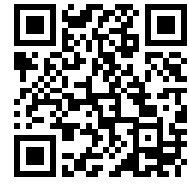

TRIAL BY JURY

A Brief Review

OF

Its Origin, Development and Merits

AND

Practical Discussions

ON

ACTUAL CONDUCT OF JURY TRIALS

Together with a consideration of

Constitutional Provisions

AND

Other Cognate Subjects of Importance

By

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GEO. T. BISEL CO.
PHILADELPHIA
1922

THIS BOOK IS DEDICATED TO MY FRIEND,

MAYER SULZBERGER,

FOR YEARS PRESIDENT JUDGE OF THE COURT OF COMMON PLEAS NO. 2 OF PHILADELPHIA COUNTY, WHOSE DEEP AND VARIED LEARNING IN DIVERSE FIELDS, AND READY SCHOLARSHIP IN THE LAW, EARLY WON MY ADMIRATION. TO HIM I AM INDEBTED FOR MANY INTERESTING AND PROFITABLE HOURS OF PLEASANT CONVERSE.

PREFACE

This volume grew out of a course of lectures on Trial by Jury, delivered by me at the Law School of the University of Pennsylvania during the second term of 1921. I had intended to keep these discourses revised to date, making them part of my general law work, but, after entering upon this most agreeable undertaking, the Chief Justiceship of Pennsylvania fell to my lot prematurely, owing to the sudden death of the Honorable JOHN STEWART (my senior in commission), just before the end of the term of Chief Justice BROWN, and the duties of that high office absorbed my time and attention to such an extent that I found it necessary to abandon the idea of continuing my hours at the University, at least temporarily. At the suggestion of many members of the Law School, who attended the course, this publication was decided upon. As far as possible, the lectures have been cast in the form of a book, dividing them somewhat differently from the way in which they were originally delivered, affixing appropriate general headings to each lecture and particular introductory headings to every paragraph, finally adding a carefully prepared index, to facilitate the use of the work as a text or reference book.

Although arranged primarily for use as a text-book, yet I have endeavored to maintain a literary quality, sufficient to hold the interest of those who read for entertainment alone, or seek general instruction; they may ignore all headings and find the text a continuing narrative, or at least as much so as is practicable in a work of this character.

While the general table of contents, and the paragraph headings assembled at the beginning of each chapter,

tell the story, a few words as to the substance of the volume may not be inappropriate.

The first three lectures give a brief summary of the early forms of trials, which preceded and led up to trial by jury, as well as the opinions and speculations of writers on the subject, concerning the origin and development of the jury system. No special attempt has been made to investigate original sources, the only thought being to put in compact form the easily available knowledge, that every lawyer should possess, of the growth and development of this great institution, which has reached its highest form among English speaking peoples. A few pages have been devoted to a consideration of the merits of the system; but by far the greater part of the volume contains practical discussions of the actual conduct of jury trials, which may be summarized substantially as follows: the formal steps in selecting, choosing and challenging jurors; opening and developing case; taking case from jury by entry of nonsuit, etc.; examination and cross-examination of witnesses, with objections and exceptions; arguments of counsel to the jury, with suggestions for protection from improper remarks of court or counsel; submitting exhibits and written statements to jury; charge of court and points for charge; a review of cases calling for binding instructions; verdicts, general and special; judgments, and judgments non obstante veredicto; granting new trial, etc.; and the formalities required in each step of the case to make up the record for purposes of review, which ought to be kept in mind during the course of a trial,—all other reference to appellate practice being omitted, for obvious reasons. In two lectures I have considered the respective powers and functions of court and jury, attempting to reconcile conflicting decisions, or at least to make plain the proper distinctions to be remembered. Toward the end, one lecture is given to constitutional

guaranties of trial by jury. The final lecture deals with the question of the number of jurors and the rule requiring unanimity in their verdicts; it contains a brief reference to the various state constitutional provisions upon these important points, and, in conclusion, a discussion of the rules of conduct governing jurors in the trial of cases and the effect on their verdicts of misbehavior.

It has been my endeavor to tell, not only what ought to be done in the conduct of a jury trial, but also how and why it should be done; in other words, to combine the historical and theoretical with the practical. I have tried not to go over matters ordinarily found in standard text-books, or, when obliged to travel beaten tracks, to do so in a manner somewhat different from others, drawing largely on my rather extensive individual experience as an administrator of the law.

The reader will find, as addenda, certain tables for use in connection with the peremptory challenging of jurors in criminal courts, which are almost necessary for a ready, workable operation of the Pennsylvania statutes governing that essential trial step. These tables are mentioned in a note to section 131 (note 2a), and carefully explained in Appendix No. 1; there the punishments fixed by the governing laws are given, with explanations as to how they are arrived at when not specifically prescribed by statute, and the law as to indeterminate sentences, with its relations to such punishments, is stated and discussed.

Appendix No. 2 contains supplementary matter concerning ancient antecedents to trial by jury, particularly compurgation, duel and ordeals.

While the subject in hand is treated largely in its general aspect, yet, throughout the work, it is looked at, to a considerable extent, from the standpoint of the Pennsylvania lawyer. I have taken occasion to discuss several important lines of Pennsylvania decisions, which appear

as departures from certain established rules of jury trial, and to explain my theory concerning the proper classification of these decisions and their relation to the body of governing law; in so doing, I touch upon the philosophy back of these variations from fixed standards, wherever the reasons for a particular rule is not otherwise apparent,—which course I have endeavored to pursue rather generally throughout the work.

As said when delivering these lectures, they were prepared primarily for law students; but many of the matters presented may prove of use to the practicing attorney, and of moment to the general reader who is interested in the subject.

Those who care for the historical development of the institution of trial by jury will, I hope, find the first three chapters of interest, but, I fear, those whose interest is centered exclusively on the practical side of the subject, after reading the introductory remarks at the head of the first lecture, had better skip to section 90, for, from there on, the points discussed are all of practical import.

Of course, much technical matter will be found in this volume, yet I have endeavored to make the work a little less formal and somewhat more human than the average law book. While I have tried to produce the best results obtainable in the time at my disposal, it must be remembered that these lectures were prepared in the midst of the active and absorbing duties of a Justice of the State Supreme Court, and their preparation for publication made during the even more exacting duties of the Chief Justiceship, which is some excuse for any evidence of haste that may be observed on reading the text; for this, and all other shortcomings, I crave the indulgence of my readers.

ROBERT VON MOSCHZISKER,

Philadelphia, 1922.

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APPENDIX NO. 2.

Supplementary matter concerning ancient antecedents to trial by jury, particularly compurgation, duel and ordeals.

LECTURES
ON
TRIAL BY JURY

TRIAL BY JURY

LECTURE I.

ANCIENT TRIBUNALS IN NATIONS OTHER THAN ENGLAND

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§ 1. **Brief summary of contents of volume.**—In these lectures, I shall (1) attempt to trace, in a comparatively brief way, the sources which are generally supposed to have given rise to the institution of trial by jury, (2) review its merits and demerits, (3) detail and discuss many practical things concerning the actual conduct of such trials, much of which may not be found elsewhere, in the books, and, finally, (4) I shall discuss the American constitutional provisions relating to my main topic, and also various other important cognate points.

§ 2. **Intended primarily for prospective and active lawyers and secondly for lay readers.**—When con-

sidering the practical aspects of my subject, I shall deal with them as simply as possible, and probably refer to many things you already know; but essential instructions stand repetition. To those who are students of the law rather than law students, I take occasion to say that these lectures are intended primarily for the latter class,—that is, for those who are studying law with the purpose of becoming practitioners at the bar,—at the same time, they may perhaps prove of aid to members of the active bar who are concerned about correct methods of practice, and possibly of interest to others who care for the historical, philosophical or theoretical aspects of our subject.

§ 3. **Scope of first three lectures.**—I shall not attempt a minute historical dissertation on the origin of our present-day trial by jury, for it would take a volume to compass that, nor shall I endeavor to decide between the conflicting views of the writers on the subject; but, to understand the present and plan intelligently for the future, it is necessary to glance back along the past. Therefore, prior to describing trial by jury as we now know it, I shall present a brief review of what the authorities have to say concerning several other countries, whose early customs most likely had their influence in forming the jury system as it gradually developed in England; and, of course, I must review, with more detail, the history of its growth in that great country which passed the perfected institution on to us.

§ 4. **Jury defined.**—The jury,[1] in our legal nomenclature, is a temporary body, constituted for the purpose of deciding, in the administration of civil and criminal justice, such disputed facts as may arise in cases brought before it. When the object to be accomplished is preliminary inquiry, the

[1] The word jury is derived from "juro," "jurare," (jus, juris, law), to swear.

body is often called an inquest; but, where facts are to be determined for final adjudication, the tribunal is always termed a jury. It consists ideally of twelve impartial persons, taken from the community and residing in the vicinity. Its duty is to hear such evidence as the court may rule proper for consideration, and to find therefrom the facts in issue; after so doing, it must apply the law to the facts thus determined, in accordance with the trial judge's instructions in that regard, and thus arrive at a final verdict, for one side or the other, on every controversy with which it has to deal.

§ 5. **Jury a matter of growth.**—Trial by jury, as we now know it, contains many features which would no doubt have been unnecessary and burdensome in a primative state of society, when the family or clan was the social and political unit, and laws were few and readily understood. On the other hand, the ancient modes of trial would be totally inadequate for the complex society of to-day. In searching for origins, we must therefore not expect to find in any one country an exact counterpart of our present system. It is interesting and instructive, however, to take account of certain points of resemblance in the ancient laws and customs of various countries, noting their influence upon our early Anglo-Saxon institutions, particularly those institutions which some writers accept as marking the sources of trial by jury.

§ 6. **Disagreement as to introduction and development of system in England.**—Forms of legal procedure, somewhat resembling trial by jury in various particulars, are found in the primitive struggles of many European nations, but we cannot tell when, in any instance, that system became a fixed mode of deciding either criminal or civil disputes. The time and manner of its introduction into

or growth in England are questions much discussed by the earlier historians; some of them contend the system was developed from laws and customs brought over by the Conqueror, while others point to what they take to be evidences of the existence of trial by jury, in an embryo state, among the Anglo-Saxons prior to the Norman Conquest; others suggest even prior dates.

§ 7. **Blackstone and others for and against Saxon or Norman origin.**—Blackstone refers to trial by jury as "a trial that hath been used time out of mind in this nation and seems to have been coeval with the first civil government thereof;" and he adds that "Some authors have endeavored to trace the origin of juries up as high as the Britons themselves, the first inhabitants of our island, but certain it is that they were in use among the earliest Saxon colonies, their institution being ascribed by Bishop Nicolson to Woden [or Odin] himself, their great legislator and captain. Hence it is that we may find traces of juries in the laws of all those nations which adopted the feudal system, as in Germany, France and Italy, who had all of them a tribunal composed of twelve good men and true.....being the equals or the peers of the parties litigant.....Its establishment however and use in this island, of what date soever it be, though for a time greatly impaired and shaken by the introduction of the Norman trial by battle, was always so highly esteemed and valued by the people that no conquest, no change of government, could ever prevail to abolish it. In Magna Charta it is more than once insisted on as the principal bulwark of our liberties."[2] Nicolson,[3] Coke, Spelman, Hume[3a] and Turner[4] take very much the

[2] Bl. Com., vol. 3, pp. 349-450.

[3] Preface, in Latin, to Wilkins's Anglo-Saxon Laws.

[3a] Hist. Eng., vol. 1, c. 2.

[4] Hist. Anglo-Saxons, 6th ed., Am. reprint, vol. 1, book 5, c. 6, pp. 476-7.

same view. On the other hand, Reeves,[5] Palgrave,[6] Hallam,[7] Burke,[7a] Thayer,[8] Maitland[8a] and others incline to give the Normans credit for establishing the jury system in England; this latter view represents the consensus of modern opinion.[8b]

§ 8. **Starkie for Saxon origin of jury.**—Starkie[9] is of opinion that, notwithstanding the differences of view as to the origin of the system, "there seem to be reasons for supposing it is derived from the patria, or body of suitors, which decided causes in the county courts of our Saxon ancestors"; but, as above said, this view does not accord with the trend of modern thought on the subject, a fact which must be constantly kept in mind when considering the writings, hereinafter noted, of those who agree with Starkie.[10]

§ 9. **Forsyth against Saxon origin; but he saw traces of a system which paved the way; Lesser agrees.**—Mr. Forsyth, in his treatise on Trial by Jury[11] calls attention to the conflicting theories as to the origin of the jury system, advanced by various writers and histori-

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[5] Hist. Eng. Law, 1st Am. ed., vol. 1, pp. 22, 24, 34.

[6] Hist. Eng. Com'lth, vol. 1, p. 243.

[7] Middle Ages, vol. 3, pp. 517, 593.

[7a] Hist. Civ. in Eng., vol. 2, c. 2, n. 28.

[8] Ev., p. 7.

[8a] Const'l Hist. of Eng., p. 120 et seq.

[8b] Id. p. 120.

[9] Evidence, 10th ed., p. 4, note c.

[10] Maitland, Const'l Hist. of Eng., p. 120; this modern writer states that the germ of the present system most likely may be found in the prerogative procedure of the court of the Frankish kings; see also Dr. Heinrich Brunner's "Die Entstehung der Schwurgerichte," and § 27a, of these lectures, with note 79 thereto, for pages of Brunner.

[11] Morgan's ed., 1875.

ans,[12] and contends[13] that the jury does not owe its existence to any preconceived idea of jurisprudence, but gradually grew out of modes of trial in use among the Anglo-Saxons and Normans, both before and after the Conquest. In discussing the causes of different views on the subject, he points out[14] that a distinctive characteristic of the jury system is that it consists of a body of men,—quite distinct from the law judges,—summoned from the community at large to find the truth of disputed facts in order that the law may be properly applied by the court; that,—in considering the ancient tribunals, composed of a certain number of persons chosen from the community, who acted in the capacity of judges as well as jurors,—few writers keep this principle steadily in view, and thus confuse the jurors with the court. The conclusion reached by him,[15] and which is said by Lesser[16] to afford the fairest statement of the case, is as follows: "It may be confidently asserted that trial by jury was unknown to our Anglo-Saxon ancestors and the idea of its existence in their legal system has arisen from a want of attention to the radical distinction between members, or judges, composing a court, and a body of men apart from that court, but summoned to attend in order to determine conclusively the facts of the case in dispute. This is the principle on which is founded the intervention of a jury; and no trace whatever can be found of such an institution in Anglo-Saxon times. If it had existed, it is utterly inconceivable that distinct mention of it should not frequently have occurred in the body of Anglo-Saxon laws and contemporary chronicles which we possess, extending

[12] Id. pp. 2-4.
[13] Id. p. 5.
[14] Id. pp. 4, 9.
[15] Id. p. 45 et seq.
[16] Hist. of Jury System, p. 69.

from the time of Ethelbert[17] to the Norman Conquest.[18] Those who have fancied that they discovered indications of its existence during that period have been misled by false analogies and inattention to distinguishing features of the jury trial, which have been previously pointed out. While, however, we assert that it was unknown in Saxon times, it is nevertheless true that we can recognize the traces of a system which paved the way for its introduction and rendered its adaptation at a later period neither unlikely nor abrupt."

§ 10. **Profatt saw germ of jury in Saxon trial, which Normans adopted and altered.**—Profatt, after discussing the various modes of trial used by the Anglo-Saxons, says:[19] "In all this we do not find the trial by jury with exactly the same form and character as it is presented to us at the present time; that would be manifestly impossible. We do find, however, a system of trial adopted, containing the very germ, and some of the features, of jury trial, which, when afterwards systematized, developed and improved under competent jurists, and moulded to meet the growing exigencies of society and the increasing importance of law, became after centuries a regular and an established institution, with well defined and separate functions in the administration of law." In speaking of the effect of the Norman Conquest, the same author states:[20] "It is the common belief that, on his accession to the throne of England, the Conqueror made a radical and complete change in the laws and institutions, and that an entirely new system was established on the ruins of the old; but that was by no means the case. While changes and innovations were certainly made, there was no sweeping abolition of laws and

[17] 560-616, A. D.
[18] 1066, A. D.
[19] Trial by Jury, sec. 20.
[20] Id. sec. 21.

customs, no entire uprooting of old institutions, and no extensive interference with the ancient rights and privileges of the people. There were, no doubt, alterations, but they were such only as adapted the old established institutions to the new polity of the Normans. That it was never the intention of William to introduce a new system of laws and customs and abolish the old, is evidenced by his constant endeavors to appear not so much in the light of one who acquired his rights by conquest, as in the character of one who came to the throne regularly, de jure, as one entitled by his relationship to the Saxon line. It was his constant endeavor to show to the people that their old laws and privileges should remain intact, that their cherished institutions should still remain as before."

§ 11. **Ancient tribunals in other nations.**—In connection with the divergent views concerning the most likely origin of the present jury system, it is of interest to consider various early judicial tribunals and modes of trial, in other countries, some of which existed long prior to either the Anglo-Saxon or Norman periods of English history.

§ 12. **Greek tribunal with members somewhat similar to modern jurors.**—For instance, in the time of Pericles, there was established in Athens an institution for the legal settlement of disputes,[21] which consisted of ten panels of what, for want of a better term, we may call jurors, of five hundred each, selected from six thousand citizens, drawn annually. The particular body before which a cause was tried was chosen by lot from one of these panels; it was presided over by a magistrate, who stated the questions at issue and the results of his own preliminary examination. This was followed by statements of the parties and their

[21] Termed Dikasteries, or courts of justice.

witnesses. The Dikasts, or members of the tribunal, were ultimate judges of both law and fact; but, aside from this distinguishing feature, in many respects they resemble our modern jurors,[22] although, of course, there is no connection between the two.

§ 13. **Roman tribunal somewhat similar to modern jury, with lawyer as juror in place of judge.**—The Romans had a council, called Comitia,[23] which had power to delegate its criminal judicial jurisdiction to minor bodies, made up from its members. In civil matters they employed a formal system of pleading, to determine the issues for trial, and, in proceeding in jure, a magistrate defined by writing the disputed points, referring them for trial to a lay judge or judges,[24] sworn to the performance of their duty, and corresponding in a degree to our jurors;[25] for, according to certain authorities, the trial was somewhat similar to that before a modern jury.[26] But Starkie[27] says: "The principal and characteristic circumstances in which the trial by a Roman differed from that of a modern jury, consisted in that in the former case neither the praetor [magistrate] nor any other officer distinct from the jury presided over the trial, to determine as to the competency of witnesses, the admissibility of evidence, or to expound the law as connecting the facts with the allegations to be proved on the record. In order to remedy that deficiency

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[22] Grote, History of Greece, vol. v, c. 46. For an interesting description of the workings of the Greek Dikasteries, see Bryce's Modern Democracies, vol. 1, p. 198.

[23] Assembly.

[24] Judices; the proceeding was in judicio, i. e., in a court of justice.

[25] Pomeroy, Municipal Law, sec. 106; Lesser, p. 33.

[26] Colquhoun, Rom. Civil Law, secs. 2322-2341.

[27] Ev., vol. 1, p. 5, note b.

they resorted to this expedient: The jury generally included one or more lawyers,[27a] and thus they derived the knowledge of the law from their own members which was necessary to enable them to reject inadmissible evidence and give a correct verdict as compounded both of law and fact." Where the judge was directed to decide according to equity and good conscience alone, without further instruction, he was called an arbiter.[28]

§ 14. **Roman tribunal had system similar to our challenge of jurors.**—Cooley states that, when judices were employed, they were selected from the community, in much the same manner as in ancient Athens; and that there was a method provided for objecting to those chosen to try any particular case, "which answered very exactly to our challenges" of jurors.[29]

§ 15. **Romans later merged duties in judge.**—This system, like our trial by jury, went through various stages of development, until it was finally overthrown, during the Empire;[30] and the Justinian Code[31] completely merged the duties of judge and jury, so that the court should decide both the law and the facts in civil cases.[32]

§ 16. **Scandinavia's earliest tribunal.**—Repp, a Danish jurist, in an Historical Treatise on Trial by Jury, Wager of Law, etc., in Scandinavia and Iceland, published in 1832, states (but his statements are not wholly consistent):[32a] "Respecting the antiquity of juries, perhaps we ought to say nothing more than this, that their origin lies

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[27a] Not in our sense of the word, but men possessed of legal knowledge.
[28] Pomeroy, sec. 108.
[29] Am. Cyc., vol. IX, Title, Jury.
[30] 352 A. D.
[31] 533 A. D.
[32] Pomeroy, sec. 109.
[32a] Repp, sec. 3, pp. 5-9.

beyond the age of clear history. Yet the history of Scandinavia is clear and authentic from the beginning of the ninth century, or the year 800....Indeed, the exact antiquity of jury trial cannot now be determined. We discover it with the earliest dawn of northern history, and even at that early period, as an ancient institution; beyond this we have not enough materials left for a fruitful investigation.....We can trace the undoubted existence of juries as far back as one thousand years; before that period, the history of northern Europe is wrapped in Cimmerian darkness, and we must not expect to find authentic records respecting juries where all other records fail." Repp further says[33] there are evidences in the Edda,—certainly not a very authentic source,—that trial by jury antedates the birth of Christianity.

§ 17. **Scandinavia introduced trial by battle and by ordeal later.**—Trial by battle was also a popular method of settling disputes in Scandinavia, especially among men of rank, and the benefit of other modes of trial was claimed by the weak and aged.[34] With the advent of Christianity in that part of the world, trial by ordeal was introduced by the clergy in order to strengthen their influence, the theory being that God would protect the innocent from injury.[35]

§ 18. **Norway had tribunal of thirty-six men.**—In early times, Norway had a judicial body called Laugrettomen (Law-amendment-men),[36] the designation being derived from the circumstances that they were judges of both law and fact, and hence their decisions often amounted to amendments of the law. Three officials nominated persons

[33] Pages 16, 17.
[34] Id. p. 9.
[35] Id. p. 19.
[36] Forsyth, pp. 16-18; Repp, p. 56.

from each of the districts to attend the meetings, called "things," or courts, the places in which the courts were held being paled off by staves driven in the ground. From the total number thus chosen, thirty-six were selected to act in a capacity much like jurors,[37] and these were presided over by a lawman (Lœgmann), whose qualification for office was that he could recite the laws of the land. The members were sworn[38] and had power to decide both law and fact, also to impose such sentence as the law prescribed.[39] If they were unanimous in their verdict, their decision fixed the law of the case; if not, the lawman had power to decide with those of the jury who agreed with him,[40] unless the king, with the advice of the "most prudent men," should otherwise determine.[41]

§ 19. **Sweden had tribunal of twelve men.**—We are told that in Sweden, quite similar tribunals anciently existed, composed of twelve men, sworn to investigate and ascertain the truth in any case, before whom witnesses appeared; they were judges of both fact and law, and seven were competent to return a verdict.[42] There were three kinds of tribunals referred to by the writers as juries; first the hundred's jury, from which an appeal lay to the lawman's jury; and from the latter to the king's jury, from which there was no further appeal.[43] The wager of law[43a] was also used extensively, requiring the oath of six, twelve, eighteen, thirty-six or forty-eight persons.[44]

[37] Forsyth, p. 16; Repp, p. 47.
[38] Repp, pp. 47, 48.
[39] Forsyth, p. 18; Repp, p. 50.
[40] Repp, p. 53.
[41] Id. p. 55.
[42] Forsyth, pp. 19, 22; Repp. pp. 88, 89.
[43] Repp, p. 90.
[43a] See §§ 43 and 45, of these lectures.
[44] Repp, p. 99.

§ 20. **Denmark had tribunal of twelve men; historians say Canute did not try to introduce this into England.**—In Denmark, there was first a body called Tingmaend, which means "thingmen," or men who frequent a "thing," or court,[45] of whom seven constituted a quorum, though in certain cases there were twenty-four; it was their business to pass upon the public affairs of the district. They were somewhat similar to a municipal council,[46] and, strictly speaking, were not jurors, though frequently employed in judicial proceedings.[47] Next came the Naevninger (nominationmen),[48] who were more like jurors, twelve in number,[49] chosen by the inhabitants of the district or by the prosecutor or magistrate;[50] a majority controlled,[51] their decisions being reviewable by the bishop and eight men of the district. Repp states it was the province of this body to pass on the more important criminal causes, also to decide upon preliminary proofs, somewhat like our grand juries;[52] but, the historians tell us that, when Canute, the Dane, became ruler of England, in 1014, he did not attempt to incorporate these Danish institutions into the system of that country.

§ 21. **Denmark also had wager of law; unanimity of twelve, etc.**—The wager of law was also extensively used in Denmark. Under this form of trial the defendant denied, on oath, the act of which he was accused, and his oath was confirmed by conjurators, usually twelve, but

[45] Repp, p. 115.
[46] Forsyth, p. 23.
[47] Repp, p. 117.
[48] Forsyth, p. 23; Repp, p. 118.
[49] Repp, p. 123.
[50] Id. p. 122.
[51] Id. p. 127.
[52] Forsyth, p. 25; Repp, pp. 119, 125.

sometimes a multiple of twelve, who declared that defendant told the truth. While the wager of law was a means to disprove a false charge, by the oath of defendant and others, where no witnesses were to be found,[53] yet, later, in important civil cases we are told actual witnesses were required even though wager of law was followed.[54] In trial by jury, the majority decided the cause, but unanimity was required in wagers of law, because the coadjutors were produced by defendant himself to swear that he told the truth, and, if one of them failed to do so, defendant necessarily failed to support the truth of his statement by the required measure of proof.[55]

§ 22. **Iceland had tribunal of twelve, composed of eleven men and a magistrate.**—Iceland was settled by the aristocratic element of Norway, who emigrated because of a political revolution in the latter country.[56] They established "things," similar to those of Norway. The Althing (Universal-thing), founded in 928,[57] was a central legislative and judicial assembly, to which appeals lay from all the district things, called Varthings.[58] Repp says that judicial procedure, both in the form of jury trials and wagers of law, was employed, and the first reached a high state of perfection. The practice is described in their code, called the "Grey Goose."[59] The number of so-called jurors was five, nine or twelve, depending upon the nature of the cause.[60] The body of twelve, called the Tolftar guida (a

[53] Repp, pp. 135-7.
[54] Id. p. 139.
[55] Id. pp. 141, 173.
[56] Id. p. 153.
[57] Id. p. 166.
[58] Id. p. 171.
[59] Id. p. 173.
[60] See list of causes in Repp, pp. 173-180.

nomination of twelve) was in use before the introduction of Christianity in Norway (prior to the year 1000); this was usually employed in disputes between the Godas (magistrates) and their Thingmen. A Godi first nominated eleven members of this body, and for the twelfth he designated one of his fellow Godas from the same district. The verdict was by a majority.[61] The members were required to be at least twenty years of age, bearing no close relationship to the parties,[62] and in good health. They were chosen from the better class of society. Those of the neighborhood where a fact occurred were preferred, providing they were not interested in the cause.[63]

§ 23. **Jutland had tribunal of eight men.**—We are told that the Sandomænd, or truthsmen, of Jutland consisted of eight members, nominated by the king for each division of the country.[64] They had jurisdiction of criminal cases, disputes concerning land and church property, etc.,[65] being judges of both law and fact; the verdict of the majority was received as a final judgment.

§ 24. **Scandinavia; lay members of judicial tribunal decided both law and facts.**—Writers on the subject state that in all the tribunals of ancient Scandinavia, the lay members appear to have performed the double function of judges of both law and fact, the lawman, who presided over them, acting merely in an advisory capacity, to aid in determining relevant questions of law, except where the jury could not agree, when he had greater power. Forsyth[66] uses this circumstance in support of his con-

[61] Repp, pp. 180, 181.
[62] Id. p. 183.
[63] Id. p. 184.
[64] Id. p. 131.
[65] Id. p. 129.
[66] Trial by Jury, c. 2.

tention that the English jury system could not have been derived from the Scandinavian source.

§ 25. **Reeves says Rollo introduced trial by twelve jurors into Normandy and Normans tried to substitute it for Saxon sectators in England.**—At this point it may be interesting to note that Reeves says[67] Rollo, the Scandinavian, led his people into Normandy about 890[68] carrying with them the method of trial by twelve jurors, and, when the Normans conquered England, they endeavored to substitute this method of trial in place of the Saxon sectators,[69] of which I shall speak more at length later on.[69a]

§ 26. **German tribunal decided both law and facts; for this reason, it is suggested, judge finally displaced jury in Germany, while the jury system developed in England under Norman influence.**—In ancient Germany, at the head of each district was a graf, who acted as military leader and also as president of the courts of justice.[70] Meetings were held at stated times, composed of all the freemen of the community, who were obliged to attend; they constituted the tribunal, and a majority ruled. The frequency of such meetings and the absence of the freemen of the community, as well as the large number present at times, led to the practice of choosing certain freemen, usually seven in number, who formed a court for the hearing of the particular case.[71] Before giving judgment, the members of the court retired from the presence

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[67] Vol. 1, p. 84.

[68] 912 A. D. is the correct date.

[69] See also Prof. Thayer in 5 Harvard Law Rev., p. 250.

[69a] There is no satisfying evidence as to the facts stated in this paragraph insofar as they concern the historic origin of trial by jury.

[70] Forsyth, p. 32.

[71] Id. p. 35.

of the presiding officer in order to consider their decision.[72] We are informed that in these early courts, the freemen, chosen as members, decided questions of both law and fact, and that persons from the neighborhood were heard under oath; if the restricted testimony they were permitted to give was conflicting, the court did not weigh and determine the evidence, but merely decided that the question should be tried by combat, or that a prisoner should submit to the ordeal as a final determination of his guilt or innocence,—or what, according to custom, should be done in the specific case. Even the judges themselves might be challenged to fight by the accused and six of his friends.[73] So, you see, those times called for strong judges. Lesser,[74] citing Forsyth,[75] states: "The explanation of the fact that an institution of the common ancestors of the English and Germans, at the start characterized by the selection of triers from the community at large, should flourish on English soil and ultimately develop into the jury, while falling into gradual desuetude in Germany, and finally becoming obsolete, must be sought in the successive stimuli—above all, the Norman invasion—which affected it in Britain; while, on the other hand, its decay on the continent may be attributed to the gradual exclusion of the freemen (at first voluntary, but afterwards compulsory) from the ancient tribunal, and to the establishment of the institution of scabini [appointed officials][76] in Germany by Charlemagne. These were the sole judges of fact as well as law; they absorbed the whole judicial functions of the court, and, therefore, in the opinion

[72] Forsyth, p. 36.

[73] Id. pp. 43, 44; see also Lesser, History of Jury System, pp. 47-52.

[74] Lesser, pp. 51-2.

[75] Chapter 3, p. 42.

[76] Pomeroy, Mun. L., sec. 113.

of our authority, there was no room for another body distinct from them, whose office should be conclusively to determine questions of fact for them. And when the principle was once established of thus making the court consist entirely of a limited number of duly qualified judges, the transition to single judges, who decided without the intervention of a jury, was a natural and almost necessary consequence."

§ 27. **English development of jury system probably due to democratic ideals.**—I think, however, the explanation lies deeper than that given by Lesser and Forsyth; it may be found—at least so far as modern development is concerned—in the different schools of thought adopted by the English and Germans respectively, the one being democratic and the other autocratic; in other words, the one, on principle, trusts to the collective opinion of a number while the other, on principle, prefers a single will.

§ 27a. **European continental countries have jury systems in modified form to-day; reasons why it did not flourish there as in England; Roman procedure adopted by Frankish rulers influenced Norman dukes, who carried it into England.**—Pomeroy thus explains why the jury trial did not grow up, by natural sequence of events, in France, Italy, and Spain, as it did in England:[77] "In the interval between the abandonment of England to the natives by the withdrawal of the [Roman] legions and governors, and the completed invasion of the Angles and Saxons, the vestiges of the Roman policy and laws had been nearly swept away by the continual wars between the Britons and the wild tribes of the north.....The Roman element was not sufficiently powerful and concentrated to warp the development of the pure Saxon ideas

[77] Mun. L., sec. 117.

in their natural order. The Franks, Lombards and other barbarian nations, on the contrary, met the Roman laws and institutions existing in full force, and, although at first overwhelming them by their rude violence, yet finally yielded to their inherent and vital power." Of course this adopts a view which differs from that of the more modern writers, who believe that whatever influence Roman institutions had upon what subsequently became the English trial by jury, must be traced through the Normans. They see in the custom of the late Roman emperors, in summoning before them those who lived in the neighborhood to declare under oath their knowledge in respect to facts of public importance, the germ of the modern trial by jury. This Roman procedure, they point out, was taken up, in the early middle ages, by the Frankish bishops, to aid in the determination of ecclesiastical questions, and by Charlemagne and the other Frankish kings in respect to civil issues.[78] This is virtually the same custom which some centuries later we find in the inquisition process of the Norman dukes, who carried it into England at the time of the invasion, where, probably, it gradually developed into our present system of trial by jury.[79]

[78] Maitland's Const'l Hist. of Eng., p. 120 et seq.

[79] Dr. H. Brunner's "Die Entstehung der Schwurgerichte," pp. 16, 36, 37, 40, 41, 85, 88, 106, 230, 231 et al., and his Preface, p. VII; see also article by W. F. Craies, under "Jury," Encyc. Brit., 11th ed., vol. XV.

LECTURE II.

DEVELOPMENT OF JURY SYSTEM IN ENGLAND.

Ancient political divisions given English names by King Alfred. (§ 28)
  County ruled by count. (§ 28)
  Hundred explained, (§ 29)
    Ruled by ealdorman, sheriff or bishop. (§ 29)
  Hundred courts explained; (§ 30)
    Theory of Hume as to their connection with trial by jury noted. (§ 30)
Anglo-Saxons divided inhabitants into:
  Unfree, (§ 31)
  Free; the free were divided into: (§ 31)
    Earls (eorls) or nobles, (§ 31)
    Churls (ceorls); (§ 31)
    Both had right to attend folk courts, (§ 31)
      As judges of law and facts; (§ 31)
    One noble equaled six churls. (§ 31)
In primitive Anglo-Saxon courts whole company of freemen were judges. (§ 32)
Anglo-Saxon institutions were:
  Wergild (forerunner of Workmen's Compensation Code), (§ 33)
  Wite, money due state for breach of peace, (§ 33)
  Frank-pledge, security for good behavior. (§§ 33, 34)
Anglo-Saxon system of trials:
  Sectators, or suitors of court, (§§ 35-7)
  Secta, or witnesses from the suit, (§§ 35, 38-9)
  Official witnesses, (§§ 35, 40-42)
  Compurgators. (§§ 35, 43-8)
  Sectators were freemen, sitting as court. (§ 36)
    Lord and vassal composed court. (§ 36)
    Nature and effect of judgment. (§ 36)
    Not confined to twelve persons, (§ 37)
    Nor did they act under oath. (§ 37)
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Secta, or trial by secta witnesses:
Exact proceeding not clear; (§ 38)
Might be merely complaint witnesses in pleadings; (§ 38)
Trial said by some writers to be decided in certain cases according to number of witnesses predominating. (§ 39)
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Hot iron, (§ 49)
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Through influence of church, or (§ 51)
Through fallacies on which they were based. (§ 51)

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§ 28. **Ancient political divisions given English names, by King Alfred.**—After the brief review of the growth of judicial institutions on the continent, contained in the previous lecture, we shall now return to England and trace the course of their development there. It is to be remembered that the Romans had political organizations, which they imposed on all their conquered countries, known as provinces. These were divided into districts

like counties, or comitatus (ruled over by a count), with further sub-division into centuries (100 men) and decennaries (10 men).[1] While it is generally stated[2] that King Alfred divided England into counties, hundreds and tithings, it is probably more accurate to say that he gave Saxon names[3] to old political divisions;[4] thus paving the way for the growth of certain early institutions or devices for working out the ends of justice, which I shall discuss after a few relevant words on the subject of these political divisions and their management, as the latter sheds light on the matter we are investigating.

§ 29. **Hundred explained; ruled by ealdorman, sheriff.** —A hundred was originally 100 freemen,[5] and, in the country, it meant 100 villas, embracing also the land. It is likewise referred to as consisting of (1) 100 tithings, (2) 100 hides of land,[6] (3) 100 families, and (4) 100 freemen.[7] Hundreds assembled from time to time,[8] and we are told that freeholders were chosen and sworn to act as a judicial tribunal with a presiding magistrate.[9] The headman or ealdorman (corresponding to the Frankish count) or the gerefa or sheriff presided.[10]

§ 30. **Hundred courts explained; theory of Hume as to their connection with trial by jury noted.**—The increase of families, and the migration of residents from

[1] Reeves, Hist. Eng. L., 1st Am. ed., vol. 1, pp. 41, 166-8, notes.
[2] Hume, Hist. Eng., vol. 1, c. 2; Lesser, Jury System, p. 64.
[3] Reeves, p. 210, notes.
[4] Coke's Inst., vol. 1, p. 168.
[5] Pomeroy, Mun. L., sec. 388.
[6] A hide of land was the amount sufficient for the support of one family (Pomeroy Mun. L. Sec. 380).
[7] Reeves, p. 210, notes.
[8] Pomeroy, sec. 388.
[9] Lesser, p. 65.
[10] Pomeroy, Mun. L., sec. 114.

place to place, caused many changes in the various districts, and finally the practice arose whereby the freemen of each hundred met twice a year to examine, inter alia, into the tithings and see whether the district had its proper complement of members.[11] Hume treats these meetings of the hundred courts as the origin of the English jury system,[12] though this is one of the points of contention among early historians.[12a]

§ 31. **Anglo-Saxons divided inhabitants into unfree and free; latter into earls and churls; both had right to attend folk courts as judges of law and facts; one noble equaled six churls.**—Under the Anglo-Saxons, the inhabitants were divided into the free and the unfree. The unfree, while not all slaves, at first could hold no lands as their own property. Pomeroy says that the term "free" referred[13] "simply to the status of the person, and the amount of privileges he could legally enjoy as an essential element of the state . . . . Freemen were then subdivided into two generic classes, noble and those not noble, or, in their own language, the 'Eorl' [earl] and the 'Ceorl' [churl or husbandman] . . . . . The freemen, thus in the possession of a share in the soil, could unite with his fellows in all matters concerning the general interests and welfare of the community. One of the most important of this branch of rights was the ability to attend the local folk courts, and join in their deliberations and decisions. . . . One noble was considered equal to six simple freemen. Thus, in judicial disputes, when it became necessary to resort to the oaths of compurgators[14] [they—the compurgators—

[11] Forsyth, p. 55.

[12] Hist. Eng., vol. 1, c. 2.

[12a] But see § 27a, of these lectures.

[13] Mun. L., sec. 366-70.

[14] Compurgation is explained later in this lecture: Secs. 35, 43.

being part of an institution concerning which I shall speak presently more at length],.....that of one eorl was equivalent in effect to those of six ceorls [so was it likewise in private feuds, or compensation for death, whereof also I shall speak later]; but their [the nobles'] most important advantage was of a political nature—from among this class alone could the chief judges [magistrates], the ealdormen, and the kings be chosen."[14a]

§ 32. **In primitive Anglo-Saxon courts, whole company of freemen were judges.**—Thayer, treating of these ancient gatherings of freemen, says:[15] "The great fundamental thing to be noticed first of all, out of which all else grew, was the conception of popular courts and popular justice. We must read this into all accounts of our earliest law. In these [primitive] courts it was not the presiding officers, one or more, who were the judges; it was the whole company [of freemen]; as if, in a New England town-meeting—the lineal descendant of these old German moots—the people conducted the judicature, as well as the finance and politics, of the town. These old courts were a sort of town-meeting of judges.....The conception of a trial was that of a proceeding between parties carried on publicly, under forms which the community oversaw."

§ 33. **Among Anglo-Saxon institutions were wergild, wite and frank-pledge; wergild, forerunner of Workmens's Compensation Code; wite, money due state for breach of peace.**—Among the earliest Anglo-Saxon institutions or devices for working out the ends of justice, we find the wergild and frithborh. The wergild required that a sum of money be paid for personal injuries, according to a regular schedule, which the law fixed, depending

[14a] Pomeroy, secs. 366-70.

[15] Ev., p. 8; cf. sec. 37, infra.

upon the nature of the injury, and the rank of the victim,[16] part going to the king, or to the lord of the manor, and the balance to the claimant. The infliction of a wound on the head an inch long was punished by the payment of one shilling; if on the face, by the payment of two shillings. The loss of an ear was estimated at thirty shillings, but if the hearing was gone, at sixty shillings; and a regular price was fixed on the head.[17] So it may be seen the modern Workmen's Compensation Code is not quite original after all. In its essential idea, it is but a repetition of this old Saxon institution, created to abolish feuds, which were frequent in early times; for, in those days, if an offender refused to pay, or the injured party to accept, compensation, the former was exposed to the vengeance of the latter and his friends[18]—just as our present law was enacted as one means of overcoming the existing feud between labor and capital; but in the ancient law, in addition to the compensation for the person, there was also a penalty (called "wite") due the state, probably because of the breach of peace.

§ 34. **Frank-pledge system explained.**—The Frithborh (meaning a peace pledge, and later called a frank-pledge) consisted of a guarantee by which every member of a tithing became surety to the other members, as well as to the state, for the maintenance of the public peace. If any member was accused of crime, the others were to arrest and bring him to trial. They could clear him by their oaths, but if he was not cleared, they were obliged to pay the wergild and wite.[19] Even to-day, every citizen is subject

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[16] Black's Law Dic.; Forsyth, p. 48.

[17] Laws of King Alfred cited in Worthington on Juries, p. 10.

[18] Forsyth, p. 49; Laws, Hen. I, c. 70, sec. 9.

[19] Forsyth, p. 51; Turner, Hist. Anglo-Saxons, vol. 1, p. 475.

to be called on to maintain the peace, and, when called, he must respond.

§ 35. **Anglo-Saxon judicial system: (1) sectators, (2) secta, or trial by witness from the suit, (3) official witnesses and (4) compurgators.**—The several institutions already referred to had their places in the Anglo-Saxon scheme of government, prior to the Conquest; but, in the main, the judicial system may be considered under four principal headings: (1st) the sectators (followers, attendants), or suitors of court, sometimes referred to as pares curiae (equals or peers of court), whose decision was designated judicium parium (judgment of their equals or peers); (2) the secta (suit, following), a kind of preliminary trial by witnesses from the suit, or suite, as we would say today, of the respective litigants; (3rd) the system of official witnesses; and (4th) trial by compurgators.[20] None of these participants in the ancient tribunals were jurors, in the sense of that word as we now understand it; although, in future references, I may so designate them, for the sake of convenience of expression. The several forms of procedure just enumerated may be examined with profit under their respective headings.

§ 36. **Sectators were freemen, sitting with a lord as a court; nature and effect of decisions.**—(1st) The sectators were freemen, whose duty it was to attend the hundred, county and manorial courts and participate in their work; according to Lesser,[21] they were "the whole court." He says they were presided over by a high officer, and he thinks the institution "a modified outcome" of what is called King Alfred's county system. However that may be, it was of early origin; the lord with his vassals sat as

[20] Purgers, from compurgo, to purify completely: Lesser, p. 74.
[21] Page 167.

a tribunal[22] to determine whether the causes before them should proceed further, and the judgment decided the burden and nature of proof and the consequences of subsequent failure or success in producing evidence.[22a]

§ 37. **Sectators not confined to twelve persons, nor did they act under oath; twelve thanes.**—Reeves[23] says: "It seems that causes in the county and other courts were heard....by an indefinite number of persons called sectators, or suitors of court; and there is no great reason to believe they had any juries of twelve men; this was an invention of a much later date....In a law of King Ethelred there is a provision that there should be twelve thanes [of superior rank], whose concurrence was made necessary; it seems, however, these were rather assessors to the judge than a part of the suitors...The number of sectators was various, according to the custom of different places, and....in no case is there the least reason to believe it was confined to twelve. These sectators discharged their office, it is thought, without any other obligation for a true performance of it than their honor; for it does not appear they were sworn to make declaration of the truth."

§ 38. **Secta, or trial by secta witnesses; exact proceeding not clear; may be merely complaint witnesses.**—(2nd) The secta, or trial by secta witnesses, was a proceeding wherein the plaintiff summoned, to testify in his behalf, a certain number of persons, who came from the neighborhood, with knowledge of the transaction in controversy; and some writers state that the defendant re-

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[22] Cooley, Am. Cyc., vol. IX Art. Jury; Lesser, p. 75.

[22a] Maitland, Const'l Hist. of Eng., p. 115; see also sec. A of appendix No. 2, infra., and sec. 74 of these lectures.

[23] Hist. Eng. L., 1st Am. ed., vol. 1, pp. 203-6; cf. sec. 32, above.

butted by producing, if possible, a larger aggregation;[24] although according to Thayer, this appears doubtful. None of the investigators make the exact proceeding clear; but Thayer is of opinion[25] that secta witnesses probably had no part in the ultimate trial. He says,[25a] "It was the office of the secta to support the plaintiff's case, in advance of any answer from the defendant," and states,[25b] "this sort of 'witness' might have nothing to do with the trial," adding, "he belonged to that stage of the preliminary allegations, the pleadings, where belonged also profert of the deed upon which an action or a plea was grounded"; then Professor Thayer suggests that, "as rules belonging to the doctrine of profert crept over in modern times, unobserved, into the region of proof, under the head of rules about the 'best evidence', and 'parol evidence', so the complaint-witnesses were, early and often, confused with proof-witnesses—a process made easy by the ambiguity of the words 'testis', 'secta', and 'witness'." This writer thinks the secta were merely, what he terms, "complaint-witnesses." Further, "the defendant could stake his case on the examination of the complaint-witnesses [of plaintiff], and, if they disagreed among themselves, defendant won"; if not, plaintiff proceeded to trial. He suggests this as the origin of the phrase—which long survived and was used in all the old narrs.—"and thereupon he [plaintiff] brings his suit." In this connection Blackstone,[26] in treating of pleading, says: "The declaration always concludes with these words 'and thereupon he brings suit, etc., inde producit sectam, etc., [meaning there-

[24] Lesser, 76.
[25] Ev., pp. 10-19.
[25a] Id. p. 13.
[25b] Id. p. 12.
[26] Vol. 3, p. 295.

upon he brings his suit—or followers]. By which words suit or secta (a sequendo)[27] was anciently understood the witnesses or followers of the plaintiff."

§ 39. **Trial by secta witnesses said to have been decided in some cases, as requisite number of witnesses predominated**—On the same point Forsyth says:[28] "Besides the trial by assize or jurata,[29] Bracton notices another mode of determining disputes; this was when a party made a claim et inde producit sectam. The meaning of this is, that the claimant offered to prove his case by vouching a certain number of witnesses [from his followers or suit] who had been present at the transaction in question. The defendant on the other hand, rebutted this presumption by producing a larger secta, that is, a greater number of witnesses on his side whose testimony, therefore, was deemed to outweigh the evidence of his opponent[29a]... Inasmuch, however, as the evidence of defendant's secta [following] was not deemed to be absolute proof, but merely raised a presumption in his favor sufficient to countervail the presumption on the other side, he was not allowed to resort to this mode of rebuttal where the complainant could produce evidence of a different character, such as a deed or charter. If this was denied, the case was to be tried per patriam[30] or per patriam et testes in carta nominatos;[31] but, if the plaintiff produced his secta, and the defendant had none,.....he was not—at all events in the instance given by Bracton of an action for dower (unde nihil habet)[32]—allowed to put

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[27] From sequor, to follow.

