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A PLEA FOR A RETURN TO RULE 51 OF THE FEDERAL RULES OF CIVIL PROCEDURE IN NORTH CAROLINA

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In May 1953, a fourteen year-old boy was seriously and permanently injured while attending a picnic at Pullen Park in the City of Raleigh. In October of that year he brought suit. In October 1956, a jury determined that the injury was proximately caused by the negligence of the city in its maintenance of the Park and fixed damages at \$32,500.00. The city appealed, and on June 28, 1957, a new trial was ordered in *Glenn v. City of Raleigh*¹ by the supreme court. On retrial of the case in September 1957, there was again a verdict for the plaintiff, but at the lesser figure of \$25,000.00. At this writing, it is understood that another appeal is in the offing.

Why should this case require two trials? Is there any assurance that the second result, if, indeed, it stands, is any more entitled to our respect than the first? This would conceivably be true if the error that necessitated the new trial had involved the issue of damages. But it did not. Nor was the error attributable to any lack of legal knowledge in the trial judge. He had correctly decided the main point at issue—that there was no sovereign immunity protecting the city from liability in this case. He had, for all that appears, correctly ruled on numerous questions concerning the admissibility of evidence. He had successfully skirted the hazards of the prohibition against comment, although he was said to have given the contentions of the parties “in detail.” Moreover, he had correctly expounded to the jury the *law* of negligence and proximate cause. Indeed, the supreme court said that he had done so “elaborately.” But still there was error because—alas—he, the trial judge, had “failed to declare and explain the law upon the evidence given in the case.”²

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¹ 246 N. C. 469, 98 S. E. 2d 913 (1957).

² *Id.* at 478, 98 S. E. 2d at 919. The trial judge, aware of the hazards facing him, addressed two separate inquiries to counsel towards the end of his charge. The first, four pages from the end, was: “Is there anything else with respect to the evidence?”, addressing both counsel by name. Both responded “No.” The second, one paragraph from the end, was: “Anything else, gentlemen?” To this inquiry, there was also a negative response. Transcript of Record, pp. 135, 139, *id.* There was a time when the judge’s precaution would surely have foreclosed an appeal based on an omission to charge. See *Harrison v. Chappell*, 84 N. C. 258, 263 (1881) (Identical circumstances. “If any objection was to be taken to the charge of the Court, then was the proper time to do so, and the failure to do it then was an assent to the charge . . .”).

Thus, the offender was exposed. The court's arraignment of him continued:

. . . . Nowhere in the charge did he instruct the jury what facts it was necessary for them to find to constitute negligence on the part of the defendant. Nowhere in the charge did the Trial Judge instruct the jury as to the circumstances under which the first issue should be answered in the affirmative, and under what circumstances it should be answered in the negative.

The provisions of G. S. 1-180 require that the Trial Judge in his charge to the jury "shall declare and explain the law arising on the evidence in the case," and unless this mandatory provision of the statute is observed, "there can be no assurance that the verdict represents a finding by the jury under the law and on the evidence presented." *Smith v. Kappas*, 219 N. C. 850, 15 S. E. 2d 375.

The chief purpose of a charge is to aid the jury to understand clearly the case, and to arrive at a correct verdict. For this reason, this Court has consistently ruled that G. S. 1-180 imposes upon the Trial Judge the positive duty of declaring and explaining the law arising on the evidence as to all the substantial features of the case. A mere declaration of the law in general terms and a statement of the contentions of the parties, as here, is not sufficient to meet the statutory requirement. *Hawkins v. Simpson*, 237 N. C. 155, 74 S. E. 2d 331, where 14 of our cases are cited. In *Lewis v. Watson*, 229 N. C. 20, 47 S. E. 2d 484, this Court said, quoting from Am. Jur.: "The statute requires the judge to 'explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relations of the particular evidence adduced to the particular issue involved.' 53 Am. Jur., Trial, section 509."

The statute to which the court refers is a most venerable one. Since 1796, the General Assembly has coupled with the prohibition against comment by the trial judge the following prescription: ". . . [B]ut he shall declare and explain the law arising on the evidence in the case."³

³ The original version of the statute was: "It shall not be lawful for any Judge, in delivering a charge to the petit-jury, to give an opinion whether a fact is fully or sufficiently proved, such matter being the true office and province of the jury; but it is hereby declared to be the duty of the Judge in such cases, to state in a full and correct manner, the facts given in evidence, and to declare and explain the law arising thereon." Laws of 1796, c. 4, § 1 (Iredell 1799). This was altered in the Revisal of 1854, c. 31, § 130 (omitting the first clause) as follows: ". . . [B]ut he shall state, in a full and correct manner, the evidence given in the case, and declare and explain the law arising thereon." This language endured until 1949 when it was amended to read: ". . . [B]ut he shall declare and explain the law arising on the evidence given in the case. He shall not be required to state such evidence

The court, in the passage quoted above, does not profess to do more than state what the law now is. Of the fourteen cases referred to, not one is more than thirty-two years old, although a criminal case⁴ dating back forty-one years is also mentioned in the *Hawkins* opinion. But G. S. § 1-180 is one hundred sixty-one years old, and it is not too late, one must believe, for the interpretation it received in its first one hundred twenty years to have a relevance, both for the court and for the General Assembly. This is especially true when one ponders such a disaster in the administration of justice as the *Glenn* case, or the court's remark that "G. S. 1-180 . . . is, perhaps, the most often cited statute on either criminal or civil appeals,"⁵ or Chief Justice Ruffin's denunciation of a "construction literal" as "absurd,"⁶ or the turgid protest, "Oh, C. S. 564 [now G. S. § 1-180] what injustice, by technical, attenuated and cloistered reasoning, is committed in thy name."⁷

This writer's conclusion, advanced with deference, is that the presently prevailing interpretation of the statute is erroneous when judged by the original intent of its drafters and the decisions of well over a century. Moreover, if results are considered, the latter-day view has no place in an efficient system for the administration of justice.

But what is this earlier interpretation to which reference has been made? Oddly enough, it is roughly summed up in Rule 51 of the Federal Rules of Civil Procedure. The Rule provides:

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

except to the extent necessary to explain the application of the law thereto; provided the judge shall give equal stress to the contentions of the plaintiff and defendant in a civil action, and to the State and defendant in a criminal action." N. C. Sess. Laws 1949, c. 107.

It should be explained that hereafter, whenever "the statute" is mentioned in this paper, it is the second branch of the statute to which reference is made unless otherwise indicated.

⁴ *State v. Merrick*, 171 N. C. 788, 88 S. E. 501 (1916).

⁵ *Morris v. Tate*, 230 N. C. 29, 31-32, 51 S. E. 2d 892, 894 (1949).

⁶ *State v. Lipsey*, 14 N. C. 485, 497 (1832).

⁷ *Barnes v. Teer*, 219 N. C. 823, 837, 15 S. E. 2d 379, 387 (1941) (dissenting opinion). Too much of an anticlimax to add in the text, but worthy of a footnote, is the despair of the commentators. See Wright, *Instructions to the Jury: Summary Without Comment*, 1954 WASH. U. L. Q. 177, 193; *A Survey of Statutory Changes in North Carolina in 1949*, 27 N. C. L. REV. 405, 435 (1949).

he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

But let us be more specific. At the same time that we are considering the interpretation of G. S. § 1-180, let us enlarge our inquiry to include as well the intimately related matter of the procedure for taking advantage on appeal of an error in the giving or failure to give instructions to the jury. The following Propositions depict the situation as it surely existed in every respect for seventy-five years after the enactment of the statute, and in most respects for over a century thereafter. And, it may be added, they accurately portray the law of North Carolina before the adoption of the statute.

Proposition 1. If the judge does charge the jury, either in response to a request or on his own motion, no error he makes in so doing can be taken advantage of on appeal in the absence of exception noted *at the trial*.

Proposition 2. It is not reversible error for the judge to omit altogether to charge the jury *on the law* in the absence of a proper request to so charge.

Proposition 3. It is not reversible error for the judge to omit altogether to charge the jury *on the evidence* whether or not there has been a request.

Proposition 4. If the judge does charge the jury on his own motion, no omission, even though excepted to at the trial, is reversible error so long as the charge as given is not positively erroneous.

Proposition 4a. A general charge on the law omitting all reference to the evidence is, in the absence of a request for more specific instructions, not positively erroneous and therefore does not constitute reversible error.

The fortunes of these Propositions in the years since 1796 will later be examined. Just now, let us consider the early interpretation of G. S. § 1-180. This is important for two reasons. First, it is not unreasonable to suppose that those closest to the statute in point of time were in a superior position to know its purposes. Second, we cannot ourselves understand its purposes unless we know something of the legal world into which the statute was thrust in 1796. This information the early opinions give us.

The first case presenting a problem arising on the second branch of the statute came in 1824 with *State v. Morris*.⁸ A judge had refused altogether a request that he sum up the evidence. The appellant, pointing to the words of the statute, "but it is hereby declared to be the duty of the judge in such cases to state in a full and correct manner the facts

⁸ 10 N. C. 388 (1824).

given in evidence," pressed for a new trial. The court's response was categorical. "The common law is not altered in this respect by the Act of 1796—no implications can arise from this law that he [the trial judge] must charge the jury."⁹ The court reached its conclusion by emphasizing the words "in such cases," interpreting them to refer to the "cases" mentioned in the first branch of the statute, that is, the occasions when the judge does charge. The object of the statute, then, was to prescribe "the manner" in which he should perform on that occasion.

