The question raised is a fundamental and obvious one: are the difficulties resulting from North Carolina's unique jury instruction practice offset by its actual benefits?

THE BENEFITS AND DIFFICULTIES RESULTING FROM THE UNIQUE ASPECTS OF NORTH CAROLINA JURY INSTRUCTION PRACTICE

1. The Trial Judge's Role in the Preparation of the Final Charge

Arguably, the North Carolina practice of placing the entire burden of preparation of jury instructions on the trial judge is beneficial since it places this important feature of the trial solely in the hands of an impartial person, schooled in the law generally and more particularly familiar with the complex state law on instructions. The lawyers are spared the time it would take to prepare charges that would only reflect their partisan views. Court time is saved since there is no need for a conference on instructions necessary in other states to formulate a correct, nonpartisan charge.

However, these theoretical benefits are more than balanced by significant detriments. The trial judge's burden of preparation is a particularly heavy one. Not only must he act without any meaningful assistance from the trial lawyers, but the complexity of state law in this area makes the preparation of an error, free charge a far more difficult job than that which faces lawyers in other jurisdictions. The North Carolina trial judge must consider not only the applicable law and the sufficiency of the evidence to support giving a charge on that law, but also the need to summarize the evidence to comply with the dictates of rule 51 or section 1-180 of the General Statutes. Further, he must carefully draft his instructions so that his summary of the evidence does not amount to a comment. When he does get assistance from the lawyers, as in the case of a request for a charge on a "subordinate" feature of the case, the request need only be in the form of a suggestion of subject matter. The exact form of the charge is still left to the trial judge.[12]

The problems of the North Carolina trial judge are compounded by other difficulties entirely apart from the peculiarities of jury in-

(1955). Prof. Wright calls the task of the North Carolina trial judge "impossible". *Id.* at 825.

12. N.C. GEN. STAT. § 1-181 (1969) and rule 51(b) deal with requests for special instructions to the jury. Both require only that the request be in writing, entitled in the cause, and signed by counsel submitting it. Neither contains a requirement on the form of the request.

struction practice. He usually has neither secretarial help nor law clerks. His research must be done on his own and often time will limit that research to a review of charges given in other cases by himself or other trial judges. Very often, because of the state's required circuit riding, the jury charge will be prepared in the judge's motel room far from his home and office. He has to transport his collection of charges in the trunk of his car much as a traveling salesman would carry his sample case.

One North Carolina lawyer, who has had significant trial experience, describes still another problem with the state jury instruction practice and the burden which it places on the trial judge:

> [North Carolina jury instruction practice] operates as a psychological Damolcetian sword on trial judges who, I believe, go frequently to untoward lengths in forcing settlements or otherwise aborting trials simply to avoid the horror. The "Thursday afternoon nonsuit" is a recognized phenomenon in North Carolina practice. It stems as much from avoidance of the torture of "giving the charge" as from a desire to get home for a long weekend.[13]

The actual amount of time spent in preparation of jury charges will, of course, vary with both the nature of the case and the experience and abilities of the trial judge. In relatively simple cases, such as a criminal case in which the accused is charged with driving under the influence of alcohol, the experienced judge can prepare the final instructions while the lawyers are giving their closing arguments. However, in more difficult cases even an experienced judge will spend from three to four hours in preparation of the final charge. Preparation time as long as ten hours is occasionally required.[14]

Superior court judges report that they are being aided in their preparation by the recently formulated North Carolina Pattern Jury Instructions.[15] However, although a substantial number of charges have been prepared for use in criminal cases and in some cases involving motor vehicle accidents,[16] pattern instructions are still unavailable for many issues raised in civil cases. Furthermore, unlike standard charges in other states, North Carolina pattern charges can only be in outline form. The instructions can set forth the law, but the judge still

13. Personal correspondence.
14. Questionnaire to Superior Court Judges; *see* note preceding note 1 *supra*.
15. *Id.*
16. NORTH CAROLINA CONFERENCE OF SUPERIOR COURT JUDGES, NORTH CAROLINA PATTERN JURY INSTRUCTIONS FOR CRIMINAL CASES (1973) [hereinafter cited as N.C.P.I.—CRIM.].

