Feb 25, 1941

EXPLANATORY NOTES

on the

GENERAL RULES

of

PRACTICE AND PROCEDURE

Adopted by the

COURT OF APPEALS OF MARYLAND

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FOREWORD.

On January 30, 1941, the Court of Appeals transmitted to the General Assembly the General Rules of Practice and Procedure adopted by the Court, pursuant to Chapter 719 of the Acts of 1939.

The Rules adopted were part of those recommended to the Court by a special Committee appointed by the Court for this purpose. This Committee was composed of one member from each of the counties of the State and eight members from Baltimore City with the undersigned as Chairman. Mr. Robert R. Bowie was appointed by the Court to act as Reporter for the Committee.

To assist in the work of the Committee the Reporter prepared a number of studies on various aspects of Maryland procedure. This pamphlet contains such of these studies as relate to the rules adopted by the Court of Appeals with the necessary revisions to conform to the final form of the rules.

This pamphlet is not in any sense, of course, an official construction or interpretation of the rules. It is merely intended to inform the Bench and Bar of the purposes, scope and functions of the various rules and to aid in a a better understanding of them.

SAMUEL K. DENNIS.

February 25, 1941.

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I. DEPOSITION RULES.

At present the statutes and court rules in Maryland present a confusing variety of procedures for taking depositions, without any apparent justification or reason for the diversity. Thus, Article 35, Section 21, provides for special commissions to be issued by law courts and orphans' courts for taking depositions of non-resident or unavailable witnesses, according to the procedure in equity. In equity, special commissions are provided for in Article 16, Section 294, and in local court rules.[1] Moreover, under Article 35, Section 22, depositions of non-residents may be taken both at law and in equity before any notary or commissioner, without any action by the court, upon five days notice to the opposite party, or by agreement. Depositions of residents, however, are governed by separate procedures. Under Article 35, Sections 26 to 36, such depositions may be taken on notice, without action by the court, before a standing commissioner, either in pending cases or for perpetuation of testimony, but such depositions may be *used* only if the witness is unavailable. In addition, in equity cases, such depositions whether for a pending case or for perpetuation may be taken according to the provisions of Article 16, Section 281 to 289. Under Article 17, Section 44, depositions by agreement are provided for.

Such a diversity of methods serves no useful purpose and merely makes for complication. In addition, the exact procedure to be followed under certain of these provisions is not entirely clear, and creates further confusion.

The Deposition Rules adopted by the Court of Appeals attempt to correct this situation by providing a simple and uniform method for all depositions. The procedure prescribed is very similar to that now available under

[1] See e. g., Rules of the Supreme Bench of Baltimore City, Equity Rules 4 to 8; Rules of the Circuit Court for Carroll County, Equity Rules 2 to 6.

existing statutes in certain cases; it is merely clarified, simplified and made available for all situations. Depositions are to be taken upon five days notice either orally or upon interrogatories, before a notary, standing commissioner or similar officer, or by agreement (Deposition Rules 1, 3, 4, 5 and 7). This is essentially the practice now provided for non-resident depositions under Article 35, Section 22. Rule 2, which regulates depositions to perpetuate testimony, substantially embodies Article 35, Sections 29 to 31. Rule 6 gives the court extensive powers to control and restrict the taking of depositions to prevent abuse; as this is particularly important in connection with the use of depositions for discovery, it is more fully discussed under the Discovery Rules. Deposition Rules 8 to 11 regulate the conduct of the examination, the signing, certifying and filing of the deposition and the effects of errors. They follow closely the existing practice, eliminating certain ambiguities and diversities. Rule 11 governs to use of depositions as evidence at the trial and confines such use to the situations where it is now permitted. Rule 12 deals with contempt and other orders and penalties and Rule 13 regulates the application of the preceding rules.

In other words, a study of these Deposition Rules will reveal that while they introduce no real innovations in deposition procedure, they greatly clarify and simplify that procedure and provide a single uniform method in place of numerous different and overlapping methods.

II. DISCOVERY RULES.

A large number of the recommendations received from lawyers for changes in procedure dealt with the problem of preparing controversies for trial. Many suggested that Maryland practice could be greatly improved by providing more effective means (1) to simplify proof of matters not genuinely disputed, (2) to eliminate from the case claims or defenses raised in the pleadings which would not be seriously pressed at the trial, and (3) to inform each party of the detailed facts relied on by the other party for claim or defense. By eliminating the matters not contested and by better informing the parties on those actually in controversy, the preparation of cases for trial could be simplified, presentation at the trial improved, trials shortened, and settlements before trial facilitated.

Twenty-four years ago this same basic problem was posed by Mr. Joseph C. France in a significant address to the Maryland Bar Association on "Simplification of Maryland Pleading". After calling attention to several outmoded procedural details, he said:

> "But the main problem persists: How to combine simplicity in pleadings with a fair amount of notice to the opposing party of what is *not* in dispute.
>
> "For illustration: You bring suit for goods sold and delivered, and the account comprises numerous items extending over a long period. There may be no bona fide contest over deliveries and yet you can be forced to prove them. And we have all experienced the consequent inconvenience and loss of time to litigants, witnesses, counsel and courts."[1]

I.

PLEADINGS AS THE BASIS FOR TRIAL.

The pleadings alone are inadequate to meet this problem, because of two fundamental weaknesses:

(1) Since the allegations of claim or defense represent generalized statements of the pleader, they fre-

[1] 21 *Proceedings*, Maryland Bar Ass., 101 (1916). See also, Walter L. Clark, President's Address, 35 *Proceedings*, Md. Bar Ass. 5 (1930).

quently do not indicate the type of proof by which they will be supported and will usually be left as vague as is permissible.

(2) Out of abundant caution or for other reasons the pleader may allege various claims or defenses which he has little evidence to support in order to be prepared for any contingency in the proof, and he may often deny the opponent's allegations to require proof even though no bona fide dispute exists. Inability to discover before trial the real nub of the opponent's case accentuates this tendency.

The result has been well summarized by Professor Sunderland:

> "If a lawyer undertakes so to prepare his case as to meet all the possible items of proof which his adversary may bring out at the trial, or to meet all the assertions and denials which his adversary has spread upon the record, much of his effort will inevitably be misdirected and will result only in futile expense. If, on the other hand, he restricts his preparation to such matters as he thinks his adversary will be likely to rely upon, he will run the risk of being a victim of surprise."[2]

Mr. Walter L. Clark pointed out the consequences in an address to the Maryland Bar Association (35 *Proceedings* (1930), pp. 11-12):

> "The inevitable results of this lack of definite information are manifold:
>
> "1. The trial is unduly prolonged;
>
> "2. The case cannot be properly prepared in advance on the law or the facts;
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> "3. Sufficient prayers cannot be drafted in advance of the trial;
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> "4. The element of surprise is capitalized by both sides;

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[2] Sunderland, *Scope and Method of Discovery Before Trial*, 42 Yale L. J. 863, 864 (1933).

> "5. The unscrupulous lawyer and client occasionally gain an advantage to which the real merits of the case do not entitle them."

The marked increase in the use of bills of particulars in Maryland in recent years is clear evidence of the reality of this dilemma. Under the Code,[3] "either party may require a bill of particulars where the pleading is so general as not to give sufficient notice to the opposite party of the evidence to be offered in support of it." But while they provide some relief from very general pleading (particularly the common counts and general issue plea), bills of particulars do not solve the problem. Despite sympathetic administration by many of the judges, they are useful only in limited classes of cases or for particular types of information. In addition, exceptions to the demand, and to the particulars furnished impose considerable burden on the Courts and lend themselves too easily to dilatory tactics.

On the basis of his own experience Mr. France concluded:

> "* * * The genius of special pleading can have no successor and, in my judgment, no substitute. Prolixity, confusion and endless amendments threaten any attempt on the part of litigants to evolve issues by their mutual statements—unless you are willing to pay the price, namely: The formalism which was at once, the life and the death of special pleading."[4]

This is also the conclusion of most other students and the experience elsewhere.[5] Consequently pre-trial procedures in addition to the pleadings are required.

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[3] Art. 75, Sec. 28, subs. 107 (1939 Code). See Poe, *Practice*, Secs. 114-121A; and Rule 15 of Supreme Bench of Baltimore City.

[4] 21 *Proceedings*, Maryland Bar Ass., 102 (1916).

[5] See, e. g., Ragland, *Discovery Before Trial* (1932); Sunderland, *Scope and Method of Discovery Before Trial*, 42 Yale L. J. 863 (1933); Simpson, *The Pleading Problem*, 53 Harv. L. R. 169 (1939); Wigmore, *Evidence* (3rd Ed. 1940) Secs. 1845-1863.

II.

MARYLAND DISCOVERY PROCEDURE.

The present procedure for discovery before trial in Maryland is, however, unsuited to accomplish these objectives effectively. Except for the narrow common law right of oyer, which permits inspection of certain specialties when pleaded,[6] this procedure is based entirely upon the bill for discovery in equity and is therefore subject to its historic limitations.

1. Bills for Discovery.[7]

Bills for discovery in equity owed their origin, over four centuries ago, to the incompetence of parties as witnesses. While this disqualification was based on a fear of perjury by a party in support of his own case, it also prevented his use as a witness by an *adverse* party even though his testimony was essential to the opponent's recovery. To prevent this injustice, equity permitted a party to obtain from the opponent facts and records which were (1) essential as evidence to prove the *party's own* case and (2) within the exclusive knowledge or possession of the opponent. In other words bills of discovery were designed primarily to obtain *production* of necessary *evidence* rather than to discover facts before trial. Bills of discovery could be combined with demands for further relief in equity or could be brought separately in aid of an action at law, either pending or contemplated.[8]

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[6] These include deeds, bonds and letters testamentary and of administration. Poe, *Pleading*, Secs. 143, 571 and 748. Art. 75, Sec. 28, subs. 106 (1939 Code) makes profert unnecessary but does not extend the right to other documents. State v. Wilson, 107 Md. 129 (1908).

Art. 75, Sec. 28, subs. 108 and 109 making failure to deny, in the next succeeding pleading, allegations of partnership, incorporation, execution or ownership of a motor an admission, also serves to narrow the issues.

[7] Throughout no attempt is made at exhaustive citation. For general discussions of bills of discovery, see Salmon v. Clagett, 3 Bland 125 (1828), Price v. Tyson, 3 Bland 392 (1831), Hill v. Pinder, 150 Md. 397 (1926). See also Miller, *Equity Procedure* (1897) pp. 837-841; Phelps, *Juridical Equity* (1894) Secs. 53, 159, 164.

