

INSTRUCTIONS TO THE JURY: SUMMARY WITHOUT COMMENT

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"Let me have the facts in alphabetical order," said a learned judge in bitter jest to a counsel who was floundering hopelessly in the midst of a mass of dates; and every one who has attended the law courts [of London] must have witnessed judicial bewilderment quite as painful, if less emphatically and sarcastically expressed.¹

The judges of this country likewise express themselves—although seldom from the bench—to the effect that counsel do not always display an ability to array the facts of a cause in understandable fashion.² It follows quite naturally that juries are frequently unable to understand the facts of the cases in which they are asked to give their verdict.³ Considering the task insuperable for an unaided jury, the English judge felt he failed in a duty if he did not himself assist the jury by his "summing-up."⁴

The English summing-up practice, however, is largely foreign to American law, since the former is understood to encompass, as a matter of course, the opinion of the judge.⁵ Our American notion seems to be that so long as he stops somewhere short of the hanging charge (advocacy for the Crown in a capital case) or mere veiled direction of the jury, the English judge does not err if he gives the jury the benefit of his advice on such matters as the adequacy of the proof and the credibility of the witnesses.⁶ In this country, the trial courts of the United States, and those of some dozen of the states,

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1. "Lex," *The Late Mr. Baron Huddleston*, 5 GREEN BAG 105, 106 (1893).

2. *E.g.*, a new supreme court rule of New Jersey will require candidates for the counsellor's examination to have taken a thirty week course in oral advocacy and brief writing. R.R. 1:21-1 (c), [adopted] Sept. 9, 1953; to be effective Sept. 1, 1954—at which time it replaces former rule 1:8-9. This rule is said to have been caused by the bench's discouragement with the inadequacy of the bar's presentation of cases.

3. "Flemington [N.J.]—Superior Court Judge Henry Schenk today dismissed a jury hearing a suit against a Trenton construction firm. . . . At 4 P.M. Judge Schenk halted the proceedings and asked the jury members how many of them could honestly say they understood all of Zuegner's figures. . . . Only seven of the jurors raised their hands. . . . Judge Schenk, after a conference with attorneys for both sides, then decided to hear the case alone. The trial jury was dismissed . . ." Trenton [N.J.] Times, Dec. 17, 1953.

4. And in *Devlin v. Kilcrease*, 2 McMullan 425, 428 (S.C. 1842), Richardson, J., seconded Lord Brougham's encomiums of Lord Ellenborough's practices of "helping" juries.

5. *E.g.*, KENNY, *OUTLINES OF CRIMINAL LAW* § 753, p. 507 (16th ed. 1952). Sunderland, *The Inefficiency of the American Jury*, 13 MICH. L. REV. 302, 305 (1915). Or see the charge in any volume of the NOTABLE BRITISH TRIALS SERIES.

6. *But see* *Clouston & Co., Ltd. v. Corry* [1906] 46 A.C. 122, 130 (P.C.), and *Markadonis v. The King* [1935] 3 D.L.R. 424 (Can. Sup. Ct.).

are said to follow a common law system which permits judicial comment.⁷ That there is a difference between the English and the American versions of this system was colorfully expressed by an elder statesman of the Vermont bar upon his return from an inspection of the English courts:

What impressed me, in the jury cases that I heard while I was over there, was that the judge on the bench . . . sat there to give the jury the benefit of his learning, and to help them weigh the evidence. Our law is that the Court has a right to do that provided the Court is careful to make it clear to the jury that they are not obliged to go that way, and make it clear to them that they are the sole judges of the disputed question; but he would *stampede a carload of frozen beef* if he exercised that right. . . .⁸

A less aggressive function was sometimes undertaken by English judges, being that of mere summarization as opposed to the complete summing up; this was the "summary without comment" of American law.⁹ An English view of that modified practice is:

According to the old legal tradition which Charles Dickens caricatured in the person of Mr. Justice Stareleigh, the judge presiding at a trial had simply to present to the jury a clear but perfectly colorless summary of the evidence.¹⁰

This colorless summary system has been called a "weak-hearted compromise" by Dean Wigmore.¹¹ It is nevertheless, in the theory and the letter of the law, the assertedly permitted practice in perhaps seventeen states.¹² However, in a number of states, as mentioned, the unrestricted common law system prevails. Taking the latter group as a conservative minimum of ten for the moment, it would by this calculation appear that in some twenty-seven of the states (a clear majority) the jury is entitled to a summing-up—be it the mere "colorless review" or something less pallid. That in fact something considerably short thereof is the practice in a rather large number of those states is sought to be shown on the accompanying map.¹³

That map must be explained, however, lest it be utterly misleading. The factors leading to the writer's conclusions that many of those

7. 9 WIGMORE, EVIDENCE § 2551 (3d ed. 1940).

8. Redmond, *Over There*, 20 Vt. ST. B.A. 174, 188 (1927). Yet Vermont has no statutory limitation and permits the common law charge. *Wilson v. Dyer*, 116 Vt. 342, 75 A.2d 677 (1950); *State v. Malnati*, 109 Vt. 429, 433, 199 Atl. 249, 251 (1938); *Foss v. Sherwood*, 104 Vt. 141, 147-148, 157 Atl. 834, 836 (1932); *Sawyer v. Phaley*, 33 Vt. 69, 73 (1860); *Yale v. Seely*, 15 Vt. 221, 236 (1843). But see 18 MINN. L. REV. 441, 445, n.20 (1934).

9. VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 227 (Published by The Law Center of New York University for The National Conference of Judicial Council, 1949).

10. "Lex", *The Late Mr. Baron Huddleston*, 5 GREEN BAG 105, 106 (1893). The reference, of course, is to *Bardell v. Pickwick* in DICKENS, PICKWICK PAPERS c. 34.

11. 9 WIGMORE, EVIDENCE § 2551 n.3 (3d ed. 1940).

12. VANDERBILT, *op. cit. supra* note 9, at 227-228.

13. P. 207 *infra*.

states are restricted-in-fact are various, and rest largely in opinion. Any attempt at sensible explanation requires state-by-state discussion. For the time being, therefore, it is simply mentioned that the merits or demerits of the "mere colorless summary" are hardly a profitable subject of discussion if it be true, as this paper contends, that in truth the instruction process of an overwhelming majority of the states stops very considerably short thereof.

MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION

The foregoing caption has two connotations. It is of course the name given to a set of resolutions adopted by the American Bar Association stating approved practices as to a variety of phases of procedure and its regulation;¹⁴ one of these deals particularly with minimum trial standards.¹⁵ It is also the title of the monumental volume in which those standards are explained, and in which the extent of compliance therewith in the forty-eight states is illustrated.¹⁶ The latter's maps, of which there are dozens, represent the data available at the time of its compilation as to different phases of practice.¹⁷ The work was not represented as being terminal and definitive, but rather as a point of reference to which more detailed state studies would be directed. Many such state commentaries have appeared since the publication of that volume, and it is hoped that the present paper may in some degree be useful in that same direction.¹⁸ Superficially, however, it might seem that the present map included herein contradicts the findings displayed by certain of the maps in *Minimum Standards of Judicial Administration*.¹⁹ It must therefore promptly be explained that the map printed here represents a synthesis of three of the maps in the above mentioned work, takes into account other factors described but not illustrated in that volume, and also considers certain later information and changes of law.

The minimum standard to which this paper is directed is part of one of the trial practice standards. In a recent article the writer recapitulated the movement for reform in judicial administration centering about that entire trial standard.²⁰ He was forced to the conclusion that in respect to its declared chief goal, the "restoration

14. *Report of the Committee on Trial Practice*, 63 A.B.A. REP. 551, 553 (adopted July, 1938).

15. See Recommendation 2, VANDERBILT, *op. cit. supra* note 9, and text at note 21 *infra*.

16. VANDERBILT, *op. cit. supra* note 9.

17. *Id.* at 220-234.

18. Throughout the present paper there are references to state reports on degrees of local compliance with the American Bar Association's minimum trial standards, *e.g.*, Wyoming, Nebraska, Iowa and Wisconsin.

19. VANDERBILT, *op. cit. supra* note 9.

20. Wright, *The Invasion of Jury: Temperature of the War*, 27 TEMP. L.Q. 137 (1953).

of the trial judge's common law powers," progress had lately been somewhat less than rapid. But that latter question, involving the controversial subject of judicial "comment," is excluded so far as possible (which is not very far) from the present inquiry. This paper seeks rather to dispose of the following question: *apart* from comment, what is the general state of compliance with the recommended trial standard? It seeks to focus on the summary *without* comment; and more precisely, on the extent to which the summary is actually used. It is thus for present purposes as though the American Bar Association's Trial Standard No. 2 had been amended by deletion of the words bracketed in the following version:

That after the evidence has been closed and counsel have concluded their arguments to the jury, the trial judge should instruct the jury orally as to the law of the case, and should have power to advise them as to the facts by summarizing and analyzing the evidence [and commenting upon the evidence or upon any part of it], always leaving the final decision on questions of fact to the jury.²¹

Turning now to the twenty-seven states in which the court nominally has at least the power to give the impartial summary which the standard as hypothetically amended contemplates, it is acknowledged that in many he instructs neither orally nor after counsel have concluded argument to the jury, both of which practices, of course, are in contravention of the recommended Trial Standard. Yet any comprehensive appraisal must take into consideration the factors of actual practice. It must also consider whether responsibility for preparing the charge is primarily that of the court or of counsel, must decide what is meant by the term "orally," and must examine the relative strictness with which the prohibitions on comment in the Intermediate states²² are enforced. When appraised in all those connections, the summary "power" will in most cases be found to represent considerably less than even the "mere colorless summary" which the English writer deplored.

THE MISSOURI POSITION

By the foregoing definition, the Missouri instructing process is not that of the type under discussion here. For instance (looking at its elements somewhat in the order of the factors mentioned in the Trial Standard No. 2, *supra*²³) it is never asserted that the Missouri judge charges orally, for in fact he is not expected to "charge." He is required to instruct in both civil and criminal cases.²⁴ The instructions

21. VANDERBILT, *op. cit. supra* note 9, at 221.

22. See the map p. 207 *infra* which shows the Intermediate states.

23. See text at note 21 *supra*.

24. Criminal cases: MO. REV. STAT., SUP. CT. RULES § 26.02 and § 26.09 (Supp. 1951). Civil cases: Non-direction raises a *prima facie* presumption of error; it con-

are in writing in the strict sense of being written out beforehand and read verbatim.²⁵ Certainly instructions (whether general or special) originating with the court rather than counsel are not contemplated to any great extent. The practice, rare elsewhere, of the reading of instructions by counsel rather than by the court persists in some circuits.²⁶ As to the order of trial whereby arguments follow the instructions, it is taken to be so settled that it is occasionally called the "Missouri order" hereafter for convenience.²⁷

As to the matter of comment on the evidence, there is an elaborate discussion of the origins of its ban in Missouri in the predecessor of this present quarterly.²⁸ Its author, an advocate of the "common law comment," was unable to concede that there was any real statutory bottom for the rule that there be no comment on the civil side.²⁹ Even he was nevertheless forced to admit that *stare decisis* had removed whatever clouds there might be in the legislative chain of title.³⁰ That same analyst found the decisions of the preceding half century to reveal few instances of deliberate comment. There was a plethora, however, on instructions in the nature of comment, *i.e.*, instructions which singled out evidence, assumed facts, and the like.³¹ If that situation has changed, the cases do not readily so indicate.³²

There is more recent literature which indicates that the Missouri bench and bar doubts that the instructing process is even passably satisfactory.³³ It is equally clear that there is no widespread sentiment that improvement in Missouri could be secured by changes in the direction of the quoted Trial Standard.³⁴ It is not the place of this

stitutes reversible error if the facts are so complicated as to warrant an instruction and if prejudice results to a party. *Yerger v. Smith*, 338 Mo. 140, 89 S.W.2d 66 (1935); *Arnold v. May Department Stores*, 337 Mo. 727, 739, 85 S.W.2d 748, 755 (1935); *Sherman Investment Co. v. Sheehan*, 199 S.W.2d 922, 927 (Mo. App. 1947); see *Dorman v. East St. Louis Ry.*, 335 Mo. 1082, 75 S.W.2d 854 (1934).

25. *Ibid.* Cf., Stone, *Instructions to Juries: A Survey of the General Field*, 26 WASH. U.L.Q. 455 (1941) as to what "written" may mean elsewhere.

26. The late Judge Merrill E. Otis colorfully describes this practice in *The Judge to the Jury*, 6 KAN. CITY L. REV. 3, 4-6 (1937).

27. MO. REV. STAT., SUP. CT. RULES, § 26.02 (Supp. 1951).

28. Rosenwald, *The Right of Judicial Comment on the Evidence in Missouri*, 14 ST. LOUIS L. REV. 221 (1929).

29. Mo. Laws 1838-39, p. 27, was similar to MO. REV. STAT. § 546.380 (1949), but was not in terms confined to criminal cases. It was constructively repealed in MO. REV. STAT. p. 499 §§ 19 and 20 (1845). See *Hogel v. Lindell*, 10 Mo. 483, 487 (1847). But Mo. Laws 1830-31, pp. 33-34, from which MO. REV. STAT. § 546.380 (1949), was derived without any substantial change, was unaffected.