must summarize the evidence in each case.[17] No form instruction can aid him very much in his task of summarizing. The requirement that the instruction be tailored to the individual case not only prevents pattern charges from being as helpful in North Carolina as they are in other states, but also deters the supreme court from approving them.[18]

2. Jury Understanding

Certainly the requirement of rule 51 and section 1-180, that the jury be instructed on the law "arising on the evidence," is designed to promote the jury's understanding that its function is to decide questions of fact in accordance with the law applicable to the case. The North Carolina courts have not only recognized this objective but have seized upon it with a fervor. For example, in most cases the parties are not even permitted to waive a recapitulation of the evidence.[19] Not infrequently, the state higher courts pause to praise the practice. In *Morris v. Tate* the supreme court said:

> G.S. 1-180, so intimate in its prescription for the conduct of the trial judge, is, perhaps, the most often cited statute on either criminal or civil appeals. It was intended, of course, to keep inviolate the line between the functions of court and jury—the one as dispenser of the law, the other as triers of the facts—and thus to

17. For example, the pattern instruction setting forth the basic charge in a case in which the defendant is accused of assault with intent to kill, reads:

> The defendant has been accused of assault with intent to kill.
>
> (*Summarize the State's case and the defendant's case to the extent required by G.S. 1-180.*)
>
> Now I charge that for you to find the defendant guilty of assault with intent to kill, the State must prove beyond a reasonable doubt:
>
> *First*, that the defendant intentionally (and without justification or excuse) [injured] [attempted to injure] (*name victim*).
>
> *And second*, that the defendant had the specific intent to kill (*name victim*).
>
> So I charge that if you find from the evidence beyond a reasonable doubt that on or about (*name date*), (*name defendant*) intentionally (and without justification or excuse) (*describe assault*), intending to kill him, it would be your duty to return a verdict of guilty of assault with intent to kill. However, if you do not so find or have a reasonable doubt as to one or both of these things, it would be your duty to return a verdict of not guilty.

N.C.P.I CRIM. § 208.65.

18. In their replies to the Questionnaire (*see* note preceding note 1 *supra*), all but one of the responding superior court judges indicated that they believed that pattern jury instructions would aid in the administration of justice. In contrast, a substantial majority of the responding judges (better than two to one) replied that they were against the creation of an approved set of instructions which must be given when applicable. The difficulty of drafting a charge to apply to all fact situations was the most frequently cited reason for the opinion of those judges opposing approved instructions.

19. *E.g.*, Eastern Carolina Feed & Seed Co. v. Mann, 258 N.C. 771, 129 S.E.2d 488 (1963); Sugg v. Baker, 258 N.C. 333, 128 S.E.2d 595 (1962).

> preserve the integrity of trial by jury. But it does more. It provides a co-operative program by which these parts of the court may work together as a single intelligent agency in judicial investigation and determination. The statute, therefore, sensibly requires, on the part of the judge, a statement of the evidence to which he is attempting to apply the law.[20]

Despite laudations such as these, not everyone has been so certain of the value of the practice in promoting jury understanding. Several superior court judges, in response to the Questionaire,[21] questioned the effectiveness of the summary of the evidence in serving its intended purpose. One judge stated: "I feel that it is an utter waste of time to have to review the evidence. If the jury hasn't understood the evidence to begin with, they will not understand the summary." Another judge commented:

> After all, the attorneys have already beat the jury over the head with a verbal barrage about the evidence giving the contentions of all parties. Why should a judge be required to repeat evidence the jury has heard several times from witnesses and attorneys?

Several judges indicated that any improvement in jury understanding was lost because a charge which contains a summary of the evidence simply takes much longer to deliver than a charge which does not. One very experienced trial judge noted: "A charge now requires me to charge for one and one half hours. If not for rule 51, I could charge in thirty minutes or less, and I believe the jury would have a much better understanding of the law and how to apply it."

