Omissions in the Charge to the Jury as Reversible Error When Not Called to the Attention of the Trial Court

Because of the complexities of the issues involved in many cases tried before juries, the charges of trial courts are a prolific source of reversals in the appellate courts. An understanding of present Ohio law upon this topic must of necessity be obtained from the evolving history of statutory and case law pertaining to the charge to the jury. The current statute in civil cases provides that, "When the evidence is concluded, either party may present written instructions to the court on matters of law, and request them to be given to the jury, which instructions shall be given or refused by the court *before* the argument to the jury is commenced."[1] The right is thereby conferred upon the parties in civil cases to have such written instructions as may be requested given to the jury before argument.[2] Refusal to give correct instructions before argument is not cured by giving the substance of requested instructions in the general charge.[3] In criminal cases, however, the right to have requested instructions given before argument is discretionary and not mandatory[4] although if the requested instructions are proper they should be incorporated in the general charge.[5] As to the general charge, the statutes provide that, "The court, *after* the argument is concluded, before proceeding with other business shall charge the jury . . ."[6] Therefore, in view of the unqualified right of the parties to present written instructions before argument and the right to predicate error upon the refusal of the court to give such instructions in civil cases, or its refusal to incorporate them in its general charge in criminal cases, the only omissions which must be considered here are those which occur in the general charge given after the arguments of counsel are concluded.

Previous to the enactment of any statute upon the subject of the charge in Ohio it was said by the supreme court that, no rule of law exists which requires a court, of its own volition to instruct or charge a jury at all, it being only customary for our courts

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[1] OHIO GEN. CODE § 11420-1 (5).

[2] Monroeville v. Root, 54 Ohio St. 523, 44 N.E. 237 (1896).

[3] Lima Used Car Exchange Co. v. Hemperly, 120 Ohio St. 400, 166 N.E. 364 (1929).

[4] State v. Cheatwood, 84 Ohio App. 125, 82 N.E. 2d 770 (1948).

[5] Grossweiler v. State, 113 Ohio St. 46, 148 N.E. 89 (1925); State v. Sanders, 68 Ohio App. 419, 41 N.E. 2d 713 (1940).

[6] OHIO GEN. CODE §§ 11420-1 (7), 13442-8 (7).

to do so.[7] Likewise it was formerly impossible to claim that error existed in a charge without having taken proper exception to the charge as given.[8] To the charge of the court, or the refusal to charge when requested, it was necessary that the exception appear or no ground would be shown by the record to justify a reversal of the judgment.[9] The object of the exception was, generally, to call the attention of the trial court to the precise point of the claimed error, so that the court could consider it and give other and different instructions if it felt it had erred.[10] The exception also served to bring upon the record for review a decision of the court upon a matter of law which the record would not otherwise show and therefore it was necessary that the exception be reduced to writing and be allowed and signed by the court.[11] Where no error appeared in the record, it was sometimes necessary that the court look exclusively to the bill of exceptions for the history of the case.[12] In order that a judgment should be reversed for erroneous instructions, it was necessary that the instructions be material to the case,[13] prejudicial to the complaining party,[14] and that exceptions be taken at the time of the errors complained of.[15]

Despite the apparent finality of these rules however, in the case of *Baker v. Pendergast*[16] it was decided that,

> Where the overruling of a motion for a new trial is assigned for error, and all the evidence offered on the trial, together with the charge of the court, is properly brought up by bill of exceptions, a reviewing court will, in connection with the evidence, look to the charge of the court, whether excepted to or not; and if there is reason to believe that the verdict was the result of erroneous instructions, will reverse the judgment and award a new trial.

Thus a special exception to the charge was not in all cases necessary before a reviewing court could find reversible error.[17] If the error of law, occurring at the trial, was such as to make the verdict contrary to law, a new trial would be granted, though no exception

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[7] Jones v. State, 20 Ohio 34 (1851), *accord,* Taft v. Wildman, 15 Ohio 123 (1846).

[8] OHIO GEN. CODE § 5298 as amended April 25, 1898; 93 Ohio Laws 299.

[9] Geauga Iron Co. v. Street, 19 Ohio 300 (1850).

[10] Western Insurance Co. v. Tobin, 32 Ohio St. 77 (1877).

[11] Commercial Bank of Cincinnati v. Buckingham, 12 Ohio St. 402 (1861).

