The Time for Taking Exception to the Court's Charge

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it be specified thereon to the contrary, "when any such check is presented by or through any Federal Reserve Bank, Post Office, or Express Co., or any respective agent thereof." This statute does not relieve a drawee bank from liability merely upon its giving exchange but leaves it still liable under such circumstances until its exchange draft is paid. Its effect is, if not to modify the common law rule that an agent for collection can accept only cash in payment of the debt owing his principle, certainly to limit the operation of that rule in North Carolina to the extent of the option granted. And it has been held under this statute that it is not negligence for a Federal Reserve Bank to accept exchange instead of cash. That decision is reasonable because under the statute the drawer who does not specify on the check to the contrary immediately agrees that it shall be payable in exchange. And because of this implied assent of the drawer to payment in exchange such payment has been held not to discharge him, but leaves him still liable if the exchange draft is dishonored.

J. B. FORDHAM.

THE TIME FOR TAKING EXCEPTION TO THE COURT'S CHARGE

Bills of exception were founded on the statute of Westminster 2d (13 Edw. 1) Ch. 31. That statute does not expressly mention at what time the exception is to be tendered, but the reason of the thing, the practice of the common law courts, and the precedents and authorities on the subject, prove that it must be at the time of the trial. When an exception is taken to the charge of the court, it must be tendered before a verdict is rendered by the jury in open court. Otherwise the exception is not available. This was the gen-

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21 This statute was called forth by the recent struggle between the Federal Reserve Banks and the small non-par banks in which the former tried to force par clearance upon the latter by presenting checks over the counter for payment in cash. The North Carolina Legislature came to the rescue of the small North Carolina banks involved and enacted the statute in question. The North Carolina court held the statute unconstitutional in Farmers, etc. Bank v. Federal Reserve Bank of Richmond, 183 N. C. 546, 112 S. E. 252 (1922), but its decision was overruled by the Supreme Court of the United States on appeal. 262 U. S. 649, 43 Sup. Ct. 651 (1922). For a further discussion of the subject see C. T. Murchison, "Par Clearance of Checks," 1 N. C. L. Rev. 133 and a note by the same writer in 2 N. C. L. Rev. 36. See also 37 Harv. L. Rev. 133.
23 Ibid.
24 Morris v. Buckley, 8 S. & R. 211 (Pa., 1822).
generally stated common law rule. Today the law in regard to exceptions is governed in the different states by statute.

The North Carolina Code provides that 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 at the trial. Exceptions of this type are taken in time when set out in the appellant's statement of the case on appeal. But exceptions for omissions to charge in a particular way are different. If a party thinks he is entitled to an instruction he should ask for it, and having failed to do so, he cannot after the verdict complain, provided the instruction given was correct. However if the omission is of such vital importance that the charge given does not cover the entire case, as required by statute, objections may be taken in the case on appeal. If there is a mistake in the judge's statement of the contentions of the parties, however, objections must be made at the time. If made after the verdict they are too late and deemed to have been waived. There is a reason for the difference, as to time, between the exceptions to the mistakes in the statement of the contentions and the exceptions to errors of law. The North Carolina statutes require the judge to charge the jury in regard to the law of the case. Hence the charge to the jury is a fundamental part of the trial. The statement of the contentions of the parties is not required of the trial judge, although he is required to state the evidence in the case to the jury. Therefore error in the statement of the contentions is not a fundamental error and should be objected to at the time.

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3 Gehl v. Milwaukee Produce Co., 93 N. W. 26 (Wis. 1903).
4 C. S. 590, sub. 2; N. C. Code, sec. 412, subd. 3.
7 C. S. 564.
11 C. S. 564.
13 C. S. 564.
In many other states the rule is different. In Massachusetts, exceptions to the judge's charge must be taken before the jury retires.\textsuperscript{12} The Virginia rule is similar to the Massachusetts view.\textsuperscript{13} The Texas statutes\textsuperscript{14} provide that before the arguments and often the evidence has been concluded, the judge shall put his charge in writing and submit it to the parties. A reasonable time is given them in which to examine the charge and present objections thereto, which objections must be presented to the court before the charge is read to the jury. All objections not so made and presented are considered as waived.\textsuperscript{15} The rules of the Federal Courts require exceptions to the instructions to be taken at the time and before the jury retires.\textsuperscript{16}

These conflicting rules of practice present the question whether it is more advantageous to require exceptions to the charge to be made before the verdict or to allow them to be made for the first time in the case on appeal. Is the North Carolina rule the best solution of this problem and best suited to the administration of justice?

It is argued that if exceptions be taken at the time, the judge will be given the opportunity to change his charge and correct the error. But is the court likely to change his charge at the request or objection of one of the parties? This may be true as to inadvertent statements in the charge; but, where the judge has spent much thought on his instructions, undoubtedly he will prefer his opinion concerning the law rather than the opinion of one of the parties. Consequently, if this is the purpose of the statutes requiring exceptions to be made at the time, this purpose would be accomplished only in a limited number of cases.

Then it is contended that justice is best subserved by requiring exceptions to be taken when the charge is given and that if the lawyer does not know of the error at the time, it is his misfortune. Quite

\begin{footnotes}
\item Arminius Chemical Co. v. Landrum, 113 Va. 7, 73 S. E. 459 (1912); Collins v. George, 102 Va. 509, 46 S. E. 684 (1904); Clarke v. Sheet's Admn., 99 Va. 381, 38 S. E. 183 (1901).
\end{footnotes}
the contrary appear to be the dictates of justice. Is an entirely erroneous result to be allowed to stand because at the particular moment the lawyer does not know that it is error? This seems to burden justice with technicalities. Opportunity should be given the lawyer to review the charge and if there is error then he should be allowed to show it.

It may be urged that there should be no distinction between exceptions to evidence and exceptions to the charge. It is the general rule that exceptions to the evidence must be taken immediately, or the objection is deemed waived. Why should not this rule apply equally to exceptions to the charge? There is a reason for this distinction. This reason is the difference between the testimony and the charge. Testimony is of various qualities. It may make an impression upon the jury or it may not; it may be believed by the jury or it may not. The jury regards the court's charge as the law of the case and their verdicts are so influenced. An error in the admission or rejection of testimony may not change the result, whereas an error in the charge is a fundamental error. Hence it is right that exceptions to the charge should not be governed by the strict requirements which govern the exceptions to the testimony.

The taking of exceptions when the charge is given tends to interrupt the procedure of the court and cause confusion. Often very lengthy exceptions are taken to the charge. If these would have to be argued and reviewed by the trial judge considerable time would be taken up, thus greatly delaying the transactions of business of the court not only in that case but in others to follow.

By following the North Carolina rules of practice, therefore, justice is more nearly attained, and this after all is the fundamental purpose of all rules of practice.

W. A. Devin, Jr.

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1 Grand Trunk Ry. Co. v. Ives, 144 U. S. 408 (1892); Lee v. Methodist Episcopal Church, 193 Mass. 47; 78 N. E. 646 (1906); Stewart v. Ferguson, 164 N. Y. 553, 58 N. E. 662 (1900); Sykes v. Everett, 167 N. C. 600; 83 S. E. 585 (1914).