The length of time taken by the trial judge to charge the jury under present North Carolina practice is a real problem. In certain kinds of cases, for example, a personal injury action with a counterclaim, the charge may take many judges as long as two hours to deliver. There is an occasional report of a three-hour charge being given to the jury.[22] Anyone who has listened to such a charge must surely wonder at the jury's ability to concentrate over that long a period.

The effectiveness of a charge will depend largely on things quite apart from the technical requirements of the state's practice. The quality of the judge's delivery plays a major role in jury understanding. The length of the trial and the intelligence of the particular jury are

20. 230 N.C. 29, 31-32, 51 S.E.2d 892, 894 (1949).
21. *See* note preceding note 1 *supra.*
22. Questionnaire to Superior Court Judges; *see* note preceding note 1 *supra.*

also factors which will cause variations in the effectiveness of any particular charge. Jury understanding is also affected by differing styles of trial judges operating within the general confines of the North Carolina practice. For example, there is no requirement that a summary of the evidence be done witness by witness.[23] Yet, some judges, particularly those who have been on the bench only a short time, understandably prefer to charge this way for fear of omitting from the summary an item of evidence later found to be critical by a reviewing court. A witness by witness review may or may not be helpful to the jury; it unquestionably lengthens and usually complicates the charge.

The only fair response to the question of whether the state practice in fact promotes jury understanding of its function is that we simply do not know. A recent psychological experiment on jury reaction to different instructions on the same points of law raised serious doubts about the ability of lawyers to predict jury reaction to varying charges.[24] To the knowledge of this writer, no social scientist has ever addressed the exact question raised by the North Carolina rule, that is, whether the jury better understands how it is to resolve factual issues under the applicable law when the evidence is summarized as opposed to when it is not. Common sense tells us that a short and articulate summary of the alternative facts in conjunction with a statement of the law might well be helpful to a jury. Yet, such a summary is probably too infrequently given under existing practice. Until the social sciences teach us more about jury reaction, we can only conclude that the assumptions made by the North Carolina appellate courts about the state's jury instruction practice are not derived from or supported by empirical evidence.

3. *Appellate Court and New Trial Time*

One of the clearest advantages of North Carolina jury instruction practice is that it tends to prevent a party from being prejudiced by his lawyer's oversights. The litigant can be harmed neither by his lawyer's failure to request a charge on an important feature of the case nor by his lawyer's negligence in failing to object to an erroneous charge. The advantage is even more significant when viewed in

23. Sugg v. Baker, 258 N.C. 333, 336, 128 S.E.2d 595, 597 (1962); State v. Thompson, 257 N.C. 452, 126 S.E.2d 58 (1962).

24. L.S.E. Jury Project, *Juries and the Rules of Evidence*, [1973] CRIM. L. REV. (Eng.) 208. The experiment involved *inter alia*, varying instructions on standard of proof in theft and rape cases and instructions on corroboration and recent complaint in a rape case. *Cf.* R. SIMON, THE JURY AND THE DEFENSE OF INSANITY 66-77 (1967).

light of the complexity of the charge required under state practice. If lawyers were required to participate in the formulation of jury instructions, the opportunity for and likelihood of attorney error would be substantial. Undoubtedly many worthy clients are rescued from the inadequacies of their counsel by the generosity of the state practice.

On the other hand, the state has paid a heavy price for its leniency. Substantial appellate court time continues to be spent in the consideration of jury instruction questions. In the court year beginning in September 1971 and ending in September 1972, the North Carolina Supreme Court and the North Carolina Court of Appeals discussed problems relating to instructions in eighteen percent of their opinions. In cases in which there was a jury verdict, the two courts discussed the judge's instructions to the jury in 37.4 percent of the opinions. These statistics can be contrasted with comparable statistics for two neighboring states, Virginia and South Carolina. Both of these states require that the parties object to instructions in order to preserve error for appeal.[25] Neither requires a summary of the evidence.[26] In the period from September 1971 to September 1972, the Supreme Court of Appeals of Virginia discussed jury instructions in 8.9 percent of all opinions and in 21.8 percent of cases involving a jury verdict. During the same period, the South Carolina Supreme Court discussed jury instructions in only 3.6 percent of all cases and in 9.6 percent of appeals from a jury verdict.