[8] Parrott v. Chestertown Bank, 88 Md. 515 (1898); Heinz v. German American Bldg. Ass., 95 Md. 160 (1902).

The scope of such bills was limited by their origin and purpose. Aimed only at preventing inability to prove a claim because of the opponent's incompetency as a witness, discovery was denied unless the evidence sought was

(1) material to the demandant's *own* case; and

(2) *essential evidence* for his proof; and

(3) not otherwise available.[9]

Likewise, discovery could not be obtained from a witness not a party to the main suit.[10] Within these conditions, discovery could be had either of facts within defendant's exclusive knowledge, through use of written interrogatories, or of books and records in his control or power. The full answer of the defendant to interrogatories, or the production of the requested documents terminated the bill for discovery.

2. Statutory Changes.

While several statutes and equity rules have simplified somewhat the procedure for obtaining discovery they have not affected either the type or extent of discovery obtainable.

At Law. To avoid the necessity of applying to equity for bills of discovery in aid of actions at law an act was passed in 1796 and amended in 1801 (Art. 75, Sec. 106 of 1939 Code). This Act authorized the court in the trial of actions at law upon interlocutory petition within specified periods

> "* * * to require the parties to produce copies, certified by a justice of the peace, of all such parts of all books or writings in their possession or power as contain evidence pertinent to the issue, or to

[9] See, e. g., Oliver v. Palmer, 11 G. & J. 426 (1841); Cullison v. Bossom, 1 Md. Ch. 95 (1847); 1 Pomeroy, *Equity* (4th ed.), Sec. 201.

[10] Ringgold v. Jones, 1 Bland 88 note (1803); Reddington v. Lanahan, 59 Md. 429 (1883).

> answer any bill of discovery only * * * in cases and under circumstances where they might be compelled to produce said original books or writings or answer such bill of discovery by the ordinary rules of proceeding in chancery * * *".

By its terms this Act merely extended to the law courts under certain conditions the same powers of discovery exercised in equity, and expressly made these powers subject to the same limitations which applied to the equitable bill for discovery. In addition it has been held not to apply to issues from the Orphans' Court[11] or from equity and, of course, is not available before suit as was the bill for discovery, or unless the statutory time requirements are complied with.[12]

In Equity. Of even less effect are the changes made by statute and by rule of court in equity discovery practice. By an act of 1798 (Art. 16, Sec. 27 of 1939 Code) courts of equity were expressly authorized to require the parties to produce such books and documents or certified copies thereof

> "in their possession or power as contain evidence pertinent to the issue, or relative to the matters in dispute between the parties, to be used as evidence at the trial of such cause"

upon proof that the books or documents

> "contain *material and necessary evidence* and that such party cannot safely proceed *to the trial of his case* without the benefit of such testimony".

This Act has been held to be merely an affirmance of the previous powers of equity.[13] Consequently, the nar-

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[11] Magraw v. Munnikhuysen, 35 Md. 291 (1872).

[12] Rich v. Boyce, 39 Md. 314 (1874); see Hill v. Pinder, 150 Md. 397 (1926). See also Art. 9, Secs. 13 and 15 (1939 Code) interrogatories to garnishees.

[13] Winder v. Diffenderffer, 2 Bland 166, 195 (1829); Hill v. Pinder, 150 Md. 397, 406 (1926); and Eschbach v. Lightner, 31 Md. 528 (1869), which discusses and construes the statute.

row limitations on production contained in the statute emphasize the restricted scope of this procedure.

Equity Rules 25 and 26 regulate the procedure for submitting interrogatories by the plaintiff to the defendant separate from the bill and by the defendant to the plaintiff in place of a cross-bill for discovery (see Art. 16, Secs. 186-188 of 1939 Code). The scope remains unchanged.[14]

By an Act of 1820 (Art. 16, Sec. 215 of 1939 Code) certain provisions for enforcing discovery under the ordinary bill of discovery were also enacted.

While these provisions make discovery of facts and production of documents available in certain cases at law and somewhat facilitate the obtaining of discovery in equity, it is apparent that they make no change in the scope of discovery. Moreover, in accordance with established equitable principles, the court has held that the adoption of the statute providing for discovery at law does not deprive equity of its previous jurisdiction. Whenever the legal remedy is inapplicable or whenever the demand for discovery is combined with another recognized ground for relief in equity, the equity court will still take jurisdiction.[15]

3. Inadequacy of this Procedure.

With the removal of the disqualification of parties as witnesses in 1864, (Art. 35, Sec. 1 of 1939 Code), the historical reason for bills of discovery was destroyed—the opposite party could now be required to give his testimony at the trial. The continued use of such bills and of the statutory equivalents shows clearly that they had gradually come to serve an additional purpose—the need for information *before* trial for *preparation* of the case.

[14] See Miller, Equity, Secs. 90 and 159.

[15] See, e. g., Anderson v. Watson, 141 Md. 217 (1922); Seeley v. Dunlop, 157 Md. 378 (1929). Cf. Becker v. Lipps Co., 131 Md. 301 (1917); Johnson v. Maryland Trust Co., 176 Md. 557 (1939).

Despite this fundamental change in function, the same restrictions which had been applied to the original use of such bills were continued, although inappropriate to the newer purpose. Discovery in Maryland is still limited to essential evidence material to the party's own case. Carried over from its earlier history, this restriction seriously impairs its use in preparing cases for trial or in simplifying the questions in controversy. To accomplish this, the party must be permitted to "pry into the opponent's case" and to force him to make admissions of undisputed facts and to reveal the positions and evidence actually relied upon. This is the very thing the traditional limitations prevent. By removing these barriers to full disclosure many other jurisdictions have realized these benefits.

III.

ESSENTIALS FOR EFFECTIVE DISCOVERY.

More effective procedures, shown by experience to aid in narrowing the disputed questions and in simplifying preparation and proof have been developed over a period of more than fifty years in numerous jurisdictions in this country and in England. Of these, adequate discovery provisions are generally recognized as most important and most useful.

The value of adequate discovery was emphasized by the American Judicature Society in its draft *Rules of Civil Procedure* (1919) in the following words (page 85):

> "* * * ample discovery before trial, under proper regulation, accomplishes one of the most necessary ends of modern procedure: it not only eliminates unessential issues from trials, thereby shortening trials considerably, but also requires parties to play the game with the cards on the table so that the possibility of fair settlement before trial is measurably increased."

The Discovery Rules which have been adopted by the Court of Appeals are based upon the long and successful experience with each of these methods in other jurisdictions.

This experience was summarized by George Ragland, Jr., a very capable lawyer, in 1932 after an extensive survey of discovery procedures in use in the various jurisdictions of this country, Canada and England.[16] In his study he not only considered the statutes and decisions but made field investigations in which he interviewed lawyers and judges as to their practical experience with the operation of each of the techniques. His findings and conclusions, which were largely incorporated into the discovery provisions of the federal rules, are in substantial agreement with earlier proposals of the American Judicature Society,[17] with recommendations of two committees of the Section of Judicial Administration of the American Bar Association[18] and of others who have studied the subject.[19]

Before discussing the individual Discovery Rules, and their sources, functions and effectiveness, (See IV) several basic considerations applicable to them as a group can first be briefly taken up.

Experience elsewhere shows that the full benefits from discovery can be had only by (1) broadening the scope of discovery permitted, and (2) providing more flexible methods for obtaining discovery.

1. Scope of Discovery.

If discovery is to be available not merely to assist parties in obtaining their own evidence but to protect them from surprise at the trial and to relieve them from

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[16] *Discovery Before Trial* (1932).
[17] *Rules of Civil Procedure* (Bulletin XIV, 1919) Am. Judicature Soc.
[18] *Reports of Section of Judicial Administration*, Am. Bar Ass. (1938), pp. 38 and 79.
[19] Wigmore, *Evidence* (3rd Ed. 1940) Secs. 1845-1863. See also Sunderland, *op. cit. supra*, n. 2.

unnecessary and useless preparation to meet evidence which will never be offered, the historic chancery restrictions must be abandoned. In other words, means must be provided, under reasonable safeguards, for ascertaining from the adverse party what evidence he proposes to bring forward in support of his claim or defense.

Many states have done just this. There both the courts and bar are practically unanimous in praise of the value of this procedure.[20] They agree that "it is good for both the parties to learn the truth far enough ahead of the trial, not only to enable them to prepare for trial, but also to enable them to decide whether or not it may be futile to proceed to trial".[21]

This view seems to be the conclusion of practically all who have studied the problem. It was strongly recommended in the 1938 Report of the American Bar Association's Committee on Pre-trial Procedure (page 38), which said:

> "Either party should have full privilege to compel the opposite party to submit to oral examination, on oath, concerning all the issues in the case. Each party is entitled to know the other's case."

Similarly, Mr. France in his 1916 address already referred to (21 *Proceedings,* Md. Bar. Ass. (1916), 102), suggested that

> "* * * under proper regulations as to time, fairness and flexibility, either litigant should have the right, in advance of the trial, to interrogate the opposing party as to his admission or denial of any material matter of claim or defense."

Likewise, in urging the adoption in Maryland of broad discovery by oral examination before trial, Mr. Clark

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[20] Ragland, *Discovery,* Chap. XV.

[21] Zolla v. Grand Rapids Store Equipment Corp., 46 F. (2d) 319-320 (1931).

said in his address to the Maryland Bar Association (35 *Proceedings* (1930), 18):

> "From the standpoint of efficiency in the disposition of actual trials, the procedure requires no argument, although such an examination might prove a stumbling block to a dishonest plaintiff or defendant, or a lazy or incompetent lawyer. Such an examination, if allowed as a matter of right before an examiner, without formal application to the Court, wastes none of the Court's time but on the contrary limits the trial, shortens the cross-examination and rebuttal testimony and, I am told, disposes of many cases without trial."

When it is suggested that the scope of discovery should be thus broadened the principal objection usually offered is the danger of increasing perjury. If a party knows the details of his opponent's case, there is the risk, it is said, that he may manufacture evidence to meet it.

Experience in the states where broader discovery is permitted refutes this fear. Far from encouraging perjury, unrestricted discovery by both parties has been found in practice to prevent it. An early examination of the witness while his memory is fresh forestalls the creation of fictitious evidence and makes it easier to check discrepancies in his testimony. Since coaching of the witness by counsel before the discovery examination is less common than for the trial, the testimony is more spontaneous. Moreover, the written deposition makes it difficult to change the evidence to meet later contingencies. The mutuality of the right provides the necessary protection.[22] Counsel in such jurisdictions agree almost unanimously that the ability to force an opponent to give his story early in the case is an effective safeguard against perjury. The data assembled by Ragland overwhelmingly supports this conclusion. In this connection it is interesting to note that the removal of dis-

[22] Ragland, *Discovery*, pp. 124-125; Sunderland, *op. cit. supra*, n. 2, at pp. 867 and 872.

qualification of the parties as witnesses was opposed by many for fear that it would result in a flood of perjured testimony. Today, however, although perjury is undoubtedly too frequent, no one would urge that this disqualification be re-applied.