30. Rosenwald, *supra* note 28, at 248.

31. *Id.* at 234, n.35 alone citing over 60 such cases.

32. *E.g.*, see objections raised in *Stephens v. Kansas City Gas Co.*, 354 Mo. 835, 851, 191 S.W.2d 601, 608 (1946); *Teel v. May Department Stores Co.*, 352 Mo. 127, 140, 176 S.W.2d 440, 448 (1943).

33. Hulen, "*Twelve Good Men and True*": *The Forgotten Men of the Courtroom*, 38 A.B.A.J. 813 (Oct. 1952).

34. See text at note 21 *supra*. *Missouri Proposed Code of Evidence* § 1.08, p. 12 (1948): "The court shall not . . . sum up the evidence or comment to the jury. . . ."

paper to take a hand in that controversy. The effort here is directed toward appraisal of the systems of the so-called Intermediate states. It is interesting to note that on the whole the practices of that group are not quite so divergent from those of Missouri as might be expected.³⁵

CLASSIFICATIONS OF STATES

The lumping together of all the rest of the states, other than the Intermediate and Common Law groups, is made solely for simplification and in order to target this discussion. It is not intended to imply that their practices are uniform. This remaining so-called Restricted group is taken as totalling twenty-one, including Missouri.³⁶ Apart from a handful which are discussed in the predecessor article,³⁷ all are accepted³⁸ (to the extent that citation is unnecessary) as forbidding even an impartial reiteration or marshalling of that which has been admitted in evidence.

There is likewise agreement as to membership of the central core, at least, of the Unrestricted group as shown on the accompanying map (white areas); and two of these, Vermont and Rhode Island, are discussed herein.³⁹ The later discussions will show (toward the end of Group IV, *infra*) why Maine, Maryland and Massachusetts are shown unrestricted to make a final total on the map of thirteen Common Law states.⁴⁰

The states in between those two extremes are discussed separately hereafter. That examination of the functioning of the anomalous summary without comment system serves to show the interrelation of the complex of elements which determines the character of a state's instructing process. The order of discussion is designed to show the drift and trend of the two main American patterns. Similarities, apart from the one main line of cleavage, may be seen to overshadow the superficial differences.

The analysis seeks, without being too grimly categorical, to work

35. The foregoing Missouri section has been read critically by Benjamin F. Boyer of the Missouri Bar, Dean of the Temple University School of Law, to whom the writer extends thanks for valuable suggestions.

36. See the map p. 207 *infra*. The states as shown are: Arizona, Arkansas, Colorado, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Texas, Virginia, Washington and West Virginia.

37. Members of this group, discussed in Wright, *supra* note 20, include Colorado, p. 151; Illinois, p. 153; South Carolina, p. 159; South Dakota, p. 155; and Virginia, references at p. 141, n.27 and p. 155, n.98.

38. Herein these references to "acceptance" refer to sources such as VANDERBILT, *op. cit. supra* note 9, at 227 and 228. The large literature of this subject is collected in Wright, *supra* note 20, at 138-142.

39. California, Connecticut, Michigan, New Hampshire, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island and Vermont. (As to California, Michigan, and New Mexico, see Wright, *supra* note 20, at 145, 143, and 147 respectively.)

40. See the latter part of Group IV, *infra*.

along somewhat adverbial lines. The main Intermediate (or theoretically Intermediate) class is divided into groups having a certain homogeneity. As to the individual members of the groups, the breakdown centers about those handymen, *How, When, Who, What, Why*. *How* (for instance) are the instructions prepared and given (written or oral)? *When* are they to be given (before or after argument)? *Who* is responsible for authorship (court or counsel)? *What* are they to include (law or fact-and-law)? And generally, *Why* is the situation handled in this manner? The main groups are:

Group I: Wyoming, Nevada, Kansas, Nebraska and Utah (exclusively written; precede argument).

Group II: Iowa, Ohio, Georgia and North Carolina (strict).

Group III: Delaware, Alabama and Tennessee (oral charges, but issues only are reviewed).

Group IV: Wisconsin and Minnesota—grading off into three substantially unrestricted states: Maryland, Massachusetts and Maine.

GROUP I: WYOMING, NEVADA, KANSAS, NEBRASKA AND UTAH

This group is homogeneous as to the *When* and *How* of the charge. In all except Nebraska the instructions precede final arguments—Missouri style. This order is found in no other state in the three later groups except Maryland, but prevails in the majority of the wholly restricted states which are not now under consideration.⁴¹ It is contrary to the recommended trial standards, but has arguments in its favor—the best of which are aligned in one of the older federal cases.⁴² It may be conceded to be a restriction on the trial judge, at any rate. When the jury retires with the words of counsel ringing in its ears,⁴³ any final review of the evidence would or will necessarily be blunted. Since that recapitulation is not used in these states, however, the question is academic.

The entire systems of these states are built around the strictly written charge—although waiver is not unknown.⁴⁴ But it is necessary to consider just what is meant by *written instructions*, since with but one exception (known to the writer, at least)—that of Maryland prior to 1941—instructions are conveyed to the jury vocally everywhere. The word *written* in this context, however, simply means read

41. VANDERBILT, *op. cit. supra* note 9, at 232 (map).

42. United States v. Foster, 183 Fed. 626, 628 (W.D. Va. 1910).

43. Otis, *supra* note 26, at 3-6.

44. Pierson, *Instructions and Argument to the Jury: The Defense Point of View*, 39 A.B.A.J. 877 (Oct. 1953), states:

The trial judge was one of the old school of unconventional [Oklahoma] judges. He insisted on instructing the jury orally. He made a point of asking counsel in the presence of the jury if they would agree to oral instructions.

Id. at 877.

aloud verbatim from writings prepared in advance. That requirement of course is common almost everywhere as to the requests by counsel for special instructions. The oral charge, however, is contemplated as being the general charge of the court, delivered in what might be termed *free-style*—as opposed to the instant procedure.⁴⁵ Even under the oral instruction plan, where the trial judge is often encouraged to organize his charge by writing it out in advance,⁴⁶ the plan expects that the charge's delivery shall be a process of speaking directly to the captive audience of twelve, with whatever repetition and emphasis the speaker finds to be needed for the adequate communication of thought.⁴⁷ Whether it includes a review of the evidence or not makes it no more nor less oral by this definition. And statutes requiring charges to be written unless a reporter is present and takes down the charge are not "written instructions" statutes for the present purposes, and will not be given much special attention hereafter.⁴⁸

The foregoing distinction between written and oral instructions is one largely derived from the literature associated with the American Bar Association's Trial Standards, and may not be universally accepted. It will at least serve to indicate the sense in which the terms are here to be used.

All this discussion of terminology has a certain unrealistic tinge with reference to this Group I framework. The underlying pre-conception of the instructing process here is largely in opposition to the concept of there being any substantial general charge by the court. Those habits of mind are illustrated by the example of what happened to some experimental legislation in Illinois in 1933 to 1935 which attempted to engraft, upon a written instructions plan, a scheme whereby the court prepared a charge based on suggestions of counsel. It lasted only until the next legislature met.⁴⁹ The proposition is spotlighted in the Nebraska discussion which follows later in this group. Meanwhile, one might also consider, under the Missouri order of trial and the strict-written plan, just how—mechanically and physically—there could be any full summary of the evidence. Such

45. The designation *free style* in this connection is the writer's own. It will be seen to mean the truly oral charge discussed in the sentences immediately following. It may be *ad libitum* or may be read directly from the judge's prepared statement.

46. Or, as Judge Stone said:

[T]he trial judge who reduces his instructions to writing, a process conducive to care, is in the long run more apt to escape reversal than the one who does not resort to that labor before charging the jury.

Stone, *Instructions to Juries: A Survey of the General Field*, 26 WASH. U.L.Q. 455, 462 (1941).

47. Chesnut, *Instructions to the Jury*, 3 F.R.D. 113 (1942).

48. Seen in Georgia, Tennessee, Minnesota *infra*.

49. Ill. Laws 1933, Art. 7, § 67, p. 784, known as § 67 Illinois Civil Practice Act of 1933; revised Ill. Laws 1935, § 1, p. 1071. See ILL. ANN. STAT. c. 110, § 191, p. 346 (1948) for present form and Historical and Practice Notes.

would have to be prepared in the interim between the close of the evidence and the reading of the instructions. Counsel would expect to see and note exceptions to the final draft and, to say the least, considerable time might elapse before the court could reduce to a satisfactory written form the summary based on the court's notes and, perhaps, a reporter's transcript of the testimony.

Wyoming

Although Wyoming adopted the Ohio Code in its entirety,⁵⁰ it does not generally follow the Ohio practice of a two-stage instruction. The only Wyoming instructions are the written ones which precede argument.⁵¹ The court's responsibility is not heavy, but it is probably no longer the law that ". . . mere non-direction, partial or total, is not ground for a new trial, unless specific instructions, good in point of law and appropriate to the evidence, were requested and refused."⁵² In felony cases, at least, it may be error to fail to state the basic law applicable, regardless of request, and the same may be said in civil cases as to statement of the main issues.⁵³

The cases, seemingly without exception, exhibit the familiar Missouri and Illinois style of separately numbered, written instructions—given or refused.⁵⁴ The cases do not reveal recapitulations of the evidence, and the only way the question of summary arises is in connection with the occasional reference to sufficiency of delineation of the issues. It also arises, indirectly, in connection with objections that instructions referring to evidence were in the nature of comment.⁵⁵

Some cases reveal the practice of letting the pleadings go to the jury—which practice the supreme court has countenanced and accepted as a means of instructing as to the issues.⁵⁶ Needless to say,

50. WYO. COMP. STAT. ANN. § 3-2408 (1945), *q.v.*, for annotations entitled *Decisions Under Law of Origin* citing the corresponding sections of Page's Ohio Code.

51. WYO. COMP. STAT. ANN. § 3-2408 (1945), which is substantially unchanged since the original territorial act of 1886. The statute does not in terms prohibit summary.

52. THOMPSON, A TREATISE ON THE LAW OF TRIALS IN ACTIONS CIVIL AND CRIMINAL § 2341 (2d ed. 1912). This language was disapproved in *Union Pacific Ry. v. Jarvi*, 3 Wyo. 375, 381, 23 Pac. 398, 400 (1890), and was approved in *Hay v. Peterson*, 6 Wyo. 419, 441, 45 Pac. 1073, 1079 (1896).

53. *Gardner v. State*, 27 Wyo. 316, 329, 196 Pac. 750, 754 (1921) (statement of the law); *cf. Harris v. State*, 34 Wyo. 175, 188, 242 Pac. 411, 415 (1926); *Wallace v. Skinner*, 15 Wyo. 233, 249, 88 Pac. 221, 224 (1907) (statement of the issues).

54. *Barber v. Sheridan Trust & Savings Bank*, 53 Wyo. 65, 78 P.2d 1101 (1938); *Wallace v. Skinner*, 15 Wyo. 233, 249, 88 Pac. 221, 224 (1907).

55. *Montgomery Ward & Co. v. Arbogast*, 53 Wyo. 275, 296, 81 P.2d 885, 893 (1938); *Wallace v. Skinner*, *supra* note 54. But see WYO. COMP. STAT. ANN. § 3-2412 as partial authorization for summarization of testimony.

56. "There seems to be no provision of the statutes either permitting or prohibiting such a practice, though we believe it is quite common in this state." *Wallace v. Skinner*, 15 Wyo. 233, 250, 88 Pac. 221, 224 (1907).

this practice (reversible error in some jurisdictions)⁵⁷ is discountenanced by the more progressive element of the Wyoming bench and bar.⁵⁸

Nevada

At first, some of the pioneer appellate judges bucked like western steers at the restriction of the 1864 constitution which provided that "Judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law."⁵⁹ Their successors, however, were more docile⁶⁰—and it is significant that no recent cases involving summations are found. Yet a 1903 case, after affirming the refusal of instructions which recited certain testimony too graphically, added:

This does not interfere with the right of the court during the trial to state the testimony or what a witness said, without assuming whether it is true. . . .⁶¹

Then, later cases show increasing strictness to the effect that whatever the court says must be exclusively in the form of a written instruction.⁶² About the only mention of the evidence comes in proffered instructions, which may be refused if their statement of the evidence is incomplete.⁶³ Nevada adopted the Federal Rules of Civil Procedure in 1952, but no change in the instant phases of instructing is necessarily involved.⁶⁴

Kansas

The Kansas Code provides very complete blueprints as to instructions.⁶⁵ General instructions are provided for in addition to those specially requested, but are to be in writing, of course, and

Before reading the instructions to the jury, the court shall, when requested, submit the same to counsel on either side and give counsel a reasonable time to suggest modifications thereof.⁶⁶

57. *Nashville, Chattanooga & St. Louis Ry. v. Anderson*, 134 Tenn. 666, 185 S.W. 677 (1915).

58. This view is taken by Frank J. Trelease, Professor of Law, University of Wyoming, and member of the Advisory Committee to the Wyoming Supreme Court on Rules of Procedure, whose kindness in reading the foregoing section is gratefully acknowledged.

59. NEV. CONST. Art. VI, §12 (1864). *State v. Millain*, 3 Nev. 409 (1867):

This language is contained in many of the newly adopted State Constitutions. . . . [W]here these peculiar expressions originated, we have been unable to find.