The above statistics deal only with appellate court time spent in consideration of jury instruction questions and not with the time spent by the trial courts in retrying cases because of errors in the final charge. Obviously, the fact of a permitted appeal increases the possibility that the appellate court will reverse the judgment below and re-

25. State v. Hall, 253 S.C. 294, 170 S.E.2d 379 (1969); Mickle v. Blackmon, 252 S.C. 202, 166 S.E.2d 173 (1969); Ragsdale v. Jones, 202 Va. 278, 281, 117 S.E.2d 114, 117 (1960); Gabbard v. Knight, 202 Va. 40, 46, 116 S.E.2d 73, 77 (1960).

Virginia requires a request for instructions in order to raise the failure to charge as error on appeal. Chittum v. Commonwealth, 211 Va. 12, 17, 174 S.E.2d 779, 782 (1970); Haymore v. Brizendine, 210 Va. 578, 581, 172 S.E.2d 774, 777 (1970). In South Carolina, the trial judge must charge on "controlling principles of law" even without a request. Further elaboration requires a requested charge. Coleman v. Lurey, 199 S.C. 442, 20 S.E.2d 65 (1942); *accord*, Trexler v. McIntyre, 216 S.C. 469, 58 S.E.2d 887 (1950).

26. S.C. CONST. art. 5, § 26; *see* Life Ins. Co. of Virginia v. Hairston, 108 Va. 832, 851, 62 S.E. 1057, 1065 (1908) ("court should content itself with giving the jury general principles of law and leaving them to apply those principles to the facts in evidence before them").

mand for a new trial. Although the propensity of the state appellate courts to reverse cases for insignificant errors in instructions seems to be declining,[27] the opportunity is still present.[28] The very complexity of the state practice gives rise to the tendency, illustrated by a number of appellate cases, to consider form over substance and literal compliance with rule over jury understanding. Furthermore, even in instances where the error below might well have been prejudicial, the error and the reversal could often have been avoided if counsel had been required to object at trial, giving the judge an opportunity to correct an obvious misstatement.

A glaring example of a reversal as a result of an over-technical reading of the statute is *Ryals v. Carolina Contracting Co.*,[29] decided by the North Carolina Supreme Court in 1941. The case involved an automobile accident in which the plaintiff had allegedly been injured by the failure of the defendant construction company adequately to warn him of construction in the road. The trial judge's charge filled thirty pages of the transcript. It consisted of a general and concededly accurate statement of the law, a statement of the contentions of each party, and a relating of those contentions to the stated rules of law. The court ordered a new trial stating, in part:

> While it was probably an oversight on the part of the presiding judge, the charge fails to give any instruction as to the law arising upon and applicable to the facts which the jury may find from the evidence. It fails to declare and explain the duties which the law imposed upon the defendant with respect to the matters

27. *See, e.g.*, State v. Holden, 280 N.C. 426, 185 S.E.2d 889 (1972); State v. Winecoff, 280 N.C. 420, 186 S.E.2d 6 (1972); State v. Bailey, 280 N.C. 264, 185 S.E.2d 683, *cert. denied*, 409 U.S. 948 (1972); State v. Lee, 277 N.C. 205, 176 S.E.2d 765 (1970).

28. In 19 BAR NOTES 23 (1967), Professor Henry Brandis, Jr. reported a study of reversals based upon errors in instructions. Professor Brandis analyzed the 4870 civil and 1386 criminal cases reported in Volumes 231-68 of the North Carolina reports. There were reversals in 1792 (thirty-seven percent) of all civil cases and 572 (forty-one percent) of all criminal cases (thirty-eight percent overall). In 294 civil cases (six percent of all civil cases) and 189 criminal cases (fourteen percent of all criminal cases) reversals stemmed in whole or in part from errors in the charge (eight percent overall). Thus error in the charge accounted for sixteen percent of the reversals in civil cases and thirty-three percent of reversals in criminal issues (twenty percent of reversals in all cases). The supreme court had considered the final charge to the jury, either expressly or by implication, in twenty-five percent of the civil and seventy-two percent of the criminal cases (thirty-five percent of all cases).