[12] Creed v. Commercial Bank of Cincinnati, 11 Ohio 489 (1842).

[13] Kugler v. Wiseman and Borchelt, 20 Ohio 361 (1851); Loudenback v. Collins, 4 Ohio St. 251 (1854).

[14] Kugler v. Wiseman and Borchelt, *supra* note 13; Crickett v. State, 18 Ohio St. 9 (1868).

[15] Little Miami Railroad Co. v. Washburn, 22 Ohio St. 324 (1872).

[16] 32 Ohio St. 494 (1877); *accord,* Railroad Co. v. Fitzpatrick, 42 Ohio St. 318 (1884).

[17] Weybright v. Fleming, 40 Ohio St. 52 (1883).

was taken to the ruling of the court.[18] Where the charge of the court was manifestly erroneous as to a material issue raised by the defense, the judgment would be reversed although it did not appear that the defendant was prejudiced thereby.[19]

Aside from the problem of exceptions to the errors complained of in the charge, additional rules were formulated as to what constituted reversible error. The omission of a court in its charge to define or explain doubtful words or phrases in a statute upon which the action was founded was held not to constitute a ground for reversal unless such definition or explanation was requested by the complaining party.[20] Where the charge was correct so far as it went, but the court's attention was not called to an omitted proposition of law involved in the case, the omission was not reversible error even though a general exception was taken to the charge, providing that the jury was not misled.[21] A similar rule was applied in criminal cases. The court in *Adams v. State*[22] said, "When exceptions are taken to a general charge given by the court to the jury, unless the party excepting points out specifically the part or propositions of the charge excepted to, or the grounds of the exception, a reviewing court is not bound to take notice of the exception."

A charge in which the court failed to define clearly the kinds of damages for which defendants were jointly liable was held not reversible for mere indefiniteness where the verdict was supported by the evidence and no further charge was requested.[23] However, a charge which consisted mainly of extracts from reported cases or abstract propositions of law which had no special reference to the circumstances of the case at bar was held objectionable; and, where the jury may have been misled, a new trial was granted.[24] It has been said that, "A charge to the jury should be a plain, distinct, and unambiguous statement of the law as applicable to the case made before the jury by the proofs, and not mere abstract legal rules."[25] When a court erred in failing to charge on

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[18] Mowry v. Kirk and Cheever, 19 Ohio St. 375 (1869).

[19] Jones v. Bangs, 40 Ohio St. 139 (1883).

[20] Schneider v. Hosier, 21 Ohio St. 98 (1871).

[21] Schryver v. Hawkes and Bierce, 22 Ohio St. 308 (1872); Smith v. Pittsburg, Ft. Wayne & Chicago Ry., 23 Ohio St. 10 (1872); Rolling Mill Co. v. Corrigan, 46 Ohio St. 283, 20 N.E. 466 (1899).

[22] 25 Ohio St. 584 (1874); *accord*, Doll v. State, 45 Ohio St. 445, 15 N.E. 293 (1887).

[23] Railway Co. v. Hambleton, 40 Ohio St. 496 (1884); Railway Co. v. Murphy, 50 Ohio St. 135, 33 N.E. 403 (1893).

[24] Railroad Co. v. Picksley, 24 Ohio St. 654 (1874); Coal Co. v. Estievenard, 53 Ohio St. 43, 40 N.E. 725 (1894).

[25] Parmlee v. Adolph, 28 Ohio St. 10 (1875).

an issue and an incorrect charge on such issue was requested, it was not error for the court to refuse to give the charge requested, but the attention of the court having been directed to the issue in question, the refusal to charge correctly was not merely misleading but erroneous.[26]

The decisions of the early Ohio cases would therefore appear to establish these general propositions: (1) A judgment would not be reversed for errors in the charge which were not material or prejudicial. (2) Errors in the charge, to be considered by a reviewing court, must have been shown by the record. (3) Exceptions to specific parts of the charge or requests for further instructions upon particular issues were generally essential, but there were certain situations in which such exceptions or requests became unnecessary by reason of the manifest error apparent in the record.

In 1898 the statute pertaining to exceptions was amended to read as follows: "A general exception taken to any charge of any court to a jury, shall apply to any and all errors of law which exist in such charge that are material and prejudicial to the substantial rights of the party excepting."[27] This was the existing law of the state at the time of the holdings in two leading cases which have established the outer limits with respect to the duty of the court and the duty of counsel regarding omissions in the charge. Within these outer limits the subsequent Ohio cases have been categorized as more nearly representing one or the other of the two views.

