

The Charge to the Jury in Maryland Under the New Rules of Practice and Procedure

Morris A. Soper

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Civil Procedure Commons](#)

Recommended Citation

Morris A. Soper, *The Charge to the Jury in Maryland Under the New Rules of Practice and Procedure*, 6 Md. L. Rev. 35 (1941)
Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol6/iss1/4>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

THE CHARGE TO THE JURY IN MARYLAND UNDER THE NEW RULES OF PRACTICE AND PROCEDURE

By MORRIS A. SOPER*

For a long generation the insignificant and ineffective part played by the Maryland state judge in the jury trial has been the object of trenchant criticism and attack. Powerful addresses have shown that the judge's instructions on the law, consisting of technical requests or prayers prepared by counsel, have been not only the greatest single source of reversible error but oftentimes utterly useless and unintelligible to the body to whom they were directed.¹ Instructions on the facts have been conspicuous by their complete absence; and as Governor Ritchie said of our State practice, when as a young lawyer his great talents had already been recognized:²

"The Court makes no comment whatever upon the evidence; says nothing upon its weight, however strong or weak that may be; nothing about the credibility of witnesses, however plainly it may appear that some are truthful or others untruthful; and refrains absolutely from giving the jury any benefit from the peculiar ability which the court's training and experience must give him of divining truth in the midst of improbable or inconsistent testimony."

How this departure from the practice at common law that was Maryland's heritage came about, the researches of eminent lawyers of our time have failed to disclose.³ Neither constitutional nor statutory enactment require the practice that became firmly established more than a century ago and has since been continued under the decisions of the highest state court. Today, however, an important change, effective September 1, 1941, has taken place under

* A.B., 1893, Johns Hopkins University; LL.B., 1895, University of Maryland; United States Circuit Judge for the Fourth Judicial Circuit.

¹ Albert C. Ritchie (1908) 13 Maryland State Bar Reports 130; Charles McHenry Howard (1926) 31 Maryland State Bar Reports 120; Charles Markell (1937) 42 Maryland State Bar Reports 72; Judge Robert F. Stanton (1938) 43 Maryland State Bar Reports 35.

² Ritchie, *op. cit. supra*.

³ Howard, *op. cit. supra*, 127, *et seq.* Markell, *op. cit. supra*, 87, *et seq.*

the General Rules of Practice and Procedure adopted by the Court of Appeals of Maryland pursuant to Chapter 719 of the Acts of 1939.⁴ Trial Rule 6(b) now provides:

(b) *Instructions.* In its instructions to the jury, which may be given either orally or in writing or both, the Court, in its discretion,

- (1) may instruct the jury upon the law of the case, either by granting requested instructions or by giving instructions of its own on particular issues or on the case as a whole or by several or all of these methods, but need not grant any requested instruction if the matter is fairly covered by instructions actually given; and
- (2) 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.

Thus the Court of Appeals has taken down the barriers which it erected long ago, and the extent to which the trial judge may now go in his charge to the jury rests very largely in his discretion. Under these circumstances it has been suggested that some comment upon the practical operation of the new procedure by one with judicial experience in state as well as federal courts would not be out of place; and for this reason these pages have been written.

Since the initiative rests with the trial judge, it is desirable first to look at the matter from his standpoint. Although the new departure lays an increased burden upon him, it may be assumed that he will not be reluctant to make the necessary effort to bring his experience and training to the assistance of the jury. Too long it has been said that the average judge is not competent to perform this difficult task, for even his severest critic must

⁴ Md. Code (1939) Art. 26, Sec. 35. The Rules, as promulgated by the Court of Appeals, together with explanatory notes, were published in June, 1941, under the auspices of the various Bar Associations.