Dean Brandis further commented: "Theoretically, if all charges had been free from error, reversals would have been reduced by 16.9%—(the difference between this and the 20% figure being represented by cases which, while involving reversible error in the charge, also involved other reversible error)." *Id.* at 24.

29. 219 N.C. 479, 14 S.E.2d 531 (1941).

> involved in the allegations of negligence. It fails to instruct the jury as to the law with respect to the breach of any of these duties, and the relation of such breach to the injuries as the proximate or concurrent cause thereof.[30]

Large segments of the court's charge are set out in the dissenting opinion of Justice Clarkson. A reading of those segments, as the dissenting justice forcefully demonstrates, shows that the only conceivable error made by the trial judge was his failure to restate the evidence as applicable to the rules of law. The fact that he had accomplished the same result in giving the contentions of the parties was simply ignored by the majority of the court. Justice Clarkson was enraged; at one point he stated:

> The modern conception of "Law and Justice" is that cases should be decided on their merit and if on the whole charge there is no prejudicial or reversible error, the verdict and judgment thereon should not be disturbed. Technicalities, refinements and attentuated and cloistered reasoning should be relegated to the dark ages of the law. In seeking for justice, errors that are not material should not be fished out of a record to grant a new trial, subjecting litigants to be harassed by a series of trials and often destroying their rights on technical grounds—in this way they are sometimes unable to bear up under the law's delay . . . .
>
> G.S., 564 [N.C. GEN. STAT. § 1-180 (1969)] is hoary with age—dead in the Federal Courts and discarded in most of the states, and a crippled germ in others. To cling to it, where there is no prejudicial or reversible error, is to shackle a court to a "living death," denying justice on the merits of a case, when the whole record shows no prejudicial or reversible error.[31]

More recently, the supreme court, in *Bulluck v. Long*,[32] remanded a case for a new trial under circumstances similar to those in the *Ryals* case. In the *Bulluck* case, which involved the collision of a car with another car parked along the side of the highway, the judge gave detailed statements of the law and of the parties' contentions with regard to the law, but again failed to restate those contentions in the form of a statement applying the law arising on the evidence. The court held that the failure to state the evidence in this manner was error despite the fact that the parties had waived a recapitulation of the evidence! The court noted:

> The chief purpose of a charge is to aid the jury to understand

30. *Id.* at 484-85, 14 S.E.2d at 534.
31. *Id.* at 497, 14 S.E.2d at 542.
32. 256 N.C. 577, 124 S.E.2d 716 (1962).

> clearly the case and arrive at a correct verdict. For this reason, the Court has consistently held that G.S. 1-180 confers a substantial legal right, and imposes upon the trial judge a positive duty, and his failure to charge the law on the substantial features of the case arising on the evidence is prejudicial error, and this is true even without prayer for special instructions . . . . In the charge here most of the evidence was stated in the contentions of the parties. Where no evidence is stated except in the contentions of the parties, that does not meet the requirements of G.S. 1-180.[33]

It is difficult to imagine how the jury could have been misled in *Bulluck*. The jury's task was to choose between the factual contentions of the parties under the law as given by the court. Both the law and the factual contentions were stated so that the jury could make a clear choice. The supreme court seems to be requiring a repetition of the contentions in neutral form, a step that is as likely to confuse, as it is to aid, the jury.[34]

Numerous cases are in accord with the holding in *Bulluck* that the evidence must be summarized despite the express stipulation of the parties that it need not be.[35] In one such case, the supreme court stated simply that the rule requiring the judge to apply the law arising on the evidence "is for the guidance of the jury, not for the benefit of counsel."[36] Obviously, the court's statement is correct. Yet, as discussed above, the requirement of an evidentiary statement has, at best, theoretical value which may or may not be realized in any given case. Who is better able to judge the need for a recapitulation of the evidence in the final charge to the jury in an individual case than the adversary parties and the trial judge? Surely not the appellate courts.