The first of the two cases, *Columbus Railway Co. v. Ritter*,[28] was an action for negligence in which the issues were not complex. The trial apparently proceeded so smoothly that the court gave but a very brief charge to the jury. No further charge was requested by counsel although a general exception was taken to the charge as a whole. The supreme court, recognizing both the existence of the duty of the trial court and the duty of counsel, held that although the charge was incomplete, it contained no prejudicial errors. Inasmuch as no further instructions were requested by the complaining party and the charge as given did not mislead the jury, there was no ground for a reversal of the judgment. The court clearly held that a general exception to the charge of the trial court does not bring into review on error an omission in the charge. The *Ritter* case has been followed in criminal cases[29] and in many other cases too numerous to require citation here.

The second of the two leading cases, that of *Baltimore & Ohio*

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[26] Kirchner v. Myers, 35 Ohio St. 85 (1878).

[27] OHIO GEN. CODE § 5298 as amended April 25, 1898.

[28] 67 Ohio St. 53, 65 N.E. 613 (1902).

[29] State v. McCoy, 88 Ohio St. 447, 103 N.E. 136 (1913).

Railway Co. v. Lockwood,[30] was decided three years after the *Ritter* case. It too was an action to recover damages for personal injuries allegedly resulting from the defendant's negligence. Here the trial court failed to charge the jury upon the specific issues of fact as made up by the pleadings. The supreme court held that,

> It is the duty of the trial court to separate and definitely state to the jury, the issues of fact made in the pleadings, accompanied by such instructions as to each issue as the nature of the case may require; and it is also the duty of the court to distinguish between, and call the attention of the jury to, the material allegations of fact which are admitted and those which are denied.

From the decisions in the *Ritter* and *Lockwood* cases it becomes apparent that the nature of the omission complained of may well be indicative of the result which will be reached on appeal. It is therefore necessary to examine the holdings in subsequent cases to determine how the courts have treated the various omissions for which error is claimed.

It was not error to omit to give an instruction to direct a verdict for the party against whom a verdict was returned and judgment rendered where such party failed to request such an instruction be given, since error consists not in the failure, but in the refusal to give an instruction to which a party is entitled.[31] A general exception to the charge did not go to omitted matters unless such omission rendered the charge misleading,[32] but when the court did not state the issues and merely said that each party complained of the negligence of the other, the charge was misleading.[33]

In *State v. McCoy*[34] the trial court omitted to charge the jury that it could find the defendant not guilty of a certain offense but guilty of a certain included offense of an inferior degree. The circuit court on appeal held the charge as given was misleading but the supreme court reversed since the court correctly charged on the greater offense and the jury found the defendant guilty. Looking to the duty of counsel the supreme court has said:

> The law imposes upon every litigant the duty of vigilance in the trial of a case, and even where the trial court commits an error to his prejudice, he is required then and there to challenge the attention of the court to that error, by excepting thereto, and upon failure of the court to correct

[30] 72 Ohio St. 586, 74 N.E. 1071 (1905).

[31] Whitaker v. Michigan Mutual Life Ins. Co., 77 Ohio St. 518, 83 N.E. 899 (1908).

[32] Morgenroth v. The Northern Ohio Traction & Light Co., 18 Ohio C.C. (n.s.) 306 (1910).

[33] Kelley v. The Ohio Traction Co., 24 Ohio App. 539, 157 N.E. 765 (1927).

[34] See note 29 *supra; accord:* State v. Driscoll, 106 Ohio St. 33, 138 N.E. 376 (1922); Todor v. State, 113 Ohio St. 377, 149 N.E. 326 (1925).