Id. at 447.

60. *State v. Ah Tong*, 7 Nev. 148, 152 (1871); *State v. Robison*, 54 Nev. 56, 61, 6 P.2d 433, 437 (1931).

61. *State v. Buralli*, 27 Nev. 41, 54, 71 Pac. 532, 536 (1903).

62. *State v. Scott*, 37 Nev. 412, 431, 142 Pac. 1053, 1058 (1914).

63. *State v. Robison*, 54 Nev. 56, 60, 6 P.2d 433, 437 (1931); NEV. COMP. LAWS § 8766 (1929).

64. NEV. R. CIV. P. 51 (adopted by the Nevada Supreme Court, effective Jan. 1, 1953; based on FED. R. CIV. P. 51, revised to provide for instructions to the jury before argument is made).

65. KAN. GEN. STAT. c. 60, §§ 60-2909 and 60-2913 (1949) (civil); KAN. GEN. STAT. c. 62, §§ 62-1438 and 62-1447 (1949) (criminal).

66. KAN. GEN. STAT. c. 60, § 60-2909 (1949).

It is thus clear that to give any real summary would involve considerable delay. There is, however, a 1906 case which rather unexpectedly undertook a full discussion of this matter. The gist of this discussion is that:

The court should present the theories of the respective parties, and in doing so may refer to the lines of evidence . . . carefully refraining from expressing an opinion as to what the facts do or do not prove. . . .⁶⁷

The foregoing case has not been overlooked in later opinions, and has been cited as authority against some of the errors against which it warned ("singling out evidence," "intimating opinion," etc.) but rarely to uphold anything remotely approaching summation.⁶⁸ Incidentally, it is no rash assumption to say that paucity of cases on summation is virtual proof that there is no custom of reviewing evidence in any given jurisdiction. It is an invariable rule that in any state system contemplating full recapitulation of the evidence and simultaneously forbidding comment, there is a lush blossoming of cases urging that the reviews in fact slipped over into comment.⁶⁹ The absence of such cases in this entire Group I is cogent (if negative) evidence that the practice does not exist.

Nebraska

In a local report on compliance with the American Bar Association's Minimum Trial Standards, it was dryly noted that:

In Nebraska there is no statutory prohibition, but the general use of written instructions makes a full summary of the evidence, as opposed to a delineation of the issues, very unlikely.⁷⁰

That the abstinence from any extended review is not inadvertent or accidental, however, is demonstrated by the modification of Federal Rule 51 at the time when Nebraska almost secured civil procedure

67. Haines v. Goodlander, 73 Kan. 183, 190, 84 Pac. 986, 988 (1906).

68. Pool v. Day, 143 Kan. 226, 234, 53 P.2d 912, 917 (1936); Wyrick v. Parsons Ry. & Light Co., 100 Kan. 122, 126, 163 Pac. 1059, 1060 (1917); Wichman v. Kansas City, Mexico and Orient Ry., 84 Kan. 339, 342, 114 Pac. 212, 213 (1911).

69. The leading Kansas case on summarizing, Haines v. Goodlander, 73 Kan. 183, 84 Pac. 986 (1906), has been cited in Kansas only in the cases mentioned in note 68 *supra*. In North Carolina, a typical case, Withers v. Lane, 144 N.C. 184, 56 S.E. 855 (1907), has been cited on this point some 39 times. In Massachusetts, a similar case, Whitney v. Wellesley & Boston Street Ry., 197 Mass. 495, 84 N.E. 95 (1908), has been cited 38 times in connection with propriety of the summation.

70. Turner & Dow, *Nebraska and the Minimum Standards of Judicial Administration*, 30 NEB. L. REV. 29, 35 (1951). Kindness of Edw. W. Morgan, Esq., of the Nebraska Bar and member of the faculty of the University of Nebraska College of Law in reading this Nebraska résumé is gratefully acknowledged. He points out that the duty of the court to instruct on all issues is enforced even in the absence of appropriate request or specific objections of counsel to omissions at the time—often permitting counsel to secure reversals after "lying doggo." The latter problems, however, are deemed beyond the scope of this article. The same remark applies to Mr. Morgan's mention of the wide use of standardized instructions, on which latter subject see *Standardized Instructions to Juries Adopted by the Association of District Judges of Nebraska*, 24 NEB. L. REV. 195 (1945).

rules based on the federal system.⁷¹ At any rate, the general scheme ostensibly resembles that of Missouri, except that despite the somewhat ambiguous provision for additional instructions after argument, in actual practice Nebraska judges always charge after arguments of counsel.⁷² The attitude toward comment, at any stage of trial, is a strict one.⁷³ As to instructions referring to the evidence, and which are alleged to be in the nature of comment, there is one mitigating doctrine. Thanks in part to Roscoe Pound's influence on the supreme bench, such error is reversible only if prejudicial.⁷⁴

Utah

In literal terms of statutes and rules, Utah is no more liberal as to instructions than the other members of this group.⁷⁵ In addition, there is evidence that the committee on adoption of the Federal Rules found the general sentiment of the bar opposed to any liberalization of the instructing process.⁷⁶ But in a 1943 case, one of the supreme court justices had gone out of his way to stimulate the use of more concrete instructions, concluding some rather extended remarks by saying:

Where no piece of evidence is singled out and emphasized I see no better way to instruct in reference to the evidence and in a concrete manner on all theories of the case than to sum up the salient bits of evidence for each party.⁷⁷

Deference must be paid to that statement as well as the court's repeated disparagement of abstract instructions,⁷⁸ a recent affirmation of the ". . . duty of the court to cover the theories of both parties in

71. The set of rules was submitted to the legislature in 1943, but the legislature rejected them and repealed the rule-making enabling act. Neb. Sess. Laws 1939, c. 30, 63 (1943); See CLARK, CODE PLEADING 50 (2d ed. 1947); VANDERBILT, *op. cit. supra* note 9, at 117. See objections of Judge Chas. E. Clark to the modified version of FED. R. CIV. P. 51, which was incorporated in the rules submitted to the legislature, in Clark, *The Nebraska Rules of Civil Procedure*, 21 NEB. L. REV. 307, 319 (1942).

72. NEB. REV. STAT. § 25-1107 (esp. part 7) to § 25-1116 (1943) (civil); NEB. REV. STAT. § 29-2016 (1943) (criminal).

73. *Kersenbrock v. Martin*, 12 Neb. 374, 11 N.W. 462, 463 (1882); *In re Estate of Strelow*, 117 Neb. 168, 220 N.W. 251 (1928), noted 7 NEB. L. BULL. 379 (1929).

74. *Stull v. Stull*, 1 Neb. (unofficial) 380, 399, 96 N.W. 196, 203 (1901) (concurring opinion of Pound, C.). NEB. REV. STAT. § 29-2308 (1943) provides that harmless misdirection of the jury is not reversible error.

75. UTAH CODE ANN. § 104-24-14(4), § 105-32-1(5) (1943), which is now in UTAH CODE ANN. tit. 78, Rules (1953) (esp. Rule 51).

76. Although Utah adopted rules of civil procedure effective Jan. 1, 1950, very similar to the Federal Rules of Civil Procedure, the instructions rule, No. 51, was drastically modified to retain the former practice. See 24 IDAHO ST. B. A. 36 (1950).

77. Wolfe, C.J., concurring in *State v. Parker*, 104 Utah 23, 36, 137 P.2d 626, 632 (1943).

78. "We have repeatedly criticized the giving of abstract statements of the law to the jury. . . ." *State v. Thompson*, 110 Utah 113, 131, 170 P.2d 153, 162 (1946).

his instructions . . . ,”⁷⁹ and the opinions of other writers⁸⁰—for all of which reasons Utah is shown with the Unrestricted-Intermediate states on the map.

GROUP II: IOWA, OHIO, GEORGIA AND NORTH CAROLINA

All of this group follow the majority practice as to the *When* of instructing. The requirements as to written instructions, apart from those of Iowa, are considerably less stringent than those of Group I. The pressure on the judge to prepare his own instructions begins to be noticeable. While there are dissimilarities as to some of the minor aspects, the members of this class have in common, in their appellate decisions, an aggressive dislike of any remarks from the bench, at any stage of trial, which border upon any intimation of opinion as to the weight of the evidence or credibility of witnesses. Only in North Carolina is there any real summary of the evidence.

Iowa

Iowa has one of the most specific rules as to the written instruction ritual which has yet been seen.⁸¹ The written-and-read instructions are mandatory, and counsel must see beforehand everything the court intends to read—first in draft, then in final form. What was said as to Nebraska has been stated several times by the Iowa courts, *i.e.*, “. . . under our practice it is not practicable or necessary for the court to review the testimony of the witnesses.”⁸² It is unusual to find reversals for mere summary, however, so long as references to the evidence, amounting in fact to partial summary, are not so one-sided as to amount to comment.⁸³ The Iowa report on compliance with the American Bar Association’s Minimum Trial Standards, one notes, flatly took the position that “Iowa does not permit the judge to sum up the evidence, nor is he allowed to comment on it.”⁸⁴

79. *Startin v. Madsen*, 237 P.2d 834, 836 (Utah 1951) (collecting cases); *Smith v. Lenzi*, 74 Utah 362, 368, 279 Pac. 893, 896 (1929).

80. Some of these discrepancies are compared in MILLAR, *CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE* 310, n.118 (1952).

81. IOWA CODE ANN., *Iowa Rules of Civil Procedure*, Rule 196 (1951). IOWA CODE ANN. c. 780 §§ 780.4, 780.9, 780.35 (1951) (criminal procedure—conforming to the civil rules).

82. *State v. Williams*, 238 Iowa 838, 845, 28 N.W. 2d 514, 518 (1947); *State v. Proost*, 225 Iowa 628, 636, 281 N.W. 167, 171 (1938) (cases cited).

83. “While the trend might conceivably indicate a virtual abolition of the power of summary, the [Iowa] courts have not undertaken to spank the unruly child, but seem content with verbal admonition [citing *State v. Williams*, *supra* note 82].” F. J. Silverman in an unpublished Iowa summary prepared while a senior student at Temple University School of Law in 1952-3. Aid received from this and several other such careful summaries prepared by Mr. Silverman is gratefully acknowledged.

84. *Simmons & Pryor. Minimum Standards of Judicial Administration*, 36 IOWA L. REV. 436, 450 (1951), citing *Russ v. War Eagle*, 9 Iowa 374 (1859). Those writers take the position that VANDERBILT, *op. cit. supra* note 9, is in error in stating at p. 229 and on the map at p. 227 that in Iowa a summary by the trial judge is compulsory. See also 19 IOWA L. REV. 603 (1934).

Iowa has had considerable trouble with the instructing process in the past. Prior to the adoption of the current rules it was said:

An examination of the North West Reporter discloses that more cases were reversed by the Iowa Supreme Court on account of errors in instructions than in any other state served by this publication.⁸⁵

It appears that the situation in the latter respect is somewhat better since the adoption of the new rules.⁸⁶ The general difficulty, however, is not a new one to the Central West. That is, when upon a tradition of wholly-written instructions there is imposed an attempt to give the judge a fair share of responsibility for the charge, when his discretion is simultaneously held to a minimum, and when there is superimposed by the reviewing courts a solicitude for the effectiveness of the instructions, a true dilemma is reached.⁸⁷

Ohio

Ohio's bifurcated system is *sui generis*. It provides that the written, special instructions requested by counsel precede the final arguments — but the court's general oral charge comes after those closing "speeches."⁸⁸ The general picture resembles that of Iowa in that judicial responsibility is greater than in the first group of states, yet scrutiny of the charge is intense.⁸⁹ While the code provisions are long-standing and rather detailed, much of the restriction seems to have come about through the cases.

The decisions do not require summary, neither do they forbid it, according to an 1891 case.⁹⁰ But in 1912 came the *caveat*: "[I]f an attempt to review the evidence by the judge is made, it should be scrupulously accurate as to matters of substance."⁹¹

85. COOK, IOWA RULES OF CIVIL PROCEDURE § 196, p. 413 (1944).

86. "[G]reat strides were made with the adoption of the new Rules of Civil Procedure in 1943, [but] there still remains much to be done." Simmons & Pryor, *supra* note 84, at 437.

87. Iowa's statehood dates from 1846. Statutes confining instructions to the law of the case, and forbidding alterations or modifications, appear as early as Iowa Laws 1860 § 4785, and IOWA CODE § 1791 (1860). The duty to charge is enforced in a long line of cases from *Owen v. Owen*, 22 Iowa 270 (1867), to *Gardner v. Johnson*, 231 Iowa 1233, 3 N.W.2d 606 (1942). More could be said were it not for the fact that the duty to charge is simply a different question from that at hand.

88. OHIO GEN. CODE ANN. § 11420-1(5) (1940).

"The present law, which applies only to civil actions is a direct descendant of a long series of related statutes which had their inception in the Code of Civil Procedure in 1853." Shibley, *Special Instructions on Law by Counsel Before Argument*, 11 OHIO ST. L.J. 321 (1950).

89. *Klass v. Klass*, 27 Ohio App. 459, 465, 161 N.E. 406, 408 (1928); 39 OHIO JUR. §§ 291 and 293; 1 REID, BRANSON, INSTRUCTIONS TO JURIES § 27 n.61 (2d ed. 1936). For the duty to charge, see *Rhoades v. City of Cleveland*, 157 Ohio St. 107, 105 N.E.2d 2 (1952), *reversing*, 100 N.E.2d 705, 708 (Ohio 1951); 2 OHIO JUR. § 744, p. 1390.

