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## ADEQUACY OF INSTRUCTIONS TO THE JURY: II\*

Curtis Wright, Jr. †

## FIFTH CIRCUIT STATES

*Georgia, Mississippi, Louisiana, Texas, Alabama, Florida*

THE six states in this group present some very special cases. They range from an original colony to Florida and Texas, which were admitted to statehood in 1845. National rank in population varies from sixth (Texas) to twenty-sixth (Mississippi) with the average almost within the top one-third. As to increase of population, the mean is close to the national figure of fifteen percent. That statement needs qualification, however, since Florida increased 46 percent and Texas 20 percent, whereas Mississippi had an actual loss of two percent. No docket delay of more than six months is found anywhere except in Texas, but some real congestion is evident there.<sup>170</sup>

None of these states could be called "code" in the sense of having followed the wave of imitation of the Field Code of New York—each having worked out its own system of regulation of procedure. At present, no judicial (supervisory) rule-making is known to exist in Louisiana or Mississippi, and the power is very limited in Alabama. Although the legislature still holds the leash in the other states, there has been judicial rule-making as to instructions in Georgia, Texas and Florida.

Instructions are given at the approved time (after argument) except in Mississippi and Texas, and written instructions are required only in those two states. In Alabama, to the contrary, it is mandatory that the general charge be oral. In Florida and Louisiana the charge may be oral unless the parties request that it be in writing; in Georgia the instructions are considered written if they are stenographically reported.<sup>171</sup> In none of these states is the court permitted to summarize or comment on the evidence. In this latter connection the heavy hand

\* Part I was published in the February 1955 issue. Two other articles written by the author in conjunction with the present article and published elsewhere are cited fully in notes 4 and 8 supra [53 MICH. L. REV. 505 at 506 and 507 (1955)].—Ed.

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<sup>170</sup> Houston and El Paso, 18 months; San Antonio, 12 months; Dallas, 9 months.

<sup>171</sup> Ga. Code Ann. (1937) §81-1102 (amended by Act 1943, p. 262). When such provision is present, it seems almost misleading to speak of the jurisdiction as requiring written instructions. See Stone, "Instructions to Juries: A Survey of the General Field," 26 WASH. UNIV. L.Q. 455 (1941) as to the term "written instructions."

of the constitutions and legislation of the Reconstruction period is most apparent.<sup>172</sup>

### Georgia

Georgia is slowly fighting its way back toward recovery from a particularistic plague of procedural "points," scattered throughout the reports. The rule-making of 1947 is a step forward, but the annotations of cases under the statute-rules still reveal the wreckage of entirely too many verdicts for errors of omission and commission in instructions.<sup>173</sup>

The system has elements of the Tennessee mechanics designed to insure that the general charge be of judicial authorship. As elsewhere on the eastern seaboard, furthermore, counsel do not see the charge beforehand.<sup>174</sup>

The aid of a local practice book is indispensable to investigation of attitudes toward adequacy. One guidebook, for instance, classifies the duty to charge *sua sponte* under When Error, Failure to Charge—with subheadings such as Essential Law, Controlling Law, Principle Necessarily Involved—and so on through Vital, Main, Substantial, Material and the like.<sup>175</sup> More cases are collected in a note of the 1920's in the *Michigan Law Review*.<sup>176</sup> It displayed seven seemingly irreconcilable Georgia cases from one 1924 volume of the Southeastern Reports. Four were reversed, three affirmed—and difficulties are exhibited by the comparisons. The note writer pointed out that the roughhewn justice of an uninstructed jury must somehow be kept in balance with the counter tendency "that parties will be encouraged to lie in wait and ambush an unwary judge." That the problem cannot be solved entirely by the decision of cases point-by-point is admitted

<sup>172</sup> *Norris v. Clinkscales*, 47 S.C. 488 at 505, 25 S.E. 797 (1896); *ROBINSON, JUSTICE IN GREY* 616 (1941).

<sup>173</sup> Notes 177, 178 *infra*. See Pound, "Some Parallels From Legal History," 49 A.B.A. REP. 204 at 205 (1924).

<sup>174</sup> *Tennessee*, note 169 *supra* [53 MICH. L. REV. 505 at 539]. Requests to charge may be made at any time before the jury retires to consider its verdict: Ga. Code Ann. (1937) §81-1101. As to Georgia instructions generally: 1954 WASH. UNIV. L.Q. 191-192.

<sup>175</sup> COZART, *GEORGIA PRACTICE RULES*, 3d ed., §§664-667 (1933). The annotations to Ga. Code Ann. (1937) §81-1101 collect numerous cases as to necessity for requests. It is nevertheless error to fail to charge, regardless of requests, on the essential law of the case, *Louisville & W. R. Co. v. Hall*, 106 Ga. 786, 32 S.E. 860 (1899); *Southern Ry. Co. v. O'Bryan*, 112 Ga. 127, 37 S.E. 161 (1900). But see *Wood v. Claxton*, 199 Ga. 809, 35 S.E. (2d) 455 (1945).

<sup>176</sup> 23 MICH. L. REV. 276 (1925) (criminal cases). Cases are collected also in *Barnes v. Thomas*, 72 Ga. App. 827, 35 S.E. (2d) 364 (1945).

(as applied to procedure generally) by the prefaces to the respective editions of the practice book heretofore cited.<sup>177</sup> There is evidence in the cases themselves, for that matter, that 40 to 50 percent of the cases tried in the courts of Georgia formerly, at least, turned on points of practice.<sup>178</sup>

### Mississippi

There is no room for discussion of adequacy of the charge as to Mississippi since the rule for eighty years has been that the court has no power to give any instructions other than the requests of counsel.<sup>179</sup> The casebooks and texts on procedure often point to this interpretation of statute as the complete end of the road in literalness of statute-interpretation. The new practice act does not reach this problem, but invaluable historical explanations of the state practice are to be found in a 1948 article describing the new procedure.<sup>180</sup>

### Louisiana

Jury trials cause "little trouble" under the unusual Louisiana Constitution. The matter may be summed up in two quotations from Louisiana writings:

"Under our constitution appeals are on both the law and the facts in civil cases and . . . few cases are remanded for retrial except where more testimony is needed for the appellate decision."<sup>181</sup>

"When the Supreme Court has the facts before it and are passing on the merits of the case, they will not notice irregularities in the charge to the jury."<sup>182</sup>

<sup>177</sup> COZART, *GEORGIA PRACTICE RULES*, 3d ed. (1933): "The vast number of rules and their intricacy and complexity make the practice of law in Georgia extremely difficult; nay, to many lawyers, this field of law is *terra incognita*. . . . At least one-half of the cases tried in the courts of Georgia involve or turn on questions of practice. . . ." Introduction to 3d ed. See also Introduction to Cozart's 1st ed. (1918).

<sup>178</sup> Cobb, J., in *Kelly v. Strouse*, 116 Ga. 872 at 898, 43 S.E. 280 (1903). Cf. Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," 29 A.B.A. REP. 395 (1906), reprinted, 20 J. AM. JUD. SOC. 178 (1937).

<sup>179</sup> Miss. Code (1942) §1530; *Jones v. State*, 216 Miss. 186, 62 S. (2d) 217 (1953); *Masonite Corp. v. Lochridge*, 163 Miss. 364, 141 S. 758 (1932); *Archer v. Sinclair*, 49 Miss. 343 (1873); *Williams v. State*, 32 Miss. 389 (1856).

<sup>180</sup> Griffith, "The New Mississippi Civil Practice Act," 20 MISS. L.J. 1 (1948).

<sup>181</sup> Bailey, "Jury Trial No Burden in Louisiana," 13 J. AM. JUD. SOC. 47 (1929); generally, La. Civ. Code, 1870 revision, 2d ed., arts. 494-592 (1951). See Miller, "Minimum Judicial Procedural Standards—How Met in Louisiana," 9 LA. L. REV. 382 at 393 (1949).

<sup>182</sup> 2 NEW LA. DIG. §653 (1950) (cases collected back to 1816); *Hoffman v. Ackermann*, 110 La. 1070, 35 S. 293 (1903); *Regan v. Adams Exp. Co.*, 49 La. Ann. Rep. 1579, 22 S. 835 (1897).

In view of that system, the occasional statements of the cases that the judge "must" charge the jury on the law are, for present purposes, simple statements of general principles.<sup>183</sup> Louisiana is nevertheless shown faint-ruled on the map,<sup>184</sup> in deference to the fact that appeals are at least confined to the merits. The result makes an appeal amount to a waiver of trial by jury, however. Yet one must remember that the statutory special verdict (developed and used particularly in Wisconsin) provides that as to matters not presented by the questions submitted by counsel, there is deemed to have been a waiver of jury trial.<sup>185</sup>

### *Texas*

Mention of special verdicts brings one to the great State of Texas, which might well claim that the Wisconsin special verdict is simply a borrowing from the Texas special issues.<sup>186</sup> More generally as to instructions, however, it is to be noticed that in 1941 a complete revision of procedure became effective under the stimulus of the federal rules.<sup>187</sup> Rule 274 makes it necessary that objections and requests be called to the court's attention with specificity and clearly shows the "beneficent contagion" of federal rule 51.<sup>188</sup> The reports of the proceedings which paved the way to the adoption of these rules should be seen in the present connection. They state some of the best arguments anywhere to be found as to the abuses, and "the discouraging reversals that follow in the wake of any other rule." It was those abuses and discouragements that "the new rule was designed to curb."<sup>189</sup>

<sup>183</sup> *Spofford v. Pemberton*, 12 Rob. (La.) 162 (1845). See as to limitations on charge: *State v. King*, 135 La. 117, 64 S. 1007 (1914).

<sup>184</sup> See Part I, 53 MICH. L. REV. 505 at 515.

<sup>185</sup> Wis. Stat. (1951) §270.28; Rosenberry, "Recent Progress in Judicial Procedure and Administration in Wisconsin," 45 A.B.A. REP. 372 (1920); MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 320 (1952).

<sup>186</sup> "In 1897 . . . Texas produced the true key to the [special verdict] situation. Ten years later Wisconsin remodeled its special verdict statute by availing itself of the Texas principle. . . ." MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 319 (1952).

<sup>187</sup> Texas Rules of Civil Procedure promulgated under the rule-making power of the Supreme Court per Texas Constitution of 1876 and effective on the last day of 1941. See Stayton, Foreword, VERNON'S TEXAS RULES OF CIVIL PROCEDURE (1942); Clark, "The Texas and the Federal Rules of Civil Procedure," 20 TEX. L. REV. 4 (1941).

<sup>188</sup> Stayton, foreword, VERNON'S TEXAS RULES OF CIVIL PROCEDURE (1942); MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 62 (1952).

<sup>189</sup> See especially, lecture of J. P. Alexander before the Judicial Section, State Bar of Texas, presenting reasons supporting the new requirements of timely and specific objections in annotation to rule 274 in VERNON'S TEXAS RULES OF CIVIL PROCEDURE (1942). The provisions of rule 274 to that effect have been upheld by the supreme court: *Larson v. Ellison*, 147 Tex. 465, 217 S.W. (2d) 420 (1949), and by the court of civil appeals: *Safety Casualty Co. v. Link*, (Tex. 1948) 209 S.W. (2d) 391 at 395; *Reddick v. Jackson*, (Tex. 1949) 218 S.W. (2d) 212 at 213.