This question of the judge's performance when he did elect to charge, discussed only by way of argument in 1824, came squarely before the court eight years later in *State v. Lipsey*.¹⁰ The trial judge, while instructing the jury to some extent, failed, in spite of a request that he do so, to recapitulate "all, nor near all" the testimony. One of the justices regarded this as a violation of the statute which entitled the defendant to a new trial. He agreed with the holding in the *Morris* case that a judge was not "bound to notice the facts at all." But he took the *Morris* dictum as establishing also that if the judge states any part of the evidence, it is mandatory that he "state the whole."¹¹

The majority of the court rejected this view or any variation of it. Its spokesman was Thomas Ruffin, conceded on all sides to be one of the half dozen greatest of American state judges.¹² Happily, Ruffin applied his full energies to the problem. The resulting opinion setting forth his ideas about the purposes of the statute brings sharply into focus Ruffin's comprehension and sagacity. There was good reason that this should be so, for the problem was one that had troubled him for some time. Two years before, he had spoken for the court in the celebrated case of *State v. Moses*,¹³ where the first branch of the statute (the prohibition on comment) had been lengthily considered. He then had been concerned that the act be so construed that its two branches be "compatible with each other, for neither clause must overrule the other."¹⁴ In other words, the restraining section was not to be so con-

⁹ *Id.* at 391. The court was speaking, of course, to the problem immediately before it, the necessity of a charge on the evidence when requested, a fact made clear by its added comment that on questions of law "either party had an undoubted right to demand the opinion of the Court." See also the dictum in *McNeil v. Massey*, 10 N. C. 91, 100 (1824), where, without reference to the statute, the court declared that the trial judge "may be silent if he will unless called on by one of the parties to express his opinion on a point of law." Again without reference to the statute, in *Simpson v. Blount*, 14 N. C. 34, 38 (1831), the court said: "Many cases do not require a charge from the court, and few a full one. Something must be left to the discretion and sense of propriety of the presiding judge. And at all events it is not error for the Court not to be active when the party has not moved it."

¹⁰ 14 N. C. 485 (1832).

¹¹ *Id.* at 488-89 (dissenting opinion on this point).

¹² See POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 4, 30-31 (1950).

¹³ 13 N. C. 452 (1830).

¹⁴ *Id.* at 457.

strued that, to avoid error, the judge must needs forego his "duty" to charge. Nor should this latter "duty" be construed to render the restraining section an inevitable snare.¹⁵

The *Lipsey* case completes Ruffin's obviously long considered response to this dilemma. Noting that the second clause of the statute was professedly declaratory,¹⁶ he argued that the legislature "could not mean to declare that to be existing law which all the world knew to be the contrary,"¹⁷ the common law being that the judge's charge on the facts was entirely discretionary. The second clause was added, he said,

... not to create a new and substantive duty on the part of the judge, but solely to prevent such a construction of the first as should in any wise interfere, either in the way of enlarging or curtailing any of those functions usually exercised, or those duties usually performed, other than saying whether the proof of a fact was full or sufficient. Hence, this clause begins with "but," that is, notwithstanding the previous enactment, and continues, "it is hereby declared to be," that is, declared that it is and shall continue to be "the duty of the judge to state in a full and correct manner the facts given in evidence." If taken to be an enacting statute, enjoining positively a duty in the terms used, it is absurd¹⁸

Ruffin's analysis of the language of the statute may be only moderately convincing; but his conception of its purpose rests, it seems to this writer, on a sounder basis. For, as he went on to explain, the judge in stating the evidence was to state it "fully and correctly," an impossibility in all but the rarest instances. And if absolute completeness and accuracy be not required, who could say when the shortcoming was material or immaterial? It is here, in his keen perception of the problem faced by the trial judge and his portentous realization of the limitations of an appellate court, that Ruffin's superiority bears in on us. In the *Moses* case, he had voiced the opinion that, difficult as it was for a trial judge to determine his response to the statute, it was practically impossible for a "revising court" to prescribe or enforce any *a priori* rules on the subject.¹⁹ He was, therefore, willing in the *Lipsey* case to assert that even supposing his reading of the statute to be erroneous, there could be no appellate review of the trial judge. The reason, argued

¹⁵ For that part of the dilemma then immediately before him, Ruffin's conclusion was that while a judge could not give his opinion of the sufficiency of the proof, it was competent for him to explain "the nature, relevancy, and tendency of the evidence." *Id.* at 458.

¹⁶ See note 3 *supra*.

¹⁷ *State v. Lipsey*, 14 N. C. 485, 497 (1832).

¹⁸ *Ibid.*

¹⁹ 13 N. C. at 458.

Ruffin, that the charge was entirely a discretionary matter at common law was that

. . . the duty is undefinable. The same reason controls the construction of the statute, even if it be considered as being an enacting one. The charge to the jury, therefore, must be left, as it always has been, to the discretion of the judge; the occasion, to his conscience—the manner, to his ability. The only exception is such a plain departure from impartiality in collating the evidence as of itself to convey to the jury an impression of the judge's opinion as clearly as an explicit declaration would.²⁰

The Ruffin view of the statute all too clearly does not prevail today, but when one remembers his pre-eminence among the nation's judges, it is a remarkable circumstance that his view has never been confronted, let alone explicitly overruled. This cannot be because it won only momentary assent. In its more essential aspects, it continued as a rule of practice until well into this century. Proposition 1, it is true, did partially fall to a new enactment in the Code of 1883.²¹ But the other Propositions continued with vitality largely unimpaired.

The authority for this last statement is overwhelming.²² Thus, to add merely a sampling to what has been given before, when there was no request, it was not reversible error in a murder prosecution for the judge to omit an instruction on the lesser degrees of homicide, even though such instruction was rendered pertinent by the evidence,²³ or to fail to instruct that the plaintiff was entitled on the evidence only to nominal damages,²⁴ or to fail altogether to instruct on the damage issue,²⁵ or to omit, in a criminal case, telling the jury that no inference could be indulged as to the defendant's character when it had not been put in issue, although the prosecution had, *over objection*, been permitted to argue to the jury the defendant's bad character.²⁶ Moreover, all interpretations

²⁰ 14 N. C. at 498.

²¹ The Code § 413, para. 3 (1883), now N. C. GEN. STAT. § 1-206, para. 2 (1953). See text at note 43 *infra*.

²² For a discussion of cases sometimes thought to be in conflict with the statement in the text, see text at note 30 *infra* and note 35 *infra*.

²³ State v. Rash, 34 N. C. 382, 386 (1851) (" . . . [I]t never is error to omit to charge upon a particular principle. If a party wishes a judge to do so, it is his duty to require it. ").

²⁴ Brown v. Morris, 20 N. C. 565, 567 (1839) ("If he had required a more specific instruction to which, in law, he was entitled, and the Court had declined to give it, he might then have assigned the refusal as error. A refusal may constitute error, but mere omission does not. ").

²⁵ Willey v. Norfolk Southern R.R., 96 N. C. 408, 411, 1 S. E. 446, 447 (1887) ("The rule of practice is too well settled to require any reasoning in its defense. "). For a later case, almost identical on the damage question, see Paul v. National Auction Co., 181 N. C. 1, 105 S. E. 881 (1921).

²⁶ State v. O'Neal, 29 N. C. 251, 253 (1847) ("This Court has repeatedly decided that an omission on the part of the judge to instruct the jury on a particular point was no error. ").

of the evidence in support of liability or defense did not have to be submitted to the jury,²⁷ nor in an assault case brought by a tenant against his landlord was it incumbent on the judge to say anything about the legal relationship of the parties, however much it bore on their rights.²⁸

What has been said so far seems to this writer amply to sustain the Propositions set forth above with the exception, of course, of Proposition 1. On this Proposition, there are no pre-Civil War cases. The practice, however, was clearly in accord with the Proposition, a fact affirmed by the court in *Williamson v. Lock's Creek Canal Co.* in 1878:

We believe it is the general, if not universal, practice of courts of appeal, to permit no errors to be assigned before them, which were not assigned in the court below

. . . . It would be inconvenient if a party could apparently acquiesce in the instructions to a jury and take his chance of a verdict upon them, and for the first time in the appellate court, assign errors in them. It may be that the instructions of the judge in this case were erroneous . . . but under the settled practice of this Court, we think that we are not at liberty to inquire

²⁷ *Morgan v. Lewis*, 95 N. C. 296, 298 (1886) ("The Court is not required to present possible aspects of the facts in their bearing on an issue, certainly not when they are not requested to do so."); *Nelson v. R. J. Reynolds Tobacco Co.*, 144 N. C. 418, 420, 57 S. E. 127, 128 (1907) (personal injury action, two circumstances indicating negligence, only one mentioned by judge: "It has been repeatedly held by this Court that the failure of the Judge below to instruct on any phase of the evidence is not error unless he was specially requested to do so."); *Brown v. Calloway*, 90 N. C. 118, 119 (1884) (payment defense in action on note; defense supported by a receipt and also other evidence; judge ignored other evidence: "If the court fails to charge the jury upon a point when there are more than one presented by the evidence, this is not error, unless it was requested to give the charge."); *Webb v. Rosemond*, 172 N. C. 848, 851, 90 S. E. 306, 308 (1916) ("The plaintiffs now insist that the court should have presented the view to the jury that defendant was liable on the written orders, whether the special promise to pay them was made by him or not; but if they desired this to be done they should have called it to the judge's attention by a special prayer, and in the absence of one, it is to be presumed that they did not desire that phase presented to the jury, but preferred to rely on the promise alone.").