[28] Pages 128-30.

[29] Jury.

[29a] See also Encyc. Brit., 11th ed., vol. XV, p. 590.

[30] By the country, or jury.

[31] By the country, or jury, and witnesses to instrument, deed or charter.

[32] Or from which she has nothing.

himself on the country, but the plaintiff recovered by force of the secta, or the defendant was called upon to wage his law; that is, he was obliged to bring forward double the number of witnesses adduced by his opponent until twelve were sworn [as to the truth of his defense]. It seems that if he could procure that number to swear for him he succeeded in resisting the demand.....An exception, however, was made in the case of merchants and traders, for they were allowed to prove a debt or payment per testes et patriam."[33] I think that, in the above excerpt, the preliminary hearing by secta witnesses and the ultimate trial are confused, or at least not distinguished; and evidently Bracton deals with matters subsequent to the introduction of juries.

§ 40. **Trial by official witnesses, who attended private contracts so as to testify in case of dispute.**—(3rd) Defects incident to the proceeding by secta led to official witnesses being appointed for each district, whose duty it was to attend all private bargains or transactions, such as contracts of sale, so as to testify thereto when occasion arose; they gave evidence of the transaction itself.[34]

§ 41. **Proceeding by official witnesses described.**—Thayer on Evidence describes the proceeding by official witnesses as follows:[35] "There was no testing by cross-examination; the operative thing was the oath itself, and not the probative quality of what was said, or its persuasion on the judge's mind. Certain transactions, like sales, had to take place before previously-appointed witnesses. Those who were present at the church door when a woman was endowed, or at the execution of a charter, were pro-

[33] By witnesses and the country.

[34] Forsyth, pp. 72, 73.

[35] Page 17.

duced as witnesses. In case of controversy it was their statement, sworn with all due form before the body of freemen who constituted the popular court, that ended the question."

§ 42. **Trial by official witnesses thought by certain authors to be origin of jury trial.**—W. F. Finlason, editor of Reeves's History, thinks the system of official witnesses the true origin of trial by jury,[36] and Prof. Robertson[37] joins in so thinking; but, as previously pointed out, in paragraph 27a, this doctrine is contrary to the trend of modern thought on the subject.

§ 43. **Trial by compurgators, or wager of law; what compurgators were and nature of their testimony, or oath, explained; character witnesses remnant of compurgation.**—(4th) In trial by compurgators, or wager of law, the charge of the prosecutor was sufficient to put one accused of crime on his defense;[38] but we are told that, in civil actions, so long as the custom continued of producing the secta, or witnesses, to give probability to plaintiff's demand, defendant was not put to wage his law, unless the secta were first produced and their testimony was found consistent—if the evidence of the secta proved inconsistent or contradictory, plaintiff failed, and the proceeding ended there. In criminal proceedings the defense was entered, first by the denial of the accused, who then called witnesses, known as compurgators, or "oath helpers"[38a] to whose testimony credit was attached according to their rank.[39] These witnesses did

[36] Note to Reeves, p. 187.
[37] Article on Jury in Enc. Brit., vol. XII, 9th ed.
[38] Lesser, p. 77.
[38a] Maitland, Const'l Hist. of Eng., p. 116, 118.
[39] Forsyth, p. 61.

not testify to matters within their own knowledge, but only vouched for the trustworthiness of the oath of the party on whose behalf they appeared; they were somewhat in the nature of witnesses as to character. Where a party was accused of crime, and denied it in court, if compurgators of a proper character appeared and swore they believed his oath, the decision would be given in the defendant's favor. The usual number of compurgators was twelve, but might be as high as forty-eight.[40] If a party was unable to call a sufficient number of these witnesses, he was deemed to have taken a false oath, and lost his case in a civil suit or was convicted in a criminal action.[41] Frequently the compurgators formed a considerable assembly. Starkie[42] expresses the view that evidence as to character in criminal cases, as we now have it, is the last remnant of the process of compurgation.

§ 44. **Trial by compurgators described.**—Blackstone[43] gives the following description of trial by compurgators: "The manner of waging and making law is this: He that has waged, or given security, to make his law, brings with him into court eleven of his neighbors, a custom which we find particularly described so early as in the league between Alfred and Guthrun, the Dane; for by the old Saxon constitution every man's credit in courts of law depended upon the opinion which his neighbors had of his veracity. The defendant, then standing at the end of the bar, is admonished by the judges of the nature and danger of a false oath, and, if he still persists, he is to repeat this or the like oath:—'Hear this, ye justices, that I do not owe unto Richard Jones the sum of ten pounds, nor any penny there-

[40] Forsyth, p. 63; Maitland, Const'l Hist. of Eng., p. 117.

[41] Forsyth, p. 68.

[42] Ev., p. 75, note h.

[43] Vol. 3, p. 343.

of, in manner and form as the said Richard hath declared against me. So help me God.' And thereupon his eleven neighbors, or compurgators, shall avow their oaths that they believe in their consciences that he saith truth; so that himself must be sworn de fidelitate,[44] and the eleven, de credulitate.[45] It is held indeed, by later authorities, that fewer than eleven compurgators will do; but Sir Edward Coke is positive that there must be this number; and his opinion not only seems founded upon better authority, but also upon better reason: for as wager of law is equivalent to a verdict in the defendant's favor, it ought to be established by the same or equal testimony, namely, by the oath of twelve men."

§ 45. **Wager of law explained; ordeal.**—As in wager of battle the defendant gave a pledge, gage, or vadium, to try the cause by battle, so in wager of law he was required to put in sureties that at such a day he would make his law, that is, take the benefit which the law allowed him. This species of trial, by the oath of the defendant himself, was established, in view of the fact that an innocent man of credit might be overborne by false witnesses. If he swore himself not chargeable, and appeared to be a person of repute, he went free and acquitted of the cause of action. He had, however, to produce eleven neighbors as "compurgators," who upon oath avowed that he spoke the truth. If he could not produce the right compurgators he had to go the ordeal.[45a] Wager of law fell into disuse[46] and was abolished by 3 and 4 Wm. IV, c. 42,

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[44] From or upon good faith.

[45] From or upon their belief.

[45a] Maitland, Const'l Hist. of Eng., p. 118; see also § 49 of these lectures and sec. C, appendix No. 2, infra.

[46] Thayer, Ev., pp. 32-4.

sec. 13, 1833;[47] if ever existing in the United States, it is now abolished.[48]

§ 46. **Compurgation not allowed in cases of official witnesses.**—Forsyth[49] says: "Although we have no express information on the point, we may reasonably conclude that compurgation was not allowed in cases where the plaintiff could prove his demand by calling the legal witnesses who had attested the contract. Otherwise, the absurdity would follow, that the oath of a defendant, backed by relatives or friends who vouched for a belief in his integrity, would be sufficient to discredit the positive testimony of those whom the law had appointed as trustworthy witnesses; and this view is confirmed by what we know of wager of law in later times. This was not permitted when the debt claimed was secured by a deed or other specialty which spoke for itself, but only, as Coke says, 'when it groweth by word, so as he may pay or satisfy the party in secret, whereof the defendant, having no testimony of witnesses, may wage his law.'"

§ 47. **Recapitulation of Anglo-Saxon judicial system.**—Forsyth[50] concludes, what he calls the results of his investigation, thus: "(1) We find that courts existed presided over by a reeve, who had no voice in the decision, and that the number of persons who sat as judges was frequently twelve, or some multiple of that number. (2) The assertations of parties in their own favor were admitted as conclusive, provided they were supported by the oaths of a certain number of compurgators; and in important cases the number was twelve, or, at all events, when added to the

[47] Anderson's Law Dic., 1096.
[48] Childress v. Emory, 8 Wheat. 674
[49] Pages 75-6.
[50] Page 76.

oath of the party himself, made up that number. (3) The testimony of the neighborhood was appealed to, for the purpose of deciding questions which related to matters of general concern. (4) Sworn [official] witnesses were appointed in each district, whose duty it was to attest all private bargains and transactions, in order that they might be ready to give evidence in case of dispute. (5) Every care was taken that all dealings between man and man should be as open and public as possible; and concealment or secrecy was regarded as fraud, and in some cases punished as guilt."

§ 48. **Trial by compurgators; where defendant failed he might be made to suffer ordeal; perjury.**—Perjury was one of the principal crimes of the middle ages.[51] The ease with which it was possible for a man to select from his friends a sufficient number to swear they believed him, led to the practice of permitting the opposite party to select certain witnesses, from among whom the defendant or accused was obliged to choose. If a man were of bad character, three times the usual number of witnesses were chosen; or, if a crime was openly committed, the defendant could not clear himself by the oaths of compurgators, but might be made to suffer an ordeal to establish his innocence.[52] When the compurgators agreed, there was a complete acquittal.[53]

§ 49. **Ordeals, trials by, enumerated: hot iron, hot water, and cold water.**—The ordeals just referred to, consisted of, first, the ordeal of the hot iron, whereby the accused was required to carry a piece of red-hot iron, of from one to three pounds, for a distance of nine paces, or to

[51] Forsyth, p. 69.

[52] Id. pp. 65, 66.

[53] Lesser, p. 79; see also appendix No. 2, infra.

walk, barefoot and blindfolded, over nine red-hot plowshares laid lengthwise at unequal distances; second, the ordeal of hot water, whereby he was made to take from a pail of boiling liquid a stone sunk to a depth equaling the length of his hand or forearm. In these two, if the victim was burned, or scalded, in such a way as to show certain degrees of injury, he was declared guilty, otherwise, innocent; but in the third—the ordeal of cold water—strange to say, if the victim, who was thrown into a pond, sank, he was declared innocent. Anderson's Law Dictionary, which I have always, with this exception, found reliable, speaking of the cold water ordeal, says, "Floating without the act of swimming was deemed evidence of innocence," but this is an evident mistake. To begin with, the accused had his thumbs tied to his toes before he was thrown into the water, which, guilty or innocent, must have made swimming a little difficult; but, aside from this, the authorities, from Blackstone[54] down, all agree that floating was evidence of guilt, "the superstitious belief" being that the "pure element" of water "would not receive into its bosom anyone stained with the crime of a false oath."[55] Dr. Henry Charles Lea, in his learned work on Superstition and Force,[56] says: "The accused, bound with cords, was lowered into [the pond] with a [short rope] to prevent fraud if guilty and to save him from drowning if innocent."

§ 50. **Ordeal of corsned or consecrated morsel.**—There were still other ordeals, which do not call for discussion,

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[54] Book 4, p. 343.

[55] Dr. Lea's Superstition and Force, (2d ed.), pp. 216, 268, 320; Patetta's Ordalie, c. 1. See Inst. of Narada, Jolly's Trans. from the Hindu, pp. 44-54.

[56] Page 216.

one of these the ordeal whereby the accused was required to swallow a piece of bread accompanied by a prayer that it might choke him if guilty.[57]

§ 51. **Ordeals came to an end early in the 13th Century.**—The ordeals came to an end in the early part of the 13th century,[58] directly, it is said, through the influence of the church;[59] but, it is fair to believe, this was affected by a general realization of the fallacies on which they were based.[60]

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[57] 4 Bl. Com. 345.

[58] Lesser, p. 142, and note.

[59] Thayer, Ev., p. 36.

[60] For further description of these ordeals and their place in ancient jurisprudence, see sections A, B, C of appendix No. 2 to this volume, and authorities there cited.

LECTURE III.

FINAL DEVELOPMENT OF JURY SYSTEM.

Anglo-Saxon inquisition by twelve senior thanes,
  Was jury of presentment, (§ 52)
    To be followed by compurgation or ordeal. (§ 52)
Articles of visitation of 1194, A. D.
  Provide for choice of twelve free men in each hundred,
    Who tried pleas of the crown, (§ 53)
    As well as much civil business; (§ 53)
    It was thus the historical grand jury; (§ 53)
    For a time they were jurors of accusation and trial; (§ 53)
    Afterwards separated as grand and petit jury; (§ 53)
    Petit jury alternative to ordeal. (§ 53)
Criminal trial by jury established;
  At first bought, (§ 54)
  Subsequently made matter of right; (§ 54)
  Defendant who stood mute was first considered guilty; (§ 55)
  Finally, by statute, plea of not guilty was entered for him. § 55)
Burke's ideas on Anglo-Saxon contributions to trial by jury. (§ 56)
Norman institutions leading to jury trial:
  Trial by combat; (§ 56)
  Separation of spiritual and temporal courts; (§ 56)
  Appointment of justiciars,
    Who tried suits in various parts of country, (§ 56)
    And heard persons from vicinity who knew facts. (§ 56)
  Recognition by sworn inquest:
    Derived from Frank capitularies, (§ 57)
    Of mixed kingly and popular origin. (§ 57)
    First used in England for purpose of taxation; (§ 58)
    Then to settle disputes between subjects; (§ 58)
    Normans needed this more than native rulers, (§ 58)
    Hence growth of native germs was fostered. (§ 58)
  Recognitors were sworn witnesses, (§ 59)
    Numbering generally twelve, or multiple thereof, (§ 59)
    Selected from vicinage, (§ 59)

With knowledge of facts, (§ 59)
Who rendered their verdict under oath (vere dictum). (§ 59)
Recognition extended by
Assize of novel disseisin, limited to land titles, and (§ 60)
Grand assize; (§ 60)
When in doubt, trial by battle was resorted to. (§ 60)
End of trial by battle. (§ 60a)
Grand assize nearer trial by jury; (§ 61)
If twelve did not agree, new jurors were added till twelve agreed; (§ 61)
This was called afforcing the assize. (§ 61)
Knowledge of jurors was acquired apart from trial. (§ 62)
Recognition prescribed by constitutions of Clarendon for disputes as to lay or clerical tenures; (§ 63)
Assize afterwards extended to other cases. (§ 63)
Jurata furnished familiar machinery for assize; (§ 64)
Transition from varying number of neighbors to twelve was easy; (§ 64)
Verdict was originally testimony (veredicto) of jury. (§ 64)
Certain writers think jury system distinctively English: (§ 65)
Anglo-Saxon germs developed by Anglo-Normans; (§ 65)
Roman institutions during Roman occupancy may have had influence. (§ 65)
Romans had decision of facts by individuals distinct from judge; (§ 66)
Anglo-Saxons had free choice of individuals from mass of citizens; (§ 66)
Compurgators developed into recognitors; (§ 66)
To these were afterwards added actual witnesses of the transaction, (§ 66)
All uniting in rendering the verdict; (§ 66)
Finally witnesses were added who took no part in the decision. (§ 66)
Ancient elements which made jurors not witnesses but judges of facts:
Arbitral, involving consent and submission; (§ 67)
Communal, being the opinion of the country; (§ 67)
Quasi-judicial, weighing testimony with resultant verdict; (§ 67)
Explanation of phrase "putting" oneself "on the country." (§ 67)

Unanimity, line of least resistance. (§ 67)
Date of final establishment of jury system stated. (§ 68)
There is evidence that early juries took outside evidence. (§ 69)
Jurors became judges of evidence submitted to them, as well as witnesses. (§ 70)
Finally solely judges of evidence, without personal knowledge of facts. (§ 70)
Need for rules of evidence followed previously stated development. (§ 71)
Also practice of attorneys in trials, followed; (§ 72)
Juror with personal knowledge must offer himself as witness; (§ 72)
Verdict on jurors' own knowledge, rather than facts produced in evidence, cannot be sustained. (§ 72)
A word of warning to investigators of antiquities;
Original data only reliable guide. (§ 73)
Brief recapitulation of subject; (§ 74)
Nature of ancient trials and original judgments. (§ 74)

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§ 52. **Anglo-Saxon inquisition by twelve senior thanes was jury of presentment, to be followed by compurgation or ordeal.**—It may be appropriate at this point to say a word or so on the origin of the grand jury and the establishment on a definite basis of the jury for trial of criminal cases. In Anglo-Saxon times, as has already been mentioned, there was the inquisition by twelve senior thanes, who were sworn, in the county courts, that they would accuse no innocent man and acquit no guilty one. The twelve thanes were in the nature of a jury of presentment, or accusation, like the grand jury of later date,[1] and the absolute guilt or innocence of those accused by them had to be determined in subsequent proceedings by compurga-

[1] Palgrave, Eng. Com., vol. 1, p. 213; Lesser, p. 135; Maitland's Const'l Hist. of Eng., 127.

tion or ordeal. A thane was always a man of importance in the kingdom.

§ 53. **Articles of visitation of 1194 provided for choice of twelve men in each hundred to try pleas of crown and civil business; at first they were jurors of accusation and trial; afterward separated as grand and petit jury; latter as alternative to ordeal.**—The Articles of Visitation of 1194, required four knights to be chosen from the county, who, by their oaths, were to choose two lawful knights of each hundred, or, if knights were wanting, free and legal men, who, in turn, were to select ten others, so that the twelve might answer for all matters within the hundred, including, says Stubbs,[2] all the pleas of the crown, the trial of malefactors, as well as a vast amount of civil business. This was the historical grand jury, and, though not at first, for a time it seems to have been both a jury of accusation and of trial.[3] Forsyth says that the petit jury, as it is called, which is the real jury of trial, appears to have arisen as an alternative of trial by ordeal; but, however this may be, the separation between the two juries was, at any rate, complete in the reign of Edward III.[4]

§ 54. **Criminal trial by jury established; was first bought, but subsequently made matter of right.**—The criminal (petit) jury, as it then was, had a definite basis toward the end of the twelfth century,[5] though the right to trial by jury in criminal cases seems to have been a matter of privilege for a time, to be purchased for a consideration, but, later on, this was changed[5a]; by the end

[2] Const. Hist. Eng., vol. 1, p. 568.

[3] Forsyth, p. 178.

[4] Id., p. 180.

[5] See Lesser, pp. 138, 139; Stubbs, Select Charters, p. 140.

[5a] Magna Charta, art. 36.

of the thirteenth century, trial by jury in criminal cases had become well established as a matter of right.[6]

§ 55. **Defendant who stood mute was first considered guilty; finally, by statute, plea of not guilty was entered for him.**—Refusal of a person charged with crime to be tried was, at one time (the middle of the thirteenth century), treated somewhat like a confession of guilt.[7] This was soon changed by statute,[8] which provided imprisonment and a penalty, consisting of barbarous torture for criminals who stood mute or declined to be tried by jury.[9] Several centuries later, it was provided[10] that persons standing mute, when charged with felony or piracy, should be held committed by their own confession, and, in 1827,[11] that, where one charged with a crime refused to plead to an indictment, a plea of not guilty should be entered for him to the same effect as if he had personally pleaded, thus establishing the rule in the form generally prevailing in American jurisdictions.

§ 56. **Burke on Anglo-Saxon contributions to trial by jury; Norman institutions leading to jury trials; trial by combat; separation of spiritual and temporal courts; appointment of justiciars who heard persons from the neighborhood who knew the facts.**—The several ancient customs and institutions mentioned in this and prior lectures, after contributing their part to the development of our present system, gradually disappeared; but, before being superseded, they in turn were no doubt affected by

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[6] Lesser, p. 143.
[7] Id., p. 146.
[8] 3 Edw. I, c. 12.
[9] Lesser, p. 147.
[10] 12 Geo. III, c. 20.
[11] 7 and 8, Geo. IV, c. 28.

the introduction of new institutions and the development of other customs, some of which call for notice. Prior to taking these up, however, it may be well to direct attention to what Burke has to say upon the subject of our Anglo-Saxon ancestors' contribution to the development of trial by jury; he states:[12] "There are few things in our history so irrational as the admiration expressed by a certain class of writers for the institutions of our barbarous Anglo-Saxon ancestors", and concludes with the opinion that "trial by jury did not exist till long after the [Norman] Conquest." This last assertion, as we have seen, is not wholly agreed with by some other writers on the subject; but, whoever may be correct about the amount of credit due to the Anglo-Saxons and Normans, respectively, the latter introduced the combat, or duel, as a means of determining suits,[13] caused a separation of the spiritual and temporal courts, appointed justiciars (who were high royal judicial officers, supposed to directly represent the crown) to try suits in various parts of the country,[14] and, under them, in some instances, persons from the neighborhood where the dispute arose were called to prove facts within their own knowledge;[15] all of which were substantial steps on the road to trial by jury.[15a]

§ 57. **Recognition by sworn inquest: derived from Frank capitularies, of mixed kingly and popular origin.**— One of the most important institutions we have to consider —which comes nearest to English trial by jury, in time

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[12] Burke's Hist. Civilization in England, vol. 2, c. 2, note 28.

[13] Lesser, 91, 103, n. 15; Forsyth, pp. 124, 125.

[14] Forsyth p. 81; Lesser, p. 91.

[15] Forsyth, p. 90.

[15a] Sec. 27a of these lectures.

and character, says Professor Robertson,[16]—is the system of "recognition" by sworn inquest, introduced into England by the Normans. Such "inquest", says Stubbs, in his Constitutional History,[17] "is directly derived from the Frank capitularies, into which it may have been adopted from the fiscal regulations of the Theodosian Code, and thus owns some distant relationship with the Roman jurisprudence." The Frank capitularies, or early French code of laws, became Norman subsequent to 912 A. D., when Rollo established himself in the territory afterwards known as Normandy. Lesser says,[18] "These capitularies—so called because of their division into chapters—[or] capitula—were promulgated by the kings, after consideration thereof in a general council or assembly, and are thus of mixed kingly and popular origin."

§ 58. **Recognition first used in England for purpose of taxation, then to settle disputes between subjects; Normans needed this more than native rulers; hence was fostered; growth of native germs.**—However derived, the inquest by recognition was originally to ascertain facts in the interest of the crown or the exchequer—as for purposes of taxation,[19] but it was gradually allowed between subjects, to settle disputes of fact. Mr. Freeman, in his Norman Conquest,[20] states that the Norman rulers of England were obliged, more than the native rulers would have been, to rely on this system for accurate information. "The Norman Conquest," says Professor Robertson, "therefore, fostered the growth of those native germs, common to England with other countries, out of which the institu-

[16] Encyc. Brit., 9th ed., title, Jury.
[17] Vol. 1, p. 656.
[18] Page 94.
[19] Lesser, p. 93.
[20] Vol. v, p. 451 et seq.

tion of juries grew"; and it is suggested, in a footnote to Professor Robertson's article,[20a] that this is the chief reason for the remarkable development of the jury system in England. The inauguration of the inquest by recognition, with its alleged analogies to the native institutions, already described, was entirely consistent with the supposed policy of fostering "the growth of native germs," as will no doubt be observed from the account I am about to give; but it is not apparent that such purpose existed[20b] in the Norman mind.

§ 59. **Recognitors were sworn witnesses, numbering generally, twelve or multiple thereof, selected from vicinage, with knowledge of facts, who rendered their verdict under oath (vere dictum).**—The system of recognition consisted in questions of fact being submitted for answers to sworn witnesses in the local courts. Lesser[21] states: "The power and duty to decide in a particular case was entrusted to a limited number of freemen selected from the district, and this number was generally twelve or some multiple of twelve. This delegated body, unlike the compurgators, did not act without knowledge of the facts involved in the dispute, but such knowledge was not acquired by means of any evidence submitted to or predicated upon argument heard by them; they decided entirely upon their own personal knowledge and information. In the selection of these persons, who were called recognitors,[22] care was taken that they should be acquainted with the circumstances of the case, with the litigant parties, and with the situation and ownership of the disputed property;

20a Encyc. Brit., 9th Am. (Maxwell Somerville) ed., title, Jury.

20b See § 27a of these lectures.

21 Page 97.

22 Reviewers, investigators.

they were, therefore, invariably chosen from the immediate vicinity of the parties or of the land in question. In doubtful cases they were strictly examined, to discover the amount and source of their knowledge. When appointed, they heard no evidence or allegations, but retired apart, and by comparing their previous information, whether acquired by sight of the occurrence or by traditions in the vicinage, or by other means, they rendered their decision or verdict, vere dictum,[23] upon oath. As they assumed to speak upon oath, from their own personal knowledge, they were liable to the penalties of perjury, if they returned a false verdict. Thus there was substituted, for the mere numerical preponderance of oaths, by irresponsible compurgators, a decision upon knowledge, by twelve recognitors, who acted upon some cognizance of the facts involved in the dispute, but they derived that information from themselves; they were, indeed, a jury of witnesses testifying to each other."[24]

§ 60. **Recognition extended by assize of novel disseisin and grand assize; trial by battle.**—The extension of the inquest by recognition began with the assize of novel disseisin,[25] whereby the king protected, by royal writ and inquest of neighbors, all those recently disseised of land; and this was followed by the grand assize, applicable generally to questions affecting freehold.[26] Originally, where a complainant had been disseised, the parties appeared in court and made their respective claims, which they offered to prove by champions, who were obliged to testify, from their own knowledge, of the justice of the respective

[23] From which is derived, etymologically, our verdict.

[24] See also Pomeroy, Mun. L., sec. 125-8.

[25] St. Henry II.

[26] Lesser, 112, 113; Maitland, Const'l Hist. of Eng., 124, 125.

claims.[27] The case might be decided by the outcome of a duel, which followed, according to Canon Stubbs,[28] as a "sort of ultimate expedient to obtain a practical decision, an expedient partly akin to the ordeal—as a judgment of God—and partly based on the idea that, where legal measures had failed, recourse must be had to the primitive law of force"; this method of trial soon fell into disuse, as parties took advantage of the right given by the assizes of a better mode of trial.

§ 60a. **The end of trial by battle.**—Though little used, trial by battle was not formally abolished until the early part of the nineteenth century, by statute 59 Geo. III, c. 46, which was passed as a result of the decision in Ashford v. Thornton,[29] where, to the amazement of the profession, it was held that this ancient device was still a legal method of settling disputes in courts.

§ 61. **Grand assize nearer trial by jury; if twelve did not agree, new jurors were added till twelve agreed; this was called afforcing the assize.**—When a defendant did not choose to accept an offer of combat, he could avail himself of the grand assize, which more nearly approaches our trial by jury; this substituted, for the views and physical powers of the champion, the oath of twelve knights.[30] The sheriff summoned four knights of the neighborhood, and these, being sworn, chose "twelve lawful knights most cognizant of the facts," whose duty it was to determine, on their oaths, the right to the land.[31] If they all knew the facts and were agreed as to their verdict, that ended the matter; if some or all were ignorant, the fact

[27] Forsyth, pp. 102, 103.
[28] Const'l Hist. Eng., vol. 1, p. 653.
[29] 1 B. & Ald. 405.
[30] Forsyth, pp. 103-4; Starkie, p. 14.
[31] Maitland, Const'l Hist. of Eng., p. 124.

was certified in court, and new knights were named until twelve were found to be agreed. The same course was followed when the twelve were not unanimous, new jurors being added until the twelve were agreed. This was called afforcing the assize.[32]

§ 62. **In grand assize, knowledge of jurors was acquired independently of trial.**—The knowledge of the knights in the grand assize was acquired independently of the trial; "so entirely," says Forsyth,[33] "did [they] proceed upon their own previously formed view of the facts in dispute, that they seem to have considered themselves at liberty to pay no attention to evidence offered in court, however clearly it might disprove the case which they were prepared to support." It is probable, however, that no such evidence was permitted in early days.

§ 63. **Recognition prescribed by constitutions of Clarendon for disputes as to lay or clerical tenures; assize afterwards extended to other cases.**—The use of recognition is prescribed by the constitutions of Clarendon, 1166 A. D., for cases of dispute as to lay or clerical tenures, and in course of time the judges who held the assize were directed to entertain cases other than those involving land. In 1285, we find it provided that, for convenience of suitors and others, instead of bringing the parties to Westminster, inquisition of trespass and other pleas shall be determined before the justices of assize. The grand assize was discontinued as a mode of trial in 1834.[34]

§ 64. **Jurata furnished familiar machinery for assize; transition from varying number of neighbors to twelve**

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[32] Forsyth, pp. 104, 105.
[33] Id., p. 107.
[34] Id., p. 115.

was easy: verdict was originally testimony (veredicto) of jury.—Forsyth,[35] writing on the general subject in hand, states: "The machinery for this mode of inquiry was ready in the existence of the jurata, so familiar to the people in the decision of disputes, and the assize supplied the model of the form in which it [the jurata] was henceforth to appear. The transition from a varying number of neighbors assembled in a county or other court, to that of a fixed number, namely, twelve, summoned to the assize [or jurata] court, was easy and slight; and the verdict of the jury was originally neither more nor less than the testimony of the [jurors]."[36]

§ 65. **Certain writers think jury system distinctively English, admitting Norman and Roman influence.**—Admitting with Stubbs,[37] Reeves,[38] and others, that the Norman recognition was the instrument which the English ultimately shaped into trial by jury, Freeman maintains,[39] none the less, that the latter may be classed as a native institution. Forsyth agrees, in a measure;[40] noting what he takes to be the jury germs of the Anglo-Saxon period, he theorizes that, out of those elements which continued in force under the Anglo-Normans was produced at last the institution of the jury, as we now know it. Other writers, as we have shown, give much credit to the effect of the civil law in influencing the establishment of the jury system in England. Strahan, in his preface to Domat's Civil Laws, says: "We are not to look upon the civil law altogether as a foreign commodity, with respect to Eng-

[35] Trial by Jury, p. 123.
[36] See also Stubbs, Const'l Hist. Eng., vol. 1, p. 617.
[37] Const'l Hist. Eng., vol. 1, p. 655.
[38] Hist. of Eng. Law, vol. 1, pp. 82-88.
[39] Vol. v, pp. 1-4.
[40] Forsyth, pp. 5, 11.

land, some of the particular laws thereof having been enacted for deciding controversies which arose here in England, and bearing date from this country. The greatest part of this island was governed wholly by the civil law, for the space of about three hundred years (A. D.41-396); during which time some of the most eminent among the Roman lawyers....., sat in the seat of judgment, here in England and distributed justice to the inhabitants." While Judge Cooley states[41] that, since Roman institutions, "which resembled in many particulars our jury, were in full force in England for more than three centuries, it would seem unreasonable to deny them any important influence in creating trial by jury."[42] The point, however, is not did Roman institutions have such an influence but did that influence operate on the English through the Normans, or otherwise?[42a]

§ 66. **Romans had decision of facts by individuals distinct from judge; Anglo-Saxons had free choice of individuals from mass of citizens; compurgators developed into recognitors; to these were afterwards added actual witnesses of the transaction, all uniting in rendering the verdict; in the end witnesses were added who took no part in the decision.**—Finally, John Norton Pomeroy[43] summarizes the situation thus: "The jury trial in its present matured form involves two very different elements, each equally important, but having no historical or theoretical connection. They are [1] the decision of the facts in a judicial trial by a number of individuals, distinct and separate from the official judge or magistrate; and [2] the free choice of these individuals from among the mass

[41] Am. Cyc., vol. IX, p. 722.

[42] But see Pollock and Maitland, Hist. Eng. L., vol. 1, p. xxxi.

[42a] See § 27a of these lectures.

[43] Johnson's Cyc., title, Jury.

of ordinary citizens. The Romans possessed the first of these features in their administration of justice; the origin of the second is to be found in the tribal customs of the German peoples, who overran the provinces of the Western empire, including the Angles and Saxons, who settled in Britain." He then reviews the folk-courts of the shires, or gamotes, which were composed of assembled free men presided over by the ealdorman, or the sheriff, or his deputy, and trial by compurgators, which, he asserts, developed into recognitors,—"a jury, as it were, of witnesses",—stating, in substance, that "In the reign of Henry III [the practice] was introduced of joining with these recognitors others who were actual witnesses of the transaction"; but, as he says, "all united in rendering the verdict." Pomeroy then goes on to say that, "During the reign of Edward III (A. D. 1350), a still more important and radical change was effected; witnesses were added to or connected with the recognitors, who communicated to the latter their knowledge of the facts, but took no part in the decision.....The innovation once made, the progress of aiding the recognitors by the testimony of outside parties was rapid."[44] None of the writers on the subject shed any clear light, however, upon the supposed transition period, when jurors, as such, ceased to be witnesses and the latter, as such, ceased to be jurors.

§ 67. **Ancient elements which made jurors not witnesses but judges of facts; arbitral, involving consent and submission; communal, being the opinion of the country; quasi-judicial, weighing testimony with resultant verdict; unanimity, line of least resistance; explanation of phrase "putting" oneself "upon the country".**—Pollock and Maitland, in their History of English Law, say:[45] "We

[44] See also Pomeroy, Mun. L., sec. 124-131.

[45] Vol. 2, pp. 622-9.

have to explain why the history of the jury took a turn which made our jurors not witnesses, but judges of fact, and the requisite explanation we may find in three ancient elements which are present in trial by jury, so soon as that trial becomes a well established institution. For want of better names, we may call them [1] the arbitral, [2] the communal, and [3] the quasi-judicial." The authors then explain how (1) the arbitral element is recognized in the phrase, used by litigants, "putting themselves upon the country", as it involves consent and submission. They next explain (2) how the verdict of the jurors is not just the decision of twelve men—it is the verdict of "a pays, a country, a neighborhood, a community"; and, in this connection, they say, "The justices seemed to feel that, if they analyzed the verdict, they would miss the very thing for which they were looking, the opinion of the country." Lastly, the authors explain how (3) we may "detect in the verdict of the jurors an element which we cannot but call quasi-judicial," saying: "They [the jurors] must collect testimony, they must weigh it and state the net result in a verdict." Pollock and Maitland then go on to state: "It is to the presence of these three elements that we may ascribe the ultimate victory of that principle of our law which requires an unanimous verdict," saying, in elaboration of this thought: "for a long time we see in England various ideas at work: If some of the recognitors profess themselves ignorant, they can be set aside and other men be called to fill their places. If there is but one dissentient juror, his words can be disregarded and he can be fined.....; but gradually all these plans are abandoned and unanimity is required [even to the point of shutting the jurors up without meat or drink[46]]. The arbitral and

[46] What a deprivation withholding the drinks was to our early juries may be imagined from an ancient bill (but still not Falstaff's monstrous "half-penny worth of bread to this intolerable deal of sack"),

communal principles are triumphing; the parties to the litigation have put themselves upon a certain test—that test is the voice of the country. Just as a corporation can have but one will, so a country can have but one voice.... Nor must it escape us that the justices are pursuing a course which puts the verdict of the country on a level with the old modes of proof.....The veredictum patria is assimilated [compared] to the judicium dei. [So also] English judges find that a requirement of unanimity is the line of least resistance; it spares them so much trouble. .....It saved the judges of the middle ages not only from this moral responsibility, but also from enmities and feuds. Likewise it saved them from the as yet unattempted task, a critical dissection of testimony.....The principle that the jurors are to speak only about matter of fact, and are not concerned with matter of law, is present from the first. They are not judges, not doomsmen; their function is not to 'find the doom' as the suitors do in the old court, but to 'recognize,' to speak the truth." Forsyth[47] takes issue with those who think the witnesses at any time acted judicially, but admits that, "in so far as their evidence was conclusive, it may be taken to have been equivalent to a judicial sentence;" and he says, "this has perhaps misled.....

taken from the records of the Court of Oyer and Terminer of Cumberland County, Pa. The document is entitled "Traverse Jury Bill during the trial of Joseph Pursell, at March term 1805;" it contains twenty separate items, fourteen of which are for brandy, beer and wine, "Madaira" being the favorite brand, 5½ quarts whereof were consumed by the jurors, who also partook of two quarts of brandy, two quarts of beer and one of cider, during what appears as one day's service. It is but fair to say, however, that the certificate of approval states some doubt as to "several of the items;" but Judge Henry, who presided at the trial concluded that, since "the prisoner was poor and unable to pay the cost" and the creditor had "furnished the articles on the credit of the County," the Commissioners should "satisfy the demand."

[47] Pages 75, 76.

others to suppose that they did pronounce such a sentence in the character of judges." He adds: "Originally, indeed, there may have been no difference between these two characters, for, when all the freemen of the hundred attended the gamot, or court, they necessarily included those who could give evidence upon the matters that came before it, and were as much members of the court as the rest; their testimony, therefore, on a disputed question was the judicial decision upon it." His thought is that "afterwards, when the court consisted of a limited number, the judges [in the sense of jurors] and witnesses must have been different persons, although the effect of the evidence of the latter remained the same."

§ 68. **Date of final establishment of jury system stated.** —It appears that proceedings involving an indefinite number of sectators continued for many years after the Normans came to England, and not until the reign of Henry II (1154-1189) was a real approach made to a general custom of trial by jury, with outside witnesses called before such a body.[48] Indeed, some historians insist that till the reign of Henry VI (1422-1461) trial by jury, to all intents and purposes, was but trial by witnesses.[49] Forsyth[50] asserts that in the reign of that monarch, "with the exception of requirement of personal knowledge in the jurors, derived from near neighborhood of residence, the jury system had become in all essential features similar to what now exist." By the middle of the thirteenth century, however, the jury was so firmly established as an institution that Bracton[51] describes its then existing form, and tells us that prior perjury by, or the serfdom of, a proposed juror, or

[48] Reeves, Hist. of Eng. Law, vol. 1, pp. 82-88.
[49] Macclachlan, Eng. Cyc., vol. III, 26.
[50] Page 131.
[51] de Laud, book 4, c. 19.

his near relationship or intimacy with, or enmity to, the parties litigant, would disqualify him for service.

§ 69. **There is evidence suggesting that the early juries took outside evidence.**—Mrs. Margaret C. Klingelsmith, Librarian of the Law Library of the University of Pennsylvania, in a paper published in the Law Review[52] of that institution a few years back, produces an array of matter, which she modestly calls[53] "examples taken here and there from among the many on record," to prove her belief "that the earliest juries of which we have record were not the sole witnesses as to the facts"; that, although the jurors may have been witnesses, they also heard others, took testimony—sworn testimony—and were expected to ascertain the facts of the cases before them for decision from documents and evidence which supplemented their own knowledge.[53a]

§ 70. **Jurors became judges of evidence submitted to them, as well as witnesses; finally solely judges of evidence, without personal knowledge of facts.**—However, in the course of time, jurors became judges of the evidence submitted to them, as well as witnesses; and from this was gradually evolved the system whereby they were solely judges of the evidence, and were not supposed to have any personal knowledge of the facts involved.

§ 71. **Need for rules of evidence followed previously stated development.**—When the triers of fact changed from recognitors to those having power to decide on testimony laid before them, it was, no doubt, found essential to have some supervision over the admission of testimony, in order to exclude that which was improper; and this

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[52] Vol. 66, pp. 107-122.

[53] Page 116.

[53a] But see § 74 of these lectures.

necessity became the foundation of the system of rules governing the admission of evidence which we now follow.

§ 72. **Also practice of attorneys in trials followed; juror with personal knowledge must offer himself as witness; verdict on jurors' own knowledge rather than facts produced in evidence cannot be sustained.**—The practice of receiving evidence openly in court also led to the extension of the duties of attorneys in the trial of cases; they were permitted to examine and cross-examine witnesses, also to influence by argument the decision of juries: and, in this development, any juror, who might have personal knowledge of the facts which were the subject matter of inquiry, was obliged to offer himself as a witness, so as to bring his testimony before the rest of the jurors in a safe and proper manner. We find this held in Bushell's Case,[54] about 1670; and finally Lord Ellenborough, in the reign of George III, plainly said that a verdict based on the jurors' own knowledge, rather than on facts produced in evidence, ought not to be sustained.[55]

§ 73. **A word of warning to investigators of antiquities; original data only reliable guide.**—A word of warning should be given to those who wish to delve into these antiquities. Anyone who has read with care the preceding pages will be struck by the great divergence of opinion among the writers quoted, some of them historians of unquestioned authority. While it is possible to reconcile a few of these differences, quite a number are fundamental, and they must stand in opposition. Then there is the difficulty of deciding on the trustworthiness of the individual author. The authority of one generation is often discredited in the next, and sometimes re-instated later.

[54] Vaughan, 135, 6 How. St. Tr. 999.

[55] Rex. v. Hutton, 4 Maule & S. 532, decided in 1816.

Green's History of the English People is now generally recognized to be more entertaining than reliable—as also Macaulay's History. Some of the authors cited in my text, and quoted from quite extensively, in the development of the story, must be considered more as purveyors of what they take to be facts, than as authorities. The student should be careful not to place entire reliance on any single writer, no matter how well known. Forsyth's "Trial by Jury," quoted by me quite frequently, is characterized in the English Dictionary of National Biography,[55a] as "a careful and trustworthy study (quoted with high commendation in Lieber's 'Civic Liberty')." The New International Encyclopædia says that some of Forsyth's legal works "are of great value and are considered authorities on the subject which they treat;" yet Mr. Hampton L. Carson, recognized as a learned and accurate master of legal lore, tells me that Forsyth is not now considered a very high authority. Reeves's History of English Law is a standard work, but W. F. Finlason, the editor of the 2nd edition (reprinted in the American edition), frequently challenges the correctness of the text. One of the authorities Finlason relies on, in so doing, is the "Mirror of Justices," which Pollock and Maitland[56] utterly condemn as consisting of "false history," "speculations" and "satire." So, it may be seen that, for satisfactory information, one must go back to original data, and judge for himself; which the present writer frankly states he has had no opportunity to do.

§ 74. **Brief recapitulation of subject; every lawyer should have some knowledge of origin and development of jury system; nature of ancient trials and original**

[55a] Vol. II, Supplement.

[56] Vol. I, p. 28.

judgments there rendered explained.—It seems apparent all may agree with the statement, previously made, that trial by jury, as we now have it, is not directly traceable to any particular institution, country or nation, but is the net result of English civilization.[67] We must, however, be impressed that the inauguration and development of the Norman inquisitions, and their system of recognition, mark a distinct advance toward our present mode of trial; these Norman institutions no doubt affected, and perhaps were affected by, existing institutions of earlier Anglo-Saxon origin, just as both the former and the latter may have been affected by, and perhaps to a degree moulded on, still more primitive ones, which show Roman influence. It nevertheless appears that the functions of the ancient and modern juries are distinct, in that the former, in most instances, were merely compurgators, while the latter are judges of fact, deciding on evidence; yet the two are connected by the tribunal of mixed functions, which decided on its own knowledge, assisted by the testimony of witnesses. Finally came the jury, as it now exists, which decides exclusively on the evidence presented before it. Just when, and precisely how, these changes came to pass, are points which, as before said, none of the students of legal lore seem able to tell us much about. The available knowledge concerning the several early tribunals here discussed, their methods of operation, and the shades of difference between them, is not exactly satisfying; but it seems reasonably clear that the modes of trial existing in England before the Norman period did not at all comprehend the receiving and weighing of evidence or the determination of controversies according to facts thus established, in our modern sense of trial by jury; on the

[67] See Pomeroy, Mun. Law, sec. 27; Cooley, Am. Cyc., vol. IX, title, Jury.

contrary, the testimony of the so-called witnesses, suitors or compurgators, was more in the nature of a strong affirmation of faith in the right of a cause, and, if this affirmation were not up to the set legal standard, a further trial, by ordeal or other such acknowledged test, was required,[58] in order to establish the truth by some sort of an "appeal to Heaven," recognized by law.[59] The primitive institutions I have endeavored to throw some light upon did, however, admit the people to a share in the administration of justice, thereby, at least, making fertile soil in which to plant the seed that eventually grew into the now firmly established institution of trial by jury. Every lawyer should have some knowledge of the best thought on the origin and development of this, the greatest practical administrative achievement in the field of the common law; and, after reading many books on the subject, I have (in the preceding chapters) compressed the information thus gleaned into comparatively brief form, in the hope of rendering such information more available to the profession than it has been heretofore.

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[58] Maitland's Const'l Hist. of Eng., 115.

[59] Id. 118; see also sec. A, appendix No. 2, infra.

LECTURE IV.

JURY SYSTEM DISCUSSED: SELECTING JURORS: GRAND AND OTHER JURIES.

Statement of practical matters to be considered next. (§ 75)
Experience of the writer detailed. (§ 76)
Suggestions to be given as to how trial steps are taken. (§ 77)
Defense of jury system:
  Casual and fixed tribunals,
    Explained; (§ 78)
    Historic tendency toward former; (§ 78)
    Trial by jury mixture of both. (§ 79)
  Casual tribunal:
    Advantages of, (§ 80)
    General finding of jury,
    Jurors not hampered by precedents. (§ 82)
  Fixed tribunal,
    Hampered by precedents. (§ 83)
    Submitting to judge without jury,
      Should be simplified by legislation. (§ 84)
  Mr. Choate's defense of jury:
    Judge and jury best system. (§ 85)
    Law's delay not due to jury. (§ 86)
    Corruption and bribery exaggerated. (§ 87)
    Jury system essential part of our political institutions; (§ 88)
      Training school for people and profession. (§ 88)
      Inspiration of advocacy, (§ 89)
        Aided by people. (§ 89)
Ambition as trial lawyers,
  To be encouraged. (§ 90)
Jury service:
  Selecting persons for jury service,
    By jury commissioners and sheriff; (§ 91)
    Jury wheel. (§ 91), also (§ 96)
  Selecting persons for jury service in Philadelphia:
    Judges and sheriff are commissioners; (§ 92)

Clerk to commissioners, duties of; (§§ 92, 93)
Apportionment by wards. (§ 93)
Choice of names. (§ 94)
Putting names in wheel. (§ 95)
Selecting panels; (§ 96)
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Selecting persons for jury service in federal courts. (§ 97)
Special or struck juries,
Not now in vogue. (§ 99)
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Based on returns of magistrates; (§ 105)
District attorney's bills; (§ 105)
Grand jury cannot originate bills; (§ 106)
Juror's information; (§ 106)
Special presentment:
District attorney's duty, (§ 106)
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Statute allowing plea of guilty, without grand jury. (§ 107)
Hearings before grand juries:
True bills, (§ 108)
Ignoring; (§ 108)
Right to submit new bill in place of one ignored. (§ 108)
Deliberations of grand juries:
Confidential, (§ 109)
Subject to judicial inquiry. (§ 109)
District attorney may not be present, (§ 110)
Nor may defendant or his counsel. (§ 110)
Witnesses before grand juries:

Names returned by magistrate, justice of peace or coroner. (§ 111)
Duty of attorney for prosecution to furnish additional names; (§ 111)
District attorney may add to or strike names from original list or from back of bill. (§ 111)
Questions between district attorney and grand jury,
As to adding witnesses and other matters,
To be reported and determined by the court. (§ 112)
Number of witnesses to be heard. (§ 112)
Examining witnesses:
District attorney may examine. (§§ 110, 112)
Objections to proceedings before grand juries:
Must be made before plea entered; (§ 113)
Motion to quash indictment. (§ 113)
Challenge to poll:
Formal challenge; (§ 113)
Exception to ruling. (§ 113)
Challenge to array: (§§ 113, 114)
Before bill is acted on, (§ 114)
Before jurors are sworn, (§ 114)
The latter not the law in Pennsylvania. (§ 114)
Subject of grand jury treated briefly. (§ 115)
Statutory juries not here discussed. (§ 116)
Pleas in criminal cases, how entered. (§ 117)
Putting cases on civil and criminal trial lists. (§ 118)

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§ 75. **Statement of practical matters to be considered next.**—This and the following lectures will be devoted largely to practical matters connected with trial by jury. I shall undoubtedly refer to many things you already know; but these essentials will stand reiteration, for they cannot be impressed too strongly on those about to begin as practitioners at the bar. Even on the points concerning which you have knowledge, I hope to shed additional light; for—without claiming special aptitude—I happen,

owing to my peculiar individual experience, to be in a better position to do this than most men of our profession.