90. *Morgan v. State*, 48 Ohio St. 371, 377, 27 N.E. 710, 712 (1891).

91. *American Steel Packing Co. v. Conkle*, 86 Ohio St. 117, 123, 99 N.E. 89, 90 (1912).

Meanwhile there had been the rather famous case suggesting that the judge should not tip the delicate balance of the scales of justice by so much as a wink or a look—and the present pattern of stringency seemed established.⁹² It has carried over into some nice illustrations of the “special pleading” of the written instructions on the law (curiously reminiscent of the older Maryland system of “prayers”),⁹³ but more pertinent here are the remarks of Judge Newcomer:

A part of the judicial power which has come down with the common law, being a part of the common law at the time of the adoption of the constitution, is the right of the trial judge to assist the jury in arriving at the facts, but finally to submit the issues to the jury for its determination. Ohio is one of the states that by the action of the [revising] courts does not use this power. . . . These . . . are precedents growing out of a pioneer situation . . . when the judges frequently were not lawyers. They are precedents suited to the court of a justice of the peace. We hope in Ohio we are at least by that stage in our civilization.⁹⁴

Georgia

The relative functions of court and jury have been changing gradually as one moves through this series, but the departure becomes more clear as one turns to Georgia. There, a request to charge may be made at any time before the jury retires to consider its verdict.⁹⁵ As to written instructions, since 1943 it has been sufficient that there be a shorthand reporting of the charge.⁹⁶ Counsel are not entitled to see any instructions of the court, or even of opposing counsel, before the same are actually charged to the jury.⁹⁷ The system is thus designed to place the responsibility for instructions largely upon the shoulders of the court.⁹⁸

In charging, however, the judge must drive through the strait gate of the Georgia Dumb Act of 1850⁹⁹—so called because it was said to

92. *Metropolitan Life Ins. Co. v. Howle*, 68 Ohio St. 614, 622, 68 N.E. 4, 7 (1903).

93. *E.g.*, *Leonardi v. Habermann Provision Co.*, 143 Ohio St. 623, 56 N.E.2d 232 (1944); *Re the Maryland “prayers”* see 13 MD. ST. BAR REP. 129 (1908).

94. Newcomer, *Judicial Powers That Should Be Exercised*, 12 A.B.A.J. 219 221 (1926). From some accounts of the Ohio frontier courts, the code precautions might have been merited at one time. See II HISTORY OF THE STATE OF OHIO, OHIO STATE ARCHEOLOGICAL & HISTORY SOCIETY 399 (1942). Thanks to Professor C. F. Hyrne of the University of Toledo College of Law for verifying the foregoing Ohio Summary.

95. GA. CODE ANN. § 81-1101 (1937).

96. GA. CODE ANN. § 81-1102 (1937). (Amended by Acts 1943 p. 262).

97. GA. CODE ANN. § 81-1101 (1937).

98. *I.e.*, in the sense of authorship at the outset, as in *Tennessee* (Group III *infra*). The judicial duty as to the completeness of the charge is not especially onerous in the absence of a request to charge by counsel; *Wood v. Claxton*, 199 Ga. 809, 35 S.E.2d 455 (1945).

99. GA. CODE ANN. § 81-1104 (1937), is derived from this act and makes a reversal mandatory when the trial judge has expressed or intimated an opinion.

strike the trial judge mute.¹⁰⁰ To it were added some of the "latest improvements" between 1852 and 1861,¹⁰¹ and by 1868 one of the supreme court judges candidly admitted:

Our experience on the circuit bench, makes us very sensible of the difficulty of making charges unexceptionable and free from violations of the Code, but we are persuaded it can be done by the Judge avoiding the slightest reference to the testimony. . . .¹⁰²

And by 1895 that court was saying: "In the courts of this state, juries, and not judges, sum up the evidence"¹⁰³—a statement which (after having gone through the alembic of the practice books) probably "sums up" the question as to Georgia practice.¹⁰⁴

To stop here is to omit mention of cases containing some fine statements of the judicial function,¹⁰⁵ and to leave out others which show what a semanticist's paradise this field of investigation would be¹⁰⁶—for it is extremely difficult to determine in what senses the terms summary and sum up are being used.¹⁰⁷ No discussion, however, could show many cases revealing deliberate reviews of the evidence.¹⁰⁸ Yet even as to the cautious charges which the cases do exhibit, the Dumb Act has been invoked most frequently. For instance, there are over a hundred cases under it in the fifteen years between 1935 and 1950.¹⁰⁹ The fifteen or so reversals may not be shocking in comparison to the record in North Carolina, the state next to be discussed. Yet in the technicality of the objections to instructions which they reveal (*i.e.*, instructions "in the nature of comment," as the Missouri cases say) these reversals argue powerfully that the Georgia judge would be on most treacherous ground were he to venture beyond a bare statement of the parties' theories and contentions.

100. "That Act [of Feb. 21, 1850] . . . was called the Dumb Act, because [Justice] C.J. Bleckley said it struck the judges dumb." Richie, *The Province of the Judge in Jury Trials*, 13 MD. ST. BAR REP. 129, 148 (1908).

101. The predecessors of the acts mentioned: GA. CODE ANN. § 81-1101 (1937) dates back to 1853; § 81-1102 back to 1860; § 81-1103 back to 1860; § 81-1104 remains unchanged since 1850.

102. *Whitley v. State*, 38 Ga. 50, 74 (1868).

103. *McVicker v. Conkle*, 96 Ga. 584, 597, 24 S.E. 23, 28 (1895).

104. COZART, *GEORGIA PRACTICE RULES*, §§ 664 and 667 (3d ed. 1933).

105. *Brown v. State*, 6 Ga. App. 356, 360, 64 S.E. 1119, 1121 (1909).

106. See GA. CODE ANN. § 81-1104 (1937) under headings: Argumentative charge, Assumption, Contentions, Facts, Issues, Law, Legal effect, Manner, Reasons, Recapitulation, Reference, Reiteration, Repetition, Restatement, Summing up evidence, Undisputed facts and Whole charge.

107. *E.g.*, *Nelson v. State*, 124 Ga. 8, 52 S.E. 20 (1905).

108. The 1951 cumulative pocket part to Book 23 of GA. CODE ANN. contains 22 pages of annotations of cases under § 81-1104. Yet the headings for Recapitulation, Restatement and Summary which appeared in the bound volume have been dropped. The last case to repeat the talismanic phrase, "In the courts of this state, juries, and not judges, sum up the evidence," was apparently *Griffin v. State*, 34 Ga. App. 526, 530, 130 S.E. 368, 369 (1925).

109. This estimate is based on a count of annotations in GA. CODE ANN. § 81-1104 (Supp. 1951).

North Carolina

This is the only state which has a mandatory summary of the evidence.¹¹⁰ As the writers universally note, its statute, from which the constitutions and codes of so many states were modeled, was adopted in 1796, being the first in any state.¹¹¹ It has made a very great deal of trouble, as the cases in almost any volume of the reports attest.¹¹² Even in 1953 there was one opinion that observed:

Ordinarily the presiding judge must instruct the jury extemporaneously from such notes as he may have been able to prepare during the trial. . . .¹¹³

The opinion goes on to say that to require him to state every sentence and clause with such nicety that it will stand inspection out of context is an impossible burden. Another case last year reversed a criminal conviction with a resounding reaffirmation of the mandatory duty to charge on the contentions, evidence and the law.¹¹⁴

Since the situation in North Carolina is rather clear, and has been discussed recently elsewhere,¹¹⁵ it may suffice here to point out that the summary of the evidence now need go only “. . . to the extent necessary to explain the application of the law thereto.”¹¹⁶ Examination showed, however, that of thirty-seven cases appealed under the summary-without-comment statute in a period of about three years ending in the fall of 1953, twenty-four were remanded for new trial.¹¹⁷ Since the statute as interpreted seems to demand the impos-

110. N.C. GEN. STAT. § 1-180 (1953). *Contra*: VANDERBILT, *op. cit. supra* note 9, at 229. But see *Minimum Standards of Judicial Administration*, 36 IOWA L. REV. 436, 449 (1951).

111. THAYER, *PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 188 n.2 (1898); Johnson, *Province of the Judge in Jury Trials*, 7 TENN. L. REV. 107 (1928). See ASHE, II *HISTORY OF NORTH CAROLINA* 47-51 as to troubles leading up to passage of the act of 1796, of which he says at 149, “. . . and further curing some of the defects of administration, the judges were forbidden in charging the jury, to express an opinion. . . .”

112. *E.g.*, see *General Statutes Construed* § 1-180, 235 N.C. 873 (1952) (8 cases cited); *General Statutes Construed* § 1-180, 234 N.C. 859 (1951) (4 cases cited); *General Statutes Construed* § 1-180, 233 N.C. 880 (1951) (7 cases cited); *General Statutes Construed* § 1-180, 232 N.C. 862 (1950) (7 cases cited). Of the foregoing 26 cases, 17 were reversed for error in instructions—such error for the most part going to the matter of propriety, sufficiency, etc., of the summary.

113. *Vincent v. Woody*, 76 S.E.2d 356, 359 (N.C. 1953).

114. *State v. Stroupe*, 76 S.E.2d 313, 318 (N.C. 1953).

115. *Wright*, *supra* note 20, at 158-159.

116. N.C. GEN. STAT. § 1-180 (1953), as rewritten and amended in 1949 *Session Laws* c. 107. For a discussion of this act, see, *A Survey of Statutory Changes in North Carolina in 1949*, 27 N.C.L. REV. 405, 435 (1948-1949) (excellent discussion of this change doubtless written by Professor Herbert R. Baer of the University of North Carolina School of Law).

117. This count is based on a series of cases commencing with *Whiteheart v. Grubbs*, 232 N.C. 236, 60 S.E.2d 101 (1950), and ending with *Blanton v. Carolina Dairy*, 238 N.C. 382, 77 S.E.2d 922 (1953), being simply the cases indexed under *General Statutes Construed* § 1-180, N.C. GEN. STAT. § 1-180 (1953), and listed in Vols. 232-238 of the North Carolina Reports.

sible of the trial judge, the map shows North Carolina in half-and-half fashion to indicate its ambivalence.¹¹⁸

GROUP III: DELAWARE, ALABAMA AND TENNESSEE

This stage of the discussion brings one to the states wherein oral instructions are the general rule, where the charge in all cases follows the closing arguments and is necessarily prepared for the most part by the court. All forbid comment on the evidence; none forbid all summarization of the evidence. The decisions of each display solicitude for the usefulness of the charge. Yet in none of them does the trial charge deliberately go beyond a statement of the issues and the contentions of the parties.

Delaware

The Delaware constitution provides that "Judges shall not charge juries with respect to matters of fact, but may state the questions of fact in issue and declare the law."¹¹⁹ The retention of this provision in the Delaware constitutional amendment of 1951 has recently been noted as an indication that the restrictive movement in America "had not fully expended its force in recent years."¹²⁰ Delaware's ban on comment is not new, however, for:

In the policy of law of this state, declared by the courts in numberless decisions, the jury is the sole judge of the facts of a case, and so jealous is the law of this policy that by express provision of the Constitution the court is forbidden to touch upon the facts of the case in its charge to the jury.¹²¹

There are occasional cases which seem to assume that the charge shall encompass a restatement of the evidence,¹²² yet a well-informed Delaware practitioner states that in fact the court confines itself to stating the issues and the contentions of the parties.¹²³ This seeming

118. *I.e.*, in the map which appears after the states in Group IV, *infra*, North Carolina is certainly restricted and must therefore be shown bold ruled and dotted. The judges, however, necessarily marshal the evidence, requiring a showing in faint ruling. For those reasons it is shown half and half.

This North Carolina study was completed at the University of North Carolina Law Library in November of 1953. The courtesy of its faculty in letting the writer have the run of that excellent library for an entire week is gratefully acknowledged. Responsibility for the writer's dim view of N.C. GEN. STAT. § 1-180 (1953), however, is his own.

119. DEL. CONST. Art. 4, § 19.

120. MILLAR, *op. cit. supra* note 80, at 311. Professor Millar adds that:

This is seen in the adoption or reaffirmation of the restrictive rule by a number of constitutions and statutes, exemplified by . . . its maintenance in the Delaware constitutional amendment of 1951.

121. Philadelphia, Baltimore & Washington R.R. v. Gatta, 27 Del. (4 Boyce) 38, 56, 85 Atl. 721, 729 (1913).

122. Baker v. Reid, 44 Del. (5 Terry) 112, 124, 57 A.2d 103, 109 (1947) *semble*; Buckley v. R. H. Johnson & Co., 41 Del. (2 Terry) 546, 25 A.2d 392 (1942).