²⁸ *Branton v. O'Briant*, 93 N. C. 99, 104 (1885) ("If instructions were desired, they should have been asked before the rendition of the verdict, and in strictness, before the retirement of the jury. One cannot be allowed to remain silent, speculating upon the result, and when it is adverse, complain that the instructions were not given An omission in the charge delivered is the fault of counsel, not a reviewable error in the trying Judge. This is too well settled to require comment" On the general validity of the Propositions set forth, there are many other cases containing language almost equally emphatic with that quoted above. The language is sometimes a mere dictum but frequently is directed to the point, *i.e.*, sustaining a charge under attack for an omission that today would not be regarded as a "subordinate feature" of the case. To cite only a few, see: *Saunders v. Gilbert*, 156 N. C. 463, 72 S. E. 610 (1911); *Davis v. Keen*, 142 N. C. 496, 55 S. E. 359 (1906); *State v. Beard*, 124 N. C. 811, 32 S. E. 804 (1899); *Boon v. Murphy*, 108 N. C. 187, 12 S. E. 1032 (1891); *Pierce v. Alsbaugh*, 83 N. C. 258 (1880); *State v. Grady*, 83 N. C. 643 (1880). These earlier cases may be of interest: *Boykin v. Perry*, 49 N. C. 325 (1857); *Ward v. Herrin*, 49 N. C. 23 (1856); *State v. Haney*, 19 N. C. 390 (1837); *State v. Scott*, 19 N. C. 35 (1836).

whether they were or not [T]he rule is not only just and reasonable in itself, but is *essential to the administration of justice*; it has been long acted on and ought to be well known, and this Court is not at liberty to depart from it in any case.²⁹ (Emphasis added.)

Because our statutory provisions have remained so nearly constant, the thought may arise that while the Propositions set forth may accurately reflect the *dominant* view until after 1900, they ignore a current of authority which provided a proper base for the later repudiation of the Propositions. There is scarcely any such authority that meets the test: Did the supreme court grant a new trial, no request having been made below, because of an omission by the judge in his charge, the charge itself containing no intrinsic error? This is not to say that there was not much language in the books like that often used by the court today. But an examination will show that it was addressed to wholly different problems from that with which we are concerned.

1. There were the cases that spoke of a "duty" to charge in one way or another when the prerogative of the judge to charge at all was under attack. The statute was here used to *sustain* this prerogative.³⁰ When decided, these cases surely were not regarded as repudiating our Propositions and cannot properly be so regarded now.

2. There were the cases dealing with the once lively problem presented by the claim that the jury was free to decide the law of the case as well as the facts. Closely connected were the cases where some particular point was mistakenly believed by the trial judge to be in the province of the jury.³¹ It can be seen that the judicial "duty" to declare the law is quite a different thing from the arrangements made for providing for a charge or a mechanism of attack on a charge after it is given. Hence, the comment above applies equally here.

3. There were the cases dealing with the problem of when a peremptory instruction is appropriate.³² In one case, when the evidence was conflicting, the judge had told the jury to decide for the State if they

²⁹ 78 N. C. 156, 160-61 (1878). It will be observed that this rule gave the judge a double-barrelled protection. Strictly, there had to be first a request and later an exception. This being true, it was one thing to weaken the other Propositions while 1 remained in effect and quite a different thing to do so after 1 had been abandoned.

³⁰ *Bailey v. Poole*, 35 N. C. 404 (1852); *State v. Hildreth*, 31 N. C. 429 (1849); *State v. Moses*, 13 N. C. 452 (1830). Consider the use made of the *Moses* and *Poole* cases in *State v. Boyle*, 104 N. C. 800, 10 S. E. 696 (1889), and the use made of the *Hildreth* case in *State v. Matthews*, 78 N. C. 523 (1878).

³¹ *Emry v. Raleigh and Gaston R. R.*, 109 N. C. 589, 14 S. E. 352 (1891); *Woodard v. Hancock*, 52 N. C. 384 (1860). On the struggle between judge and jury on this point in the criminal law field, see Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939).

³² *Gaither v. Ferebee*, 60 N. C. 303 (1864); *State v. Summey*, 60 N. C. 496 (1864). See also *State v. Norton*, 60 N. C. 296 (1864).

believed the evidence. Quite naturally, the court complained that it was the "duty" of the trial judge to "apply" the law to the varying aspects of the facts.³³ Again, the comment above is appropriate.

4. There were cases where there was no evidence at all in support of the verdict and judgment rendered.³⁴ These cases presented the question really of how late a demurrer to the evidence would be entertained, not that of the imperviousness to attack of a charge when there is evidence. Once more, the comment above is appropriate.

The doctrines embodied in our Propositions thus obtained in their entirety until after the Civil War. The first departures came in extremely serious *criminal* cases that held that a judge might not, in such cases, rely solely on a general charge when a more detailed one, specifically related to the evidence, was requested.³⁵ Had these cases been employed only to achieve this result (which was the situation for many years), they would have no marked significance, for this slight chip off the Ruffin edifice is certainly not crucial. But, years later, one of them in particular contributed greatly, although illegitimately, to the development of a new doctrine.

These first limited departures from prior doctrine came, it is important to note once again, in the most serious type of criminal proceedings. The two cases were both prosecutions for the capital felony of murder. In *State v. Dunlop*,³⁶ the court, without citing any cases, declared that "a general essay on the law of homicide" was not sufficient to be held a compliance with the statute. But it is abundantly clear that the court was speaking to the situation when a request was improperly refused, as

³³ *State v. Summey*, *supra* note 32.

³⁴ *Brown's Heirs v. Patton's Heirs*, 35 N. C. 446 (1852); *Grist v. Backhouse*, 20 N. C. 496 (1839); *Ring v. King*, 20 N. C. 301 (1838).

³⁵ *State v. Matthews*, 78 N. C. 523 (1878); *State v. Dunlop*, 65 N. C. 288 (1871). For the whole period down to 1896, the centennial year of the statute, the four categories given in the text subsume all the cases granting new trials which this writer has seen cited in relation to our problem and all those he has been able to uncover by his own search with the following possible exception: *Bynum v. Bynum*, 33 N. C. 632 (1850). The judge in his charge, in a will case, had failed to make clear that the attestation requirements differed as to realty and personalty. Not without strain, the court concluded that the difference had been "sufficiently presented to make it incumbent on the court to inform the jury of the distinction." *Id.* at 636; *State v. Austin*, 79 N. C. 624 (1878) (the judge omitted the intent requirement in describing a criminal offense); *State v. Byers*, 80 N. C. 426 (1879) (on an alibi defense, the judge charged only that if jury should find the alibi false, that was additional evidence of guilt); *Burton v. Wilmington and Weldon R. R.*, 82 N. C. 504 (1880), *aff'd on rehearing*, 84 N. C. 193 (1881). This case dealt principally with the question of the necessity of exceptions at the trial. The judge admitted evidence valid for one purpose but not for all. The judge admitted it generally and said nothing in his charge of any limitations. This latter failure was said to be so "connected with the facts allowed to be proved as to extend the exception to the reception of the testimony to the disposition afterwards made of it." *Id.* at 195; *State v. Rogers*, 93 N. C. 523 (1885) (murder prosecution; omission in charge an alternative ground for a new trial). Of these cases, only *Byers* and *Rogers* appear *contra* to the view expressed in the text as to the necessity of requests.

³⁶ *Supra* note 35.

there had been in the trial then under review. The second case, *State v. Matthews*,³⁷ arose in 1878. Again there were requests which were refused. The court agreed that the trial judge was correct in refusing the requests. But a new trial was granted because of a lack of fullness in the charge the judge did give. On its facts, then, the *Matthews* case can be said to stand for no more than the proposition that the judge may not rely on a general charge when a request, *whether erroneous or not*, had been presented. A later decision confined the *Matthews* doctrine still further to those instances where a *proper* instruction had been requested and refused.³⁸ But the drive of the opinion is toward a broader proposition. From an early case upholding the *right* of a judge, *over the protest of a defendant*, to say whether a killing amounted to murder or manslaughter, should the facts be taken as deposed by the witnesses, the court quoted the following:

It is the undoubted province and duty of the Court to inform the jury upon the supposition of the truth of the facts as being agreed or found by the jury, what the degree of homicide is If it were not so, there would be no rule of law by which a killing could be determined to be murder The only security for the accused is for the law to define *a priori*, what shall constitute a crime, and, in the case of capital punishment, when it shall be inflicted.³⁹

That there was no such "duty," in the absence of a request and in the sense that reversible error was committed if such information was not imparted to the jury, is proved by the authority previously cited, particularly *State v. Rash*.⁴⁰ Nevertheless, the court translated the above defense of the trial judge's prerogative into these words of enduring mischief:

It will be seen from the manner in which we have reviewed the instructions of the able and learned judge who presided at this trial, that in our opinion a judge who presides at a trial in which human life is at stake, does not fully perform the duties which his office imposes on him, by stating to the jury, however correctly, principles of law which bear more or less directly, but not with absolute directness upon the issues made by the evidence in the case We think he is required, in the interest of human life and liberty, to state clearly and distinctly the particular issues arising on the evidence, and on which the jury are

³⁷ 78 N. C. 523 (1878).

³⁸ *State v. Rippey*, 104 N. C. 752, 10 S. E. 259 (1889).

³⁹ *State v. Hildreth*, 31 N. C. 429, 434 (1849).

⁴⁰ 34 N. C. 382 (1851).

to pass, and to instruct them as to the law applicable to every state of the facts which upon the evidence they may find to be the true one. To do otherwise, is to fail to "declare and explain *the law arising on the evidence*," as by the Act of Assembly he is required to do.⁴¹

As indicated above, the *Matthews* case did not wreak its mischief for many years. It seemed to be limited to prosecutions for capital offenses. Its necessary and immediate effect on the general scheme embodied in our Propositions was minor, indeed. Perhaps the destruction of the scheme can best be narrated by considering the fortunes of Propositions 1 and 2 individually and then dealing with the remaining three collectively.