admit that he is as well equipped to aid the jury as the average lawyer who practices in his court. It is more to the point to say that it is easier to aid the trier of facts to reach the correct conclusion by making an impartial statement of the facts than it is to convince him by partisan advocacy. Nor will it be too difficult for the judge, in view of his special qualifications and the assistance which counsel are always eager to render, to state the law of the case in plain and simple terms far more helpful and intelligible to the jury than the technical, hypothetical and sometimes verbose instructions with which for the past century Maryland jurors have been served. The difficulties need not be minimized. They are in fact very real for it is not easy to be didactic in the field of the law, as every one has found who has ventured into law school work. But the new responsibility will stimulate the judge to a far greater interest in his trial work and in most cases will develop a skill more than equal to the task; and if here or there an incumbent who has come to regard the bench as a haven of rest is disturbed, even then the administration of justice will be benefited.

SUMMING UP THE EVIDENCE

The most radical departure from the prior practice is contained in that portion of the rule which permits the judge to sum up the evidence, so long as he instructs the jury that they are to determine for themselves the weight of the evidence and the credibility of the witnesses. Obviously, this provision does not purport to define with precision the permissible limits of the charge upon facts; and experience in applying similar legislation demonstrates that some room has been left for interpretation by the appellate court. Until that body has spoken, it is safe to assume that the trial judge will not go to extremes in seeking to find the limits of his authority. He will not state his opinion on the weight or credibility of the evidence or the merits of the cause, coupling his opinion with the statement that it is not binding on the jury, in the hope that the high court will adopt the federal practice in toto.

Indeed, such behavior would be unwise even if it were expressly authorized. He is an unwise judge under any system who so far forgets his duty of impartiality and invades the province of the jury. The facts in any case may be left to speak for themselves and no judge brought up in the Maryland tradition is likely to do otherwise.

On the other hand, one may venture the opinion that the Maryland judge is not now expected to confine himself to a mere recital or recapitulation of the evidence. The opposite is indicated by the immediate juxtaposition in the rule of the requirement that the jury be warned that they must decide for themselves; for this caution is unnecessary if the judge withholds all comment upon the testimony. Indeed, the phrase, to sum up the evidence, customarily means something more than a mere summary of what the witnesses have said. It envisages a definition and simplification of the issues at the outset, and "observing where the question and knot of the business lies;"⁵ it includes a statement of the conflicting contentions of the parties with reference to the evidence adduced to support them and the inferences to be drawn therefrom; and it permits calling the attention of the jury to the possible bias of the witness or such other relevant considerations as may affect the value of the testimony, leaving the final decision on this, as well as on all other questions of fact, to the determination of the jury.

Some light is thrown upon the meaning of the new rules by the explanatory notes published with them. We are warned by Chief Judge Bond of the Court of Appeals in the preface to the rules that while the explanatory notes "are not in any sense an official construction or interpretation," they are intended to inform the profession "of the purposes, scope and functions of the various rules and to aid in a better understanding of them." Turning to the notes under Rule 6, we find that reference is made to the deficiencies of the prior practice and to the changes recommended by leaders of the Maryland Bar, and there is quoted the following significant passage from the speech

⁵ 2 HALE, HISTORY OF THE COMMON LAW (5th Ed., 1794), Chap. 12, p. 147.

of Albert C. Ritchie in 1908, illustrating what the proposed changes were designed to accomplish:⁶

“It is not proposed for one instant to permit the Court to tell the jury what they must find, nor even to tell the jury what, in the Court’s judgment, they ought to find, or what evidence in the Court’s judgment they should adopt and what they should reject. What is proposed is this:

“At the conclusion of the case let the judge briefly and compactly sum up and recapitulate the evidence in all its bearings; let him give the jury the benefit of his advice and counsel regarding it; let him indicate to them the inferences which his own trained mind draws from it; let him show wherein it conflicts; show the bias of certain witnesses, and the disinterestedness of others; show the circumstances which should induce the jury to regard certain evidence with caution, other evidence with favor; call attention to the fact that some testimony is uncontradicted, other testimony uncorroborated. In a word, let the Court draw upon the fund of his experience, his training and his intelligence, as an aid to the jury in their deliberations, and thus use his knowledge and his faculties where they can do more good in the promotion of justice than they ever could do sealed tight in the judicial breast.