*Alabama*

Alabama mechanics are closer to those of Georgia than any so far seen, and resemble those which will appear later under South Carolina. It has one of the "may charge" statutes, however, and the judicial duty is low.<sup>190</sup> In this respect it seems to resemble Virginia to its east, or Arkansas to the west. The flavor of the oral general charge can be gained by seeing the model charge set out in full in the recently published *Alabama Circuit Judge's Handbook*.<sup>191</sup> While the court speaks to the jurors in the first person, and addresses them in the second, one cannot avoid concern as to whether much of the charge conveys meaning to its audience.<sup>192</sup> Despite the obvious efforts of the court to "put across" the legal propositions necessary for the jury to apply, it is doubtful whether much of the charge can be referable, in the jury's mind, to any basis of experience or knowledge. That query, however, is applicable to instructions to the jury generally, and is no reflection on the excellent charge for which we are indebted to the compiler of the handbook. The state is shown in bold ruling on the map by reason of certain rather extreme applications of the low duty principle,<sup>193</sup> the strict repression of the trial judge,<sup>194</sup> and too many appeals on instructions—the latter doubtless due to what the Alabama Judicial Council has called the "written instructions vice."<sup>195</sup>

*Florida*

Florida had tried the code back in the "inauspicious Reconstruction days" of 1870, but returned to a modified common law system after a

<sup>190</sup> Ala. Code (1940) tit. 7, §270; *Claude Jones & Son v. Lair*, 245 Ala. 441 at 447, 17 S. (2d) 577 (1944); *St. Louis-S.F. R. Co. v. Norwood*, 222 Ala. 464 at 466, 133 S. 27 (1931). See *McPherson v. State*, 198 Ala. 5 at 6, 73 S. 387 (1916). See generally, 1954 WASH. UNIV. L.Q. 195-196.

<sup>191</sup> By Hon. Walter B. Jones, Presiding Judge 15th Judicial Circuit of Alabama: "Oral Charge to the Jury in a Negligence Case," ALABAMA CIRCUIT JUDGES' HANDBOOK 145-153 (1953).

<sup>192</sup> *Id.* at 153: "Now at the request of the Plaintiff, I give you the following charges in writing. . . ." Expectably, such written charges of counsel are technical. As to the general, court-prepared charge, however, it is emphasized that such is an *ideal* charge—selected for attention here by reason of its superiority. But can laymen be expected to follow even this excellent charge upon its first reading?

<sup>193</sup> *Southern Bldg. & Loan v. Davis*, 223 Ala. 222, 135 S. 164 (1931); *Southern Bldg. & Loan v. Wales*, 24 Ala. App. 542, 138 S. 553 (1931). See *McPherson v. State*, 198 Ala. 5, 73 S. 387 (1916).

<sup>194</sup> "The numerous and oft recurring reversals of judgments, because of instructions deemed to invade the province of the jury, manifest the care and vigilance the court exercises. . . ." *Brown v. State*, 109 Ala. 70 at 79, 20 S. 103 (1896).

<sup>195</sup> Jones, "The Trial Judge's Charge to the Jury," 15 ALA. LAWYER 143 at 144 (1954).

three-year trial.<sup>196</sup> In 1949, however, it finally achieved a set of procedural rules based on the federal system.<sup>197</sup> The new common law rule 39 toughens up the practice as to requests and objections in conjunction with a provision for settlement of instructions.<sup>198</sup> A series of cases since have gone right down the line in upholding the new rule—with one superficially strange exception.

Such is shown in a case where the court had inexplicably failed to hold the presettlement conference. While it in no way appears that counsel did not have a chance to make objection at the close of the charge, he did not in fact state any objections. He was nevertheless permitted to assert error on appeal.<sup>199</sup> At first this case might seem to stand for mandatory presettlement; it would seem that the omission of settlement conference creates a vested right in error. A more natural (however speculative) reason can be found, however, if one considers the seventy-five year common law background upon which the new rules are superimposed. The common law practice must have relied upon viewpoints like those of Messrs. Chitty and Tidd. It was the position of the latter that while it was quite necessary to make one's objections at the close of the charge, the task was stated by them as being a difficult, painful, and dangerous one.<sup>200</sup> It is conceivable that

<sup>196</sup> CLARK, CODE PLEADING, 2d ed., 26 (1947).

<sup>197</sup> 30 Fla. Stat. Ann. (1950) foreword, Rules of Common Law. For background, history and large bibliography, see CLARK, CODE PLEADING, 2d ed., 52, and n. 148 (1947).

<sup>198</sup> The pertinent portion thereof is 39(b) which provides: "Not later than at the close of the evidence, or at such earlier time during the trial as the Court may reasonably direct, it shall be the duty of parties to the cause to file written requests that the Court instruct the jury on the law as set forth in such requests. The Court shall then require counsel to appear before it for the purpose of a conference to settle the instructions to be given. At such conference all objections shall be made and ruled upon and the Court shall likewise inform counsel at said conference of such general instructions as it will give. No party may assign as error the giving of any instruction unless he objects thereto at such time, nor the failure to give an instruction unless he shall have requested the same. The Court shall instruct the jury after the arguments are completed."

<sup>199</sup> Tampa Transit Lines, Inc. v. Corbin, (Fla. 1952) 62 S. (2d) 10. Note, however, that writer does not imply that same is necessarily contra to the aforesaid series of cases upholding rule 39(b), being *Eli Witt Cigar and Tobacco Co. v. Matatics*, (Fla. 1951) 55 S. (2d) 549; *Adams v. Royal Exchange Assur.*, (Fla. 1952) 62 S. (2d) 591; *Dowling v. Loftin*, (Fla. 1954) 72 S. (2d) 283.

<sup>200</sup> "If the judge . . . misstate the law or *misdirect* the jury in any respect . . . it is the duty of the leading counsel *immediately to state the objection*, and if he do not, the Court will not, on motion, grant a new trial; and, therefore, however painful the duty, and in some cases heretofore perhaps dangerous (as regards the subsequent observations of the judge on the merits), yet it is imperative on counsel, if at all, *to object at the time*, or lose the effect of the objection, and be precluded from supporting a motion for new trial," 3 CHITTY, PRACTICE 914 (1836). See discussion of the common law practice as to Delaware, citing same English authorities, in *Buckley v. Johnson & Co.*, 41 Del. 546 at 558, 25 A (2d) 392 (1942).

the Florida courts are amenable to excusing counsel from that duty as a matter of courtesy. It must be remembered that the nearby state of South Carolina has held, by its supreme court, that counsel need not be put in the embarrassing position of calling the court's error to its attention in open court at the conclusion of the charge.<sup>201</sup>

While the cases over the years have not placed much emphasis on the judicial duty to charge,<sup>202</sup> the doctrine of fundamental error was recognized not too long ago in a criminal case where there was an omission of charge on the burden of proof.<sup>203</sup> The cases seem to indicate that on the civil side the chief difficulties are caused by too many requests to charge, however, rather than too few.<sup>204</sup>

There is an intimation or so that a general objection might suffice to preserve error of commission in the charge, but it is too soon to determine under what circumstances such would be the case, and how severe such error would have to be.<sup>205</sup> Generally, however, the improvement brought about by the new rules is very apparent in the decisions since 1949, and Florida is shown in light ruling on the map.

Three states here have been shown to have made reasonably satisfactory solution of the adequacy problem: Louisiana, Texas, and Florida. Louisiana defies comparison with other states, of course, but is included in this group because the unusual scope of its appeal is thought-provoking. Appeal is largely a retrial based on the written record—but at least it goes to the merits and offers a comparative study with the Civilian system without necessity for looking to the law of other countries.<sup>206</sup>

Texas shows the familiar phenomenon of another fast-growing state turning to the federal rules system. Its use of special issues affords much of interest—but one also wonders whether it is more than a coincidence that the three states which make the most use of special

<sup>201</sup> *Steinberg v. South Carolina Power Co.*, 165 S.C. 367, 163 S.E. 881 (1932).

<sup>202</sup> *Carter v. Bennett*, 4 Fla. 283 at 341 (1852); *Lungren v. Brownlie*, 22 Fla. 491 at 493 (1886); *Howland v. Morris*, 143 Fla. 189, 196 S. 472 (1940); *Stewart v. State*, 158 Fla. 121, 27 S. (2d) 752 (1946); 7 ENCYC. DIG. OF FLA. REPTS. (Recompiled), Instructions, §7a (1952).

<sup>203</sup> *Robinson v. Town of Riviera*, 157 Fla. 194, 25 S. (2d) 277 (1946).

<sup>204</sup> See the plentiful evidence to this effect in §7 of the DIGEST OF FLORIDA REPORTS, note 201 *supra*.

<sup>205</sup> *Bradley v. Associates Discount Corp.*, (Fla. 1952) 58 S. (2d) 857 (semble).

<sup>206</sup> Cf. Reiss, "Lessons in Judicial Administration from European Countries," 37 J. AM. JUD. SOC. 102 (1953).



verdicts all show delay in getting cases to trial: Wisconsin, Texas, and North Carolina.

Florida is growing at a rate surpassed only by California and Arizona. The procedural revolution achieved there was the result of a twelve-year campaign of planning and study.<sup>207</sup> The change was foreshadowed by remarks of the Florida Supreme Court in 1940 when it was speaking of a slightly different aspect of the federal rules:

"While to some they may seem to go too far with their liberal practices, these rules are designed to speed up and simplify practice in the federal courts, and do so with excellent results. In the modern, fast-moving world the trend is toward faster methods of procedure, without, of course, sacrificing any of the fundamental rights of the parties."<sup>208</sup>

#### FOURTH CIRCUIT STATES

##### *Virginia and West Virginia, North Carolina, South Carolina, Maryland*

These are of course all original colonies except West Virginia, which was carved out of the Old Dominion in 1863. While the average growth of these five states was only a shade above that of the country as a whole, the increase in Maryland was 29 percent, and in Virginia it was 24 percent. The mean population rank of these states is twenty-first, North Carolina being tenth, is largest in this respect, and West Virginia, twenty-ninth, is the smallest. With the possible exception of West Virginia, none completely escapes the delay-in-trial problem.<sup>209</sup>

None of these states joined the first wave of imitation of the Field Code but, during Reconstruction, North Carolina joined up in 1868, and South Carolina in 1870. West Virginia is now governed by code and rules of court as to trial practice,<sup>210</sup> whereas Virginia has no statutory provisions as to instructions—but has some supreme court rules that bear on trial practice. South Carolina has no rule-making, whereas

<sup>207</sup> Foreword to Rules in 30 Fla. Stat. Ann. (1950).

<sup>208</sup> Howland v. Morris, 143 Fla. 189 at 193, 196 S. 472 (1940).

<sup>209</sup> *Virginia*: Richmond, 8 months; *North Carolina*: Greensboro (Guilford Co.) 13 months, Charlotte (Mecklenburg Co.) 12 months; *South Carolina*: Greenville, 12 months; *Maryland*: Baltimore, 10 months; *West Virginia*: Charleston, 6 months.

<sup>210</sup> To be precise, under W.Va. Code (1949) §5183, all statutes relating to practice have force only as rules of court subject to being altered by court action. As to W.Va. pleading and practice generally, see CLARK, CODE PLEADING, 2d ed., 28 ff. (1947); CLARK, CASES ON MODERN PLEADING 28, n. 13 (1952).

in Maryland the procedure as to instructions is completely governed by rules promulgated in 1941.

The mechanics of instructions vary considerably, in that arguments precede instructions only in North and South Carolina; written instructions are mandatory only in West Virginia, permissible in Virginia (at least, waiver is common as to the requirement that they be written), and oral instructions are now customary elsewhere. Comment is ostensibly prohibited everywhere. In Maryland, however, the court may summarize—and the interpretations seem to be taking the line that if he does not unfairly slip over into comment such is not necessarily error. In North Carolina a summary of the evidence is mandatory, but it is reversible error if the summary includes anything that may be called comment.