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33. *Id.* at 587, 124 S.E.2d at 723 (citations omitted).

The supreme court in *Bulluck* also indicated that the judge had failed to inform the jury that a violation of section 20-141 of the General Statutes, which requires reasonable and proper speed, was negligence per se. Although the exact charge given on this question is not set out in the opinion, it appears that the trial judge did inform the jury that traveling at a speed in excess of what would be reasonable and proper under the circumstances would be negligence. 256 N.C. at 586, 124 S.E.2d at 723. Thus although the term "per se" was not used, the jury seems to have been adequately informed of the effect of the statute.

The court also held that the trial judge had erred in failing to inform the jury of plaintiff's contentions with regard to the doctrine of sudden emergency. The judge's error seems to have been his failure to state that the plaintiff denied the existence of facts which gave rise to the doctrine. *Id.* at 587, 124 S.E.2d at 723.

34. Another case in which the supreme court required a new trial under similar circumstances was Glenn v. City of Raleigh, 246 N.C. 469, 98 S.E.2d 913 (1957). The *Glenn* case is fully discussed and criticized in Paschal, *supra* note 10.

35. *See* cases cited note 17 *supra*.

36. Sugg v. Baker, 258 N.C. 333, 335, 128 S.E.2d 595, 597 (1962).

Similarly the supreme court has held that the evidence must be summarized even where the trial judge intends to give a peremptory instruction and the sole purpose of submitting the case to the jury is to have it determine the credibility of plaintiff's witnesses.[37] The requirement of an evidentiary statement in such a case seems superfluous. There are no alternative findings for the jury to consider. It has one task only—the determination of credibility. Certainly it is capable of performing that task without a recapitulation of the evidence. The need for a new trial in such an instance seems a sad waste of expensive judicial time.

Of course, not all instances of reversals because of errors in instructions can be classified as over-technical applications of the statute or rule. In many instances, the error was substantial and clearly prejudicial to the appellants. One such case was *Investment Properties of Asheville, Inc. v. Norburn*,[38] which involved an action on a guaranty agreement allegedly made by one Norburn. The trial judge had instructed the jury that Norburn would be responsible under the note if he "received a valuable consideration for the execution and delivery of the guaranty."[39] The supreme court correctly noted that, under this charge, the jury might well have understood that it was required to find that Norburn himself had received a valuable consideration. Under the facts of the case, the instruction was indeed unduly restrictive. The trial judge made a mistake. Yet, there is no reason to believe that had counsel called the mistake to his attention, the trial judge would not have readily corrected it and avoided the need for appellate review and a new trial of the case. Perhaps *Investment Properties* is the kind of case that should be reversed on appeal. But it also illustrates a problem that would never have reached the appellate courts had counsel been required to object to erroneous instructions before the jury began its deliberations.

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37. Morris v. Tate, 230 N.C. 29, 51 S.E.2d 892 (1949). *See also* Belmany v. Overton, 270 N.C. 400, 154 S.E.2d 538 (1967) and Whiteside v. McCarson, 250 N.C. 673, 110 S.E.2d 295 (1959) where the court held that a peremptory instruction in favor of the defendant in cases involving the statutory presumption of agency in the operation of a motor vehicle (N.C. GEN. STAT. § 20-71.1 (1965)) must be couched in terms which directly relate to the specific evidence adduced by defendant.

However, the holding of the *Morris, Belmany* and *Whiteside* cases may not be generally applicable to peremptory instructions. In 2 MCINTOSH NORTH CAROLINA PRACTICE AND PROCEDURE § 1516 (Phillips Supp. 1970), the author indicates that, except for cases involving section 20-71.1, a peremptory instruction may be stated without specific reference to the evidence in the case.

38. 281 N.C. 191, 188 S.E.2d 342 (1972).

39. *Id.* at 197, 188 S.E.2d at 346.