> the same, to cause his exceptions to be noted. For much graver reasons a litigant cannot be permitted either intentionally or unintentionally to induce or mislead a court into the commission of an error and then procure a reversal of the judgment for an error for which he was actively responsible.[35]

It was not error to confine the charge to the issues made by the pleadings, although other evidence was introduced, since there had been no amendment and no request to charge.[36] Where a charge was requested but no specific rule of law was formulated, it was not error to omit to charge on the relation between a prior conviction for a felony and the credibility of the witness.[37] But where the trial court omitted to state clearly the rule for the determination of future damages, such inaccuracy was prejudicial error.[38] Where, however, the court omitted to charge on the questions of the measure of damages[39] or the minimization of damages through the efforts of the plaintiff,[40] such omissions were not reversible error when not called to the attention of the court and particularly so when the instructions were correct so far as they were given.[41] In the absence of an allegation of contributory negligence or a request to charge thereon an omission to so charge was not prejudicial although the evidence may have tended to establish contributory negligence.[42] Failure to charge that clear and convincing evidence was the highest degree of proof available in civil cases was an omission and not reversible error when not called to the attention of the court.[43] But where a court placed a greater burden of proof than the law required upon one of the parties, substantial rights of the litigants were thereby invaded, prejudice was presumed and a general exception to the charge was sufficient to save the error.[44] A general exception does cover prejudicial errors of law existing in the charge as given.[45] If the charge was not excepted

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[35] State v. Kollar, 93 Ohio St. 89, 91, 112 N.E. 196 (1915); *accord,* State v. Shaeffer, 96 Ohio St. 215, 117 N.E. 220 (1917).

[36] Ely v. Borck, 7 Ohio App. 49 (1916).

[37] Cincinnati Traction Co. v. Lied, 9 Ohio App. 156 (1917).

[38] Toledo Railways & Light Co. v. Prus, 7 Ohio App. 412 (1917). *Contra,* Hansen v. Goetz, 37 Ohio L. Abs. 112 (1942).

[39] Marion Savings Bank v. Harper, 34 Ohio App. 339, 171 N.E. 248 (1930).

[40] Campbell v. Eddy, 27 Ohio App. 13, 160 N.E. 640 (1927).

[41] Northwestern Ohio Natural Gas Co. v. First Congregational Church, 126 Ohio St. 140, 184 N.E. 512 (1933).

[42] City of Zanesville v. Goodrich, 14 Ohio App. 228 (1920).

[43] Schulte v. Hagemeyer, 16 Ohio App. 1 (1922).

[44] Cleveland Railway Co. v. Kozlowski, 128 Ohio St. 445, 191 N.E. 787 (1934).

[45] McDonald v. Pennsylvania Railway Co., 105 Ohio St. 280, 136 N.E. 894 (1922); New York Life Insurance Co. v. Hosbrook, 130 Ohio St. 101, 196 N.E. 888 (1935).

to, or further instructions asked, the court should consider the entire record when the motion for a new trial was taken on the grounds of error in the charge.[46]

An omission to charge on the subject of *res ipsa loquitur* where the facts called for that doctrine was not error in the absence of a request for such a charge.[47] Failure to charge that plaintiff, whose wife was driving when a collision occurred, would not be barred by his wife's negligence unless she was his agent, was not reversible error where no further charge was requested and no exception was taken to the charge as given.[48] An omission in the charge of the court could not be regarded as error, especially if the court asked counsel if they wished any additional instructions on particular points and the answer was in the negative.[49] The assumption is always made that the court would have charged correctly if the error had been called to his attention.[50] The court's failure to charge that presentation of a note for payment to all of the makers was necessary in order to charge an indorser, was not a mere omission, but under the circumstances was a clear failure to charge upon a very important issue, and clearly prejudicial.[51] Where a special verdict was to be rendered it was held even more important that the issue be clearly defined.[52] In the absence of a request, the failure of the court to charge on the question of corroboration was no more than an omission with respect to which counsel should not have sat idly by and failed to call to the attention of the court.[53]

It would seem that the existence of the duty of the court and the duty of counsel is the underlying reason for the decisions in the cases discussed. Where the omission in the charge is of a minor nature it is the duty of counsel to call the attention of the court to the omission as in *Columbus Railway Co. v. Ritter.* Where, however, the omission becomes one of such a serious nature that the issues are not separately stated to the jury, as in *Baltimore & Ohio Railway Co. v. Lockwood* then it is the court which has failed in its duty. This distinction is discernible in those cases in which the courts could clearly classify the nature of the omission. The language in the cases indicates that errors in the charge are classified as

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[46] Cox v. Waltz, 13 Ohio L. Abs. 364 (1932).

[47] Beeler v. Ponting, 116 Ohio St. 432, 156 N.E. 599 (1927); Walker v. Toledo Hotel Co., 59 Ohio App. 229, 17 N.E. 2d 422 (1938).

[48] Burkhart v. Hancock, 25 Ohio App. 183, 158 N.E. 497 (1926).