§ 76. **Experience of the writer detailed.**—It was my privilege to enjoy a short, but extremely active, career as a barrister—trying, when I take into account my service as public prosecutor, many cases before many judges and juries; then to serve six years on the common pleas bench and eleven in a court of appeals. In the last high position, I have had to listen, for about five hours a day, during seven months of each of those eleven years, to earnest law lectures, on all subjects—civil and criminal—from the cream of a great bar; it is my desire to impart to others, the knowledge, gathered from this rather wide experience, so far as lies within my power.

§ 77. **Suggestions to be given as to how trial steps are taken.**—I recall that, after coming to the bar, the thing which bothered me the most was not so much what ought to be done in the various stages of an actual trial, as just how to do it—or rather, how it was usually done; in short, how to handle myself in a courtroom—knowledge which, as a rule, one cannot get from books. With this thought in mind, I shall endeavor to give, in plain words, such information as experience has taught me on points which will probably bother the young practitioner; but, in connection herewith, let me say, if you know what to do, the fact that it may not be done in a customary manner is of much less importance than you probably think. It is comforting, however, to one about to execute responsibilities in a novel environment—which is the case of most young lawyers during their first days in court—not to be perplexed by unnecessary anxieties; this being so, suggestions, as to the way in which trial steps are customarily taken, may be of practical use. Therefore, when,

from time to time, I tell either what is, or should be, done in the course of trial, I shall also add something as to the manner of performance.

§ 78. **Defense of jury system: casual and fixed tribunals explained; historic tendency toward former.**—First permit a few words—which I fear need very much to be said and cannot be repeated too often—in defense of trial by jury. We constantly hear the present system attacked by those—both laymen and lawyers—who would substitute in its place some form of trial by trained officials, sitting as a fixed, or permanent, tribunal; but the tendency of the English common law, as shown by my review of various experiments of the past, has been steadily toward the development of the casual, as distinguished from the fixed, tribunal. By "fixed" tribunals, I mean bodies composed of officials appointed, either for life or for a term of years, to take cognizance of certain classes of causes; and by "casual" tribunals, those called together for an occasion, whose members are dismissed when the case before them is determined.

§ 79. **Casual and fixed tribunal: trial by jury mixture of both.**—Trial by jury, in its perfected form, is really a mixture of both the fixed and casual tribunal; for, when properly administered, it is a trial by judge and jury. If he who presides over the trial is a real judge, desirous of reaching only a correct decision, according to law, the system affords him such broad opportunities for properly guiding and controlling the triers of fact, and of correcting their mistakes, or giving other triers the opportunity so to do, that it may be viewed as an ideal institution, in the general run of cases, for determining disputes between private parties, as well as for the proper administration of the criminal law. Particularly in the latter field has

the jury established its right to live; for, when such an official body, composed of his fellowmen, either convicts or acquits one accused of crime, the verdict is usually accepted by all, even the convicted one, with a grace which the decision of trained judges would never command.

§ 80. **Casual tribunal: advantages of temporary body.**—A panel of jurors is a temporary body, composed of non-professional functionaries, who come directly from the people, and, when their work is done, return to their usual avocations. The body serves for so short a period that its members have neither time, incentive, nor opportunity to connive for the advancement of either their individual or common interests, or even to consider and make undue allowance for each other's fads, fancies or prejudicies—forms of weakness all too apt to exist in permanent tribunals, be they judicial or administrative.

§ 81. **Casual tribunal: general finding of jury best in most cases, particularly where inferences must be drawn from disputed facts.**—As judges of the credibility of witnesses, the weight of evidence in the average case, or the guilt or innocence of those charged with criminal offenses, and for the ascertainment of unliquidated damages, my experience convinces me that jurors, through the general verdict, can render better service than is possible by any fixed tribunal, composed of one or more members with professionally trained minds. In fact, my experience as a judge shows that, although in cases of complicated accounts, requiring a minute examination of a great number of items, or other like instances, a chancellor or single judge can best act, yet, in the ordinary case, the general finding of a jury is the most acceptable device so far conceived for the practical administration of law and justice. I have taken part in one capacity or another, in the trial

or review of thousands of cases, and this experience has given me faith in the jury system; considering the fact that it must of necessity be administered by human agencies, and therefore is subject to the frailties which we all share in common, it is, to my mind, about the most perfect instrument which can be devised as an aid to organized society in administering justice between the State and its citizens and between man and man. While, as already said, certain kinds of litigation can best be tried by the fixed tribunal, yet for the average case, requiring the decision of facts, particularly where inferences must be drawn, if I were a litigant I would much prefer to submit my cause to the judgment of twelve ordinary men, presided over by a judge learned in the law, than to have the latter pass upon it alone. Of course men specially trained and experienced acquire great proficiency in weighing evidence and properly judging the arguments of counsel; but, allowing for all this, I am of opinion that the advantage in deciding questions of fact lies on the side of the casual tribunal, such as a jury.

§ 82. **Casual tribunal: jurors not hampered by precedents, while fixed tribunal is.**—When twelve men are gathered together from all walks of life and placed in the responsible position of jurors, in the sum total they are better judges of parties and witnesses, of the way people look on everyday affairs, and of the motives which move men, than the trained judge, who is leading a different sort of life. Moreover, the juror brings a certain spontaneity of judgment to bear on the decision of matters before him; whereas the trained official constantly thinks of rules and precedents, which are apt to control him, even when determining questions of fact. In other words, by employing the casual tribunal, we command a more general

use of the common-sense way of getting at the real facts, as distinguished from the scientific method of drawing inferences, making deductions, and reaching conclusions.

§ 83. **Fixed tribunal: hampered by precedents.**—The mistakes of the fixed tribunal are likely to be treated as precedents, and influence the decision of other cases; but this is not so with the casual tribunal.

§ 84. **Fixed tribunal: practice of submitting to judge without jury should be simplified by legislation.**—I believe, however, our practice ought to be so simplified by legislation that, if all parties to a legal controversy, in the civil courts, desire to submit their cause to trial by a judge without a jury, they should be enabled to do so, regardless of the nature of the action or the amount involved; moreover, in such cases there ought to be conferred upon the judge power to find and state a general verdict, rather than to follow our present complicated system, under the Pennsylvania Act of 1874, which obliges him to formulate an elaborate written adjudication, stating separate findings of fact and conclusions of law. By the reform here suggested many faults of the fixed tribunal would be eliminated; for, when passing upon questions of fact, the judge would be freed from the fetters which now beset him, and, as a consequence, his mental processes would move more naturally.

§ 85. **Mr. Choate's defense of jury system: judge and jury best.**—After writing the views just stated, a colleague called my attention to an address of the late Joseph H. Choate, delivered some years ago before the New York Bar Association. What that eminent lawyer thought on the subject in hand, as the result of long experience, so thoroughly coincides with my own views, that I cannot refrain from quoting several appropriate excerpts from his

speech. Mr. Choate said: "For the determination of the vast majority of questions of fact, arising upon conflict of evidence, the united judgment of twelve honest and intelligent laymen, properly instructed by a wise and impartial judge, who expresses no [binding] opinion upon the facts, is far safer and more likely to be right than the sole judgment of the same judge would be. There is nothing in the scientific and technical training of such a judge that gives to his judgment upon such questions superior virtue or value,.....however learned and instructed in legal questions he may be. [On the other hand] there is something in the technical training and habit of mind of the judge that tends really to unfit him to pass alone upon such a question; and for his caprice, his prejudice, his errors of judgment, there is no [adequate] check or balance, and no cure."

§ 86. **Mr. Choate's defense of jury system: laws delay not due to jury.**—Mr. Choate goes on to say: "The [most] formidable charge against the common law trial by jury is to accuse it of a great share in the law's delay; but I deny the charge absolutely and altogether. There is nothing in the whole realm of litigation so short, sharp and decisive as the ordinary jury trial; from the first moment when the impanelling of the jury begins, down to the last, when the verdict is recorded, there is no pause or interruption except such as the natural wants of those concerned, for food and rest and sleep, require. It would not be possible to devise a mode of trial which in its actual operation would more absolutely preclude delay."

§ 87. **Mr. Choate's defense of jury system: corruption and bribery greatly exaggerated.**—"One other charge.... is the possibility of corruption and bribery of individual jurors; but, in my judgment, the common estimate of the

extent of this danger is greatly exaggerated. There are but few well authenticated cases of such crimes in the jury box. I have had little to do with the trial of criminal cases, but in an experience of more than forty years in the trial of civil cases before juries, I cannot recall one case where I had reason to believe that corruption or bribery had reached a single juror."

§ 88. **Mr. Choate's defense of jury system: essential part of our political institutions; training school for people and profession.**—Mr. Choate then uttered these pregnant thoughts: "The jury system is so fixed as an essential part of our political institutions; it has proved itself to be such an invaluable security for the enjoyment of life, liberty and property for so many centuries; it is so justly appreciated as the best, and perhaps the only known, means of admitting the people to a share, and maintaining their wholesome interest, in the administration of justice; it is such an indispensable factor in educating them in their personal and civil rights; it affords such a school and training in the law to the profession itself, and is so embedded in our constitutions.....that there can be no substantial ground for fear that any of us will live to see the people consent to give it up."

§ 89. **Mr. Choate's defense of jury system: inspiration of advocacy, aided by people.**—Afterwards, he adds matter, personal to the lawyer, as follows: "Here alone we feel the real joy of the contest....., which is the true inspiration of advocacy; here alone occur those sudden and unexpected conflicts of reason, of wit, of nerve,—with our adversaries, with the judge, with the witnesses,—those constant surprises, equal to the most startling in comedy or tragedy; here alone is our one entertainment, in the confinement for life to hard labor, to which our choice of profession has sentenced us; and here alone do the people

enter into our labors and lend their countenance to our struggles and triumphs. Sorry indeed for our profession will be the day when this best and brightest and most delightful function, which calls into play the highest qualities of heart, of intellect, of will, and of courage, shall cease to excite and feed our ambition, our sympathy and our loyalty." I may add that, whether or not in the beginning one shows a natural aptitude for trial work, every man with any considerable experience gradually comes to have the feeling so aptly expressed by Mr. Choate.

§ 90. **Ambition as trial lawyers to be encouraged.**—It is my desire, in these discussions, to help the members of our profession along the road of success as trial lawyers, and to guide their ambition in that direction; for I am told that in recent years there has been a marked deterioration in the grade of this important work. Lawyers should bear in mind that they not only belong to a great profession, but also that they have in their hands the guardianship and development of the greatest institution, next to the church, which has to do with the happiness of man—the law; and, to be faithful to that trust, they must become proficient.

§ 91. **Selecting persons for jury service, commissioners and sheriff; jury wheel.**—Now taking up practical matters, the method of selecting persons for jury service should be first explained. Under the law of this state,[1] in most of the counties, "two sober, intelligent and judicious persons" are selected as jury commissioners, to serve for a period of years, but no elector is permitted to vote for more than one candidate,—the thought being to give political minority representation among the commissioners. These commissioners meet, with a judge, in the respective county

[1] Act of April 10, 1867, P. L. 62. See Report of Pa. Bar Assn. for 1922 for suggested changes of act, e. g. changing "electors" to "taxables."

seats, at set periods each year, and designate such number of duly assessed electors of the county to serve as jurors as the court may order; the names so selected are placed in a wheel,[2] which is subsequently opened, under proper safeguards, and the panels of jurors drawn therefrom by the commissioners and the sheriff of the county. I can explain the modus operandi more in detail by taking Philadelphia County as an example—which, however, acts under a special statute, and has, I think, an ideal system, well administered.

§ 92. **Selecting persons for jury service in Philadelphia: judges and sheriff are jury commissioners; clerk.**—Here the fifteen judges of the courts of common pleas, together with the sheriff of the county, constitute the jury commissioners, all of whom serve in that capacity without compensation. The board of judges, acting by authority of law, appoints an official known as the clerk of the jury commissioners, whose modest salary represents the only compensation paid to any one for services rendered in selecting jurors; this person is chosen with the utmost care, the effort being to obtain a member of the bar, of mature years and high character, not actively prominent in the political life of the community.

§ 93. **Jury service: selecting jurors in Philadelphia, apportionment by wards; duty of clerk.**—From time to time the board of judges determines, according to the way

[2] The wheel used in Philadelphia County is a round drum-shaped device, made of copper, supported on a pedestal by two upright bars, connected with a horizontal bar which forms the axle of the wheel, the latter turning readily on its axis. The wheel is about one foot and a half in diameter and a foot wide throughout. It is enclosed at all points, and has a small hinged door in the circumference, some six inches square, provided with a lock and key. In the sheriff's office, the wheel is kept in a safe with a combination lock. All the names are taken out of the wheel before it is filled again, which is done once every year.

the business is running, the total number of jurors that will probably be needed for the coming year in all the courts. An order is then made, stating the desired number, and handed to the clerk of the jury commissioners. At a subsequent meeting, with the sheriff in attendance, the names of the several judges and the sheriff are written on sixteen separate slips of paper; these are put in a box. In another box are placed slips containing the numbers of the wards of the city, from the first to the last. One of the judges takes a slip from the latter box, at the same time the sheriff draws a slip from the former, and the clerk checks them up. The name of the jury commissioner which appears on the slip drawn by the sheriff is then marked off against the ward whose number is drawn by the judge. This course is pursued until every ward has a commissioner's name accredited to it. It then becomes the duty of the clerk to make a record of the drawing, which is duly certified by the presiding member and the secretary of the board of judges. After this, the clerk, by an arithmetical calculation, which takes into account the total number of duly assessed electors, first, in the whole city and next in each ward, decides how many jurors must be contributed by the latter, respectively. After making this calculation, he sends the ward assessors books, containing lists of names, to the several commissioners, according to the drawing, with the number of jurors to be selected from each ward plainly marked thereon. The commissioners, in the privacy of their chambers, then proceed to mark the lists sent to them respectively.

§ 94. **Jury service: selecting jurors in Philadelphia; wards and election divisions; choice of names.**—When I served as judge of the common pleas, it was my custom to perform this duty as soon as possible after getting the lists. I took the first ward which I had to care for, and

divided the total number of jurors required therefrom by the number of election divisions therein, thus determining how many should be chosen from each division. In actually selecting the names, I was guided by the occupations or businesses of the electors, taking by preference those who were designated as householders and who lived on the chief streets; for, in a big city like Philadelphia, where thousands of names must be marked every year, it is impossible, for those fixed with the responsibility, to select jurors known to them personally.

§ 95. **Jury services: selecting jurors in Philadelphia; putting names in wheel.**—As the jury commissioners complete marking their lists, they return the ward books to the clerk, each keeping a copy of the names which he has selected. The clerk then transcribes from the ward books the marked lists of the selected names, upon little slips of paper; and these, together with the typewritten lists of each ward in duplicate, are sent back, in sealed envelopes, to the commissioners, each of whom compares the slips and the typewritten lists with the memoranda which he has made, and, if he finds them correct (as I invariably did), he reseals the envelopes, retaining them in his possession until a subsequent meeting, at which time, all commissioners being present, together with the clerk, each one deposits in the wheel, with his own hand, the slips containing the names of the jurors selected by him, and returns the typewritten lists, certified by him, to the clerk of the board. The receptacle is then locked and sealed by the clerk and the sheriff; the latter retains the wheel, but the key is put into the custody of the prothonotary.[2a]

[2a] Mr. T. Elliot Patterson, the efficient incumbent of the office of clerk to the commissioners, read a paper, on "Selection and Drawing of Jurors", before the Pennsylvania Bar Association, in 1914, which is both interesting and instructive. See 20th Annual Report, pp. 316-47.

§ 96. **Jury service: selecting panels and printing lists; notice to jurors; jury wheel.**—Prior to each term, an order is made by a judge (acting for, and carrying out the decision of, the board of judges) as to the actual number of names which shall be drawn to make up the panel of jurors in the several court rooms. The wheel is brought into open court, and, with a judge on the bench, the designated number of slips are drawn therefrom by the sheriff and tabulated for the several courts by the clerk, these tabulations being certified by the judge. The printed jury lists are thus arrived at, and the persons named are duly notified to appear for service.

§ 97. **Persons for jury service in federal courts.**—In the United States courts, the district judges from time to time designate jury commissioners. In this district, I am informed, they make a practice of communicating with leading citizens, throughout the territory covered by the court's jurisdiction, asking for suggestions as to names of persons to go into the jury wheel. After inquiry by the commissioners, concerning the persons thus suggested, such of them as seem worthy are selected, and their names placed in the wheel for future use in drawing juries.

§ 98. **Special or struck juries and common juries.**—Up to this point all I have said has had reference to what are termed "common juries," but at common law there were two kinds of juries, "special" and "common," the former also being known as "struck juries." Special or struck juries were chosen only for the trial of cases of great nicety, or where the sheriff was not trusted, because suspected of partiality. In such instances the sheriff was required to bring his freeholders' book before the prothonotary, where a special jury was chosen.

§ 99. **Struck juries not now in vogue.**—At the present day, in Pennsylvania—at least in Philadelphia county—

the practice of selecting struck juries has gone out of vogue. The only case in which our statutes[3] particularly give the right, is where a view of premises in controversy is asked for; but, even in such instances, according to modern practice, a common jury, after being impanelled in the usual way and sworn to perform its duty, is sent to make the view. I explain what a struck jury is, not on account of its importance at the present time, but because, recently, when talking over the subject of this lecture with a successful member of the bar, I had occasion to use the term "struck jury," and I saw that he thought I had reference to the jurors left, out of the number originally called to the box in the common pleas, after eight had been struck from the list. If he had ever heard of a struck jury, he had evidently forgotten what it was; so the incident made me think it worth while to explain the matter here.

§ 100. **Sheriff's juries.**—There is also another class of juries, known as "sheriff's juries." When judgment has been taken by default for damages generally, which admit of no formal calculation, the judgment creditor has the right to a writ of inquiry of damages. This right is most generally exercised in cases of tort, and the writ is obtained by preparing a præcipe requiring the prothonotary to issue it; whereupon that official makes out an order, directed to the sheriff, who summons a jury for a fixed time.[3a] The parties litigant are notified to appear before these jurors, and the plaintiff produces evidence, just as he would in court, to prove his damages, which are assessed accordingly.

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[3] Act of April 14, 1834, sec. 124, P. L. (1833-4), pp. 333, 363.

[3a] The sheriff usually selects his jury from acquaintances in the public offices, as a matter of convenience and with a view to dispatch and efficiency.

§ 101. **Common juries, to liquidate damages alone; Pennsylvania act; writ of inquiry; record.**—If a defendant admits liability, in a case where the damages are unliquidated and incapable of liquidation without the decision of questions of fact from oral evidence, the court which enters the judgment against defendant may, under an old act of assembly,[4] issue a writ in the nature of a writ of inquiry, directing a common jury to be subsequently called to assess the damages; but this custom no longer prevails. The present practice is to try the case, on the question of the amount of the damages alone, when it is reached on the list, before the jurors then sitting; but I think that, whenever a prior judgment is taken by default, and a common jury is used, some sort of an order is entered on the record, pro forma, to bring the practice within the terms of the act of assembly, before the jury assesses the damages. At least, this is the practice which should be pursued.

§ 102. **Grand juries; called on venire; in Philadelphia and elsewhere.**—While the proceedings before the grand jury belong to the preliminary stages of a criminal trial, yet it is necessary for a lawyer to know something about them, in a general way at least, so that, if necessary to protect the interests of a client, he may take advantage of defects therein. In Philadelphia, a new grand jury is called each month, and in the other counties each quarter year, on a venire issued for that purpose, those named in the venire being selected in the same manner as other jurors.

§ 103. **Grand juries: appointment of foreman; charging.**—The foreman of the jury is appointed by a judge presiding in the quarter sessions, which judge, on the open-

[4] Act of May 22, 1722, sec. 27, 1 Sm. L. 144.

ing day of each term, explains to the jurors their duties; this ceremony is called charging the grand jury.

§ 104. **Grand juries: number of jurors necessary to act.**—The grand jury consists of not more than twenty-four and not less than twelve members. The latter number must be present at all times to constitute a quorum, since it takes that many to find a true bill; if less than twelve vote to indict, the bill is marked ignored. Should all of the twenty-four persons summoned report for service, at least one is excused,—so as to prevent the possibility of an evenly divided jury in any case.

§ 105. **Grand juries: indictments, based on returns from magistrates; district attorney's bills.**—Indictments are generally based on returns from magistrates, justices of the peace or coroners; but they may, by leave of court, be submitted to the grand jury by the prosecuting officer without any of these preliminaries. Indictments thus submitted, are called "district attorney's bills"; they are, however, unusual.

§ 106. **Grand juries: cannot originate prosecutions; jurors' information, special presentment; duty of juror, judge and district attorney.**—The grand jury has no power to originate prosecutions;[5] it can act only on bills sent before it by the district attorney, or on such matters as may be submitted to it, for consideration, by the court. If any juror has personal information of a matter which he believes they should act on, or if knowledge comes to the grand jury through an investigation which they think requires consideration, aside from the inquiry being carried on in the particular case wherein they gained such knowledge, they send for the district attorney, or an assistant, who, at their request, will draw a special present-

[5] Com. v. Dietrich, 7 Pa. Superior Ct. 515.

ment, which subsequently is called to the attention of the court, for such action as the presiding judge may deem proper. If the judge thinks the matter requires investigation, he will direct it to be submitted to the jury with power to proceed, otherwise not.

§ 107. **Grand juries: statute allowing plea of guilty without action of grand jury.**—In 1907[6] the legislature of Pennsylvania enacted a statute permitting offenders in all but homicide cases, to plead guilty to bills of indictment without having them passed on by the grand jury, and authorizing the courts to sentence on such pleas. This was done to speed the trial of men under arrest, particularly in the counties where the grand jury is not in continuous session. The act has been sustained by the Pennsylvania Superior Court.[7]

§ 108. **Grand juries: hearings; ignoring or finding true bill; District attorney's power to submit new bill in place of one ignored.**—In ordinary cases, the grand jury decides, simply, whether or not the witnesses depended on by the Commonwealth establish a prima facie case against those accused of criminal offenses; and, before it, all doubts are resolved in favor of the Commonwealth. If the witnesses show a prima facie case, the jury are bound to find what is called a "true bill"; if not, they mark the bill ignored, or, technically, "Ignoramus"—"We ignore." When a bill is ignored, the district attorney has the right to submit a new one; but this is a power to be exercised sparingly, and its abuse may be stopped by the proper court.

§ 109. **Grand jurors: hearings; deliberations confidential but subject to judicial inquiry.**—The grand jurors take an oath of secrecy. It has been held by the Supreme

[6] Act of April 15, 1907, P. L. 62.

[7] Com. v. Francies, 58 Pa. Superior Ct. 266.

Court of Pennsylvania, however, that, while their vote and deliberations are strictly confidential, and cannot be divulged, yet what took place in their investigations may be judicially inquired into where necessary "to advance the cause of truth and justice".[8]

§ 110. **Grand juries: hearings; deliberations confidential; district attorney and defendant's counsel may not be present.**—The district attorney may not address the grand jury or be present at their deliberations[8a] or during the vote on a bill, if any juror objects; although the former may, at a previous stage of the proceedings, examine witnesses before the grand jury. The defendant has no right to appear, either personally or by counsel.

§ 111. **Grand juries: hearings; witnesses shown on return of magistrate or coroner; duty of counsel for private prosecutor to furnish names of witnesses to district attorney and latter's power to add names to or strike them from list of witnesses.**—It is the duty of the attorney for the private prosecutor, if there is one, to furnish the district attorney with names of prospective witnesses, other than those shown on the return of the magistrate, justice of the peace or coroner. The district attorney has power to add to or strike from this list of witnesses before endorsing the names contained therein on the bill of indictment.

§ 112. **Grand juries: hearings; witnesses, number of necessary to be heard; district attorney has right to add witnesses to or strike them from back of bill of indictment; questions relating thereto, or concerning other matters between district attorney and grand jury, to be**

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[8] Gordon v. Com., 92 Pa. 216, 220, 221; Com. v. Green, 126 Pa. 531.

[8a] Maginnis's Case, 269 Pa. 186, 197-8.

reported to and determined by court.—The grand jury can hear those witnesses only whose names are marked on the back of the bill of indictment by the district attorney, who may add to or strike from this list, as he deems proper. If the grand jury desire the presence of a witness whom the district attorney declines to call, or if any other question arises between the district attorney and the grand jury, the foreman of the latter may report the matter to the court and receive instructions in the premises; which instructions are binding upon all concerned. A true bill can be found on the testimony of one person alone; but no bill can be ignored until all the witnesses designated by the Commonwealth's officer are heard.

§ 113. **Grand juries: objecting to proceedings, must be made before plea entered; motion to quash; challenge to poll and to array; formal challenge; exception.**—Whenever objections to the propriety of the grand jury's proceedings, or to the legality of the manner in which the jury was constituted or summoned, are made, such objections must be raised before plea entered.[9] Objections of the kind indicated are usually made on a motion to quash the indictment or by challenge for cause to a particular juror,[10] which is called a challenge to the poll. If the jury has been sworn and you desire to challenge a particular juror, the proper method is to request the judge, who charged the grand jury, to have that body brought into court, so that you may make your challenge, and, when that motion is complied with, you orally state your cause and formally make your challenge; when it is ruled on, if not allowed, and you think error has been committed,

[9] Com. v. Freeman, 166 Pa. 332.

[10] Com. v. Clark, 2 Browne, Pa. 323; Com. v. Craig, 19 Pa. Superior Ct. 81, 93.

you should, of course, enter an exception. There may also be a challenge to the array, or entire panel.[11]

§ 114. **Grand juries: objection to proceedings, challenge to array, to be made before bill is acted on.**—Many authorities hold that an objection by way of challenge must be entered before the grand jurors are sworn,[12] but this is not the Pennsylvania rule; in Brown v. Commonwealth,[13] and in Rolland and Johnson v. Commonwealth,[14] challenges to the array were entered after indictment found. Although no point as to time of challenge seems to have been raised in either of the instances just cited, yet to hold that such a challenge had to be entered before the grand jurors are sworn would, under our system of criminal procedure, in effect deprive many defendants of the right of challenge; so it cannot be the law of this state. While no authorities have been found which rule the matter, I should say that a challenge to the array ought to be entered before the bill in question is acted on by the grand jury; otherwise, the points depended upon can be raised only on a motion to quash the indictment. Such a challenge is made in the same manner as a like challenge to the array in the case of petit juries, and this will be described in the next lecture.[14a]

§ 115. **Subject of grand juries treated briefly.**—What I have said about grand juries is simply to give in very brief outline, an idea of the institution and its proceedings; the subject has been gone into this far, since it is necessary for every lawyer to know that his clients have

[11] Jillard v. Com., 26 Pa. 169, 170.

[12] 20 Cyc. 1328.

[13] 73 Pa. 321, 322.

[14] 82 Pa. 306, 307.

[14a] See sections 122-138, below.

certain rights to orderly procedure in the selection and conduct of that ancient and still important body. We shall now pass to the consideration of other matters.

§ 116. **Statutory juries beyond scope of these lectures.** —In all thus far said, I have had in mind common law juries only; of course there are many statutory juries, for special purposes, such as juries to inquire into the lunacy of one alleged to be insane, juries of view in land damage cases, etc., etc., but these are beyond the scope of my subject.

§ 117. **Pleas in criminal cases, how entered.**—Neither shall I go into questions of pleading, for that is a separate department of knowledge; it is quite aside from the field I have laid out for myself in these discussions. It should be said, however, that pleas in the criminal courts are usually entered orally, before the time of trial, by having the indictment read to, or called to the attention of, the defendant, at the bar of the court. The accused is informed of the charge against him, by the crier, and asked how he pleads; his attorney is supposed to be at his side, and, if the prisoner stands mute, counsel pleads not guilty for him. The plea is entered on the back of the indictment, by the clerk; at least the course just outlined is pursued in Philadelphia County.

§ 118. **Putting cases on civil and criminal trial lists.**— Putting a civil case on the trial list is a very simple matter, controlled by the rules of the different courts; it is usually done by entering merely an order in the clerk's book or by filing, with the clerk of the particular court wherein the suit is pending, a written request asking that the case be listed. In Philadelphia, criminal cases are placed on the list by the district attorney's office. If you want such a case ordered down, you first make a request

of that official; should he refuse, you may apply to the court, either by written petition, with a copy served on the prosecuting attorney, or by going into the appropriate court room and making an oral motion that the case be listed for trial.

LECTURE V.

CHOOSING TO CHALLENGING JURORS.

Ideal jury:
  Mixed jury of intelligent men from all walks of life. (§ 119)
Study listed jurors; (§ 120)
  Draw conclusions therefrom, (§ 120)
  As well as from examination on voir dire, (§ 120)
  Or from independent investigation. (§ 120)
  Limitations of examinations on voir dire. (§ 120)
Have client and chief witness by your side. (§ 121)
Striking and challenging jurors:
  Ethics of. (§ 122)
  Striking jurors in Philadelphia:
    Manner of striking in civil cases. (§ 123)
  First 12 men may be accepted without striking. (§ 124)
  Importance of secrecy in striking. (§ 124)
  Criminal cases, prison cases. (§ 125)
Challenging jurors:
  Examining as to competency to sit; (§ 126)
    Discretion of court; (§ 126)
    Right is to reject not to select. (§ 126)
  Challenges for cause:
    When to be made; (§ 127)
    Form of challenge; (§ 127)
    Saving peremptory challenges; (§ 127)
    General rules governing them, same in all cases. (§ 128)
    Criminal cases. (§§ 127-8)
    Civil cases: (§§ 127-9)
      Relationship; (§ 129)
      Employment; (§ 129)
      Voir dire. (§ 129)
  Peremptory challenges:
    Civil cases. (§§ 123, 127)
    Criminal cases:
      Philadelphia rule of court:

Alternating challenges. (§ 130)
Examining on voir dire. (§ 130)
McCarrell Act:
Text of Act; (§ 131)
Power to make rules of court. (§ 131)
Right of district attorney to stand aside jurors. (§ 132)
Discretion of court to permit challenge by Commonwealth,
After turning witness over unchallenged; (§ 133)
New facts; (§ 133)
Mistake as to name or identity. (§ 133)
Commonwealth v. Brown:
Right to reject not to select. (§ 134)
Alternating challenges. (§§ 135-6)
Manner of making as now established:
Guiding principle, not to allow one side advantage; (§ 136)
Speculating on chance of saving challenge. (§ 136)
Same number of challenges,
In joint trial as in separate trial. (§ 137)
Formal way to challenge. (§ 138)
Foreman of jury is juror first accepted. (§ 138)
Exceptions:
Criminal cases: (§ 139)
Rulings on challenge of juror; (§ 139)
Defendant, but not district attorney, generally entitled to exception. (§ 139)
Pennsylvania statute,
Gives district attorney right to except:
In nuisance; (§ 140)
In forcible entry and detainer. (§ 140)
To order quashing indictment; (§ 140)
To order arresting judgment; (§ 140)
All above, reviewable on appeal of Commonwealth. (§ 140)
Civil cases:
Both sides entitled to exceptions. (§ 141)
Challenge of the array:
Time and manner of making. (§ 142)
Quashing array; (§ 143)
Special venire for new men; (§ 143)
Calling talesmen. (§ 143)
Knowledge of criminal law important. (§ 144)

§ 119. **Ideal jury, mixed jury of intelligent men from all walks of life.**—I can think of no time when the exercise of one's knowledge of men, and the motives which usually move them, will stand one in better stead than in selecting a jury; and my experience shows that a mixed jury of intelligent men, taken, so far as possible, from all walks of life, is the ideal to strive for if you want justice, which is all the true lawyer has a right to seek.

§ 120. **Study listed jurors, draw conclusions therefrom as well as from examination on voir dire or independent investigation; limitations of examination on voir dire.**—It is important to have some knowledge of the jurors chosen to try your cause, particularly if there is any question out of the ordinary to be determined, and it is well for a lawyer, who is preparing a case, to know the political, religious and other beliefs and affiliations of the men who may be called as jurors; it is also helpful to know their political, fraternal and social connections, their positions, or standing, in society, whether or not they have the reputation of being fair-minded and honorable men, and all such information. In country districts, this knowledge is generally possessed by members of the Bar, or can be readily obtained, but, in the great centers of population, unless a lawyer has exceptional opportunity of gaining such information, he has to depend largely upon the meager notation of facts which appears on the printed jury lists; for examination on the voir dire is usually strictly confined by the court to matters connected with the proposed juror's relationship to, or bias in favor of, either of the parties litigant, his prior knowledge of the case and expressed opinions thereon,—if any,—relevant conscientious scruples, and similar matters. Counsel has the right, however, to make proper investigations before the trial, so long as he does not actually approach those sum-

moned for jury service; and, in cases of importance, these investigations are often systematically done. When no special investigation has been made, counsel must depend upon a close observation of the face, demeanor, way of answering questions, etc., of each juror, as he is examined, and draw conclusions therefrom, as to his education and mentality,—manner of looking at things in general,—likely prejudices, power of perception and capacity for discrimination. If this course is pursued, and counsel exercises quick but thoughtful judgment, as to the ability of each man examined properly to appreciate and impartially to determine the facts in the case, he will at least not select his jury blindly; and, in the average case, I think one is about as apt to get a fair set of triers in the way just indicated as in any other.

§ 121. **Have client and usually chief witness by your side.**—When the jury is being drawn, always, if possible, have your client by your side, and sometimes his principal witness; ask them about each juror before he is accepted.

§ 122. **Striking and challenging jurors: ethics of.**—Should a juror whom you suspect of a personal feeling against you or your client appear, challenge him at once; on the other hand, should a friend—I mean in the personal sense of that term—happen to be on the panel, and you do not want apparently to reflect on him by a challenge, tell your opponent, so he may challenge him, if he chooses. You will find in selecting a jury, as in all else which makes up your professional life, that square dealing with both friend and foe pays in the long run.

§ 123. **Striking jurors in Philadelphia: peremptory challenge and manner of making in civil cases.**—There is a box in every court, containing the panel of jurors

to sit in that room for a period of two weeks, and the names of jurors to serve in each case, as its turn arrives on the list, are drawn from this box by the clerk of the court. In the civil courts of the state, twenty names are drawn, each side having the right to peremptorily challenge—that is, challenge without stating a reason—four, thus reducing the jury to twelve. This is done in the following manner: The clerk hands counsel for plaintiff the printed list of jurors, with the twenty names indicated thereon, which he drew from the box; on this list appears the residence and occupation of each of the proposed jurors. Counsel for plaintiff strikes off one name, by running his pencil through it and writing, at that point, words to indicate he struck that particular juror—for instance, "Plaintiff, No. 1"—and passes the list back to the clerk, who gives it to counsel for defendant; he strikes and designates a name, in the same manner, only, of course, writing "Defendant, No. 1." The list is then handed back to plaintiff's counsel, and so on, until eight names have been struck, or eliminated, from the twenty originally listed. In case either party neglects or refuses to strike, the clerk of the court does so on his behalf.

§ 124. **Striking jurors; first twelve men may be accepted; importance of secrecy in striking.**—If the first twelve men called into the box are satisfactory to both sides, as is often the case, they are taken by mutual consent, without any striking of the list; but, if the list is struck, you will be wise to do it secretly; for an accepted juror, in some way connected with one whom you decline to accept, may resent your action as to the latter, or the rejected one, when accepted by you in a subsequent case, may resent his earlier rejection. None of these considerations should affect a sworn juror; but we know such is a possibility, and you should protect your client in every

proper manner against all conceivable prejudices on the part of those who are to determine his cause.

§ 125. **Striking jurors: criminal cases, prison court cases.**—In the criminal courts, the process is not always quite so simple. Of course, even in these tribunals, there are many cases, of minor importance, where the first twelve jurors are accepted; and, in fact, it often happens that, in what is known as the "prison court" (where, as you will no doubt recall, those accused, who have not furnished bail, are tried), one set of twelve men will pass on indictment after indictment—rendering their verdicts without leaving the box—until some case comes along concerning which they are obliged to consult more at length; then the jurors will retire from the room for that purpose, and new men take their places. In most cases of any importance, however, both the district attorney and counsel for the defendant endeavor to select the jurors with care.

§ 126. **Challenging jurors: Examining jurors as to competency to sit; discretion of court; right is to reject not to select.**—In passing on questions of challenge, the judge is vested with large discretion,[1] and one experienced in such matters always restricts the examinations within the limits suggested by the particular case before him. We often read of days being consumed, drawing a jury, in murder and other trials of public interest; but this usually means that counsel are indulging themselves for the benefit of the galleries, and indicates that the presiding judge is not properly equipped for his post. I am proud to say that in Philadelphia juries are usually rapidly selected, even in cases which attract public notice. This would be so everywhere if trial lawyers were compelled to keep con-

[1] See Com. v. De Palma, 268 Pa. 25, 31, 32; Com. v. McCloskey, 273 Pa. 456.

stantly in mind the fact that the only object in examining jurors is to obtain twelve impartial and mentally competent men, and that the right is to reject those who fail in these essentials, not to select men who will probably favor one side or the other. You should on all occasions insist firmly on what you may conceive to be your client's rights, but remember you will gain nothing by being captious, and you are apt to create a bad impression by asking unnecessary questions when empanelling a jury.

§ 127. **Challenging for cause: when to be made, civil and criminal; saving peremptory challenges; form of challenge.**—Both in civil and criminal cases, after a juror has been examined on his voir dire, either side may challenge for cause. Usually counsel put in their challenges for cause in the first instance, so as to save as many peremptory challenges as possible. It is done in this way: If either the examination or cross-examination develops facts which show the proposed juror to be incompetent for any reason, counsel rises and says to the court that, for the following causes, giving his reasons, he challenges the juror. The trial judge then usually further examines the juror and either allows or refuses the challenge.

§ 128. **Challenging for cause: general rules governing them same in all cases.**—Everything said, as to challenges for cause, as distinguished from peremptory challenges, applies equally to both classes of cases—civil and criminal, —except the distinction against the Commonwealth, as to taking exceptions, which I shall cover later.[1a]

§ 129. **Challenges for cause: civil cases: relationship, employment, voir dire.**—In civil trials, unless the case is an unusual one, just before those not peremptorily challenged are finally accepted as jurors, counsel usually,—

[1a] See sections 139-40.

in an informal manner, addressing the jurors en masse,—asks a few general appropriate questions; as, for example, whether any one of them is related to or employed by either of the parties litigant. If these questions are answered satisfactorily, the men in the box are sworn; but, if any one of them, by his answers, shows disqualification to serve as a juror in that particular case, counsel promptly challenges him for cause. In this class of cases—civil—jurors are not always sworn on their voir dire; although they may be whenever desired by counsel.

§ 130. **Peremptory challenges, criminal cases, Philadelphia rule of court, alternate challenge after examination on voir dire.**—Philadelphia County has a rule of court governing criminal trials, to the effect that "in all cases not triable exclusively in the court of oyer and terminer and general jail delivery, the Commonwealth and the defendant shall each have the right to exercise such challenges as they are entitled to under the law at any time before the entire jury is empanelled and sworn, unless either the Commonwealth or the defendant, before the calling of the jury, shall request the court that the jurors shall be called and sworn singly, in which case the right to challenge shall be exercised alternately by the Commonwealth and the defendant immediately after the examination of the juror on his voir dire is completed and before such juror is sworn in the trial of the case."

§ 131. **Peremptory challenges, McCarrell Act, text of act; power to make rules of court.**—In Pennsylvania a statute[2] known as the McCarrell Act provides that both the Commonwealth and the defendant, in addition to the challenges for cause now allowed by law, shall be entitled to peremptory challenges as follows: "In all trials for

[2] Act of July 9, 1901, P. L. 629.

misdemeanors, except for perjury, forgery and misdemeanors triable exclusively in the courts of oyer and terminer and general jail delivery, the Commonwealth and the defendant shall each be entitled to six peremptory challenges; in the trial of felonies, other than those triable exclusively in the courts of oyer and terminer and general jail delivery, and in the trial of persons charged with perjury and forgery, the Commonwealth and the defendant shall each be entitled to eight peremptory challenges; and in the trial of misdemeanors and felonies, triable exclusively in the courts of oyer and terminer and general jail delivery, the Commonwealth and the defendant shall each be entitled to twenty peremptory challenges;[2a] all of which challenges shall be made and assigned by the Commonwealth and the defendant respectively when the juror is called: Provided, That, in cases not triable exclusively in the courts of oyer and terminer and general jail delivery, the court in which a case is called for trial may, by a general rule, fix a different manner and time for exercising

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[2a] When sitting as a Judge in the Criminal Courts of Philadelphia County I frequently was embarrassed to know how many challenges were properly allowable under this act of assembly in cases brought before me, and, usually, counsel were in the same dilemma. At that time, to overcome this difficulty, I listed the various criminal offences covered by the Pennsylvania acts of assembly, classifying them under three headings, namely, six challenges, eight challenges, and twenty challenges, arranging alphabetically the offences which research disclosed to belong under these several headings, and showing in each instance the nature of the offence, with a reference to the date and place of publication of the act. In addition I prepared a general alphabetical index referring the reader to the before mentioned lists where the details appear. I have had these lists and index brought down to date, including the Acts of 1921; and, believing this work will be of help to both Bench and Bar, have included it as an appendix to the present volume. While I have every reason to believe the information contained in these lists is correct, yet, of course, I have not had the time personally to verify the same.

said peremptory challenges in the process of empanelling a jury."

§ 132. **Peremptory challenges, McCarrell Act, right of district attorney to stand aside jurors.**—The McCarrell Act further provides that it shall be unlawful for any district attorney to "stand aside jurors." Prior to that legislation, the Commonwealth was not obliged to challenge, either for cause or peremptorily, until the whole panel was gone through; the district attorney could stand aside juror after juror, without assigning any reason therefor. This right grew out of the construction long placed upon the statute of 33 Edward I,[3] which was in force in this state till 1901, the date of the McCarrell Act.

§ 133. **Peremptory challenges, McCarrell Act, discretion of court to permit challenge by Commonwealth after turning witness over unchallenged, new facts, mistake as to name or identity.**—In 1905, a question as to the construction of the McCarrell Act arose in Commonwealth v. Evans[4] and the Supreme Court held that, when counsel for defendant, after examining a juror, turns him over to the Commonwealth for cross-examination, and the latter accepts the juror without cross-examination, the defendant will not then be allowed peremptorily to challenge him; but, subsequently, in Commonwealth v. Marion[5] the same tribunal explained that it had been the practice of the court below, in the county where Commonwealth v. Evans was tried, for the Commonwealth and defendant each to exercise the right of peremptory challenge after their respective examinations of a juror on his voir dire, the Common-

[3] Com. v. Kay, 14 Pa. Superior Ct. 376, 384, by RICE, P. J.; Com. v. Brown, 23 Pa. Superior Ct. 470, 499.

[4] 212 Pa. 369.

[5] 232 Pa. 413, 419, 421.

wealth directly examining the first juror, and the defendant the second, etc., and that, under the prevailing practice, the turning over of a man by either side to the other for cross-examination was equivalent to an acceptance of that particular juror. The appellate court said, in the Marion Case, that, there being no rule, or customary practice, of the trial court to the contrary, it was within the discretion of the presiding judge to permit the Commonwealth to peremptorily challenge a juror after he had been examined in the first instance by the district attorney, and turned over, unchallenged, to defendant for cross-examination, if the cross and re-examination developed new material facts. Again in Commonwealth v. Hettig,[6] the Superior Court held that, where the Commonwealth passed a juror, under a wrong impression as to his name, or identity, and thereafter, before the defendant had taken any initiative as to his challenge, the trial judge permitted the district attorney to reconsider the passing of the juror and to exercise his right of peremptory challenge, it was not error.

§ 134. **Peremptory challenges, McCarrell Act, Commonwealth v. Brown, right to reject not to select.**—I think the practice to be pursued is pretty well settled now, but, for a number of years, the proper manner of exercising the right of peremptory challenge was much controverted. In Commonwealth v. Brown,[7] a most important prosecution, in the quarter sessions, of certain school directors of the City of Philadelphia, for corruption in office, where I happened to be of counsel, the subject in hand was largely discussed by President Judge RICE of the Superior Court. He there declares, in plain language, a principle

[6] 46 Pa. Superior Ct. 395, 402.

[7] 23 Pa. Superior Ct. 470, 498, 501.

which it is well to keep in mind, namely, that the "right of peremptory challenge is not of itself a right to select, but a right to reject jurors."

§ 135. **Peremptory challenges, McCarrell Act, Commonwealth v. Brown, alternating challenges.**—In the Brown Case (which was tried at a time when Philadelphia County had no rule of court as to peremptory challenges) defendant's counsel contended that the right of peremptory challenge might be exercised at any time up to the moment the empanelled jury was sworn; but the Superior Court held that, in the absence of a local rule providing otherwise, the trial judge had not erred in holding that the challenges were to be exercised as the respective jurors were called. Another important question determined was that, so far as the provisions of the act of assembly, to the effect that the peremptory challenges "shall be made and assigned by the Commonwealth and defendant respectively", is concerned, it was fully met by the following method, there pursued:[8] "The Commonwealth first exercised the right or election to challenge the first juror called; that is, the district attorney, as to that juror, after examining him on his voir dire, and after he was cross-examined by defendant, if there was no challenge for cause, first said whether he would exercise a peremptory challenge or not. When the next juror was called, after the aforesaid preliminaries, the defendant exercised the first say, or election, to peremptorily challenge or not; and thereafter the Commonwealth and the defendant alternated in such procedure until both had exercised their full number of challenges."

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[8] I quote from my paper-book on the appeal of that case in which I describe what happened at the trial.

§ 136. **Peremptory challenges, manner of making as now established; McCarrell Act; alternating challenges, speculating on chance of saving challenge.**—As the law is now established by these cases, any fair practice which alternates the peremptory challenging of jurors between the Commonwealth and the defendant, in such a manner that each is obliged, in turn, first to say whether or not peremptorily challenges are made to the jurors as respectively called, until all the challenges allowed to each side are either exhausted or the jury box is filled, will be taken as a compliance with the act of assembly; but where, as in the Evans Case,[8a] the practice pursued gives one side a distinct advantage over the other, by permitting either the Commonwealth or the defendant to "speculate on the chance of saving a challenge," it is not a compliance with the act; and this is the guiding principle to be kept in mind.

§ 137. **Peremptory challenges; same number of challenges in joint trial as in case of separate trial.**—It has recently been decided by the Superior Court of Pennsylvania that, where two or more persons are jointly tried, they together are entitled to only the same number of peremptory challenges as any one of them would have had if separately tried.[9]

§ 138. **Peremptory challenges; formal way to challenge; foreman of jury.**—The formal way to exercise a peremptory challenge is to use simply the word "Challenged". Take, for instance, the first man called. He is sworn by the clerk to make true answers to the questions about to be put to him. The district attorney then examines the proposed juror, and turns him over for cross-

[8a] 212 Pa. 369.