“Then let the Court follow this up with a clear statement that the comments he has just made are in no sense binding upon the jury; that the jury are after all the final judges of the facts; that they must find such verdict as to them seems proper, and if their own good judgment does not adopt the suggestions the Court has made, then it is both their right and their duty to follow their judgment, and disregard the suggestions of the Court.”

In paragraph four of the notes under Rule 6, the following appears:

“Under this rule, therefore, the Judge, without encroaching on the proper province of the jury, may assist it in performing its functions. By reviewing the evidence he may call to their attention the basic questions to be decided, and by oral instructions he can

⁶ Ritchie, *op. cit. supra*, n. 1.

explain the law applicable to the case in plain and understandable language and show how it applies to the various alternatives presented by the evidence. Both changes should make jury trial a more efficient instrument for the administration of justice."

It seems obvious that such an interpretation will be given to Rule 6 as will effectuate the remedial purpose that inspired its passage.

The courts in other states have been inclined to a liberal interpretation of constitutional or statutory provisions in this field. A typical provision, more restrictive on its face than Rule 6 now under consideration, is that "Judges shall not charge juries with respect to matters of fact but may state the testimony and declare the law." It has been held in Massachusetts that such an enactment does not forbid comment upon the evidence. Thus in *Whitney v. Wellesley and Boston Street Railway*,⁷ a suit for personal injuries suffered by a passenger by the breaking of a seat in a railway car, complaint was made that the judge dwelt unduly on the circumstance that the plaintiff testified to an injury to the right leg while the defendant's doctor shortly after the accident located the injury in the left leg. The Supreme Court said:

" . . . In the construction of the statute it uniformly has been held that, in charging juries, the judge, although prohibited from stating his opinion as to the credibility of witnesses, may sum up the testimony according to his recollection, submitting its effect, however, to their consideration and judgment, and leaving to them for decision all issues of fact within their province. He may elucidate the proper application of the legal principles involved by illustrations drawn from common experience, or by reference to cases where similar questions have been decided, and define the degree of weight which the law attaches to a whole class of testimony. In any clear analysis of the evidence, however impartial, the attention of the jury necessarily must be directed to the weight and importance of particular facts which they may find to have been proved. If an unbiased analytical state-

⁷ 197 Mass. 495, 502, 84 N. E. 95 (1908).

ment of the testimony and of the law distinctly indicates the party who is entitled to prevail, this furnishes no just reason for the defeated party to complain, either of the method employed or of the adverse verdict. Besides, it is not a violation of the constitutional requirement that judges shall be as free, impartial and independent as the lot of humanity will admit, if the instructions, while judicially fair, are comprehensively strong, rather than hesitatingly barren or ineffective, and neither the tone of a charge nor the form of verbal delivery are of themselves ground of exception, if no error of law appears. In a word, the judge who discharges the functions of his office is, under the statute as well as at common law, the directing and controlling mind at the trial, and not a mere functionary to preserve order and lend ceremonial dignity to the proceedings."

Again, in *Hohman v. Hemmen*,⁸ the judge was held not to have transgressed the statute by referring to facts which might have a bearing upon the weight to be given to the testimony of certain police officers. The court said:

"This statute has been interpreted as restraining judges from stating 'their own judgment or conclusion upon matters of fact', and as including within this prohibition expressions of opinion as to the credibility of particular witnesses, and as to the weight to be given to evidence when the law 'does not define the degree of weight to be attached to it.' The statute, however, provides expressly that judges 'may state the testimony,' and does not restrain them from furnishing to juries 'guides or illustrations . . . as to weighing the evidence of witnesses, and as to tests by which their reliability or credibility may be determined.'"