Moreover, the Rules adopted by The Court of Appeals provide complete safeguards against any abuse of discovery. Deposition Rule 6 expressly gives the trial court the fullest possible powers to prevent any improper taking of depositions. Under that Rule any party or the deponent may apply to the Court *before* the deposition is taken for any order necessary to protect him from hardship or injustice or abuse. The Rule expressly authorizes the Court, for good cause shown, to forbid the taking of the deposition, to change the time, place, or method of taking it, to restrict the scope of examination, to make the taking private, to require simultaneous disclosures, or to make any other appropriate order. In addition, the Court is given the further power to impose the costs, including reasonable attorney's fees, upon a party who seeks to take depositions in order to harass or oppress another party. These plenary powers, it is obvious, give the court to fullest control to prevent any improper use or abuse of the procedure.

2. Method of Discovery.

For a completely adequate discovery procedure, effective and workable methods of discovery are vitally important.

When the scope of discovery is narrow or the material sought is formal, specific or limited, written interrogatories provide an inexpensive and satisfactory means of discovery. They should therefore be retained for use in such situations, supplemented by the demand for admissions of facts and genuineness of documents. But when more extensive information on the controversial

aspects of a case is desired, written interrogatories are generally cumbersome and unsuitable. With all the interrogatories presented at one time and opportunity for careful consideration before answering, evasive replies are not difficult. As a result the number of interrogatories tends to multiply in the effort to force disclosures and prevent evasion, thereby imposing on the courts a severe burden in passing on exceptions and objections.[23]

An *oral* examination, however, avoids most of these difficulties. With questions presented singly and without time for study, answers are more direct, fruitful lines of inquiry can be immediately followed up and evasion minimized by basing subsequent questions upon prior replies. Moreover, in practice far fewer objections are made to the questions, and fuller disclosure is obtained.

The fullest advantages of the oral discovery have been achieved most simply in certain states where the ordinary deposition procedure has been adopted for discovery. In these states, statutes similar to Article 35, Section 26 (1939 Code) have been held to permit unlimited taking of depositions (without regard to probable absence of the witness) either for discovery or perpetuation, and have applied restrictions only on their use at the trial.[24] By this means the necessity for lawyers to learn a new technique for discovery is avoided and, in addition, the advantages of preservation of the discovered testimony for use at the trial in case of unavailability or death of the witness are obtained at the same time. This combined discovery-deposition method has been in successful operation for many years in a number of states (such as New Hampshire, Indiana, Wisconsin,

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[23] Sunderland, *op. cit. supra*, n. 2, at pp. 873-877. See Coca Cola Co. v. Dixi-Cola Lab., Inc., 30 Fed. Supp. 275 (1939).

[24] In Danzer v. W. Maryland Rwy. (Baltimore Court of Common Pleas, 1931) an attempt to use Art. 35, Sec. 26, in this way was prevented by an opinion of Judge Stanton on January 16, 1932, construing the statute to restrict *taking* as well as use of depositions.

Kentucky, Missouri and others) and is widely used and endorsed. Because of this history of satisfactory use in the states it was substantially adopted in the Federal Rules discovery procedure.[25]

One objection raised to this procedure for discovery is the contention that it will put poorer litigants at a disadvantage. They will be prevented from using the procedure, it is said, because of the expense of writing up the depositions. The Rules themselves provide the complete answer to this. Deposition Rule 8 expressly authorizes the trial court to relieve a litigant from having the testimony transcribed "to save expense, or to prevent hardship or injustice". In other words, the court can allow the poorer litigant to take the deposition of his opponent *without going to the expense of having the testimony transcribed.* Furthermore, under Deposition Rule 6, discussed above the court can control the taking of depositions by a more wealthy opponent to prevent injustice. Consequently, the court has adequate powers to prevent any abuse by one party or the other and to put both parties on a par in the use of the procedure. As a matter of fact, this procedure has proved most beneficial in other jurisdictions for the poorer litigant with a bona fide claim, who may now be at a distinct disadvantage against an adversary with a large organization to collect evidence and interview witnesses. In practice this procedure often assists such litigants to obtain prompt and favorable settlements without the necessity of trial.

Objection may be made that extensive use of discovery by deposition will result in "trying the case twice". But this contention overlooks the practical effects of such discovery which tend to prevent this:

(1) By forcing admissions by the opponent of uncontested facts, many witnesses and much evidence can be eliminated at the trial.

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[25] Ragland, *Discovery*, Chaps. IV, XI, XXVII.

(2) By forcing abandonment before trial of unfounded claims or defenses, witnesses or proof which would otherwise be kept in readiness can be dispensed with.

(3) By acquainting the parties with the strength of the opponent's case before trial settlements before trial are promoted and trial thereby avoided.[26]

These various benefits have in practice more than justified the broad discovery procedure. They tend to undermine the "sporting theory" of lawsuits, and to reduce the delay, uncertainty and expense of litigation and to aid in bringing about the "general change of attitude on the part of the Bar" hoped for by Mr. France, when it would be "the ethical and usual thing to admit frankly on the record all things that are not fairly in dispute."[27]

IV.

THE DISCOVERY RULES ADOPTED.

In the light of the preceding discussion of the fundamental bases for the discovery rules, the individual rules may now be briefly discussed to show their scope, sources and functions.

Rule 1. Discovery by Deposition.

Under this Rule depositions may be taken for discovery after suit is brought. This adopts the practice which has been successfully used for many years in Indiana, Kentucky, Missouri, Nebraska, New Hampshire, Ohio and Texas (Ragland, *Discovery*, pp. 19-26) and has been recently adopted in Illinois, Arizona, Colorado and in the Federal Rules. Under the practice in the jurisdictions named and under the rule adopted, discovery by deposition may be had both from witnesses and from parties. In addition, in California and seven other western states depositions of parties and their agents may be taken for discovery.

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[26] Ragland, *Discovery*, Chap. XXIX.
[27] 21 *Proceedings*, Md. Bar Ass., 103 (1916).

The taking of such depositions is governed by the regular deposition procedure (Deposition Rules 1 and 3 to 12, inclusive). Under Deposition Rule 6 the court has the fullest power to control or restrict the taking of such depositions to prevent abuse or oppression. That Rule authorizes the court for good cause shown to forbid the taking of the deposition, to control the time, place, officer and method for taking the deposition and the scope of the examination, or to make any other appropriate order. In this way the parties or the person to be examined may be fully protected against improper use of the procedure.

By using the deposition procedure the creation of a new and separate discovery procedure is avoided. Moreover, the incidental preservation of testimony is frequently valuable in case of unforeseen contingencies (Ragland, pp. 241-46).

Where this method has become established, the expense of this procedure has been kept low. However, to prevent any litigant from being deprived of the proper use of the procedure because of the expense of transcribing the testimony the court is expressly authorized by Deposition Rule 8(c) to relieve the party from the necessity of having the testimony transcribed in a proper case. In this way a poor litigant can be given the same opportunity to use the procedure as a wealthier one.

The use of such depositions at the trial is, of course, governed by Deposition Rule 11, which limits it to the usual situations.

Rule 2. Interrogatories to Parties.

This Rule authorizes discovery by interrogatories to a party to any proceeding, on the pattern of the traditional equity procedure (Md. Equity Rules 25 and 26). While also now available at law by a petition for discovery under Art. 75, Sec. 106 (1939 Code), their narrow

scope discourages their use. Such interrogatories have long been an established part of the practice in England (Rules O. 31, r.r. 1-11, 21 and 24, Annual Practice (1940)) and in Massachusetts and a number of other jurisdictions (Ragland, pp. 92-96).

While less efficient than oral examination for general discovery, they are an inexpensive means for some types of cases (Ragland, pp. 92-96). To overcome their weaknesses, the number permitted as of right is limited as is done in Massachusetts, and the penalty of costs is used, as in England, and the Federal Rules (Rule 37(a)), to discourage vexatious questions or exceptions and evasive answers. (See subs. (a) and (c)) Cf. *Coca Cola Co. v. Dixi-Cola Lab., Inc.*, 30 Fed. Supp. 275 (D. Md., Chesnut, J., 1939).

Rule 3. Scope of Examination and Interrogatories.

Under this Rule, discovery by deposition or interrogatories is permitted to extend to the whole case. This is now the practice in a number of the states (Ragland, pp. 120-145) and in the Federal Courts (Rule 26(b)). As has been said above, this is recommended by the 1938 Reports of the Section of Judicial Administration of the American Bar Association (pp. 38 and 79), Dean Wigmore (*Evidence* (3rd Ed. 1940), Secs. 1845-1863), Ragland, *Discovery Before Trial* (1932), Sunderland, *Discovery,* 42 Yale L. J. 863 (1933); see France, 21 *Proceedings,* Md. Bar Ass. (1916) 102; Clark, 35 *Proceedings,* Md. Bar Ass. (1930) 15, 17-18. See Pike and Willis, *The New Federal Deposition-Discovery Procedure,* 38 Col. L. Rev. 1179 and 1436 (1938) and *Federal Discovery in Operation,* 7 Chicago L. Rev. 297 (1940). This extension in the permissible scope of discovery is essential to obtain the benefits of the procedure in eliminating undisputed matters, assisting preparation for trial, shortening trials and promoting settlements.

Ample powers are given to the court to prevent any possible abuse of the privilege of such discovery. As has already been said, Deposition Rule 6 allows the court to control the scope of discovery by deposition to prevent oppression or abuse. Likewise, in the case of interrogatories the court necessarily will pass on their propriety in ruling on any exceptions. In either case, of course, the court would be governed by the principles stated in this Rule 3 but would be able to prevent any improper use of the discovery power.

Rule 4. Discovery of Documents and Property.

This section provides the method for obtaining production and inspection of documents and property. It consolidates several sections of existing law (Art. 16, Sec. 27; Art. 75, Secs. 104 and 106 (1939 Code)) to provide the same method for all proceedings. The chancery rule limiting such discovery to evidence necessary to the party's own case (embodied in Art. 16, Sec. 27 and Art. 75, Sec. 106 (1939 Code)) is eliminated, however, and discovery is permitted of "evidence material to *any matter* involved in the proceeding". (See Notes to Rule 3.)

In addition, by use of a subpoena *duces tecum,* discovery of documents can be had at the deposition examination (Ragland, pp. 184-5); but such a subpoena can be issued only upon order of the court.