[9] Com. v. Deutsch, 72 Pa. Superior Ct., 299.

examination by counsel for defendant. After the cross-examination is concluded, the district attorney then says, "Challenged" or "No challenge", as the case may be. Sometimes the district attorney uses the phrase "Challenge withdrawn", which means the same as "No challenge," but any unequivocal expression, which conveys the meaning intended, will do (as is the case in most instances where counsel has to state a position in court). When the next juror is examined and cross-examined, by the district attorney and counsel for defendant, respectively, the latter is obliged to first say whether or not he challenges; and so alternating, as to who shall initially announce his intentions, respecting each juror. Of course, if the side having the first say does not challenge, the other side may; but if neither challenges, the juror takes his seat in the box. The juror first accepted becomes the foreman of the jury.

§ 139. **Exceptions; criminal cases; rulings on challenge of jurors; defendant, but not district attorney, generally entitled to exceptions.**—If a challenge is allowed on motion of the district attorney, defendant can take an exception; but, if it is defendant's challenge, the district attorney has no redress. Should the challenge be disallowed, the challenging party, if he has not exhausted his number, may exercise the right of peremptory challenge; or, if defendant, and his peremptory challenges are exhausted, he may take an exception, for future use on appeal.

§ 140. **Exceptions: criminal cases, Pennsylvania statute; nuisance, forcible entry and detainer, quashing indictment, arresting judgment, ruling against commonwealth in such cases subject to review.**—In the olden days, the office of an exception was to bring the matter in

question formally on the record, so it might subsequently be incorporated in a bill of exceptions, for use on review; because, in those times, they had no court stenographers, as we now have, to take down all that is said or done in the course of a trial. Today, however, the purpose of an exception is to give formal notice that the exceptant does not acquiesce in the ruling of the court, and intends again to claim the benefit of the objection or request which the court has overruled or denied. I shall have more to say on the subject of exceptions in another lecture; but, at this point, it is appropriate to tell you that, generally speaking, the district attorney has no right to except at the trial of a criminal case. In Pennsylvania, however, a statute[10] gives the Commonwealth standing to object to errors, and to file a bill of exceptions, in prosecutions for nuisance, forcible entry and detainer and forcible detainer; and the Supreme Court of Pennsylvania has held that alleged errors in quashing an indictment, or in arresting judgment, are reviewable on an appeal of the Commonwealth.[11]

§ 141. **Exceptions: both sides entitled to in civil cases.** —In civil cases, as distinguished from criminal, both sides may have exceptions noted to rulings on challenges, or otherwise.

§ 142. **Challenge of the array: time and manner of making, in Philadelphia and elsewhere.**—In addition to the challenges already discussed, a litigant may challenge the entire array, or whole body of persons whose names are in the jury wheel, for any fault or irregularity in their selection, or in the depositing of their names in the wheel, or improper custody therof, or for other relevant causes. This is done in Philadelphia by filing a petition in the

[10] Act of May 19, 1874, P. L. 219.

[11] Sadler's Cr. Proced. in Penna., 478-9, and cases there cited.

appropriate court, stating the reasons for the challenge. A copy of the petition is served on the opposite side, on the jury commissioners and the sheriff; and the matter comes up on a rule to show cause why the array should not be quashed. I am told that, in the country districts, all this is done in a much more informal way, by personal application in open court. Whatever method is pursued, one who desires to attack an array must proceed promptly before the trial is entered upon.[11a]

§ 143. **Challenge of array: quashing array; special venire for new men; calling talesmen.**—Of course, if an entire array is quashed, new names must be selected and put in the wheel, and this is specially authorized by law. In the criminal courts, it sometimes happens that so many jurors are challenged, either for cause or peremptorily, that the panel becomes exhausted before the box is full. Under such circumstances, or when an array is quashed, and it is necessary to proceed with expedition, the court may issue a special venire, returnable forthwith; and thereunder the sheriff summons a sufficient number of jurors to fill the box, allowing for challenges. At common law, he might take for service persons sitting in the court-room, or from the streets—called talesmen—and this practice is followed in some of our country districts;[12] but, with us in Philadelphia, the sheriff under our statute[13] usually summons from the electors whose names are in the wheel.

§ 144. **Knowledge of criminal law important.**—Some may wonder why, in this lecture, I have devoted so much time to the subject of empanelling a jury in criminal cases,

[11a] See § 114, supra.

[12] Com. v. Cressinger, 193 Pa. 326.

[13] Act of April 20, 1858, P. L. 354.

when the majority of law students expect to practice mostly in civil courts; but, in the first place, I strongly advise all, who hope to become barristers, to get into the criminal courts as quickly as possible, even if they defend cases without fees. You will be amply compensated by the experience thus gained. Give a part of your time to such work—like a young doctor going into a hospital as an interne. It will pay in the end by rapidly fitting you for general practice in the courts. Aside from this, however, it is the duty of every lawyer to be prepared to defend those charged with crime, if and when called upon to do so by the court; such a call may come at any time, and that is why I have taken occasion to describe in some detail how to empanel and challenge juries in criminal cases—a matter with which many lawyers of experience have difficulty.

LECTURE VI.

VARIOUS WAYS OF TAKING CASE FROM JURY.

Taking case from jury: (§§ 145-176)
- Criminal cases:
  - Nolle prosequi; (§ 146)
  - Submitting bill; (§ 146)
  - Instructing verdict of not guilty. (§ 146)
- Civil cases:
- Voluntary nonsuit:
  - Explained. (§ 147)
  - "Suffering" nonsuit. (§ 148)
  - Be sure of necessity; (§ 149)
    - [Sealed verdict explained. (§ 149)]
  - New action may be instituted after nonsuit; (§ 150)
  - But possibly not where court refuses to remove nonsuit; (§ 150)
  - Costs. (§§ 150, 154)
  - Manner of taking voluntary nonsuit. (§ 151)
- Compulsory nonsuit:
  - Manner of taking; (§ 152)
  - When justified; (§ 152)
  - Substitute for demurrer and reason why; (§ 152)
  - Be prepared to sustain motion for nonsuit: (§ 152)
  - Test of evidence. (§ 153)
  - Consider prejudice with jury from refusal of nonsuit; (§ 154)
  - Appeal; (§ 154)
  - New action may be instituted; (§ 154)
  - Costs. (§§ 150, 154)
  - Pennsylvania statute. (§ 155)
  - Federal decisions. (§ 156)
- Binding instructions:
  - How to ask for; (§ 157)
  - Refusal; (§ 157)
    - Exception; (§ 157)
    - Appeal; (§ 157)
  - Last speech to jury where no evidence submitted. (§ 157)

TAKING CASE FROM JURY

Judgment non obstante veredicto:
How right to move for, affects nonsuit motion. (§ 158)
Withdrawal of juror: (§ 159)
Explained; (§ 160)
Legal fiction; (§ 160)
Costs in discretion of court. (§ 160)
Amusing incident; (§ 161)
How to move for; (§ 162)
Reasons which warrant request for:
Surprise; (§ 162)
Defective pleading; (§ 162)
Failure of proofs; (§ 162)
Misbehavior of witness; (§ 162)
Improper conduct of counsel. (§§ 162-3)
Improper remarks of court. (§ 164)
Antiquity of withdrawal of juror in England. (§ 165)
Waiver of objection to refusal of withdrawal of juror:
Declining offer to withdraw juror, when comment is made on refusal of defendant to testify: (§ 166)
Offer to place wife of defendant on stand; failure to object promptly. (§ 167)
Questioning defendant as to other offenses: (§ 168)
Effect of failure to object promptly. (§ 168)
Review by original or appellate court:
Improper conduct of district attorney; (§ 169)
Failure to object and its effect. (§ 169)
Withdrawal of juror, need not always be asked; (§ 170)
Review obtainable without such motion; (§ 170)
Refusal of defendant to testify, (§ 170)
Improper comment thereon. (§ 170)
Recapitulation:
Juror may be withdrawn on motion of defendant, (§ 171)
Even in capital case; (§ 171)
But defendant's consent may not be asked, (§ 171)
And will not bind him if asked; (§ 171)
Failure to ask for withdrawal of jurors, acts as waiver, (§ 171)
But not, on appeal, where defendant's interest is materially affected; (§ 171)
Withdrawal of juror is within discretion of court, (§ 171)

Subject to review; (§ 171)
Safest course is to ask, (§ 171)
And, if refused, except. (§ 171)
Discharge of jury:
Civil cases; (§ 172)
Criminal cases: (§ 172)
Capital cases:
Use of remedy restricted. (§ 172)
Twice in jeopardy: (§ 173)
Reasons that justify use of remedy in Pennsylvania:
Absolute necessity; (§ 173)
Illness; (§ 173)
Inability of jury to agree; (§ 173)
When done to benefit defendant; (§§ 174-5)
Consent of defendant; (§§ 173-5)
Cases collected; (§§ 173-175)
Separation of jurors. (§ 173)
New York rule: (§ 176)
Inability to agree; (§ 176)
Coercion. (§ 176)
Court and counsel, etc.: (§ 177)
Advice to counsel on proper court methods:
Questions put by court,
Answer promptly, simply, and without argument. (§ 177)
Use psychology. (§ 178)
Be serious but pleasan,t (§ 179)
Particularly with court officials. (§ 179)
Statement of subjects treated and to be treated. (§ 180)

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§ 145. **Taking cases from jury: various ways to be stated.**—I shall now call your attention to several ways in which, during the course of a trial, a case may be taken from the jury, and, for the time being at least, ended by the court.

§ 146. **Criminal cases: nolle prosequi; submitting bill; instructing verdict of not guilty.**—In criminal practice a

nol. pros. (or nolle prosequi), which is a declaration of record from the representative of the Commonwealth that he will not further prosecute the particular indictment, or some designated part thereof, may be formally entered, by leave of court, at any time before sentence; but, when the evidence proves insufficient to justify a conviction, it is usual, nowadays, for the prosecuting officer to abandon his case by simply saying to the jury that, by permission of the court, he submits the bill (which means he agrees to a verdict of not guilty), or, should the district attorney not do this, counsel for defendant may ask the court to instruct the jury to acquit his client. In either event, if the trial judge conceives that the Commonwealth has failed to make out its case, he instructs the jury to render a verdict of not guilty, which is done.

§ 147. **Civil cases: voluntary nonsuit explained.**—In civil practice a trial may be ended by what is termed the voluntary nonsuit, which, if the case is going against him, a plaintiff may have entered at any time before the jury actually announces its readiness to render a verdict;[1] this is called "suffering a nonsuit".

§ 148. **Voluntary nonsuit: "suffering nonsuit"; appropriate story.**—Apropos of the phrase just used, I recall an amusing incident which happened some years ago before the late Judge ARNOLD, in the Court of Common Pleas No. 4 of Philadelphia County. Edward Brooks, Jr., Esq., was counsel for the plaintiff; every time he reached the real point in his case, an objection to the evidence was successfully interposed. He had been wrestling with the situation for about an hour, without success, when the judge leaned over the bench and said, with a smile, "Don't you think you had better suffer a nonsuit?" To this Mr.

[1] McLughan v. Bovard, 4 W. 308; Easton Bank v. Coryell, 9 W. & S. 153.

Brooks replied, with a note of sadness in his voice, "Doesn't your Honor think I have suffered enough already?"

§ 149. **Voluntary nonsuit: be sure cause is lost before suffering; sealed verdict explained.**—Another story, connected with the subject of the voluntary nonsuit, was recently told me by one of my colleagues. He said that a good many years ago he was sitting in court, waiting to try a case. Another, very hotly contested, case had gone to the jury, on adjournment the previous afternoon. The jurors, having reached their conclusion after the judge left the court house, sealed the verdict; which, as you no doubt know, means that they wrote their finding on a piece of paper, certified by the foreman, and handed it to the clerk of the court in a sealed envelope addressed to the judge, as may be done by the latter's permission, but only by such permission. The next morning, immediately after court opened, before the foreman of the jury had an opportunity to say it had reached a verdict, Richard P. White, Esq., who represented the plaintiff, and who no doubt had ascertained from the clerk the fact that a sealed verdict would be announced, having scanned the faces of the jury, for some reason came to the conclusion the case had gone against him. So, before the verdict was announced, Mr. White arose, and, addressing the judge, said he would suffer a voluntary nonsuit; which was duly recorded. When the paper was opened, much to Mr. White's chagrin, it contained a verdict for plaintiff.

§ 150. **Voluntary nonsuit: how to guard right to possible future removal; opportunity for new suit; costs.**—The voluntary, like the involuntary, or compulsory, nonsuit, has the advantage of affording plaintiff a chance to have another day in court, since, on payment of costs, he

may institute a second suit for the same cause of action; but one should never take a voluntary nonsuit unless quite sure that it is the best course to pursue, for, differing from the involuntary nonsuit, there is less likelihood of its removal by the trial court, unless, at the time of entry, leave is asked to subsequently move the court to take it off.[1a] The Supreme Court of Pennsylvania has said, in two cases,[1b] "It is well settled that [the refusal to take off a nonsuit] is tantamount to a judgment for defendant on demurrer to plaintiff's evidence," and a Philadelphia court recently decided that such refusal prohibited another action;[1c] this suggests the necessity for consideration in deciding whether or not to ask for the removal of a nonsuit rather than to institute a new case.

§ 151. **Voluntary nonsuit: formal manner of taking.**—If for any sufficient reason you decide to take a nonsuit, simply arise and say, "I wish to suffer a voluntary nonsuit, with leave to move to take it off, if desired." If this is said in due season, the trial judge will reply that the nonsuit is granted, and direct the clerk to make up the record accordingly; whereupon the jury is discharged.

§ 152. **Compulsory nonsuit: when justified; be prepared to sustain your motion for; manner of taking; substitute for demurrer, reason why.**—If, when plaintiff

[1a] Koecker v. Koecker, 7 Phila. 371, 375, by PAXSON, J.; see also Garrat v. Garrat, 4 Yeates 244.

[1b] Finch v. Conrade's Executor, 154 Pa. 326, 328; Hartman v. Pittsburgh C. P. Co., 159 Pa. 442, 444. But see § 154, note 2b.

[1c] Mullen v. Becker, Mun. Ct. (not reported), by Judge Bartlett, now of Common Pleas (No. 1), since appealed to the Superior Court, No. 71, Oct. Term, 1922.

closes, defendant conceives that his opponent has either failed in his proofs or has shown a case on which, under the law, he cannot be allowed to recover, counsel may move for a compulsory nonsuit. This is done by rising and simply stating to the court that you ask for a nonsuit, giving the grounds on which you rely; but counsel should, whenever possible, be prepared with authorities to sustain any legal argument which he may be obliged to make in support of his motion. The motion for nonsuit has taken the place of a demurrer to the evidence; because, under the latter practice, if a defendant failed to convince the court he was entitled to judgment in his favor, he was subject to final judgment against him on the demurrer.

§ 153. **Compulsory nonsuit: testing evidence to know when one is justified in asking for nonsuit.**—Never ask for a nonsuit unless you feel confident plaintiff has failed to show a prima facie case; to entitle defendant to this relief, it must appear that, after the evidence has been considered in the light most favorable to plaintiff, and the latter has been given the benefit of every inference of fact which might be drawn therefrom, he has failed to prove a case on which, under the law, a recovery may be had.

§ 154. **Compulsory nonsuit: possible prejudice with jury from refusal, instability of remedy, appeal, new action, costs.**—When plaintiff's proofs are all in, if, on the application of the test just stated, you feel that his case should not go to the jury, ask for a nonsuit, but not otherwise; for, should the court overrule your motion, the jurors are apt to think the judge feels plaintiff ought to recover. Then, again, if a doubtful nonsuit is entered, the strong probability is that it will subsequently either be removed by the trial court or reversed on appeal. Under

a statute in Pennsylvania;[2a] when, on motion, the trial court refuses to remove a nonsuit, plaintiff may appeal; or he may omit such motion, pay the costs and start another action.[2b]

§ 155. **Compulsory nonsuit, Pennsylvania statute, historical development.**—It appears that, in early days, the Pennsylvania courts refused to nonsuit plaintiffs on their "own exhibition of facts";[3] but the Act of March 11, 1836,[4] and later statutes, expressly provide for such relief.[5]

§ 156. **Compulsory nonsuit: federal decisions.**—At one time the United States Courts would not nonsuit "without the consent and acquiescence of the plaintiff";[6] but subsequently this was changed[7] by allowing the remedy where there are State statutes on the subject.

§ 157. **Binding instructions; how to ask for; refusal, exception, appeal; last speech to jury.**—If you do not wish to prove a defense, on refusal of your application for a nonsuit, be prepared with a written request for binding instructions which, if you so desire, hand to the trial judge, with the remark that you prefer to stand on the grounds urged in support of your previous motion, and therefore

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[2a] Act March 11, 1875, P. L. 6-7.

[2b] Bournonville v. Goodall, 10 Pa. 133; Fitzpatrick v. Riley, 163 Pa. 65; Bliss v. Phila. R. T. Co., 73 Pa. Superior Ct. 173. See also § 150 and note 1c, as to whether new action may be commenced after overruling of motion to remove nonsuit.

[3] Delany v. Robinson, 2 Wh. 503, 507; Jones v. Wildes, 8 S. & R. 150.

[4] P. L. 76, 78.

[5] Also see Dalmas v. Kemble, 215 Pa. 410, 412.

[6] Doe v. Grymes, 1 Peters 469; D'Wolf, Jr., v. Rabaud, 1 Peters 476; Crane v. Lessee of Morris, 6 Peters 598; Silsby v. Foote, 14 Howard 218; Schuchardt v. Allens, 68 U. S. 359.

[7] Central Transportation Co. v. Pullman's Palace Car Co., 139 U. S. 24, and Coughran v. Bigelow, 164 U. S. 301.

will not take up the time of the court and jury by submitting evidence, or some statement to that effect. Of course, if, at this stage of the proceedings, the trial judge changes his attitude, and grants your request for binding instructions—as sometimes will happen—your victory will be greater; on the other hand, if your request is refused, you have the advantage of the last speech to the jury—to which you are entitled under such circumstances; and I assure you that, if you know how to use it, this is no mean advantage. Furthermore, you may insist upon your application for binding instructions by taking an exception to its refusal, and, should the verdict go to your opponent, you may ask the trial court for judgment n. o. v. Finally, if this is refused, you still have your right of appeal. Sometimes counsel for defendant prefer to move for binding instructions in the first instance, so as to obtain a final judgment, instead of being fixed with the inconclusiveness of a judgment of nonsuit.

§ 158. **Judgment non obstante veredicto; right to move for, and effect of on motion for nonsuit.**—Since the Pennsylvania non obstante veredicto Act of April 22, 1905,[7a] which has largely superseded the old practice of reserving points of law, a trial judge will often refuse a motion for a nonsuit, preferring to consider the whole record on a motion for judgment under the act, should the verdict go against defendant. The subject of judgment n. o. v. will be discussed at large in another lecture.[7b]

§ 159. **Withdrawal of juror.**—There is still another method of getting a case from the jury without verdict, and that is by the withdrawal of a juror.

[7a] P. L. 286.

[7b] Sections 351-62.

§ 160. **Withdrawing juror explained: legal fiction; discretion of court to impose costs.**—Understand, the term "withdrawing a juror" describes a fiction according to which the clerk is supposed, on direction of the court, actually to call a juror out of the box, counsel is presumed to then object to proceeding with eleven jurors, and this objection is supposed to be sustained; but what really takes place is a mere statement from the bench that a juror is withdrawn. The effect of this is to send the case over for trial at the next term of court, without prejudice to the rights of anyone; although the court, if it deems proper, may put the costs on the party responsible for the withdrawal of the juror.

§ 161. **Withdrawing juror: amusing incident illustrating importance of knowing legal terms.**—I recall an incident that happened in our courts when I was a law student; and the man upon whom this story is told now enjoys a large practice in New York. In the course of a trial before Judge FINLETTER (the father of the present Judge FINLETTER), the lawyer to whom I refer asked a question which so outraged the Judge's sense of propriety that he immediately said "Mr. So-and-So, you know you had no right to ask that question; I withdraw a juror." Counsel, in sublime ignorance and all seriousness, blandly asked, "Which one, your Honor?"—much to the amusement of the Bar. The telling of this story has its serious purpose, that is, to impress on you the importance of knowing, early in your career, the real meaning and significance of all court room terms, and this we can best do by really knowing something about each of them.

§ 162. **Withdrawing juror: how to move for; reasons which warrant course, surprise, defective pleading, failure of proofs, misbehavior of witnesses or counsel, etc.—**

If occasion arises for the use of this remedy, you merely state to the court that you ask for the withdrawal of a juror, giving your reasons. Many reasons justify an application of this character; for instance, if counsel is so embarrassed by surprise that he cannot properly proceed, if he discovers formal defects in his pleadings, which he wants time to remedy, if his proofs fail, or other such unexpected contingencies arise, a request for the withdrawal of a juror is usually granted. Then, again, it sometimes happens that a witness or party litigant misbehaves on the stand, for example, by refusing to answer questions or to heed the admonitions of the court as to the manner in which testimony must be produced; or counsel, in the course of a trial, may overstep the limits of proper professional conduct, either in the examination of witnesses, or in addressing the jury, in all of which events the court will withdraw a juror and continue the case, either on motion of opposing counsel, or of its own volition.[7c]

§ 163. **Withdrawing juror: improper conduct of counsel.**—There are quite a number of recent decisions, of both the Supreme and the Superior Courts of this state, approving the withdrawal of jurors, where lawyers, who were too zealous, abused their privilege of advocacy, by putting improper questions to witnesses, after being warned not to do so, or where counsel addressed the jury in a manner calculated to arouse passions rather than appeal to reason. All such conduct is not only properly penalized by the withdrawal of a juror, but is highly reprehensible and a breach of one's professional oath; in the long run, if persisted in, it hurts a lawyer's clients and seriously injures his standing with the courts.

[7c] How to bring trial occurrence on record. See § 284.

§ 164. **Withdrawing juror: improper remarks of court.** —We have cases in the books where it has been held to be error for a judge not to grant an application for the withdrawal of a juror, when improper remarks of his own, likely to prove unduly prejudicial to a litigant in the civil courts, or to a defendant in the criminal courts, are uttered in the presence of the jury. When such remarks are made, counsel should respectfully, but firmly, call the court's attention to them and ask for the withdrawal of a juror.

§ 165. **Withdrawing juror: antiquity of, in England.**— The practice of withdrawing a juror seems to be about as old as the jury system itself. In a note to Chedwick v. Hughes,[8] it is stated by Chief Justice HOLT that, in King v. Perkins, tried before him in 1628, "it was the opinion of all the judges of England, upon debate between them, that [1] in capital cases a juror cannot be withdrawn though all the parties consent; [2] that in criminal cases, not capital, a juror may be withdrawn if both parties consent, but not otherwise; [3] that in all civil cases a juror cannot be withdrawn but by consent of all parties." The above statement, as an authority, is of no weight now, and its strength was doubted in Foster's Crown Law[8a]—1791—where, referring to Chedwick v. Hughes, it is said: "What were the circumstances of that case or what became of it does not appear, and, therefore, I freely own this extra-judicial opinion—for with regard to capital cases it is extra-judicial—weighed very little with me in the present question." But, regardless of the correctness of the law as stated in this old English case, it at least shows that, even in those early days, the practice of withdrawing a juror was well known.

[8] Carthew, 464.

[8a] Page 37.

§ 166. **Withdrawing juror: effect of declining to take advantage of court's offer so to do, when comment was made on failure of defendant to testify, violation of Act of 1887 in that regard.**—I have indicated, in a general way, under what circumstances one is entitled to ask for the withdrawal of a juror; but it seems to me that, in view of certain recent Pennsylvania decisions, it might be well to look at this point a little more closely. The Pennsylvania Evidence Act of 1887[9] provides that neglect or refusal of a prisoner on trial to testify in his own behalf shall not raise any presumption against him or be adversely referred to by court or counsel. Our Superior Court,[10] considering this act, ruled that, when the provision in question had been breached, and counsel for defendant had declined an offer of the trial judge to withdraw a juror, he could not be heard to complain on appeal.

§ 167. **Withdrawing juror: waiver; effect of offer to place wife on stand.**—The act mentioned in the preceding paragraph also provides that neither husband nor wife, with some exceptions, shall "be competent or permitted to testify against each other", which is equivalent to saying they shall not be offered for that purpose, yet, in a first degree murder case, Commonwealth v. Weber,[11] the Supreme Court of Pennsylvania refused to sustain a contention that reversible error had been committed by declining to strike from the record an offer to place the wife of defendant on the stand.

168. **Withdrawing juror: waiver; questioning as to other offenses and effect of failure to object promptly**

[9] Act May 23, 1887, P. L. 161, sec. 10.
[10] Com. v. Nowyokot, 39 Pa. Superior Ct., 506.
[11] 167 Pa. 156, 162.

to such examination.—In Commonwealth v. Brown,[12] the district attorney asked a defendant, on trial for murder, if he was not a deserter from the army, and he answered in the affirmative; then, after his own counsel had examined him on the same matter, he requested the withdrawal of a juror. On appeal, the overruling of this motion was assigned for error, it being contended that the mere asking of the original question violated the Pennsylvania Evidence Act of 1911,[13] which provides that no defendant shall be asked any question tending to show he had previously committed or been charged with an offense other than the one on trial. The appellate court agreed that the intention of the act was to prevent the asking of questions of the character forbidden therein; but, without deciding whether or not desertion was an offense within the meaning of the statute, the court held that, since no objection was made by defendant's counsel at the time the question was asked, and he, himself, subsequently interrogated his client in regard to the matter, the court did not err in refusing to withdraw a juror.[14]

§ 169. **Waiver: review; effect of failure to object to improper conduct of district attorney.**—In Commonwealth v. Weber,[15] before referred to, appellant contended that the trial court erred in permitting the district attorney to discuss matters not sustained by evidence; but the Supreme Court refused to consider the contention, because no objection was made at the time the matters complained of were referred to in the court below, saying: "The attitude of defendant's counsel, as exhibited by the record, is,

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[12] 264 Pa. 85.

[13] Act March 15, 1911, P. L. 20.

[14] But see Com. v. Green, 233 Pa. 291-2, commented on infra, sec. 170.

[15] 167 Pa. 156.

in substance, this: 'Counsel for Commonwealth erred in the matter of his address to the jury: I erred by remaining silent, when I should have promptly brought his error to the notice of the court by objection; the court committed no error, but its judgment should be reversed because it did not perform my duty'."[16]

§ 170. **Review: withdrawal of juror need not always be asked to entitle one to review; comment by district attorney on defendant's failure to testify.**—In Commonwealth v. Green,[17] the Supreme Court of this State reversed because the district attorney called the jury's attention to the fact that defendant had not taken the stand in his own defense. There does not appear to have been any request to withdraw a juror; but, nevertheless, the matter was considered, when assigned for error; which indicates that one need not always ask for the withdrawal of a juror in order to entitle him to subsequent relief on appeal.[18]

§ 171. **Recapitulation, capital cases: juror withdrawn on motion of defendant, even in capital cases; defendant's consent may not be asked and will not bind him; failure to ask for withdrawal of juror acts as waiver; but not, on appeal, where defendant's interest is materially affected; discretion of court, subject to review; safest course is to ask withdrawal of juror and, if refused, except.**—So far as Pennsylvania is concerned, the rule seems to be, [1] a juror may be withdrawn on the voluntary motion of a defendant, even in a capital case; but his consent to such procedure may not be asked, and will not bind him if asked.[19] [2] When the violation of a defend-

[16] But see Com. v. Green, 233 Pa. 291-2.

[17] 233 Pa. 291-2; See also Com. v. Barille, 270 Pa. 388, 394.

[18] But see Com. v. Brown, 264 Pa. 85, and Com. v. Weber, 167 Pa. 156.

[19] Com. v. Barille, 270 Pa. 388, 394. For further discussion of Pennsylvania law on the subject of discharging jurors in capital cases, see following four paragraphs.

ant's statutory rights or privileges, or any other unwarranted incident, prejudicial to him, happens in the trial of a criminal case, the proper remedy is to ask the withdrawal of a juror. In some instances, failure to invoke this remedy in due season will, on conviction, be taken as a condonement of the matter,[19a] if subsequently complained of on appeal; while, in others, where the matter of complaint probably materially affected the defendant's interest before the jury, he will be allowed to assign it for error on appeal, even though he failed to ask the withdrawal of a juror at the proper time in the court below. In all such cases, the remedy, in the first instance, is largely within the discretion of the trial judge,[20] but the safest course for counsel to pursue is, first formally to object, and then to ask for the withdrawal of a juror. This course should be pursued, whenever those on the opposite side of a case are guilty of trial misconduct, which counsel believes, in the event of the verdict and judgment going against him, he may desire to urge as prejudicial to his client's interests; and, if his request for the withdrawal of a juror is refused, he should enter an exception on the record.

§ 172. **Discharge of jury in civil and criminal cases; remedy restricted in capital cases.**—A collection of cases, in a note to Usborne v. Stephenson,[20a] indicates that, at the present time, it is settled in most American jurisdictions that the courts have power to discharge the jury, either with or without the consent of the parties, in both criminal and civil cases; but, according to Pennsylvania law, this course can be pursued, in capital offenses, only under rare circumstances.

[19a] Mackin v. Patterson, 270 Pa. 107, 110-11, and cases cited.

[20] Com. v. Pava, 268 Pa. 520, 524; Wilhelm v. Uttenweiler, 271 Pa. 451.

[20a] 48 L. R. A. 432 et seq.

§ 173. **Twice in jeopardy; how to raise point; absolute necessity, sickness, consent, separation of jurors, inability to agree.** — With us, in the trial of capital cases, the discharge of the jury is permitted only in instances of absolute necessity, otherwise, on a plea of twice in jeopardy, it will operate as an acquittal;[21] the instances in which such procedure has been allowed are cases where the health of a juryman, the judge or the defendant, had become so seriously affected as to incapacitate him and render his appearance in court practically impossible.[21a] It has been held that even the separation of the jurors, by consent of the Commonwealth and the prisoner, does not give rise to such necessity as justifies their subsequent discharge;[22] neither does illness of a juror, when it can be relieved, constitute a sufficient reason for discharge,[23] nor has the court power to discharge a jury in a capital case because of its mere inability to agree, even though the regular term of court is approaching its end.[24]

§ 174. **Twice in jeopardy: rule does not apply when conviction is set aside for benefit of defendant.**—It may be well to state, at this point, that, when, on application of defendant, the trial court for any sufficient reason sets aside a conviction in a capital case, or, under such circumstances, an appellate court grants a new trial, the rule of twice in jeopardy does not apply;[25] nor does the rule apply, in such a case, when a juror is withdrawn for the benefit of the defendant and at his request.

[21] Com. v. Tenbroeck, 265 Pa. 251, 257; Com. v. Cook, 6 S. & R. 577.

[21a] Com. v. Davis, 266 Pa. 245, 248; but question of twice in jeopardy cannot be raised by habaes corpus: Com. ex rel. v. Richards, 274 Pa. 467.

[22] Hilands v. Com., 111 Pa. 1.

[23] Com. v. Clue, 3 Rawle, 498; see also Com. v. Insano, 268 Pa. 1, 6.

[24] Com. v. Fitzpatrick, 121 Pa. 109.

[25] Com. v. Lutz, 200 Pa. 226; Com. v. Gabor, 209 Pa. 201; and see Hilands v. Com., 6 Atl. 267, 269, n.; Com. v. Fitzpatrick, 121 Pa. 109, 117.

§ 175. **Twice in jeopardy: rule does not apply when juror is discharged for benefit of defendant, or in cases of absolute necessity, Pennsylvania authorities.**—In Commonwealth v. Cook[26] the Supreme Court of Pennsylvania, by TILGHMAN, one of our truly great Chief Justices [some think our greatest], reviews the law on the subject of the right of the court to discharge the jury on the trial of a capital case. In the course of a most interesting opinion, he says: "Concerning the power of the court to discharge a jury in a capital case, judges have not always agreed. It is one of those questions which remained long unsettled, nor even yet has any general rule been established which embraces all cases; indeed, from the nature of the thing, such a rule is not to be expected. The judges have, therefore, thought it safest to decide, from time to time, the cases which have been brought before them, taking care not to commit themselves on general principles. There is, indeed, one principle which cannot be contradicted, and that is, that the jury may be discharged in cases of absolute necessity; but what constitutes that necessity has been ascertained only in the particular cases that have arisen. There was an ancient tradition among the English lawyers, that a jury, charged in a capital case, could not be discharged without giving a verdict, even with the consent of the attorney-general and the prisoner; this is laid down for law by Sir Edward Coke (in his 1st Inst. 227 b. and 3 Inst. 110). It is doctrine altogether unreasonable; for why should not the jury be discharged, when it is desired by all parties interested in the verdict? Accordingly, we find it could not stand, though supported by so great a name. Lord Coke cited a case in the Year Books,[27] which, being thoroughly examined, was found not

[26] 6 S. & R. 577, 579.

[27] 21 Edw. III.

to support his opinion; the matter was fully discussed in the case of Kinlocks, Foster 22, and the law, in cases of consent, settled on a foundation too firm to be shaken. The Kinlocks, having been indicted for treason, pleaded not guilty, and were put upon their trial; after the jury were sworn, they asked permission to withdraw their plea, in order to plead another matter of which they were advised they could not have the advantage on the general issue; leave was given, with the consent of the attorney-general, and a juror withdrawn, after which, their second plea being overruled, they were tried by another jury and convicted of high treason. They then moved in arrest of judgment, because the first jury had been discharged; but it was decided by nine judges against Wright (the only dissentient) that the discharge of the jury was legal, and judgment was pronounced against the prisoners. We may conclude, then, that in cases of consent, fairly given, where the prisoner is assisted by counsel, and the discharge of the jury is intended for his benefit, they may be discharged without giving a verdict."[28] Several recent opinions of our Supreme Court tacitly recognize that a juror may be withdrawn in capital cases,[29] and, Commonwealth v. Shoemaker[30] definitely states, "to have withdrawn a juror at the request of the defendant would not have prejudiced the Commonwealth's right to try the prisoner again on the indictment." The indictment in question was for murder.[30a]

§ 176. **New York twice in jeopardy rule, inability to agree, coercion.**—On the other hand, the New York Court

[28] See Peiffer v. Com., 15 Pa. 468, 470-71, opinion by GIBSON, C. J.

[29] Com. v. Greason, 204 Pa. 64, 67; Com. v. Brown, 264 Pa. 85, 89; Com. v. Fiorentino, 266 Pa. 261.

[30] 240 Pa. 255, 260.

[30a] See Com. v. Barille, 270 Pa. 388.

of Appeals[81] set aside a verdict of guilty in a capital case, and ordered a new trial, when the presiding judge, by his remarks in refusing to discharge the jurors, upon a report of their inability to agree, and by keeping them together in consultation for 85 hours, after a seven-weeks trial, coerced an agreement.[81a]

§ 177. **Practice, court and counsel: questions put by court should be answered without argument; psychology of judge.**—In concluding this lecture, it may be well to say that the pressing of the various motions here discussed generally brings on a colloquy between judge and counsel in which the former will frequently put questions to the latter. When this occurs, be prompt and frank with your answers; do not equivocate or give the appearance of equivocation, and do not over-indulge in speculations as to what is in the back of the judge's mind, or try to meet what you conceive this supposed hidden matter to be by an argumentative reply. Simply answer the questions as freely, yet as concisely, as you can. For instance, if, when you are presenting a subject, suddenly, in the midst of your presentation, the trial judge breaks in by asking, "Did that happen at twelve o'clock?", don't say, "Yes, your Honor, but I do not see how that controls the case, for," etc., etc.—thus endeavoring to overcome something you think is in the mind of the judge which must be straightened out by argument. Just answer the question; for the chances are ten to one you will be wrong in your surmise as to the mental operations of your interlocutor; and, even if you are right in this regard, the judge will invariably indicate when he wants a point argued. Under circumstances such as suggested, it is more than likely

[81] People v. Sheldon, 156 N. Y. 268.

[81a] See Com. v. Tenbroeck, 265 Pa. 251, 256.

the mind of the man you are trying to convince has come to a point of inquiry, which, until it is answered, prevents his mental operations from going forward; and, for that reason, he has difficulty in following your argument. In other words, his thoughts stick at, or are constantly going back to, the one point of fact which is disturbing him; when he gets an answer to that, his mind moves on, but not before. I know such to be the psychology of the situation, not only from my own experience, but, as I have an interest in such matters, from inquiry of others. I further know from experience and observation that a contentious reply, to a question which is not put to invite argument, usually not only interferes with the listening capacity and reasoning faculty of the judge; but, if he happens to be high-strung [as most quick-minded men are], it causes him acute mental distress and consequent irritation, which, despite his desire to do right, may operate against you, at least for the moment. One more suggestion: When the court asks you a question, don't reply, "I am coming to that" (as lawyers so often do); but come to it, then and there, with a responsive answer.

§ 178. **Court and counsel: use psychology.**— Perhaps your idea of the judge is that he is a sort of superior intellectual being, with a mentality somewhat different from the ordinary mortal, but my own observation leads me to believe that this is seldom so; and, further, as I suggested a moment ago, when we meet the keen, clear, quick-thinking man on the bench, he is apt to suffer from an intellectual impatience, which must be taken into account in dealing with him, and perhaps offset against his virtues. However that may be, it will profit you to be a bit of a psychologist in dealing with him, or, for that matter, with any other man you want to convince.

§ 179. **Court and counsel: be serious but pleasant to all court officials.**—Relevant to the matters we have been discussing, it is well to be always serious, though pleasant, in your court-room manner, not only to the judge, jury and witnesses, but also to your opponent and the court officials; particularly the latter, for, if you become an active practitioner, they can and will do you many a good turn.

§ 180. **Statement of subjects treated and to be treated.**—We have now reviewed the historical aspects of our subject, looked into the selection of jurors, and considered how issues may be taken from them, before verdict; but, in this connection, I have saved the subject of binding instructions for future discussion. I shall next deal, in a general sense, with the actual trial of cases—civil and criminal—up to the verdict, and beyond; the purpose being to tell you, in a live, illustrative way, how various trial steps are ordinarily taken, and to give you the benefit of some practical suggestions which experience leads me to believe will prove of value.

LECTURE VII.

OPENING CASE; OFFERS OF PROOF; EXAMINATION OF WITNESSES; OBJECTIONS AND EXCEPTIONS; STENOGRAPHER STATUTES.

How to conduct a trial,
  And how not to do it, to be stated. (§ 181)
  Proper demeanor toward trial judge. (§ 182)
  Develop case along systematic line; (§ 183)
  Avoid showing surprise. (§ 183)
Opening case to jury:
  Formal salutation. (§ 184)
  Object of opening speech explained. (§ 185)
  State case concisely, but not evidence. (§ 185)
  State no facts you cannot prove. (§ 186)
  Do not anticipate defense. (§ 187)
Open defense briefly. (§ 188)
  Advisability and danger of admissions by counsel. (§ 189)
    Case on danger of broad admission. (§ 190)
    Another case in point,
    On admission of facts peculiarly within knowledge of person making admissions; (§ 191)
    Applicable rule. (§ 191)
Calling witnesses:
  Follow natural sequence of events; (§ 193)
  Consider effect in choice of witnesses. (§ 193)
  Explain absence of material witnesses. (§ 194)
Offers of proof:
  Calling for offer of proof; (§ 195)
  Allowance of, in discretion of court. (§ 195)
  Avoid including inadmissible facts, (§ 196)
    Or all may be rejected. (§ 196)
  Avoid offers for effect. (§ 197)
  Avoid hearsay evidence; (§ 198)
    It will not support a verdict. (§ 198)
  Offer to be followed by other evidence. (§ 199)

Offers for general and specific purpose:
Governing rules relating thereto. (§ 200)
Objections to offers:
General objections not good if any part of offer is proper; (§ 201)
Each question put to witness an offer; (§ 201)
Necessity for exception on overruling of objections; (§ 201)
First exception not always sufficient protection, (§§ 201-2, 220)
If answer goes beyond offer, (§§ 201-202)
If answer is irresponsive. (§ 201)
How to make an objection; (§ 202)
Don't object too often; (§ 202)
Let objection cover whole line of proof; (§ 202)
See that no evidence beyond line gets in. (§§ 201-202)
General and special objections defined. (§ 203)
Defects of general and advantages of special objection; (§ 204)
Statement of rules governing, on review. (§ 204)
Examples of defects of general, and advantages of special objection. (§ 205) (§ 206)
Special objections, inherent advantages of. (§ 207)
Specific objection not stated, will be considered waived. (§ 208)
Treated as waived by appellate court; (§§ 206, 209, 210)
Example stated. (§ 209)
General and specific objections, when treated as waived. (§ 210)
Advice on course to pursue on arguments of objections. (§ 211)
Examining witnesses:
Put your witnesses at their ease; (§ 212)
Never scold; (§ 212)
Use simple language; (§ 213)
Speak loud enough. (§ 213)
Avoid leading questions. (§ 214)
Make witnesses state facts, not conclusions. (§ 215)
Examining through interpreters;
Speak to the witness direct. (§ 216)
Indicating space by signs, etc., or using plans or models; (§ 217)
How to do it for purpose of review. (§ 217)
Reading testimony taken by deposition, etc.; (§ 218)
Act the part of the absent witness. (§ 218)
Request to strike out evidence not objected to,
Must be promptly made; (§ 219)
Governing rules on review; (§ 219)

Asking for instructions to disregard testimony, (§ 219)
Effect of, on review. (§ 219)
Evidence admissible when offered, but insufficient later; (§ 220)
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Request for instruction to disregard proper; (§ 220)
Original objections not always sufficient on appeal. (§§ 201, 220)
Bills of exceptions to rulings:
What to do if judge objects to recording harmful matter; (§ 221)
Advice as to proper conduct and demeanor under such circumstances. (§ 221)
Statute of Westminster:
Is foundation of our practice as to exceptions; (§ 222)
Text of statute. (§ 222)
Scope of statute; (§ 223)
Making up record thereon; (§ 223)
Exception essential; (§ 223)
Old practice as to exceptions discussed. (§ 223)
Pennsylvania practice Acts as to exceptions:
Criminal Practice Acts of 1860 and 1874. (§ 224)
Act of May 24, 1887:
Stenographer to keep notes of trial; (§ 225)
Exceptions allowed by court noted by stenographer,
Only on direction of trial judge. (§ 225)
Act of May 11, 1911: (§ 226)
Need for express allowance of exception eliminated. (§ 226)
Act of June 2, 1913:
Exception need not even be requested by counsel; (§ 227)
But counsel must object to ruling; (§ 227)
Must see that exception is noted; (§ 227)
All to take place in presence of court, (§ 227)
Otherwise acquiescence will be assumed. (§ 227)
Act merely dispenses with necessity for asking notation of exception; (§ 228)
Act further explained. (§ 228)
Bill of exceptions may still be allowed; (§ 229)
Old practice to compel judge to seal bill outlined. (§ 229)

§ 181. **How to conduct a trial—and how not to do it—to be stated.**—In this lecture, I shall start to treat of the actual trial, describing briefly some of the steps which ordinarily occur; and, in so doing, I shall continue to pursue the plan of telling you, at each stage, not only what is usually done, but, also, how it is done, or ought to be done—or ought not to be done,—as I understand it.

§ 182. **Proper demeanor toward the trial judge.**—First and foremost, and above all—do not antagonize the trial judge. If he happens to be irritable, show charity; remember he is but human and may not feel well on that particular day—good digestion may not wait on appetite. Be respectful to the judge throughout the trial; first, because it is due to his office, and, next, because in all probability the jury will resent any disrespect in that particular, even more than the man himself. In Philadelphia, a panel of jurors serves two weeks, generally with the same judge presiding every day; and I know from experience the peculiar pride with which, after a few days of this mutual work, the jurors view the judge—how they come to consider him as part of themselves and themselves as part of him. Of course, when necessary, be firm in insisting upon the rights of your client, and your own rights as an attorney, when you think them improperly opposed by the court; but you will always gain in the eyes of the jury by doing this in a tactful and respectful way, as you will lose by pursuing any other course. If, after fairly presenting the matter, you cannot get the court to grant what you deem to be your due, see that the stenographer's notes show your demand and its refusal; then see that an exception is entered and trust to a reversal on review.

§ 183. **Develop case along systematic line: avoid showing surprise.**—It is highly important to prepare and develop your case along some systematic line; but it often happens in the middle of a trial that a complete change of front must be made. Witnesses may disappoint you and testify differently from what you had reason to anticipate. When this occurs, be careful not to let it disturb your equanimity. If you re-adjust yourself, as though nothing of importance had happened, it will have a good effect on the judge and jury, by showing that your confidence in the justice of your cause has not been shaken. A court incident, in which the late John G. Johnson figured some years ago, illustrates the importance of knowing, at least in a general way, what every witness you call is likely to say on the important points you have to establish; also how one can school himself cheerfully to accept disappointment. Mr. Johnson placed a well-known builder on the stand, as an expert; but none of his answers supported the case he was called to sustain. After a very few minutes, Mr. Johnson, realizing his dilemma, with a look of mock despair, which he sometimes assumed, said to the witness, "Now, sir, I shall end this examination with the last interrogatory in equity—Is there *anything* you can say for the benefit or advantage of the defendant in this case?" This bit of humor saved the situation, but I doubt if it saved the case.

§ 184. **Opening case to jury: formal salutation.**—It is customary, although not absolutely required, for counsel, when about to open his case, to face the judge, and start with some such phrase as "May it please the Court"; then, turning to the jury, he addresses them as "Gentlemen of the Jury". The great Johnson, in his direct manner, usually dispensed with these and all other preliminaries.

How the salutation to the mixed juries of the present day shall be, I leave for you to determine, but suggest the phrase, "Members of the Jury" as suitable.

§ 185. **State case concisely, but not the evidence: object of opening speech explained.**—Your opening speech should be concise and to the point; simply tell the jury—just as you would naturally relate a story, without over-emphasis—what your case is—what you propose to prove, but not how you intend to prove it. Leave something to the jurors' curiosity, and don't tire them out before they start the trial. If you explain in detail exactly how your witnesses will testify, the jurors are apt to lose interest during the taking of the testimony. Then, again, it may be that certain of the witnesses will not come up to your expectations, and, should this happen, some of the jurors will probably think, either that you have failed to prove your case to that extent, or, possibly, that you practiced a deception on them in your opening. The object of the opening speech is not to advise the jury concerning the testimony of your various witnesses, but to let them know what the case is about, so they may understand the purpose and effect of the evidence, when produced.

§ 186. **State no facts you cannot prove.**—Never state a fact which you cannot sustain by proof, or one which, on objection, you will not be permitted to prove; to do so is not only highly improper, but a dangerous practice, apt to hurt your client's cause with both court and jury.

§ 187. **Do not anticipate defense.**—It is a safe rule, in developing your case, not to anticipate what you think the defense will be; for, in doing so, you may give currency to facts which the defendant is not prepared to prove, and the jury may take them as admissions on your part, or you may suggest matters of defense that the other side

had not thought of, which it will subsequently use to your disadvantage.

§ 188. **Open defense briefly.**—When opening for a defendant, you can, as a rule, be even more terse than when representing a plaintiff; for, necessarily, when it comes time to put in defendant's side, the jury have a pretty good knowledge of what the controversy is about.

§ 189. **Advisability and danger of admissions.**—When outlining the defense, it is often good policy to admit frankly facts either proved by the other side or necessarily involved, if they favor or do not work against you; but in doing this, one must be careful as to the language employed, lest he admit too much.