PROPOSITION 1

IF THE JUDGE DOES CHARGE THE JURY, EITHER IN RESPONSE TO A REQUEST OR ON HIS OWN MOTION, NO ERROR HE MAKES IN SO DOING CAN BE TAKEN ADVANTAGE OF ON APPEAL IN THE ABSENCE OF EXCEPTION NOTED AT THE TRIAL.

The fate of this Proposition was sealed, to a degree, by the enactment of what is now G. S. § 1-206, paragraph 2, in section 413, paragraph 3 of the Code of 1883. The paragraph reads: "If there is error, either in the refusal of the judge to grant a prayer for instructions, or in granting a prayer, or in his instructions generally, the same is deemed excepted to without the filing of any formal objections." Even before this statute, the court had abandoned the practice commanded in the *Williamson* case. It had declared that the rule requiring exceptions to the charge to be noted at the trial

. . . does not embrace the case where the Judge, in response to a request for instruction or of his own accord, misdirects the jury upon a material question of law injuriously to the appellant, by which they have been misled or may have been misled in rendering the verdict, and the error is patent upon the record . . .⁴²

Presumably, there was a class of "errors" not "patent upon the record," and here some objection voiced at the trial was still to be required. That this was, indeed, the view of the court is shown by the series of cases first interpreting the 1883 statute, particularly *Fry v. Currie*,⁴³ where the court announced its continued adherence to the old "positive error v. omission" distinction and declared that the words "in his instructions generally" embraced such instructions that involved

⁴¹ *State v. Matthews*, 78 N. C. 523, 536-37 (1878).

⁴² *Burton v. Wilmington and Weldon R. R.*, 84 N. C. 193, 200 (1881).

⁴³ 91 N. C. 436 (1884).

positive error. With much weariness, the court added these words of warning:

It is becoming so common for counsel to criticise instructions, not for an inherent and apparent error, but for an alleged error in its (*sic*) relations to the evidence, that we deem it proper to announce that we can consider only exceptions made in the court below, and under the statute such as are included in its terms. It would do great injustice to the judge to have his rulings revised when no exception was taken at the time, or to have reversed on appeal instructions other than such as contain an erroneous proposition of law; and beyond this in our opinion it was not the intention of the general assembly to go in putting the enactment in its present form.⁴⁴

Thus, the great change effected by the 1883 statute was that where the charge was positively erroneous it could be challenged on appeal without the matter ever, either by request or exception, having been brought to the trial judge's attention. This had never been possible before, even under the *Matthews* ruling. How significant the change was to be depended, of course, on what was held to be error so positive that review was obtainable. This question is the problem we face in the discussion of our remaining Propositions.

PROPOSITION 2

IT IS NOT REVERSIBLE ERROR FOR THE JUDGE TO OMIT ALTOGETHER TO CHARGE THE JURY ON THE LAW IN THE ABSENCE OF A PROPER REQUEST THAT HE DO SO.

While this Proposition was never squarely faced by the court before 1913, the books abound with statements that the judge need not charge at all in the absence of a request.⁴⁵ As late as 1907 the court remarked that it was not "error generally to refrain from giving instructions unless asked to do so."⁴⁶ But the court, without stating that a total failure to charge would be reversible error, had declared earlier that such failure would be a "gross dereliction of duty" in a case of any complexity.⁴⁷ The point was finally decided in 1913 in *Blake v. Smith*,⁴⁸ where the judge simply told the jury: "Take the case gentlemen, and settle it as between man and man." There was a reversal hinged on the proposition that the "construction literal," which Ruffin had deplored, and which

⁴⁴ *Id.* at 443-44.

⁴⁵ See note 9 *supra*.

⁴⁶ *Jarrett v. High Point Trunk and Bag Co.*, 144 N. C. 299, 301, 56 S. E. 937 (1907).

⁴⁷ *Holly v. Holly*, 94 N. C. 96, 101 (1886). There was, however, no suggestion that such a "dereliction" would result in a new trial.

⁴⁸ 163 N. C. 274, 79 S. E. 596 (1913).

the court both before and after him had rejected, was henceforth to be applied to the statute.

PROPOSITION 3

IT IS NOT REVERSIBLE ERROR FOR THE JUDGE TO OMIT ALTOGETHER TO CHARGE THE JURY ON THE EVIDENCE WHETHER OR NOT THERE HAS BEEN A REQUEST.

PROPOSITION 4

IF THE JUDGE DOES CHARGE THE JURY ON HIS OWN MOTION, NO OMISSION, EVEN THOUGH EXCEPTED TO AT THE TRIAL, IS REVERSIBLE ERROR SO LONG AS THE CHARGE AS GIVEN IS NOT POSITIVELY ERRONEOUS.

PROPOSITION 4A

A GENERAL CHARGE ON THE LAW OMITTING ALL REFERENCE TO THE EVIDENCE IS, IN THE ABSENCE OF A REQUEST FOR MORE SPECIFIC INSTRUCTIONS, NOT POSITIVELY ERRONEOUS AND THEREFORE DOES NOT CONSTITUTE REVERSIBLE ERROR.

Of these Propositions it may be observed that 4a is the only one wholly repudiated by the law today, although 4 is now a hollow shell, and only a fragment remains of 3. The initial work of destruction began with the *Dunlop* and *Matthews* cases, which modified 3 by making it reversible error for the judge to fail to charge fully on the evidence in serious criminal prosecutions when there was a request that he do so. That the *Matthews* opinion was not intended to have any greater effect is perhaps indicated by some words from its author in a civil case a year before when a judge failed to instruct that certain evidence, if believed, would establish a fact necessary to the plaintiff's case. The court declared:

. . . [I]t was the duty of the plaintiff if he desired fuller or more specific instructions to have asked for them. It has been repeatedly held that it is not error in a judge to omit to charge upon a point on which he is not requested to charge. If a contrary rule should prevail, and a party could get a new trial whenever upon a critical subsequent examination of a judge's charge he could detect some point omitted or not fully treated, charges must be unnecessarily long, and even then few verdicts would stand.⁴⁹

In any event, it is highly significant that the next major assault on the Propositions now under discussion came, not in a civil case, but in *State v. Boyle*,⁵⁰ where the defendant was appealing a conviction for rape. The circumstances could hardly have been more trying. The

⁴⁹ *Morgan v. Smith*, 77 N. C. 37, 39 (1877).

⁵⁰ 104 N. C. 800, 10 S. E. 696 (1889).

defendant was a Roman Catholic priest from the North, the evidence suspicious, the year 1889. The appeal was on the ground that the trial judge did not "array the state of facts on both sides, and apply the principles of law to them."⁵¹ In awarding a new trial, the court for the first, and perhaps only, time confronted any of the decisions sustaining the Propositions now under discussion. At that, the confrontation was extremely slight. The *Morris* case alone was mentioned by name. It and its companions were interpreted as applying only to "plain" cases.⁵² To support the change in practice about to be announced, the court cited six criminal and two civil cases. The court relied mainly on *State v. Moses*, which, as we have seen, had nothing to do with the question of whether or not it is reversible error for the judge to fail to apply the law to the evidence or to fail to charge in any way in the absence of a request. Of the other five criminal cases cited, only one in any way sustains a departure from the previous practice, and this, too, it should be noted, was a prosecution for murder, the court speaking of the case as one of "serious and vital importance to the prisoner."⁵³ The two civil cases cited both *uphold* the charge, in one the point of attack being the right of the judge to charge at all,⁵⁴ and in the other,⁵⁵ whether a very scanty charge sufficed in the absence of a request.

With these feckless underpinnings, the court went on, in *State v. Boyle*, to declare:

We thus cite and quote largely from several cases to show that it is the indispensable duty of the judges to observe, carefully, the statute cited, and that it is, as well, very important that they shall do so, and that a failure in such respect is ground for a new trial, when it appears that a complaining party may have suffered prejudice by such failure.⁵⁶

It is clear from the rest of the opinion that the "failure" referred to by the court was a failure to tell the jury, whether requested or not, that if they found one set of facts, they should return one verdict, another set, some other verdict, and so on. Although immediately "distinguished"⁵⁷ and "explained"⁵⁸ (there had, after all, been requests) and

⁵¹ *Id.* at 817, 10 S. E. at 698.

⁵² If this is true, there had hardly been a "not plain" civil case in the history of the court to that time.

⁵³ *State v. Rogers*, 93 N. C. 523, 530 (1885). In this case the defendant, as in the *Matthews* case, proffered an erroneous instruction. In addition to the *Dunlop* and *Matthews* cases, the court also cited *State v. Jones*, 87 N. C. 547 (1882) (nine instructions presented to the judge and refused); *State v. Rippey*, 104 N. C. 752, 10 S. E. 259 (1889) (three instructions requested and refused).

⁵⁴ *Bailey v. Poole*, 35 N. C. 404 (1852).

⁵⁵ *Holly v. Holly*, 94 N. C. 96 (1886).

⁵⁶ *State v. Boyle*, 104 N. C. 800, 822, 10 S. E. 696, 697 (1889).

⁵⁷ *State v. Pritchett*, 106 N. C. 667, 11 S. E. 357 (1890).