Rule 5. Mental and Physical Examinations.

This Rule deals with mental and physical examinations of parties upon order of the court, and embodies existing practice. The inherent power of the trial court to order a medical examination of a party whenever his condition is relevant to the action is well established in Maryland. *United Railway and Electric Company vs. Cloman,* 107 Md. 681 (1908); *Scheffler vs. Lee,* 126 Md. 373 (1915); *Brown vs. Hutzler Bros. Co.,* 152 Md. 39

(1927). While these cases involve physical examination their reasoning appears to authorize a mental examination in a proper case. With respect to the terms of the order this section merely codifies the practice indicated by the cases cited.

Rule 6. Admission of Facts and of Genuineness of Documents.

This Rule provides a simple method for obtaining admissions of undisputed specific facts or documents and avoiding proof. Since neither party can apply to the Court for rulings on the requests or replies, (except to assess costs of proof at the trial for unjustified refusal to admit) no serious burden of administration is placed on the Courts. See Clark, 35 *Proceedings,* Md. Bar Ass. (1930) 13-15.

Similar rules providing for admissions of the genuineness of documents are in effect in England, some twenty of the United States (Ragland pp. 207-210) and the Federal Courts (Rule 36), and admissions of facts are provided for in England and some six states (Ragland pp. 194-207) and the Federal Courts (Rule 36).

Rule 7. Failure to Comply With Orders.

This Rule provides sanctions for refusal to make discovery when ordered, similar to those prescribed by existing law (See Art. 16, Secs. 28, 215, and 299; Art. 75, Sec. 106 (1939 Code)).

LAW RULES.

I. PLEADING.

Pleading Rule 1, the only one of the rules affecting pleading, relates to pleas amounting to the general issue plea. Under the existing law, with certain exceptions, any plea which amounts in legal effect to the general issue plea is defective. At common law this was considered merely as a defect in form, to be attacked by a special demurrer or motion. Under our present practice, however, although the special demurrer has been abolished, pleas amounting to the general issue are held bad *in substance* on general demurrer.[1]

Pleading Rule 1 merely removes this basis for objection to a plea. It does not affect the right to plead the general issue plea. It only permits pleadings which would otherwise have been held bad because amounting to the general issue plea.

II. JUDGMENTS BY CONFESSION.

The practice with respect to the entry of judgments by confession varies widely among the several circuits of the State. In many counties judgments by confession can be entered by the Clerk without notice and upon the mere production of a note or other written instrument containing power to confess judgment, in accordance with Article 26, Section 6 (1939 Code). In some circuits, however, a judgment by confession can be entered only if supported by affidavit by the plaintiff or some one on his behalf; and in a few circuits provision is made for notice to the defendant either before the entry of the judgment or immediately thereafter.

This lack of uniformity in the procedure is itself undesirable. In addition, in the counties where no notice to the defendant is required there is dissatisfaction with the

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[1] See generally, Poe, PLEADING AND PRACTICE, V. II, Secs. 637-641.

practice. This seems to be predicated largely upon two grounds:

(1) That the defendant is fairly entitled to have the plaintiff's claim supported by affidavit or other proof of the amount actually due and to have notice of the claim either before or immediately after judgment.

(2) Where a judgment is entered by confession, especially where no notice is given, courts will always entertain a motion to strike out the judgment; and in most circuits the courts adopt the practice of opening the judgment for trial even after the term upon almost any showing that the judgment ought not to have been entered. This frequently results in a trial of the case long after the facts are cold and when witnesses are no longer available.

The rule regarding judgments by confession seeks to correct this situation by prescribing a uniform procedure throughout the State. Under the rule judgment by confession may be entered under a power of attorney by filing an affidavit, stating the amount due and the post office address of the defendant. After entry of judgment notice is given to the defendant either by personal summons within the State or by delivery or by registered mail outside the State. Unless the defendant moves to strike out the judgment within thirty days after he receives such notice, the judgment becomes final. In other cases judgment by confession can be entered only upon order of court.

III. TRIAL RULES.

Since trial of a lawsuit is at best costly to the litigants and time-consuming for all concerned, it is essential that so far as possible controversies be settled by a *single* trial and that retrials or duplicate trials be reduced to a minimum. Yet at present in Maryland under some circumstances the same case may be retried several times and cases involving similar transactions or occurrences often require separate trials.

Thus whenever the lower court concludes after trial that it has misdirected the jury or improperly failed to direct a verdict or that the jury has ignored the instructions or has decided against the evidence, the court's only power at present is to order a new trial of the entire case. Likewise, if on appeal the Court of Appeals finds that the lower court erred in its instructions or improperly directed a verdict it must now order a new trial.

The possibility of errors in trials cannot, of course, be completely removed, but it is possible to provide various means for minimizing the likelihood of such errors, or for correcting them or segregating their effect without requiring a complete new trial of the case. A number of devices for these purposes have been developed in other jurisdictions and are in successful operation. Among these, the methods of the greatest practical value include (1) more adequate methods of instructing the jury; (2) special verdicts; (3) judgment notwithstanding the verdict; (4) partial new trials; and (5) improved procedure for trials without a jury.

Similarly, effort and time are often wasted in separate trials for cases involving the same transactions or occurrences, or by the necessity of a new trial where a plaintiff takes a voluntary non-suit during the trial. The first can be partly corrected by allowing freer consolidation of cases for trial, and the second by regulating the right to non-suit.

The Trial Rules incorporate these various devices for avoiding retrials or duplicate trials, and make several other minor changes in trial practice. The discussion which follows explains the purpose of each of these devices and their value in promoting more efficient administration of justice and saving time and expense.

RULE 1. VOLUNTARY DISMISSAL.

The plaintiff at law may now dismiss his action or submit to a voluntary judgment of *non-pros* at any time

before argument on the facts begins and a defendant has the same right as to any claim of set-off.[1] Thus, after a full trial on the merits, and even after the Court has ruled on the prayers, an action or set-off may be voluntarily dismissed, leaving the party dismissing entirely free to sue again on the same facts and to subject the opposite party to the expense and inconvenience of again defending against the claim. At present, this right is *absolute,* and not subject to any control by the Court.[2]

This unrestricted right of a party to dismiss his claim and place upon his opponent the expense and inconvenience of a second trial is obviously open to abuse.[3] In its 1938 report, the Section of Judicial Administration of the American Bar Association said:

> "It is, we believe, the very general opinion of the Bar that the practice constitutes an abuse of legal procedure in the great majority of cases and is unduly wasteful of judicial time and oppressive to defendants."[4]

Consequently, in a considerable number of states,[5] in England,[6] and in the Federal Courts,[7] this privilege has been greatly curtailed.

Under Trial Rule 1, a party may dismiss an action at law or set-off without an order of court at any time be-

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[1] Art. 75, Sec. 183 (1939 Code); Easter v. Overlea Land Co., 128 Md. 99 (1916). Such dismissal by a plaintiff does not affect the defendant's right to proceed with any claim of set-off. Before this statute a plaintiff could dismiss at any time before verdict (Hall v. Schuchardt, 34 Md. 15 (1871); see Staylor v. Jenkins, 70 Md. 472 (1889)) and defeat defendant's set-off (Gildea v. Lund, 131 Md. 385 (1917)).

[2] State v. Lupton, 163 Md. 180 (1932). The Court in its discretion may, however, stay the second suit until costs in the first are paid. Bull's Lessee v. Sheredine, 1 H. & J. 206 (1801); Brinsfield v. Howeth, 107 Md. 278 (1908). Cf. Art. 75, Sec. 74 (1939 Code).

[3] See Head, *The History and Development of Nonsuit,* 27 W. Va. L. Quart. 20 (1920).

[4] At page 46.

[5] See Head, *op. cit. supra,* n. 8; 89 A. L. R. 13 and 126 A. L. R. 284. See American Judicature Society, *Bulletin XIV* (1919), Art. 25.

[6] Annual Practice (1940), O. 26, Rules 1-4; O. 21, Rule 16.

[7] Federal Rule 41.

fore the introduction of any evidence at the trial; thereafter a party can dismiss only by agreement of the other party or with the permission of the court. The court, in its discretion, may grant such permission and may impose conditions or terms. In this way, the court can prevent a dismissal where the party has had a fair trial with full opportunities to present his evidence, and may thus save the defendant from the unnecessary hardship and expense of a second trial. On the other hand, if the party shows that for any proper reason his case has not been fully presented, the court may allow voluntary dismissal without prejudice to another suit. Thus, the rule preserves the right in proper cases while preventing its abuse. The provision (in subsection (c) of the Rule) that two dismissals by notice are a bar is found in Alabama, Minnesota and the Federal rule. Subsection (d) regarding costs conforms to existing law. This rule should eliminate unnecessary duplication of trials and vexatious litigation.

RULE 2. CONSOLIDATION.

Where several actions, which involve common questions of law or fact, are pending at the same time, duplication of trials can often be avoided by hearing the actions or the common questions together or by consolidating the actions. Power to do this is now broad in equity[1] but is very limited at law.[2] Trial Rule 2 gives the court at law power (1) to order *joint trial* of common issues in several law actions or (2) to *consolidate* the actions. Thus, the actions may simply be tried together while leaving parties and other matters separate, or in proper cases they may be merged. This conforms to the practice which now prevails in a number of other states and in the federal courts.[3]

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[1] Miller, *Equity Procedure* (1897), Secs. 236 and 237.

[2] See Art. 50, Secs. 7 and 8 (1939 Code); Mitchell v. Smith, 4 Md. 403 (1853).

[3] See Federal Rule 42. See American Judicature Society, *Bulletin XIV* (1919), Art. 26.

RULE 3. STIPULATED JURIES.

The constitutional guarantee of trial by jury means a jury composed of twelve men and a verdict by unanimous agreement. In the interest of greater efficiency, however, a number of states have adopted constitutional amendments reducing the number of jurors required to hear civil cases and providing for verdicts by a specified majority.[4] The benefits of such modifications can, of course, be obtained by agreement of parties. Rule 3 merely authorizes the parties to stipulate for smaller juries or for less than unanimous verdicts.[5] How far this will be used will, of course, depend entirely on the litigants themselves.

RULE 4. DIRECTED VERDICTS.

Trial Rule 4 deals with directed verdicts in jury trials and Trial Rule 5 deals with similar cases when tried before the court without a jury.

Rule 4 codifies the existing practice as to directed verdicts with two minor additions.[6] One requires that the grounds for the motion for directed verdict be stated for the information of the court and counsel; the second permits the court to reserve its ruling on the motion until after the verdict or disagreement of the jury. This is intended to facilitate the use by the court of judgment notwithstanding the verdict provided for in Trial Rule 8. The rights of the party requesting the directed verdict are protected by providing that any such reservation operates as a denial for the purposes of appeal.