§ 190. **Case on danger of broad admission by counsel.**—In Bowser v. Citizens', etc., Co.,[1] for instance, the court below entered judgment n. o. v. on the theory that plaintiff's deceased husband, who had been killed by contact with an electric wire, was guilty of contributory negligence in grasping the wire with his hand. It appeared, however, that defendant's counsel made an admission of record, at trial, stating, inter alia, that the wire adhered to the body of the deceased "in his unconscious act of falling, he having become engaged and entangled in said wire with his left hand and arm." The appellate court said that, considering all the evidence, including this admission, the court below had no right to draw the conclusion upon which it had based its judgment.

§ 191. **Another case in point, on admission of facts peculiarly within knowledge of person making the admission; applicable rule.**—On the other hand, one cannot undertake to admit a material matter, for the evident

[1] 267 Pa. 483.

purpose of saving his opponent from presenting further testimony on that particular point, and, by the language employed, so restrict his admission as to render it deceptive and nugatory; nor can he do so safely without stating all facts peculiarly within his knowledge, directly connected with the special matter he undertakes to admit. For, as evidenced by the recent decision of the Supreme Court of Pennsylvania in Gawronski v. McAdoo,[2] under such circumstances, the appellate tribunal will apply the rule that, the facts being peculiarly within the knowledge of the party making the admission, it must be assumed that, had he really made his admission as broad as it purported to be, the facts withheld would have sustained the other side.

§ 192. **Calling witnesses.**—After you have told the jury what you propose to prove, call your first witness; and there is room for generalship in deciding who this shall be.

§ 193. **Follow natural sequence of events; consider effect in choice of witnesses.**—My experience has taught me that ordinarily the best policy is to develop your case according to the natural sequence of events. In other words, it is generally best to marshall your facts so that the case is gradually built from its base up—ending in a climax. If, in doing this, you can distribute your strong witnesses in such a way that you score a point in the beginning and make a good impression at the end, so much the better; but, if by thus arranging your witnesses you have to break and confuse the natural sequence of events, avoid this method. Not only produce your evidence as a whole according to the above suggestion, but keep it in mind when examining each individual witness.

[2] 266 Pa. 449, 455.

§ 194. **Call client and principal witness to stand; explain absence of material witnesses.**—Remember that evidence consists of not only what is produced but very often of that which is not proved;[3] therefore, unless very good reasons exist for not doing so, always call to the stand your client and all other witnesses who have material knowledge of the facts in controversy. If you cannot do this, explain why, in the presence of the jury.

§ 195. **Calling for offers of proof; allowance of, within discretion of court.**—When you place a witness on the stand, counsel on the other side may inquire what you intend to prove; this is termed "calling for offer". It is done by stating to the court that you ask for an offer of proof. When such an offer is called for, the court usually allows it, although the matter is within the discretion of the trial judge.

§ 196. **Avoid including inadmissible facts, or all may be rejected.**—In making your offers be brief and careful not to include inadmissible facts, else the whole may be rejected; for the court is not required to pick the good from the bad, but may rule it all out.[4]

§ 197. **Avoid offers for effect.**—Do not indulge in the reprehensible practice of making offers, for their supposed effect on the jury, of facts which you know to be inadmissible, or which you are not prepared to prove; such a course does not benefit you in the long run, and it is a breach of the good faith which, under your oath, you owe the court.

§ 198. **Avoid hearsay or other incompetent evidence; it will not support a verdict.**—Do not depend upon hear-

[3] Frick v. Barbour, 64 Pa. 120, 121; Hall v. Vanderpool, 156 Pa. 152.

[4] Evans v. Evans, 155 Pa. 572; Greenough v. Small, 137 Pa. 128; Hunter v. Bremer, 256 Pa. 257, 267; see also Mundis v. Emig, 171 Pa. 417.

say or otherwise incompetent evidence; for, even if you manage to get such proof in, it will not support a verdict.[5]

§ 199. **Offer to be followed by other evidence.**—Sometimes it is necessary to state, when making your offer, that you expect to prove, by subsequent witnesses, other facts which show the relevancy of those contained in the offer.[6]

§ 200. **Offers for general or specific purpose and governing rules relating thereto.**—It is not necessary that the object of evidence tendered be stated by the party offering it, unless it is asked either by the opposite party or the court. Should the object be neither asked nor stated, and in no wise appear, if the evidence is rejected, its admissibility for any purpose is sufficient to impugn the decision of the court;[7] but, when the evidence is offered for a specific purpose, which is insufficient to warrant its admission, the trial court cannot be convicted of error in rejecting it, although the same proofs might be admissible for some other purpose not stated at the time of the offer.[8] That you may plainly understand this, I shall, in the course of what I am about to say, state the same rules again with more elaboration, in connection with objections to offers of evidence.

§ 201. **Objections to offers: general objections not good if any part of offer is proper; necessity for another objection if answer is irresponsive to or goes beyond offer; necessary to take exceptions if objections are overruled; asking question of witness is in nature of offer of proof.**

[5] Brown v. Kittanning, etc., Co., 259 Pa. 267, 271.

[6] Hill v. Truby, 117 Pa. 320; Piper v. White, 56 Pa. 90.

[7] Richardson v. Lessee of Stewart, 4 Bin. 198, 201-2; Benner v. Hauser, 11 S. & R. 352, 356.

[8] Page v. Simpson, 172 Pa. 288, 295; Beam v. Gardner, 18 Pa. Superior Ct. 245, 256.

—At this point, it may be well to explain that each question put to a witness on direct examination is in its nature just as much an offer of proof as is a formal tender of evidence. If an offer is made which in your opinion contains irrelevant matter, or if, for any reason, the witness on the stand is incompetent to prove the matters offered, object. State the reasons for your objection, because a general objection will not avail if any part of the offer is good. If your objection is overruled, see that an exception is duly noted by the stenographer. Then watch carefully that the witness's testimony is not irresponsive and that it does not go beyond the offer; if either of these things occur, be prompt to make another objection, and, if overruled, take an exception.

§ 202. **Objecting to evidence: how to make objection; don't object too often; let objection cover line of proof; see that evidence beyond line does not get in.**— Never object to evidence unless you feel it may do you harm; the habit of constantly objecting, so much indulged in by certain lawyers, is apt to lead the jury to believe the objector is trying to keep something from them, which they ought to know.[8a] In making your objections, face the court, and state them so plainly that the jury may understand and appreciate the reason and justice of your course. If

[8a] The mistaken practice of hasty objections is illustrated by a story told of D. M. Dalmas, late of the San Francisco bar. He was cross-examining a handwriting expert who stated he had lived in New York, Chicago, St. Louis and San Francisco. Mr. Delmas, having elicited from the witness how long he had lived in each city, then said: "Now, Mr. Handwriting Expert, please tell the jury just why you left St. Louis after three years residence there." "I object," shouted the prosecutor. "Objection sustained," ruled the judge. The jury brought in a verdict of not guilty, because it considered the handwriting expert a discredited witness. "Just why did this man leave St. Louis?" Mr. Dalmas was afterwards asked. He replied: "I haven't the slightest idea."

you make an objection to all questions along a given line of examination and the objection is overruled, state when taking your exception, it is intended to cover all proofs along that line; this will protect you on appeal and save you from the appearance of making too many objections, —but, when pursuing such course, be careful to see that evidence beyond the indicated line does not creep in, without new objections and exceptions being entered of record.

§ 203. **General and special objections defined.**—There are two kinds of objections—the general objection, which specifies no particular grounds, and the special objection, which particularizes the grounds upon which it rests. In some jurisdictions it is not accounted error to overrule a general objection, unless the evidence in question goes to the heart of the case and is manifestly inadmissible; but in Pennsylvania we have not gone quite so far as this. Back in 1852,[9] our Supreme Court stated, what is still its attitude, and that of most other such tribunals, namely: "General objections are to be discouraged", and "counsel may expect them to be entertained.....[on appeal] with some marks of dislike."

§ 204. **Defects of general and advantages of special objections; statement of rules governing on review.**—It is not only fair to the trial court that counsel should state their objections in terms, but, if you enter only a general objection, and any part of the evidence offered is pertinent or admissible, on any conceivable ground, its admission as a whole will not be error;[10] whereas, if you particularize your objection, and the ground stated is good, should the trial judge admit the testimony over your

[9] Blackstock v. Leidy, 19 Pa. 335, 339. See also section 263 below.

[10] Cullum v. Wagstaff, 48 Pa. 300, 303; Benner v. Hauser, 11 S. & R. 352, 356; Campbell v. Wells Bros. Co., 256 Pa. 446.

objections, his action in so doing will he held error even though, on appeal, your opponent may bring forth new grounds in support of the ruling, and the reviewing court may conceive the evidence in question might have been admissible for the purposes suggested in these new grounds;[11] for, under such circumstances, the appellate tribunal will say, counsel who tendered the proofs, having stated nothing to the contrary when the objection was made, it must be presumed the evidence was not offered for the other purpose, first suggested by him on appeal, but exclusively for the purpose called attention to by his opponent in the objection ruled upon at trial. Then again; if you particularize your objection, stating a reason which, according to the issues appearing as involved, is in itself good, and the objection is sustained, the ruling will be affirmed on appeal, even though your opponent may then call attention to grounds warranting the admission of the testimony, other than those suggested at the trial; for, under such circumstances, the appellate court will say: "The reasons now depended on should have been called to the attention of the trial judge when he made the ruling." The underlying principle is that the object for which a particular piece of evidence is submitted has to be kept steadily in view when considering a complaint as to its admission or rejection, and the complaint must be confined to that object; "the relevancy of the evidence....., had it been offered generally, need not be affirmed or denied, [because] a party cannot offer evidence for a specified purpose, and complain when it has been rejected that it was legitimate for another and distinct object."[11a]

[11] Deitrich v. Kettering, 212 Pa. 356, 359; Gaines v. Com., 50 Pa. 319, 326; Beam v. Gardner, 18 Pa. Superior Ct., 245, 256.

[11a] Gaines v. Com., 50 Pa. 319, 326; Pinter v. James Barker, Inc., 272 Pa. 541.

§ 205. **Example of defects of general and advantages of special objection.**—Suppose, for example, a witness is asked, "What did Smith say?" You object to the question because it seeks to elicit a declaration by a third party, made in the absence of your client, and that it is hearsay. Your opponent, instead of attempting to answer your grounds of objection, merely insists on his question; and the court sustains your position, rejecting the testimony. On appeal, counsel who asked the question cannot successfully urge that the declaration of Smith was part of the res gestæ, offered for the purpose of proving the transaction under investigation, and admissible on this ground, even though hearsay; for, if he urges that reason, he will be told he should have presented it to the court below, when his question was objected to, and, not having done so, it will be treated as waived. On the other hand, suppose your objection be merely a general one, and that, instead of being sustained, it is overruled. On appeal, if you urge that the declaration, admitted against your objection, was hearsay, and your opponent, for the first time, points out that it was part of the res gestæ, the appellate tribunal will uphold its admission.

§ 206. **Another example of defects of general and advantages of special objection.**—Take another example: A witness for plaintiff in a slander case has been charged, on cross-examination, with fabricating his testimony, because of a desire to injure the defendant, growing out of a certain transaction between the two, which occurred at a given date. On re-examination, counsel for plaintiff asks the witness what he said to a third party, concerning the matters to which he testified in chief, at a time anterior to the date mentioned on cross-examination. This is objected to as irrelevant and not tending to prove any issue

in the case; counsel for plaintiff allows the objection to be sustained without offering any specific reason in support of his question. Under these circumstances, he cannot on appeal successfully urge that the testimony sought to be elicited was admissible, because of the attempt to impeach the credibility of his witness on cross-examination, as a consonant statement, although he might have done so at the time of the objection in the court below—not having made the point then, it will be considered as waived.

§ 207. **Special objections: inherent advantages of.**—I trust these illustrations will make clear to you the profit one may derive from a special objection; for, so far as my researches have disclosed, while the disadvantage of both general and special objections are discussed at large in the books, the inherent advantages of the latter seem to have been overlooked.

§ 208. **Specific objections not stated will be considered waived.**—It is important, however, when one makes a special objection, that he be careful to include all justifiable reasons against the evidence offered, for those not stated will subsequently be considered waived;[12] therefore, when formulating specific objections, put them on adequate grounds, and make them all-inclusive.

§ 209. **Specific objections not stated will be treated by appellate court as waived; example stated.**—When evidence, objected to on inadequate grounds, is admitted, a court of review will not consider adequate grounds urged on appeal for the first time.[13] To illustrate, if you object that evidence is "irrelevant and immaterial", and your

[12] Messmore v. Morrison, 172 P. 300, 304; Roebling's Sons Co. v. American Amusement, etc., Co., 231 Pa. 261, 271, and cases there cited.

[13] Brown v. Kittanning Co., 259 Pa. 267, 270.

objection is overruled, you cannot urge, on appeal, that the kind of evidence offered was incompetent; because, as recently said in Glenn v. Trees Oil Company,[14] if the objection had been placed on the latter ground, it may be plaintiff could have offered other and competent proofs.

§ 210. **General and specific objections when treated as waived on review.**—From the examples given, and the principles enumerated, you may see that the whole trend of the law is to make counsel state their reasons, both for and against the admission of testimony, at the time it is objected to in the trial court; and that, when testimony is refused, because of an apparently good objection thereto, without any special grounds justifying its admission being called to the trial judge's attention, if these grounds are subsequently relied on, for the first time, in a court of appeals, the latter tribunal will say "the reasons for admission of the testimony, which are now urged, should have been brought to the attention of the court below at the time of its ruling, and, not having been made then, they must be considered as waived;" just as such tribunal will say the same thing to the party who enters a special objection, which, so far as the grounds stated in the court below are concerned, was properly overruled, if, on appeal, he attempts to assign new reasons in support of his objection.

§ 211. **Advice on proper course to pursue on argument of objections to offers.**—When your opponent is arguing a point of evidence arising out of an objection, if the court seems to incline your way, keep silent; don't interrupt or attempt to interject your own argument. Under such circumstances, silence saves time and shows a lack of anxiety, which indicates confidence in your case; and, moreover,

[14] 266 Pa. 74, 81.

in the course of your opponent's argument, you may learn much of his line of battle, as well as the court's attitude, that you can use to your own advantage.

§ 212. **Examining witnesses: put your witnesses at their ease; never scold**—In presenting your evidence, the aim is to make the jurors understand the facts as you claim them to be, and to convince them of the justice of your cause; the latter must be constantly remembered and brought forward. When examining your own witnesses, if they are embarrassed, try to put them at their ease, both by your general manner and the way you frame your questions. On the other hand, if a witness is pert, or so bold or forward as likely to make a bad impression on the jury, don't scold—in fact, never scold your own witness;—but repress him as far as possible by your personal demeanor.

§ 213. **Examining witnesses: use simple language; speak loud enough.**—Use simple, untechnical language, whenever it is possible, and, above all, speak plainly, keeping your voice pitched sufficiently high to be distinctly heard, not only by the witness, but by the judge and the jury. If you do this, the witnesses are apt to follow your lead and speak plainly themselves; otherwise, quite often, you will encounter difficulty in having the testimony heard by those for whose benefit it is being recited.

§ 214. **Avoid leading questions.**—Learn, as early as you can, how to frame questions without making them leading. Of course, in many formal matters, leading questions are unobjectionable; but if one does not know how to ask a question without suggesting the answer, he will be constantly in trouble; having your opponent's objections sustained becomes humiliating, and may well prejudice you in the eyes of the jury.

§ 215. **Make witnesses state facts, not conclusions.**—Do not permit your witness, in detailing a conversation, or in describing a situation, to state his conclusions concerning what was said, in the first instance, or existed, in the second; make him give the words of the conversation as nearly as possible, and, in describing the situation, have him state the facts from which he draws his conclusions in reference to the existing condition. For example, in Sorber v. Masters[15] the Pennsylvania Supreme Court ruled that a controlling fact had not been established in the court below, because the witness thereto, "in place of stating, in totidem verbis, what was said, insisted upon giving his version thereof." Again, in Smith v. Standard Steel Car Co.,[16] also recently decided, the same tribunal ruled that the court below erred in basing its judgment n.o.v. "on certain conclusions of fact, which appear in the testimony of some of the plaintiff's witnesses"; and it is stated at another place in the opinion[17] that, "if defendant desired to prove it was Smith's [the injured man's] duty to keep the quadrant [the thing which caused the injury] in repair, it should have shown affirmatively that orders to that effect had been given to Smith, instead of merely asking its foreman for his conclusion of fact as to whose duty it was to make such repairs."

§ 216. **Examining through interpreter, speak to the witness direct.**—If you are examining a foreign witness, who does not speak the English language, do not make the common mistake of addressing your questions to the interpreter. One constantly hears counsel examine such witnesses in this manner: "Mr. Interpreter, ask him what

[15] 264 Pa. 582, 587.
[16] 262 Pa. 550, 555-6.
[17] Page 557.

his name is." The proper way to put the question is,—addressing the witness and ignoring the interpreter,—"What is your name?" Then the interpreter is supposed to use the same words, translated into the native tongue of the witness. An interpreter, who knows his business, will give back the answer in like form. He will not say the witness states so and so, but will use the latter's words precisely as they are uttered. If this suggestion is adhered to, it will save much trouble where many foreign witnesses are called; and, at the present time, a large part of the business of the courts is taken up by such cases.

§ 217. **Indicating space by signs, etc.; using plans or models; how to do it for purpose of review.**—When a witness indicates anything by signs, as, for instance, distance, space, actions, etc., or when a witness points to an object by way of illustration, or, if a plan or model is used in the examination of the witnesses, always be sure an adequate explanation appears on the stenographer's notes, briefly disclosing what the witness did or indicated. Otherwise, as our Supreme Court has said in several recent cases, should the verdict go against you, on appeal you may be met by the rule that the reviewing tribunal will assume the undisclosed evidence was of a character to support the verdict; and, if the evidence in question be material, the application of this rule may mean the loss of your case in the appellate tribunal.[18] In order to make the record safe, the examining attorney simply describes, in as few words as possible, just what the witness indicates. For example, should the witness say the plaintiff was as far from a given object as from the witness stand to the door of the court-room, the examining attorney should say to the stenographer, "Indicating some twenty feet," or what-

[18] Bowser v. Citizens, etc., Co., 267 Pa. 483, and cases there cited.

ever the distance may be. If what he states is not right, the opposing attorney will correct him, and, if they cannot agree, the trial judge will direct the stenographer what to put in his notes. If a plan or model is being used, and is to be offered in evidence, it can be marked in some manner to show the points indicated, and the examining attorney should see that the notes show to what mark the witness points, with such brief descriptive words as may be necessary for a correct understanding of the testimony, on review.

§ 218. **Reading testimony taken by depositions; act the part of the absent witness.**—If possible, always produce your witnesses in person; but, if you have to read testimony, don't do it in a sing-song manner—put expression into your reading and act the part of the absent witness. I have heard lawyers read long depositions in such a way that all present—to quote the old form of narr.—were rendered "sick, sore, lame and disordered, and so continued for a long time, to-wit, from hence hitherto"; or until the jury, by its verdict, made the punishment fit the crime.

§ 219. **Request to strike out evidence not objected to, must be promptly made; asking for instructions to disregard testimony; governing rules on review.**—At times testimony gets in, which you want stricken out; so that it can neither be referred to by counsel at argument nor considered by the jury. This is the rule, recently formulated by our Supreme Court, applicable under such circumstances: When irrelevant or incompetent testimony is elicited by questions which are not objected to at the time they are put, and the trial is permitted to proceed with this objectionable testimony on the record, a refusal of a request to strike out, made after the witness has left

the stand, will not be reviewed. In such a case the only course is to ask that the jury be instructed to disregard the testimony, and a refusal of this request can be assigned for error; but, where an immediate objection is interposed, followed at once by a motion to strike out, or where, before the witness leaves the stand, the incompetency or irrelevancy of a material part of his testimony is clearly shown by himself, and a prompt motion to strike out the objectionable matter is entered, its refusal will be reviewed.[19] Our Supreme Court also said in a recent case[20] that "where counsel makes a practice of sitting silent and permitting improper questions to be put, taking his chances on the answers....., that fact will be considered against him on review."

§ 220. **Evidence admissible when offered but insufficient later; motion to strike out or for instructions to disregard proper; original objection not always sufficient on appeal.**—Where testimony, which is admissible when offered and accepted, is subsequently, before the close of the case, shown to be insufficient in law to sustain a finding on the points as to which it is relevant, the proper practice is to move to strike out the evidence, or if, for any reason, that procedure is not available, you should request the trial judge to instruct the jury in accordance with the requirements of the situation. If you objected to the evidence when offered, and had an exception noted when it was accepted, do not trust to these; for, under such circumstances, the proof having been admissible at the stage of the trial at which it was put in, your objection and exception will not serve you on appeal.[21] The rules dis-

[19] Forster v. Rogers Bros., 247 Pa. 54, 62; Kleppner v. Pittsburgh, etc., R. R., 247 Pa. 605; Keebler v. Land Title & Trust Co., 266 Pa. 440.

[20] Forster v. Rogers Bros., supra.

[21] Lynch v. Meyersdale Elec. L. Co., 268 Pa. 337.

cussed above, relevant to and governing the striking out of testimony, are worthy of especial notice, for they clear up points of practice as to which, until quite recently, there was considerable confusion in Pennsylvania.

§ 221. **Bill of exceptions: when judge objects to recording prejudicial matter write out what occurred, sign with witness, and have bill sealed; advice as to proper conduct and demeanor under such circumstances.**—If the trial judge makes objection to the stenographer's record showing the happening of any matter prejudicial to your client, or to an exception being noted—which is hard to imagine in these days—still keep your head and be respectful in your demeanor; simply write out what occurred, sign it, have someone present sign as a witness, and proceed under the statute[22] to compel the sealing of a bill. You will lose nothing by pursuing this course; for, on reflection, the judge will probably admire you for being firm and dignified in the enforcement of your rights.

§ 222. **Statute of Westminster: is the foundation of our practice as to exception; text of statute.**—There is no general act in Pennsylvania expressly giving the right to take exceptions in civil cases, but such right is founded on an old English statute, which was in force at the time of the establishment of our colonial government, namely, the Statute of Westminster, 13 Edw. I, c. 31, which provides that, "if one impleaded before any of the justices doth allege an exception, praying that the justices will allow it, which, if they will not allow, if he that alleged the exception do write the same exception, and require that the justices will put their seals for a witness, the

[22] 13 Edw. I, c. 31; see 3 Binney 606 and sec. 3010 Brewster's C. P. Practice.

justices shall do so; and if one will not, another of the company shall."[23]

§ 223. **Statute of Westminster: scope thereof; making up record thereon; exception essential; old practice discussed.**—A bill of exceptions under this statute is founded on an objection either to the competency of witnesses, the admissibility of evidence, the legal effect given thereto by the court, or on some other matter of law, in which either party is overruled by the court,[24] and the exception brings upon the record matters which would not otherwise appear therein.[25] This was essential, since, before the days of court reporters there was no official record taken of the testimony of witnesses or of other matters occuring in the course of a trial, and, if either party desired to have a ruling afterwards reviewed, it was necessary to make a written memorandum thereof, and have it approved by the trial judge while fresh in the minds of the court and counsel, which was subsequently made the basis of a formal bill of exception; and this enabled the matter complained of to be brought up before an appellate court for review.

§ 224. **Pennsylvania Practice Acts of 1860 and 1874, relating to exceptions in criminal cases.**—In criminal cases there was no common law right to a bill of exceptions,[26] nor was such right given by any English statute prior to our independence.[27] By a Pennsylvania act in 1860,[28] it was provided that "upon the trial of any indictment for murder or voluntary manslaughter it shall and may be lawful for the defendant or defendants to except

[23] See note to Drexel v. Man, 6 W. & S. 386, 393, 396.
[24] Wheeler v. Winn, 53 Pa. 122.
[25] Janney v. Howard, 150 Pa. 339.
[26] Schoeppe v. Com., 65 Pa. 51.
[27] Middleton v. Com., 2 Watts, 285.
[28] Act of March 31, 1860, P. L. 439, 444, sec. 57, 2 Purd. 1463.

to any decision of the court upon any point of evidence or law, which exception shall be noted by the court, and filed of record as in civil cases." The right to take exceptions was subsequently, in 1874, extended to all criminal cases.[29]

§ 225. **Act of May 24, 1887; stenographer to keep notes of trial; exception allowed by court noted by stenographer.**—The legislation authorizing the appointment of official stenographers[30] changed the mode of making up a bill of exceptions and eliminated most of the formalities previously required. This act made it the duty of the court stenographer to take complete notes of the proceedings, and to transcribe and file a typewritten copy; thereunder exceptions, taken by either side, were noted by the stenographer only on direction of the trial judge, and such action was equivalent to the formal sealing of a bill of exceptions; but, to become a part of the record, the transcript of the stenographer's notes had to be certified by him, approved by the trial judge, and filed by the latter's express direction. When this course was pursued, the notes became a complete bill as to every matter to which an exception was in fact asked and allowed during the trial.[31]

§ 226. **Act May 11, 1911; need for express allowance of exception eliminated.**—The need for an express allowance of an exception was eliminated by the Act of May 11, 1911,[32] which provides that "it shall not be necessary on the trial of any case, civil or criminal, in any court of record in this commonwealth, for the trial judge to allow an exception to any ruling of his, but, upon request of

[29] Act of May 19, 1874, P. L. 219, 2 Purd. 1464; Haines v. Com., 99 Pa. 410; Hutchison v. Com., 82 Pa. 472.

[30] See Act of May 24, 1887, P. L. 199, 4 Purd. 4463 et seq.

[31] Connell v. O'Neil, 154 Pa. 582; Rosenthal v. Ehrlicher, 154 Pa. 396.

[32] P. L. 279.

counsel, made immediately succeeding such ruling, the official stenographer shall note such exception, and it shall thereafter have all the effect of an exception duly written out, signed and sealed by the trial judge."

§ 227. **Act of June 2, 1913; exception need not even be requested by counsel, but counsel must object to ruling and see that an exception is noted in presence of court, or acquiescence will be assumed.**—The Act of May 11, 1911, was amended by the Act of June 2, 1913, which eliminates therefrom the words "upon request by counsel made." But the only purpose which an exception can have, under our present practice, is "to give formal notice that the exceptant does not acquiesce in the ruling of the court and intends to claim the benefit of the objection which the court has overruled." Therefore, one, dissatisfied with a ruling on evidence, must in some manner indicate such dissatisfaction, otherwise it will be understood that he acquiesces in the ruling. If the record fails to show any expression of dissatisfaction, acquiescence will necessarily be assumed; but when dissatisfied counsel need do no more than to state that he excepts to the ruling in question. Whereupon if the court does not change its ruling, the stenographer will immediately, without a request so to do, note an exception.

§ 228. **Act of June 2, 1913: statute construed; it merely dispenses with necessity of requesting stenographer to note exception.**—I do not find any case in which the provision of the Act of 1913, now under discussion, is construed; but, in Fisher v. Leader Publishing Co.,[33] Justice POTTER, speaking for our Supreme Court, said the provision in the Act of 1911, which is amended by the Act of

[32a] P. L. 421.

[33] 239 Pa. 200, 204.

1913, "merely" dispensed with the requirements that exceptions should be allowed by the court; that is to say, in other respects the practice concerning exceptions remained as it was immediately prior to the Act of 1911. In view of this construction, to my mind the only change accomplished by the Act of 1913 is to "merely dispense with", or eliminate, the necessity of expressly requesting the stenographer to note an exception. In other words, under this latter Act, whenever counsel indicates, by stating an exception, that he does not acquiesce in a ruling of the presiding judge, announced during the course of the trial, the stenographer must immediately note the exception on the record; but, if no such indication is made, both the court and the stenographer may assume, as theretofore, that the ruling is acquiesced in by all concerned, and govern themselves accordingly.

§ 229. **Bill of exception may still be allowed; old practice to compel judge to seal bill outlined.**—A bill of exception may still be allowed, if occasion requires it.[34] The rule, prior to the appointment of court stenographers, demanded that the bill be presented and sealed during trial, but, in practice, the exceptions were reduced to writing, noted at the trial, and the bill proper was formally drawn and presented for sealing within a reasonable period thereafter, unless the time was fixed by a rule of court;[35] and, under the old practice, if a trial judge, for any reason, refused to seal a bill, the remedy was by petition to the Supreme Court, setting forth the circumstances and asking that the judge be commanded to affix his seal.[36]

[34] Janney v. Howard, 150 Pa. 339; Connell v. O'Neil, 154 Pa. 582; Fisher v. Leader Pub. Co., 239 Pa. 200, 204.

[35] Morris v. Buckley, 8 S. & R. 211; Stewart v. Huntington Bank, 11 S. & R. 267; Meese v. Levis, 13 Pa. 384.

[36] Drexel v. Man, 6 W. & S. 386; Haines v. Com., 99 Pa. 410; Reichenbach v. Ruddach, 121 Pa. 18; Com. v. Arnold, 161 Pa. 320.

LECTURE VIII.

CROSS-EXAMINATION AND REBUTTAL: SUBMITTING EXHIBITS AND WRITTEN STATEMENTS TO JURY.

Cross-examination:
- Proper office of: (§ 230)
  - To supply omissions; (§ 230)
  - To expose falsities. (§ 230)
- Avoid aimless cross-examination; (§ 231)
- Adverse testimony often strengthened by repetition; (§§ 231-2)
- Suggestions as to permissible repetition:
  - Manner of such examination. (§ 232)
  - Illustration, Lincoln in a murder case. (§ 233)
- Bad methods:
  - Constantly interrupting witness; (§ 234)
  - Fiercely attacking witness,
    - Arouses sympathy of jury. (§ 234)
- Often omit cross-examination altogether. (§ 235)
- Instance of disconcerting cross-examination. (§ 236)
- Attack on unexpected lines:
  - Beecher Case; (§ 237)
  - Commonwealth v. Brown. (§§ 238-242)
- Watch for defects:
  - Such as inferences, rather than facts; (§ 243)
  - Bias of relationship, etc. (§ 243)
  - Improbable story, when to let it alone. (§ 244)
  - Honest mistake, how to treat witness. (§ 245)
  - Answer favorable to you,
    - Don't call witness's attention to it. (§ 246)
  - Critical points: (§ 246)
    - Avoid questions thereon unless quite sure of answer; (§ 246)
  - Ridicule:
    - Story to illustrate its use. (§ 247)
    - Another example. (§ 248)
- Experts:
  - How to examine them; (§ 249)
    - Example. (§ 250)

Trapping an expert:
Example; (§ 251)
Another example. (§ 252)
Defense:
Not permissible to interject it on cross-examination of plaintiff's witnesses; (§ 253)
Nor wise; (§ 253)
Exception to this rule:
Plaintiff himself may be cross-examined broadly; (§ 253)
Evidence improperly elicited:
Will not be considered on motion for nonsuit; (§ 253)
Will not be considered on motion for judgment n. o. v.; (§ 253)
If taken under objection, exception may cause reversal. (§ 253)
May be treated as coming from party's own witness. (§ 254)
May be taken as true, if making against examiner and not denied or qualified; (§ 254a)
New matter that is admissible:
Bias, interest or relationship may be shown; (§ 255)
Knowledge, lack of integrity, or inaccuracy of witness; (§ 255)
Part of conversation not given in chief; (§ 255)
Res gestae, may be inquired into. (§ 255)
Rebuttal:
Brief explanatory speech allowed, (§ 256)
In discretion of court. (§ 256)
Evidence belonging to case-in-chief not allowed in rebuttal, (§ 257)
In discretion of court: (§ 257)
Seldom disturbed on appeal. (§ 257)
Prima facie case-in-chief may be substantiated by rebuttal (§ 258)
Submitting exhibits to jury:
Method of formal offer; (§ 259)
None but those formally received can be be submitted; (§§ 260, 263)
Method pursued when only part of writing is in evidence. (§ 260)
Matters which must appear of record when documentary evidence is offered. (§ 261)
Submitting exhibits, matter of discretion for court, (§ 261)
Subject to review. (§ 261)
Reversed when prejudicial to party. (§ 262)
Statement showing mathematical calculations,
Submitted in discretion of court, (§ 263)
Subject to special objection and exception. (§ 263)

§ 230. **Cross-examination: proper office of, to supply omissions and expose falsities.**—No one can tell you, except in a very general way, how to cross-examine; but a few suggestions, and some illustrations, may tend to put your minds on the right track, and to start you thinking on a most fascinating and important subject. The office of cross-examination is not to give lawyers a chance to show their skill, but to demonstrate which side is presenting the most probable story, or is mistaken, albeit perhaps honestly so; to ascertain which has enjoyed the better opportunity of knowing the truth, or best took advantage of its opportunities in that regard; and, where untruths have been spoken, to make them appear. In short, the real design of cross-examination is to supply omissions and expose falsities in the evidence-in-chief,—thus to elicit and make plain the whole truth concerning the matters under investigation.

§ 231. **Avoid aimless cross-examination; adverse testimony is often strengthened by repetition.**—When a witness is turned over to you, after direct examination, the first things to ask yourself are: Shall I cross-examine him at all?[1] Has he really made any adverse impressions on the jury, or testified to anything which materially hurts my client's cause? Has he omitted anything, consistent with his testimony, which will make for my client, and which I can probably extract from him? Your mental answers to these questions, and others of the same character, should determine whether or not you will cross-examine; for sometimes it is better to forego the temptation of cross-examination, as I shall point out. One ought never to cross-examine unless he has an object in view—there is nothing worse than an aimless examination. Above

[1] See section 235, below.

all, do not ask a witness to repeat evidence, damaging to your case, unless you know how to weaken it; for he will often strengthen his testimony on repetition. It is far better to attack such testimony in your speech by calling attention to evidence produced on your side contradicting it.

§ 232. **Suggestions as to when repetition is admissible, and as to manner of examination.**—The average cross-examiner makes the mistake of taking every witness over the whole field of his evidence-in-chief; thus giving him the opportunity to reassert all that he said before, and often to strengthen it. While occasions may arise when it is good policy to have the witness reiterate what he said in chief, before you attack the story by further cross-examination, yet, as a rule, this useless repetition is insisted upon without any real purpose in view. Some wag once said that cross-examination consisted in asking all the questions-in-chief again but in a cross manner. When the way in which a witness tells his story indicates a design to falsify, it may pay to make him repeat it. In such instances ask him to repeat the vital parts of his testimony, and, probably, he will do so in pretty much the same words as originally used, indicating that it has been studied. Then ask a question that will bring him to the middle of the story, then quickly jump back to the beginning, or the end, making him talk as much as possible in reply to each question; if he is speaking by rote, that method is apt to prove so confusing it will be impossible for him to maintain consistency. It is also well to centre such a witness's attention on other facts involved in the case, but disassociated with the details of his story. He will likely be unprepared for this line of examination, and the falsity of his testimony can soon be made apparent.

§ 233. **Illustration, Lincoln in a murder case.**—A story is told about a clever cross-examination conducted by Abraham Lincoln, when a very young lawyer, wherein he pursued the method of making the witness reiterate his testimony; but this was done with a purpose in view. Lincoln had been retained to defend one Armstrong (son of Jack Armstrong, who, as the story goes, had been given a thorough thrashing by Lincoln when a youth—the fight resulting in a lifelong friendship), charged with shooting a man, at a campmeeting, on the 9th of August. A witness swore that the quarrel occurred just after dark and that he knew the parties, saw the shot fired by Armstrong, saw him run away, and had picked up the murdered man just before he died; all this was stated with an elaboration of detail. When Lincoln came to cross-examine, he took the witness over all the important details previously testified to, making him tell how he stood about twenty feet away from the scene of the crime, in a wood, with the trees in thick foliage all around, and how, under these circumstances, he distinctly saw the shot fired from a pistol in the hands of the accused—although the nearest artificial lights were three-quarters of a mile away, at the camp meeting. Then Lincoln asked "Did either one of the men have a light?" The witness answered, "No". Lincoln again inquired, "Did you have a candle with you?" To this the witness testily replied, "No, what would I want a candle for?" Then Lincoln said, "How could you see the shooting?" To which the witness, as Lincoln knew he must, in order to explain the possibility of seeing at night in the wood, responded "I saw it by the light of the moon." Lincoln at once produced a well-known almanac from his coat pocket, opened it slowly, and read with careful deliberation that, on the night in question, the moon was unseen, and did not rise until one o'clock the next morn-

ing. The story is that the witness completely broke down, and subsequently confessed he himself had committed the murder.

§ 234. **Bad methods: constantly interrupting witness; fiercely attacking witness, arouses sympathy of jury.**— Many attorneys have a bad habit of constantly interrupting the person they are cross-examining, when his answers seem to make against them; this is most annoying not only to the witness, but, as I have often observed, to intelligent jurors. I recall one case where a juror arose in the box and protested that he wanted to hear what the witness had to say, and that counsel's method of cross-examination prevented this. In another instance, an Italian was being cross-examined in my court by an attorney who pursued this objectionable method. After the witness had been interrupted, in the course of his answers, several times, and the cross-examiner again broke in upon him, he stopped, and remarked in a perfectly respectful way, "If you will shut your damned mouth, I will try and tell you what you asked me." That man meant no disrespect to the court or to anyone else; he was simply exercising the English he had learned in South Philadelphia. Some lawyers think it necessary always to fiercely attack on cross-examination; this is a bad method, for the jurors know that they, themselves, some day may be in the position of the person attacked and their sympathies will naturally go out to him. Nor does it pay to argue with one under cross-examination; if you get the better of the argument, the jury will naturally think it is because of your superior position, but, if the witness wins, the defeat will tell against you.

§ 235. **Often omit cross-examination altogether.**—In the great majority of cases, the best results can be achieved

by passing most of your opponent's witnesses without cross-examination, or at least without any extended examination of that character. Mr. John G. Johnson, who was a master of the art, usually pursued this course. I have seen him pass three out of four of his opponent's witnesses without any examination whatever.

§ 236. **Instance of disconcerting cross-examination.**—Ex-Judge GRAY, of the United States Circuit Court for this circuit, tells a good story on George V. Massey, who, for many years, was chief counsel of the Pennsylvania Railroad. When a young practitioner, Mr. Massey defended a man charged with statutory mayhem. A witness for the Commonwealth swore that the accused had bitten off an ear of the prosecutor. The alleged offense happened during a fight in a lumber camp. According to the testimony in chief, the victim had fallen during a struggle with defendant. Mr. Massey, on cross-examination, made the witness admit there were sharp implements on the ground where the struggle took place. He then inquired whether it would not have been possible for a man to have his ear cut off by falling on one of these implements. The response admitted that such an occurrence was quite within the range of possibility; whereupon the cross-examiner asked if this was the fact, why the witness had the audacity to assert that defendant had bitten off the prosecutor's ear? The answer was most disconcerting; for the witness replied, "I might have thought the ear had been cut off if I hadn't seen your client spit it out of his mouth." This is an example of cross-examination not proving helpful.

§ 237. **Attack on unexpected lines; the Beecher Case.**—Quite often a most effective cross-examination may be had by making no direct reference to the testimony of the

witness, but attacking him along entirely different lines. An example of this occurred in the celebrated Tilton-Beecher Case; there Mr. Beecher was accused of intimacy with Tilton's wife. In place of taking the defendant over the various details of his denial, and cross-examining him upon the facts to which he had testified, counsel for plaintiff read a passage from one of Beecher's sermons, in which the latter said that, should a person commit a great sin, the disclosure of which would probably cause misery to others, the transgressor could not justifiably confess his fault to relieve his own conscience. After quoting this passage, the cross-examiner, looking steadily at the witness, put the single question, "Mr. Beecher, do you still consider that sound doctrine?" to which Mr. Beecher replied, "I do." You will see the probable effect of that answer, and the use to which it could be put by counsel when arguing the case before the jury.

§ 238. **Attack on unexpected line: Com. v. Brown; embracery.**—About the best cross-examination I ever had the pleasure of hearing was conducted by John Weaver, then District Attorney of Philadelphia County, in Com. v. Brown; to which case I have referred before. During the empanelling of the jury, one John Ihrig, while being examined on his voir dire, admitted he had been approached by a man named Bodenstein, under circumstances which constituted the crime of embracery. At the conclusion of Ihrig's testimony, a bench-warrant was issued for Bodenstein. Subsequently, Bodenstein gave testimony, implicating a man named Simpler as the real author of the alleged embracery; whereupon a warrant issued for him. All of this occurred in the presence of defendants, and much of it before the jury being empanelled.

§ 239. **Com. v. Brown: tampering with jury.**—As you no doubt know, any attempt to tamper with a juror, or one about to occupy that position, where a party to the case is implicated, may be offered in evidence, on the theory that such an attempt tends to prove the party's knowledge that his cause is an unjust one which requires improper support. It happened, on the very evening of the day when the bench-warrant went out for Simpler, that Mr. Weaver boarded a Girard Avenue trolley car; taking his position on the rear platform, he observed one of the defendants, sitting in the front part of the car, talking to another man. This defendant looked up, and seeing the District Attorney, forthwith left the car. When the defendant in question took the stand in his own behalf, Mr. Weaver started to cross-examine him along the lines of his direct examination; then, suddenly, much to my surprise (I was his junior in the trial of the case), and to the evident amazement of the witness, he put this question: "You know Mr. Simpler?" The witness hesitated. Mr. Weaver looked at him and said nothing; finally, the witness said, "Yes, sir."

§ 240. **Com. v. Brown continued: witness admitted being with party accused.**—Then the witness admitted that he was present in the court-room when the bench-warrant went out for Simpler, and that he knew the latter had been accused under oath of an attempt to corrupt the jury. The cross-examiner immediately asked, "You were with Simpler on Tuesday night, were you not?" (that being the night of the day when the bench-warrant issued.) The witness hesitated and answered equivocally, as those caught in a trap on cross-examination usually do, "I *saw* him on Tuesday night." The cross-examination then proceeded:

"Q. You were with him on Tuesday night?

"A. Yes sir; I was with him on Tuesday night. [This was said with evident embarrassment.]

"Q. Where were you in company with Mr. Simpler on that night?

"A. First at my house.

"Q. And then?

"A. Just wait a moment please.

"Q. Does it take you so long to find that out?

"A. I have a right to think to be correct. [You can imagine the dramatic effect this hesitation had upon the jury.]"

§ 241. **Com. v. Brown continued: witness surprised by line of examination.**—Then, most reluctantly, the witness testified that Simpler had stopped at his house on the evening in question; and he hesitatingly admitted that he had told him about the bench-warrant. He said that Simpler left his house, and, subsequently he met him on the street, when they together took the trolley. From this point the cross-examination continued:

"Q. [By the District Attorney] I happened to be on that car, didn't I?

"A. Yes, sir.

"Q. And I *did not know* your friend was Mr. Simpler.

"A. You *didn't know it!* [This was said with evident astonishment, which had its effect upon the jury.]" From that time on, the cross-examiner had the man at his mercy; for the witness, not having been asked in the first part of the cross-examination anything about the trolley-car incident, probably comforted himself with the thought that Mr. Weaver either had not noticed him on the car or did not know who his companion was. Later, when the witness found to the contrary, he painfully re-adjusted

himself; and no doubt proceeded on the theory that the District Attorney was all the while aware Simpler was his companion. When this theory was suddenly toppled over, he was uncertain what hypothesis to adopt; and that was the precise mental situation Mr. Weaver intended to create when he surprised the witness by the statement that he did not actually know it was Simpler (which was so) till that fact was admitted on the stand. Having got the defendant into this confused mental state, the District Attorney asked him why he left the car, instead of continuing on with Simpler; and, to the evident amusement of the jury, the witness gave the lame excuse that he needed a little exercise. The cross-examiner then led him on to say that notwithstanding the fact that he knew a bench-warrant was out for Simpler, charging the latter with embracery, and that he, the defendant, had been with him on the evening when the warrant issued, he had neither informed any one concerning the meeting or that he knew of Simpler's whereabouts; finally, the defendant admitted that Simpler was one of the many persons whom he had expected to come to court to testify to his good character.

§ 242. **Com. v. Brown: comment upon; psychological effect of surprising dishonest witness.**—This cross-examination is a very good example of the psychological effect which can be obtained through surprising a dishonest witness, by suddenly departing from your line of questions and adopting a cross-examination which you feel he may be afraid of. That course, in this instance, not only completely destroyed the witness in the eyes of the jury, but it also went far toward destroying the effect of the testimony of his character witnesses, upon whom he largely depended to sustain his defense. For, as you can see, the jurors might well reason, "Well, if defendant was going

to call Simpler to show character, how do we know the rest of his witnesses are not of the same type?" or they might justifiably say to themselves, "No matter what these character witnesses may think about the defendant, they cannot convince us that one found in close companionship with a man who had made attempts to corrupt this jury, is of good character," which shows the cleverness of bringing in, by a single question, the subject of the character witnesses and connecting them with Simpler. Here, while the cross-examiner shot more or less in the dark, he knew exactly what he wanted to do; and he did it. Mr. Weaver told me, after the trial, that the thought of Simpler being defendant's companion had not occurred to him till the cross-examination was under way; that is why I say the cross-examiner shot in the dark (as, on such occasions, one sometimes must); but, as you no doubt observed, he felt his way and took no undue chances. In other words, had the defendant, at the first question, denied being with Simpler on the night the district attorney referred to, the cross-examination might have stopped there and then, without the Commonwealth's case suffering from the inquiry.

§ 243. **Watch for defects, inferences rather than facts, bias of witness, relationship, etc.**—Keep your eyes on the witness, and not only listen to what he utters, but observe how he says it. Watch during the direct examination for weak points in his narrative—either for likely untruths, the withholding of the whole truth, a misstatement, indications of lack of means of knowledge, faulty recollection, or testifying to inferences rather than facts, for defects in manner, or anything else which strikes you as opening up a line of attack. If you think the witness is withholding testimony which he could give if he chose, make an effort

to demonstrate this, and the jury will probably draw the inference that, had he spoken, it would have been in your favor. If, because of the witness's relationship to the opposite party, it is reasonable to suppose he has a bias, bring out that relationship, so it will appear to the jury. In fact, always try to develop, on a cross-examination, any motive which apparently baises the person under examination in favor of the other side. If he appears to be testifying to things of which he has scanty knowledge, bring out that fact; or, if he apparently had means of knowledge, but lacks the intelligence to observe facts correctly, show this to the jury. Most witnesses, at least in certain parts of their testimony, entangle facts with their own beliefs, and state inferences without sufficient grounds to justify them; if the one you are cross-examining has done this, it should not be difficult to demonstrate it.

§ 244. **Improbable story, when to let it alone.**—If you feel the story told is prima facie improbable, yet doubt your power to demonstrate this on cross-examination, don't attempt it; for, should you fail, as you probably will, the jury are apt to reason that, since the cross-examination did not shake the witness, what he said may be true after all, even though it sounded improbable when testified to in chief. Under such circumstances, you had better demonstrate, by your manner of dismissing the witness, that you consider his testimony so improbable you entertain no fear the jury will believe it; later on, you can so state in your argument.

§ 245. **Honest mistake: how to treat witness.**—If you feel the witness has made an honest mistake in his testimony which hurts your cause, try to show him that you are merely seeking for the truth; and if, during cross-examination, you can point out and induce him to own one such

mistake, you are apt to shake the confidence of the witness and cause him to acknowledge others.