⁵⁸ *State v. Brady*, 107 N. C. 822, 12 S. E. 325 (1890).

subsequently overruled,⁵⁹ not once, but four times, and although a prosecution for a capital offense, the *Boyle* case had an enduring effect in other areas. Lawyers continued for years after its overruling to cite it to the court. The fact is that in spite of the case's repeated repudiation, the court never fully regained its former position. True, what constituted "omission" and what constituted "positive error" continued to be approached very literally. If the judge erred simply because he had not added to his charge, then such error was not ground for a new trial. As a corollary to this proposition, the general charge, containing no reference to the evidence, was sustained.⁶⁰ But vague allusions to unspecified exceptions to the old practice began to appear. These, although inserted in opinions upholding charges, indicated that a new day was on the way.⁶¹

A small step was taken in 1896, the year of the statute's centennial. This case should have perhaps been considered along with Proposition 2, since the case concerns a total failure to charge. But this is hardly accurate, for there was a total failure in respect to only one issue. The judge had instructed the jury, there being no request, merely to decide from the evidence whether the plaintiff was guilty of contributory negligence. This was said to be reversible error, the judge being "required to submit at least the abstract proposition or definition, when it is necessary that the jury should know what it is in order to fit the law to the facts."⁶² Aside from the very special instances mentioned earlier,⁶³

⁵⁹ *State v. Beard*, 124 N. C. 811, 813, 32 S. E. 804 (1899) ("The case of *State v. Boyle*, has been so often criticized, explained, and overruled . . . that it can no longer be considered as authority. The Court in that case undertook to say how well a Judge should succeed in aiding the jury to understand the evidence, and seems to have succeeded better in producing confusion than in establishing the rule of practice intended to be established. We do not wish to fall into this error again."); *Turrentine v. Wellington*, 136 N. C. 308, 48 S. E. 739 (1904); *State v. Edwards*, 126 N. C. 1051, 35 S. E. 540 (1900); *State v. Kinsauls*, 126 N. C. 1095, 36 S. E. 31 (1900).

⁶⁰ *Turrentine v. Wellington*, *supra* note 59; *Cowles v. Lovin*, 135 N. C. 488, 47 S. E. 610 (1904); *Kendrick v. Dellinger*, 117 N. C. 492, 23 S. E. 438 (1895).

⁶¹ *Yow v. Hamilton*, 136 N. C. 357, 362, 48 S. E. 782, 784 (1904) ("When an appellant complains that the Judge omitted to give a charge upon any given phase of the evidence, the rule, *which has some exceptions not applicable here*, requires him to show that the Judge was especially asked to give the desired instruction." [Emphasis added.]); *Simmons v. Davenport*, 140 N. C. 407, 411, 53 S. E. 225, 226 (1906) ("The rule which requires that the complaining party should ask for specific instructions if he desires the case to be presented to the jury in any particular view, *does not of course dispense with the requirement of the statute that the judge shall state in a plain and correct manner the material portions of the evidence* given in the case and explain the law arising thereon. . . . But a party cannot ordinarily avail himself of any failure to charge in a particular way, and certainly not of the omission to give any *special* instruction, unless he has called the attention of the court to the matter by a proper prayer for instructions." [Emphasis added.]).

⁶² *McCracken v. Smathers*, 119 N. C. 617, 621, 26 S. E. 157, 158 (1896). (In addition to the holding of the case, there are the ominous words: "When this court . . . modified the broad rule laid down in *State v. Boyle*, it was not intended that the jury should be left to grope in utter darkness, unless counsel were

which are concerned with essentially different problems, this holding, a century after the adoption of the statute, was the first in a civil case that awarded a new trial solely because something was not added to a charge when the matter had in no way been called to the attention of the trial judge.

Thirty years later the Ruffin scheme had been completely discarded. The steps leading to this consummation need not detain us long. To show the change gradually evolving, the 1886 declaration, "The court is not required to present *possible aspects* of the facts,"⁶⁴ was amended ten years later, in an opinion *upholding* a charge, to read "*every possible aspect*."⁶⁵ In 1907, the court took a somewhat longer stride. In awarding a new trial for failing to give an alternative instruction on contributory negligence, the court declared that the judge, when he did elect to charge on the law, must "not only . . . state it correctly, but . . . state the law as applicable to the respective contentions of each party."⁶⁶ In 1916, in *State v. Merrick*, came the fateful words:

. . . [T]he authorities are at one in holding that, both in criminal and civil causes, a judge in his charge to the jury should present every *substantial* and *essential* feature of the case embraced within the issue and arising on the evidence, and this without any special prayer for instructions to that effect . . . [I]f a litigant desires that some *subordinate* feature of the cause or some particular phase of the testimony shall be more fully explained, he should call the attention of the court to it by prayers for instructions . . .⁶⁷ (Emphasis added.)

sufficiently diligent to draw fire from the court by prayers for instruction." *Id.* at 620, 26 S. E. at 158).

⁶³ See text at note 30 *supra*.

⁶⁴ *Morgan v. Lewis*, 95 N. C. 296, 298 (1886) (Emphasis added.).

⁶⁵ *Russell v. Carolina Central R. R.*, 118 N. C. 1098, 1112, 24 S. E. 512, 513 (1896).

⁶⁶ *Jarrett v. High Point Trunk and Bag Co.*, 144 N. C. 299, 301, 56 S. E. 937 (1907). To sustain this proposition, the court cited *Bynum v. Bynum*, 33 N. C. 632 (1850), *State v. Austin*, 79 N. C. 624 (1878), and *Burton v. Wilmington and Weldon R. R.*, 82 N. C. 504 (1880), *aff'd on rehearing*, 84 N. C. 193 (1881). In addition, the court cited *State v. Wolf*, 122 N. C. 1079, 29 S. E. 841 (1898). This case is no better authority for the decision than *State v. Austin*. In both, the judge had erroneously described a criminal offense.

⁶⁷ *State v. Merrick*, 171 N. C. 788, 795, 88 S. E. 501, 505 (1916). It should be noted that here again the appeal was from a conviction for a capital offense. Again, the court's citation of authority for its formulation is wholly inadequate. For the astounding proposition stated, the court cites four cases: *State v. Barham*, 82 Mo. 67 (1884); *Carleton v. State*, 43 Neb. 373, 61 N. W. 699 (1895); *State v. Foster*, 130 N. C. 666, 41 S. E. 284 (1902); *Simmons v. Davenport*, 140 N. C. 407, 53 S. E. 225 (1906). Aside from the fact that in the *Simmons* case the charge was *upheld*, the language quoted from that case in note 61 is largely in conflict. In the *Carleton* case the charge was again *upheld*. The *Barham* and *Foster* cases both involved the question of whether lesser degrees of murder must necessarily be submitted to the jury.

The italicized words were given special place in a civil case the next year⁶⁸ and have been a main reliance of the court ever since⁶⁹ in its formulation of what is required of a trial judge. In 1922, the requirement that the judge must "apply" the law to the various aspects of the evidence was made secure.⁷⁰ In 1925, it was said that the statute conferred a "substantial legal right,"⁷¹ words that also have apparently impressed the court.

We are now ready for the modern court's statement of the touchstone of reversible error. Perhaps the words from *Williams v. Eastern Carolina Coach Co.* give the prevailing formulation as succinctly as any:

Section 564 [now G. S. § 1-180] confers upon litigants a substantial legal right and calls for instructions as to the law upon all substantial features of the case. [Citations omitted.] As was said in *S. v. Matthews*, 78 N. C. 523, 537, its requirements are not met by a general statement of legal principles which bear more or less directly, but not with absolute directness upon the issues made by the evidence. While the manner in which the law shall be applied to the evidence must to an extent be left to the discretion of the judge, he does not perform his duty if he fails to instruct the jury on the different aspects of the evidence and to give the law which is applicable to them, or if he omits from his charge an essential principle of law.⁷²

It must be obvious that the present prescriptions of what a judge's charge must contain abound in snares which will often trap even the most wary. The judge must answer for himself, with no help from counsel, such questions as: What principles of law are "essential"? What features of the case are "substantial"? Which are "subordinate"? What kind of statement bears with "absolute directness" on the issues? When has sufficient law been "applied" to the evidence? Questions such as these have been before the court scores of times in the last ten years, and the number of new trials granted in that period for failure to divine the correct answer is something over forty.

In what follows, no effort is made to give a complete survey of the present practice. Rather, the purpose is, by a sampling of the cases, to indicate something of the problem with which we are now faced. To do

⁶⁸ *Hauser v. Forsyth Furniture Co.*, 174 N. C. 463, 93 S. E. 961 (1917).

⁶⁹ *Shepard's North Carolina Citations* indicates that the case has been cited or quoted in seventy-three cases.

⁷⁰ *Bowen v. Schnibben*, 184 N. C. 248, 114 S. E. 170 (1922).

⁷¹ *Wilson v. Wilson*, 190 N. C. 819, 821, 130 S. E. 834 (1925).

⁷² 197 N. C. 12, 15, 147 S. E. 435, 437 (1929). The device of indirect quotation hardly excuses the omission of the qualifying words carefully inserted in the *Matthews* opinion. The court there spoke of a "trial in which human life is at stake," of the "interest in human life and liberty." See text at note 41 *supra*.

more, to define the "duty" of the judge, will not be attempted, as that "duty," after all the cases, remains for us, as it was for Ruffin, "undefinable." A word of explanation is in order. Whenever we speak of the "duty" to charge or the necessity of one, we are speaking of the situation where it is reversible error for the judge not to so charge, even though there has been no request for that instruction.