123. Henry J. Ridgley, Esq., of Dover, Delaware. The fact that Delaware has recently adopted the pattern of the Federal Rules of Criminal Procedure, in addition to superior court rules patterned after the federal civil rules, should

contradiction is shown to be largely semantic upon close examination of the cases. For instance, a 1942 case in the superior court¹²⁴ contains a detailed account by an experienced judge as to the occurrences during a trial at which he presided. It is seen that in three separate instances he carefully indicated that he meant the term "charge upon the facts" to be synonymous with "contentions of the parties." When the jury asked for further instruction, for instance, he replied:

The Court instructed the jury that it should arrive at its verdict based upon the preponderance of the evidence that it has heard, and I cannot go further than that. . . . If I can charge you on any further facts (contentions of the parties), or any further law, I will be very glad to charge you.¹²⁵

That position seems to accord with the unique and specific language of the Delaware constitution but results, of course, in something even less than the "mere colorless review" which some deprecate. It is nevertheless noteworthy that relatively few cases seem to be appealed on the ground of excesses in the trial charge.¹²⁶

Alabama

Alabama exhibits no departure from the mechanics common to this group except that requested special instructions must be read verbatim if given, and may accordingly be refused for a typographical error.¹²⁷ The statute delimiting the charge is nevertheless unique:

The court may state to the jury the law of the case, and may also state the evidence when the same is disputed, but shall not charge upon the effect of the testimony, unless required to do so by one of the parties.¹²⁸

The explanation of that choice of language is found in the Alabama custom as to instructions in the nature of directed verdicts.¹²⁹ It carries over into the present subject to the extent that complaints as to charges on the facts are usually based on the ground that they amounted to something in the nature of direction.¹³⁰ The term "general charge" is taken in Alabama to refer to the directory charge, so the court's charge must here be called the principal charge to avoid

be watched. It seems likely to the writer that the general objections to instructions, now tolerated, may be eliminated if the spirit of the federal rules is followed. *Cf.* Long v. State, 44 Del. (5 Terry) 262, 273, 65 A.2d 489, 494 (1947).

124. Buckley v. R. H. Johnson & Co., 41 Del. (2 Terry) 546, 552, 25 A.2d 392, 394 (1942).

125. *Id.* at 552, 25 A.2d at 394.

126. A case by case examination of the Delaware Reports from vol. 41 to vol. 44 (1940-50) revealed no square case on the matter of summary or comment.

127. ALA. CODE tit. 7, § 273 (1940); Thomas v. State, 124 Ala. 48, 57, 27 So. 315, 320 (1900); Jarrell v. State, 35 Ala. App. 256, 262, 50 So.2d 767, 772 (1949); Wilson v. State, 34 Ala. App. 219, 223, 39 So.2d 250, 254 (1948).

128. ALA. CODE tit. 7, § 270 (1940); Hair v. Little, 28 Ala. 236 (1856).

129. Hon. J. R. McElroy, *The General Affirmative Charge With Hypothesis in Alabama*, 1 ALA. L. REV. 151 (1949).

130. Rowe v. State, 243 Ala. 618, 623, 11 So.2d 749, 753 (1943); George v. State, 240 Ala. 632, 638, 200 So. 602, 607 (1941).

confusion. Those principal charges are oral in the full sense¹³¹ and are followed by the reading of the "given" special charges—which are just as plethoric and technical as one finds anywhere.¹³² Then follows, at the court's discretion, an opportunity for the court to explain and elucidate those special instructions—subject only to the requirement that he shall not modify or alter them in the process.¹³³

It is clear that the practice contemplates nothing more than presentation of the issues and contentions of the parties in the principal charge. Occasional statements that the court may review disputed evidence must be taken with a grain of salt if one is thinking in terms of the sort of review North Carolina requires,¹³⁴ for as an 1896 case says:

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. . . .¹³⁵

Vigilance against comment, which always makes summary hazardous, is thus seen to be strict—although Rule 45, which appeared in 1913, has saved many cases where error in the giving or refusing of instructions was merely technical and not prejudicial.¹³⁶ The calamity of new trial is not seen so frequently in the past forty years—since the adoption of that (harmless error in instructions) rule—but one has no sure way of knowing whether credit is due to the rule or to abandonment of the custom of summarizing.

Tennessee

The following provision of the Tennessee Constitution is clearly the first appearance of the familiar pattern in American organic law:

Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.¹³⁷

This section has never been pressed in Tennessee to the extent to

131. *E.g.*, *Hair v. Little*, 28 Ala. 236, 248 (1856); *Coats v. State*, 34 Ala. App. 577, 578, 42 So.2d 591, 592 (1949).

132. [O]f one hundred and seventy-five written charges, which were tendered by the accused, the court gave eighty-four. . . . The oral charge of the trial judge [in addition] covers seventeen typewritten pages." *Lovejoy v. State*, 33 Ala. App. 414, 419, 34 So.2d 692, 696 (1948).

133. Under ALA. CODE tit. 7, § 273 (1940) (charges moved for by the parties), it has long been so held. *Callaway & Truitt v. Gay*, 143 Ala. 524, 529, 39 So. 277, 279 (1905); *Eiland v. State*, 52 Ala. 322, 328 (1875); *Bryer v. State*, 34 Ala. App. 561, 563, 42 So.2d 496, 498 (1949).

134. See the discussion of the North Carolina position *supra*.

135. *Brown v. State*, 109 Ala. 70, 79, 20 So. 103, 106 (1896).

136. ALA. CODE tit. 7, Sup. Ct. Rule 45, p. 1022 (1940); *Henderson v. Tennessee Coal, Iron & Ry.*, 190 Ala. 126, 129, 67 So. 414, 415 (1914).

137. TENN. CONST. Art. 6, § 9 (1870) (same form as TENN. CONST. Art. 5, § 5 (1796)). As to its adoption, see Johnson, *Province of the Judge in Jury Trials*, 12 J. AM. JUD. SOC'Y 76, 80 (1928); 14 MASS. L.Q. 48, 51 (1928); 7 TENN. L. REV. 107, 115 (1929).

which it has been enforced in the states which borrowed it.¹³⁸ Early cases lucidly expounded the merits of the impartial review which, they said, the constitution was not designed to inhibit. At the same time, it was admitted that “. . . the court in its discretion may decline exercising the power given it, without committing error.”¹³⁹

Later cases, however, are more inclined to discuss the adequacy of presentation of the issues than to refer to the process of refreshing the jurors as to the evidence.¹⁴⁰ Although not every remark in the presence of the jury is error simply because it bears a slight tinge of comment, the increasing trend has been to hold the charge well within the originally permitted limits.¹⁴¹ An enlightening on-the-ground report from Professor Forrest W. Lacey says:

All attorneys and the judge agreed that there was no custom of giving a summary of the evidence as such. There is, however, a custom of the judge giving the theories. . . . The judge was frank to admit that in giving the theories of the respective parties . . . there was a certain amount of summarizing of the evidence. . . . The attorneys all agreed that the judges carefully refrained from giving any comment, even in the giving of the theories of the case, which probably accounts for the dearth of cases on the problem.¹⁴²

The provisions for requests to charge are designed to insure that the charge is prepared by the court.¹⁴³ Requests may be written or oral, may be submitted after the principal charge and (uniquely) need not be heeded by the court if submitted prior thereto.¹⁴⁴ That is,

138. This language was borrowed from the 1796 statute of North Carolina heretofore discussed in Group II, *supra*. Of the states in the present four groups, only the following do not now have a similar provision in their constitutions or statutes: Nebraska, Wisconsin, Minnesota, and Maryland.

139. *Ivey v. Hodges*, 23 Tenn. (4 Humph.) 154, 156 (1843).

Whereupon, the judge [Sir Matthew Hale himself] in giving his direction to the jury, told them, that he would not repeat the evidence unto them, lest by so doing he should wrong the evidence on the one side or on the other.

A Trial of Witches at St. Edmonds in 1665, 6 COBBETT'S STATE TRIALS 687 (London ed. 1810).

140. *Nashville, Chattanooga & St. Louis Ry. v. Anderson*, 134 Tenn. 666, 681, 185 S.W. 677, 680 (1916); *Tevis v. Proctor & Gamble Distributing Co.*, 21 Tenn. App. 494, 503, 113 S.W.2d 64, 70 (1937). *But cf.* *Earp v. Edgington*, 107 Tenn. 23, 35, 64 S.W. 40, 43 (1901), where the charge was held diffuse and overlong to the extent of confusing the issues.

141. *Smartt v. State*, 112 Tenn. 539, 552, 80 S.W. 586, 588 (1904) (reversible error to remark in colloquy with counsel that an inference might be drawn from certain testimony); *Ayres v. Moulton & Reid*, 45 Tenn. (5 Cold.) 154 (1867); *Hughes v. State*, 27 Tenn. (8 Humph.) 75, 79 (1847); *Tevis v. Proctor & Gamble Distributing Co.*, 21 Tenn. App. 494, 503, 113 S.W.2d 64, 70 (1937) *semble* (Recent cases on this point are rare).

142. Professor Lacey of the law faculty of the University of Tennessee, in letter dated December 5, 1953, stated the consensus of informed local opinion.

143. TENN. CODE ANN. §§ 8809 and 8810 (Williams 1934) (civil); TENN. CODE ANN. §§ 11749-11751 (Williams 1934) (criminal).

144. *Chesapeake, Ohio & S.W. Ry. v. Foster*, 88 Tenn. 671, 673, 13 S.W. 694 (1890); *Roller v. Bachman*, 73 Tenn. (5 Lea.) 153 (1880); *Hemmer v. Tennessee Electric Power Co.*, 24 Tenn. App. 42, 47, 139 S.W.2d 698, 701 (1940).

requested instructions are designed to supply omissions in the court's charge rather than to suggest what the charge shall be. Incidentally, such charge in civil cases is almost always oral, despite a statutory provision by which counsel may demand that the instructions be reduced entirely to writing beforehand,¹⁴⁵ but the criminal charge provision, making the written charge mandatory, is seldom successfully dispensed with even by stipulation of counsel.¹⁴⁶

Needless to say, the foregoing arrangement as to the presentation of requests to charge puts a heavy burden on the court. One is told that the Tennessee trial judge is sometimes submitted thirty or forty typewritten pages of requests at the close of his main charge.¹⁴⁷ The consequent delay before the jury is sent out may stretch to three or four hours. The circumstance that such requests had long been ready to be presented quite understandably irks the court but is, of course, completely consistent with the arrangement and order provided by the statute.

GROUP IV: WISCONSIN, MINNESOTA, MARYLAND, MASSACHUSETTS, MAINE AND RHODE ISLAND

Since only two states of the six in this group are found actually to belong in the Intermediate class, some differences in mechanics may be expected. In all of them, the principal charges are oral, although in varying degrees. In Wisconsin and Minnesota the requirement that it be in writing is satisfied so long as the charge is taken down by a reporter. Maryland charges are now permissively oral, whereas in Massachusetts, Maine and Rhode Island it is required that they be given in that offhand style.¹⁴⁸ In Wisconsin, incidentally, the requested written charges must be rendered verbatim. In all these states the judge has the chief responsibility for preparing the charge—although his duties with respect to sufficiency of the charge are

TENN. CODE ANN. § 8810 (Williams 1934) requires, however, that special requests be in writing. Unless such are submitted after the conclusion of the general or main charge, the judge cannot be put in error for refusal.

145. Professor Lacey, *supra* note 138, says:

It is not the custom to request the trial judge to reduce his charge to writing. None of the attorneys remembered any case in which such a request had been made, and the judge said it occurred only rarely. . . .

146. TENN. CODE ANN. § 11749 (Williams 1934). See the following cases strongly disapproving waiver of written charge in criminal cases: *Pedigo v. State*, 191 Tenn. 691, 236 S.W.2d 89 (1951); and *Adcock v. State*, 191 Tenn. 687, 236 S.W.2d 88 (1949).

147. But Professor Lacey mentioned in this connection that some judges prevail upon counsel to give the court a preview of the special instructions to be requested.

148. "Offhand" is here used in the same sense as "free-style" was used in discussion appearing in the introduction to Group I, n.42 *supra*. VANDERBILT, *op. cit. supra* note 9, at 233 cites these three states as ones requiring oral instructions. That does not mean that the judge may not prepare his instructions beforehand, of course—this is a matter of the style of delivery.

rather minimal in Wisconsin. In all but Maryland the charge follows closing arguments. With some possible exception as to criminal cases in Wisconsin and Maryland, it is rather generally conceded that the power to summarize exists in all. In addition, there is general (but not unanimous) agreement that Rhode Island judges also have the common law power of comment. Perhaps due *inter alia* to difficulties of definition, there is no agreement among the writers as to whether there is full-fledged power to summarize in the other states.

Wisconsin

Whatever powers (latent or patent) the Wisconsin judges may have, it seems clear to the writer that they do not indulge in summary as a matter of practice, that they probably could not comment in criminal cases, and would be foolhardy to try it in civil causes.¹⁴⁹ A Wisconsin report on compliance with the American Bar Association's Minimum Trial Standards simply says that there is power to summarize, but not to comment.¹⁵⁰ In 1927, a well-argued attempt was made to convince a conference of circuit judges that they had the common law powers, but for present purposes that address serves best as an admission that those asserted powers were at least in desuetude.¹⁵¹

On the criminal side, there is no real bottom to the restrictions which are asserted by way of *dicta* or mere rulings in the older cases,¹⁵² but one doubts if those old holdings would readily be abandoned.¹⁵³ On the civil side, the likelihood of clarification is slim, since the use of special issues is highly developed and along lines which

149. The reasons for this opinion are to follow, but it is to be noted that statutes on instructions do not forbid comment or a summary. WIS. STAT. §§ 270.21, 270.22, 270.23, 270.28 and 357.14 (1951).