An even more glaring example of an instance in which lawyer participation in the preparation of jury instructions might have prevented a new trial is *State v. Williams*.[40] In that second degree murder and manslaughter case, the charge, as it appeared in the record on appeal, contained some gross errors. For example, the charge contained a statement that the state "has satisfied" the jury "beyond a reasonable doubt" that the defendant was guilty of criminal negligence. The court noted:

> It is clear that some of the errors in this charge resulted from *lapsus linguae* on the part of the trial judge; however, in all fairness to this experienced trial judge, we feel compelled to observe that it is also apparent that many of the errors of omission and commission resulted from the taking and transcription of the record.[41]

Nevertheless, the court felt compelled to reverse and remand for a new trial. What better way to prevent both prejudice resulting from a slip of the tongue on the part of the trial judge and reversals resulting from the shortcomings of court reporters than to require the trial lawyers to listen carefully to the charge as given and to object to those parts of it found to be erroneous. In most instances, the trial judge will be willing to correct obvious misstatements. Obvious errors such as the omission of an "if" or "not", which were not objected to but appear on the record on appeal, can then rather safely be assumed to have been errors of the court reporter in transcription, rather than actual errors occuring at the trial.

CONCLUSIONS

The benefits derived from North Carolina jury instruction practice are theoretical at best. The detriments are easily documented. The practice places upon an already overworked and understaffed trial judge an almost impossible research and drafting burden that could more appropriately and more efficiently be placed upon trial counsel. The form of instruction which the judge is required to give may promote or may impede jury understanding depending upon the kind of case being tried, the oral communication skills of the judge, and the length of time the judge feels obligated to take in giving the final charge. Although the litigants are spared from the errors of their attorneys, the appellate courts needlessly spent time considering cases

40. 280 N.C. 132, 184 S.E.2d 875 (1971).
41. *Id.* at 137, 184 S.E.2d at 878.

based upon alleged errors in jury instructions that could have been corrected in the trial court.

The most troublesome aspect of the North Carolina practice is the license that it gives to trial lawyers to leave the courtroom during the final charge to the jury and then to raise on appeal an error in the instructions. Lawyers have apparently become so lax in their treatment of instructions at the time of trial that even the most obviously reversible errors are not called to the judge's attention.[42] Although it is understandable why the party who can object to the error on appeal does not object at trial, a possible explanation for the failure of his adversary to object is that he was not listening.

At the very least, North Carolina practice should be altered to require the trial lawyers to both request and object to instructions. A substantial majority of trial judges responding to the Questionnaire[43] favor a rule that requires lawyers to object to the charge before the jury begins its deliberations.[44] Although a slight majority rejected the notion of a rule requiring attorneys to request all instructions, many indicated disapproval of such a rule either because of the lack of training of attorneys in this area or because of the likelihood that slanted charges would be submitted.[45] Both reasons are valid but only when a *detailed* request for instructions is required. If evidentiary statements continue to be mandatory, lawyers' detailed requests would probably not be helpful. The compulsory evidentiary summary makes the actual wording of the final charge uniquely a one-man job, fit only for a person actually neutral in the case. Detailed requests, under the current rule, would only result in lengthy conferences on instructions—a consequence that might make the cure worse than the illness. Nevertheless, a rule that forces the trial lawyer to list each point of law on which he desires a charge would not present these problems and would, at least, give the trial judge some basic guidance on the areas of law that have to be covered in the charge. For example, compliance with such a rule would alert a trial judge in a criminal case to the need to charge on a lesser included offense.

There is no good reason to lighten the lawyer's burden with regard to objections. If the jury is presumed to sit and listen carefully

42. Two superior court judges responding to the Questionnaire replied that lawyers "sometimes" object to the final charge before the jury begins its deliberations. Thirty replied that they "rarely" object, and two replied that they "*never*" object.

43. *See* note preceding note 1 *supra*.

44. Questionnaire to Superior Court Judges; *see* note preceding note 1 *supra*.

45. *Id.*

to the charge and to understand it, the very least that should be expected of trial counsel is that they do the same and do it with sufficient alertness to call to the attention of the trial judge any errors that they might hear.[46] As in the federal courts, particularly egregious errors in the charge could be considered on appeal as plain error.[47] Ordinary errors in instructions would not be reversible error unless objected to prior to the time that the jury began its deliberations.