RULE 5. DEMURRER TO EVIDENCE.

Rule 5 merely provides the equivalent of a directed verdict in cases tried by the court alone pursuant to Trial Rule 9.

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[4] See Scott, FUNDAMENTALS OF PROCEDURE (1922), pp. 75-79.

[5] In several states and the federal courts, this is permitted. See Federal Rule 48.

[6] For the present Maryland practice, see Poe, *Pleading and Practice*, (1925) V. II, Secs. 293-296; Art. 75, Sec. 96 (1939 Code).

RULE 6. INSTRUCTIONS TO THE JURY.

Trial by jury is inherently difficult to administer. Under the ordinary general verdict, it is the duty of the judge to decide the law and instruct the jury, and of the jury to find the facts and apply the instructions. This division of functions creates various pitfalls. If the court erroneously states the law, or the jury finds against the evidence, or does not apply the instructions, an unjust verdict results, and with a general verdict, the only remedy is a new trial, with its attendant expense and delay.

Since the average juror is, of course, unfamiliar with the law and inexperienced in weighing evidence, efficient operation of jury trial therefore requires that the instructions to the jury be clear and simple and that the jurors receive all possible assistance in considering the facts.[1]

1. Common Law Practice.

The historic jury trial at common law achieved both of these objectives in large measure: the court gave its charge to the jury orally in direct and concrete language and it also discussed and commented on the issues and the evidence.

The value and importance of this to the jury was pointed out in the seventeenth century by Sir Matthew Hale in his famous book on *The History of the Common Law,* in which in discussing trial by jury, he says:

> "Another excellency of this trial is this; that the judge is always present, at the time of the evidence given in it. Herein he is able, in matters of law, emerging upon the evidence, to direct them; and also, in matters of fact, to give them a great light

[1] For an interesting discussion of the practical functions of instructions, see R. J. Farley, *Instructions to Juries—Their Role in the Judicial Process*, 42 Yale L. J. 194 (1932).

> and assistance, by his weighing the evidence before them, and observing where the question and knot of the business lies; and by showing them his opinion even in matter of fact, which is a great advantage and light to laymen. And thus, as the jury assists the judge in determining the matter of fact, so the judge assists the jury in determining points of law, and also very much in investigating and enlightening the matter of fact, whereof the jury are the judges."[2]

Blackstone, writing about 1765, likewise emphasizes these functions of the judge in the trial by jury:

> "When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel, and all others, sums up the whole to the jury; omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving his opinion in matters of law arising upon that evidence."[3]

Finally, the United States Supreme Court, construing the Federal constitutional guarantee of jury trial, has strongly stated the vital part of the judge in such trials at common law. In *Capital Traction Co. v. Hof*, 174 U. S. 1 (1899), the Court said:

> "Trial by jury * * * is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence."[4]

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[2] 2 Hale, *History of the Common Law* (5th Ed. 1794), Ch. 12, p. 147.
[3] Blackstone, *Commentaries* (1765), Book III, Ch. 23, p. 375.
[4] At pages 13-14; see also Vicksburg and Meridian R. R. Co. v. Putnam, 118 U. S. 545 (1886).

2. Maryland Practice.

Although the Maryland Constitution guarantees the right to trial by jury in civil cases according to the course of the common law of England,[5] yet under the present practice here, jury trials lack the basic common law features described by Hale, Blackstone and the Supreme Court. The late Governor Ritchie in an address to the Maryland State Bar Association in 1908, after referring to the use of written prayers, described the Maryland practice as follows:

> "In practice, this is all. The court makes no comment whatever upon the evidence; says nothing upon its weight, however strong or weak that may be; nothing about the credibility of witnesses, however plainly it may appear that some are truthful or others untruthful; and refrains absolutely from giving the jury any benefit from the peculiar ability which the court's training and experience must give him of divining truth in the midst of improbable or inconsistent testimony.
>
> "Unless in exceptional instances, the court does not even read to the jury the prayers it grants. Without word or comment, it silently hands them to the clerk, and if counsel do not see fit to explain them to the jury in their closing arguments then the jury see them for the first time in their jury room, and if they do not both read and understand them there, they are never the wiser for the court's instructions."[6]

In jury trials in Maryland, therefore, the judge has lost his historic common law powers and been reduced to a mere moderator or umpire. This radical departure from the orthodox common law practice apparently had its early origins in the distrust of the colonial judges; it came about not by statute or constitution, as in many

[5] Declaration of Rights, Art. 5, Constitution, Art. 15, Sec. 6. See Knee v. City Passenger Ry. Co., 87 Md. 623 (1898).

[6] Ritchie, *The Province of the Judge in Jury Trials*, 13 *Proceedings*, Md. St. Bar Ass. 130, 131 (1908).

states, but simply by usage later embodied in court decisions.

Since these decisions have been reviewed in detail in the addresses of Messrs. Albert C. Ritchie, Charles McHenry Howard, and Charles Markell,[7] it is sufficient to state here that they establish (1) that no comment by the court on the evidence is permitted,[8] and (2) that although oral instruction on the law is permissible, it has not been facilitated or encouraged.[9]

3. Changes Recommended.

Leaders of the Maryland Bar have repeatedly criticized this deviation from the historic jury trial. They point out that (1) the drafting of prayers has become a technical, formalized art, requiring slavish adherence to precedent and full of traps for lawyer and court alike; (2) the various technical requisites of a valid prayer combine to produce long and involved sentences in a cramped and artificial style which are practically unintelligible; (3) frequently counsel in drafting and submitting prayers are less concerned with informing the jury than with laying the basis for an appeal; (4) because of the length, number, complexity and unintelligibility of prayers, the jury probably often abandons all attempts to unravel and understand them and simply disregards the instructions; and (5) the jury in considering the evidence, receives no aid whatever from the experience and judgment of the court.[10]

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[7] Ritchie, *op. cit. supra.* at pp. 132-3; Charles McHenry Howard, *The Exclusive Use of Written Prayers and Instructions in Civil Cases In Maryland*, 31 *Proceedings*, Md. State Bar. Ass. 120 at 140-144 (1926); Charles Markell, *Trial by Jury—A Two-Horse Team or One-Horse Teams?*, 42 *Proceedings*, Md. State Bar Ass. 72, at 82-90 (1937).

[8] See Sandruck v. Wilson, 117 Md. 624 (1912); Coffin v. Brown, 94 Md. 190, 203 (1901); Dairy Corporation v. Brown, 169 Md. 257 (1935); cf. Gilpin v. Somerville, 163 Md. 40 (1932).

[9] See Smith v. Crichton, 33 Md. 103, 108 (1870); Rosenkovitz v. United Rwys. Co., 108 Md. 306 (1908); Winslow v. Atz, 168 Md. 230, 245 (1935); cf. Weant v. Southern Trust Co., 112 Md. 463, 476 (1910).

[10] Ritchie, *op. cit. supra*, at pp. 133-134; Howard, *op. cit. supra*, at pp. 146-151; Markell, *op. cit. supra*, pp. 82-86; Stanton, *Some Trials of a Trial Judge*, 43 *Proceedings*, Md. State Bar Ass. 35, 41-42. See also, Farley, *op. cit. supra*, n. 1.

Consequently, they have urged a return to the earlier practice. In his 1908 address, Mr. Ritchie strongly recommended this:

> "It is not proposed for one instant to permit the Court to tell the jury what they must find, nor even to tell the jury what, in the Court's judgment, they ought to find, or what evidence in the Court's judgment they should adopt and what they should reject. What is proposed is this:
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> "At the conclusion of the case let the judge briefly and compactly sum up and recapitulate the evidence in all its bearings; let him give the jury the benefit of his advice and counsel regarding it; let him indicate to them the inferences which his own trained mind draws from it; let him show wherein it conflicts; show the bias of certain witnesses, and the disinterestedness of others; show the circumstances which should induce the jury to regard certain evidence with caution, other evidence with favor; call attention to the fact that some testimony is uncontradicted, other testimony uncorroborated. In a word, let the Court draw upon the fund of his experience, his training and his intelligence, as an aid to the jury in their deliberations, and thus use his knowledge and his faculties where they can do more good in the promotion of justice than they ever could do sealed tight in the judicial breast.
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> "Then let the Court follow this up with a clear statement that the comments he has just made are in no sense binding upon the jury; that the jury are after all the final judges of the facts; that they must find such verdict as to them seems proper, and if their own good judgment does not adopt the suggestions the Court has made, then it is both their right and their duty to follow their judgment, and disregard the suggestions of the Court.
>
> "When the prayers are granted, let the Court read and explain them to the jury in the light of the outline of the case he has just given, and then when the

jury finally comes to retire, who can doubt that they will go into their deliberations with minds far better equipped for the task before them than if they heard only the biased arguments of counsel, and received from the Court nothing but hypothetical instructions, the meaning of which they must decipher for themselves?