§ 246. **Favorable answer; don't call witness's attention to it; avoid questions on critical points unless reasonably sure of answer.**—When you get a really favorable answer, either let the witness go or pass to some other line of inquiry. Don't call the witness's attention to the fact that you consider he has testified to something in your favor; call attention to that fact in your speech, and remember that the jury has probably understood the effect of the testimony as well as yourself. Above all, don't gamble your client's case away by asking a critical question without being pretty confident of the answer that is likely to be made.

§ 247. **Ridicule: story to illustrate its use.**—There are rare occasions when a cross-examination which heaps ridicule upon one who has testified to an improbable story, pays. I recall a case tried before me, where the plaintiff swore he had tendered a transfer ticket to a conductor of the Rapid Transit Company, who refused it and violently ejected him from the car; for which he claimed damages. On cross-examination, the attorney for defendant drew the witness on from one exaggeration to another. He induced him, by a series of leading and suggestive questions, to state that the conductor had knocked him down and dragged him from the car. At this point I said the cross-examination had gone far enough; when defendant's attorney gravely stated, if I would permit two more questions, he would guarantee to have the witness testify that, after the conductor had dragged him out by one leg, he had swung him three times around his head and thrown him bodily over the top of the car. I declined to permit any further examination and counsel waved his victim

aside; the attorney for plaintiff immediately closed and counsel for defendant stated he would offer no testimony. A verdict for defendant showed the cross-examination had been effective with the jury.

§ 248. **Ridicule: another story.**—In the story just told, the person involved brought derision upon himself by gross exaggeration, and, under such circumstances, it is often possible to destroy the effect of testimony by ridicule. There is a story of a pert witness, who sought to protect himself against the cross-examiner, by stating that he had not come into court to be played with. This was at a time when Anna Held, the well known actress, was singing a popular ditty entitled "Oh won't you come and play with me?" so the witness, no doubt hoping to create a little amusement at the expense of the cross-examiner, added, "Do you take me for Anna Held?" Quick as a flash the attorney replied, "No, Ananias would be nearer to it." As you can imagine, from then on the cross-examiner had no further pertness from that source; and this bit of ridicule did his cause no harm.

§ 249. **Experts: how to examine.**—Unless counsel has carefully studied the subject on which an expert testifies, it rarely pays to cross-examine such a witness; but, if you are satisfied of the honesty of the expert, you may be able, on cross-examination, to bring out some facts, not stated in chief, that make in favor of your client, and which will tend to lessen the weight of the testimony against you. Such a course should be attempted, however, only when the person in question is plainly honest, although you may think mistaken, in his opinions or the application of his views to the case, also only when you know the subject and what you are after; otherwise you may do more harm than good. If you decide to cross-

examine an expert, unless you have the knowledge to demonstrate that he is wrong in his opinions, or in their application, it is usually best to direct your examination along lines that the witness has not anticipated, and to draw some admissions from him which you can use, as an attack, in your argument.

§ 250. **Experts: example of cross-examination of.**—A good illustration of the wisdom of dismissing, without cross-examination, an honest expert, with whom you none the less disagree, occurred in our local courts a few years ago. The late Dr. John H. Musser, who was a great physician, but a most modest person, and short in stature, appeared as an expert for the plaintiff in a personal injury case. Counsel for the injured man had the expert state his really unusual qualifications, and then the doctor gave his testimony in support of plaintiff's claim, describing the latter's ailments and expressing his opinion as to the probability of their permanency. At the close of the examination in chief, the attorney for the defendant corporation (who, by the way, was D. J. Smyth, our present City Solicitor), looked at the witness with a smile, and, with a deprecatory wave of the hand, announced no examination. In his speech to the jury, reviewing the evidence, Mr. Smyth, when he reached Dr. Musser's testimony, said "And now we come to Dr. Musser, little Johnny Musser. We'll let it go at that." The small verdict for plaintiff, which followed, rather indicated the wisdom of the course pursued; for the strong probability is that (as good a court lawyer as Mr. Smyth happens to be) he would, by cross-examination in that particular case, have merely impressed on the jury Dr. Musser's honest opinion as to the plaintiff's injuries, whereas, by doing as he did, the whole effect of the doctor's testimony was minimized.

§ 251. **Experts: trapping such a witness.**—Of course, where an expert states things or opinions which, acording to your side of the case are wrong, and you feel it within your power to break down either his testimony or credibility, then it is both your duty and the part of wisdom to cross-examine. A good example of an effective cross-examination in such a case is related by Francis R. Wellman, of the New York bar, in his excellent book on the Art of Cross-Examination:[1a] A well known doctor, who served as a medical expert for several corporations, was called by a railroad to prove that a man, claiming large damages for alleged permanent injury to his spine, had not been hurt to the extent plaintiff's doctors sought to prove. After defendant's expert had stated his opinion, that all the symptoms in the case justified but one conclusion, namely, the one arrived at and testified to by him, the cross-examining attorney asked whether he was able to give the name of any medical authority which sustained that view. The witness said, "Oh, yes, Dr. Ericson agrees with me." Counsel then asked, "Who is Dr. Ericson?" To this the expert, with a patronizing smile, replied that Ericson was the best known authority who had recently written on diseases of the spine. Counsel appeared surprised, and asked about the book; also how a doctor, as busy as the witness, possibly had time to read such a work. He answered the question in a superior way, "Well, Mr..., to tell you the truth, I have often heard of you, and I had suspected you would ask me some such foolish question, so this morning, before starting for court, I took down the book from my library, and found that it entirely agreed with my diagnosis in this case;" at which the audience laughed. Thereupon, the examining attorney

[1a] Page 77.

reached under the counsel table and drew forth a copy of the book in question; walking deliberately to the witness-stand, he put the book down, with the request that the doctor should open it and show where the authority sustained his views. As counsel, who evidently had familiarized himself with the work, correctly surmised, the expert had not examined the book at all; he became embarrassed, said it was impossible, on short notice, to find anything in such a thick volume. Of course, the cross-examiner reminded him he had found it that very morning, therefore must be familiar with about where it was. He said, "You may have all the time in the world, Doctor; just take your ease and find it." The witness fumbled through the book with ill success and finally left the stand, totally discredited.

§ 252. **Experts: another example of trapping.**—If you are convinced that a witness is deliberately falsifying his testimony, you are justified in trapping him into an exposure of his dishonesty. A friend of mine from the west told me of a cross-examination of that sort, by a young lawyer, which brought him fame and fortune. It is somewhat along the line of the story just related, but sufficiently different to warrant its recital at this point. A medical expert was on the stand for an injured plaintiff. During the course of the cross-examination, the attorney for the defendant took a large book from his bag, and placing the volume on the table before him apparently read a passage from it, which went far toward sustaining the testimony given by plaintiff's expert; he then looked up and said, "Doctor, you are familiar with the work of the very eminent Dr.....[giving an assumed name]?" to which the witness replied, "Certainly I am!" The cross-examiner then asked, "How do you account for the passage which

I have just read?" Whereupon the expert entered into a long explanation showing that the passage, when properly understood, supported his testimony, which; of course, it did. At the conclusion of the explanation, the cross-examiner passed the volume to the witness and asked him to read it aloud. The doctor was amazed to find that, instead of being the book mentioned, it was a legal publication on cross-examination. The attorney for defendant, turning to the trial judge, then stated, if the court desired, he was prepared to offer evidence to the effect that there was no such medical book as mentioned by him; but the judge said it was quite unnecessary, for he believed the jury understood,—and the verdict showed they did.

§ 253. **Defense: neither permissible nor wise to interject it on cross-examination of plaintiff's witnesses; exception to this rule, plaintiff himself may be broadly examined; evidence improperly elicited not considered on motion for nonsuit or for judgment n. o. v., and, if taken under objection and exception, may cause reversal on appeal.**—It seldom pays to endeavor to interject your defense on the cross-examination of plaintiff's witnesses, and, as a general rule, this is not allowed, unless the plaintiff himself is on the stand and has failed to tell the whole story; under such circumstances, the witness being a party to the cause, may be cross-examined on any feature of the case. In other words, those engaged in the litigation cannot limit cross-examination by restricting their story in chief;[2] but those who are not parties to the cause may be cross-examined only on matters connected with their testimony-in-chief,[2a] and evidence improperly elicited

[2] Albrecht v. Erie City, 265 Pa. 453, 455 and cases cited; Bowser v. Citizens Co. 267 Pa. 483.

[2a] Stybr v. Walter, 272 Pa. 202.

will not be considered, either on a motion for a nonsuit or judgment n. o. v.; moreover, if properly objected to, the eliciting of such evidence may cause a reversal on appeal.[3]

§ 254. **Defense: improperly elicited defense will be treated in law as coming from party's own witness.**—In Smith v. Standard Steel Car Co.,[4] our Supreme Court recently said that, where a defendant is allowed to cross-examine a witness of plaintiff improperly, and in this way proves matter constituting a defense to action, the testimony thus elicited will be considered as though the witness had been called and examined in chief by defendant, itself, rather than plaintiff.

§ 254a. **Facts elicited on cross-examination, and not denied or qualified, may be taken as true.**—When one brings out on cross-examination facts which make against him, these facts, if no evidence is introduced to contradict or qualify them, may be taken as true, and will support a finding against the cross-examining party.[4a]

§ 255. **New matter: may be elicited which indicates bias, relationship, knowledge, interest or inaccuracy of witness; part of a conversation not given in chief and res gestae may be inquired into.**—It is the rule, however, that questions which tend to show bias, interest, or relation of the witness to the party calling him, or which go to test his knowledge, integrity or accuracy of statement, may always be asked on cross-examination; or, if one gives only part of a conversation in his testimony-in-

[3] Leedom v. Leedom, 160 Pa. 273; Denniston v. Phila. Co., 161 Pa. 41; Sullivan v. N. Y. etc., R. R., 175 Pa. 361; Kane v. P. R. T. Co., 248 Pa. 160.

[4] 262 Pa. 550.

[4a] Dunmore v. Padden, 262 Pa. 436, 438-39; Krewson v. Sawyer, 266 Pa. 284, 287; see also Young v. Hipple, 273 Pa.

chief, the rest of it may be elicited on cross-examination; and a party may always cross-examine as to the res gestæ given in evidence, though such examination brings out new matter.[5]

§ 256. **Rebuttal: brief explanatory speech allowed in discretion of court.**—We shall now assume the proofs are in, so far as the respective cases-in-chief are concerned, and that all witnesses have been examined and cross-examined; this brings us to the point of how a rebuttal is offered. If the defense is one which demands a rebuttal, counsel may, in opening, address the jury or not, as the occasion requires. Should the rebuttal evidence be such as to call for no explanation, it is usual simply to put your witnesses on the stand, and examine them, without more ado, but if the rebuttal is beset with complications, a brief explanatory speech is permitted; the whole matter is subject to the control of the trial judge. I give this explanation, for, in the first case tried by me, as a young lawyer, it was necessary to offer a lengthy rebuttal, and I was much exercised to know whether one had a right to open to the jury,—a point on which, at that time, I obtained no light from the books on practice.

§ 257. **Rebuttal: proofs belonging to case-in-chief not received as rebuttal; discretion of court; review therof.**—It is important to present your evidence in its proper order. A witness who belongs to the case-in-chief should then be called, for, if you wait till rebuttal to offer him, his testimony may be declined purely on the ground that it is tendered at an inappropriate time; but the order in which proofs are received is within the control of the trial

[5] Glenn v. Phila. and W. C. Traction Co., 206 Pa. 135, 137; Reibstein v. Abbott's Alderney Dairies, 264 Pa. 447.

judge, and his discretion in that respect will seldom be disturbed on review.[5a]

§ 258. **Rebuttal: prima facie case-in-chief may be substantiated by rebuttal proofs.**—While on the subject of the rebuttal, it may be well to call attention to the case of Lynch v. Myersdale Electric Light Co.,[6] where the Supreme Court of Pennsylvania recently said that, if, in the first instance, plaintiff depends upon a prima facie showing of liability on part of defendant,—such as the application of the res ipsa loquitur rule,—subsequently he may, in reply to evidence which if believed would acquit defendant, substantiate his case-in-chief by proving in rebuttal specific acts showing defendant's liability; as just stated, however, such matters are, within the discretion of the trial court.[7]

§ 259. **Submitting exhibits to jury: method of formal offer,**—Before passing from that branch of our subject which deals with the proofs, it seems wise to say a few additional words on the subject of documentary evidence. Whenever you have a document or other object which you wish to offer in evidence, the correct method is to present it to the witness, possessing the requisite knowledge or proper qualifications, for the purpose of identification; when identified, you direct the stenographer to mark the document or object as an exhibit. The first evidence of this kind offered is marked "Plaintiff's Exhibit A" or "Defendant's Exhibit A", as the case may be; and future exhibits are marked with succeeding letters, in the order in which they are tendered by the respective parties. Some-

[5a] Hoffman v. Berwind-White, etc., Co., 265 Pa. 476, 485, and cases there cited.

[6] 268 Pa. 337, 342.

[7] 38 Cyc. 1357-58, and cases there cited.

times, when there are a great many exhibits, numbers are used instead of letters.

§ 260. **Submitting exhibits to jury; none but papers formally received by the court to be handed to jury; method pursued when only part of writing is permitted in evidence.**—All exhibits which are regularly received in evidence, except depositions, may, and, unless very good reasons to the contrary exist, should be sent out with the jury; but papers not regularly offered and accepted in evidence should not be given to the jury, even though referred to at the trial.[7a] If part only of a written exhibit is received in evidence, the balance may be covered and sealed, before the document is handed to the jury. For instance, in one reported case, certain leaves of a book, offered in evidence, were thus formally sealed and hidden from the jury.[8]

§ 261. **Submitting exhibits to jury: in discretion of court but subject to review; matters which must appear of record when documentary evidence is offered.**—While, as a general rule, exhibits regularly offered and received in evidence are handed to the jury, still, whether or not this shall be done is largely a matter of discretion for the trial judge.[9] If counsel feels that the court has committed error, prejudicial to his client, in refusing to permit an exhibit to go out with the jury, he should be careful to see, first, that the evidence in question appears as having been formally offered and accepted, next, that his request as to sending out the exhibit and the judge's refusal to grant the request, together with the reasons assigned for

[7a] See Com. v. DePalma, 268 Pa. 25, 32, where such error was held harmless.

[8] Com. v. Stanley, 19 Pa. Superior Ct. 58.

[9] Com. v. Brown, 264 Pa. 85, 92.

such refusal, if any, are formally spread upon the record; and, finally, that appropriate exceptions are noted. So also if counsel feels that any document or object is being improperly sent out with the jury, he should make objection, and, if that is overruled, enter an exception, seeing that all this is noted by the court stenographer.

§ 262. **Submitting exhibits to jury: matter of discretion for court: reversed when prejudicial to party.**—In one very recent case[10] our Supreme Court reversed a judgment for plaintiff because the trial judge refused to allow certain material exhibits to be handed to the jury. Mr. Justice WALLING there said: "A plan and photographs exhibiting the place of accident were admitted in evidence, but, when defendant asked that they be sent out with the jury, the trial judge sustained plaintiff's objection, and refused the request, without stating any reason. This was error. When such exhibits are put in evidence they become a part of the case, and it is the uniform practice to give them to the jury during their deliberations. Maps and photographs are of great assistance to this court[11] and no less so to a jury. 'If the jury are not to see them [plans in quoted case], then they are of no use at all; if the jury are to see them, then it is proper they should have them before them till the case is ended by a verdict."[12] Treating it as a matter of discretion, it was an abuse thereof to withhold the plan, etc., from the jury without cause. There was no question raised as to their accuracy or materiality. They were [on the trial] of especial assistance in showing the tracks, and also the place under the bridge

[10] Chitwood v. P. & R. Ry., 266 Pa. 435, 438.

[11] Kupp v. Rummel, 199 Pa. 90, 93.

[12] Wood v. Willard, 36 Vermont 82, 90; S. C., 84 Am. Dec. 659, 663.

where the rear end of the train had stood and where defendant's evidence tends to show the accident occurred. So it is a fair conclusion that the ruling in this regard was prejudicial to the defendant. There might be a case where a refusal to send exhibits out with the jury would be justified, but there must be special reason to warrant it."[13]

§ 263. **Submitting exhibits to jury: formally admitted evidence only allowed, but statements showing mathematical calculations may be used, subject to special objection; discretion of court.**—As a general rule nothing not formally admitted in evidence is allowed to go out with the jury; but, in actions of assumpsit, suits on mortgages, etc., it is the Pennsylvania practice to hand the foreman of the jury, just before that body retires, statements showing the results of mathematical calculations, when these may facilitate the making up of a verdict,—each side having submitted its paper to opposing counsel. This practice is always subject to the control of the trial judge, and can be indulged in only by his consent. Whenever these statements are used there must be of course formally admitted proofs before the jury of every item referred to in them; but, even here, counsel must be diligent, for, if you think such a statement contains an item as to which there is no proper proof, a mere general objection will not serve on appeal, you must specify what is wrong.[14]

[13] Riddlesburg, etc., Co. v. Rogers, 65 Pa. 416.

[14] Kline v. Gundrum, 11 Pa. 242, 253; Terry's Ex'rs v. Drabenstadt, 68 Pa. 400, 403. See sections 203-10, above, as to general and special exceptions.

LECTURE IX.

ARGUMENT OF COUNSEL: CHARGE OF COURT AND POINTS FOR CHARGE: BINDING INSTRUCTIONS: STENOGRAPHER STATUTES.

Argument of counsel:
- Constitutional right to argument. (§ 264)
- Be natural in argument. (§ 265)
- Be clear, brief and accurate; (§ 266)
- Keep notes for use in argument; (§ 266)
- Never misstate testimony. (§ 266)
- Lincoln's method:
  - Frank and friendly relations with jury; (§ 267)
  - Apparently giving away his case; (§ 267)
  - Then presenting his own side candidly; (§ 267)
  - Keeping details in subordination; (§ 267)
  - Fastening attention to essential points. (§ 267)
- Ridicule is two-edged weapon. (§ 268)
- Law should be left to court. (§ 269)
- Logic, reason and tact still in style. (§ 270)

Order of addresses:
- Plaintiff has first address, or "sum-up"; (§ 271)
- Defendant the second; (§ 271)
- Plaintiff the reply; (§ 271)
- One who admits prima facie case of opponent but depends on affirmative defense to overcome it has last speech; (§ 271)
- Defendant offering no evidence, has last speech; (§ 271)
- Order of addresses is in discretion of trial judge. (§ 271)
- Division of time when more than one attorney on a side. (§ 272)

Charge of court:
- Requests for charge, (§ 273)
  - Draw them for simple affirmance; (§ 273)
  - Don't repeat; (§ 273)
  - Don't end each one with request for binding instructions; (§ 273)
  - Purpose of requests. (§ 273)
  - Withdrawal of requests for charge: (§ 274)
    - Formal manner of doing it. (§ 274)

Exceptions to answers to points; (§ 275)
Exceptions to charge, (§ 275)
General and special, (§ 275)
Rules relating thereto. (§ 275)
Filing of charge, statutes requiring: (§ 276)
Pennsylvania practice. (§ 276)
Filing of charge under act makes it subject of appeal, (§ 277)
Without formal bill of exceptions, (§ 277)
But only on request and allowance. (§ 277)
Exceptions noted by stenographer under act of 1911, (§ 278)
Need not be allowed by court, (§ 278)
But counsel must state to court grounds of objections. (§ 279)
Stenographer's transcript of notes of trial: (§ 280)
Request for, must be entered on record; (§ 280)
This includes charge, requests and answers; (§ 280, note 19)
Form of request, (§ 280)
But this is not necessary in support of motion for judgment n. o. v. under statute. (§ 280, note 19)
General exceptions:
Limited to reasons given, (§ 281)
Unless fundamental controlling error appears; (§ 281)
Review of whole charge. (§ 281)
Special exceptions: (§ 282)
Waiver of objection by silence. (§ 283)
Improper remarks of court or counsel:
How to make record thereof; (§ 284)
How to note exceptions thereto. (§ 284)
Binding instructions,
Request for necessary preliminary to judgment non obstante veredicto; (§ 285)
Also in case of variance between pleading and proof. (§ 285)
Remedies where jury disobey:
Withdrawal of case from jury; (§ 286)
New trial; (§ 286)
Demurrer to evidence. (§ 286)
One juror disobedient,
Juror discharged and instructed verdict by eleven jurors ordered on agreement of parties. (§ 287)
Whole jury recalcitrant: (§ 288)
May not judge enter verdict as though on demurrer? (§ 288)

Subject to correction by motion and review. (§ 288)
Decisions as to remedies. (§ 289)
Old time coercion of jurors. (§ 290)
Classical charge to jury; (§ 291)
Tribute to Judge Sulzberger. (§ 292)

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§ 264. **Argument of counsel: constitutional right.**— The next subject in due course is the argument of counsel. Writing on this point, ten years ago, in Commonwealth v. Polichinus,[1] as a Justice of the Supreme Court, I said: "The constitutional right to be heard by counsel carries with it the right to have arguments of counsel considered by the jury, in passing upon the evidence. Courts may regulate the manner and time for the exercise of the right to be heard by counsel, and may limit the number and length of the addresses to be made to the jury: Stewart v. Commonwealth, 117 Pa. 378. A trial judge may properly instruct the jury that the arguments of counsel are not binding upon them, and that they are only to be guided by such arguments in so far as they are supported by the evidence and appeal to their reason and judgment; but, when the learned judge in the present case told the jury, without any saving words, that they were not to consider the evidence in the light of the arguments of counsel, he committed clear reversible error." This excerpt shows how highly the law esteems and how zealously it guards the right of a litigant to have counsel address the jury. I refer to it as a right, for, even though the constitution only guarantees it, in that sense, to an accused in the criminal courts, still the privilege of addressing the jury through counsel has long been recognized as the right of all litigants.

[1] 229 Pa. 311, 314.

§ 265. **Be natural in argument.**—In argument be yourself; if your manner is naturally of the old school, don't try to assume another, for my experience has taught me that jurors are apt to admire a courtly gentleman; but, if you happen to lack natural polish, do not try to assume an artificial sort for the occasion—it will bother you and not help with the jury.

§ 266. **Be clear, brief and accurate; keep notes for use in argument; never misstate testimony.**—Be logical, clear and to the point. Don't weary the jury by talking too long, yet be sure you slight no part of the case; keep brief notes before you, made during the trial, to refresh your memory and guide the order of your argument. Above all, never misstate testimony, for, if done with design, it is a form of dishonesty resented by all; the juror has no way of telling whether you misquote inadvertently or purposely—he may believe the latter, although you be entirely innocent of any evil design—so be most careful and exact in your references to the evidence.

§ 267. **Lincoln's method: Frank and friendly relation with jury; apparently giving away his case, then presenting his own side candidly; keeping details in subordination while fastening attention on essential point.**—"Lincoln assumed at the start a frank and friendly relation with the jury which was extremely effective. He usually began, as the phrase ran, by 'giving away his case,' by allowing the opposite side every possible advantage that they could honestly and justly claim. Then, he would present his own side with a clearness, a candor, an adroitness of statement which at once flattered and convinced the jury, and made even the bystanders his partisans. Sometimes he disturbed the court with laughter by his humorous or apt illustrations; sometimes

he excited the audience by that florid and exuberant rhetoric which he knew well enough how and when to indulge in; but his more usual and more successful manner was to rely upon a clear, strong, lucid statement, keeping details in proper subordination and bringing forward, in a way which fastened the attention of court and jury alike, on the essential point on which he claimed a decision. 'Indeed,' says one of his colleagues, 'his statement often rendered argument unnecessary, and often the court would stop him and say, 'if that is the case, we will hear the other side.' ' "[2]

§ 268. **Ridicule is a two-edged weapon.**—Do not indulge too much in ridicule; but, if you must use that weapon, as a rule let it be at the expense of counsel on the other side, rather than of a witness. The natural sympathies of both court and jury go out to witnesses, but seldom to counsel; they are supposed to be able to take care of themselves. I have known counsel's ridicule of a party to turn the scales of justice to the latter when they were naturally and properly tending the other way. It is a two-edged weapon to be handled with great care.

§ 269. **Law should be left to the court.**—Ordinarily, it is neither wise nor proper to argne controverted points of law to the jury. Argue as to the justice of your client's cause, and, if you please, the injustice of the other side, the credibility of witnesses, and the weight of the evidence; but leave the law for the court. If you do state the guiding principles of law, be sure not to step into doubtful fields. Apropos of this, I recall a case that was tried before me some years ago when a judge of the common pleas in Philadelphia, where counsel for plaintiff, in a damage suit, devoted a good part of his closing address to telling

[2] From Raymond's Life of Lincoln, p. 32, quoted by Nicolay and Hay.

the jury the legal rules and principles which controlled the action. After making several misstatements of law, he concluded by saying: "But, gentlemen of the jury, you must take your law from the court." I opened my charge thus: "Counsel for defendant has seen fit to tell you what he conceives to be the rules of law which must guide and control your deliberations. I agree entirely with what he last said, namely, that you must take your law from the court." Whereupon, counsel for defendant beamed; but, when I immediately added, "with pretty much all else he said as to the law, I disagree," his countenance fell; and, when I proceeded to either depart from, or restate in different form, the legal principles which he had discussed before the jury, I fear the impression they gathered was that the closing argument of learned counsel would not profit them much; at least, the verdict so indicated, and very properly.

§ 270. **Logic, reason and tact still in style.**—I shall not dwell further on the manner of argument to the jury, although it is a department of trial work in which many a case is won or lost. While florid oratory may have gone out, logic, reason and tact are still in style; cultivate them as weapons of offense and defense, and, by and through their use, try to convince both the court and the jury that you have justice and law on your side. When you accomplish this, you usually not only obtain, but hold the verdict.

§ 271. **Order of addresses: plaintiff has first, or "sum up," defendant the second and plaintiff the reply; defendant, offering no evidence, and one who admits prima facie case of opponent, but depends on affirmative defense to overcome it, has last speech; order of speeches, matter of discretion for trial judge.**—Ordinarily, coun-

sel for plaintiff has the first address (called the "sum up"), counsel for defendant the second, and then plaintiff's attorney is allowed to reply; but when defendant offers no evidence, his attorney gains the last speech to the jury. When plaintiff rests on a prima facie case, which defendant meets by an affirmative defense,—for instance, if plaintiff sues on a promissory note and defendant admits liability but claims a set-off which more than counterbalances the obligation in suit, defendant has the last speech to the jury.[2a] Such matters are, however, within the discretion of the trial court. In Robeson v. Whitesides,[2b] the Supreme Court of Pennsylvania said: "Whether the plaintiff or defendant had the conclusion to the jury, we shall not undertake to decide, as we are clearly of opinion it is not assignable for error. Every court is the best judge of its own practice; and it does not become this court, on slight grounds, to interfere. Counsel consider the last word to the jury as of some consequence; sometimes it enables them to remove, and sometimes to create, false impressions on the minds of the jury, but every inconvenience of this kind, it is presumed, is attended to and prevented by the charge of an upright and able court. It is, at any rate, but damnum absque injuria."[2c]

§ 272. **Division of time when more than one attorney on a side.**—When more than one lawyer to a side, counsel usually agree among themselves as to the order in which they will speak. If no agreement is reached, the trial

[2a] 38 Cyc. 1307.

[2b] 16 S. & R. 320, 321.

[2c] See also Com. v. Contner, 21 Pa. 266, 274; Smith v. Frazier, 53 Pa. 226; Blume v. Hartman, 115 Pa. 32; Patterson v. Bank, 130 Pa. 419; Mendenhall v. Mendenhall, 12 Pa. Superior Ct. 290; Sheehan v. Rosen, 12 Pa. Superior Ct. 298; Pittsburgh Engine Co. v. South Side Elec. Mfg. Co., 43 Pa. Superior Ct. 485.

judge regulates the matter, and he also may control the time allowed to each side; but, as a general rule, counsel's time is not limited.

§ 273. **Charge of court: requests for charge; draw them for simple affirmance; don't repeat; don't end them with request for binding instructions; purpose of requests.**—If the issues are at all complicated, prepare requests for charge, tersely stating your conception of the relevant guiding principles of law; but make these requests as few, and state them as plainly, as possible. A properly drawn request should be so constructed that it may be answered by a simple affirmance or denial, without explanation or qualification. The purpose of requests is not to trap the trial judge, as some lawyers seem to think, nor is it to get him to argue your case to the jury; the purpose is to recall the law involved to the mind of the judge, so that he may properly inform the jury. Therefore, when a point has been once plainly stated in a request, do not repeat it in some other form in subsequent requests, and above all, avoid the common habit of making your requests end with a prayer for binding instructions; since that alone generally warrants a refusal, even though the request contains a correct statement of law. If you feel you are entitled to binding instructions, submit a final, properly drawn, request to that effect, and stand on it; which, generally speaking, is all that is necessary.

§ 274. **Withdrawal of request for charge; formal manner of doing it.**—If the trial judge covers your points in his general charge, withdraw them; or withdraw such of them as are in practical accord with his instructions. This is done by rising and merely stating, "If Your Honor please, I withdraw my requests for charge"; or, if they are not all withdrawn, designate those which are.

§ 275. **Exceptions to answers to requests for charge and to charge; how to take; general and special exceptions and rules of practice relating thereto.**—Should any of your requests be refused or so qualified as, in your opinion, to constitute error, enter an exception, by stating, in the hearing of the judge, that you except to the refusal of such and such points and to the qualifications of those you enumerate. You pursue the same course as to those answers, made to your opponent's requests, which you conceive to be prejudicially wrong, so far as your interests are concerned, or that contain errors which may cause a reversal; this is done by stating, in the hearing of the judge, that you except, or desire to enter an exception, to the way in which he answered such and such points of your opponent, stating reasons, when deemed necessary. You must listen to the charge, and note such portions thereof as you deem to be erroneous; call these to the attention of the trial judge, before the jury retires, and, if he does not make what are to you satisfactory corrections, enter exceptions, designating, in a terse way, the portions excepted to, giving your reasons. Recollect that, while a general exception is permitted under our practice, yet the appellate court will, on such an exception, give only a limited review,[2a] and, even in taking such an exception, general reasons must be stated. Hence it is best, whenever possible, to specially designate the errors you complain of, rather than depend on a general exception, as I shall explain more at large a little later on.[2b]

§ 276. **Filing charge: statutes requiring; Pennsylvania practice.**—The Pennsylvania Act of February 24, 1806,[3]

[2a] Com. v. Greevy, 271 Pa. 95, 106, citing Sikorski v. P. & R. Ry., 260 Pa. 242.

[2b] Sections 281-2, below.

[3] 4 Sm. L., 270, sec. 25, 3 Purd. 3356.

provides that, "if either party, by himself, or counsel, require it, it shall be the duty of the said judges respectively to reduce the opinion so given with their reasons therefor to writing and file the same of record in the cause." This act has been construed to include charges delivered to juries as well as opinions;[4] but it does not necessarily require the judge to write and file the whole charge—only such part as may be particularly specified by the parties as objected to.[5] By Act of April 15, 1856,[6] it was made the duty of the trial judge, on request, to "reduce the whole.....charge of the court, as delivered to the jury, to writing at the time of delivery of the same, and forthwith file the same of record." The Act of March 24, 1877,[7] provides for the submission of written points for charge and answers thereto, and that the charge and answers shall be filed as part of the record for the purpose of assignment as error.[7a]

§ 277. **Filing of charge made subject of appeal, without formal bill of exceptions, but on request and allowance.**—Under the three acts mentioned above, the filing of the charge made it the subject of error without a formal bill of exceptions;[8] but such filing was done only on request.[9] The Act of May 24, 1881,[10] as amended by Acts of May 1, 1907,[11] and May 11, 1911,[12] requires official court stenographers to take full notes of all proceedings, on

[4] Downing v. Baldwin, 1 S. & R. 298.
[5] Meese v. Levis, 13 Pa. 384.
[6] P. L. 337, 3 Purd. 3357.
[7] P. L. 38, 3 Purd. 3357.
[7a] See note 19 to §281.
[8] Bassler v. Niesly, 1 S. & R. 431; Wheeler v. Winn, 53 Pa. 122.
[9] Meese v. Levis, 13 Pa. 384; Lehigh Valley R. R. v. Hall. 61 Pa. 361.
[10] P. L. 93.
[11] P. L. 135.
[12] P. L. 279.

the trial of a case, and to transcribe and file these, if so directed by the trial court or when an appeal has been taken to the Supreme or Superior Court.

§ 278. **Exception noted by stenographer, under Act of May 11, 1911, need not be allowed by court.**—In order to enable a dissatisfied litigant to assign errors to charges, under these early acts exceptions had to be allowed, by the trial judge, before the verdict;[13] but, under the act of May 11, 1911,[14] it is no longer necessary for the court to allow an exception. Section 2 of the act in question provides that "Exceptions may be taken, without allowance by the trial judge, to any part or all of the charge or to the answers to points, for any reason that may be alleged regarding the same in the hearing of the court before the jury retires to consider its verdict, or thereafter by leave of the court; and they shall be thereupon noted by the official stenographer, and thereafter have all the effect of exceptions duly written out, signed and sealed by the trial judge."

§ 279. **Counsel must state grounds of objections to court under Act of May 11, 1911.**—Prior to the Act of 1911, it was decided that a general exception might be taken to the charge without at the time particularly specifying the error complained of;[15] but the Act of 1911 contains language not found in the prior statutes, in so far as it provides, in section 2, that exceptions may be taken "for any reason that may be alleged regarding the same in the hearing of the court." This is a reasonable requirement because it gives the trial judge an opportunity, if he sees fit, to correct any errors which may be pointed out

[13] Rosenthal v. Ehrlicher, 154 Pa. 396; Smith v. Times Pub. Co., 178 Pa. 481; Curtis v. Winston, 186 Pa. 492.

[14] P. L. 279. See also Sections 226-7, 280 and 355.

[15] Curtis v. Winston, 186 Pa. 492; Mastel v. Walker, 246 Pa. 65.

before the jury retires to consider its verdict. The clause to which I call attention recently came before our Supreme Court[16] and it held that, while the language referring to the statement of reasons was not imperative in form, still the requirement—that reasons be given—plainly indicated it was the intention of the legislature to grant a remedy, under which the trial judge could not arbitrarily prevent the notation of a general exception, and, at the same time, to guard against the abuse of the remedy by compelling counsel to state, in a general way, the grounds of objection. So that, as the law now stands, in order to have any benefit from a general exception to the charge, unless such exception is expressly allowed in the old-fashioned way, counsel must allege his general reasons for the exception in the hearing of the court, and the record must indicate that this was done—either by showing an exception asked, or in some other way.[17]

§ 280. **Stenographer's transcript of notes of trial: request for, must be entered on record; form of.**—In order to secure the notes of the stenographer, in accord with the act of assembly,[18] counsel must see that a request for the transcript of the notes is entered on the record. This is usually done by having the court stenographer enter on the notes of trial the following or other suitable form: "And now [giving the date], before the jury retire, and in the hearing of the court, counsel [for plaintiff or defendant, as the case may be] excepts to the charge of the court and its answers to the plaintiff's points [designating those in question, with the reasons briefly stated], and to the answers to the defendant's points [again designating

[16] Sikorski v. P. & R. Ry., 260 Pa. 242.

[17] Chamberæti v. Susquehanna Coal Co., 262 Pa. 261, 263.

[18] Act of May 11, 1911, P. L. 279.

them]; also, before the jury retire and in the hearing of the court, counsel request that the notes of testimony, objections, rulings thereon and exceptions thereto, together with the charge of the court, plaintiff's points and defendant's points, with the respective answers of the court thereto, and all exceptions, be written out in long hand and filed of record in this case, for the purpose of review."[19]

§ 281. **General exceptions: review limited to reasons given unless fundamental controlling errors appear; review of whole charge.**—When a general exception is taken pursuant to the provisions of the Act of 1911, the appellant may assign for error all matters which properly

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[19] There is a general absolute necessity for a request that the charge be placed on the record, otherwise it is not assignable for error (Sikorski v. P. & R. Ry. Co., 260 Pa. 243, 252; and Sgier v. P. & R. Ry. Co., 260 Pa. 343, 348, and cases cited therein) and it should be remembered that the points, when answered, are part of the charge (Ward v. Babbitt, Inc., 270 Pa. 370; Stine v. R. R., 271 Pa. 115; Maculuso v. Humboldt F. I. Co., 271 Pa. 489; Duff v. Hamlin, 272 Pa. 245, 252), and therefore require no specific request to bring them on the record, apart from the request as to the charge itself. If, however, the points are refused and not read, a special request must be made for the filing of the same: Northern Tr. Co. v. Huber et ux., 274 Pa. 329.

What is said in the above paragraph of the text, as to the necessity of a request and an order to have the notes of the stenographer transcribed to become part of the record, has reference to making up the record for the purpose of assigning errors to the charge itself and the answers to points, and does not refer to making up the record for the purpose of a motion for judgment non obstante veredicto; the latter is covered by the procedure outlined in the Act of April 22, 1905, P. L. 286; when a request for binding instructions has been presented, and reserved or declined, nothing further in connection therewith is necessary to enable the party presenting the request to move for judgment n. o. v. See Keck v. Pittsburgh, etc., Ry. Co., 271 Pa. 479, 482; Mooney v. Kinder, 271 Pa. 485, 486; Duff v. Hamlin, 272 Pa. 245, 253.

fall within, or are suggested by, the reasons stated at the time of the exception, and, in addition thereto, any controlling fundamental errors of law; but if, in disregard of the act and pursuant to prior practice, a general exception is asked of, and allowed by, the court, without requiring a statement of reasons, appellant may assign thereunder all fundamental errors of law, and such material matters of fact as are so inadequately presented as to mislead the jury. He may also assign the whole charge as inadequate, if it fails to present the real questions in the case, or is calculated to give the jury a wrong impression of the material matters involved. The appellate court, however, will refuse to review matters not specifically called to the attention of the trial court, unless basic or fundamental in their nature.[20]

§ 282. **Special exceptions.**—In addition to the general exceptions included in the catch-all form above suggested, of course you understand, from what I have previously said,[21] that such special or specific exceptions should be taken as the occasion may require.

§ 283. **Waiver of objection by silence.**—Frequently, the trial judge will invite criticism of his charge and ask that his attention be called to any omissions therein. When this occurs, be prepared to make suggestions; for, if you sit silent under such circumstances, it will be held strongly against you on appeal.

§ 284. **Improper remarks of court or counsel: how to make record and note exceptions thereto.**—If anything

[20]Gordon v. P. R. T. Co., 264 Pa. 461; Mackowski v. P. R. T. Co., 265 Pa. 34; Groner v. Knights of Maccabees, 265 Pa. 129; Com. v. Scherer, 266 Pa. 210; Provident, etc., Trust Co. v. Phila., 202 Pa. 78; Kelly v. Pbg. Traction Co., 204 Pa. 623; Bousquet's Est., 206 Pa. 534.

[21] See Sections 203-10.

happens during the course of the trial that the court stenographer would not ordinarily put on his notes,—such as the misbehavior of a witness or the improper remarks of counsel, or of the trial judge,—which you conceive to be prejudicial to the interests of your client,—the correct course to pursue is to ask that a description of the occurrence, or statement of the objectionable words, be properly noted. When such a request is made, it is usual for counsel to dictate to the stenographer what he conceives should go on the record. If the dictated statement of facts is objected to by counsel on the other side, it is the duty of the trial judge to give his version of the occurrence or remarks.[22] If the trial judge refuses to perform his duty in this respect, counsel should put his request in the shape of a formal motion, object to the overruling of the motion, and take an exception; then he should make a memorandum of the occurrence and have it noted by reliable witnesses, and subsequently put them in the form of an affidavit to be filed with the record, or, if this is not permitted, to be presented to the appellate court. Of course, if the stenographer's notes show the whole occurrence, together with the refusal of the trial judge to state his version, that will be sufficient record on appeal, without an affidavit,[23] provided proper exceptions are taken.

§ 285. **Binding instructions: as preliminary for judgment non obstante veredicto; also in case of variance between pleading and proof.**—I shall speak of the practice which controls judgment non obstante veredicto in another lecture,[23a] but, at this point, it is appropriate to say that you must ask for binding instructions at the trial,

[22] Com. v. Shoemaker, 240 Pa. 255, 259.

[23] Com. v. Shoemaker, supra.

[23a] See sections 301, 306, 310, 351-62; see also sections 157, 158, 412, and note 19 to section 280.

as a prerequisite to a request for judgment notwithstanding the verdict, if the verdict goes against you. This subject of binding instructions is most important, and must be treated from several points of view. There are occasions when it is necessary to ask for binding instructions, in order to preserve your right to insist upon the matter on which you rely, in the event of an appeal; for example, if there is a variance between the pleadings and the proof.[24] When your opponent has closed his case, and you feel that a material difference exists between the allegata and probata, ask for binding instructions in your favor, on that ground; if your request is declined, prepare a written point for charge to the same effect, and submit it to the court at the proper time.

§ 286. **Remedies where jury disobeys: withdrawal of case from jury; new trial; demurrer.**—When a trial judge gives binding instructions for one side or the other, it, in effect, albeit not in theory, withdraws the case from the jury; for such instructions can be enforced, if in no other way, by granting a new trial and continuing to do so till the jury carries out the will of the judge. Of course, binding instructions always presuppose a case which turns exclusively on points of law; although the single point may be that the evidence is legally insufficient to support any verdict other than that directed—in which instance, a demurrer to the evidence, would bring the same result; but, as previously suggested,[25] the practice of demurring to the evidence has inherent dangers which render it unpopular.

§ 287. **One juror disobedient: juror discharged and instructed verdict by eleven jurors ordered on agree-**

[24] Kroegher v. McConway & Torley Co., 149 Pa. 444, 458; Miller v. Belmont, etc., Co., 268 Pa. 51.

[25] See above section 152.

ment of parties.—I recall a case, tried before me in the common pleas, where one juror out of the twelve refused to abide by my instructions to find a verdict for defendant, saying he had conscientious scruples against so doing. I simply discharged that juror, and, on agreement of the parties, had the remaining eleven render the verdict.

§ 288. **Whole jury recalcitrant: query, if judge may not enter verdict, as though on demurrer, subject to correction by motion and review.**—Where a whole jury proves recalcitrant, the trial judge may take the matter into his own hands and have the clerk enter such verdict as the court decides; this being subject to review on a motion to set aside the verdict and grant a new trial, or, in a proper case, for judgment n. o. v.—when, of course, if the trial judge erred in law, his action in entering the verdict would be of no legal effect; otherwise, it would sufficiently support a judgment, as though on demurrer to evidence; but, since I find no decision precisely following this theory, the view I express must be understood as the opinion of Professor von Moschzisker, and not of Judge MOSCHZISKER—a distinction with a difference.

§ 289. **Decisions as to remedies.**—The nearest authority on the point under discussion is Pardee v. Orvis,[26] an action of ejectment, in which the only question of title was, whether a definitely located tract of land lay in Clinton County or in Centre County. The trial judge, while virtually instructing that the plaintiff was entitled to recover, submitted the issue to the jury, who, notwithstanding the directions to the contrary, brought in a sealed verdict for defendants, which the court refused to accept, and ordered the verdict to be entered for plaintiff. On appeal, it was held this action, though technically irreg-

[26] 103 Pa. 451.

ular, did not harm defendants, and constituted no cause for reversal. In that case, the court below, disposing of a motion for a new trial, said:[27] "There were really no facts for the jury to pass upon, as.....nothing was controverted.....but the location of the boundary line between Clinton and Centre counties, which was a question of law for the court. For some reason the jury returned a verdict for defendant, which we declined to receive, and instead of sending them back to reconsider it, we directed a verdict for plaintiff, before the entry of which verdict defendant excepted." Judgment was entered on the verdict for plaintiff, whereupon the defendant appealed, assigning for error, inter alia, the refusal to accept the verdict of the jury and the entry, by the court, of a verdict and judgment for plaintiff. Chief Justice MERCUR, in disposing of this assignment states:[28] "Under the whole evidence it would have been the duty of the court to set aside a verdict for the defendant below. It would have been more regular to have given the jury binding instructions before sending them out, yet it was not substantial error if he [the judge] did so instruct them when he discovered they were about to render a verdict contrary to the law of the case," citing Whiting & Co. v. Lake.[29] In this last mentioned case, a somewhat similar situation arose. There, however, the trial judge submitted the issues to the jury, and when it returned a verdict for plaintiffs, which was not warranted by the law and the facts, he formally directed the jury to find for defendant. On review, Justice STERRETT said:[30] "The state of the evidence was such that it would have been the duty of the court to set aside a

[27] Page 456.
[28] Page 458.
[29] 91 Pa. 349, 351.
[30] Page 354.

verdict in favor of the plaintiffs; this being the case, there was no error in giving binding instructions to the jury to find for the defendant, but it would have been more orderly to have so instructed them in the first instance." I find two cases from other jurisdictions in accord with these Pennsylvania authorities: see Cahill v. Chicago, etc., Railroad Company,[30a] and Albanell v. Cobian.[31]

§ 290. **Old time coercion of jurors.**—Of course, we know that in olden times juries were obliged to agree on verdicts under extreme coercion; thus, during the reign of Edward III, those who dissented from the majority were committed to prison, and the judges resorted to carrying them in carts until they concurred.[31a] The remedy of one who suffered injury from a false verdict was to proceed directly against the jurors and attaint them; but this, proving inadequate, was superseded by fine and imprisonment, which, although perhaps effective as a punishment, did not relieve the injured suitor. As Mr. Justice WILLIAMS said, in Smith v. Times Publishing Company,[32] "The theory on which this proceeding rested was that the unjust verdict must have been reached by a neglect to follow, or a wilful disregard of, the instructions of the judge, and that such neglect and misconduct was a contempt of court which subjected them to punishment at once."