It is perhaps well to begin with the amendment to the statute adopted in 1949.⁷³ It has not resulted, as some feared,⁷⁴ in a new requirement that the judge state the contentions of the parties, although now, as formerly, if he does state the contentions of one side, he must state those of the other "equally pertinent."⁷⁵ But the amendment has not relieved the judge appreciably of his duty to state the evidence, because it is still required that the judge state as much of the evidence as is necessary for an "application" of the law.⁷⁶ This is true even when both parties specifically stipulate that any statement of the evidence is waived.⁷⁷ It still obtains generally that objection must be made to an error in the statement of contentions,⁷⁸ but this is not true when the statement of contentions gives an erroneous picture of the law uncorrected by any later word from the judge,⁷⁹ nor is objection necessary when the judge fails to give the contentions with "equal stress."⁸⁰

We may turn now to "essential [and nonessential] principles of law." It has been repeatedly held that it is not necessary for the judge to define such terms as "greater weight,"⁸¹ and "preponderance."⁸² Nor need he explain the meaning of "burden of proof," at least when the case is "very simple."⁸³ But the burden must be specifically allocated, and this as to the damage issue, even though the burden was properly placed in respect to the preliminary issue.⁸⁴ The judge must explain that the violation of a statute is *prima facie* evidence of negligence,⁸⁵ but it is not an "essential" principle of law, necessary to be mentioned, that certain facts constitute one, *prima facie*, a holder in due course of a negotiable

⁷³ N. C. Sess. Laws, c. 107 (1949). For text of amendment, see note 3 *supra*.

⁷⁴ *A Survey of Statutory Changes in North Carolina in 1949*, *supra* note 7, at 435.

⁷⁵ *Brannon v. Ellis*, 240 N. C. 81, 81 S. E. 2d 196 (1954).

⁷⁶ *Chambers v. Allen*, 233 N. C. 195, 63 S. E. 2d 212 (1951).

⁷⁷ *Brannon v. Ellis*, 240 N. C. 81, 81 S. E. 2d 196 (1954).

⁷⁸ *Millikan v. Simmons*, 244 N. C. 195, 93 S. E. 2d 59 (1956).

⁷⁹ *Caudle v. Southern Ry.*, 242 N. C. 466, 88 S. E. 2d 138 (1955).

⁸⁰ *Edgewood Knoll Apartments, Inc. v. Braswell*, 239 N. C. 560, 80 S. E. 2d 653 (1954).

⁸¹ *Redd v. Mecklenburg Nurseries, Inc.*, 241 N. C. 385, 85 S. E. 2d 311 (1954); *Simmons v. North Carolina State Highway & Public Works Comm'n*, 238 N. C. 532, 78 S. E. 2d 308 (1953).

⁸² *Arnold v. State Bank & Trust Co.*, 218 N. C. 433, 11 S. E. 2d 307 (1940).

⁸³ *Matthews v. Blackwood Lumber Co.*, 204 N. C. 725, 169 S. E. 708 (1933).

⁸⁴ *Tippite v. Atlantic Coast Line R.R.*, 234 N. C. 641, 68 S. E. 2d 285 (1951).

⁸⁵ *Barnes v. Teer*, 219 N. C. 823, 15 S. E. 2d 379 (1941).

note⁸⁶ or that checkbook entries are such evidence of a bank deposit.⁸⁷ The presumption that a marriage is valid is nonessential law,⁸⁸ but the presumption of fraud sometimes attending relations with a fiduciary is of a higher order.⁸⁹

One judge, long after it was known that such terms as "negligence" and "proximate cause" must be "defined," announced: "Negligence is not difficult to define. Negligence, Ladies and Gentlemen of the Jury, is a failure to perform some duty imposed by law, a want of due care."⁹⁰ He soon learned that while negligence was all of these things, it was also "doing other than, or failing to do, what a reasonably prudent man would have done under the same or similar circumstances."⁹¹ But apparently "prudent" is not "essential" if one uses the word "reasonable."⁹² Where, in a negligence case, the defense is a third party's negligence, the plaintiff can complain on appeal if the judge fails to tell the jury that he can recover if the defendant's and the third party's negligence combined to produce the injury.⁹³ This is so even though there has been an instruction to deny recovery if the third party's negligence was the "sole" proximate cause. Likewise, a defendant can complain if, on the contributory negligence issue, the judge instructs that plaintiff's negligence must be *the* proximate cause of the injury.⁹⁴ If a judge actually does say "a" instead of "the," or, what is more likely, his "the" is mistaken for an "a" by the reporter, it perhaps will be held that there, too, an additional instruction, that the plaintiff cannot recover if his negligence combined with that of the defendant to produce the injury, is necessary. A plaintiff may also complain, in an intersection collision case, if the jury is not told that it was proper for the plaintiff to act on the assumption that the defendant would obey the law.⁹⁵

There seems to be a more stable situation with respect to the contract cases. "Quantum meruit" may be simply defined as requiring a "reasonable" amount for services rendered, no explanation of "reasonable" being required here⁹⁶ or when "reasonable time" is in issue.⁹⁷ No definition at all is required of such words as "guaranty" and "insolvency" in an action by a depositor against a bank official on the theory that he had given a personal "guaranty" of a deposit against loss because of the

⁸⁶ First Nat'l Bank v. Rochamora, 193 N. C. 1, 136 S. E. 259 (1926).

⁸⁷ Pate v. Snow Hill Banking and Trust Co., 162 N. C. 508, 77 S. E. 230 (1913).

⁸⁸ Carter v. Reaves, 167 N. C. 131, 83 S. E. 248 (1914).

⁸⁹ McNeill v. McNeill, 223 N. C. 178, 25 S. E. 2d 615 (1943).

⁹⁰ Mikeal v. Pendleton, 237 N. C. 690, 692, 75 S. E. 2d 756, 757 (1953).

⁹¹ *Id.* at 690, 75 S. E. 2d at 756.

⁹² Williams v. Woodward, 218 N. C. 305, 10 S. E. 2d 913 (1940).

⁹³ Tillman v. Bellamy, 242 N. C. 201, 87 S. E. 2d 253 (1955).

⁹⁴ Noah v. Southern Ry., 229 N. C. 176, 47 S. E. 2d 844 (1948).

⁹⁵ Finch v. Ward, 238 N. C. 290, 77 S. E. 2d 661 (1953).

⁹⁶ Madison County v. Catholic Society, 213 N. C. 204, 195 S. E. 354 (1938).

⁹⁷ Crouse v. Vernon, 232 N. C. 24, 59 S. E. 2d 185 (1950).

bank's "insolvency."⁹⁸ But when illegality is a defense, there must be some elaboration of what is or is not illegal⁹⁹ and the statute of frauds cannot be ignored when properly pleaded.¹⁰⁰

The court has, on occasion, been surprisingly tolerant of omissions in respect to damages. As late as 1921, in a libel suit a charge was upheld which included only a warning not to award the plaintiff more than called for in his prayer for relief nor even necessarily that much and a direction "to consider and weigh with care the evidence on that point, and allow such fair and reasonable sum as you may find the plaintiff entitled to."¹⁰¹ But this hardly can be said to be the likely result today. The judge must give some "rule" for the measurement of damages, a requirement not satisfied by giving the contentions of the parties.¹⁰²

How much of a "rule" must the judge give? In a personal injury action, a charge that plaintiff could recover "such an amount as will reasonably compensate him for loss sustained" was upheld against the attack that it made no mention of the requirement that plaintiff's prospective losses be reduced to their present worth.¹⁰³ The court insisted that it was the defendant's task to request an amplifying instruction if "reasonably compensate" was not satisfactory to him on this point. Again, an instruction that spoke only of "the present worth of that amount he is entitled to receive" was upheld.¹⁰⁴ Doubt is cast on the present validity of these cases, however, by a later decision.¹⁰⁵ An omission to charge on present worth is definitely error when coupled with a similar omission in giving the contentions of the parties—and this in spite of the usual rule that a misstatement of contentions must be objected to at the time. A direct reference to the mortuary tables is not required,¹⁰⁶ but if the tables are mentioned, care must be taken that the jury understands that other evidence may be considered as well.¹⁰⁷ The court is under no compulsion to mention matter in mitigation, at least when the mitigating matter is, in an alienation of affections action, the plaintiff's misconduct.¹⁰⁸ But liquidated damage provisions of a contract must be explained when there is an action for its breach.¹⁰⁹

⁹⁸ *Garren v. Youngblood*, 207 N. C. 86, 176 S. E. 252 (1934).

⁹⁹ *Orvis Bros. & Co. v. Holt-Morgan Mills*, 173 N. C. 231, 91 S. E. 948 (1917).

¹⁰⁰ *Worthington & Frizelle v. Jolly*, 174 N. C. 266, 93 S. E. 776 (1917).

¹⁰¹ *Paul v. National Auction Co.*, 181 N. C. 1, 105 S. E. 881 (1921).

¹⁰² *Adams v. Beaty Service Co.*, 237 N. C. 136, 74 S. E. 2d 332 (1952).

¹⁰³ *Murphy v. Suncrest Lumber Co.*, 186 N. C. 746, 120 S. E. 342 (1923).

¹⁰⁴ *Campbell v. High Point, Thomasville & Denton R. R.*, 201 N. C. 102, 159 S. E. 327 (1931).

¹⁰⁵ *Caudle v. Southern Ry.*, 242 N. C. 466, 88 S. E. 2d 138 (1955).

¹⁰⁶ *Derby v. Owens*, 245 N. C. 591, 96 S. E. 2d 851 (1957).

¹⁰⁷ *Harris v. Atlantic Greyhound Corp.*, 243 N. C. 346, 90 S. E. 2d 710 (1955).

¹⁰⁸ *Chestnut v. Sutton*, 207 N. C. 256, 176 S. E. 743 (1934).