### *Virginia and West Virginia*

There is sufficient basic similarity to permit this grouping although, as to the duty to charge, in Virginia the giving of instructions uninvited is actually condemned.<sup>211</sup> West Virginia has statutes which countenance it,<sup>212</sup> and which contain a provision that the court, as an alternative to giving the separate instructions, which are usual, "may in writing instruct upon the law governing the case, putting such instructions in the form of an orderly and connected charge, incorporat-

<sup>211</sup> "It is not the practice in Virginia to give instructions unless requested, except where it is necessary to prevent a failure of justice, and, while the giving of instructions by the court unasked is not error if the instructions correctly propound the law, still the practice is condemned." BURK'S PLEADING AND PRACTICE IN VIRGINIA AND WEST VIRGINIA, 4th ed., c. 38, §286 (1952); *Blunt v. Commonwealth*, 4 Leigh (31 Va.) 689 (1834); *Dejarnette v. Commonwealth*, 75 Va. 867 (1881); *Du Pont Co. v. Snead's Admr.*, 124 Va. 177, 97 S.E. 812 (1919). But see note, 22 COL. L. REV. 162 (1922), discussing a line of cases which ended with *Chesapeake & Ohio R. Co. v. Stock & Sons*, 104 Va. 97, 51 S.E. 161 (1905), and which concerned the rather different question of the duty to modify an equivocal request.

The attitude is that instructions are a burden which counsel cannot impose upon the court. *Womack v. Circle*, 70 Va. 192 at 208 (1877); *Chesapeake & Ohio R. Co. v. Stock & Sons*, supra this note. *West Virginia: Bank v. Hannaman*, 63 W.Va. 358 at 363, 60 S.E. 242 (1908); cases collected 10 MICHEE'S VIRGINIA-WEST VIRGINIA JURISPRUDENCE §12 (1950). Some may find it interesting to see how the judges in Virginia did not pick up the burden in the first place, and how that rule of common custom became codified into its common law practice with the aid of early practice books. Catterall, "Trial by Jury in Virginia," 28 VA. L. REV. 106 at 109 (1941); Moreland, "Judge and Jury in Virginia," 1924 VA. ST. B. ASSN. 221 at 239; 1937 VA. ST. B. ASSN., Judicial Section session 45-57. See note 215 infra.

<sup>212</sup> With one exception the prevailing practice as to instructions is a statutory hold-over which will control procedure in the trial courts until the adoption of rules by the supreme court under W.Va. Code (1949) §5183. See W.Va. Code Ann. (1949) §§5653, 5654, 5655, and Trial Court Rule VI(e).

ing therein the substance and, as far as may be, the language of the instructions prayed upon either side or prepared by the court on its own motion, with correctly propounded law applicable to the case. . . ."<sup>213</sup> The latter must be submitted to counsel on both sides for objection, as under the present Iowa rule.

Virginia practice is important for its influence elsewhere as well as for its own sake, since Illinois—at least—has formally recognized that its practice derives from the common law practice of Virginia as it existed at the time Illinois was settled before 1818.<sup>214</sup> Another interesting element is the way in which the *laissez faire* doctrine of the judicial duty grew up—since its influence may be traced into Illinois and possibly Arkansas in one direction, and perhaps down into Alabama and Mississippi in another. The sort of thing that comes to light is the fact that the county trial judge, until well after the middle of the 19th century, was not a lawyer.<sup>215</sup> He was more likely to have been an intelligent farmer, before whom the lawyers addressed the jury upon both fact and law. Therefore the instruction was simply upon a controverted point of law upon which the attorneys could not agree, and which called for the action of the court.<sup>216</sup>

### *North Carolina*

In North Carolina, the rule could not be more different. Not only must the court instruct upon all the applicable law, but it must state the contentions of the parties.<sup>217</sup> It must summarize the facts with complete impartiality, and without the slightest hint of comment. At one time it was thought that the summary for the respective sides must

<sup>213</sup> W.Va. Code Ann. (1949) §5653; BURK'S PRACTICE, 4th ed., §286, p. 520 (1952); Atlas Realty Co. v. Monroe, 116 W.Va. 337, 180 S.E. 261 (1935). See Maxwell, "The Problem of Jury Instructions," 43 W.VA. L.Q. 1 (1936). Cf. §67 of the Illinois Civil Practice Act of 1933, discussed at notes 137, 138 *supra* [53 MICH. L. REV. 533], and Iowa Rule 196, note 111 *supra* [53 MICH. L. REV. 528].

<sup>214</sup> People v. Callopy, 358 Ill. 11 at 16, 192 N.E. 634 (1934).

<sup>215</sup> Byrd, "The Province of the Court in Jury Trials," 1907 VA. ST. B. ASSN. 194 at 196. See Strode, "Oral Instructions to Juries," 1939 VA. ST. B. ASSN. 359.

<sup>216</sup> Rule making in Virginia is in progress and, while no interpretations have been found, under Rules of the Supreme Court of Appeals of Virginia, effective February 1, 1951, as amended, rule 1:8 provides that objections (including those directed at instructions) must be made in time to permit correction and must state the grounds of objection at the time.

<sup>217</sup> N.C. Gen. Stat. (1953) §1-180, as rewritten and amended in 1949. See, under prior law, Mebane Graded School Dist. v. Alamance County, 211 N.C. 213, 189 S.E. 873 (1937). For discussion of the 1949 change, in particular, see 27 TEMPLE L.Q. 158-159 (1953), and 1954 WASH. UNIV. L.Q. 193.

be of equal length.<sup>218</sup> It should be explained parenthetically that verdicts cannot be directed. When a judge from another circuit was first told of those rules (equal length of summary and no directed verdict) he exclaimed, "What if the evidence is all on one side? When the trial judge comes to the short side, must he say, 'We shall now observe a few moments of silence in deference to section so-and-so of the Code?'"

The rule of equality is no longer honored, although in a 1953 case the trial judge felt it necessary to tell the jury in his charge that "it had taken longer to give a summary of the state's evidence than the defendant's, but they were to attach no significance to that."<sup>219</sup> And as might have been expected, he was called to account for his "comment" ("attach no significance to that") although in this instance he was exonerated.

As to objections, there is no duty of counsel to point out error in the summary, or to "call" the court for anything it deems to approach comment.<sup>220</sup> As to errors of law, or the relating of the facts to the law, the general rule seems to be—quite seriously—that there is no general rule. What sort of error of omission or commission can be raised by a general objection seems to have defied local writers who have studied the "stockpile of judicial utterances" as it has mounted up from volume to volume. The final result becomes an almost perfect clinical case. It shows what must invariably happen when a procedure is regulated entirely by inflexible statute, and when attempt is made to hold the judicial duty to the highest peak of perfection without compelling counsel to accept equal responsibility for perfection and completeness of the charge.

### *South Carolina*

South Carolina mechanics are very close to those heretofore described as to Alabama. Here, however, "the chief danger is the inadvertent omission of some important element of the charge" on the

<sup>218</sup> *State v. Boyle*, 104 N.C. 800 at 820, 10 S.E. 696 (1889), collecting the cases from which this doctrine developed. But see *State v. Anderson*, 228 N.C. 720, 47 S.E. (2d) 1 (1948).

<sup>219</sup> *State v. Smith*, 237 N.C. 1, 74 S.E. (2d) 291 (1953).

<sup>220</sup> *Carruthers v. Atlantic & Yadkin Ry. Co.*, 215 N.C. 675, 2 S.E. (2d) 878 (1939); *Wilson v. Branning Mfg. Co.*, 120 N.C. 94, 26 S.E. 629 (1897); McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE §580, p. 642, esp. n. 60 (1929). See "A Survey of Statutory Changes in North Carolina in 1949," 27 N.C.L. Rev. 405 at 435 (1949).

judge's part.<sup>221</sup> Under the bare meaning of the rule, a request which is not entirely correct may be refused outright, but the better (and doubtless the safer) practice on the judge's part is to work them into the general charge after eliminating the incorrectness.<sup>222</sup>

There is a provision of the state constitution to the effect that the trial judge "shall declare the law,"<sup>223</sup> but that so-called constitutional duty to charge has recently been restated as simply standing for the very familiar principle

" . . . that the judge shall state the controlling principles of law applicable to the case in the light of the pleadings and the evidence, even if no request is presented by counsel for either party; but that if any elaboration thereof, or a charge on some specific phase, is desired, counsel must bring the matter to the attention of the Court or it will be deemed to have been waived."<sup>224</sup>

The requirement of specific objections does not prevail—it is believed to place a "delicate and difficult task" upon counsel in many cases. The Supreme Court actually held in 1932 that "to make such requirement might place counsel in an embarrassing position."<sup>225</sup> On the other hand, counsel cannot escape all responsibility—he must call attention to error in the statement of the issues at the time, for instance.<sup>226</sup>

No one can read *The Trial Judge in South Carolina*, by the late Judge Lide, without being highly impressed with the judicial tradition of this state. He will, incidentally, be rewarded with a great deal of information as to the matter at hand as well as some whimsical by-products. For instance, Judge Lide did not like to use standardized instructions, saying "[they] may indeed be quite helpful, but like all 'canned products' they necessarily lack freshness."

Putting together the attitude toward objections (leniency), the complete restriction of the judge (muzzled watchdog),<sup>227</sup> the inflexible

<sup>221</sup> LIDE, *THE TRIAL JUDGE IN SOUTH CAROLINA* 22 (1953); *Youngblood v. So. R. Co.*, 152 S.C. 265, 149 S.E. 742 (1929). See *Coleman v. Lurey*, 199 S.C. 442, 20 S.E. (2d) 65 (1942).

<sup>222</sup> LIDE, *THE TRIAL JUDGE IN SOUTH CAROLINA* 63 (1953); note 224 *infra*.

<sup>223</sup> CONST. OF 1895, art. 5, §26; 27 *TEMPLE L.Q.* 159 (1953).

<sup>224</sup> *Coleman v. Lurey*, 199 S.C. 442 at 446, 20 S.E. (2d) 65 (1942); *White v. Charleston R. Co.*, 132 S.C. 448, 129 S.E. 457 (1925); *Langley v. Southern R. Co.*, 113 S.C. 45, 101 S.E. 286 (1919).

<sup>225</sup> *Steinberg v. South Carolina Power Co.*, 165 S.C. 367 at 371, 163 S.E. 881 (1932).

<sup>226</sup> *Coleman v. Lurey*, 199 S.C. 442 at 446, 20 S.E. (2d) 65 (1942); *State v. Adams*, 68 S.C. 421 at 427, 47 S.E. 676 (1904).

<sup>227</sup> The term is quoted in a veteran S.C. practitioner's letter set out in MORGAN, *THE LAW OF EVIDENCE: SOME PROPOSALS* 13 (1927). See Figg, "Limitations on Trial Judge's

statutory procedure, the fact that no conference for presettlement of instructions is provided for, that the judge may have to try to digest as much as 19 pages of closely typewritten requests while trying to preside at trial,<sup>228</sup> and the present 12-month docket delay in one county, one finds a situation that is at least borderline. Were the charge not truly oral, or were the South Carolina judicial traditions less proud, the ruling on the map would certainly be dark instead of light.