[49] Davis v. State, 26 Ohio App. 340, 159 N.E. 575 (1927); Winterbottom-Connelly Co. v. Butler, 11 Ohio L. Abs. 521 (1931); Iles v. Industrial Commission, 37 Ohio L. Abs. 309 (1942).

[50] Ohio Oil Co. v. Liles, 54 Ohio App. 124, 6 N.E. 2d 18 (1935).

[51] Wehnes v. Schliewe, 47 Ohio App. 452, 192 N.E. 12 (1934).

[52] Gendler v. Cleveland Railway Co., 18 Ohio App. 48 (1924).

[53] State v. Sweet, 26 Ohio L Abs. 523 (1937).

to errors of omission and errors of commission. Those errors which the duty of counsel requires be called to the attention of the court in order to claim successfully that error existed in the charge have been called errors of omission. The more serious errors pertaining to those elements of the charge which it is the duty of the court to give correctly, and to which a general exception was sufficient to save the error, have been called errors of commission. Unfortunately, however, there are some cases in which it is very difficult to determine whether the errors complaind of are errors of omission or errors of commission. This difficulty was recognized in *Telinde v. The Ohio Traction Co.*[54] Here the plaintiff pleaded negligence which was denied by the defendant who in turn pleaded contributory negligence. The evidence tended to show both negligence and contributory negligence. A judgment was rendered for the plaintiff which was reversed by the court of appeals because of errors in the charge in failing to define negligence and contributory negligence. The supreme court affirmed the decision of the court of appeals on the authority of the *Lockwood* case. In the opinion Chief Justice Marshall also referred to the *Ritter* case and discussed the duties placed upon the court and counsel by the two cases. The opinion contains this significant statement:

> As between the responsibility resting upon the court on the one hand, and that resting on counsel on the other, it is apparent that cases will constantly arise for which no definite rule can be established. It is not intended in this case to modify or in the least detract from any statements in any of the reported cases dealing with the relative duties of court and counsel. The problem is not always solved, however, by merely determining whether the blame rests upon the court or upon counsel. It may be that both are at fault, and when in such case error intervenes which is material and prejudicial to the substantial rights of the party excepting, what course should be pursued by a reviewing court? Substantial justice to the litigant should be the highest aim of the courts, otherwise the Bill of Rights becomes only a form. In spite of the rules already laid down and those which may hereafter be declared, it is manifest that there will yet remain a twilight zone in which cases will appear where the courts will be compelled to determine upon the particular issues of those cases, and the evidence adduced in support thereof, whether instructions amount to a charge complying with Section 11447, and, if not, whether it was the duty of counsel to make specific objections and requests for further instructions.

Following the *Telinde* case there are several cases which admirably reveal the difficulty experienced by the courts in classifying errors as omissions or commissions. In *Cleveland Railway Co.*

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[54] 109 Ohio St. 125, 141 N.E. 673 (1923).

v. McCoy[55] the court, after much discussion, concluded that an incomplete charge on contributory negligence was an error of commission not omission. Ten years later however, failure to charge on the contributory negligence of a beneficiary in a wrongful death action was held, by the majority of the reviewing court, to be an error of omission while one judge, although concurring in the result, felt that it was an error of commission.[56] In a will contest case in which the trial court did not mention the codicil in the charge to the jury the majority of the reviewing court held the error was one of omission. The dissenting judge, who regarded the error as highly prejudicial, classified it as an error of commission.[57] Judge Matthews, dissenting in *State v. Hobbs*,[58] held that a definition which omitted the mental attitude required by the statute in defining the crime was an error of commission which was prejudicial.

In 1936 an important statutory change was made on the subject of the charge. The general exception to the charge of the court was abolished.[59] With respect to the charge the new provision, which is the law at the present time, provides that, "Error can be predicated upon erroneous statements contained in the charge, not induced by the complaining party, without exception being taken to the charge."[60]

It is obvious that this statute eliminates the problem of whether a general exception to the charge is sufficient to call the particular error to the attention of the reviewing court. It has not, however, solved the problem of defining the duty of the court and the duty of counsel. The same classification as to errors of omission and errors of commission appears in the cases.