"As a result of this practice the Court would take a real part in the administration of justice. He would be the guide, the helpmate, the counsellor of the jury. Instead of giving them mere colorless instructions, to be read or not as they chose, his instructions, both read and explained, would be accompanied by practical, working suggestions and aid, and yet by impressing upon the jury their ultimate rights and duties as final arbiters of the facts, not one iota of their province would be infringed upon."[11]

The proposal to restore to the judge his historic functions in the trial by jury has been strongly urged before the Maryland State Bar Association on several subsequent occasions. In an address delivered to the Association in 1926, Mr. Charles McHenry Howard discussed the origins and weaknesses of our present practice as to prayers and instructions and advocated that the judge be given his former powers of oral instruction and summing up the evidence and commenting upon its weight.[12] Likewise in 1937, Mr. Charles Markell considered this subject, pointing out particularly the greater efficiency in jury trials in the federal courts, where the historic functions of the judge have been retained, as compared with such trials in the state courts, where the judges have been deprived of these powers.[13] Finally, in his President's address in 1938 Judge Robert F. Stanton took up the matter from the point of view of the trial judge and emphasized the extent to which prayers have

[11] Ritchie, *op. cit. supra*, at pp. 142-143.
[12] Howard, *op. cit. supra*.
[13] Markell, *op. cit. supra*.

merely become traps for the judge. In the course of his discussion he said:

> "It has often been said that the only experienced lawyer in the trial *who is disinterested* in the outcome of the case, is the judge. He is required to know the law and is accustomed to weighing the evidence. And while under our practice he cannot comment on the facts, nor explain the law; if, in his judgment, the jury have decided improperly, either on the facts or the law, he may set aside the verdict on a motion for a new trial. It is an illogical situation to grant the power to the judge to set aside a verdict, and at the same time withhold from him the power to advise the jury from his experience, prior to their verdict, by an analysis, summary and comment on the evidence, with the instruction that his comments are merely advisory, and theirs is the power to decide in the full exercise of their discretion."[14]

At Judge Stanton's suggestion a special committee of the Association was appointed to "make recommendations for appropriate action to restore the trial judge to his proper role in jury trial of civil cases." In 1939 this Committee recommended the appointment of a committee to confer with the Committee on Civil Procedure of the Court of Appeals with the view to "restoration of the trial judge to his proper function in jury trials."[15]

Practically every competent person or group, who has studied this problem, has concluded that the restoration to the trial judge of his historic common law power to charge the jury orally is essential for efficient and just trial by jury. In 1927 a committee of distinguished professors and judges, appointed by the Commonwealth Fund to study reform of the law of evidence, reported on this question. The Committee conducted a survey of lawyers with experience both in courts where comment

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[14] Stanton, *op. cit. supra*, at p. 42.
[15] 44 *Proceedings*, Md. State Bar Ass. 45 (1939).

by the judge was not permitted and in courts where it was, to determine whether they believed comment by the judge aided trial by jury. On the basis of this survey the Committee concluded that in actual practice the privilege of comment tends to save time and expense by bringing quicker verdicts, reducing the number of disagreements, diminishing new trials and applications for new trials and fostering closer attention by the judge during the trial.[16] It concluded (at page 21):

> "But if the greater part of lawyers who have observed the jury at work under both systems are willing to certify that the historic rule produces better results, it can hardly be opposed on the ground that comment would mislead the jury. Consequently, the reported experience of trial lawyers fortifies the theory that the return to the orthodox rule would greatly aid the administration of justice even without changes in the rules of evidence. It would strike a heavy blow against the 'sporting theory' of a lawsuit."

Likewise, the report of the Section of Judicial Administration of the American Bar Association, approved by the Assembly and House of Delegates in 1938, vigorously urged this reform. It recommended that "the trial judge shall instruct the jury orally as to the law of the case and he may advise the jury as to the facts by summarizing and analyzing the evidence and commenting upon the the weight and credibility of the evidence or upon any part of it, always leaving the final decision on the question of fact to the jury."[17]

Moreover, the Code of Evidence now being prepared by the American Law Institute includes provision for such summing up and comment upon the evidence.[18] In the discussion of this rule it is stated, "it [the right of

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[16] *The Law of Evidence* (1927) Ch. II.

[17] *Reports of Section of Judicial Administration*, Am. Bar Ass. (1938), at pp. 43 and 64.

[18] *Code of Evidence*, Tentative Draft No. 1 (American Law Institute 1940), Rule 10.

comment by the judge] has been commended by commentators from Sir Matthew Hale to Dean John H. Wigmore. The great Thayer, after asserting the impossibility of conceiving of trial by jury in English history in a form 'which would withhold from the jury the assistance of the court in dealing with the facts,' declared that trial by jury in such a form 'is not the venerated institution which attracted the praise of Blackstone and of our ancestors, but something novel, modern, and much less to be respected'."

Among students of the law of evidence and of procedure and trial, opinion is practically unanimous in favor of the return to the common law rule. The view of Dean Wigmore is typical. In his *Treatise on Evidence,* he says:

> "This unfortunate departure from the orthodox common law rule has done more than any other one thing to impair the general efficiency of jury trial as an instrument of justice."[19]

Within recent years several states, which restricted comment on the evidence by the judge, have by constitution, statute or rule returned to the orthodox rule allowing such comment. This was done by constitutional amendment in California,[20] by statute and rule in Michigan,[21] and by rule in New Mexico.[22]

Despite the widespread agreement of the lawyers, judges, commentators already referred to, and others, who have carefully considered this matter, there are, of course, some who oppose the change to the common law

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[19] Wigmore, *Evidence* (3rd Ed. 1940) Sec. 2551, pp. 504-5. See also: Sunderland, *The Inefficiency of the American Jury*, 13 Mich. L. R. 302 (1915); Cartwright, *Present But Taking No Part*, 10 Ill. L. R. 537 (1916); Johnson, *Province of the Judge in Jury Trials*, 12 J. Am. Jud. Soc. 76 (1928); Wigmore, *A Program for the Trial of Jury Trial*, 12 J. Am. Jud. Soc. 166 (1928); Tennant, *The Right of the Trial Judge to Comment on the Evidence*, 16 J. Am. Jud. Soc. 16 (1932).

[20] Constitution, Art. VI, Sec. 19, as amended 1934.

[21] Michigan Court Rules 37, Sec. 9; Michigan Comp. L. (1929), Sec. 17322.

[22] New Mexico Trial Court Rule 70-106 (1934).

rule. They particularly object to the right of the judge to express his opinion on the weight of the evidence on the ground that the jury will be excessively influenced by the judge's views.[23]

4. Rule Adopted.

The Rule adopted restores to the judge part of his original common law powers.

Subsections (a) and (b) (1) are based on existing law and practice but clarify the right to give instructions orally. Written instructions requested by the parties or prepared by the court may still be used, but the court, in its discretion, may give its instructions orally on any issue or on the whole case. While this right to instruct orally now exists, expressions in some of the cases tend to discourage its use. In this respect the Rule merely removes any special requirements or restrictions on such oral instructions.

Subsection (b) (2) allows the court in its discretion to sum up the evidence. This power is permissive only and not mandatory; the judge need not sum up unless he wishes. If he does sum up the evidence, he must inform the jury that they are to determine for themselves the weight of the evidence and the credit to be given to the witnesses. In about 24 states and in the federal courts the judges have at least the power conferred by this Rule with respect to summing up the evidence and in many of these their power is much broader.

Subsections (c) and (d) require a specific objection to any instructions before the jury retires in order to raise such objections upon appeal. This merely broadens the present provision requiring special exceptions for certain classes of objections to the instructions (Art. 5, Secs. 10 and 11, 1939 Code). Thus, the judge or opposing counsel are enabled to consider the objection and make any corrections to overcome it.

RULE 7. SPECIAL VERDICTS.

As has already been said, one of the problems of trial by jury is the necessity of applying the law as determined by the Court to the facts as found by the jury. Under our present practice of general instructions by the Court on the law, followed by a general verdict of the jury on the whole case, the jury performs the function of applying the law as well as deciding on the facts. This method has certain marked disadvantages: (1) general instructions on the law are difficult to frame and are a prolific source of errors and reversals on appeal; (2) the duty of considering the law and applying it to the facts complicates the job of the jury in deciding on the facts; and (3) with the general verdict the effect of any error cannot be segregated but vitiates the entire verdict and requires a new trial.[1]

1. Nature of Special Verdict.

To free the jury from the burden of applying the law to the facts, the common law developed, as early as the thirteenth century, the special verdict, in which the jury found the facts in dispute specially and left it to the Court to apply the law to them. Originally the special verdict was a means of protecting the jury from "attaint," or punishment for finding an erroneous verdict, by shifting to the Court the responsibility for applying the law to the facts.[2] This common law special verdict was used in Maryland during the Colonial period.[3]

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[1] See Sunderland, *Verdicts, General and Special.* 29 Yale L. J. 253 (1920); Donley, *Trial by Jury in Civil Cases—A Proposed Reform,* 34 W. Va. L. Quart. 346 (1928).

[2] Morgan, *A Brief History of Special Verdicts and Special Interrogatories,* 32 Yale L. J. 575 (1923).

[3] See Howard, *The Exclusive Use of Written Prayers and Instructions in Civil Cases in Maryland,* 31 *Proceedings,* Md. State Bar Ass. 120 (1926), 137-8; see Beale v. Digges, 1 H. & McH. 26 (1705); Lloyd's Lessee v. Hemsley, 1 H. & McH. 28 (1712); Gover v. Turner, 28 Md. 600 (1868).

The common law form of special verdict has now generally fallen into disuse. Under it the jury was required to find every fact essential to establish a cause of action even though some of such facts were not in dispute. In addition, there were other highly technical distinctions as to the form of the findings. As a result the common law special verdict was difficult to administer and was itself a fruitful cause of errors.[4]

In more recent times, however, a modified statutory form of special verdict has been developed in some states and is in successful use. These statutes wipe out the technicalities of the common law special verdict and make the method far more flexible and simpler to administer. Such provisions have been particularly successful in North Carolina, Texas and Wisconsin over a period of more than fifty years, and the experience accumulated in these states shows that the special verdict can do much to improve the efficiency of trial by jury.[5] For this reason, provision for its use was included in the new Federal Rules.[6]

This modified special verdict was discussed in detail in an address to the Maryland State Bar Association in 1929 by Mr. John W. Staton.[7] After reviewing the shortcomings of the Maryland system of general instructions and general verdicts, and of the common law special verdict, Mr. Staton analyzed the experience in North Carolina, Texas and Wisconsin with the modified special verdict and showed its advantages. By specific examples he compared the complexity of the instructions used in submitting the case to the jury in Maryland with the simplicity of the questions to the jury under the modi-

[4] See Sunderland, *op. cit. supra*, n. 1; Green, *A New Development in Jury Trial*, 13 Am. Bar. Ass. J. 715 (1927) reprinted in Green, JUDGE AND JURY (1930), Ch. 13. See, for instance, Mahoney v. Ashton, 4 H. & McH. 210 (1798).

[5] This practice is described in detail in Green, *op. cit. supra*, n. 4; and also in Donley, *op. cit. supra*, n. 1, and Staton, *The Special Verdict as an Aid to the Jury in Civil Cases*, 34 *Proceedings*, Maryland State Bar Ass. 4 (1929).

[6] Rule 49(a).

[7] 34 *Proceedings*, Md. State Bar Ass. 4 (1929).

fied form of special verdict in these states. Under their procedure the Court may submit to the jury specific questions as to the ultimate issues to which the jury may give a categorical answer. The Court gives such instructions as to burden of proof, the meaning of particular words or phrases in the questions or other matters as are necessary to permit proper answers. On the basis of these answers the Court applies the law to the case and orders entry of the proper judgment. In his address Mr. Staton strongly urged the adoption of the special verdict into Maryland practice.