### *Maryland*

Maryland's reform in 1941 from one of the worst systems of instructing into one of the best is described at some length elsewhere.<sup>229</sup> One might wonder if this new system is working well, in view of the docket delay of ten months in Baltimore. The reports show that instructions are not causing undue trouble,<sup>230</sup> however, whereas the reorganization of the courts in Maryland, long overdue, may—it is hoped—correct the metropolitan court problem there.<sup>231</sup>

As to the adequacy-of-charge problem in these five states, the extremes range from the Virginias—which ask little of the judge—to North Carolina, which asks of him the impossible. In South Carolina one saw a fine old common law system which had been mutilated by constitutional changes and legislation of the difficult Reconstruction days. Maryland has worked out a satisfactory escape from its ancient system of written prayers (which were simply handed to the jury after a silent reading), and has something quite functional in its stead. It may be of some significance that Maryland is the fastest-growing state

Commenting on the Evidence in South Carolina Jury Trials," 5 S.C. L.Q. 214 (1952); Soper, "The Charge to the Jury," 24 J. AM. JUD. SOC. 111 (1940).

<sup>228</sup> Powers v. Rawls, 119 S.C. 134, 112 S.E. 78 (1922); LIDE, THE TRIAL JUDGE IN SOUTH CAROLINA 61-63 (1953). S.C. LAWS (1952), vol. 7, Circuit Court Rules: Rule 11 [as amended] re requests to charge. See new provision as to requests and objections to charge, Acts of Gen. Assembly of S.C. (1953), no. 27, approved Feb. 20, 1953; 27 TEMPLE L.Q. 160 (1953).

<sup>229</sup> 27 TEMPLE L.Q. 148-151 (1953); 1954 WASH. UNIV. L.Q. 202.

<sup>230</sup> West v. Belle Isle Cab Co., 203 Md. 244, 100 A. (2d) 17 (1953), collecting the most frequently cited cases under the General Rules of Practice and Procedure, part 3, subd. 3, rule 6; Sun Cab Co. v. Powell, 196 Md. 572, 77 A. (2d) 783 (1951). And see Washington Suburban Sanitary Commn. v. Musgrove, 203 Md. 231, 100 A. (2d) 27 (1953).

<sup>231</sup> Soper, "Reorganization of the Court of Appeal of Maryland," 8 MD. L. REV. 91 (1944); editorial, "The Need for Further Procedural Reform in Maryland, Particularly in the Criminal Procedure," 9 MD. L. REV. 173 (1948); editorial: "Criminal Procedure Reform Achieved in Maryland," 11 MD. L. REV. 319 (1950); Elliott, "Judicial Administration—1953," 156, reprinted from 1953 ANNUAL SURVEY OF AMERICAN LAW; Institute of Judicial Administration, Check-List Summary of 1954 Developments in Judicial Administration, 4, 11, 12, 13, 17.

in the circuit group—in line with the tentative theory herein being tested that the federal rules system is an answer to the requirements of an expanding economy or a growing population.

### THIRD, SECOND, AND FIRST CIRCUIT STATES

*Delaware, Pennsylvania, New Jersey; New York, Connecticut,  
Vermont; Rhode Island, Massachusetts, Maine,  
New Hampshire*

The ten old-line states in these three circuits comprise the most densely populated areas so far considered, and docket congestion is the rule. Only in Delaware, Maine, New Jersey, and Vermont is the logjam in the courts not to be found. Another relative exception is Pennsylvania, which reports court congestion only in Pittsburgh. The disability and death of certain judges are believed related to that particular problem of a 21-month backlog. Nevertheless Philadelphia County Common Pleas are at a danger point of 9.5 months.

The average growth of 11 percent is not a very enlightening figure, since the real problem is the further crowding of the already overcrowded urban centers, and court delays of three to over four years in and around Boston and New York.

Apart from New York, the codes have had little to do with procedure in this area. Maine and Massachusetts have statutes relating to instructions, but even those have had little influence. The constitution of Delaware forbids comment on the evidence, however, and Delaware is here taken as the only state in which such restriction has any importance for present purposes. It will be seen that regulation of procedure by judicial rule-making has been a favorable factor as to the instructing process in Delaware, Pennsylvania, New Jersey, and in Connecticut. The court customarily summarizes the evidence in all states except Delaware, although such review is minimal in New York. Oral instructions are the rule, being mandatory everywhere except Vermont—and it is customary even there. Instructions follow closing arguments of counsel in all these states.

Requests to charge are to be submitted prior to argument in all but New York and Rhode Island, except that in Maine the court may fix the time for submission at its discretion.

As to adequacy of the charge, the foregoing description of mechanics shows that a general, oral charge is contemplated in every one of these states. For that matter, the writer has found no instance of a

complete failure to charge the jury in the reports of any of these states. As to the judicial duty to charge, nine of these states ostensibly place upon the court the duty of instructing the jury as to the law applicable to the major issues of the case, whereas in New Jersey the cases say that (apart from the rules of fundamental error) the court is required to instruct only as to those matters on which correct instructions have been submitted. The seeming uncompromising difference in these positions will be seen to make no sharp difference as to adequacy of the charge in this group, however, when the states have been considered separately. Of particular interest are the experiences of the states in working out their rules. Discussion will show that there is little likelihood of a jury being forced to bring in a crackerbarrel verdict in any of these states. On the other hand, the extreme nicety of balance required to make any general rule work in this connection will become even more apparent. For the time being, the order of discussion of states will follow the plan heretofore followed, whereby they are taken up in inverse numerical order of the federal circuits.

### *Delaware*

Delaware had permitted a practice to develop, "admittedly in the teeth of common law tradition, whereby a general objection to the charge sufficed to preserve many grounds of error with respect thereto." A 1942 opinion of the Superior Court of Delaware contains a full and interesting discussion of the course of this divergence from the English practice.<sup>232</sup> This matter is now somewhat moot, however, since Delaware more recently has adopted superior court rules in which federal rule 51 appears without modification.<sup>233</sup> While the rule has not yet received interpretation, it means—if it means anything—that objections must be timely and specific.

### *Pennsylvania*

The Pennsylvania reports mention fundamental error (as to charges) with a surprising frequency.<sup>234</sup> Such cases may be seen in a

<sup>232</sup> *Buckley v. Johnson & Co.*, 41 Del. 546 at 558, 25 A. (2d) 392 (1942), quoting Chitty's language, note 200 *supra*.

<sup>233</sup> Del. Code Ann., Rules of the Superior Court (civil), rule 51, p. 411 (adopted July 1, 1947); 1954 WASH. UNIV. L.Q. 194.

<sup>234</sup> See especially cases under *Sears v. Birbeck*, 321 Pa. 375, 184 A. 6 (1936), such as *Hodgson v. Bigelow*, 335 Pa. 497, 7 A. (2d) 338 (1939); *Kins v. Deere*, 359 Pa. 106, 58 A. (2d) 335 (1948); *Knight v. Allegheny County*, 371 Pa. 484, 92 A. (2d) 225 (1952).



very recent law review note which collects and discusses the cases of the past century on this point in the light of adequacy of the charge.<sup>235</sup> It will be seen there that Pennsylvania adheres to the doctrine that a high standard of adequacy of the charge must be maintained, and at the same time has for more than a century adhered to the rules as to objections which federal rule 51 codifies.<sup>236</sup> The cases might be taken to mean, however, that in order to maintain the necessary balance, the possibility of fundamental error of omission must be kept before the judicial conscience. The memory of that duty, so to speak, is kept fresh by noticing the possibility of fundamental error in connection with appeals on instructions, although reversals on such a basis are infrequent.

### *New Jersey*

In New Jersey, by contrast, it appears that "shocking error" is required before there will be a retrial for inadequacy of instructions.<sup>237</sup> Anywhere else, such standard might afford little protection. It must be remembered, however, that the New Jersey courts are truly administered.<sup>238</sup> Judicial statistics are kept, and the product of the courts is subject to strict internal control not only as to its quantity, but also as to its quality. This is one of the few judicial enterprises that keep books, despite the rather widespread opinion in other businesses and professions that such recording and control are indispensable. On the other side, that of counsel, it must be remembered that they are truly officers of the court in this jurisdiction, and subject to its control. They are in literal fact required to prosecute their cases with due diligence.<sup>239</sup>

<sup>235</sup> Note, 28 *TEMPLE L.Q.* 102 (1954).

<sup>236</sup> *Heil v. Glandung*, 42 Pa. 493 at 499 (1862). See *Burkholder v. Stahl*, 58 Pa. 371 at 377 (1869); 6 *STANDARD PENNSYLVANIA PRACTICE* §§3, 9, 22.

<sup>237</sup> *Melone v. New Jersey Central Power & Light Co.*, 30 N.J. Super. 95 at 105, 103 A. (2d) 615 (1954). "Nor is there plain error of a shocking sort of which we should take notice under R.R. 1:5-3(c)," *State v. Picciotti*, 12 N.J. 205, 96 A. (2d) 406 (1953). See *State v. Vaszorich*, 13 N.J. 99, 98 A. (2d) 299 (1953).

<sup>238</sup> The term "administered" is here used to indicate the unification and organization of courts as recommended by the minimum standards. *VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION*, c. 2, p. 29 (1949). See also *PIRSIG, CASES AND MATERIALS ON JUDICIAL ADMINISTRATION*, c. 5, p. 429 (1946). N.J. CONST. OF 1947, ART. VI, §2, ¶3.

<sup>239</sup> R.R. 1:25 (Canons of Ethics) consists of an incorporation of the 47 Canons of Professional Ethics of the American Bar Association. Canon 21 relates to punctuality and expedition. Discipline of attorneys for failure to prosecute causes with due diligence has occasionally been necessary. See *Stoffer*, "The Work of the Judicial System: 1953-54," 9 *RUTGERS L. REV.* 1 at 16 (1954). [note: N.J. rules are cited, pursuant to rule 1:1-10 as "R.R." followed by the rule number (*simpliciter*), *THE REVISION OF THE RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY* (1953)].

The rules by which this judicial administration is conducted are not considered to be the Twelve Tables, but are looked upon as flexible devices to facilitate the prompt and efficient disposition of cases. Thus, were the bookkeeping of these courts to reveal evidence of frequent complaint as to adequacy of charges, prompt correction of the weakness in the system could and would doubtless be made.

The avowed New Jersey goal is to eliminate appeals not on the merits, and to avoid disturbance of a jury verdict except in the most extreme case.<sup>240</sup> Although there is no unanimity as to reports on the exact degree of achievement, it is conceded on the one hand that "the hallmark of the new practice is its devotion to the merits," and on the other that many "reported decisions are still concerned, to one degree or another, with points of practice."<sup>241</sup>

### *New York*

In New York the ancient tradition of oral requests to charge, proffered after argument, still persists. As to a dragnet objection, however, only the most flagrant unfairness could conceivably be reached thereby.<sup>242</sup> It is to be noted that the Civil Practice Act seemingly permits objections or exceptions to be taken at any time before verdict is rendered.<sup>243</sup> As suggested earlier, incidentally, the judicial custom is to confine the summary to a recital of the merest skeleton of the facts. It further seems that the power to comment on the facts is rarely exercised.<sup>244</sup> The fact remains, however, that it is admitted that the New York trial judge has ample power to control his courtroom<sup>245</sup>—a power

<sup>240</sup> Rule 1:5-1 (criminal); rule 1:5-3 (civil). *Rapp v. Public Service Coordinated Transport*, 9 N.J. 11, 86 A. (2d) 676 (1952); *Stevens v. Roettger*, 22 N.J. Super. 64, 91 A. (2d) 617 (1952); Clapp, "Civil Procedure in State Courts," 1951 ANNUAL SURVEY OF AMERICAN LAW 799, 807.

<sup>241</sup> Schnitzer, "Civil Practice and Procedure," 9 RUTGERS L. REV. 307 at 340 (1954).