150. 25 WIS. BAR BULLETIN 17, 19 (Oct. 1952). In a letter dated Sept. 25, 1953, Professor Delmar Karlen of the New York University School of Law (formerly of Wisconsin) wrote:

With respect to [these] questions, I have encountered the same difficulties. . . . The cases in Wisconsin seem utterly contradictory. . . . I am certain however, of the practice—which is that the trial judges do not exercise whatever power they have. It is not customary to either summarize the evidence, or to express an opinion on it.

151. Hoyt, *The Judge's Power to Comment on the Testimony in His Charge to the Jury*, 11 MARQ. L. REV. 67, 72 (1927).

152. See *Dingman v. State*, 48 Wis. 485, 491, 4 N.W. 668, 672 (1880), which cites early civil cases and says of one: "The same case . . . holds that in criminal cases the rule is more stringent, and that in such cases it is error to express any opinion. . . ." (Italics added.); *Horr v. C.W. Howard Co.*, 126 Wis. 160, 164-166, 105 N.W. 668, 670-671 (1905).

153. See *Jessner v. State*, 202 Wis. 184, 191, 231 N.W. 634, 637 (1930), where it is said:

It is not to be denied that many courts of this country do not tolerate any expression of opinion on the part of the trial judge. . . . Such is the tendency of this court. [Collecting cases.]

discourage the use of any more general instruction than is absolutely necessary.¹⁵⁴

There were two decisions in the Wisconsin Supreme Court in the early 1930's indicating friendliness toward the common law judicial function, but neither decision is square on the point.¹⁵⁵ There is inclination among the writers to place Wisconsin toward the Unrestricted side.¹⁵⁶ A well-informed Wisconsin observer noted, however, that "The cases . . . seem utterly contradictory."¹⁵⁷ Review of those cases seems purposeless here, in view of the discrepancy between the present practice and theory. So long as the supreme court asserts existence of the common law power, however, it would be improper to show this state—for the present purposes—otherwise than Intermediate on the map.¹⁵⁸

Minnesota

Apart from North Carolina, this is the first state of any of the groups so far discussed, in which the review of the evidence is actually practiced. Although Minnesota has recently adopted the Federal Rules of Civil Procedure, that fact made no especial change in the mechanics of the charge.¹⁵⁹ That Minnesota system was described in this Quarterly several years ago by the learned Judge Royal A. Stone of the Supreme Court of Minnesota.¹⁶⁰ He pointed out that there the judge is largely "on his own" in preparing the charge. As to the requested instructions on the law, it is not reversible error to give them as the instructions of one or the other of the parties, but the supreme court feels strongly that there is great loss of force and prestige if the law is not stated in the form of a statement sponsored and adopted as the court's own. The judge must assume responsibility for the charge, for:

A judge's habitual dependence upon counsel for the whole, or even much of his instructions, will not stimulate his juridical metabolism.¹⁶¹

154. *Byington v. City of Merrill*, 112 Wis. 211, 226-229, 88 N.W. 26, 31-32 (1901). See REID BRANSON INSTRUCTION TO JURIES iii (3d ed. 1936), which says that ". . . [I]n some states, notably Wisconsin, the use [of special verdicts] is almost universal in civil cases."

155. See *Branigan v. State*, 209 Wis. 249, 255-257, 244 N.W. 767, 770 (1932); *Jessner v. State*, 202 Wis. 184, 231 N.W. 634 (1930).

156. MILLAR, *op. cit. supra* note 80, at 312; VANDERBILT, *op. cit. supra* note 9, at 227, 228.

157. Note 150 *supra*.

158. Thus one avoids denial of the language of cases which says it is commendable for the judge to summarize if he has the courage, *e.g.*, *Horr v. C.W. Howard Co.*, 126 Wis. 160, 165-166, 105 N.W. 668, 670-671 (1905).

159. Complete rule making power was entrusted to the supreme court (as to civil procedure) in 1947, Laws 1947, c. 498 § 1. MINN. RULES OF CIV. PROC. for the district courts took effect Jan. 1, 1952. As to the opinion that no especial change was brought about, see the letter of Professor Louisell cited in text at note 170 *infra*.

160. Stone, *supra* note 25.

161. *Id.* at 464.

The jurisdiction is Common Law in the sense that there is no law inhibiting summing-up, although there is a provision found on the criminal side only which might be taken to imply that instructions concerning facts in criminal trials are to be held within closer bounds than are those in civil causes.¹⁶² On either side, incidentally, it is sufficient that the charge be written in the form of the reporter's pothooks awaiting transcription in the event of an appeal.¹⁶³

The summary power in this state is seldom questioned—the really debatable point is to what extent it may go farther.¹⁶⁴ A detailed attempt to supply the answer appeared in a law review note of some twenty years ago, which dissected many Minnesota cases turning on challenged judicial remarks and summations.¹⁶⁵ After having aligned them under their ostensible categorizations—error in “singling-out,”¹⁶⁶ argumentativeness,¹⁶⁷ undue stress and the like¹⁶⁸—its author was dismayed to find the line between the taboo and the permissible to be discouragingly indefinite. It is submitted, however, that one may encounter the same frustration if he seek to classify the very numerous federal cases involving those same varieties and variations of unfair comment.¹⁶⁹ The likelihood that certain charges, disapproved in Minnesota, would have passed muster in many federal circuits, however, is not strictly relevant to the present topic. On the other hand, the following statement of Professor David W. Louisell¹⁷⁰ goes right to the nub and center of the present business:

Our Supreme Court encourages the trial courts in their charges to summarize the evidence—to marshal the facts—but only tolerates the expression of an opinion by the court as to the credibility of any witness. When the judge expresses an opinion, the opinion will be scrutinized carefully to make sure it is fair.¹⁷¹

162. MINN. STAT. ANN. § 631.08 (1947) in substance says that if the court presents the facts, it shall inform the jury that it is the exclusive judge thereof.

163. Stone, *supra* note 25, at 461. This explains why reported instructions are duly “written.”

164. Earlier 48-state surveys had placed Minnesota with the Common Law states, but VANDERBILT, *op. cit. supra* note 9, at 227 showed it as Intermediate; and MILLAR, *op. cit. supra* note 80, at 310-311, n.118, says:

[I]t is not altogether clear that Minnesota can be regarded as squarely falling within this [unrestricted] group: see Pressley Fruit Co. v. St. Louis, Iron Mountain & Southern Ry., 130 Minn. 121, 153 N.W. 115 (1915). . . .

165. Note, 18 MINN. L. REV. 441 (1934), analyzing scores of Minnesota cases.

166. Taubert v. Taubert, 103 Minn. 247, 251, 114 N.W. 763, 765 (1908).

167. State v. Dallas, 145 Minn. 92, 176 N.W. 491 (1920).

168. Harriott v. Holmes, 77 Minn. 245, 79 N.W. 1003 (1899).

169. United States v. Murdock, 290 U.S. 389 (1933); 9 WIGMORE, EVIDENCE § 2551 (3d ed. 1940); Weissberger, *The Right of the Trial Judge in Federal Courts to Comment on the Evidence*, 5 BROOKLYN L. REV. 272 (1936); Note, 95 A.L.R. 785 (1935); Note 18 MINN. L. REV. 441, 433-450 (1934).

170. Professor David W. Louisell, member of the law faculty at the University of Minnesota.

171. In a letter to the writer dated September 11, 1953 and citing the following cases: State v. Hansen, 173 Minn. 158, 217 N.W. 146 (1927); King Cattle Co. v. Joesph, 165 Minn. 28, 205 N.W. 639 (1925); Bonness v. Felsing, 97 Minn. 227, 106 N.W. 909 (1906).

Maryland

A rather plausible argument may be made that the written instructions system originated in provincial Maryland a century and a half before the adoption of the Constitution of the United States.¹⁷² At any rate, it is quite clear that the system of written prayers came to fine flower in the corresponding period ending in 1941.¹⁷³ But in the latter year, Maryland scrapped that plan entirely, and took the Massachusetts system as its model.¹⁷⁴ The 1941 rule retained little of the old charging procedure except its ancient order of instructing before final arguments. It is noticeable, however, that the language of the pertinent Trial Rule is not too stringently specific:

[T]he Court . . . may sum up the evidence, if it instructs the jury that they are to determine for themselves the weight of the evidence and the credit to be given to the witnesses.

An oral charge need not comply with the technical rules as to prayers.¹⁷⁵

Taking "sum up" in its American connotation, Maryland would be in the Intermediate class—but on the contrary, it seems that the words are being given their historic meaning, and this state is therefore shown unrestricted on the map.¹⁷⁶ The rule has had nine interpretations in appealed civil judgments, and in each case the charge has been approved—and the language of the opinions has tended toward allowance of considerable latitude.¹⁷⁷ On the criminal side, however, there are really no precedents either way—since criminal juries have, at least until very recently, judged both fact and law under the Maryland Constitution.¹⁷⁸

172. See *Maryland Provincial Act of 1642*, 1 ARCHIVES OF MD. 151, 187; Howard, *The Exclusive Use of Written Prayers and Instructions in Civil Cases in Maryland*, 31 MD. ST. BAR REP. 120, 133 (1926).

173. A prayer is a request in writing by counsel to the Court to declare to the jury the law applicable to the facts of the case. When granted, the prayer becomes the court's instruction. . . . Except in exceptional cases, the Court does not even read to the jury the prayers it grants. Ritchie, *The Province of the Judge in Jury Trials*, 13 MD. ST. BAR REP. 129 (1908). See also, *Maryland Steel Co. v. Engleman*, 101 Md. 661, 679, 61 Atl. 314, 315 (1905).

174. Soper, *The Charge to the Jury in Maryland under the New Rules of Practice and Procedure*, 6 MD. L. REV. 35 (1941) (collecting Massachusetts cases at 40, 41).

175. MD. ANN. CODE GEN. LAWS, *General Rules of Practice and Procedure*, Rule 6(b) (2) (1951).

176. See especially, as to scope given the phrase "sum up," *Snyder v. Cearfoss*, 190 Md. 151, 161, 57 A.2d 786 (1947).

177. This series includes cases on various aspects of instructions, being interpretations of the entire Rule 6 as to instructions. It commences with *Feinglos v. Weiner*, 181 Md. 38, 44, 28 A.2d 577, 580 (1942), includes *Snyder v. Cearfoss*, *supra* note 176, and ends with *Victor Lynn Lines v. State*, 199 Md. 468, 478, 87 A.2d 165, 171 (1952). *Wright, supra* note 20, at 150, n.76.

178. *Henderson, The Jury as Judges of Fact and Law in Md.*, 52 MD. ST. BAR REP. 186-188 (1947), giving the history of Article 25, § 5 of the *Maryland Constitution*. But see *Criminal Procedural Reform Achieved in Maryland*, 11 MD. L. REV. 319 (1951).

Massachusetts

The classic oral charge, with all its repetition and emphasis, is found amply illustrated here.¹⁷⁹ This commonwealth has not been a Common Law jurisdiction, strictly speaking, since a statute (borrowing the language seen in the Tennessee Constitution)¹⁸⁰ was in 1860 bulled through the state house in midnight fashion by the aggressive General Ben Butler.¹⁸¹ That act was in derogation of the common law as it had been accepted and adapted in Massachusetts, however, and accordingly has always been held down to the barest essence of its wording.¹⁸² One of its early interpretations said:

But a judge may "state the testimony"; and this can hardly be done without calling the attention of the jury to the weight and importance to be attached to particular facts. . . . To assist and guide the deliberations of the jury by such comments is no infringement upon their province, but often is a duty necessary to lead their minds to an enlightened and discriminating consideration of the case.¹⁸³

Since the last-mentioned statement is probably still "law" in Massachusetts, one might wonder if it is necessary to go further. It is well to do so, however, to demonstrate the extent to which state comparisons are relative matters—and to show that judgments as to a state's liberality rest largely in opinion. For instance, there was considerable feeling in Massachusetts in 1928 that its trial judges were unduly hampered. This was illustrated by a newspaper symposium on the subject of the restoration of common law judicial powers.¹⁸⁴ In the same direction, the late Dean Wigmore, in speaking of the summary without comment system, referred to a 1932 Massachusetts case as a "good example of the application of this weak-hearted compromise rule."¹⁸⁵

On the other hand, an articulate advocate of the federal system of charging, when introducing the new Maryland rule to the bar of that state, cited and discussed the Massachusetts cases as models of the tolerant interpretation for which the sponsors of the new rule hoped.¹⁸⁶

Supporting the position that Massachusetts is unrestricted is its

179. *Whitney v. Wellesley & Boston St. Ry.*, 197 Mass. 495, 496-501 (1908) (84 N.E. 95 is same case, but charge not set out). See VANDERBILT, *op. cit. supra* note 9, at 233.

180. See text at note 137 *supra*.

181. MASS. GEN. LAWS c. 231, § 81 (1932). See Hale, *History of the Statute Forbidding Judges to Charge upon the Facts*, 11 MASS. L.Q. 57 (1926).

182. See Hogan, *The Strangled Judge*, 22 VT. ST. BAR ASSN. 13 (1929), 14 J. AM. JUD. SOC'Y 116 (1930) (abbreviated reprint).