In *Simko v. Miller*[61] the supreme court was called upon to consider alleged errors in the charge of a court in an action for negligence in which contributory negligence was made an issue. It was held that the new code provision, under which the case was decided, did not change the rule that errors of commission need not be excepted to generally, while errors of omission must be called to the attention of the court specifically. The court discussed the *Lockwood* and the *Ritter* cases and found that the charge given was bad by reason of errors and omissions which were highly prejudicial under the doctrine of the *Lockwood* case. The usual distinction was

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[55] 28 Ohio App. 318, 162 N.E. 699 (1927).

[56] Nunn v. Davidson, 55 Ohio App. 297, 9 N.E. 2d 732 (1937).

[57] Adams v. Foley, 36 Ohio App. 295, 173 N.E. 197 (1929).

[58] 59 Ohio App. 274, 17 N.E. 2d 937 (1937).

[59] OHIO GEN. CODE § 11561. Repealed effective Jan. 1, 1936, 116 Ohio Laws 304.

[60] OHIO GEN. CODE § 11560. Effective Jan. 1, 1936.

[61] 133 Ohio St. 345, 13 N.E. 2d 914 (1938).

made between errors of omission and errors of commission, however it would seem that the result reached was based both on the omissions and the errors existing in the charge as given. The case aptly illustrates the difficulty in classifying errors in the charge by this method.

Some of the more recent Ohio cases decided under the present statute contain similar language. Failure to instruct as to the effect of a prior inconsistent statement, used when the party calling the witness has been surprised by his testimony, was said to be an inadvertant omission rather than an error of commission, and hence not reversible since not called to the attention of the court.[62] Failure to define the words *"prima facie"* used in the charge was not prejudicial error when there was no request to do so.[63] In *Karr v. Sixt*[64] the trial court had failed to charge completely as to the beneficiaries in a wrongful death action. No additional instructions were asked but a general exception was taken to the charge. The majority of the court held that the error was one of omission, and that the general exception presented for review only questions as to errors of law existing in the charge as given, which was not confusing and misleading as far as it went. Judges Matthias and Hart dissented on the ground that the incompleteness of the charge rendered it misleading and therefore prejudicially erroneous.

In *Portney v. Frank*[65] it was held that the statute abolishing the general exception to the charge does not change the duty of counsel to call the attention of the court to any omission in a charge unless the jury was misled by the charge as given. If the charge as given is correct and not misleading, unless the omission is called to the attention of the court and such other instructions are specifically presented and refused there is no reversible error.[66] Whether a charge is misleading must be determined by the charge as given, keeping in view the issues made and the evidence presented.[67] A charge which directs the jury that it may accept as true admissions contained in the pleadings, without stating that this applies only to the party making the admissions, will not be deemed prejudical where no attempt is made to have the charge corrected.[68]

From the review of the decisions considered it is apparent that

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[62] State v. Duffy, 134 Ohio St. 16, 15 N.E. 2d 535 (1938).

[63] Smith v. Zone Cabs, 135 Ohio St. 415, 21 N.E. 2d 336 (1939).

[64] 146 Ohio St. 527, 67 N.E. 2d 331 (1946).

[65] 77 Ohio App. 357, 65 N.E. 2d 290 (1946).

[66] Hubbard v. Cleveland, C. & C. Highway, Inc., 81 Ohio App. 445, 76 N.E. 2d 721 (1947); State v. Grambo, 82 Ohio App. 473, 75 N.E. 2d 826 (1947); Bachman v. Ambos, 83 Ohio App. 141, 79 N.E. 2d 177 (1947).

[67] Kleinhans v. The American Gauge Co., 83 Ohio App. 453, 80 N.E. 2d 626 (1948).

[68] Place v. Elliott, 147 Ohio St. 499, 72 N.E. 2d 103 (1947).

Ohio courts fully recognize the existence of the duty of the trial court and the duty of counsel. It is submitted however, that the distinction made between errors of omission and errors of commission is of little assistance in classifiying the errors in a charge. The distinction is one of degree, rather than one of kind as the words would seem to imply. It is obvious that an omission in a charge can become so manifestly erroneous and prejudicial as to be classified as an error of commission. The problem is one of determining the effect of the omission. If the charge as given is misleading the decision should be reversed. On the other hand, if the omission was one which would have been corrected if requested by counsel, but which as given was not prejudicially erroneous, the decision should not be reversed merely because counsel failed in their duty to call the omission to the attention of the court. Since it is the effect of the omission rather than the type of omission which is important, little is to be gained by denominating the error one of omission or one of commission.

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