<sup>242</sup> *Brozek v. Steinway R. Co.*, 161 N.Y. 63, 55 N.E. 395 (1899); *Walsh v. Kelly*, 40 N.Y. 556 (1869); 4 WARR'S NEW YORK PRACTICE, 4th ed., 322 (1938); 4 CARMODY'S NEW YORK PRACTICE, 2d ed., 3085 (1932).

<sup>243</sup> *New York Civil Practice* (Cahill-Parsons, 1946) §446; *Altman v. Central New York Bldg. Corp.*, 106 N.Y.S. (2d) 695 at 698 (1951) for discussion and collection of authorities at syll. 3, 4, p. 698.

<sup>244</sup> *Diamond*, "Instructions to Jury," in 2 TRIAL PRACTICE 8 (Practicing Law Institute pamphlet) (1946); editorial, "Judges in New York May Advise Juries," 17 J. AM. JUR. SOC. 187 (1934), being a report of colorful remarks of the late Justice Dowling before the N.Y. State Bar Assn. See note, 2 BROOKLYN L. REV. 273 (1933).

<sup>245</sup> *Nims*, "Comments on the Minimum Standards of the A.B.A. as Applied to the Courts of New York," 25 N.Y. UNIV. L. REV. 701 at 714 (1950); *Hurlbut v. Hurlbut*, 128 N.Y. 420 at 426, 28 N.E. 651 (1891); *Hoffman v. N.Y. Central R. Co.*, 87 N.Y. 25 (1881).

which seldom exists unless he has the freedom which results from possession of the power to charge orally, and to discuss the facts.

In view of the overwhelming problems of court organization facing the metropolitan New York courts, and which are now under study, it seems picayune to suggest that the federal rules method as to requests and objections might improve what is a basically and fundamentally sound system for charging the jury.

### *Rhode Island*

The foregoing description of the New York system is in general applicable to that of Rhode Island, as well. Yet comparison of those states may seem incongruous. It must be remembered, however, that the density of population of Rhode Island is the highest in the country, and that it has a metropolitan court problem at Providence. Caveat should be made that the New York remarks as to disuse of the comment power do not apply to Rhode Island. In this small state the judges often speak freely.<sup>246</sup>

It will be noticed that there has been a departure from the order (inverse) of circuits here—a change which is made to enable showing certain similarities and contrasts. Massachusetts will be discussed next, then Connecticut, followed by Vermont and Maine. Discussion of New Hampshire will complete the circuit(s) of the 48 states.

### *Massachusetts*

Massachusetts has entirely too many appeals on instructions in its reports, yet it cannot be said that its system does not tend toward adequacy. The duty of the court is generally taken to be high.<sup>247</sup> As a leading case points out, the "duty to give instructions covering the main factual hypotheses of the case is an absolute duty which must be performed irrespective of requests. . . ."<sup>248</sup>

When viewed from the other side, that of counsel's responsibility, the matter appears thus: ". . . the field where requests for instruction

<sup>246</sup> *Flint v. Nicholson*, 67 R.I. 513, 25 A. (2d) 617 (1942); 1954 WASH. UNIV. L.Q. 205 at 206.

<sup>247</sup> *Judicial responsibility*: *Brick v. Bosworth*, 162 Mass. 334 at 337, 39 N.E. 36 (1894). *Orality and continuity*: *Herrick v. Waitt*, 224 Mass. 415, 113 N.E. 205 (1916); *Maryland Casualty Co. v. Jackson*, 230 Mass. 384, 119 N.E. 682 (1918); *McMahon v. O'Connor*, 137 Mass. 216 (1884); *Howes v. Grush*, 131 Mass. 207 (1881); *Counsel must pinpoint objections*: *Jones v. Newton St. Ry. Co.*, 186 Mass. 113, 71 N.E. 114 (1904); *Boutelle v. Dean*, 148 Mass. 89, 18 N.E. 681 (1888).

<sup>248</sup> *Brick v. Bosworth*, 162 Mass. 334 at 337, 39 N.E. 36 (1894).

are necessary and proper is rather narrow, since there is no necessity for requests on the main points in a case and there is no right to requests which narrow out a portion of the facts or evidence."<sup>249</sup>

Perhaps the best way to evaluate such a system is to turn back to the Second Circuit for a moment, and consider the case history to be seen in Connecticut.

### *Connecticut*

"The English reform greatly influenced the Connecticut Code of 1879, one of the more successful of the early American codes. . . ."<sup>250</sup> The function of the Connecticut trial judge, until well after 1900, at least, seems however to have been taken from English tradition rather than legislation.<sup>251</sup> "It is not for the attorneys to frame the charge," said Connecticut cases on appeal.<sup>252</sup> "No Help Wanted," in effect was what the court of errors and appeals was saying; "*he* can handle that job all by himself."

To that extent, and perhaps to that extent only, it appears that the transplant did not "take." One sees that in about 1929 the appellate rule-making power was reinforced. In a significantly short time thereafter an old rule was reactivated (which rule has since been amended to button itself up even tighter) to the effect that the supreme court of errors shall not be bound to consider errors of omission or commission in the absence of request or specific objection made in good time.<sup>253</sup> It became apparent that such rule had long been needed, since the basic position of the cases theretofore had been that the "parties in every action have the right to expect that the court will direct the jury concerning every question of law arising in the trial of each case . . . [and] omission [of any essential matter] will be error."<sup>254</sup>

<sup>249</sup> MOTTLE, MASSACHUSETTS PRACTICE—CIVIL §426, p. 229 (1948). See Superior Court Rules Ann. (1932) pp. 199-200.

<sup>250</sup> CLARK, CODE PLEADING, 2d ed., 20, esp. n. 43 (1947).

<sup>251</sup> "Counsel are not expected to even intimate to the [English] judge how they would like to have the jury charged." Sunderland, "Modern English Legal Practice," 4 *THE L. REV.* 273 at 288 (1925-6). As to the tradition, see Lex, "The Late Mr. Baron Huddleston," 5 *GREEN BAG* 105 at 106 (1893).

<sup>252</sup> *State v. McKee*, 73 Conn. 18 at 30, 46 A. 409 (1900). See *Hartford v. Champion*, 58 Conn. 268 at 276, 20 A. 471 (1889).

<sup>253</sup> Rules for the Trial Court, §153, *THE CONNECTICUT PRACTICE BOOK OF 1951*. Note: the same section appeared as §156 in the 1934 *PRACTICE BOOK*; its present form incorporates revisions and amendments of 1943 and 1951. As to history: Maltbie, "The Rule-Making Power of the Judges," *THE CONNECTICUT PRACTICE BOOK OF 1951*, xi-xvii.

<sup>254</sup> *Pietrycka v. Simolan*, 98 Conn. 490 at 499, 120 A. 310 (1923); *Lindquist v. Marikle*, 99 Conn. 233 at 236, 121 A. 474 (1923); *Hartford v. Champion*, 58 Conn. 268, 20 A. 471 (1889).

The scores of cases that followed enforcement of the new appellate rule show quite clearly that counsel very frequently failed to submit any requests whatsoever.<sup>255</sup> From the cases examined—and which may be found in almost every column of the Connecticut reports from 1929 until rather recent years—it is clear that reeducation has not been instantaneous.<sup>256</sup> It has been necessary to condition the bar to a reciprocal responsibility for completeness of the charge, and it appears that the process is not complete.

Finally, it must be noticed that the appellate court's rule does not say that it *will* not review—it simply says that it *need* not. The cases show that it sometimes invokes the rule, and does not notice allegations of errors of omission.<sup>257</sup> At other and proper times, it considers matters of fundamental omissions or errors, just as do the United States courts of appeals despite the strict requirements of federal rule 51.<sup>258</sup>

### *Vermont and Maine*

A good collection of Vermont cases may be found in the original version of Hogan's "The Strangled Judge."<sup>259</sup> That article incidentally depicts, in a closed and nonmetropolitan milieu, a relationship between bench and bar which many city lawyers might envy. As to Maine, certain aspects of the charge there were suggested in an earlier article.<sup>260</sup> For the present question of adequacy, however, it is believed that New Hampshire will best illustrate the reciprocity principles

<sup>255</sup> "A large portion of all the decisions of the Supreme Court deal with the correctness and adequacy of charges to the jury in particular cases. . . ." MALTBIE, *CONNECTICUT APPELLATE PROCEDURE* §46, p. 65 (1940). See annotations to §153, *THE CONNECTICUT PRACTICE BOOK OF 1951*, pp. 80, 81; *CONNECTICUT DIGEST* §42 (1945). There is no abundance of cases on "comment," however, as the judicial power in that respect is confirmed by statute: Conn. Gen. Stat. (1949 rev.) §§7969, 8806.

<sup>256</sup> E.g., Bjorkman v. Newington, 113 Conn. 181, 154 A. 346 (1931); Ursini v. Goldman, 118 Conn. 554, 173 A. 789 (1934); Iannucci v. Lamb, 123 Conn. 142, 193 A. 212 (1937).

<sup>257</sup> Tully v. Demir, 131 Conn. 330 at 334, 39 A. (2d) 877 (1944); Greenwald v. Wire Rope Corp. of America, 131 Conn. 465 at 470, 40 A. (2d) 748 (1944); Cervino v. Coratti, 131 Conn. 518 at 522, 41 A. (2d) 95 (1945); Ladd v. Burdge, 132 Conn. 296 at 297, 43 A. (2d) 752 (1945); Kiss v. Kahm, 132 Conn. 593 at 594, 46 A. (2d) 337 (1946); Ehrhard v. Taylor, 136 Conn. 13 at 14, 68 A. (2d) 133 (1949); Bradley v. Nieman, 137 Conn. 81 at 83, 74 A. (2d) 876 (1950); Automotive Twins, Inc. v. Klein, 138 Conn. 28 at 35, 82 A. (2d) 146 (1951).

<sup>258</sup> Kucineski v. Davey, 123 Conn. 662 at 665, 197 A. 688 (1938); Riley v. Connecticut Co., 129 Conn. 554 at 557, 29 A. (2d) 759 (1943); Mickel v. New England Coal & Coke Co., 132 Conn. 671 at 674, 47 A. (2d) 187 (1946); Proto v. Bridgeport Herald Corp., 136 Conn. 557, 72 A. (2d) 820 (1950).

<sup>259</sup> 22 Vt. St. B. Assn. 13-63 (1929).

<sup>260</sup> *Maine*: 1954 WASH. UNIV. L.Q. 204-205. *Vermont*: id. at 178, esp. n. 8.

which are at the base of any system making for adequacy of the charge. It can safely be said, furthermore, that in all three states a duty to see that the jury does not go out uninstructed is recognized.<sup>261</sup> Maine, however, makes it clear that "the court is under no legal obligation to perform any part of the duty of counsel."<sup>262</sup>

### *New Hampshire*

New Hampshire has what has heretofore been called the sufficient-to-suggest rule, and which has been mentioned in connection with Washington, Kentucky, Ohio, and federal cases.<sup>263</sup> Whereas in Kentucky the principle was applied against a low basic-duty background, here it has somewhat different surroundings.<sup>264</sup> Here, in addition to the basic duties of the court as to fundamental issues and principles of law, it is possible for circumstances and an incomplete, incorrect, or untimely request (which may come in the form of an exception) to put the court on notice as to the necessity of instructions on a matter going somewhat beyond the bare essentials.<sup>265</sup>

Generally, the reciprocal duties of court and counsel in New Hampshire can hardly be separated. An illustration is given in the rather well known case of *Perlman v. Haigh*.<sup>266</sup> There the supreme court remanded for new trial, after judgment on a verdict for defendant, because there had been no charge on the sudden emergency doctrine. At the conclusion of the charge, plaintiff's counsel had said: "I except to the court's refusal to make a statement relative to the sudden emergency doctrine." The court replied that there had been no request for

<sup>261</sup> *Vermont*: Rowell v. Town of Vershire, 62 Vt. 405 at 408, 19 A. 990 (1890); In re Bean's Will, 85 Vt. 452, 82 A. 734 (1912); Merrihew's Admr. v. Goodspeed, 102 Vt. 206, 147 A. 346 (1929). See also Luce v. Hassam, 76 Vt. 450, 58 A. 725 (1904).