If comment of the kind approved in these cases is permissible where the judge is expressly forbidden to charge as to the facts and is authorized merely to state the facts, a liberal interpretation of the authority of the Maryland

⁸ 280 Mass. 526, 529, 182 N. E. 850 (1932). See also, *Johnson v. Foster*, 221 Mass. 248, 108 N. E. 928 (1915); *Fegan v. Quinlan*, 256 Mass. 10, 13, 152 N. E. 97 (1926); *Richards v. Munro*, 30 S. C. 284, 9 S. E. 108 (1889); *State v. Addy*, 28 S. C. 4, 13, 4 S. E. 814 (1888); *Norris v. Clinkscales*, 47 S. C. 488, 505, 25 S. E. 797 (1896); *McClellan v. Wheeler*, 70 Me. 285 (1879).

judge "to sum up the evidence" is clearly justified. Indeed, it was held in Tennessee, in *Ivey v. Hodges*,⁹ that "summing up" is indicative of the English practice that allows the judge to express an opinion on the merits of the case if he tells the jury that his opinion is not binding upon them. The court said:

"The 9th section of the 6th article of our constitution provides, that 'Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law.' This provision arose out of the jealousy with which our ancestors always looked upon any attempt on the part of the courts to interfere with the peculiar province of the jury, the right to determine what facts are proved in a cause, and to put a stop to the practice of summing up, as it was and is yet practiced in the courts of Great Britain and in all probability in the colonies before the revolution; and which consists in telling the jury not what was deposed to, but what was proved. This the framers of our constitution considered a dangerous infraction of the trial by jury, and have prohibited it by express terms."

Bearing in mind these illustrative decisions and particularly the terms of the rule as explained by the accompanying notes, it is not unreasonable to expect that the trial judges will feel free to charge on the facts in the manner most helpful to the jury.

INSTRUCTIONS ON THE LAW

In the same spirit the task of giving instructions on the law will doubtless be approached. The innovation here does not consist in the abandonment of written prayers, setting forth the instructions on the law desired by counsel, but rather in the use to which the prayers may be put. The introductory paragraph of the rule provides:

(a) *Prayers.* At the close of the evidence or at such earlier time during the trial as the Court reasonably directs, any party may file with the Court written prayers that the Court instruct the jury on the law as

⁹ 23 Tenn. 154 (1843).

set forth in the prayers, and shall furnish to all adverse parties copies of such prayers.

As we have seen, paragraph (b) of Rule 6 gives the judge discretion to instruct the jury by granting (or modifying) these requested instructions; or by giving instructions of his own, or by following both of these methods, and in any case he may give his instructions orally or in writing or both. The practice of giving instructions on the law by adopting or modifying prayers prepared by the attorneys is so well known to the legal profession in Maryland, and the inherent defects and dangers of the method have been so often discussed that nothing need be added here. Accordingly, attention will be directed to the questions likely to arise when the judge formulates a comprehensive charge, including his summing up of the facts, and his instructions on the law, and gives it to the jury, orally or in writing.

It is to be expected that at the close of the evidence, if not before, the judge will follow the usual salutary practice of asking counsel to submit the propositions of law which they desire him to include in his charge. It is likely that counsel will prefer to offer formal prayers, as has been their custom, setting out with precision the applicable rules of law in a hypothetical framework of facts. The judge may incorporate one or more of the prayers, as offered, in his charge, accompanying them with explanatory comments, or as is not infrequently and, some think, preferably done, he may reject all of the prayers, and yet use in his own words such of the offered material as constitutes a correct exposition of the law. The jury will more easily understand and more readily apply the rules of the law if they are couched in simple colloquial terms, with appropriate illustration and application to the facts of the controversy. Any lawyer, however able, who attempts to read the black letter of the Restatements of the Law, prepared by the leaders of the profession under the direction of the American Law Institute, realizes how difficult it is to understand the text without reference to the accom-

panying comment. How much more are jurors in need of lucid explanation. Moreover, there is an obvious advantage in a charge which contains all of the comments on the facts and all of the instructions on the law in one coherent statement.