The special verdict should not be confused with the general verdict accompanied by special interrogatories. With that, the jury returns a general verdict and also answers specific questions on particular issues.[8] Consequently, general instructions to the jury are still required, and the duties of the jury are increased rather than simplified as under the special verdict. The method of special interrogatories with the general verdict was tried in Maryland for a short period about forty years ago and abandoned.[9] While certain of the more troublesome features of this device have been improved in its more recent forms,[10] it seems largely unnecessary, if the special verdict is adopted.[11]

In certain classes of cases the present Maryland practice approximates the special verdict. Of this nature are the special issues framed in the Orphans' Courts[12]

[8] See Wicker, *Special Interrogatories to Juries in Civil Cases*, 35 Yale L. J. 296 (1926).

[9] Ch. 185, Acts of 1894, repealed by Ch. 641, Acts of 1900. See Poe, *Pleading and Practice* (5th Ed. 1925) V. I, Secs. 758A-758B, V. II, Sec. 332A. See Staton, *op. cit. supra*, n. 5, at 11-13.

[10] In the Maryland form, parties had an absolute right to submit interrogatories on material facts, and the right was apparently abused. See B. & O. R. R. Co. v. Cain, 81 Md. 87, 105 (1895). The more modern statutes and rules correct this by leaving the matter to the discretion of the court. See Federal Rule 49(b); Wicker, *op. cit. supra*, n. 8.

[11] See Staton, *op. cit. supra*, n. 5; Green, *op. cit. supra*, n. 4. The Declaratory Judgments Act, it may be noted, expressly provides for interrogatories to the jury or special verdicts by the jury (Art. 31A, Sec. 9, 1939 Code).

[12] See Art. 93, Secs. 235, 254 and 265 (1939 Code); and Munnikhuysen v. Magraw, 35 Md. 280 (1872); Tatem v. Wright, 139 Md. 20 (1921); Simmons v. Hagner, 140 Md. 248 (1922).

and in the equity courts[13] for submission to a jury at law. Even more similar are the issues framed in Workmen's Compensation cases upon appeal to the courts from the State Industrial Accident Commission.[14] Moreover, the state insolvent law[15] and the Declaratory Judgments Act[16] both provide expressly for submission of special issues to be answered by the jury. While the procedure in these various types of cases is not, of course, identical, in each category the method of special findings by the jury is substituted for the general verdict.

2. Advantages and Use.

The advantages of special verdicts are several and important: (1) The specific questions direct the attention of the jury to the controlling issues in the case. This promotes better consideration by the jury of the evidence bearing on such issues and largely eliminates the likelihood of misunderstanding. (2) Since the Court applies the law after the jury has found its answers to the questions submitted to it, general instructions on the law are eliminated, and the likelihood of error reduced. (3) If the Court errs in applying the law, the upper Court can often correct the error by applying the proper rule to the facts as found by the jury. This avoids the necessity of many new trials and permits the upper Court to enter the correct judgment instead. (4) The special findings of the jury on the issues may avoid the necessity of new trial for errors in the admission or exclusion of evidence. The findings may show clearly that the erroneous exclusion or admission of evidence

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[13] See generally, Miller, *Equity Procedure* (1897); Secs. 232-235; Barth v. Rosenfeld, 36 Md. 604 (1872); Chase v. Winans, 59 Md. 475 (1883). See also special statutory provisions, such as Art. 16, Secs. 33 and 52; Art. 9, Sec. 29; Art. 31A, Sec. 9 (1939 Code); Goodman v. Wineland, 61 Md. 449 (1884).

[14] Art. 101, Sec. 70 (1939 Code): and see Schiller v. B. & O. R. R., 137 Md. 235 (1920); Central Construction Co. v. Harrison, 137 Md. 258 (1920); Dembeck v. Shipbuilding Corp., 166 Md. 21, 28-30 (1934).

[15] Art. 47, Sec. 23 (1939 Code); see Goodwin v. Selby, 77 Md. 444 (1893).

[16] Art. 31A, Sec. 9 (1939 Code).

was not prejudicial and that a new trial is therefore not necessary.

The rule adopted is designed to facilitate effective administration of the special verdict. It is based on the federal rule (49(a)) which was patterned on the Wisconsin, Texas and North Carolina practice. The principal features are: (1) Its use is discretionary with the Court. Thus, the Court may use either the general verdict or the special verdict, according to the nature of the particular case. This prevents unnecessary use of the special verdict for cases where it is not really required. (2) The form of submitting the issues to the jury is largely left to the trial judge. As long as the method used fairly submits the issue to the jury, neither party may properly complain. (3) The jury is required to make findings only as to the questions submitted. Before the jury retires any party may request the submission of other issues. By failing to do so, the party is deemed to waive a jury trial as to such issue and the Court is authorized to find or is deemed to have found on the issue in accord with the judgment. In this way the failure to submit issues necessary for recovery but not really in dispute cannot be assigned as error on appeal and one of the handicaps of the common law special verdict is therefore avoided.[17]

In the operation of the special verdict, the only serious problem is the formulation of the "issues of fact" to be submitted to the jury.[18] Obviously, any case may involve numerous "evidentiary" questions of fact, but to prevent the special verdict from becoming unwieldy, only the more "ultimate" issues should be submitted. The difference, however, is not hard and fast but rather one of degree. Consequently, it is undesirable to attempt to fix precise tests applicable to all classes of

[17] See *Note*, 34 Ill. L. Rev. 96 (1939); Ilsen and Hone, *Federal Appellate Practice as Affected by the New Rules of Civil Procedure*, 24 Minn. L. R. 1 (1939); Lipscomb, *Special Verdicts Under the Federal Rules*, 25 Wash. Univ. L. Quart. 185 (1940).

[18] Sunderland, *op. cit. supra*, n. 1.

cases, for that will lead to technical or nice distinctions which will largely defeat the value of the special verdict. Rather the method should be kept flexible and left as far as possible to the discretion of the trial judge. Best results are obtained by keeping the number of questions small.[19]

The framing of proper issues should be facilitated in this state by the experience in framing issues from the Orphans' Courts,[20] from the equity Courts[21] and particularly in appeals from the State Accident Commission in workman's compensation cases.[22] The present practice in the latter field should prove particularly valuable in developing the necessary technique and approach in other types of cases. Moreover, once the use of the special verdict becomes familiar many of the issues can be more or less standardized. The use of the special verdict and avoidance of technicalities should be facilitated by the existing statute authorizing the court, contrary to common law, to draw all inferences from a special verdict which could have been drawn from the same facts in a trial by the court.[23]

If sympathetically administered the special verdict can materially improve the efficiency of trial by jury as an instrument of justice. It simplifies the functions of both judge and jury, facilitates verdicts conforming to the evidence, segregates the effects of errors, and reduces the necessity for reversals and new trials.

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[19] Lipscomb, *op. cit. supra*, n. 12; Staton, *op. cit. supra*, n. 5; Green, *op. cit. supra*, n. 4; Donley, *op. cit. supra*, n. 1.

[20] See n. 12 *supra*.

[21] See n. 13 *supra*.

[22] See n. 14 *supra*.

[23] Art. 26, Sec. 16 (1939 Code); see Poe, *op. cit. supra*, n. 9, V. II, Sec. 334.

RULE 8. JUDGMENT N. O. V.

At present when a party moves at the close of the evidence for a directed verdict, the Court faces a dilemma if the question is doubtful. If the verdict is directed and the ruling reversed on appeal, a new trial is required; while if the lower court refuses the motion, but concludes after the verdict that the motion should have been granted, it can only grant a new trial, although the Court of Appeals could now enter the proper judgment.

To correct this, many states have authorized the lower court to enter judgment notwithstanding the verdict. Under this practice, after the verdict or disagreement of the jury, the party who moved for the directed verdict may renew his motion within a specified time, and the court, if convinced that judgment should have been directed, may enter judgment accordingly despite the verdict or disagreement of the jury. The opposing party may, of course, appeal from this ruling and the upper court, if it reverses on this ground, may reinstate the verdict.

This improvement, which has been used for many years in a number of states[1] and England,[2] and was incorporated in the Federal Rules,[3] has been strongly recommended by the American Bar Association's Section of Judicial Administration[4] and the American Judicature Society.[5]

Since it merely confers on the trial court the same power to enter judgment in such a situation, which the Court of Appeals has long exercised, the rule introduces no new principle;[6] but in appropriate cases it may avoid the necessity of an appeal or new trial.

[1] See Note (1935) 34 Mich. L. Rev. 93; Note (1935) 13 Tex. L. Rev. 209. Some fourteen states have adopted this practice by statute and six others by judicial decision.

[2] Annual Practice (1940), O. 36, Rule 39.

[3] Rule 50.

[4] *Report* (1938), at page 46.

[5] *Bulletin XIV* (1919), Art. 39, Sec. 5.

[6] Art. 5, Sec. 17 (1939 Code); see Poe, *Pleading and Practice* (1925), Sec. 838.

RULE 9. TRIAL BY THE COURT.

In cases at law the parties may, of course, dispense with the jury and have their case tried by the court. When this is done in Maryland, however, the same procedure is followed as in a trial by jury. The court performs its own ordinary functions and separately acts as the jury: written instructions are given by the court to itself as a jury and, upon appeal, the verdict of the court on the facts has the same binding force as the verdict of a jury.[1] On the other hand, the court in trying an equity case attempts no such division into two parts but merely decides on the law and the evidence and enters the decree it considers right, and this decision is reviewable on both the law and the facts, although weight is given to the opportunity of the trial court to observe the witnesses.[2]

1. Uniformity.

The source of this difference in procedure and effect in trials by the court at law and in equity is historical rather than rational. As was stated by the Section of Judicial Administration of the American Bar Association in its 1938 *Report:*

> "The problems involved in the review of non-jury cases are essentially the same whether such cases are legal or equitable in their nature. In each type of case questions of fact are decided by the trial judge in the same way, and there is no constitutional reason why there should be any difference in regard to the conclusiveness of the decision. If questions of fact are to be reviewed on appeal in equity cases, every reason in support of such a review applies

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[1] Poe, *Pleading and Practice* (1925), V. II, Secs. 249 and 309; Ashman, *Directed Verdicts and Instructions* (1939), Sec. 16.

[2] See, e. g., Mt. Savage etc. Coal Co. v. Monahan, 132 Md. 654, 657 (1918); Simmont v. Simmont, 160 Md. 422, 426 (1931); Moran v O'Brien, 156 Md. 221, 222 (1929); Tillinghast v. Lamp, 168 Md. 34, 41 (1935).

with equal force to the review of facts in law cases tried without a jury. On the other hand, if the decision of the trial court on questions of fact is to be deemed conclusive on appeal in law cases tried by the court, the same result should follow in equity cases. In other words, it is not the distinction between law and equity which should produce differences in the mode of trial or review, but the distinction between jury and non-jury determination of questions of fact. This principle has been embodied in the new Federal Rules.