183. *Durant v. Burt*, 98 Mass. 161, 168 (1867).

184. *Should a Judge Charging a Jury be Allowed to Comment on the Evidence?* Boston Traveler, Oct. 1, 1928; 14 MASS. L.Q. 44 (1928) (reprint).

185. 9 WIGMORE, EVIDENCE § 2551 n.3 (3d ed. 1940), referring to Hohman v. Hemmen, 280 Mass. 526, 182 N.E. 850 (1932).

186. Soper, *supra* note 174, at 40-41 (1941).

concession that the judicial discretion as to the summary includes the important power to refrain altogether from touching on the facts when the court deems fit¹⁸⁷—as did the federal trial court in the Alger Hiss trial.¹⁸⁸ Furthermore, when a summary seems to have gone somewhat over the line, or when it appears that the trial court must have temporarily lost its judicial poise, there is not necessarily a reversal. The reviewing court may say:

We think it would have been better if the expressions had been more guarded, but when we consider the instructions as a whole . . . we are of opinion that no intentional argument or expression of opinion appears, and that there is no such error as would justify us in disturbing the verdict.¹⁸⁹

Maine

Prior to its 1874 statute,¹⁹⁰ the Maine cases had established the common law summing up approximately within the usual American limits.¹⁹¹ Although its statute was more elaborate in terms than that of Massachusetts,¹⁹² it met with the same cool reception accorded its counterpart in the Bay State.¹⁹³

The courts recognized that summarization under the statutory restriction was a task of delicacy, but felt that the judge was accordingly entitled to exercise some discretion as to its limits.¹⁹⁴ Judicial interpretations seemed in time to overshadow the written law.¹⁹⁵

187. *R. Dunkel, Inc. v. V. Barletta Co.*, 302 Mass. 7, 18 N.E.2d 377 (1938) (collecting cases). Note also in this connection the language of Sir Matthew Hale quoted in note 139 *supra*.

188. *United States v. Hiss*, 185 F.2d 822, *cert. denied*, 340 U.S. 948 (1950). See McCulloch, *The Earl Jowitt on the Hiss Case*, 40 A.B.A.J. 199, 201 (March, 1954).

189. *Cook v. Bartlett*, 179 Mass. 576, 580, 61 N.E. 266, 267 (1901) (charge set out at 179 Mass. at 578). In that case, the plaintiff sought recovery for loss of services of an adopted daughter by reason of her alleged seduction. The charge said that the jury might consider the likelihood of parents bringing the daughter here to testify falsely merely for money ". . . to her own disgrace, . . . perhaps not exactly selling the girl, but selling all they could ever take any pride in, in the child."

190. ME. REV. STAT. c. 212 (1874). The present form, ME. REV. STAT. c. 212, § 105 (1944), remains substantially unchanged.

191. *Hayden v. Bartlett*, 35 Me. 203, 204 (1853); *Dyer v. Greene*, 23 Me. 464, 470 (1844); *Ware v. Ware*, 8 Me. 29, 42 (1831).

192. ME. REV. STAT. c. 212, § 105 (1944), provides that:

During a jury trial, the presiding justice . . . shall not, during the trial, including the charge, express an opinion upon issues of fact arising in the case. . . .

193. The process of putting this statute in its place commenced with *State v. Benner*, 64 Me. 267, 291 (1874), and *Grows v. Main Central R.R.*, 69 Me. 412, 416 (1879).

194. *Jameson v. Weld*, 93 Me. 345, 357, 45 Atl. 299, 304 (1899); *York v. Maine Central R.R.*, 84 Me. 117, 128, 24 Atl. 790, 793 (1891); *Murchie v. Gates*, 78 Me. 300, 306, 4 Atl. 698, 701 (1886); *Virgie v. Stetson*, 73 Me. 452, 464 (1882).

195. *State v. Mathews*, 115 Me. 84, 86, 97 Atl. 824 (1916); *State v. Day*, 79 Me. 120, 125, 8 Atl. 544, 546 (1887). In *State v. Mathews* at 115, 97 Atl. at 825, the charge displays considerable sarcasm by the trial court in its discussion of a defense that the illegal "old cider" was in reality merely three gallons of vinegar that the defendant was going to sweeten and drink "with soda."

Simple inadvertences and slips of the judge were excused.¹⁹⁶ "Mere truisms" and "observations as to matters of experience" were held permissible in a case where the court remarked that defendant had testified to borrowing the property in question for five or six years which (the judge added) "is a long time to borrow things in ordinary communities."¹⁹⁷ A later case saltily said:

If the respondent felt that the justice in his charge "spoke daggers," the record discloses that there were no "daggers" used.¹⁹⁸

It had been decided at the outset that the statute simply meant that the judge should refrain from speaking of the facts in a manner implying his utterances to be entitled to obedience.¹⁹⁹ That position may have been tempered since,²⁰⁰ but not to an extent such as to raise any real doubt that Maine belongs to the White group.²⁰¹

Rhode Island

Since the respected Judge Otis of Missouri once suggested that Rhode Island is Intermediate, it is mentioned herein as a postscript to Group IV.²⁰² It is now at least clear that the unrestricted charge is often used by its trial justices, but whether the supreme court is seeking to curtail that freedom must be considered.

Several historical factors make the common law charge something less than a direct heritage, in unbroken line, from the early days of these plantations.²⁰³ Instructions cases are seen as early as 1858, however.²⁰⁴ Although the relative powers of court and jury were clarified substantially in 1902,²⁰⁵ there had meanwhile been enacted a statute giving the judge great latitude in his comments on the evidence.²⁰⁶ Presently one notices that in the nine months ending in

196. *Grows v. Maine Central R.R.*, 69 Me. 412 (1879).

197. *McLellan v. Wheeler*, 70 Me. 285, 286 (1879).

198. *State v. Mann*, 143 Me. 305, 307, 61 A.2d 786, 788 (1948).

199. *State v. Benner*, 64 Me. 267, 291 (1874). See *Allard v. La Plain*, 125 Me. 44, 46, 130 Atl. 737, 739 (1925).

200. *Desmond v. Wilson*, 143 Me. 262, 267, 60 A.2d 782, 785 (1948).

201. *State v. Jones and Howland*, 137 Me. 137, 140-142, 16 A.2d 103, 105 (1940); *Benner v. Benner*, 120 Me. 468, 469, 115 Atl. 202 (1921).

202. Otis, *supra* note 26, at 57.

203. See CONSTITUTION OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS Art. X, § 3 (1843) (expressly annulled by Article of Amendment, Art. XII (1903)). As to history of constitution, see *Gorham v. Robinson*, 57 R.I. 1, 12, 186 Atl. 832, 839 (1936).

204. *State v. Lynott*, 5 R.I. 295 (1858).

205. Opinion to the Senate, 24 R.I. 625, 58 Atl. 51 (1902). The Judges of Rhode Island in the opinion answered in the affirmative the question: "Has the General Assembly the power to establish inferior courts, and to authorize the judges thereof, not being judges of the Supreme Court, to preside at jury trials and instruct the jury?"

206. *State v. Quigley*, 26 R.I. 263, 269, 58 Atl. 905, 907 (1904), which construed R.I. GEN. LAWS c. 223, § 13 (1896). The latter is now R.I. GEN. LAWS c. 496, § 20 (1938). For a flagrant abuse of this latitude see the charge held improper in *Pompei v. Cassetta*, 63 R.I. 74, 77, 7 A.2d 198, 200 (1939): "No matter who gets this woman . . . he does not get any prize package. . . ."

March of 1953, three cases were appealed on the grounds that the charges had been unfair—and in all three there was reversal and remand.²⁰⁷

In two of them, the court simply failed to give the jury a fair picture of the respective positions of the parties in the light of their contentions and supporting evidence.²⁰⁸ The third showed a charge wherein the judge recounted his observations in very "folksy" fashion indeed.²⁰⁹ Because he drew unduly on his personal notions and extra-judicial experience, to the derogation of expert witness testimony, a clear example of unfair comment was presented.

Percentagewise, the trial justices are seen to have had a bad winter season in Rhode Island in 1952-53.²¹⁰ That score nevertheless need not evidence a campaign to hold down the superior courts. It may rather be taken to demonstrate that, even in a Common Law state, the reviewing courts will not hesitate to scrutinize the trial charge for unfairness, nor to strike down any verdict that might reflect an inaccurate, inept, or partisan charge.²¹¹

CONCLUSION

Recapitulation

The unrestricted category is now finally taken here as including the following thirteen: *California, Connecticut, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island and Vermont.*

The Intermediate group has dwindled to a thin grey line of five plus the unappraisable North Carolina—a round figure total of six. Of that half dozen, Alabama and Tennessee use no more than statements of theories and contentions. Utah and Wisconsin courts have no substantial review of the evidence whatsoever. The mandatory summary of North Carolina has proved to be a trap not only for the litigant but also for the harassed trial judge. Only in Minnesota is there any real use of review—and its judges have a supervised comment power for a margin of safety. But the comment power is

207. *McCreadie v. Biltcliffe*, 95 A.2d 458 (R.I. 1953); *Miller v. Bessette*, 94 A.2d 253 (R.I. 1953); *W.C. Viall Dairy v. Providence Journal Co.*, 89 A.2d 839 (R.I. 1952).

208. *McCreadie v. Biltcliffe*, 95 A.2d 458, 459 (R.I. 1953); *Miller v. Bessette*, 94 A.2d 253, 255 (R.I. 1953).

209. *W.C. Viall Dairy v. Providence Journal Co.*, 89 A.2d 839, 841 (R.I. 1952).

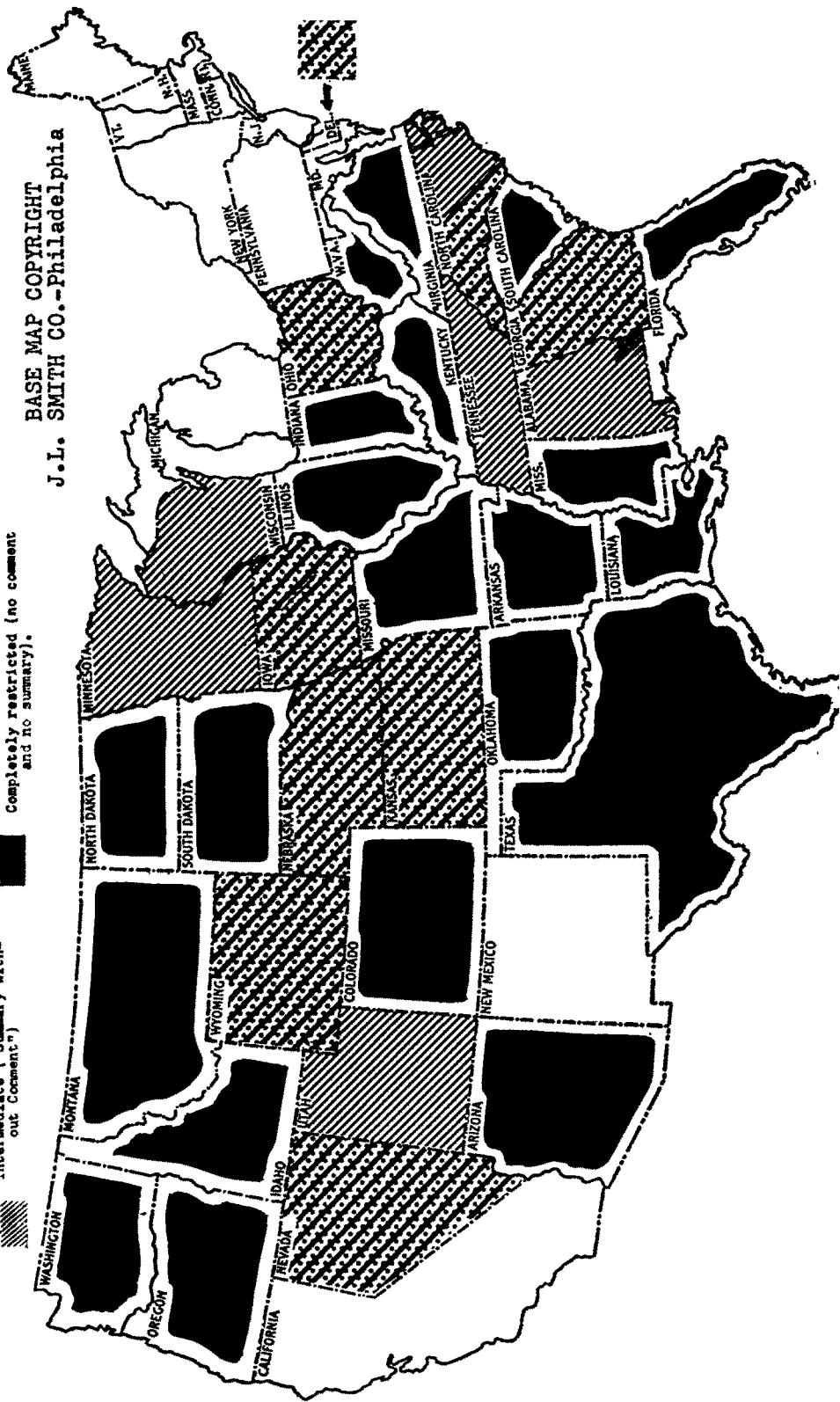
210. To wit: 0.000 as to this random series of cases. But in no one of the foregoing did the supreme court deny the power of the judge to make fair summation.