¹⁰⁹ *Van Gelder Yarn Co. v. Mauney*, 228 N. C. 99, 44 S. E. 2d 601 (1947).

On the other hand, in a condemnation proceeding, it is up to the claimant to demand of the court special attention to any "incidental" loss such as the destruction of his milling rights in a stream.¹¹⁰

Scores of decisions awarding new trials have made us aware that it is not enough for the judge merely to identify the substantial features of a case from a legal standpoint or merely to declare the true legal rule bearing on these substantial features, however great the detail or clarity of his exposition. He must "apply" the rules announced to the evidence given in the case. This requirement has almost certainly produced more new trials than any other incorporated in the present view of the court.

While there is no rigid rule prescribing how this must be done, the court has indicated that the "better" practice is to tell the jury that if they find one set of facts that the evidence tends to show, they will answer an issue in a particular way, and so on. Generally, and this is especially true in highway cases and the more usual negligence actions, it is not sufficient for the judge to give the law, however elaborately, and then sum up the evidence, in however great detail. But on occasion such a charge will pass muster, as it did in *Guyes v. Council*.¹¹¹ After noting that there "was much evidence offered and numerous elements enter into and constitute a part of the alleged fraud and deceit and alleged negligence," the court acknowledged that it would have certainly been "difficult," and, perhaps, "impossible" to present the case to the jury in any other way.¹¹²

In "applying" the law, if a judge does indicate the proper answer to an issue should certain facts be found, must he necessarily give an alternative instruction? It is undoubtedly the course of safety to do so, but whether it is necessary is not clear. We can say with some assurance that such an instruction is necessary when the negative of the facts posited for an affirmative answer does not embrace the other party's position. Thus, in the recent case of *Williamson v. Williamson*,¹¹³ an action for the breach of a contract to support, it was said to be error for the judge to supply no alternative instruction when he had charged: "Now, if you find . . . that the defendant carried the plaintiff to her granddaughter's and did not return or send for her, you will answer the issue . . . Yes." The defense was that the plaintiff was content to stay with her granddaughter. That this was a valid defense is not apparent from the instruction. However, even where the converse of an instruction as given does embrace the defense relied on, it has been

¹¹⁰ *Riverview Milling Co. v. State Highway Comm'n*, 190 N. C. 692, 130 S. E. 724 (1925).

¹¹¹ 213 N. C. 654, 197 S. E. 121 (1938).

¹¹² *Id.* at 656, 197 S. E. at 122.

¹¹³ 245 N. C. 228, 95 S. E. 2d 574 (1957).

held that an alternative instruction must be given.¹¹⁴ Yet, a later case indicates that when the "jury could not have failed to understand," there is no such necessity.¹¹⁵ It is necessary for the judge to explain the effect of an affirmative as well as a negative answer to the contributory negligence issue, that is, he must tell the jury that if they answer the issue "yes," they need proceed no further.¹¹⁶

Statutes are clearly a part of the law that the judge must "declare and apply."¹¹⁷ Despite some early indications to the contrary,¹¹⁸ in highway cases, mention, and perhaps reading, of applicable statutes is required¹¹⁹ and, "except in cases of manifest factual simplicity," identified by the court only in a case by case exposition, there must be some explanation of the applicable statute. The difficulty attending the judge's selection of the statutes to be adverted to and explained is illustrated by the case of *Childress v. Johnson Motor Lines, Inc.*¹²⁰ Since Virginia law governed, the judge brought to the jury's attention, in its consideration of the negligence issue, the Virginia statute declaring a person guilty of reckless driving who, whatever the maximum speeds prescribed, drove "at a speed or in a manner so as to endanger life, limb or property . . ." He did not read or mention the Virginia speed limits. This was held to be error of which the *defendant* could complain.

Throughout this paper, we have emphasized the problems of the trial judge. We should also have adverted to the quandary confronting the lawyer who earnestly wishes to preserve the right of his client to have the opinion of the judge on the law and its application to the evidence. When can he have any assurance that he has not forfeited this "substantial right"? Two pairs of cases highlight this conundrum. The first pair is *Lewis v. Watson*¹²¹ and *Harrison v. Metropolitan Life Ins. Co.*¹²² In the *Lewis* case, suit was brought for the wrongful death of a pedestrian. In his charge, the judge read the first forty-one lines of G. S. § 20-141, a statute setting forth certain regulations on operating a motor vehicle, and then told the jury to answer the negligence issue "Yes" if they should find "that the defendant . . . failed to keep a *careful and proper lookout* . . . or operated the truck-tractor at an *excessive rate of speed, or in a careless and reckless manner* . . ." The court awarded the plaintiff a new trial because there was no explanation of the italicized

¹¹⁴ *Mehaffey v. Appalachian Constr. Co.*, 194 N. C. 717, 140 S. E. 716 (1927).

¹¹⁵ *Lipscomb v. Cox*, 197 N. C. 64, 147 S. E. 683 (1929).

¹¹⁶ *Oates v. Herrin*, 197 N. C. 171, 148 S. E. 30 (1929).

¹¹⁷ *Bowen v. Schnibben*, 184 N. C. 248, 114 S. E. 170 (1922).

¹¹⁸ *Fisher v. Deaton*, 196 N. C. 461, 146 S. E. 66 (1928).

¹¹⁹ *Barnes v. Teer*, 219 N. C. 823, 15 S. E. 2d 379 (1941); *Kolman v. Silbert*, 219 N. C. 134, 12 S. E. 2d 915 (1940).

¹²⁰ 235 N. C. 522, 70 S. E. 2d 558 (1952).

¹²¹ 229 N. C. 20, 47 S. E. 2d 484 (1948).

¹²² 207 N. C. 487, 177 S. E. 423 (1934).

words. "The jury," it was said, "was left to decide these matters according to its own notions."

In the *Harrison* case, the defense to an action on an insurance policy was fraud in answering an inquiry as to whether or not the insured had ever been "attended by a physician." An issue was submitted to the jury asking whether the insured had been so attended. There was in the charge no hint of the judge's opinion of the legal meaning of the phrase "attended by a physician." Nevertheless, the court affirmed with no reference to G. S. § 1-180, although, as the ritual commands with appealing litigants, the statute, and the judge's imperfections, were brought to its attention.¹²³ The jury, in this case, was left to decide this highly technical matter according to its own notions. In which case, *Lewis* or *Harrison*, did the lawyer more reasonably expect reversal? In which case did the jury more need the aid of the judge?

Our second pair of cases is *Mallard v. Mallard*¹²⁴ and *Grant v. Bartlett*.¹²⁵ The *Mallard* case was a contested suit for divorce on the ground of two years' separation. The defendant alleged and produced evidence to the effect that the plaintiff absented himself merely to obtain employment. The judge took no notice of this evidence in his charge except to point out the defendant's contention, that because of this evidence, the separation issue ought to be answered in the negative. When the defendant appealed, the court awarded a new trial because of the judge's failure to "advise the jury as to whether such contention had any legal validity."

In the *Grant* case, the plaintiff and the defendant were clearing land for a pasture when the plaintiff received a blow from an axe in the hands of the defendant. There was evidence for the defendant that tended to show that immediately after the occurrence, the plaintiff gave an account which, if true, would have exonerated the defendant. The judge, having omitted any reference to this evidence in his charge, was requested by counsel to review "and to explain to the jury the legal effect of such evidence." Whereupon, the court charged as follows:

The defendant offered evidence tending to show the plaintiff made statements as to the manner in which the accident occurred, and offered them as evidence tending to show that the accident was the fault of the plaintiff. You will consider that evidence just as any other evidence. You will determine what the truth is. Whether or not he made these statements, and whether or not he told the truth. You will consider everything said by the plaintiff here at the trial or related by other witnesses as to what he said;

¹²³ Transcript of Record, pp. 41-42, *id.*

¹²⁴ 234 N. C. 654, 68 S. E. 2d 247 (1951).

¹²⁵ 230 N. C. 658, 55 S. E. 2d 196 (1949).

or what the defendant said about it here at the trial or any other statements he made as to how it occurred, you being charged with the responsibility of determining how it occurred.¹²⁶

On appeal, there was an affirmance, it being said that the judge had "substantially complied" with the request. Moreover, the 1949 amendment to the statute was referred to as somehow excusing the judge. But was the jury ever advised whether the defendant's contention, like that of the *Mallard* defendant, "had any legal validity"? Again, in which case, *Mallard* or *Grant*, did the lawyer more reasonably expect reversal?

Now a brief note on the practice under Federal Rule 51. Here, there need be no apology for brevity, for the fact is that Rule 51 has given scarcely any trouble. In his exhaustive treatise on the Rules, Moore requires but twelve pages to dispose of this Rule in its entirety.¹²⁷ In all the one hundred forty odd volumes of the *Federal Reporter*, with roughly 90,000 cases, since the effective date¹²⁸ of the Federal Rules, one finds only a scattering of cases in which Rule 51 even comes into question¹²⁹ and, what is more significant, only *three* cases in which the court definitely granted a new trial for error in the instructions not brought to the attention of the court below.¹³⁰

In at least one of the circuits, the ninth, the Rule is read quite literally. No error not specifically called to the attention of the court below is considered.¹³¹ Other circuits, resorting to a pre-Rule Supreme Court case,¹³² have formulated an exception to the rigorous language of the Rule. But while there has been a fair amount of talk about such an exception, actually the exception has resulted in a new trial, as said above, in only three cases.

In view of our court's struggle to determine the contours of the

¹²⁶ Transcript of Record, p. 25, *id.*

¹²⁷ MOORE, *FEDERAL PRACTICE* c. 51 (1951). Six of these pages are in the supplement.