<sup>262</sup> *Virgie v. Stetson*, 73 Me. 452 (1882). See *State v. Benner*, 64 Me. 267 at 291 (1874), for interpretation of the instructions statute of 1874 [Me. Rev. Stat. (1954) c. 100, §104]. But the court "should make the position and contention of the litigants clear. . . ." *Benner v. Benner*, 120 Me. 468, 115 A. 202 (1921); *Desmond v. Wilson*, 143 Me. 262, 60 A. (2d) 782 (1948).

<sup>263</sup> *Kennett v. Yates*, 41 Wash. (2d) 558, 250 P. (2d) 962 (1952), and *Montgomery v. Virginia Stage Lines, Inc.*, (D.C. Cir. 1951) 191 F. (2d) 770; *Louisville & N.R. Co. v. Craft*, 192 Ky. 314, 233 S.W. 741 (1921); *Chesapeake & Ohio R. Co. v. De Adley*, 241 U.S. 310, 36 S.Ct. 64 (1916); note, 22 COL. L. REV. 162 (1922).

<sup>264</sup> *Kentucky*: *Jones v. Saunders*, 284 Ky. 571, 145 S.W. (2d) 514 (1940); STANLEY, INSTRUCTIONS TO JURIES IN KENTUCKY (1948 Supp.) §13. *New Hampshire*: *Burke v. B. & M. R. Co.*, 82 N.H. 350, 134 A. 574 (1926); *Bjork v. U.S. Bobbin & Shuttle Co.*, 79 N.H. 402, 111 A. 284 (1920).

<sup>265</sup> *Perlman v. Haigh*, 90 N.H. 405, 10 A. (2d) 228 (1939). Generally, however, "An exception to an instruction is unavailing unless the attention of the court is specifically directed to the error claimed." *Bixby v. B. & M. R.*, 94 N.H. 107, 47 A. (2d) 922 (1946).

<sup>266</sup> 90 N.H. 404, 10 A. (2d) 228 (1939).

such and added, ". . . the Court has not had an opportunity to consider it, whether or not it should be applied, in view of the request coming at this time," and made no charge thereon.<sup>267</sup>

The supreme court reminded the trial court that the duty to charge in the first instance rests upon the court, that counsel also has a duty. It recognized that counsel in fact had made no request in writing, nor had he complied with the court rule as to time of submission, but he had succeeded in putting the court upon notice as to an essential element of his case, adding:

"In view of the rule which prevails in this jurisdiction as to the reciprocal duties of court and counsel, plaintiff's counsel was justified in assuming that this phase of the case would be covered by the charge even though no specific request were made in writing. . . ."<sup>268</sup>

In summarizing this group of ten states, it is hard to see how any rule could be more logical than that last mentioned. Yet in a metropolitan setting its general administration would be a matter of extreme difficulty. The basic principle of reciprocity and the right to rely is fundamental justice. It lies at the very opposite extreme of the rule that has been applied in several of the Fifth Circuit states. That opposite rule permits refusal of a request if it contains even so much as an obvious typographical error.<sup>269</sup> The application of the present rule, in the form seen in *Perlman v. Haigh*,<sup>270</sup> however, presupposes a small bar which generally practices with and before courts and counsel whose habits and even eccentricities are so well known as to make their next moves to some extent predictable. It is hardly a workable rule for the metropolitan practice in which court and counsel are strangers more often than not.

The application of the foregoing remarks to the practice in these three circuits will be clarified after a brief reference to the federal rules. It is within the states of these circuits that one can often call forth an argument as to whether the federal rules follow the state practice, or the state practice conforms to the federal. A short answer is that the

<sup>267</sup> *Id.* at 404.

<sup>268</sup> *Id.* at 405. See also *Ware v. B. & M. R. Co.*, 93 N.H. 213 at 214, 38 A. (2d) 879 (1944): "But the duty of Court and counsel are reciprocal in this respect."

<sup>269</sup> "Charge 13, requested by the defendant, has evidently typographical errors, which alone would justify its refusal. . . ." *Reliance Life Ins. Co. v. Garth*, 192 Ala. 91 at 95, 68 S. 871 (1915); Ala. Code (1940), tit. 7, §273; *Thomas v. State*, 124 Ala. 48 at 57, 27 S. 315 (1900); *Jarrell v. State*, 35 Ala. App. 256 at 262, 50 S. (2d) 767 (1949).

<sup>270</sup> 90 N.H. 404, 10 A. (2d) 228 (1939).

federal rules are based on such of the common law practice as is adapted to prompt adjudication of modern day litigation (in courts which now, for the most part, are very busy indeed). It is in the details of rule 51—time and form of requests; advance notice of proposed action by the court; time and manner of objections—that the adaptation to modern pressure is especially to be seen.

Within this Atlantic group one need not go to the small New England states to find practice situations which do not require every modern facility to permit the local court to keep pace with the pressure of time. Pennsylvania and New York have their agricultural areas wherein conditions of practice resemble those of rural Vermont and New Hampshire. It is undeniable, however, that state practice cannot be tailored county by county; it must strike a median that meets the needs of the greatest bulk of the population. If any fault can be found with the details of the safeguards for adequacy in these states it might be as follows. The general system throughout the region is the same, yet the requirements of the area range from one extreme to the other. It might well be that the systems of Massachusetts and New York could be implemented further with some of the mechanical facilities of the federal rules, especially as to the time and form of requests for instructions. It is, for that matter, believed that such result is achieved to a considerable extent by local rules of court. The difficulty of such method is, however, that local rules tend to make for complexity and obscurity of practice.

### *Recapitulation*

"I would advise you to set aside your therapeutic ambitions and try to understand what is happening," said one of the most controversial figures in medicine. "When you have done that, therapeutics will take care of itself."<sup>271</sup> That very statement is controversial in the present context, but perhaps not entirely inapt, as a review of "what is happening" may show. As to that review, one may look first at the bright side of the map-picture.

In the Tenth Circuit were seen the youngest, most sparsely populated states. There the fastest growing members are asking more of trial procedure than that which satisfied their pioneer predecessors, and the majority of that group have adopted part or all of the federal rules.

<sup>271</sup> Attributed to Sigmund Freud by Weinberg in "Mechanism and Neurosis," 39 AMERICAN SCIENTIST 74 (1951).



Noticeable is the setback caused by an abortive effort to anticipate change in Colorado in 1930. It is even possible that lag in improvement of instructing processes of several neighboring states is not unrelated thereto.

In the seven states in the Ninth Circuit group, pressure of rapid growth was seen to have caused adaptation toward the minimum standards and federal rule 51 in California, Arizona and Nevada, while straws in the winds of Oregon and Washington were also noticed.

In the twenty states next considered, being the states in circuits 8, 7, 6 and 5, older groups of settlements were seen. These constituted the remainder of the states with the exception of the Old Colonies of the eastern seaboard. Of these intermediate states, Minnesota and Michigan were seen to stand out in the extent of their compliance with the rules here taken as making for the more adequate charge.

In the faint-ruled or reasonably adapted group appear South Dakota, Iowa, Indiana, Kentucky, Tennessee, Texas and Louisiana, and finally, Florida. The Louisiana system is included in this group of eight simply because, under its particular system of law, it at least avoids retrials not on the merits. There was nothing in its system referable to common law procedure, however, except a certain faint resemblance to features to be found in the statutory special verdict.

Tennessee, like Louisiana, is not a state where there has been any noticeable change or progress in the instructing procedure. It is simply a jurisdiction that has provided as workable a system as possible within its constitutional restriction on the judge. Apart from the states retaining the common law freedom of the judge, the Tennessee practice has more of the features of the English method of charge than may be found except on the Atlantic seaboard.

The other states are South Dakota, Iowa, Indiana, Kentucky, Texas and Florida. Of these, all but South Dakota and Iowa have adopted rules modelled very closely after federal rule 51. The influence of that same rule is very noticeable in Iowa, and South Dakota has secured a number of its features. In each one of these, against a background of considerable restriction in a number of respects, a better solution is thus reached. In every one of those instances, the discussion has shown that the responsibilities of court and counsel are placed in better balance. Everywhere except Kentucky, where the rule is too recent to have had interpretation, the cases show the new rules to be functioning. Remands for retrial, resulting from inadequacy of the charge, are markedly abating in these states.

In the Fourth Circuit, the system of South Carolina is believed to work well. It seems, however, from the writer's Yankee viewpoint, that leniency as to objections is a little overdone—and the same might be said as to Florida mentioned earlier. In the same circuit, Maryland made a remarkable change via the federal rules model and got away from one of the most ineffective procedures imaginable in the process.

The states in the first three circuits, ranging from Delaware to Maine, all retain the American common law system with sufficient integrity to avoid much likelihood of inadequacy of the charge.<sup>272</sup> The newcomer to this group is Delaware, under its recent adoption of the federal rules.

It is to be noticed that of twenty-nine states shown on the map as being white or faint-ruled, at least sixteen may be said to have made or taken some definite step toward improvement in the past twenty-five years: Utah and New Mexico; Arizona, California and Nevada; Iowa, Minnesota and South Dakota; Indiana; Michigan and Kentucky; Texas and Florida; Maryland; Delaware; and Connecticut. Minor changes in systems already workable, such as that to be seen in South Carolina, are not included in the foregoing tabulation of sixteen.

The so-called trouble spots on the map, being the states shown in black, are Oklahoma; Nebraska and Missouri; Illinois; Mississippi and Georgia; and finally North Carolina (being listed in inverse order of circuits in the fashion followed throughout).

The reasons for such listings, briefly recapitulated, are, in order: Nebraska and Oklahoma set the duty of the court to charge *sua sponte* at a very high level, and counsel is given maximum freedom from responsibility. In Missouri and Illinois the court has no responsibility of its own motion to give an adequate charge—the matter being left to counsel; in Mississippi the court does not even have power to instruct of its own motion. Adequacy of the charge depends entirely, in Mississippi at least, upon whether the counsel will happen to cover the case in their combined requests. The remaining two states have high duty of the court, low duty of counsel. North Carolina has the additional duty to state the contentions of the parties and summarize the

<sup>272</sup> It is the writer's conviction that there is an American common law charge, being close to that of the federal trial courts, found in about thirteen of the states. That such charge is "as at common law" seems somewhat an afterthought—a fact first brought to light in *Vicksburg & Meridian Ry. Co. v. Putnam*, 118 U.S. 545, 7 S.Ct. 1 (1886), and underscored in *Capital Traction Co. v. Hof*, 174 U.S. 1 at 16, 19 S.Ct. 580 (1899). The discussion in 27 *TEMPLE L.Q.* 137-164 and 1954 *Wash. Univ. L.Q.* 177-212 points to very considerable differences between the American and the English common law charge.

evidence without comment, all of its own motion. Especially in Georgia, and to some extent in North Carolina, the exact extent of the court's duty seems to "depend"—but what it depends upon seems to be determined by the reviewing courts on a sort of *freirechtsfindung* or free-wheeling basis.<sup>273</sup> Stated otherwise, the standard of the reviewing courts seems to be somewhat plastic.