211. The average of affirmances as to challenged summations in the federal courts is high, of course. Otis, *supra* note 26, at 25-27. But even under that very liberal federal system, a reversal on these grounds is no novelty. See those cases at 9 WIGMORE, EVIDENCE § 2551 n.6,7 (3d ed. 1940), which include rebukes to the United States district judges, which Dean Wigmore attributes to the baneful effect of the opinion in *Querica v. United States*, 289 U.S. 466 (1933).

THE INSTRUCTING PROCESS : TRIAL JUDGE'S POWER TO COMMENT ON THE FACTS

-  Judge has considerable leeway
-  Intermediate ("Summary without Comment")
-  Ascertained in fact.
-  Ascertained in fact; restricted in fact.
-  Completely restricted (no comment and no summary).

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supposed always to be exercised subject to supervision and scrutiny in this country, and to be primarily useful only as a reserve of power.²¹² Thus only the fact that the permissible limits on comment in Minnesota are unclear justifies its exclusion from the minority (White) group.

The remaining eight of the assertedly Intermediate states have been placed, on the accompanying map, in the (bold-ruled-and-dotted) areas of those "restricted in fact," for the reasons already stated in the individual discussions. But the particular point at which the line is drawn between these and the (faint-ruled) Intermediate states is by no means considered vital. It has simply seemed that the restriction of the recently reaffirmed Delaware constitutional article²¹³ has just enough firmness to warrant placing Delaware behind the line which separates the more restricted from the less restricted. The reader's own sources of information may lead him to move the line in one direction or the other. Based on drawing the line there, however, it appears that the following are actually restricted as to the review and restatement of the evidence: *Delaware, Georgia, Iowa, Kansas, Nebraska, Nevada, Ohio and Wyoming*. Adding these to the twenty-one concededly restrictive states makes a total of some twenty-nine wherein no review of the evidence is permissible, or at least practicable. Then as to the previously discussed remainder of nineteen (six Intermediate and thirteen Unrestricted), it may safely be said that only in the White group of thirteen, plus North Carolina and Minnesota, is such practice in existence to any perceptible extent. The conclusion follows that the "clear but perfectly colorless presentation of the evidence" which the English writer decried is not a hardy species which thrives on confinement. Given rules which are designed to hold the charge exactly within the limits of the summary-without-comment specifications, the truncated summing up shrinks to something less than a review although, happily, seldom to the point of a mere reading of the pleadings.²¹⁴

Postlude

The two main schools of thought as to the judicial function are so far apart, as Judge Clark once suggested, that it is hard to find a basis for impartial discussion of their respective merits.²¹⁵ It is perhaps for that reason that virtually no objective discussion of the

212. Otis, *supra* note 26, at 15, 47 *et seq.*

213. DEL. CONST. Art. 4, § 19.

214. *Wallace v. Skinner*, 15 Wyo. 233, 249, 88 Pac. 221, 224 (1907); *cf. Nashville, Chattanooga & St. Louis Ry. v. Anderson*, 134 Tenn. 666, 185 S.W. 677 (1915).

215. Clark, *supra* note 21.

present problem is found.²¹⁶ Yet theoretically it might seem that common ground could be reached.

The impasse is seen to center at the flammable topic of "comment"—the very subject which this paper sought to avoid. Yet the use of the comment power, where it is permitted in the American system, is always subject to review—and such is the situation in the British Dominions, for that matter.²¹⁷ The strongest advocates of the federal or common law powers, furthermore, are the most vehement in their assertions, sometimes documented, that the comment prerogative is most rarely used.²¹⁸

The majority argument, on the other hand, is inspired by—and is built around—abhorrence of that comment power.²¹⁹ But it is seldom heard that there is anything undesirable about an impartial recapitulation of the evidence.

The law has always favored peaceful adjustment of seemingly irreconcilable contentions. Thus for the minority to give up the seldom-used residual power of comment, and for the majority to make the sacrifice of conceding a right to give an uncolored restatement of what has gone on at trial, would seem to make for a sensible settlement. As the discussion has shown, however, the brute fact is that this compromise has been tried since 1796, and has always failed. The compromise systems inevitably shrink into the custom of merely stating the pleadings, issues or contentions, or they expand into something substantially indistinguishable from the minority system. The unfairness of simply blaming the trial judiciary for the failure of these attempted compromises is attested by numerous cases in which reviewing courts admit the utter temerity of any charge which attempts comprehensive summary within the limits of a strict no-comment rule.²²⁰ And even a cynic could hardly deny that a trial judge has an almost fiduciary duty to avoid inviting technical appeals. Something more than a judge's selfish concern for his personal percen-

216. Enough of this literature has been cited herein *passim* to show that summary and comment is, to the contrary, usually treated as a fighting issue.

217. The most readily accessible collection of Dominion cases is in 9 WIGMORE, EVIDENCE § 2551 n.4 (3d ed. 1940). But in England, criminal appeal was not achieved until 1907 (KENNY, OUTLINES OF CRIMINAL LAW, 492, 496 (15th ed. 1936)), and in Scotland, not until 1926. See Trial of Oscar Slater, Appendix X, in NOTABLE ENGLISH TRIALS SERIES (4th ed. 1950).

218. VANDERBILT, *op. cit. supra* note 9, at 225.

219. Illustrations collected in the original version of Hogan, *The Strangled Judge*, 22 VT. ST. BAR ASS'N. 13, 19 (1929), and see Levenson, *Comment to the Jury by the Trial Judge, A Reply*, 21 ORE. L. REV. 168 (1942).

220. "When a trial judge has both the industry and the courage to undertake to so promote the cause of justice, we are far from suggesting criticism or disapproval." *Horr v. C.W. Howard Paper Co.*, 126 Wis. 160, 165, 105 N.W. 668, 671 (1905). See also the quotation from *Whitley v. State*, 38 Ga. 50, 74 (1868) in the Georgia discussion in Group II, *supra* note 102.

tage of sustained judgments thus discourages use of the intermediate power on his part.

Despite agitation for improvement, this deadlock remains.²²¹ The reform argument, invoking a sort of postliminium, says in effect: scrap the restrictions and there will be an automatic revival of the traditional powers of the trial judge, since they were of the essence of jury trial as at common law. The other side sits grimly tight or devises new legislative restrictions.²²² From this *cul de sac* there seems no easy escape, nor is it the proper function of a survey like this to try to locate the exit. Such attempt would at best be a brash one, since the province of the judge and the jury was not a new problem when *Bushell's Case* was decided almost three centuries ago.²²³ Few solutions could be advanced that are not already to be found in the vast literature on this subject.²²⁴

It is at least clear that the extent to which the courts of the several states permit a summary of the evidence is a relative matter, and one which is difficult to "peg" in specific categories. The controlling element is not necessarily a prohibition of such review, since most of the states herein discussed ostensibly permit it. Often some requirement such as strict insistence upon written-and-read instructions is the one which makes recapitulation of the evidence a mere matter of theory rather than practice.

When one looks at the general instructions phase of the charging process in isolation, as has been done here, it is at least superficially puzzling to find that requirements as to the mechanics of the charge are permitted to impinge upon the function which the instructions are expected to perform; the classic definition of the charge to the jury comprises statement of the issues, and the contentions of the parties with respect thereto, discussion of what the contestants have done by way of introduction of testimony and other evidence to support those contentions, and the laying down of the applicable rules of law.²²⁵ Yet most states have modified that definition, and the writers on procedural reform, almost to a man, refuse to stomach those restrictions. Their objections take many forms, but probably have one common denominator—a rejection of one tacit assumption

221. *Kolkman v. People*, 89 Colo. 8, 300 Pac. 575 (1931); *People v. Kelly*, 347 Ill. 221, 179 N.E. 893 (1932).

222. Brand, *A Threat to the Federal Judiciary*, 35 J. AM. JUD. Soc'y 164 (1952).

223. *Bushell's Case*, Vaughan 135, 124 Eng. Rep. 1006 (C.P. 1670), discussed in Blume, *Origin and Development of the Directed Verdict*, 48 MICH. L. REV. 555 (1950).

224. Chesnut, *Instructions to the Jury*, Judicial Administration Monographs, Series A, #6, 3 F.D.R. 113 (1942) (reprint); 1 RANDALL, *INSTRUCTIONS TO JURIES* iii (1922).

225. FIELD AND KAPLAN, *MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE* 101 (1953).

of the modified systems. That is, they deny the latter's basic postulate, which is that some workable system can be devised to take the place of judicial discretion as to the method of performing this judicial duty. Adhering to a common law concept, they insist that almost by definition of the term *court of record* there can be no substitute for the judicial discretion of such court. Common to most of their criticisms are the compelling arguments to be made from the history of the manner in which the limitations arose. Times have now changed, they point out, and the reasons for the restrictive rules have disappeared.

Still looking only at the trial judge's power to recapitulate the evidence, it appears that the foregoing arguments have not brought about very much change in the past quarter century. This "glacial progress" is noteworthy only by comparison to the force and authority behind the concerted effort for reform as exemplified by the promulgation of the American Bar Association's Minimum Standards of Trial Practice. It is believed, however, that the movement cannot be accurately appraised by looking at this single element of the charge in isolation. One must seek further, picture the instructing process as a whole, and view it broadly as a joint function of the court and the parties. Regulation of the system of instructing must be seen for what it is, a matter of the division of duties and responsibility between judge and counsel. At common law, the power of the court was great, but so was the responsibility of the advocates for the parties. If counsel were to be in position to complain of errors or omissions in the charge, it was essential that they had called such alleged mistakes or inadequacies to the attention of the court in time to have given it opportunity to have made such corrections.²²⁶

The trend of the nineteenth century pattern of state court restrictions was clearly toward reduction of the judicial power, and also—in many instances—toward a lessening of the common law responsibility of counsel. Delaware, for example, first restricted the scope of the charge by constitution, as seen in the earlier discussion (Group III). Thereafter a practice developed, admittedly in the teeth of that common law tradition, whereby a general objection to the charge sufficed to preserve many grounds of error with respect thereto.²²⁷ Quite recently, however, Delaware adopted trial rules modeled after the Federal Rules of Civil Procedure—Rule 51 of which codifies the common law responsibility of counsel.²²⁸ And in states scattered all

226. See *Buckley v. Johnson & Co.*, 41 Del. (2 Terry) 546 (1942), holding that the common law rules as stated in 2 CHITTY, GENERAL PRACTICE 913, and 2 TIDD, PRACTICE 934 (1856), had been modified by Delaware common law.

227. *Buckley v. Johnson & Co.*, *supra* note 226.

228. DEL. CODE ANN., *Rules of the Superior Court (civil)*, Rule 51, p. 411 (Adopted July 1, 1947). Federal Rule 51 is found in 28 U.S.C.A., Rules; and see Chesnut, *Instructions to the Jury*, 3 F.D.R. 113, 117 (1944).

over the country there are such mutations in varying degrees. Seemingly regardless of the pre-existent system of instructing, the federal rules of procedure are being adopted by state after state, and Rule 51 with them.²²⁹ It is believed that the next step in evaluating attempts to improve the charge to the jury must consider the effect of this trend toward regulation of procedure by such rules. It is possible that a changed balance of responsibility between court and counsel is emerging.²³⁰ All would admit that there is a difference between "muzzling" a judge by forbidding him to summarize or comment on the evidence, on the one hand, and an insistence, on the other hand, that his instructions be models of perfection quite regardless of whether counsel requested correct or incorrect instructions—and regardless of whether they made other than a dragnet objection before the jury retired. It seems obvious that it is less disastrous to justice to forbid any sort of summing-up than to give counsel open season, as someone said, to hunt for error in the charge at his convenience after verdict. When the change in the American pattern that is being brought about through the model of the Federal Rules of Civil Procedure is evaluated, it may well be found that considerable progress toward improvement of the instructing stage of trial practice is being made by what is sometimes called the "flanking attack."

Completing the circle, however, and returning to the power to undertake the difficult and somewhat thankless task of clarifying the facts for the jury, there is not much indication that the reform movement's "frontal attack" has made itself widely felt. In many state courts the bench is not permitted to make much reference to the facts, and in more the judges have found it indiscreet to volunteer (regardless of theoretical powers) much of what Judge Soper called the sorting out of tangled skeins of controversy.²³¹ In this connection, these somewhat plaintive words from a Delaware charge seem apposite:

The Court are not allowed to comment on the testimony, and it is of such character that we shall not undertake to review it, because it might seem like commenting. We hope, therefore, that the jury will be able to remember and understand the testimony with sufficient clearness to determine whether the note sued on was a promissory note. . . .²³²

229. See MILLAR, *op. cit. supra* note 80, at 62 for a prediction that they will eventually become the pattern of state procedure of the entire country.

230. The third article of this series on Instructions (the present paper being the second) will consider the so-called Duty to Charge in the light of the respective responsibilities of court and counsel.

231. Soper, *The Charge to the Jury*, 1 F.R.D. 540, 24 J. AM. JUD. Soc'y iii (1940).

232. *Gibson v. Gillespie*, 34 Del. (4 W.W. Harr.) 331-344, 152 Atl. 589, 595 (1928).

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