¹²⁸ September 1, 1938. *FED. R. CIV. P.* 86(a). Since that date, there have been thirty-two volumes of the *North Carolina Reports* containing roughly 16,000 cases.

¹²⁹ For cases mentioning some exception to the rigors of the rule, see MOORE, *op. cit.*, *supra* note 127, at § 51.04, n. 3, 4.

¹³⁰ *Mondshire v. Short*, 196 F. 2d 606 (5th Cir. 1952) (erroneous instruction that ordinary negligence alone was sufficient under Texas guest statute to impose liability); *Dowell, Inc. v. Jowers*, 166 F. 2d 214 (5th Cir. 1948) (erroneous strong intimation in the charge of what the damages should be); *Shimabukoro v. Nagayama*, 140 F. 2d 13 (D. C. Cir. 1944) (verdict for plaintiff based on incredible testimony). One other case granting a new trial for an unobjected to error in instruction, but where there was also another basis for the court's action, is *Harlem Taxicab Ass'n v. Nemesh*, 191 F. 2d 459 (D. C. Cir. 1944). Besides the exception to the Rule, its rigors have also been mitigated by reading it with Rule 46. See *Montgomery v. Virginia Stage Lines*, 191 F. 2d 770 (D. C. Cir. 1951).

¹³¹ *Walker v. West Coast Fast Freight, Inc.*, 233 F. 2d 939 (9th Cir. 1956). The court noted that other courts asserted some exception to the Rule, and that, indeed, it had itself before the adoption of the Rules practiced such an exception. But, it concluded the Rule does not admit an exception.

¹³² *United States v. Atkinson*, 297 U. S. 135 (1936).

abstract command to "declare and apply the law," and its interminable wrestling with "substantial" and "subordinate," the federal formulation is interesting. As said before, it stems from the pre-Rule case, *United States v. Atkinson*, where the court declared:

In exceptional circumstances, especially in criminal cases, appellate courts in the public interest, may, of their own motion, notice error to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.¹³³

Now, of course, this formulation no more dictates particular decisions than does that of our court. But it does indicate factors at once more relevant and more practical if there must be an exception to the Rule. There is no talk of "substantial" and "subordinate" principles of abstract law. The emphasis is on the public interest and the public respect for the judicial process.¹³⁴ That this is a more easily administered formula is obvious from the record of the federal courts.

CONCLUSION

To recur to the question asked at the beginning of this paper: Why, in the *Glenn* case, were two trials necessary? We may, as the court did, point a finger at the trial judge. In a sense, certainly, he was in error; but only in the most superficial view can the error be regarded as exclusively his. What of the lawyers? They can be quickly exonerated. True, the defendant's counsel might have requested the charge which he later complained that he did not get. But had he done so, there might well have been, in the present circumstances, reason to suspect that he had not properly represented his client. It was possible, and perhaps probable, that the judge had deprived the defendant of no real advantage at all, only a theoretical one (until the alchemy of the court transmuted it into one worth \$7,500.00). He could take his chances on a satisfactory verdict and, failing that, draw on the ample resources of G. S. § 1-180.

As for the plaintiff's lawyer, it would, of course, have been proper for him to remind the judge of his derelictions. It must be said that had he done so, he would have protected the verdict that he was likely to win. But perhaps he, too, out of an abundance of caution, was guarding against an errant jury. It is more likely that he considered the charge satisfactory. If such was the case, consider his position. To

¹³³ *Id.* at 160. The words, "of their own motion," have some significance. In *Shimabukoro v. Nagayama*, 140 F. 2d 13, 15 (D. C. Cir. 1944), it was said that the appellant had no standing to argue the point.

¹³⁴ The Second Circuit apparently eliminates "obvious" error from the exception. See *Troupe v. Chicago, O. and G. B. Transit Co.*, 234 F. 2d 253 (2d Cir. 1956).

protect the expected verdict, he must be alert to claim the benefits, fanciful or actual, guaranteed by the present interpretation of G. S. § 1-180, *for his adversary!*

It might be helpful to examine the path by which we have come, after one hundred sixty-one years, to our present situation. It is not a coincidence that our difficulties flow largely from four prosecutions involving capital offenses—*Dunlop*, *Matthews*, *Boyle*, and *Merrick*. It must be obvious that the problem of review in such cases is an entirely different one from that presented by any civil case. It may be that wisdom will dictate the same rule in both criminal and civil cases,¹³⁵ but that is not necessarily so—a fact recognized by the court in the *Matthews* case and, oddly enough, in the *Merrick* case also.¹³⁶

A second main source of our difficulties is our forgetfulness of the circumstances attending the enactment of two statutes, G. S. § 1-180 and paragraph two of G. S. § 1-206 (providing that any errors “in the instructions generally” should be “deemed excepted to”). Enough has been said in this respect about G. S. § 1-180, but one word more may be said about G. S. § 1-206. It is hardly conceivable that this statute would have been passed in 1883 had the present interpretation of G. S. § 1-180 then been in vogue. The law of 1883, even after the passage of G. S. § 1-206, guaranteed to the trial judge notice of all the subtle snares awaiting him today. The theory of the statute was that notice of this kind of danger is enough. Against those snares of the more obvious kind (positive error), he was to be his own guardian. The latter-day interpretation of G. S. § 1-180 has, of course, smashed this scheme to smithereens.

The third main source of our difficulties lies in the unarticulated assumptions in the court's present statement of the purpose of G. S. § 1-180. We are told that its purpose was to preserve the rule of law. We are further told that without the present interpretations, jurors would be left to “grope in the dark,” that without it, “there can be no assurance that the verdict represents a finding by the jury under the law and on the evidence presented.”¹³⁷ It would perhaps be unfair to regard this language as telling us that we can have no confidence in any verdict rendered in North Carolina prior to 1916 or in any of the thousands of verdicts in the federal courts today. But what does it mean? At the

¹³⁵ In the federal courts the same rule obtains in criminal cases as in civil. See *FED. R. CRIM. P.* 30. It is indicated, however, that the “safety valve” is resorted to more freely in criminal cases. See *Johnson v. United States*, 318 U. S. 189 (1943).

¹³⁶ 171 N. C. 788, 795, 88 S. E. 501, 505 (1916) (“It is held in many well considered cases that the rule denying reversible error for an omission to charge on a given phase of a cause does not prevail to the same extent in criminal as in civil cases . . .”).

¹³⁷ *Smith v. Kappas*, 219 N. C. 850, 854, 15 S. E. 2d 375, 378 (1941).

very least it seems to suggest that an overthrow of the present practice would necessarily result in poor and inadequate instructions, that only by the present practice can we exact from the trial judge the kind of charge to which every litigant is entitled.

Such assumptions have no support either in reason or experience. Moreover, they forget that our judges' own sense of duty is the foundation on which we have builded and must, in any event, largely rely. As much as we deplore the delay and expense involved in an endless procession of new trials, our object in this study has not been primarily to point to some method of obviating this unseemly spectacle. Rather, it has been to suggest a method by which we can have a real assurance that the charge of the judge will, indeed, be a mighty instrument in upholding the rule of law. The proposition is as simple as this: three men are better than one, especially where two of them are, as they ought to be, experts on the matter at hand. We lawyers are, on ceremonial occasions, fond of recalling that we are officers of the court. Yet, on one of the great occasions in the administration of justice, we assume the role of passive onlookers. To do so is to deny our history.

Our difficulties can be quickly ameliorated. But there must be a basic change. It has been nineteen years now since the Federal Rules were adopted. Some twenty states have already embraced them practically in their entirety. It has now been ten years since Dean Brandis uttered his classic "Plea for Adoption by North Carolina of the Federal Joinder Rules."¹³⁸ Since that time we have had a Commission for the Improvement of the Administration of Justice, for eight years a Judicial Council whose duty it is to "make a continuing study of the administration of justice in this State,"¹³⁹ Bar and Bar Association Committees, and perhaps more than the usual number of resolutions to "co-operate." But still our basic difficulties, many of them easily eradicable, remain. To our shame, it was necessary last year (but abundantly welcome in the circumstances) for Dean Brandis and Mr. Graham to bring the earlier exhaustive article¹⁴⁰ on the mysteries of joinder up to date.¹⁴¹

Now, under the auspices of our Bar Association, there has been launched a great new study, said to be the most comprehensive survey of a state's judicial system ever undertaken. The Institute of Government has dedicated its superb abilities to the task. A generous donor has supplied needed funds. Our sudden riches have once again raised our hopes. But we have other resources, less exciting, perhaps, but

¹³⁸ 25 N. C. L. REV. 245 (1947).

¹³⁹ N. C. GEN. STAT. § 7-453 (1953).

¹⁴⁰ Brandis, *Permissive Joinder of Parties and Causes in North Carolina*, 25 N. C. L. REV. 1 (1946).

¹⁴¹ Brandis and Graham, *Recent Developments in the Field of Permissive Joinder of Parties and Causes in North Carolina*, 34 N. C. L. REV. 406 (1956).

resources we dare not ignore. One such resource which has been ignored with grievous results for over forty years in North Carolina in the interpretation of G. S. § 1-180 is the wisdom of Thomas Ruffin. In this task, we have also ignored, as Ruffin did not, the wisdom of an English court sitting nearly four hundred years ago:

. . . . And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered:—

1st. What was the common law before the making of the Act.

2nd. What was the mischief and defect for which the common law did not provide.

3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.

And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.¹⁴²

¹⁴² Heydon's Case, 3 Co. Rep. 7a, 7b, 76 Eng. Rep. 637, 638 (Ex. 1584).