Particularly in Oklahoma, Nebraska, Missouri, Illinois and Mississippi, the written instructions system is a fearful source of reversals for error (of commission) in instructions.

The twelve states shown in the dark ruling are, respectively: Colorado, Kansas and Wyoming; Montana and Idaho; Arkansas and North Dakota; Ohio; Alabama; and Virginia and West Virginia. The instructing practice in these states generally seems subject to too many restrictions upon the court—whatever the attitude toward the court's Duty to Charge may be. As seen, the latter may vary from *laissez faire* to rather indecisive positions like that of Wyoming. Whatever the particular combination may be, the result is always too many reversals for instructions. Generally, these two middle views as to the *sua sponte* duty-without-power are simply gradations between the extremes seen in Mississippi at one end and Nebraska at the other. As Tweedledum might have said: "It makes no difference which road you take—they both end up at the same place." Here the "same place" is the treacherous system wherein on the one hand judgments have no finality and, on the other, there is no assurance that the twelve forgotten men in the box will be given any useful guidance.

### CONCLUSION

It is somewhat consoling to recall that reform in procedure always moves "by very short steps."<sup>274</sup> It would, however, be no great task for a cynic to point out that many of the steps which have been herein recounted are much too short to assure adequacy of the charge. It might thus be suggested that, as to a number of the light-ruled states, for example, "disfigurements" still abound, and furthermore, that many of

<sup>273</sup> See Radin, "The Good Judge of Château-Thierry and His American Counterpart," 10 CALIF. L. REV. 300 (1922); Introduction by John W. Salmon to Geny, "Freedom of Decision," in SCIENCE AND LEGAL METHOD—SELECT ESSAYS 41 (Modern Legal Philosophy Series) (1917). The comparison is only partially apt; these courts follow precedent—but now have a variety of precedent from which to choose.

<sup>274</sup> For a valuable recital of the slow course of reform since the 18th century, see McWilliams, "The Law: A Dynamic Profession," 41 A.B.A.J. 18 (1955).

the alleged "reforms" are simply waiver provisions—statutes of limitations in minuscule, so to speak. The skeptic could assert that the mere tightening of requirements as to requests and specific objections are no assurance that a court, given this new buckler, will not in its turn view the instruction proceedings with the fine "detachment" theretofore enabled on the part of counsel.

Before attacking that strawman, it might be an act of courtesy to indicate the scope of this necessarily brief conclusion. Its respective topics could be labeled about as follows: Reform; Sanctions; Judges and Judicial Selections; Research; Jurisprudence and Comparative Law; Law and Facts (special verdicts); Human Elements (and human nature); and Some Simple Fundamentals. Since those eight subjects are inseparable for present purposes, or at least merge imperceptibly, it seems unwise to categorize the discussion by separate headings.

Returning to the realist's (cynical or skeptical) challenge, it seems not entirely unanswerable. One response is that the underlying and basic duty-to-charge, on the part of the courts, is intrinsically much higher than the previous discussion has been able to indicate. Such is clearly and indisputably the fact as to criminal cases. True, the basic duty seems on the civil side to have been minimized. Looking back to some of the states seen in the Ninth and Eighth Circuits, for instance, it seems likely that the lowering of the elemental duty took place as a natural defensive compensation to indulgence of the general objection and increased power of counsel. The latent duty to charge is believed to be present at all times, however, although in some places the sole apparent basis is the obligation of the judicial oath. An example in that connection may be found in one of the severely restricted jurisdictions, Illinois. Back in 1859 the supreme court, by Walker, J., said in response to a challenge of the trial court's right to instruct *sua sponte*:

"Instead of its being error for the court on its own motion to instruct, where it seems to be required by the justice of the case, it is rather the duty of the judge to give such instructions. . . . And we have no hesitation in saying that so far from its being error, that the court acted in strict conformity with the duty imposed by the oath of the judge, and the requirements of the law."<sup>275</sup>

It is perfectly true that the judicial duty in that particular state has been beclouded by later opinions, but such change is entirely

<sup>275</sup> *Stumps v. Kelly*, 22 Ill. 140 at 142 (1859).

consistent with the development of more and more refinements of what are here called the indirect restraints. By inevitable progression, the initiating-duty of the trial court must be lowered as his power is decreased—if a predicament like that seen in North Carolina is to be avoided.

Mention of the judicial oath raises the political and personal element of the character of the judge himself. It is axiomatic that judicial selection is an imperfect process in the majority of the states. Somewhat incidentally, however, the writer interpolates his personal wonderment at the fact that our trial judges are as good as they are generally. His only explanation, in the face of the execrable methods of election of judges, is that the potency of the judicial oath (in its effect upon those who undertake it) must be much greater than the lay public believes it to be. Another possible explanation of why the trial judge is so very frequently found to be so remarkably capable and conscientious is an unappraisable factor. It may be called anything from American luck to the political genius of the democratic system of government. If it is luck, however, few will deny that we are "crowding our luck" by continuance of prevalent methods of judicial selection and by failure to give the trial judiciary the security of proper tenure.

Reform as to judicial selection and tenure is of course needed, and such is a "must" canon of the minimum standards of judicial administration.<sup>276</sup> Reform in the direction of the minimum standards is going forward on a number of fronts, of course, but discussion thereof would mean further departure from the topic at hand. It must therefore suffice to say here that better selection and tenure of and for the judiciary seems an inescapable element for reconstruction in the present phases of procedure. Nevertheless, it is not practicable to await improved judicial selection before seeking to provide better machinery for that "improved" judiciary to use.

Another phase of the duty to charge which stands in need of closer consideration is a matter as to which the law schools of the country can serve. Dean Pound has pointed toward the state law schools and the need for their service as "ministries of justice."<sup>277</sup>

<sup>276</sup> It is significant that "Judicial Selection, Conduct and Tenure" is the title of the first chapter of VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* (1949) (bibliography therein). See almost any issue of the *Journal of the American Judicature Society*, e.g., Brand: "Selection of Judges—The Fiction of Majority Election," 34 *AM. JUD. SOC.* 136 (1951); Winters, "A Better Way to Select our Judges," *id.* at 166.

<sup>277</sup> Pound, "A Ministry of Justice: A New Role for the Law School," 38 *A.B.A.J.* 637 (1952).

By what may be more than a coincidence, many of the "national" law schools are located in sections of the country where the worst problems as to adequacy of instructions are not to be found. The law schools elsewhere might well give more study and attention to the matter of instructions—and here something considerably more ambitious than collating standardized, "approved" instructions is contemplated.

Whatever else they may be, instructions are a matter of pressing and practical concern to most lawyers (apart from certain specialists). Surely such is the case in the states other than those on the north Atlantic seacoast. Were the law schools to interest themselves in this direction, a step would for one thing be taken toward conciliation of that segment of the bar which finds the law school product utterly untrained in the practical.<sup>278</sup> To sense the force of this suggestion, one should compare the columns of space devoted to problems of instruction in the states' bar association periodicals with the rarity of treatment of the subject in the institutional law reviews.

From the law schools' standpoint, the subject of instructions need not be confined to the rather bare phases of observation and crude comparison such as that to be found in the present article. So soon as the literature of comparative state law as to procedure has been sufficiently built up to permit one to know what the "is" is, a solid base for jurisprudential inquiries will be provided. Any attempt to get much beneath the surface in a 48-state study like the present one, however, is largely futile in the face of the necessity for condensation.

The present matter of adequacy of the charge is a problem far too urgent and recurrent to be allowed to remain at the stage of mere observation and comparative description. One may here suggest a few more basic aspects of the problem—without trying to solve it—to show that this "duty" should be run down to its jurisprudential roots. Where, for instance, does this judicial duty *ex sua motu* fit into the Anglo-American common law principle of party prosecution? It has until now herein been assumed that there is such a duty. Perhaps to this extent the writer has been following the admonition of Sir Frederick Pollock, who urged that in our reexamination of our common law heritage we assume an "excellent arrogance."<sup>279</sup> One might stop to

<sup>278</sup> Cantrall, "Economic Inventory of the Legal Profession: Lawyers Can Take Lessons from Doctors," 38 A.B.A.J. 196 at 199 (1952); HARNO, *LEGAL EDUCATION IN THE UNITED STATES* 146-155 (1953).

<sup>279</sup> POLLOCK, *THE EXPANSION OF THE COMMON LAW* 9 (1904).

ask, however, "Are you sure it is a duty?" Surely many American text-writers of the 19th century did not think so, as witnesses the statement of Graham and Waterman's *New Trials*:

"The court may instruct the jury without being moved so to do, but it is not bound to do it; and it need only decide upon the instructions as asked, and is under no obligation to mould them into proper form."<sup>280</sup>

It is a truism that in the common law system the parties always are the ones to bring their case into court. Going farther, under what is called the transaction-maxim, the scope and content of the judicial controversy is to be defined by the parties.<sup>281</sup> Conversely, the court is restricted to a consideration of what the parties put before it.

That is not at all the way the English procedure appeared to the Civilian, Tissier, writing in 1906 concerning projected reform of the French Code of Procedure. By what seems to us an amazing turning of the tables, he complains that whereas in England and Germany the judge has always taken a strongly active hand in directing the cause through the stages of trial, the French judge plays a purely passive role. He argues that the code philosophy must be modified, as it has been in the province of Quebec, in terms of greater activity of the judge in the management of the trial. He observes significantly that a case does not belong entirely to the parties—at least, it does not so belong after it has been brought into court.<sup>282</sup>

Sometime, and it must have been a rather long time ago, the common law decided that once the cause was before the judges, it no longer was the exclusive property of the parties. That it was able to do without any fundamental change in the judicial function, and without violating the fundamental that

"The essence of a judge's office is that he shall be impartial, that he is to sit apart, is not to interfere voluntarily in affairs, is not to act *sua sponte*, but is to determine cases which are presented to him. To use the phrase of the English Ecclesiastical courts, the office of the judge must be promoted by some one."<sup>283</sup>

<sup>280</sup> Vol. 3 at 807 (1855); but see SACKETT, INSTRUCTIONS AND REQUESTS FOR INSTRUCTIONS §4 ("Duty of Court to Instruct") (1881).

<sup>281</sup> Millar, "The Formative Principles of Civil Procedure," 18 ILL. L. REV. 1 at 9 ff. (1923).

<sup>282</sup> Tissier, "Le Centenaire du Code de Procédure et les Projets de Réforme," 5 REVUE TRIMESTRIELLE DE DROIT CIVIL 625 at 647 (1906).

<sup>283</sup> GRAY, THE NATURE AND SOURCES OF THE LAW, 2d ed., 114 (1928). See quotation and discussion in FULLER, THE PROBLEMS OF JURISPRUDENCE 318 (1949); and see FIELD AND KAPLAN, MATERIALS ON CIVIL PROCEDURE 13, 101 (1953).

Stated otherwise, if the foregoing principle ever stood for the notion that the cause belonged to the parties after it had gone to trial, that time must have been earlier than jury trial as we have known it for three centuries. It must be much older than that, but we are uninterested in trial as it existed before *Bushell's* case—the time in the year 1670 when the independent jury emerged.<sup>284</sup> The common law of the 18th and 19th centuries was individualistic, but if it was ever individualistic to the extent that the court did not take over the processing of the cause once the jury was sworn, the common law is now like Pollock's old rifle that has been fitted with a new stock, a new lock, and a new barrel.