Ideally, both the state's generosity toward its lawyers and its overzealousness for jury understanding, reflected in the requirement of an evidentiary statement, should be eliminated, and a rule more akin to federal rule 51 should be adopted.[48] The state had a clear opportunity to adopt rule 51 when the new rules of procedure were adopted in 1967. For reasons most likely having their roots in the understandable affection of trial lawyers for current practice, the federal version of the rule was rejected, and the old practice under section 1-180 was retained.[49] Obviously, it is not too late to adopt the federal rule. Professor Francis Paschal has argued persuasively that such a step actually would not create new North Carolina practice, but rather would be a return to a practice that existed in the Nineteenth Century and which was changed only by inadvertance.[50]

The adoption of federal rule 51 would impose a new requirement in the state that counsel request and object to instructions in order to preserve error for appeal. It would also eliminate the language of present rule 51 and section 1-180 that requires the judge to "de-

46. Former Dean and Professor Emeritus Henry Brandis, Jr. of the University of North Carolina School of Law advised his students with regard to current practice as follows: "In North Carolina, it is assumed that the members of the jury, who are laymen, understand and will faithfully follow every word in the judge's charge. It is simultaneously assumed that no lawyer can be expected to understand any part of the charge until he sees it in writing after the trial is over."

47. *See, e.g.*, Choy v. Bouchelle, 436 F.2d 319 (3d Cir. 1970); Celanese Corp. v. Vandalia Warehouse Corp., 424 F.2d 1176 (7th Cir. 1970); O'Brien v. Willys Motors, Inc., 385 F.2d 163 (6th Cir. 1967).

48. FED. R. CIV. P. 51 provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

49. Personal correspondence.

50. Paschal, *supra* note 10.

clare and explain the law arising on the evidence of the case."[51] The enactment of such a rule would not necessarily mean that the federal practice of permitting the judge to comment on the evidence would also have to be adopted. Comment on the evidence is prohibited in many state courts that otherwise follow a practice similar to that in the federal courts.[52] The fear that comment by the trial judge might have an undue influence on the jury seems well founded. The no comment rule preserves the important image of the judge as a neutral figure and leaves the determination of factual issues entirely to the jury.[53] If the unique features of the North Carolina practice which require the trial judge to summarize the evidence and relieve lawyers from any responsibility for jury instructions are eliminated, the no comment rule, as applied to the final charge to the jury, should not prove unduly troublesome for either trial or appellate court judges.[54]

Hopefully, if federal rule 51 were adopted, a set of truly standard jury instructions could be developed. The pattern instructions now in existence, which are excellent given their limited scope under state practice, could be revised to provide more than an outline for the trial judge. As in some other states,[55] these instructions could be approved by the North Carolina Supreme Court to be used where applicable. A substantial part of the burden of drafting would be eliminated for both the trial lawyer and the trial judge. Appellate court time could be used for other more significant purposes. The result would be a saving of time and money and an enhancement of justice.

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51. The federal courts have, on occasion, referred to a requirement that the judge relate the law to the evidence. *See, e.g.*, Bird v. United States, 180 U.S. 356 (1901). *See also* discussion in C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2556, at 659-60 (1971). However, no case has interpreted such language as requiring an evidentiary summary.

52. *See, e.g.*, authorities cited note 8 *supra.*

53. Almost all trial judges responding to the Questionnaire favored retention of the no comment rule.

For a strongly worded article calling for the elimination of the no comment rule Kentucky, *see* Lukowsky, *The Constitutional Right of Litigants to Have the State Trial Judge Comment Upon the Evidence*, 55 KY. L.J. 121 (1966).

54. With regard to continuing difficulties caused by the no comment rule as applied to other features of the judge's conduct of the trial, *see* 1 STANSBURY'S NORTH CAROLINA EVIDENCE § 37, at 110-11 & nn.60-61 (Brandis rev. 1973).

55. *See, e.g.*, ILL. SUP. CT. R. 239; MO. SUP. CT R. 70.01.