OBJECTIONS TO THE CHARGE

The method of taking objections to the charge is covered in paragraph (c) of the rule as follows:

(c) *Objections.* Before the jury retires to consider its verdict, any party may object to any portion of any instruction given or to any omission therefrom or to the failure to give any instruction, stating distinctly the portion or omission or failure to instruct to which he objects and the specific grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Objection may be made because of what is included in a charge and because of what is omitted therefrom; and failure to give an instruction is expressly made a ground of objection. It is clear, however, that the mere failure of a judge to include in his charge a prayer as drawn by counsel is not necessarily reversible error, even though it correctly sets out the law. This is because paragraph (b) (1) of the rule authorizes the judge to prepare his own instructions, and if these contain the substance of the prayers that are correctly drawn, there is no error.

Objections of counsel must be addressed to the charge as given. An objection may of course be based upon the failure of the judge to cover in his charge the substance of a prayer; but the objection, to be considered on appeal, must refer not only to the prayer in question but must state in addition the specific grounds of error involved in its rejection. In other words, counsel must not only object to the failure to include the material contained in the rejected prayer, but must tell the judge why his action is erroneous. This is true not only because paragraph (c) requires that counsel shall in each case state "the specific

grounds of his objection," but because of the express provisions of paragraph (d) which is as follows:

(d) *Appeal.* Upon appeal a party, in assigning error in the instructions, shall be restricted to (1) the particular portion of the instructions given or the particular omission therefrom or the particular failure to instruct distinctly objected to before the jury retired and (2) the specific grounds of objection distinctly stated at that time; and no other errors or assignments of error in the instructions shall be considered by the Court of Appeals.

In this connection one should bear in mind the provision in paragraph (b) (2), which is most significant of the attitude of the Court of Appeals, that "an oral charge need not comply with the technical rules as to prayers." By "oral charge," the charge prepared by the judge, whether oral or written, as distinguished from the written prayers of counsel, is evidently intended. From the standpoint of the jury the charge is oral whether it is read from a prepared paper or is delivered extemporaneously by the judge from his notes. It can hardly be supposed that strict technical accuracy is required in one case but not in the other. An error to be noticed must therefore be substantial. Moreover, it must be apparent to counsel and must be pointed out to the judge before the jury retires. The Court of Appeals adheres to the salutary and well established rule that an error which is not noticed by appellant's attorney can hardly have prejudiced his case with the jury. The elimination of reversals based on mere technical errors is clearly indicated. For example, if an instruction is technically incorrect in that it does not charge all possible theories of the case or states an abstract proposition of law, or assumes or ignores or unduly emphasizes a material fact, it will be held to be harmless error unless the defect is called to the attention of the trial judge in time to correct it.

Counsel are saved embarrassment and possible prejudice by the provision of the rule entitling them to an opportunity to make their objections to the charge out of

the presence of the jury. The method of making objections is new and as we have seen it does not consist as heretofore in merely noting an exception to the adverse action of the judge on the written prayers. The particular part of the charge complained of must be pointed out and the specific error therein must be indicated. The objection of counsel is usually made orally and incorporated in the stenographer's notes. As pointed out by one with wide experience as a trial lawyer in both state and federal courts, this practice presents no real difficulty:¹⁰

“. . . Competent trial counsel can easily follow the charge as given and note the substantial objections which may arise from his point of view on the charge as given. It is not necessary and indeed is futile to undertake to make specific objection to mere matters of phraseology or of small and immaterial matters. Nearly every case depends upon not more than two or three main points. If the trial judge has taken a view contrary to counsel's position on these points, it is easy enough to note the special exception thereto and the reasons therefor. Indeed it is almost impossible to fail to note the important points on which the judge has ruled against the lawyer's contention. The purpose of the special exceptions is to give the judge an opportunity to correct his charge in any particulars called to his attention before the jury retires to consider their verdict. And only objections so specifically made with the grounds therefor will be a basis for an appeal.”