It must be taken as given or postulated for present purposes that there is a duty to perform the judicial function of instructing the jury on fundamentals, and that such duty has already been "promoted" by the "some one" who brought the cause before the court, by his very act of submitting the case for trial by jury. It is very likely, however, that the proposition stated by Graham and Waterman, and which is a statement of the law as it is ostensibly enforced in several states today, is an excess of the transaction-maxim or party-prosecution principle. In other words, the principle was carried too far into the successive stages of procedure. The motives leading to such distortion of the maxim are doubtless to be found in the history of American politics,<sup>285</sup> of the settlement of the West,<sup>286</sup> and to no small degree in the collective history of the American lawyer<sup>287</sup> and of *Legal Education in the United States*.<sup>288</sup>

Whatever is the jurisprudential basis, the entire law of procedure would have to be rewritten before one could deny that once a cause is "in court," it is the judicial office to assume a certain supervision; the machinery has been set in motion. As we were in the habit of saying in our local bar, "Once the case is at issue, you are in the gears." As to the administrative functions of the court, it is likely that some of the newer supervisory functions have come in by way of equity procedure.

<sup>284</sup> *Bushell's Case*, Vaughan 135, 124 Eng. Rep. 1006 (1670), discussed in Blume, "Origin and Development of the Directed Verdict," 48 MICH. L. REV. 555 (1950).

<sup>285</sup> SCHLESINGER, *THE AGE OF JACKSON*, c. 25, p. 329 ff. (1946); Farley, "Instructions to Juries—Their Role in the Judicial Process," 42 YALE L.J. 194 at 199 ff. (1932).

<sup>286</sup> POUND, *THE SPIRIT OF THE COMMON LAW* 112 ff. (1921); POUND, *APPELLATE PROCEDURE IN CIVIL CASES* 380 (1941); POUND, "The Judicial Office in America," 10 BOST. UNIV. L. REV. 125 at 135 (1930).

<sup>287</sup> POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 225-242 (1953).

<sup>288</sup> HARNO, *LEGAL EDUCATION IN THE UNITED STATES* 35-40 and 71-80 (1953) (Survey of the Legal Profession).



It is in any event certain that pretrial, discovery, the use of special questions in the court's discretion, and a great many more such facilities are now part of the general American procedural law. By that token, it seems that any argument that the court may not act *sua sponte* as to charging the jury before they retire to the juryroom is at least as dubious as the Jeffersonian proposition that the common law was that of pre-Norman, Anglo Saxon England.

Suffice the foregoing to suggest the depths to this subject which merit study much deeper than that here possible. But here a challenger might point out, with a great deal of important opinion on his side, that

"You are never going to get anywhere with Instructions, because the general verdict of a jury is based on fact, law, and goodness knows what else—anyway. Trial by general jury verdict is a crude tool. There is no use trying to apply precision tests to a machine that works to such broad tolerances. It reminds one of the old steam engine test, where a piston was considered to fit if a thin dime would barely slide between the piston and the cylinder wall. The special verdict is the only solution, and for it one doesn't need any instructions on the law."<sup>289</sup>

That argument is just about as important as it could be, considering the fact that it is not the least bit helpful. It may nevertheless be conceded that if, in any given written-instructions-jurisdiction, an all out effort were made to fit a statutory or rule-made special verdict into the procedural system, it would not take long to do so. The effort spent during any trial term month by lawyers and judges in such state would probably amount to the total of man-hour effort necessary to produce a workable special verdict plan. Nevertheless, it would still be necessary to persuade the courts and the parties to use it, since to make its use absolutely mandatory would be unwise if not impossible from a variety of standpoints.

As to its voluntary use, many would not like it by its very sound; special verdicts have long had a bad name in some states. The common law special verdict came to stand for utter and confusing technicality;

<sup>289</sup> The "quotation" is merely hypothetical, but follows the arguments to be seen in, e.g., Sunderland, "An Appraisal of English Procedure, 50 A.B.A. REP. 242 at 254 ff. (1925); Sunderland, "Modern English Legal Practice," 4 TEX. L. REV. 273 at 288 (1925); and literature collected in VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 237-243 (1949). The steam-engine figure is borrowed from WEINER, THE HUMAN USE OF HUMAN BEINGS 115 (1954).

some states—such as Indiana—finally outlawed it.<sup>290</sup> Others would not take to it by reason of its unfamiliarity. Trial specialists might have very personal and practical reasons for shunning it; they might have no dislike of the present general verdict which permits the jurors to decide a bit of law “on their own” despite their limited function (in terms of the “antique brocard”) of responding to the facts.<sup>291</sup> On the other side of the bench, many judges, despite their absence of personal interest in the outcomes, might not care to have to apply the substantive law in its fullest rigor in every kind of case.<sup>292</sup> As to commercial matters—say a bills and notes case—few judges would hesitate. In negligence causes, however, under a rule that requires plaintiff to prove himself to have been “free” of contributory negligence, many completely conscientious judges would hesitate.

Looking again at the federal rules, we see that they provide for the discretionary submission of special questions on the part of the court, and take a considerable step in the sophisticated direction of separating fact and law by that means when it is deemed applicable and appropriate.<sup>293</sup> Since there is as yet no conceivable way to separate types of cases, even in terms of the broad concepts such as contract, tort, and the like, for the purposes of applying distinct procedural methods, judicial discretion is indispensable.<sup>294</sup> No code or rule could predetermine what kinds of cases should be used for ordinary general verdicts, nor which

<sup>290</sup> Ind. Stat. Ann. (Burns, 1933) §2-2022; 3 *LOWE, WORK'S INDIANA PRACTICE* §55.2, p. 428 (1950). Under prior law see *Pittsburgh, Cincinnati and St. L. R. Co. v. Spencer*, 98 Ind. 186 (1884). Generally, see *SCOTT, FUNDAMENTALS OF PROCEDURE IN ACTIONS AT LAW* 95 (1922).

<sup>291</sup> See *Bushell's Case*, Vaughan 135 at 149, 124 Eng. Rep. 1006 at 1013 (1670). “But this conventional brocard cannot be taken as a trustworthy guide to the solution of any particular controversy on the subject. . . .” 9 *WIGMORE, EVIDENCE*, 3d ed., §2549 (1940); *FIELD AND KAPLAN, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* 608 (1953).

<sup>292</sup> Wyzanski, “A Trial Judge's Freedom and Responsibility,” 65 *HARV. L. REV.* 1281 at 1284 (1952).

<sup>293</sup> *SCOTT, FUNDAMENTALS OF PROCEDURE IN ACTIONS AT LAW* 89 (1922); Sereni, “Basic Features of Civil Procedure in Italy,” 1 *AM. J. COMP. L.* 372 at 374 (1952). “Continental jurists have recognized frankly that the separation of law and fact in jury procedure is chimerical.” Seagle in 4 *ENCYCL. OF THE SOCIAL SCIENCES* 498 at 500 (1932).

<sup>294</sup> Judge Wyzanski, note 296 *supra*, indicates that his policy as to summation of the facts varies greatly with the type of case. He does not suggest that there is any possible way in which the varying scope of the duty might be codified. Goodhart reminds us that in England there has come about a “. . . virtual abolition of the jury in all civil actions which are not concerned with the personal reputation of the litigants . . .” [“Current Judicial Reform in England,” 27 *N.Y. UNIV. L. REV.* 395 at 407 (1952)] but nowhere has there been found the suggestion that the judicial duty may be codified and specified so that there is a blueprint of the duties as to instruction for each type of action.

should require special questions. The great and encompassing virtue of the federal rules pattern is that it does indeed respect the need for judicial discretion.

It is therefore believed sensible to accept it as a fact that the general verdict trial by jury will outlive us all; it is an institution not likely to be changed in its general outlines in the foreseeable future. The task is taken to be that of making it reasonably accessible to litigants, following the principle that "justice delayed is justice denied," and seeking the maximum of finality for judgments based on jury verdicts.

Many more questions than can be suggested here have been raised in the course of the four-year inquiry which this paper concludes, but one's time must be considered "up." At risk of seeming offensively trite, however, one might suggest that it is sometimes forgotten, apparently, that judges are "people"; they are human. No human can be expected to assume a heavy burden of responsibility unless he has some authority with which to enforce that responsibility. To apply that copybook maxim-like truth to the charge and its adequacy, one may ask, how can a court whose very right to instruct *sua sponte* is only grudgingly recognized, which cannot speak except to read from the pages of a stilted, presetled series of requests, be expected to carry a heavy duty to charge upon the law "fully"?

A mandatory duty to charge, under such conditions, makes for many technical appeals, and its bad effect in that respect is hardly compensated by any good it may do. To suggest that the "conditions" be changed is not to propose an immediate solution. The first paper in this group contains ample evidence that the campaign to restore the trial judge's powers is a slow, uphill fight, that no miracles in this respect are likely to occur.<sup>295</sup> To the contrary, the American "trameled conditions of jury trial" are encysted in custom and habits of thought, and further engirded by constitutions, statutes and precedents. A long "war" may be expected before widespread change takes place.

How then may this duty be enforced if it is not subject to mandate unless the trial judge has some modicum of authority commensurate with the duty? The question may be answered by another: what does a conscientious, professional judge seek to do in his charge, regardless

<sup>295</sup> The first paper in this series, herein cited throughout as 27 TEMPLE L.Q. 137, found that in the last quarter-century of concerted movement to restore certain of the trial judge's traditional powers, an actual change in that direction had been effected only in Maryland.

of the rules or system in force? He tries to insure, in every way available to him, that the charge is complete and clear, of course. He does so because that is his professional, personal duty—and quite regardless of what the legislature has said he must do. That duty is ethical, non-legal perhaps, but the only form of duty that benefits the litigants and the jurors instead of burdening them.<sup>296</sup> Thus, answering a question raised earlier: is it a duty?—the answer is of course affirmative. The fact that the duty lies more in the moral than the strict legal field makes it no less respectable. Its nature does, however, underscore again (as if that were needed) the importance to the American trial system of constant striving toward improvement in judicial selection and provision for judicial tenure.

### *Some Simple Fundamentals*

Despite the wide variety of systems which we have explored, we see that the essential principles of a system making for adequacy of the charge are few. The first requisite is a thoroughly professional judge, whose own ethics and devotion to duty serve as a safeguard for the adequacy of the charge—and in a fashion no rule of legislature or court could approach. He should also have discretionary power; he should be free to do or say anything of a judicial nature which is of aid to the inquiry before him—provided always that he may not impinge upon the independence of the jurors or influence them unfairly. He must have freedom as to the manner in which he gives the charge, and should have ingrained in himself a high respect for the necessity of delivering (not merely reciting) to the jurors orally (with such repetition and emphasis as is necessary for the communication of thought) a fair understanding of the issues of the cause, the questions of fact which they are to determine, and the principles of law applicable to the various possible finding of fact.

The second requisite consists of able counsel. They should be diligent to request that the court give a reasonable number of instructions, but be aware of the fact that the assimilative capacity of jurors is limited, especially as to unfamiliar principles of law. As officers of the court, counsel should assist the court in every way possible, but feel

<sup>296</sup> But see *Connecticut*: “. . . at the annual meeting of the judges of the superior court on June 5, 1950, it was voted to adopt [the Canons of Judicial Ethics of the A.B.A.] and print them in the Practice Book. See THE CONNECTICUT PRACTICE BOOK OF 1951 15-23. *New Jersey*: the said Canons are part and parcel of the rules. See 1 WALTZINGER, NEW JERSEY PRACTICE 287-300 (1954).

obliged (quite apart from any rules) to make timely, pointed (but not contentious) objection to any error of omission or commission inadvertent or otherwise, in connection with the charge to the jury.

If the court instructs orally, at the close of the evidence, with the cooperation of counsel, and in accordance with the ethics of his office and under the conditions described, the charge should by any standard be adequate. That ideal may not be easy of achievement everywhere but is that not—if we are bound to do justice—simple and fundamental?