"Whether the principle traditionally employed in courts of chancery, allowing a full review of the facts, produces a sounder administration of justice than the opposite principle, followed in some states, that the decision of the court is always to be given the same effect as the verdict of a jury, may perhaps be a matter open to legitimate argument. If so, it should probably be considered a local question, to be determined by each state in accordance with its conceptions of public policy.

"But whatever view may be taken regarding the advantages of allowing or denying a review of facts, nothing can be said in favor of a rule under which the review would depend on whether the case technically falls within the field of equity or the field of law.

"*We recommend* that findings of fact shall have the same effect on appeal in all cases tried by the court without a jury, whether they are cases at law or cases in equity."[3]

About twenty-five states and the Federal Courts have adopted a uniform rule for review of all non-jury cases, whether at law or in equity.[4] Such a rule certainly seems desirable; in view of the substantial similarity

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[3] *Report* (1938), at page 107.

[4] Clark and Stone, *Review of Findings of Fact*, 4 Univ. of Chi. L. Rev. 190, at 215-16 (1937).

today in the manner of trial both at law and in equity, there appears to be no sound reason for different types of review.[5]

2. Scope of Review.

If a uniform rule for both law and equity is desirable, what is the proper scope of review?

In an address to the Maryland Bar Association in 1928 Judge Eli Frank of the Supreme Bench of Baltimore City urged the adoption of the equity review in all trials by the court. After pointing out the advantages of such trials at law in saving time and in the consideration of difficult cases, Judge Frank continued:

> "Under any trial system, where a case is heard before the judge alone, he necessarily decides both the law and facts. Under the practice prevailing in Maryland, he is required to instruct himself sitting as jury as to the law and having, as jury, determined the facts, to apply the law to them. His decisions upon the law are subject to review upon appeal. His determination of facts is final and subject to no review except his own, upon motion for a new trial. Occasionally judges have been accused of granting all the law asked for by the party against whom the decision is to be made and then deciding against that party on the facts. In this way, all opportunity for appeal to a higher tribunal is cut off. * * * Of course, no judge worthy of his responsible position would consciously proceed in such a manner, and yet the Bar has always experienced the fear that judges might be influenced by such an unworthy motive. On the other hand, in his effort to preserve to the defeated litigant an opportunity for appeal, a conscientious judge might often lean backward and expose the successful party to the expense and delay of an appeal, where it would be improper

[5] By statute, the method of trial by oral testimony in open court is the same in equity as at law. Art. 16, Secs. 290-291 (1939 Code).

to do so. I am convinced that much of the unpopularity of non-jury trials is to be attributed to the considerations just discussed.

"It has been suggested that these difficulties might be obviated by establishing on behalf of the defeated party, in case of trial before the judge alone, an opportunity for review on the facts as well as on the law. This may be accomplished in several ways. An appeal to the Court of Appeals might be allowed from the action of the judge on motion for a new trial in cases tried by him alone. A better plan of procedure would, it seems to me, be to treat such cases on appeal, as equity cases are now disposed of in all appellate tribunals. In equity appeals, the Court of review passes upon the facts as well as the law. The adoption of this plan would have a two-fold effect in tending to increase the number of non-jury trials. In the first place, the apprehended danger of the *nisi prius* judge in effect cutting off all appeal by deciding all of the law in favor of the losing party would be removed. In the second place, the additional right of appeal on the facts which would exist only in cases of non-jury cases and never in cases tried before juries would be a powerful incentive and inducement to lawyers and clients to forego jury trials in favor of that form of procedure which would give them this additional right. An interesting by-product would be the abolition of the barbarous formula by which the judge now 'instructs himself sitting as a jury'.

"The establishment of non-jury trials has proceeded in the characteristic common law method of adapting existing methods of procedure to a new situation. The judge is expected to divide himself into two parts. In one of these he functions normally as a judge. In the second, he must operate abnormally and technically as a jury. The result is an unnatural one. He should act as the composite whole that he actually is, just as the chancellor acts

> in his own Court of equity, and like the decrees of the chancellor, his verdicts and judgments should be reviewable on the facts as well as on the law."[6]

Between a verdict by the jury and a verdict by the court sitting as a jury, there are important differences which justify a different degree of review. Aside from the fact that the jury's verdict represents the unanimous opinion of twelve rather than of one, their verdict is also subject to a form of review by the trial judge. On a motion for new trial, he may grant it on the ground that the verdict of the jury is against the weight of the evidence, but as a practical matter such an independent check is lacking where the judge acts as the jury. Consequently, the review on appeal may properly be broader in non-jury cases.[7]

In about sixteen states and in the Federal Courts, the equity form of review has been applied to all non-jury cases both at law and in equity.[8] In these jurisdictions, the appellate court reviews the decision of the trial court on both the law and the facts. Even in appeals from equity, however, the case is not considered completely *de novo*. The decision of the trial court is not disturbed unless clearly erroneous and recognition is given to its opportunity to see the witnesses and to hear the testimony. These limitations on the scope of review in equity have been clearly stated by the Court of Appeals in many cases. In *Moran v. O'Brien,* for example, the Court said:

> "This court has on numerous occasions declared its policy to be not to reverse in equity cases findings of fact made by the chancellor, especially where the testimony was taken in open court, whereby oppor-

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[6] Frank, *His Day in Court,* 33 *Proceedings,* Md. State Bar Ass. (1928) 78, at 90-92.

[7] See Blume, *Review of Facts in Non-Jury Cases,* 20 J. Am. Jud. Soc. 68-73 (1936); cf. Chesnut, *Proposed New Federal Rules of Civil Procedure,* 22 Am. Bar Ass. J. 533, at 540-541, 572 (1936).

[8] Clark and Stone, *op. cit. supra* n. 4.

> tunity was afforded the court to observe the appearance, demeanor and manner of testifying of the various witnesses produced, or, in other words, to obtain the atmosphere of the case, which, of course, is denied to this tribunal on appeal; unless we are convinced that such findings are clearly not warranted by the evidence contained in the record."[9]

Trial Rule 9 applies this standard of review customary in equity to all appeals from decisions by the court alone in jury-waived cases at law.

3. Findings by the Court.

In many of the states and in the Federal Courts, the trial court in non-jury cases is required to file special findings of fact and conclusions of law. In some jurisdictions such findings are required in all cases; in other jurisdictions, unless waived by the parties; and in still others, if requested by any party.[10]

The requirement of such findings has, however, been strongly criticized as carrying over into trials by the court features of jury trial which were based upon the division of functions between judge and jury. In jury trials it is, of course, essential that the judge state the law to inform the jury or that the jury state the facts in the form of a special verdict to permit the judge to apply the law. When the same person determines both law and fact, however, there is obviously no need for him to inform himself on either law or facts. Consequently, formulation of the facts and law, which is required in a jury trial, because of the division of function, is totally unnecessary in administering trial by the court alone.[11]

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[9] 156 Md. 221, 222 (1929); see also n. 2 *supra*, and Building and Loan Assn. v. Dembowczyk, 167 Md. 259, 266-67 (1934); Jacobs v. Jacobs, 170 Md. 405, 413-14 (1936).

[10] Sunderland, *Findings of Fact and Conclusions of Law in Cases Where Juries Are Waived*, 4 Univ. of Chi. L. Rev. 218 (1936).

[11] Sunderland, *op. cit. supra*, n. 10, at 218-220.

Such findings are not required under the English procedure. In a careful article considering this whole problem Professor Sunderland states:

> "England and the British dominions, in administering non-jury cases at law, completely abandoned all those features of the common law trial which were based upon the division of functions between judge and jury. The English rule simply provides that 'The judge shall, at or after the trial, direct judgment to be entered as he shall think right.' [Order 36, rule 39] No formal statements are required from the judge as to the issues which he considers material or as to the principles of law which he considers controlling. He is not required, in his capacity as jury to formally make findings of facts, either general or special, to which in his capacity as judge, he applies the law which he has announced. He merely proceeds, in the informal manner of a chancery judge, to hear the case and decide it. Mr. Odgers [*Pleading and Practice,* Sec. 339 (11th ed.)] described the whole process in a single sentence: "In non-jury cases he [the judge] gives judgment at the conclusion of counsels' speeches, stating his reasons." Even the reasons are not required, and some of the approved forms do not contain them. Nothing need be stated by the judge beyond sufficient facts and directions to enable the clerks in the proper department to enter the correct judgment."[12]

On the other hand, the parties and lawyers frequently would like to know briefly at least the considerations on which the trial court decides. This is evidenced by the present rule requiring opinions by the court in equity cases in the counties.[13] Moreover, upon an appeal the opinion of the trial court may be useful in directing the attention of the appellate court to the questions involved

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[12] Sunderland, *op. cit. supra,* n. 10, at 219.

[13] At present, equity courts in the Counties, except Prince George's, are required to file an opinion whenever the decree or order is "passed upon argument, oral or in writing, on the part of any of the parties". Art. 16, Sec. 198 (1939 Code).

in the case and the grounds on which the trial court based its decision.[14]

The rule adopted attempts to obtain these advantages without imposing an undue burden on the trial court. It does not require formal findings of fact or conclusions of law; it merely requires the court either to dictate to the court stenographer or to file later a brief statement of the grounds of his decision. Since the court must certainly formulate the grounds on which it acts in reaching a proper decision, the requirement that these grounds be concisely stated should not complicate or delay the proceedings. Yet the brief statement of the court's reasons will better satisfy the parties and counsel and assist the Court of Appeals in case of an appeal.

RULE 10. PARTIAL NEW TRIALS.

In some cases an error, which has occurred during the trial, may affect only a portion of the matters in controversy or only some of the parties to the litigation. Under such circumstances the Court of Appeals now has the power to order a new trial limited to the particular part of the litigation affected by the error.[1] The value of this power in saving time and expense in appropriate cases is apparent.[2] Rule 10 extends the same power to the trial court on a motion for a new trial. This avoids the present necessity of a complete new trial or an appeal.

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[14] See Title Co. v. McCulloh, 108 Md. 48, 53 (1908).

[1] Art. 5, Secs. 25 and 26 (1939 Code).

[2] Power to grant partial retrials has been recommended by the Section of Judicial Administration of the American Bar Association (1938 *Report*, p. 45) and by the American Judicature Society (*Bulletin XIV* (1919), Art. 40, Sec. 9).

EQUITY RULES.

The amendments made in the General Equity Rules are merely to clarify them on two points.

The changes in Rules 7, 8 and 11 make it clear that the bill or petition in equity need not contain a prayer for the writ of subpoena, which is to be issued as of course by the Clerk.

Rule 12 is amended to make it clear that additional subpoenas may be had at any time before final decree.