§ 291. **Classical charge to jury.**—While on the subject of submitting cases to the jury, I am going to take a few minutes, in conclusion, to give a classical charge, delivered some years ago by the Honorable Mayer SULZBERGER, which shows how a master judge, when presiding over

[30a] 74 Fed. 285, 20 C. C. A. 184.
[31] 9 Porto Rico, Fed. 13.
[31a] Crab's English Law, p. 300.
[32] 178 Pa. 481, 507.

jurors, may so guide their deliberations as to, in some degree, please all concerned and at the same time reach a proper result. In the case I have in mind, a negro, who had been refused a drink at the bar of the Rittenhouse Hotel, brought suit for damages; charging the jury, Judge SULZBERGER said: "The defendant is an innkeeper who, according to the immemorial custom of innkeepers, furnishes food and drink to the wayfarer. Plaintiff wandered into his place and asked for some refreshment; he was refused by the person in charge, on the ground that he was not of the right color—as his skin was too dark. It appears from the evidence, and also otherwise, that men who have skins of various degrees of whiteness, or yellowness or muddiness, believe they are the final sum of the Creator's wisdom, and that anybody whose complexion substantially differs from theirs is an inferior creature. You will therefore know that this barkeep was perfectly certain that Confucius, the great Chinese philosopher, if he had come along with his yellow complexion, would have been distinctly an inferior, subject to his contempt. So also, if the man was a little darker than Confucius; and, if he was quite dark like the plaintiff, then he might be wiser than Aristotle, and more beautiful than Venus, but nevertheless he would be no good. I am now giving the point of view of the barkeeper, to show you that he acted in a perfectly natural manner and without malice, his conduct representing merely the profound conviction of superiority which God implants in mankind. When there is no superiority in a man, he has a consciousness of superiority, which serves instead; and, if we did not have this, many of us would be dragging along hopelessly in the world, because most of the superiority that most of us have is purely imaginary. The constitution of the United States has been so amended and the laws of the United States and

the several states have been so altered that this old idea, that a black man must necessarily be treated as an inferior, shall not be officially recognized. Socially it is recognized, and no law is powerful enough to overcome social prejudice; but law is powerful enough to manage public matters. While it would take thousands of years to efface a social prejudice, it does not take that long to impose a legal obligation. This innkeeper wants a privilege from the State of Pennsylvania, to keep an inn; he has it on condition that he shall faithfully perform the duties of an innkeeper, and the duties of an innkeeper are not performed when he refuses accommodation. Here, by his agent on the spot, he refused accommodation to the plaintiff; and does not deny the statement of his agent that those were his orders. You are therefore entitled to believe that he gave the order to refuse drink or other accommodation to anybody who was a 'nigger'; that was what he said. If he did that he failed in his public duty; he violated the condition under which he holds a license; his license is subject to be revoked, and he liable in damages for the breach of duty. The only question is, what damages? Our old law is that where a man has not suffered any real damage we grant nominal damages. I cannot say that there is any evidence that the plaintiff suffered real damage. Do not forget that this was the Rittenhouse; the Rittenhouse is a place where people dwell who are all superior. Now, you know a superior person is unaware of anything but the physical existence of inferior persons. The latter, to him, are like worms and cats and such things; you have to have them around, you do not know why, but there they are. Hence there are no degrees of social rank for a negro in that restaurant. A negro, when he gets in there, is no more to the people who frequent the Hotel Rittenhouse than a worm; and,

when he is treated accordingly, he does not lose caste with that crowd one bit—he stands just as well afterward as before, his reputation has not been injured, his standing has not been injured, with those who witness his treatment he has been in no wise injured, except in law. Legal injury is about six and one-fourth cents usually, and that is about all that I see he suffered. The real penalty is prescribed by the statute of 1887 [the Liquor License Law]; but it must be pursued in another way, and not in this way. I therefore instruct you that, on the uncontradicted evidence, plaintiff is entitled to a verdict, but he is not entitled to a verdict for more than nominal damages, and those damages it is within your power to state, but they must be nominal. I have given you six and a quarter cents because that is the old term when we used to have a 'fipenny bit'; but you may put it anywhere up to $5 as far as I care." Verdict for plaintiff, twenty-five cents.

§ 292. **Tribute to Judge Sulzberger.**—The charge just read is not only amusing but instructive; it no doubt satisfied the injured plaintiff, for it ridiculed and rebuked the defendant; it must have gratified the defendant, for it saved him from damages; and it pleased the jurors by giving them an easy way out. When MAYER SULZBERGER left the bench of Philadelphia County, it lost one of its chief ornaments; he is, indeed, a splendid scholar, and was a great judge, when in the public service.

LECTURE X.

WHEN CASE IS FOR COURT AND WHEN FOR JURY.

Powers of judge on facts:
- Early view in Pennsylvania; (§ 293)
  - Cases quoted restricting power of court. (§ 293)
- Change in views, enlarging powers of court. (§ 294)
- Later views maintained. (§ 295)
- Governing principle stated: (§ 296)
  - Scintilla doctrine. (§ 296)
- Credibility of witness:
  - Generally for jury. (§ 297)
  - Not always for jury. (§ 298)
  - Lonzer v. Lehigh Valley Railroad Co.:
    - Rule on capricious disbelief by jury,
    - Where candor of witnesses is undoubted. (§ 298)
  - Lonzer case stated:
    - Scintilla doctrine applied. (§ 299)
  - Lonzer case cited:
    - Scintilla doctrine again applied. (§ 300)
  - Lonzer case cited again, but
    - Evidence showed contributory negligence. (§ 301)
  - Lonzer case extended to cases of
    - No conflicting testimony. (§ 302)
  - Lonzer case applied:
    - Capricious disbelief by jury; (§ 303)
    - No conflicting testimony; (§ 303)
    - Candor of witnesses undoubted. (§ 303)
  - Lonzer case cited again:
    - Capricious disbelief by jury; (§ 304)
    - No conflicting testimony. (§ 304)
  - Lonzer case applied again:
    - Capricious disbelief by jury; (§ 305)
    - No conflicting testimony. (§ 305)
  - Lonzer case cited again:
    - Capricious disbelief by jury; (§ 306)
    - Scintilla doctrine. (§ 306)

Lonzer case explained again, not followed:
Capricious disbelief by jury, (§ 307)
Not applied, if conflict in evidence; (§ 306)
Lonzer case again explained, not followed:
Capricious disbelief of jury; (§ 308)
Not applied, if conflict in evidence. (§ 307)
Lonzer case again explained, not followed:
Candor means credibility; (§ 309)
Credibility of witnesses for jury on oral testimony. (§ 309)
Lonzer case again explained, not followed:
Credibility of witness to overcome presumption, for jury. (§ 310)
Recent trend of decisions: (§ 311)
Credibility of witnesses is for jury where case depends on oral testimony; (§ 311)
Unless evidence for plaintiff is mere scintilla. (§ 311)
Documentary evidence: (§ 312-314)
Construction of, for court. (§ 312)
When not sued on, but offered as foundation for inference of fact, then for jury (§ 313)
Written evidence mixed with oral evidence, for jury; (§ 314)
Technical, etc., terms in writing when they require oral explanation, for jury; (§ 314)
Then the writing, with facts as found applied thereto, subject construction by court. (§ 314)
Jury's duty to follow court's construction. (§ 314)

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§ 293. **Power of judge: early view in Pennsylvania; cases quoted restricting power of court.**—We, in Pennsylvania, at one time, swung far in the direction of denying to trial judges any right of control, in the realm of fact, prior to the rendition of the verdict, the prevailing idea seeming to be that one could not ask for binding instructions because of the insufficiency of proofs, but had to demur formally to the evidence, or let it go to the jury and subsequently move in arrest of judgment; then our Supreme Court showed a tendency to swing too far the other

way. So we are apt now to get a wrong slant on the matter. Therefore, to obtain an intelligent understanding of the subject, it is necessary to start with the early cases and trace our way down; which I shall do as briefly as possible. In some early cases, our Supreme Court took the position that the trial judge could not, under any circumstances, be called upon to charge that either party had failed to establish his claim or defense.[1] That view was expressed by Judge TILGHMAN, in Zerger v. Sailer,[2] where he said: "He [the judge] was called on to declare that upon the whole evidence plaintiff had failed in proving his cause of action. The rule of law is that 'to questions of fact the judges are not to answer.' How could the judge answer the question proposed, without deciding the fact? If the court have a right to direct the jury that certain facts are proved or not proved, then the jury are bound to obey the direction. It follows that the trial by jury is at an end. The court may express their opinion of the evidence and if they think the jury are clearly mistaken in deciding on facts, they may order a new trial; but when the new trial is had, the decision of the facts reverts again to the jury. If the opinion of the court is desired on matters of law, they may be required to give it, in their charge to the jury, hypothetically—that if the jury shall be of opinion certain facts are proved, or not proved, the result of law will be in a certain way; or, if the defendant's counsel think that the facts proved do not support the declaration, they may demur to the evidence. I know no other way of withdrawing the decision from the jury and giving it to the court, unless the parties will agree on a state of facts, to be submitted

[1] Zerger v. Sailer, 6 Binn. 24; Galbraith v. Black, 4 S. & R. 207, 210-11.
[2] 6 Binn. 24, 27.

to the court's decision." Again, in Jones v. Wildes,[3] GIBSON, C. J., said: "When the evidence was closed on both sides, the defendant moved for a nonsuit, to which the plaintiff refused to submit; and, insisting on his right to go to the jury, prayed a direction that, on the whole case, the law was with him. This was refused by the judge; who charged that the law was with defendant, and that the verdict should be in his favor. Now, this was a positive direction to find in a particular way, and necessarily left nothing to the jury. We have often had questions of this sort in the country, and have reversed judgments on this ground, when the direction was less positive than in the case before us.....A judge is not bound, nor ought he to be required, to give an opinion as to the law on the facts of the whole case.....Judgment reversed and a venire facias de novo awarded."

§ 294. **Power of judge: change in views enlarging powers of court.**—The view just noted, at one time given voice to by such great judges as GIBSON and TILGHMAN, that in the absence of a formal demurrer to the proofs, the merest scintilla of evidence, produced by him who had the burden of proof, took his case to the jury, persisted for many years; but it gradually broke down. GIBSON, himself, in Weidler v. Farmers' Bank,[4] where a verdict was directed for defendant, said: "Taking every fact and circumstance given in evidence to be true—and there does not seem to have been any fact in dispute—still plaintiff had entirely failed to make out his case; and the trial judge might, in perfect consistency with his duty, say so." Finally, in Howard Express Company v. Wile,[5] 1870, Judge

[3] 8 S. & R. 150.
[4] 11 S. & R. 134, 141.
[5] 64 Pa. 201, 205.

SHARSWOOD said: "The doctrine that wherever there is a scintilla of evidence of a material fact, the question must be submitted to the jury has not stood the test of experience, and it has accordingly been exploded in England.[6] The more reasonable statement of the rule is, that where there is any evidence which alone would justify an inference of the disputed fact, it must go to the jury, no matter how strong or persuasive may be the countervailing proof. Under these circumstances a court may set aside a verdict as against the weight of the evidence—that is the most they can do to assist the party; but in a case in which a court ought to say that there is no evidence sufficient to authorize the inference, then the verdict would be without evidence, not contrary to the weight of it. Wherever this is so they have the right, and it is their duty, to withhold it from the jury. Evidence may be legally admissible as tending to prove a particular fact, which yet by itself is utterly insufficient for the purpose. It may be a link in the chain, but it cannot make a chain unless other links are added..... Where evidence on both sides is to be weighed, so as to determine on which side the scales incline, the jury is the appropriate tribunal, but where the weight on one side is of such a character as not to incline the beam at all....., —good to help something else but nothing in itself, nothing but a conjecture,—then it is as much a question for the court as if even this scintilla was absent. The rule thus understood does not impair the true value of trial by jury; it restrains it from arbitrary power, which would endanger its existence, and might lead to its entire abolition."

§ 295. **Power of judge: later views maintained.**—The position thus stated by Judge SHARSWOOD has been rather

[6] Ryder v. Wombwell, L. R. 4 Exch. 34.

consistently maintained ever since. In School Furniture Company v. Warsaw School District,[7] Mr. Justice CLARK said: "There is in every case triable by jury a preliminary question of law for the court, whether or not there is any evidence from which the fact sought to be proved may be inferred; if there is, there is sufficient to send the case to the jury, no matter how strong may be the proofs to the contrary. It is unnecessary to cite authorities in support of a principle so plain; this is the doctrine now generally recognized, not only in the courts of this and the sister states, but also in the Federal and English courts. In determining the sufficiency of the evidence, the court must, of course, take it as true, with every reasonable inference favorable to him who has the burden of proof."[8]

§ 296. **Power of judge: governing principle stated; scintilla doctrine.**—I think the governing principle may now be stated thus: In deciding whether there is more than a scintilla of evidence to send the case to the jury, the true test is: upon a review of the evidence, in the light most favorable to the party carrying the burden of proof, is it conceivable that a rational mind, desiring only to reach a just and proper determination of the question at issue, could reasonably arrive at the conclusion contended for by that party? If it is reasonably conceivable that, on this kind of a consideration of the evidence, such a conclusion could be so reached, the issue must be submitted to the jury; otherwise not. Because, under the circumstances last contemplated, there would be no real evidence for the jury to pass on; and hence none to support a verdict in favor of him who carried the burden of producing such proofs.

[7] 122 Pa. 494, 501.

[8] Blakeslee v. Scott, 37 Leg. Int. 474, cited by Judge Clark.

§ 297. **Credibility of witnesses: generally for jury.**—Always remember, however, that, in making the test to determine whether there is more than a scintilla of evidence, the trial judge is in no sense to pass on the credibility of witnesses. So far as the court is concerned, where this question of credibility is involved, the judge must, in making the test, resolve that point, like all others, in favor of the party carrying the burden of proof. In short, the judge must conclusively assume the witnesses told the truth, so far, but only so far, as their testimony favors the last mentioned party, otherwise it must be excluded from consideration at that time; if, thus viewed, the evidence makes possible a verdict in his favor, the case must go to the jury, as they are the only ones who may reject evidence on the ground that it is not to be believed. Of course, in cases where the law fixes a special standard—as, for instance, where the evidence is required to be "clear, precise and indubitable",—it is always for the court to say, as a matter of law, whether a witness's testimony measures up to such special standard; but this is another story, to which I shall refer later on.[8a] I am at present speaking exclusively of the test, in the ordinary case, where the question is as to the right to ask for binding instructions in one's favor because of the weakness of competent evidence produced by your opponent, when the latter has the burden of proof; in other words, where the inquiry is whether or not the party carrying that burden has produced more than a scintilla of evidence.[9]

§ 298. **Credibility of witness: not always for jury; Lonzer v. Railroad, rule on capricious disbelief by jury; where candor of witnesses undoubted.**—The credibility of

[8a] See section 324.

[9] Lehigh, etc., R. R. v. Evans, 176 Pa. 28, 32; Bartlett v. Rothchild, 214 Pa. 421, 427.

witnesses is, generally speaking, for the jury; but, in Lonzer v. Lehigh Valley Railroad Company,[10] which was decided in 1900, Mr. Justice MITCHELL said: "When the testimony is not in itself improbable, is not at variance with any proved or admitted facts, or with ordinary experience, and comes from witnesses whose candor there is no apparent ground for doubting, the jury is not at liberty to indulge in a capricious disbelief; if they do so, it is the duty of the court to set the verdict aside....., and, where that is the case, the court may refuse to submit it at all and direct a verdict accordingly." The last clause of the language just quoted has been a constant source of irritation ever since it was written; and the only way in which we can get a proper comprehension of how the courts have understood it, is to look at its application. I shall first briefly state the Lonzer case and review the Pennsylvania decisions in which it has been followed, and then those where it is mentioned, but not followed.

§ 299. **Lonzer case stated: scintilla doctrine applies.**— In the Lonzer Case itself, plaintiff's husband, a locomotive engineer on one of defendant's trains, was killed in an accident caused by the subsidence of land, over certain mine workings, traversed by defendant's railroad. Defendant introduced evidence that it had issued a printed order to all employees directing them to run trains slowly at the place where the accident happened; that plaintiff's husband had a copy of this order in his possession and showed it to one of defendant's witnesses. Had the order been obeyed, the accident would not have happened. Plaintiff did not deny the order, but made an effort to show that it had not been posted until after the accident; this evidence, however, did not amount to more than a scintilla. In reversing a judgment for plaintiff, Mr. Justice

MITCHELL, speaking for our Supreme Court, said: "On review of the whole evidence the facts are practically undisputed, and from them it clearly appears that Lonzer's death was the direct and approximate result of his voluntary disregard of an order made especially to avoid the very danger from which the accident resulted."

§ 300. **Lonzer case cited on scintilla doctrine.**—In Keiser v. Lehigh Valley Railroad,[11] the trial court gave binding instructions for defendant and our Supreme Court affirmed on appeal. It is there ruled that the negative testimony of nine witnesses,—that, on a stormy, windy night, they did not hear warnings given by a train,—cannot prevail over the positive testimony of fourteen witnesses, who swore that such warning was given. The rule in the Lonzer Case was applicable here on the principle that plaintiff's testimony amounted to no more than a scintilla.

§ 301. **Lonzer case cited again: but evidence showed contributory negligence.**—Hamilton v. Central Railroad of New Jersey[12] is one of those cases where the testimony depended upon by plaintiff showed that her husband's own negligence contributed to the accident which caused his death. The trial court entered judgment for defendant n. o. v., which was affirmed on appeal. While the Lonzer Case is mentioned in the opinion of the court below, it was in no sense necessary to the decision of the case.

§ 302. **Lonzer case extended to cases of no conflicting testimony.**—In Schley v. Susquehanna, etc., Railroad Company,[13] decided Per Curiam by our Supreme Court,

[10] 196 Pa. 610, 613.
[11] 212 Pa. 409, 411.
[12] 227 Pa. 137, 142.
[13] 227 Pa. 494, 496.

an admittedly drunken plaintiff was injured while asleep in a railroad car. The court said, on appeal, "According to plaintiff's testimony, the burden of proof of negligence was on him because he was not a passenger when injured; he had remained in the car twenty-five minutes after it reached the station." After this statement, the opinion continues that, "according to the undisputed testimony of defendant's witnesses", after plaintiff had been awake for ten minutes, and the car was on a siding, the accident happened. It was held that this latter testimony was properly considered by the trial court in directing a verdict for defendant, citing the language of the Lonzer decision. This is an instance of no conflicting testimony and where the story told by defendant's witnesses was entirely consistent with plaintiff's proofs; still, the decision goes further than usual in taking the question of the credibility of defendant's witnesses from the jury.

§ 303. **Lonzer case applied: capricious disbelief by jury; no conflicting testimony; candor of witnesses undoubted.**—In Walters v. American Bridge Company,[14] the trial court entered judgment for defendant in a personal injury case, notwithstanding a verdict in favor of plaintiff. The court rested its action on the ground that, "under the uncontradicted evidence," the condition which caused the injury was not created by defendant, but by an independent contractor. This was shown by unattacked documentary evidence; not only was the evidence in question unattacked, but the execution of the writing was admitted by plaintiff, on the trial, and the writings in connection with the contract further showed that the independent contractor had "assumed" the work. That it "actually did the work as an independent contractor" was shown

[14] 234 Pa. 7, 10.

by two entirely disinterested witnesses for defendant. Our Supreme Court said: "Under the uncontradicted written evidence, and the unimpeached parol testimony of disinterested witnesses, there was no question [but] the work on the bridge was being done by an independent contractor at the time the appellant was injured." The opinion then goes on to say: "It is vain for the learned counsel for appellant to insist that, under the rule as to parol testimony, the case was one for the jury, and the plaintiff is therefore entitled to judgment on the verdict. There was no evidence that any employee of the defendant company was ever on or about the bridge or had ever done any act in connection with the work of repair; while, on the other hand, the oral testimony on the part of the defendant as to the independent contractor was not in itself improbable, was not at variance with any proof or admitted facts or with ordinary experience, and, having come from witnesses whose candor there was no ground for doubting, the jury ought not to have been permitted to indulge in a capricious disbelief of their testimony: Lonzer v. Lehigh Valley R. R. Co., 196 Pa. 610."

§ 304. **Lonzer case cited again: capricious disbelief by jury; no conflicting testimony.**—In Lerch v. Hershey Transit Co.,[15] plaintiff swore that a trolley car she was alighting from prematurely started and threw her. On part of defendant, a passenger, who was a disinterested witness, testified it was he, and not the conductor, who gave the signal to start the car, and that he did so without authority from the conductor. This witness was corroborated by another disinterested witness; and plaintiff, who took the stand in rebuttal, "would not say the conductor had given the signal". On appeal, our

[15] 246 Pa. 473, 476.

Supreme Court ruled the jury "ought not to have been given license to indulge in an utterly unfounded capricious belief that the conductor had given the signal", which was the crux of the case, citing Lonzer v. Railroad. But the judgment was really reversed for error in the charge, and a new trial was granted.

§ 305. **Lonzer case applied again: capricious disbelief by jury; no conflicting testimony.**—In Timlin v. American Patriots,[16] where our Supreme Court entered judgment for defendant, reversing one entered on a verdict for plaintiff, a new and governing fact, set up by the defense, namely, the date of the death of a certain physician, was proved by an entirely disinterested witness for defendant, who was corroborated by another such witness. There was no attempt on part of plaintiff to deny this testimony by counter-proofs, or to attack the credibility of the witnesses. Moreover, an admission made by plaintiff tended to corroborate defendant's proofs. Under these circumstances, our Supreme Court said the rule in the Lonzer Case, as to juries not being allowed to bring in verdicts capriciously, applied. This, as you may see, was an extreme instance, which, if any case could, warranted the application of the rule.

§ 306. **Lonzer case cited again: capricious disbelief by jury; scintilla doctrine.**—In Macneir v. Wallace,[17] judgment n. o. v., entered in the court below, for defendant, was affirmed, our Supreme Court saying there was nothing in the evidence to sustain a finding of the essential fact depended upon by plaintiff. After which, evidence favoring defendant is noted, with comment indicating the jury had indulged in a capricious disbelief of such evidence,

[16] 249 Pa. 465, 469.

[17] 252 Pa. 323.

and the Lonzer Case is cited to show that under the circumstances the verdict for plaintiff could not stand. Here, however, the report indicates there was not even a scintilla of proof to support the verdict, so, without regard to the evident capricious disbelief by the jury, the verdict could not stand.

§ 307. **Lonzer case explained, not followed: capricious disbelief by jury; conflict in evidence.**—The first case to mention Lonzer v. Railroad was Devlin v. Beacon Light Company,[18] reported the following year. There Mr. Justice FELL said: "The rule stated in Lonzer v. Lehigh Valley Company....., that a verdict may be directed where a different conclusion could not be reached by the jury without a capricious disregard of apparently truthful testimony that is in itself probable and is not at variance with any proved or admitted facts, does not apply where there is a conflict of testimony, unless that on one side amounts only to a scintilla"; and in Heh v. Consolidated Gas Company,[19] Mr. Justice POTTER repeats the same language. There the court below accepted defendant's explanation of the accident, and gave binding instructions accordingly; but, on appeal, the judgment for defendant was reversed and a new trial granted.

§ 308. **Lonzer case again explained, not followed: capricious disbelief by jury; conflict in evidence.**—In Cromley v. Pennsylvania Railroad Co.,[20] judgment on a verdict for plaintiff, in an accident case, was affirmed. Mr. Justice FELL said that, although the weight of the testimony was in favor of defendant, yet the case was for the jury, and added this statement of the Lonzer rule:

[18] 198 Pa. 583, 585.
[19] 201 Pa. 443, 447.
[20] 211 Pa. 429, 431.

"Where the testimony of the witnesses in support of an action is a mere scintilla and that opposed to it is so overwhelming that no real controversy is raised, and where the jury could not find for plaintiff without a capricious disregard of apparently truthful testimony, probable in itself and not at variance with any admitted or proved facts, a verdict may be directed for the defendant; but such cases are rare, and they do not arise where there is a real conflict of testimony" (citing Lonzer v. Railroad, and an earlier case,[20a] from 155 Pa. 156, mentioned there.)

§ 309. **Lonzer case explained again, not followed: candor of witness means credibility; credibility of witness for jury on oral testimony.**—In Second National Bank v. Hoffman,[21] Mr. Justice BROWN reasserts the old rule that, when the establishment of a question of fact depends upon oral testimony, the credibility of the witnesses is for the jury alone and it is their exclusive province to determine from such testimony whether the fact in dispute has been established. There the appellate court reversed a judgment for defendant, entered on a verdict rendered under binding instructions, saying the court below had mistakenly followed the Lonzer Case, and explaining that, when the word "candor" was used in the latter case, the court simply meant "credibility", and that, when a witness had any interest in the matter in controversy, his "credibility" was necessarily for the jury.

§ 310. **Lonzer case again explained, not followed: credibility of witness to overcome presumption, for jury, where there is conflict in testimony.**—The latest instance in which our Supreme Court mentions the Lonzer Case is

[20a] Holland v. Kindregan, 155 Pa. 156.

[21] 229 Pa. 429, 434.

Holzheimer v. Lit Brothers;[22] there plaintiff produced sufficient evidence to raise a presumption that an automobile, which had injured him, belonged to defendant and was in charge of one of the latter's servants when the accident happened. The case was submitted to the jury, which found for plaintiff; but the court below entered judgment n. o. v., on the ground that defendant had offered such positive testimony, to overcome the mere presumption in plaintiff's favor, to discard it would be capricious, citing Lonzer v. Railroad. The appellate court said that, notwithstanding the evidence on the part of defendant's witnesses, which, if believed, entirely overcame the presumption in plaintiff's favor and showed the automobile was being used by a stranger, for his own purposes, at the time of the accident, the case should have been submitted to the jury, so that tribunal might pass upon the credibility of these witnesses. Mr. Justice STEWART there states: "So far as the liability of defendant was concerned plaintiff's case rested wholly upon a presumption.....The presumption was of course rebuttable, but this does not mean it had any less probative force than it would have had had it rested on direct evidence. .....No reason can be suggested why the general rule, which commits the credibility of witnesses to the determination of the jury, should not be applied in such a case, as it is where there is a conflict in the testimony." The learned Justice then said that, since defendant's testimony "came from living witnesses and its value depended upon their credibility," the case had to go to a jury.

§ 311. **Recent trend of decisions is back to rule that credibility of witness is for jury where case depends on oral testimony, unless evidence depended on is mere scintilla.**—This review of the Pennsylvania authorities shows

[22] 262 Pa. 150, 152, 153.

a decided drift back to the old rule,[22a] so well put by Justice SHARSWOOD in Reel v. Elder,[23] more than fifty years ago, where he said: "However clear and indisputable may be the proof, when it depends upon oral testimony, it is nevertheless the province of the jury to decide, under instructions from the court, as to the law applicable to the facts, and subject to the salutary power of the court to award a new trial if they should deem the verdict contrary to the weight of the evidence." Of course this statement is also subject to the rule that a mere scintilla of evidence is not sufficient to take an issue to the jury; and when this is kept in mind, the Lonzer rule as put by Justice FELL in Cromley v. Pennsylvania Railroad Company,[24] may be brought into consistency with the law as here stated by Justice SHARSWOOD.

§ 312. **Documentary evidence: construction of, for court.**—I have said much in relation to parol proofs, and I must now say a few words as to documentary evidence. When the evidence relied on is a writing, its construction is a matter exclusively for the court. Thus, in Welsh v. Dusar,[25] TILGHMAN, C. J., said: "The construction of written instruments is the province of the court; and it is of the utmost importance, that this province should not be invaded by the jury."[26]

§ 313. **Documentary evidence not sued on but offered as foundation for inference of fact; whether such inference can be drawn is for jury.**—There are occasions when

[22a] See also Gillmore v. Alexander, 268 Pa. 415, 421; and Derrick v. Harwood Elec. Co., 268 Pa. 136, 141; Kelly v. Dir. Gen., 274 Pa. 470; Shaughnessy v. Dir. Gen. R. Rs., 274 Pa. 413.

[23] 62 Pa. 308, 316.

[24] 211 Pa. 429, 431, quoted above, page 13-14.

[25] 3 Binney, 329, 337.

[26] See also Addleman v. Manufacturers', etc., Co., 242 Pa. 587, 591; Keefer v. Sunbury School Dist., 203 Pa. 334, 337.

written evidence, without relation to its connection with parol proofs, may be for the jury. For instance, where the writing in question is not sued on, but is put in evidence simply as proof tending to show an admission of a fact,—just as though a witness had been called to prove the same matter shown by the writing,—if it is problematical whether or not an inference can be drawn from the writing, which would justify a conclusion that the alleged admission had been made, it would be for the jury to draw the inference or not, as it might deem proper. In Floyd v. Kulp Lumber Co.,[27] Justice STEWART, of our Supreme Court, said on this subject: "It was not a question of construction of the legal effect of the writings, but a question of probative effect of the alleged admissions contained in them. Did these admissions identify the land then in dispute.....? This was a question which the jury alone could determine; and it was equally for the jury to say what weight the admissions were entitled to in this action. Where a writing is not a dispositive instrument, but is put in evidence merely to show an extrinsic fact, it would be for the jury to say what inference is to be drawn therefrom. When [under such circumstances] documents are offered in evidence as [merely] the foundation of an inference of fact, whether such inference can be drawn from them is a question for the jury."

§ 314. **Documentary evidence mixed with oral evidence, or where technical, trade or business terms require oral explanation; facts for jury; writing, with facts as found applied thereto, subject to construction by court.**— Where there is any latent ambiguity, or uncertainty as to the intention of the parties, caused by the use of terms in a writing, which have a peculiar trade significance and

[27] 222 Pa. 257, 270.

require parol explanation, or where a case is presented in which the right to recover depends on a mixture of written and parol evidence, it must be submitted to the jury (subject, of course, to the general rule which requires competent proofs, sufficient to sustain a recovery); but even in such instances, after the jury finds the uncertain facts, it is their duty to construe the written evidence in accord with the meaning which the trial judge may tell them the writing in question has when the facts, as they may determine them to be, are applied thereto. An excerpt from McCullough v. Wainright[28] explains this rule. It is there said: "Where a writing possesses an ambiguity, arising from reference to extrinsic objects, it may be explained by parol testimony, relative to the nature, situation, and circumstances of those extrinsic objects at the time of the contract; but never, unless this cannot draw the interpretation or construction of the contract [itself] to the jury. It is the province of the court to declare the construction of the contract, according to the true position and relative situation of these extrinsic objects, dehors the writing; and it is the province of the jury to find the true situation and character of these objects." Then, turning from general principles to the facts in the case, the opinion proceeds: "The situation of the trees, the low-water mark, the shore, and the particular localities mentioned in the agreement, could be ascertained only by parol testimony, and their relative position in regard to each other; this was a question for the jury; but the law arising on the contract, as thus explained, was for the court. The whole question might be said to be a mixed question of law and fact, and, as such, went to the jury, with suitable legal

[28] 14 Pa. 171, 174.

instructions from the court."[29] Again, in Home B. & L. Ass'n v. Kilpatrick,[30] the appellate court said: "If the written evidence in question had stood alone, it would have been the duty of the court to have construed it; but, in view of the oral testimony relating to, and necessary to be considered in connection with, the written evidence, there was no error in submitting the whole to the jury, under proper instructions. When matters of fact, depending on oral testimony, are connected with and necessary to a proper understanding of the written evidence, the court is not bound to construe the latter as though it stood alone; an admixture of oral and written evidence draws the whole [case] to the jury."[31]

[29] See also Foster v. Berg & Co., 104 Pa. 324, 328; Nat'l Dredging Co. v. Mundy, 155 Pa. 233.

[30] 140 Pa. 405, 419.

[31] See also Denison v. Wertz, 7 S. & R., p. 372; Sidwell v. Evans, 1 P. & W., 383; McGee v. Northumberland Bank, 5 W. 32; Dixon-Woods Co. v. Phillips Glass Co., 169 Pa. 167, 181.

LECTURE XI.

MATTERS FOR COURT OR FOR JURY: VERDICTS — GENERAL, SPECIAL AND CONDITIONAL.

Inferences from facts and oral evidence are generally for jury. (§ 315)

In certain instances inferences from fixed facts or undisputed oral evidence (credibility of witnesses being conceded) are for court. (§ 316)

Matters for court under last stated rule:

As to reasonableness of notice or time; (§ 317)

Rebuttal of presumption of payment from lapse of time. (§ 318)

Where only justifiable inferences from plaintiff's evidence defeats his case. (§ 319)

Carroll v. Railroad:

Walking in front of moving train. (§ 319)

Theory of Carroll Case stated: (§ 320)

Only possible inference from plaintiff's evidence was that he was negligent. (§ 320)

Logical application of "stop, look and listen" rule; (§ 321)

That rule defended. (§ 321)

What is reasonable inference,

Where personal injuries result from several ways,

And defendant is liable for only one,

Jury may not guess; (§ 322)

Binding instructions follow. (§ 322)

Sufficiency of proof: (§ 323)

Preliminary question whether evidence is up to required standard of proofs, for court; (§ 324)

Credibility of witnesses may be for court to limited extent, to say whether evidence is free from inherent unreliability. (§ 324)

Issue devisavit vel non: (§ 325)

Chancery power of court to pass on evidence. (§ 325)

Relative rights, etc., of judge, jury and counsel:

Judge may express opinion on weight of evidence. (§ 326)

Explanation of reasons for exceptions to general rule that oral evidence takes case to jury: (§ 327)

Exceptions necessary to preserve rule. (§ 327)
Court still judge of law; (§ 328)
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Application of these principles in criminal cases. (§ 329)
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After payment of jury fee and entry of judgment. (§ 350)

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§ 315. **Inferences from facts and oral evidence are generally for jury.**—In my last lecture I commented on the principle that, when oral evidence is admitted to establish an issue, it necessarily takes the case to the jury. It is likewise a general rule that "inferences from facts are for the jury."[1] In Maloy v. Rosenbaum Co.,[2] it was recently said: "The ascertainment of the underlying facts, and the drawing of the inferences and final conclusions therefrom, are for the jury, even where strong conflicting oral evidence is produced by a defendant;" but these rules are subject to variation.

§ 316. **In certain instances inferences from fixed facts or undisputed oral evidence, credibility of witnesses being conceded, are for the court.**—The general rule stated in the preceding paragraph is subject to certain excep-

[1] Adams v. Columbian Steam Boat Co., 3 Whart. 75, 81.
[2] 260 Pa. 466, 472.

tions, where inferences from fixed facts or undisputed oral evidence (the credibility of the witnesses being conceded) is for the court alone, as may be seen from the illustrative instances which follow.

§ 317. **Matters for court: as to reasonableness of notice or time.**—For example, let us suppose that notice is the thing to be proved; if there are issues of fact for determination, and the testimony is conflicting, it of course must go to the jury, so that tribunal may find the facts, but when the facts are fixed, the sufficiency of notice, in the sense of reasonableness, is not, as a general rule, a matter of inference for the jury—it is a point of law for the court, which the trial judge may determine without submitting the question to the jury.[2a] In Gurly v. Gettysburg Bank,[4] decided 1821, the Supreme Court, speaking on the subject of notice to an endorser of the non-payment of a note, said, "That reasonableness of notice is not simply matter of law is evident, because it must depend upon facts, such as the distance of the parties from each other, the course of the post, and, sometimes, unavoidable accidents, which the court cannot decide;" yet, in Jones v. Wardell,[5] decided in 1843, passing on the reasonableness of notice, to the drawer, of the dishonor of a bill of exchange, the same court said:[6] "Where there is a question as to the facts," the jury must decide what the facts are, but when they are determined or conceded, the court must decide "whether the notice is reasonable;" and, in concluding as a matter of law that the notice there involved was in fact reasonable, the court expressly considered,

[2a] See also Gilmore v. Alexander, 268 Pa. 415.
[3] Vilsack v. Wilson, 269 Pa. 77, 80.
[4] 7 S. & R. 324, 325.
[5] 6 W. & S. 399.
[6] Id. p. 401.

and drew its inference of reasonableness from, the very kind of facts referred to in Gurly v. Gettysburg Bank[7] as necessarily taking the case to the jury. Finally, in Brenzer v. Wightman,[8] decided the next year, the same tribunal after referring to the conflict of prior decisions, said it was then settled that, "when the facts are ascertained or undisputed," reasonableness of notice is a matter of law for the court; and this seems to be the general rule in other jurisdictions.[9] The principle on which the rule rests extends to reasonableness of time for doing any obligatory act; as recently said, in Miller v. Belmont Packing, etc., Company,[10] "all relevant facts being undisputed, the reasonableness of the time would be for the court."

§ 318. **Matters for court: rebuttal of presumption of payment from lapse of time.**—Let me state another variation from the general rule: There is, as you no doubt know, a presumption, after twenty years from maturity,[11] that a debt, evidenced by specialty—a bond, for instance—has been paid; but this presumption may be rebutted by explanation of the delay or other proof indicating non-payment. "Whether the facts and circumstances relied on, if true, legitimately give rise to a presumption of non-payment, and rebut the presumption of payment from lapse of time, is [a point] of law for the court,"[12] not of inference for the jury. In other words, this counter pre-

[7] 7 S. & R. 324, 325.

[8] 7 W. & S. 264, 266.

[9] Penrose v. Cooper, 88 Kans. 210, 216; Cole v. C. & N. W. R. R., 38 Iowa, 311, 312; Birdsall v. Russell, 29 N. Y. 220, 248-9; Claflin v. Lenheim, 66 N. Y. 301.

[10] 268 Pa. 51, 60.

[11] Eby v. Eby's Assignee, 5 Pa. 435, 437.

[12] 30 Cyc. 1295.

sumption, of non-payment, when it arises, "the facts being established....., is one drawn by the law itself from .....[those] facts, and whether it exists or not is necessarily for the court" to say, not for the jury to infer;[13] but, when the essential facts are in dispute, their determination is for the jury, like all other matters of controversy involving the establishment of disputed facts. While, where there is a conflict in the testimony, or anything else in the case to raise a question of credibility of the witnesses, produced to overcome the presumption of payment from lapse of time, the issue, as to whether these witnesses are telling the truth, will take the case to the jury,[13a] yet, where the evidence is oral and the parties agree there are no disputed facts, if each side asks for binding instructions on the same testimony, the issue, as to whether the presumption of payment from lapse of time has been overcome, can be determined by the court, without at all submitting the evidence to the jury.[14] As you can see, these rules, in the class of cases to which they apply, necessarily vest in the courts power to draw inferences from fixed facts, whenever that course is required, even though the evidence of those facts lies in parol; and, to this extent, at least, they vary the ordinary rule that "inferences from facts are for the jury."

§ 319. **Matters for court: where only justifiable inferences from plaintiff's evidence defeats his case; Carroll v. Railroad; walking in front of moving train.**—The variation from the ordinary rule, that oral evidence takes the case to the jury, by the principle laid down in Lonzer v. Lehigh Valley Railroad Company,[15] I discussed at

[13] Reed v. Reed, 46 Pa. 239, 243.

[13a] Beale's Exrs. v. Kirk's Adm., 84 Pa. 415, 417.

[14] Delany v. Robinson, 2 Whart. 503; Gilmore v. Alexander, 268 Pa. 415.

[15] 196 Pa. 610, 613.

length in the preceding lecture,[15a] and need not go into it again at this time; but there is another leading and much followed Pennsylvania decision, called Carroll v. Pennsylvania Railroad Company,[16] which requires consideration. There plaintiff, who had been struck at a crossing by a railroad train, was denied the right to have his claim for damages sent to a jury. Our Supreme Court, explaining the ruling in that decision, said in the next opinion which mentions the Carroll Case:[17] "It clearly appeared, from the evidence of the witnesses for the plaintiff, that they saw the train which struck plaintiff.....and that plaintiff could have seen it from where he said he stopped and looked; the relative positions of the plaintiff and the train, at the time, were ascertained. This court, therefore, correctly held that 'it is in vain for a man to say he looked and listened, if, in despite of what his eyes and ears must have told him, he walked in front of a moving locomotive.'"

§ 320. **Matters for court: theory of Carroll Case stated; only inference from plaintiff's evidence was that he was negligent.**—As may be seen, the excerpt just quoted from the Carroll Case is an application of the "stop, look and listen" rule, which defines an imperative duty. When the precise measure of duty is determined by law, and is the same under any and all circumstances, a failure to perform up to the required standard is negligence per se; and when, from the testimony produced by a plaintiff, no other inference is honestly possible than that he did not so perform, the case must be taken from the jury by binding instructions for defendant. This is the theory on

[15a] Sections 298-319.

[16] 12 W. N. C. 348.

[17] Schum v. Pa. R. R., 107 Pa. 8, 12, 13.

which Carroll v. The Railroad was decided. Of course, it is a variation of the general rule that inferences from facts are to be drawn by the jury; but, if any variations are warranted, this is one of them. It is generally spoken of as the rule of Carroll and the Railroad, or, more briefly, the rule of the Carroll Case.

§ 321. **Matters for court: Carroll Case logical application of "stop, look and listen" rule; that rule defended.**—There is much more room to quarrel with the "stop, look and listen" rule, itself, as an encroachment on the rights of the jury, than with the rule in the Carroll case; but the former is now so ingrained in our law that it has become a rule of thumb, and its discussion at this time is of no practical use. It can, however, be said in its favor that the "stop, look and listen" rule has filled a real purpose and saved many lives, which probably accounts for its continued existence; and, as stated before, the rule in the Carroll Case is but a logical application thereof.

§ 322. **Matters for court: what is reasonable inference, where personal injuries result from several ways and defendant is liable for only one, jury may not guess; binding instructions follow.**—In a case where the testimony establishes a personal injury, that might have resulted in any of several possible ways, only one of which would fix defendant with liability, the court will not permit the jury to infer, or guess, from such evidence that the one cause which would make defendant liable was the moving efficient cause of the injury; but, under such circumstances, the trial judge must give binding instructions for defendant. This rule rests on the principle that a jury will not be allowed to reach a verdict by mere conjecture, but only from direct evidence or by reasonable inference; and it, of course, places power in the court, under the

circumstances indicated, to decide what is a reasonable inference from oral proofs;[18] to this extent the rule is a variation of the ordinary one that such inferences are for the jury.

§ 323. **Matters for court: on legal sufficiency of proof; standard by which proof is measured.**—Whenever, in any manner, an issue is reduced to the mere legal sufficiency of the proofs, it thereby becomes a question of law; and this is a guiding principle to keep in mind. At the same time, it must be remembered that the extent of the power of the court to pass on evidence, in deciding this question of legal sufficiency, depends in each case on the standard by which the proofs must be measured.

§ 324. **Matters for court: preliminary question whether evidence is up to required standard; credibility of witnesses may be for court, to limited extent, to say if evidence free from inherent unreliability.**—Where the law demands proof up to a certain standard, there is always a preliminary question for the court, whether the evidence presented measures up to that standard, and this, in some cases, may require the trial judge, at least to a limited extent, to pass upon the credibility of witnesses. For instance, where, on the trial of an accident case, defendant produces a written release, and plaintiff seeks to set it aside on the ground of fraud, the law says that the proof demanded for this purpose must be "clear, precise and indubitable." To measure up to the first two mentioned requirements, the witnesses must be "credible, distinctly remember the facts to which they testify, and narrate the details exactly," and the last requirement means that the statements of the witnesses must be true. In some cases our Supreme Court has said indubitable proof means

[18] Alexander v. Pa. Water Co., 201 Pa. 252.

"evidence that shall not only be credible but of such weight and directness as to make out the facts alleged beyond doubt",[19] or "beyond a reasonable doubt"; or such evidence as "must carry a clear conviction of its truth to the mind of the jury";[20] but, so far as this last requirement applies to the preliminary consideration of the evidence by the court—to judge of its sufficiency to go to the jury,—it simply means that, disregarding counter-attacks on plaintiff's proofs, they must have the appearance of truth, at least to the extent of being free from manifest inconsistencies or marks of inherent unreliability. To this extent the court not only has the right, but is obliged to consider and weigh oral evidence,[21] and, in so doing, to pass on the credibility of witnesses.

§ 325. **Matters for court: sufficiency of proof; issue devisavit vel non; chancery.**—There is another instance, in which the trial judge is vested with power to decide whether or not he shall submit oral evidence to the jury, even though it be conflicting, and that is in an issue devisavit vel non. This, as you know, is an issue, sent by the orphans' court for trial in the common pleas, to test the validity of a will, where it is alleged there was fraud, undue influence, or mental incapacity of the deceased, at the time of its execution. In such cases, the trial judge, after weighing the evidence, refuses to submit the issues to the jury unless he feels the ends of justice call for a verdict against the will, or is so uncertain on this point that he could conscionably sustain a finding either way. If he knows that his professional and official conscience will not permit him to sustain a verdict against the validity

[19] Hart v. Carroll, 85 Pa. 508, 511.

[20] Highlands v. P. & R. R. R., 209 Pa. 286, 292, 295; see also Allegro v. Rural Valley Mutual Fire Ins. Co., 268 Pa. 333.

[21] Ralston v. P. R. T. Co., 267 Pa. 257; Leonard v. Coleman, 273 Pa. 62; Seiwell v. Hines, Dir. Gen., 273 Pa. 259-261.

of the will, it is his bounden duty to peremptorily instruct the jury to find for those who support it. In this instance, however, the jurisdiction is in aid of a court of chancery and the practice is affected by that circumstance.[22]

§ 326. **Relative rights, etc., of judge, jury and counsel; right of judge to express opinion on weight of evidence.** —The relative rights, powers and duties of judge, jury and counsel are so well and strongly stated by the great GIBSON, in a case back in 2nd Wharton,[23] that I shall quote extensively therefrom. He said: "The [trial] judge directed that the testimony of a particular witness, if true in fact, rebutted the presumption of payment in point of law; and that, as there was no evidence in the cause which purported to contradict [the witness], the question depended on his credibility, which was left to the jury..... The argument for a new trial seems to be rested on a supposed invasion of the jury's province in saying what was evidence, and what was not. It is certainly not only the right, but the duty, of the judge, thus to discriminate for purposes of admission or exclusion; and it is difficult to imagine why he may not do so in summing up. It will not be pretended that a jury may find capriciously and without the semblance of evidence, or that the court may not set aside their verdict for palpable error of fact; and, if it may subsequently unravel all they have done, why may it not indicate the way to a wholesome conclusion in the first instance? The superior fitness of a jury to determine facts has lately been so vaunted, that for a judge to open his lips in respect to the weight of testimony, is sometimes frowned upon as a grievance; and the supposed

[22] Phillip's Est., 244 Pa. 35; Fleming's Est., 265 Pa. 399; Tetlow's Est., 269 Pa. 486.

[23] Delany v. Robinson, 2 Whart. 503, 507-8.

practice of British judges in this particular is not only put in advantageous contrast with our own, but set forward as the true exponent of the constitutional injunction, that trial by jury shall remain as heretofore. The framers of the constitution, however, we must suppose, took for their model the trial by jury that had theretofore existed in America,[28a] without regard to the fluctuations of foreign practice.....As to the superior qualifications of a juror for the determination of facts, it will scarce be pretended that an unpracticed mind can be more accurate in its operations than one which has been trained to habits of discrimination by the comparison of circumstances, and whose experience, in any other pursuit, would have led to peculiar skill. Yet this mode of trial has decisive advantages over every other, but they are not those that are usually attributed to it by its eulogists;[28b] they consist mainly in its publicity, in the popular knowledge of the laws which it disseminates, and in the confidence inspired by popular agencies in their administration; and they are undoubtedly so great that civil liberty would not long survive [its fall]. But an arbitrary license, on the other hand, would be equally fatal to its usefulness as an instrument of justice in the particular cause.....It is doubtless unpleasant to the advocate to have the impressions made by an ingenious speech effaced by the mechanical but accurate process of the judge who follows him; but it is to be remembered that what is lost by it to the advocate, is gained to justice, which is the superior object of protection. Without this process of judicial review, causes would frequently be determined, not according to their justice, but according to the comparative talents of the counsel. To hold the scales of justice even, a judge may

[28a] See sections 370-400.

[28b] See sections 78 to 89.

fairly analyze the evidence, present the questions of fact resulting from it, and express his opinion of its weight, leaving the jury, however, at full and entire liberty to decide for themselves. The judge who does no more than this, transcends not the limits of his duty."