TIME AND FORM OF CHARGE

The rule does not indicate whether the judge's charge should be given before or after the argument of counsel. Practice in this respect differs in various jurisdictions, and while in most places the charge follows the argument, and is required to do so by the Federal Rules of Civil Procedure, the other method is used by a substantial number of courts. Each method has its adherents who usually prefer the practice to which they are accustomed. Many

¹⁰ Judge W. Calvin Chesnut, Maryland State Bar Association, June 27, 1941, *The Daily Record*, June 28, 1941.

think that it is of advantage for the judge to speak last as he will then have had the benefit of all that can be said by the advocates for their respective sides and can also correct, within the limits of his authority, any mistakes that counsel may have made. On the other hand, much benefit is derived by the jury, especially in a complicated case, if the first person to address them after the evidence is all in is a disinterested and impartial expert qualified to point out the gist of the controversy and to arrange the evidence in a systematic and orderly fashion. Under this method counsel are fully informed of the judge's views on the law and the facts before they speak; and this advantage is substantial, although it is not so great as it may seem, since it is customary to give counsel advance information of the substance of the charge when it follows the argument. If the judge speaks first, and competent stenographers are available, there may be time to transcribe the charge during the argument, so that without delay the jury may take the written charge with them to their room. The rule indicates that it is within the discretion of the judge to reduce his remarks to writing and hand them to the jury. Undoubtedly the practice of charging the jury before argument is more nearly akin to the practice to which Maryland lawyers are accustomed, and it was in vogue in the United States Courts in Maryland prior to the adoption of the new Federal Rule. On the other hand the desirability of uniformity should not be overlooked.

The arrangement of the charge must be left to the discretion of the individual judge. Some comment as to an order of presentation, which has been found by experience to be useful, may perhaps be permissible. It is well to begin with some account of the respective functions of court and jury, and the duties they are called upon to perform; but comment on this matter may be brief, since the average juror knows or quickly learns what he is expected to do. The general nature of the controversy, as shown by the pleading and the prayers, and developed by the testimony, may then be explained. This may be fol-

lowed by a statement in general terms of the rules of law involved; for example, if it be a case of personal injuries, the fundamental rules of the law of negligence may be set out.

Next, the judge should sum up the evidence, performing thereby the most important duty of all in some respects, since it is the evidence that gives peculiar character to the case. It is not usually desirable to review the testimony in detail. It is sufficient to state the respective theories that the parties seek to establish with a condensed account of the supporting evidence, emphasizing the testimony of important witnesses, and the reasonable inferences to be drawn therefrom. In this connection the jury may be furnished with guides or tests, such as the influence of bias or personal interest, that throw light on the value of the testimony. The judge should not be deterred by the fear that in the course of the charge it may appear that plaintiff or defendant has the better case. If the evidence is fairly arrayed, first for one and then for the other, any preference aroused in the minds of the jury springs from the inherent nature of the case and not from the partiality of the judge. Always the judge may take the precaution of stating that the tendencies indicated by the evidence are those for which the parties respectively contend, always he will tell the jury that they are the sole judges of the facts, and always he will make the necessary corrections at the end of the charge, when requested by counsel to do so.

The privilege and duty of charging the law in simple understandable terms should also be accepted without hesitation. The judge need have no fear that his deliverance will be condemned because it is not phrased in formal, technical language, or because each sentence separated from the context does not state a rule of law completely with all its exceptions and qualifications. Such a feat, well nigh impossible, would have small practical value, if performed. The jury needs to have its attention called to the substance of the rules in every day language, with application to the facts of the instant case, and, if pos-

sible, with pertinent illustrations. Here too the judge may expect helpful suggestions from counsel at the end, which will enable him to correct errors of commission and omission. Finally, the judge may be reassured by the evident purpose of our highest court to ascertain in each jury trial under review, not whether all the refinements of the law have been observed, but whether justice in a practical sense has been done.