§ 327. **Explanation of reasons for exceptions to general rule that oral evidence takes case to jury; exceptions necessary to preserve rule.**—I fear no governmental system, be it administrative or judicial, will ever prove perfect in operation; and this, because it is always dependent on human agencies. Man is what he is—with all his virtues and imperfections—and, so far as we can see, he bids fair to continue in the same general mold. We have no substitute for man, and, since the world must depend upon him to carry on whatever general plan it is to work under, when we find this agency going awry at a given point, it furnishes no good reason for abandoning any of the established rules that constitute our general system, and which, on the whole, have proved satisfactory. At the same time, those fixed with the responsibility of administering the law cannot sit still and do nothing to remedy such defects when they arise, after the defects in question have continued long enough to appear as evils. If we can put our hands on the point where the practical working of a general rule is going wrong, and can devise a slight departure for the sake of meeting the defect—which you must remember is not a defect in the governing rule, but in the agency upon which, as previously said, we must depend for the maintenance of our whole system,—the thing to do is not to abandon the rule, which is an intricate part of the system, but to tolerate a justifiable variation therefrom; and that is precisely what has been done, from time to time, in order to maintain the system

under which we work. I prefer this as the true explanation of the several departures, or variations, which I have mentioned, rather than some fine-spun theory that endeavors to reconcile these variations to one another and the general rules to which they are more or less in the nature of exceptions. After all, when we consider the intricacies of organized society, the important part which our judicial system plays in keeping it going, and that this system consists of a series of general rules, all of which must be construed, and their administration guided by the courts, it is amazing that a principle—such as oral or conflicting evidence takes the case to the jury—should be subject to so few variations; and, while these few may be confusing to you at first, when you get into your professional life, they will soon become properly placed in your minds—at least sufficiently for all practical purposes. My only aim here, in describing the variations I recall (and I think I have given the principal ones), is to help you to a general understanding of the system of trial by jury; and this, throughout these lectures, I have been endeavoring to do, in a more or less detailed, yet, necessarily, sketchy, way.

§ 328. **Court still judge of law, jury of facts.**—While certain variations exist, and must be taken into account, some of which I have called to your attention and others of which you will learn in practice, yet the general rule is as previously stated: In cases where the evidence consists of oral testimony, or where uncertain inferences are to be drawn from facts, the cause must be submitted to the jury; for they are the judges of the credibility of the witnesses and the facts; while the court is the judge of the law.

§ 329. **Application of rule last stated in criminal cases.** —There has always been discussion in the books as to whether in criminal cases the jurors are not judges of the law as well as the facts. The Supreme Court of Pennsylvania, speaking by Chief Justice MERCUR, in Hilands v. Commonwealth,[24] once said: "The jurors are not only the judges of the facts in such case, but also of the law; [because] if they find the prisoner not guilty, although in clear mistake of the law, no court can review the correctness of that verdict". This is true from a practical standpoint, but theoretically the jurors are supposed to take their law from the court, and to act accordingly; so I do not think anything is gained by the long dissertations in which others have indulged, in order to decide whether or not jurors in criminal cases are judges of the law, and I shall not enter upon a discussion of that subject.

§ 330. **Court directing verdict for defendant on opening statement of counsel for plaintiff; federal courts.**— In Oscanyan v. Winchester Repeating Arms Company,[25] it was held by our highest federal tribunal that the court may direct a verdict for defendant upon the opening statement of plaintiff's counsel, where, after he has been given an opportunity to explain and qualify, it still clearly appears that, if the facts asserted as true were proved, the law would not allow a recovery. This authority fixes the practice in the United States Courts; but, whenever it is to be taken advantage of, counsel moving for judgment must be careful to see that the record shows all the essential facts, concerning his opponent's opening, upon which he depends to sustain his judgment; and then, should the

[24] 111 Pa. 1, 5.
[25] 103 U. S. 261.

case be appealed, he must see that these are set forth in the bill of exceptions.[26]

§ 331. **Court directing verdict for defendant; Canadian courts.**—I must confess my sympathy with the Federal Supreme Court rule in this matter; and, I am told, the practice there permitted is constantly followed in the Canadian courts, where openings by counsel for both plaintiff and defendant are required before any testimony is taken, and the trial judge therefrom, and from his perusal of the pleadings, publicly dictates to the stenographer the facts admitted and denied, giving counsel the opportunity to correct mistakes; he then limits the evidence to the disputed matters. In this way business is greatly expedited; but how far the Supreme Court of Pennsylvania would approve of such practice, I, of course, cannot predict.[27]

§ 332. **Court directing verdict for defendant; federal courts; auditor to make tentative preliminary findings;**

[26] Liverpool, etc., S. S. Co. v. Comrs. of Emigration, 113 U. S. 33.

[27] In Buehler v. U. S. Fashion Plate Co., 269 Pa. 428, 433, 434, it is said: "A fact averred in the statement of claim, and not specifically denied in the affidavit of defense, is an admitted fact [Act of May 14, 1915, P. L. 483], but does not become such for purposes of trial, unless put before the jury in one of three ways: (1) by the presiding judge stating to the official stenographer, in the presence of counsel, that certain facts, which he details and directs to be placed on the notes of trial, are averred in the statement and not denied in the affidavit, and hence must be treated as admitted; or (2) by counsel directing to be placed on such notes certain detailed facts, which they admit; or (3) by offering in evidence specific parts of the statement of claim, with what counsel conceive to be the replies thereto contained in the affidavit of defense, and having the facts thus sought to be established placed on the notes of trial as admitted, because averred in the statement and not denied in the affidavit of defense." See also Franklin Sugar Refining Co. v. Hanscom Bros., Inc., 273 Pa. 98; Parry v. First Nat. Bk., 270 Pa. 556; Farbo v. Caskey, 272 Pa. 573; Gurdus v. Phila. Nat. Bk., 273 Pa. 110; Karnofsky Bros. v. Del. & Hudson Co., 274 Pa. 272.

might be equivalent to binding instructions, if approved.—The United States Supreme Court recently decided that an auditor may be appointed by a nisi prius court, to sort out the issues and make tentative findings thereon, when the case is complicated, and such procedure will tend to facilitate the trial, by simplifying some of the issues and eliminating others, which on investigation might prove either susceptible of clarification or not to be in dispute; should the auditor's advance findings be approved by the court at trial, this, of course, would be equivalent to binding instructions on the latter class of issues. The case to which I refer[28] will be more fully discussed in my next lecture; but it may be well to say here that the decision controls only the practice in the Federal Courts.

§ 333. **Mutual requests for binding instructions; held waiver of jury trial in federal courts; not so in Pennsylvania courts.**—In Beuttell v. Magone,[29] it is held that a request by each party for binding instructions is equivalent to a submission of the case to the court, and waives a jury trial; this is not our practice, however, nor does it seem reasonable. With us, both sides may ask for binding instructions, and, if the court thinks the evidence is such as the jury should pass on, it will submit the case, despite the mutual requests for binding instructions; but, under such circumstances, if the parties expressly agree that there is no question for the jury, the court may dispose of the case.

§ 334. **Request for binding instructions no waiver in federal courts in case of alternative request to go to**

[28] Ex Parte Peterson, 253 U. S. 300.
[29] 157 U. S. 154.

jury.—In Sampliner v. Motion Picture Patents Company,[80] Mr. Justice McReynolds says: "Among other things, counsel for plaintiff in error now insist that 'if there were any questions of fact to be decided or divergent inferences of fact to be made, the district court erred in not submitting them to the jury.' The point is well taken. Statements by plaintiff's counsel made it sufficiently plain that while he sought an instructed verdict, he also requested to go to the jury if the court held a contrary view concerning the evidence. In the circumstances disclosed, we think the request was adequate and timely under former opinions of this court. (Empire State Cattle Co. v. Atchison, T. & S. F. R. R. Co., 210 U. S., 1, 8; Sena v. American Turquoise Co., 220 U. S. 497, 501; Schmidt v. Bank of Commerce, 234 U. S. 64, 66; Williams v. Vreeland, 250 U. S. 295, 298.) It should have been granted; clearly some substantial evidence strongly tended to show that the assignment was taken in extinguishment of an existing indebtedness, and not for mere speculation upon the outcome of intended litigation."

§ 335. **Verdicts: defined; general and special, defined.**—The verdict in a civil case consists of a finding for either plaintiff or defendant, according to the facts which the jury deem proven; ordinarily they are either general or special. A general verdict is one which pronounces comprehensively on all of the issues, simply in favor either of the plaintiff or defendant; the legal points involved are supposed to be found therein, as charged by the judge—thus it virtually embodies a decision both on law and fact—and, if the court permits, judgment may be entered thereon for the prevailing party. A special verdict is one by which the jury finds the facts only, leaving the court

[80] U. S. Adv. Ops. 1920-1, page 87.

to determine, as a matter of law, which party is entitled to recover on them, and to enter the final judgment accordingly. There is also what is known as a conditional verdict.

§ 336. **Conditional verdicts: equity at first worked out through them; example.**—In the early days of Pennsylvania jurisprudence, before the chancery powers of our courts were thoroughly established, "conditional verdicts" were quite generally used. Under this practice the jury would find damages for plaintiff, attaching a condition to their verdict that, if plaintiff performed a certain act by a given time, the verdict should be entered for defendant. An example of this may be found in Walker v. Butz,[31] decided in 1795, where large damages were awarded in an action for obstructing a water course, and plaintiff filed an agreement in court "to release the damages to be found by the jury on the water right being secured" to him. The jury, "under the direction of the court," found the damages claimed by plaintiff, with the condition that they should be released in accordance with the agreement upon the defendant securing to plaintiff his water rights.[32]

§ 337. **Conditional verdicts: other examples.**—The case of Irvine v. Bull[33] contains an interesting paragraph explaining this early practice, wherein it is said: "Not having a court of chancery, our predecessors adopted modes of using and applying common law actions, unknown where there is a common law court and also a court of chancery. Thus, to compel a specific performance, an action on the case was brought.....with.....counts for damages for breach of the contract; and the jury might give damages for a sum so large, as that the vendor would

[31] 1 Yeates, 574.

[32] See also Anonymous, 4 Dallas 147.

[33] 7 Watts 323-325.

make a deed rather than pay such sum, and the verdict was conditional for so much, to be released on making a deed within a specified time." In Decamp v. Feay,[34] Justice GIBSON ruled that the jury might find damages conditionally, prescribing the terms on which they must be released, but it was not competent for the court to instruct the finding of damages sufficient to insure specific execution of a contract, leaving it for the judge to stipulate conditions that would control the plaintiff in the use of the verdict. GIBSON said the control must be exercised by the jury itself through the form of the verdict.[35]

§ 338. **Conditional verdicts: equitable ejectment still survives.**—Since the establishment of the chancery jurisdiction of our courts, these conditional verdicts, being no longer needed, have practically disappeared, except in equitable actions of ejectment. Originally, in Pennsylvania, two verdicts in ejectment had to be obtained by a plaintiff before he could get possession of the land, but, if equitable rights were involved, plaintiff could bring an action, which would be classed as an equitable ejectment; and, in such an action, he could secure a conditional verdict.[36] For instance, A takes a deed to land with knowledge that his grantor, B, had previously sold the property by written agreement to C. If A goes into possession, C may maintain ejectment against A to recover either the possession or the purchase money he gave B; such an ejectment is an equitable one wherein a conditional verdict may be entered for C, plaintiff, but ordering him to

[34] 5 S. & R. 323, 326-7.

[35] See also Hawk v. Geddis, 16 S. & R. 23; Dickey v. McCullough, 2 W. & S. 88; Dixon v. Oliver, 5 Watts 509; Frantz v. Brown, 1 P. & W., 257; Adams v. Smith, 19 Pa. 182; Roland v. Miller, 3 W. & S. 390; Beaver v. Beaver, 23 Pa. 167; Tull v. Lynn, 18 Pa. Dist. R. 699, 702.

[36] Bascom v. Cannon, 158 Pa. 225.

execute a deed to A, defendant, upon the payment by the latter to the former of the purchase money which C had paid to B.[37] If, after such a finding, plaintiff refuses to execute the conveyance thereby called for, a bill in equity will lie to compel him to perform in accordance with the verdict.[38] You understand, however, that where plaintiff claims under a purely legal title, and does not assert an equitable one, the principles covering cases of equitable ejectment do not apply, and a conditional verdict may not be rendered.[39]

§ 339. **Special verdicts: requests for findings of particular facts; court cannot compel such findings.**—At times, for practical reasons, it is desirable to obtain specific findings from the jury, on the controlling facts, even though the case may not be one for a special verdict, in the strict sense of that term.[39a] For instance, should you represent a defendant corporation, and the real question in controversy is, Did plaintiff step from a moving car, or was it started while she was in the act of alighting therefrom? —if the weight of evidence on that issue is your way, but plaintiff happens to be a woman, who was badly injured, and you fear that, through sympathy, the jury may smother a finding on this immediate point in a general verdict against your client, you may formulate a written issue covering the point in question, which you may ask the trial judge to submit to the jury for a specific finding, or answer. If your request is granted, which is a matter entirely within the control of the trial judge, the jury will be instructed to bring in their special answer with the general verdict; but the court cannot in this manner inter-

[37] Riel v. Gannon, 161 Pa. 289.

[38] Riel v. Gannon, supra.

[39] Littieri v. Freda, 241 Pa. 21.

[39a] See Reese v. Peoples Coal Co., 64 Pa. Superior Ct. 519, 524.

fere with the right to find a general verdict and compel the jury to render the special answer.

§ 340. **Special verdicts: they show grounds of verdict on motion for new trial or on appeal; jury may disregard request for special findings; court may grant new trial, if necessary.**—In Patterson v. Kountz,[40] the Supreme Court of Pennsylvania writing on the subject I am now discussing, said the obtaining of such special findings "is often a very convenient practice, and prevents embarrassing questions from arising subsequently, on a motion for a new trial or on a writ of error, when it cannot otherwise be known on what grounds the verdict was rendered"; but it is there added: "The learned judge below had a perfect right to request the jury to find particular facts, though they might have disregarded his request and found a general verdict" only.[41] From the standpoint indicated in the excerpt just read, the practice is of great value; for, should the special findings conflict with the general verdict, the court will usually set the latter aside and grant a new trial.

§ 341. **Special verdicts: all issues must be presented; facts not found presumed not to exist.**—The court may submit all the issues in the case, each being formulated for a separate answer, and thus obtain a formal special verdict, on which it may enter judgment; but, when this course is pursued, counsel must be careful to see that every issue involved is duly submitted, otherwise the verdict will be of no avail. As far back as 1850, it was decided[42] that a special verdict must find all the facts on which judgment is to be pronounced; further, that, if the

[40] 63 Pa. 246, 252.

[41] Chambers v. Davis, 3 Whart. 40.

[42] Wallingford v. Dunlap, 14 Pa. 31, 32.

trial judge states to the jury certain facts as undisputed, and directs a special verdict to be found as to only the disputed facts, it will be accounted error—for the undisputed as well as the disputed facts must be incorporated in the special verdict before it is ripe for judgment. These holdings have been uniformly followed to the present time,[43] the theory being that a fact not found by the special verdict is presumed not to exist. Standard Sewing Machine Co. v. Royal Ins. Co.,[44] decided in 1902, reaffirms the rules laid down in the earlier Pennsylvania cases, as to the necessity for special verdicts incorporating all the facts, and contains an interesting discussion by the late Justice MESTREZAT, who was particularly strong in handling points of practice. Finally, in Panek v. Scranton Railway Company,[45] the Supreme Court of Pennsylvania quite recently reviewed some prior, and apparently inconsistent, rulings, reaffirming the old principle that a special verdict must contain all the facts, or judgment cannot be entered thereon. It is there said: "A case should be submitted to the jury as an entirety, and not in fragments; so that, whichever way they find, judgment may be entered thereon. Had the question here been answered in the negative, it would have necessitated the submission of various other questions, singly or in combination, and would have deprived the jury of its right to render a general verdict". The opinion then goes on to say: "It is undoubtedly proper [however] for the court, in certain

[43] Thayer v. Society of United Brethren, 20 Pa. 60; Pittsburgh, etc., Co. v. Evans, 53 Pa. 250; Loew v. Stocker, 61 Pa. 347; Vansyckel v. Stewart, 77 Pa. 124; Tuigg v. Treacy, 104 Pa. 493; Com. v. Grimes, 116 Pa. 450; McCormick v. Royal Ins. Co., 163 Pa. 184; Com. v. Zacharias, 181 Pa. 126; Standard Sewing Machine Co. v. Royal Ins. Co., 201 Pa. 645; Kelchner v. Nanticoke Boro., 209 Pa. 412.

[44] 201 Pa. 645, 648.

[45] 258 Pa. 589, 594.

cases, to request the jury to find a special verdict or to make special findings of fact in addition to the general verdict."

§ 342. **Special verdicts: issues must be consistent.**— In stating special findings for the jury to pass on, care must be taken to see that they are consistent with one another; for, if the findings are subsequently ascertained to be irreconcilable, no judgment can be entered thereon.[46]

§ 343. **Agreement as to facts not in dispute, jury to find those disputed, proper practice; such cases equivalent to case-stated; right of appeal should be reserved.**— If the parties see fit, they may agree on the facts as to which there is no dispute, leaving for actual determination by the jury only those in controversy; for, in the last analysis, most cases are governed by but a small number of disputed facts. When the practice here suggested is followed, counsel must agree that the jury shall, pro forma, find the admitted facts, including therein all the material facts in the case save those in controversy; further, that the jury shall especially find the disputed facts, and, on the findings as a whole, the court shall enter judgment. Where this course is pursued, if I were counsel, I would incorporate in the agreement a clause saving the right of appeal; for the litigation would be reduced, before judgment, practically to the status of a case-stated, and, in a case-stated, if the right of appeal is not specifically saved, it does not exist.[47]

§ 344. **Special verdicts: questions of law for court on final judgment even in criminal cases.**—When all the material facts are found by the jury, the propositions of

[46] McHale v. McDonnell, 175 Pa. 632, 645.

[47] Pinkney v. Erie R. R., 266 Pa. 566.

law, arising out of the facts thus determined, may be submitted to the court for final judgment, even in criminal cases.[48]

§ 345. **New system for submitting issues, suggested, with reservations.**—I have often thought, if the prevailing issues in a case could be first put to the jurors, and, after obtaining answers thereto, other necessary questions of fact submitted (points on which there is no controversy being eliminated from the jury's consideration), and the case thus worked out,—so that the court could enter judgment on the record,—in some instances more satisfactory results might be obtained than under our present practice of submitting all the issues at one time; but, I suppose, the difficulty with this suggestion is that many trial judges are not masters of the art of administering the law, and, in most cases, they would get but poor aid from the bar, few lawyers being skilled in court practice, hence the effort might end in confusion worse confounded. This, in all probability, is the real reason why our courts of appeal have set their faces so strongly against encouraging such experiments.

§ 346. **Verdicts generally: formal method of rendering; must be responsive to issues, etc.**—When the jury comes to render its verdict, the foreman stands, and is asked by the court crier: "Have you agreed on a verdict?" to which, if they have agreed, the foreman replies in the affirmative. In the criminal courts, the crier then asks, "How say you, guilty or not guilty?" and, in the civil courts, "How do you find, for plaintiff or defendant?" If a criminal case, the foreman answers either "Not guilty" or "guilty as indicted." In a civil case, the foreman an-

[48] Com. v. Chathams, 50 Pa. 181, 185, and Com. v. Eichelberger, 119 Pa. 254.

swers, "We find for plaintiff," or defendant, as it may be. Should the finding be for plaintiff, and the case is one calling for a money verdict, the amount is asked and given. All of which the clerk duly enters on the records of the court. Of course you understand the exact words used by the crier and the foreman are not material;[49] but the verdict rendered must be responsive to the issues or charges on trial. Should the verdict be sufficient in substance, though defective in form, the court may direct the jury how to amend it; but if it is not responsive to the issues or charges, the court must send the jury back for further consultation until they are prepared to bring in a responsive verdict.[50]

§ 347. **Verdicts generally: explanation of polling jury; polling jury before verdict is recorded in criminal cases.** —Either party to a criminal prosecution has a right to have the jury polled, which, you no doubt understand, is the calling of the name of each juror by the crier and requiring him, personally, to declare his verdict; but, if you want this done, a request to that effect must be made before the verdict is recorded.[51]

§ 348. **Verdict generally: polling discretionary with court in civil cases.**—In a civil suit, I think it discretionary with the trial judge whether or not he will order or allow a poll of the jury.[52] If, on a poll of the jury, it develops that they do not agree, it is usual for the trial judge to send them back for further consultation, or handle the situation as the occasion may require.

[49] Com. v. Buccieri, 153 Pa. 535; Com. v. Schmous, 162 Pa. 326.

[50] Com. v. Huston, 46 Pa. Superior Ct. 172, 216 to 225; S. C. 232 Pa. 209.

[51] Scott v. Scott, 110 Pa. 387; Com. v. Twitchell, 1 Brewster 551; Com. v. Schmous, 162 Pa. 326.

[52] Scott v. Scott, 110 Pa. 387; Byrne v. Grossman, 65 Pa. 310.

§ 349. **Verdict generally: judgment on verdict after time allowed for motion for new trial; motion in arrest of judgment or appeal.**—In the civil courts a certain number of days is allowed, before judgment, for the purpose of filing a motion for a new trial; but, in the criminal courts (at least in Philadelphia), if the verdict is against the defendant, it is usual to give notice that you want time to file reasons in support of a motion for a new trial. This is done by a simple oral statement in open court; which has the effect of postponing final judgment until your motion is filed and finally disposed of. If a new trial is refused, sentence is imposed on your client, and this is the final judgment; from which your only relief is a motion in arrest of judgment, by which you seek to take advantage of formal defects appearing on the face of the record,[58] or an appeal to a higher court.

§ 350. **Judgment: how to enter; after payment of jury fee and entry of judgment, appeal may be taken.**—In a civil case, if the motion for a new trial is refused, the winning party pays the jury fee to the prothonotary of the court and hands him such an order for judgment as the local rules require; whereupon judgment is entered, and the case is ripe for appeal.

[58] Delaware D. C. Co. v. Com., 60 Pa. 367, 371.

LECTURE XII.

POWERS OF COURT: JUDGMENT NON OBSTANTE VEREDICTO; GRANTING NEW TRIAL, ETC.

Judgment non obstante veredicto: (§ 351)
Reserving point of law on evidence: (§ 352)
Conflict of authorities. (§ 352)
Non obstante veredicto statute of 1905: (§ 353)
Allows judgment for plaintiff or defendant; (§ 354)
Act further explained. (§ 354)
Necessity for exceptions upon entry or refusal of judgment n. o. v. repealed by Act of 1911. (§ 355)
Statute constitutional in Pennsylvania. (§ 356)
Statute unconstitutional in federal courts: (§ 357)
Dissenting opinion quoted. (§ 358)
Federal decision has no effect on Pennsylvania courts. (§ 359)
Motion for judgment n. o. v. and for new trial: (§ 360)
Practice on appeal. (§ 360)
Practice in court below. (§ 361)
Refusal of new trial not usually assignable as error; (§ 362)
May be assigned where judgment has been entered on extravagant award. (§ 362)
Grant of new trial not reviewable,
Unless founded on manifest abuse of discretion or mistaken view of controlling point of law. (§ 362)
When sure of ground, motion for judgment n. o. v., best to stand on. (§ 362)
Power of court to grant new trial to be discussed: (§ 363)
Origin of practice; (§ 364)
History. (§ 364)
Preserves confidence of public in jury trial. (§ 365)
Excessive verdicts:
Conditions may be imposed, (§ 366)
Plaintiff obliged to accept cut in verdict or new trial. (§ 366)
Power to grant new trial necessary; (§ 367)
Power also given to Supreme Court by Act of 1891, (§ 367)
But seldom exercised. (§ 367)

After discovered evidence,
Must be such as could not have been discovered and presented at trial; (§ 368)
Practice in presenting such evidence to common pleas; (§ 368)
Practice in presenting it to appellate court. (§ 368)
Why general rules have been discussed from Pennsylvania standpoint. (§ 369)

§ 351. **Relative rights of court and jury: judgment non obstante veredicto to be discussed.**—So closely allied with the subjects of when cases must be submitted to the jury and under what circumstances binding instructions may be had, is the practice of entering judgment notwithstanding the verdict, that perhaps it might have been taken up in connection with our prior discussion of them, but, on the whole, it seems more appropriate to consider the matter at this point.

§ 352. **Relative rights of court and jury: reserving point of law on evidence; conflict of authorities.**—For many years a battle waged in Pennsylvania, and, I assume, in other common law jurisdictions, concerning the proper way to reserve a point, which would permit the court to enter judgment notwithstanding the verdict. An accurate and learned analysis of the cases arising out of this controversy is presented in Fisher v. Scharadin,[1] where Justice DEAN of the Supreme Court of Pennsylvania said: "Now, why is not the reservation, as to whether there is any evidence entitling the plaintiff to recover, a question of law? It is conceded.....a close examination of all the cases running back fifty years shows that prior to Wilde v. Trainor, 59 Pa. 439, it was settled that such a reservation as the one in this case would not have been [held good]; but, in the case last cited, SHARSWOOD, J., says: 'It may, no doubt,

[1] 186 Pa. 565, 569.

also be a pure question of law, whether there is any evidence at all to go to the jury on some fact essential to the plaintiff's case, or, if plaintiff's case is admitted or conclusively established, on some fact essential to the defendant's defense.' From this case [meaning the case decided by Judge SHARSWOOD] dates diversity of practice in the lower courts, and, to some extent, of opinion in this court. The case was decided in 1868, just five years after the act of 1863, [whereby] the power to reserve points.....had been extended to all the common pleas courts of the commonwealth.....Obviously, there had been a struggle to get away from the rigid rulings theretofore prevailing and attain.....promptness in final judgment by a more liberal exercise of the power to reserve points at the trial. There were [in times past], doubtless, good reasons for strict adherence to the earlier [rigid] rule [discouraging such reservations]; for [in those days] the evidence was taken down in narrative form, in long-hand, by counsel and court; there was scarcely a pretence of reducing the exact words of the witness to writing; it might well be that much of what was relevant and important evidence would be lost, and the established or undisputed facts at the trial be incapable of ascertainment from the meagre report, but now, when every word of the testimony, interrogatory and answer of witness, offer, purpose of, and objection to, evidence are taken down verbatim, in the presence and hearing of the judge, who afterwards considers them, the old rule, it seems to us, in the interests of speedy administration of justice, should be relaxed. Whether there be any evidence which entitled the plaintiff to recover is necessarily a question of law.....; the only effect of declaring the reservation bad [will be] to put the parties to two trials instead of one."

§ 353. **Relative rights of court and jury: non obstante veredicto statute of 1905 to be considered.**—Following the above quoted excerpt, the court decided that the reservation was good, saying this was done, notwithstanding the conflict of authority, with a view to thereafter freeing the question from doubt; but the whole matter was finally brought to a satisfactory conclusion in Pennsylvania by our Act of April 22, 1905,[2] popularly known as the non obstante veredicto Statute.

§ 354. **Non obstante veredicto statute allows judgment for plaintiff or defendant; act further explained.**—The first and leading case construing this statute was Dalmas v. Kemble,[3] where I happened to be the trial judge. There Justice MITCHELL so clearly construes this important piece of legislation that I shall read rather liberally from his opinion. He said: "The act being so recent, it is important that it should be examined closely, and its proper construction settled. Its terms are: 'Whenever upon the trial of any issue, a point requesting binding instructions has been reserved or declined, the party presenting the point may.....move the court to have all the evidence taken upon the trial duly certified and filed, so as to become part of the record, and for judgment non obstante veredicto upon the whole record; whereupon it shall be the duty of the court.....to enter such judgment as should have been entered upon that evidence.' This statute makes no radical innovation on the settled line of distinction between the powers of the court and the jury; it shows no intention to infringe, even if it could constitutionally do so, the province of the jury to pass upon the credibility of witnesses and the weight of oral testimony.

[2] P. L. 286.

[3] 215 Pa. 410, 411.

The court has long had authority to direct a verdict for defendant when it was of opinion that the plaintiff, even if all his evidence be believed, had failed to make out his case; but this had to be done off-hand at the trial, and a mistake of the judge either way resulted in delay and expense. If he directed for defendant, but, on more deliberate examination or consideration, came to the view that there was some evidence for the jury to pass upon, a new trial was the only remedy; while, on the other hand, if he refused a binding direction, but later found it should have been given, the same result followed.....No doubt when time was not urgent and trials were conducted leisurely, with full argument on every point as it arose, the system worked fairly well; but, with the growing complexity of issues, the constantly increasing pressure upon the trial lists, the taking of testimony in shorthand, and the consequent hurry of trials, the inconveniences became burdensome. In practical reforms for facilitating business without impairing settled legal principles, Pennsylvania has always been in the front. The authority to reserve questions for the consideration of the court in banc was first conferred by the Act of March 1, 1825, P. L. 41, upon the judges of the District Court of Philadelphia; [it was] continued in the same court by the Act of March 28, 1835, P. L. 88, and extended to the courts of the Commonwealth generally by the Act of April 22, 1863, P. L. 554..... The Act of 1905 is another step in the same direction; it broadens the power of the judge in this respect, that whereas heretofore the verdict was required to be for the plaintiff and the reservation to be of leave to enter judgment for the defendant non obstante, now what is reserved is a request for binding direction to the jury, and it may be for either plaintiff or defendant; but, though thus

enlarged, so as to include both parties, the power of the judge is the same as it was before—he is to enter such judgment as should have been entered upon that evidence, or, in other words, to treat the motion for judgment as if it was a motion for binding directions at the trial, and to enter judgment as if such direction had been given and a verdict rendered in accordance. What the judge may do is still the same in substance, but the time when he may do it is enlarged so as to allow deliberate review and consideration of the facts and the law upon the whole evidence. If upon such consideration it shall appear that a binding direction for either party would have been proper at the close of the trial, the court may enter judgment later, with the same effect; but, on the other hand, if it should appear that there was conflict of evidence on a material fact, or any reason why there could not have been a binding direction, then there can be no judgment against the verdict. As already said, there is no intent in the act to disturb the settled line of distinction between the provinces of the court and the jury." This interesting and instructive opinion ends in a reversal of Moschzisker, J., because the Supreme Court thought he had improperly taken the case from the jury. Other cases have followed Dalmas v. Kemble without any enlargement or diminution of its holding.[4]

§ 355. **Non obstante veredicto: necessity for exceptions upon the entry or refusal of such judgments re-**

[4] See Bond v. P. R. R., 218 Pa. 34; Shannon v. McHenry, 219 Pa. 267; Danko v. Pbg. Rys., 230 Pa. 295; Second Nat. Bank v. Hoffman, 233 Pa. 390; Page v. Moore, 235 Pa. 161; Schwartz v. Glenn, 244 Pa. 519; but see, as to points of practice under the Act, Hardoncourt v. North Penn Iron Co., 225 Pa. 379; Duffy v. York, etc., Water Co., 233 Pa. 107, 235 Pa. 217; Hobel v. Mahoning, etc., Ry. Co., 233 Pa. 450; Walters v. American Bridge Co., 234 Pa. 7; Chambers v. Mesta Machine Co., 251 Pa. 618; Hewitt v. Democratic Pub. Co., 260 Pa. 59.

pealed by Act of 1911.—It has recently been decided, in Knobeloch v. Pittsburgh etc. Ry. Co.,[5] that—since the Act of May 11, 1911, P. L. 279, does away with the necessity for taking exceptions to final orders—when the trial court enters or refuses judgment n. o. v. and such action appears in the record, an exception is not necessary to support an assignment of error; and this, notwithstanding the fact that the Act of 1905 requires an exception to be taken to the entry or refusal of such a judgment.[5a]

§ 356. **Non obstante veredicto statute constitutional in Pennsylvania.**—The Act of 1905 and the decision in Dalmas v. Kemble have now established the non obstante veredicto practice in Pennsylvania on a firm and satisfactory basis; and, so far as I recall, the constitutionality of the act has never been questioned in the State Supreme Court, although that most learned of jurists, the late President Judge RICE of the Superior Court, in one of his typically fine opinions, passed upon the point, probably to the satisfaction of the whole profession.[6]

§ 357. **Non obstante veredicto statute unconstitutional in federal courts.**—The Supreme Court of the United States has taken the view that the act transgresses the national constitution, so far as the latter regulates trial by jury in the federal courts. Slocum v. New York Life Insurance Co.,[7] was an action on a life insurance policy. The trial court refused binding instructions, and the jury found a verdict for plaintiff, on which judgment was entered. The Circuit Court of Appeals followed the Pennsylvania practice, and, after arriving at the conclusion that

[5] 266 Pa. 140.

[5a] See section 280, v. 19, for collection of cases.

[6] See American W. & V. Co. v. Fayette Lumber Co., 57 Pa. Superior Court, 608.

[7] 228 U. S. 364, 375.

the evidence did not warrant its submission to the jury, reversed, entering judgment for defendant, n. o. v. Upon appeal to the Supreme Court of the United States, the action of the Circuit Court was held, by a five to four decision, to be beyond the power of a federal court, because of the constitutional guaranty of trial by jury. The basis for the majority opinion written by Justice VAN DEVANTER, may be gathered from the following excerpt: "While it is true.....the evidence produced at the trial was not sufficient to sustain a verdict for the plaintiff and that the Circuit Court erred in refusing so to instruct the jury, the real question is, whether, in the direction to find for defendant, given by the Circuit Court of Appeals, there was an infraction of the Seventh Amendment to the Constitution of the United States, which declares: 'In suits at common law, where the value of controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined, in any Court of the United States, than according to the rules of the common law.'" The opinion goes on to say: "The action of the Circuit Court of Appeals in setting aside the verdict and assuming to pass on the issues of fact, and to direct a judgment accordingly, must be tested by the rules of the common law....While under those rules that court could set aside the verdict for error of law in the proceedings in the Circuit Court and order a new trial, it could not itself determine the facts.....How, then, can it be said that there was not an infraction of the Seventh Amendment? When the verdict was set aside the issues of fact were left undetermined, and, until they should be determined anew, no judgment on the merits could be given. The new determination, according to the rules of the common law, could be had only through a new trial, with the same right to a jury as before. Disregarding those rules,

the Circuit Court of Appeals itself determined the facts, without a new trial. Thus, it assumed a power it did not possess and cut off the plaintiff's right to have the facts settled by the verdict of a jury."

§ 358. **Non obstante veredicto statute: dissenting opinion in federal court.**—Justice HUGHES, in a dissenting opinion, concurred in by Justices HOLMES, LURTON and PITNEY, maintained that the Pennsylvania practice of entering judgment n. o. v. is in entire conformity with the Seventh Amendment. He says, correctly I think, that whether there is any evidence to sustain a verdict is not a question of fact, but of law, and that the mere submission of the case to the jury, under a mistaken view of the law, did not create any disputed facts. In discussing our practice, Justice HUGHES said:[8] "The practice of entering judgments non obstante veredicto has long existed in Pennsylvania, and it enables the case to be concluded by a verdict, while the entry of judgment thereon is made dependent on the court's opinion of a reserved question of law. This permits the judge to give to the decisive law question on which a case turns a more careful examination than he can do in the stress of trial. Moreover, if an appellate court, on review of such judgment finds error, it can reverse and direct entry of judgment for the other party, and avoid a retrial. Long experience in this practice has convinced the bar and bench of the State of its value in conducing to a more careful and deliberate consideration of the law by the trial judge and to the avoidance of retrials." He further very properly remarks[9] that our practice "was not intended in any way to impair, and did not impair, the function of the jury to deal with dis-

[8] Pages 402-3.

[9] Pages 405, 408.

puted questions of fact; but its purpose is to facilitate the disposition of questions of law"; and he states the view that the old demurrer to evidence was substantially the same as our modern practice of a motion for judgment n. o. v., saying the practice of demurring to the evidence was cumbrous and fell into disuse and that of a motion for the direction of a verdict took its place, but the fundamental question of the legal insufficiency of the evidence remained the same.

§ 359. **Non obstante veredicto statute: federal decision has no effect on Pennsylvania courts.**—The effect of the decision in the Slocum Case is to hold that, so far as practice in the United States Courts is concerned, the Pennsylvania non obstante veredicto Act of 1905 is in conflict with the Federal Constitution, and invalid; but, since the Seventh Amendment does not control the state courts, the decision has no effect on these tribunals. It is difficult for a Pennsylvania lawyer to understand the ruling that, if a trial judge gives binding instructions and his conclusion is right, it will be sustained; whereas, if, after verdict, upon mature consideration, following argument on both sides, the court of which he is a member does what amounts to the same thing, such action will be reversed, even though the conclusion reached is correct. You must remember, however, that this is the rule in the federal courts, as long as the Slocum Case remains unreversed, and the Pennsylvania practice, under the Act of 1905, is not now available in those tribunals.

§ 360. **Judgment non obstante veredicto: motion for such judgment and for new trial; practice on appeal.**—It is usual to move for a new trial at the same time that judgment n. o. v. is asked; and, if the trial court finds that the party praying relief is entitled to the latter

remedy, the motion for a new trial is either dismissed or accounted as superseded, and judgment is entered in his favor. When this is done, and the case is appealed, the appellate court, if it reverses the judgment, but finds material errors (which might have been prejudicial to appellee), will usually send the record back with leave to the court below to reinstate and act upon the motion for a new trial, instead of entering final judgment for appellant; on the other hand, if it finds no such errors, judgment is either entered for appellant or the record is returned to the court below with a direction that it enter such judgment. If the trial court gives judgment n. o. v. for defendant, but is doubtful of the right so to do on the record before it, and is dissatisfied with the amount of the verdict, if it so states in its opinion entering the judgment, in case of a reversal, the appellate court will usually return the record with leave to reinstate and act on the motion for a new trial. Where, however, no such certificate of dissatisfaction appears, if the appellate court reverses, it will if possible enter final judgment for appellant; but if there is anything to suggest material trial errors committed against appellee, the court will return the record to the trial tribunal, so the latter may enter the judgment, and the appellee is thus afforded a chance to appeal therefrom. Of course, where the court finds no error in the entry of judgment n. o. v. or in the trial of the case, it will affirm the judgment.

§ 361. **Judgment non obstante veredicto: motion for, and for new trial; practice in court below.**—In some instances the court below, when it enters judgment n. o. v. simply leaves the motion for a new trial undisposed of, treating it—as suggested by Justice MITCHELL, in Dalmas v. Kemble[10]—as superseded by the judgment entered, but

[10] 215 Pa. 410.

subject to reinstatement, and action thereon, in case of the reversal of that judgment; in this manner the trial court may in a measure keep control of the final disposition of the case. Although the practice just referred to was discountenanced in Walters v. American Bridge Co.,[11] it has, nevertheless, been permitted in several subsequent cases.[12]

§ 362. **Judgment non obstante veredicto: motion for, and for new trial; refusal of new trial not usually assignable for error, but may be where judgment is entered on an obviously extravagant award; granting new trial not reviewed on appeal except for abuse of discretion or mistake of controlling point of law; when sure of ground it is best to stand on motion for judgment n. o. v.**— The granting or refusing of a new trial is discretionary with the trial court, and the first mentioned relief will not be reviewed, unless abuse of discretion clearly appears or it is clear that the new trial was granted on a mistaken view of a controlling point of law;[12a] the refusal of a new trial is not generally assignable as error, because all trial mistakes, when properly brought upon the record, may be assigned on appeal without asking the court below for a new trial. The refusal of a new trial is assignable, however, and may be reversed, where the court below has entered judgment on an obviously extravagant award of damages.[12b] If convinced you are entitled to judgment n. o. v., it is the best policy to stand

[11] 234 Pa. 7.

[12] See Simons v. P. & R. Ry., 254 Pa. 507, 510; Hewitt v. Democratic Pub. Co., 260 Pa. 59, 61; U. S., etc., Bk. v. Switchmen's Union, 256 Pa. 228, 233; Holzheimer v. Lit Bros., 262 Pa. 150; Ralston v. P. R. T. Co., No. 2, 267 Pa. 278, 285 and Bowser v. Citizens' L., H. & P. Co., 267 Pa. 483.

[12a] Hess v. Gusdorff, 274 Pa. 123; Alianell v. Schreiner, 274 Pa. 152, and Ferry v. Payne 466.

[12b] Gail v. Phila., 273 Pa. 275; see also §§ 367 and 418, infra.

on that motion alone, for, if it is refused, and a new trial granted, an appeal from the refusal of judgment n. o. v. may be quashed. I state these few principles, not as points of appellate practice, for I am not dealing with that subject in these lectures, but as enlightening information in connection with the subject of the motion for a new trial; and I do this because the possibility of the necessity for such a motion, and also for an appeal, should the motion be refused, are things which the barrister must constantly have in mind during the course of a trial, so he may guard the record to the end that it may support such a motion, if occasion requires.

§ 363. **Power of court to grant new trial to be discussed.**—One hears the power of the courts to grant new trials so often criticized, it is important that a properly educated lawyer should have some historical knowledge of the matter. Therefore, I shall briefly discuss the subject.

§ 364. **Power of court to grant new trial: origin of practice; history.**—Anciently new trials were unknown. The remedy for a mistrial consisted in subjecting the action of the jury, which had given an obviously erroneous verdict, to revision by a second jury; and, if the latter, by the rendition of a different verdict, convicted the former of having previously delivered a false one, this was held to imply perjury in the first jury, which rendered the members thereof infamous, subjecting them to imprisonment with forfeiture of their lands and chattels to the king; while the judgment based on the first verdict was accordingly reversed. Lesser tells us that, "by statutes in 1495, 1531 and 1571, the imprisonment and forfeiture were commuted into a pecuniary penalty, and the attaint was limited to cases where the verdict was not less than £40 (Stat. 13 Eliz. c. 25), which remained substantially the

law governing attaints until their formal abolition"; that, "after attaints had become obsolete, and the fining and imprisonment of jurors had been declared illegal, some other method for revising verdicts against evidence had to be devised. It was then that the courts seized upon the ancient precedent of awarding a new venire—or writ directing the sheriff to summon a new panel of jurors." He says that "the introduction of new trials, in assumed reliance on these frail precedents, but really by judicial legislation, may safely be ascribed to the year 1655, when Chief Justice GLYNNE,[13] after full discussion, granted a motion to set aside a verdict of 1500 pounds, in a slander suit, on the ground that the damages were excessive; for, seven years before,[14] the King's Bench had refused to grant such a motion—although the judge presiding at the trial had certified the verdict passed against his opinion—on the grounds that such a procedure was too arbitrary, and that the defendant might have his attaint against the jury, there being no other remedy in law. By the end of the 17th century, in any event, this method of supervising and revising the verdicts of juries was an established factor in English jurisprudence."[15]

§ 365. **Power of court to grant new trial: preserves confidence of public in jury trial.**—In a foot note to Lesser's History of the Jury System,[16] it is well said: "The power of granting new trials, though it may sometimes almost seem to be arbitrary, must be deemed a highly salutary one, as without it the institution of trial by jury would be in danger of losing its hold upon the confidence

[13] Wood v. Gunston, Style, 462.
[14] Slade's Case, Style, 138.
[15] Lesser, History of Jury Systems, pp. 113-115, 117-119.
[16] Page 125.

of the public. It serves as a safeguard against the passions, prejudices and mistakes to which juries are at times subject, inasmuch as they have the ordinary weaknesses of human nature. Where the objection to the verdict is in the amount of the damages allowed, and the court is not only satisfied that there has been a mistake made, but has some test or standard by which to ascertain, approximately, what the amount should be, it is not uncommon to leave the matter somewhat to the election of the plaintiff to remit the excess.....or have a new trial granted. While, where the judge upon the trial has correctly instructed the jury as to the law, and they have rendered a verdict which is incompatible with such ruling, it must be obvious that the only way in which this mistake of the law can be corrected, is by granting a new trial (Washburn, Study & Practice of the Law, 5th ed., p. 246)." Along these lines, Mr. Justice SHARSWOOD said: "If a verdict is contrary to the charge of the court, on a question of law, it must be set aside, whether it be the second or the second hundreth" verdict in the case;[17] and this judicial attitude has been reiterated many times in Pennsylvania.[18]

§ 366. **Excessive verdict; granting new trial; imposing conditions; plaintiff obliged to accept cut in verdict or new trial.**—Where the trial court cuts the amount found by the jury, this is done by simply making an order directing that, if plaintiff files a paper remitting all damages over a certain sum the verdict may stand, and judgment may be entered thereon for the reduced amount, but if such a remittitur is not filed by a certain day, a new trial is granted. This is never done, however, unless the trial court feels judicially outraged by the excessive-

[17] Howard Exp. Co. v. Wile, 64 Pa. 201.
[18] Maloy v. Rosenbaum Co., 260 Pa. 466, 472.

ness of the verdict and that it cannot in good conscience sustain a larger amount than stated in its order.[19] In granting a new trial the court may impose reasonable conditions.[20]

§ 367. **Excessive verdict: power to grant new trial necessary; power also given to Supreme Court by Act of 1891; but seldom exercised.**—Chief Justice MITCHELL, in writing upon the subject of the power to grant new trials, for excessive verdicts, vested in the Supreme Court of Pennsylvania by the Act of May 20, 1891,[21] said:[21a] "The authority of the common pleas in the control and revision of excessive verdicts through the means of new trials was firmly settled in England before the foundation of this colony, and has always existed here without challenge under any of our constitutions. It is a power to examine the whole case on the law and the evidence, with a view to securing a result not merely legal, but also not manifestly against justice, a power exercised in pursuance of a sound judicial discretion, without which the jury system would be a capricious and intolerable tyranny that no people could long endure. This court has had occasion more than once recently to say that it was a power the courts ought to exercise unflinchingly. It has never been thought to be confined to the judge who heard and saw the witnesses, but belongs to the full court in banc, and was freely exercised by this court when the judges sat separately for jury trials: see, for example, Sommer v. Wilt, 4 S. & R. 19. The Act of 1891,[22] vests a further power of

[19] Ralston v. P. R. T. Co., No. 2, 267 Pa. 278.
[20] Welsh v. Dusar, 3 Binn. 329; Parshall v. Conklin, 81½ Pa. 487.
[21] P. L. 101.
[21a] Smith v. Times Pub. Co., 178 Pa. 481, 501.
[22] P. L. 101.

revision, of the same nature, in this court. It is an authority to review the exercise of the discretion of the court below in this respect, as we do in some others. It is a power to review only, before final judgment, and does not violate the right to a jury trial, nor even interfere with it in the particular case more than was or might have been done by the court below." I may add that the power under discussion has only once been exercised, and that was in Smith v. Times Co.,[23] the case in which the language I have just quoted was written; I refer at large to the case, not so much because it deals with the statutory grant of power to the Supreme Court, but because of its excellent discussion of the general subject in hand—the ordering of new trials—from both the standpoints of history and judicial expediency.

§ 368. **After-discovered evidence: must be such as could not have been discovered and presented at trial; proper practice in presenting to court.**—If the verdict is not to your liking and you subsequently discover evidence which, in your opinion, if believed, demonstrates a material error in the result reached, you may file a petition with the trial court, setting forth this after-discovered testimony, in support of a motion for a new trial. Upon receipt of such a petition, the court will either finally act thereon or order depositions taken. If the court is convinced that the evidence is of a character which, properly to serve the ends of justice, requires a new trial, and that it, by due diligence, could not have been discovered and presented at the prior trial, it will set aside the verdict and put the case down for another hearing. If such evidence does not come to light until the record has been

[23] 178 Pa. 481, 501. Since the above was written, two cases on the same subject have been decided: Leonard v. Coleman, 273 Pa. 62; Gail v. Phila., 273 Pa. 275; in latter, Supreme Court ordered new trial.

removed to the appellate court, you may present your petition there. This last mentioned course was recently pursued in the case of Carrie Ralston v. Phila. Rapid Transit Co.,[24] where counsel for defendant presented a petition, accompanied by the affidavit of a witness, stating facts which, if true, showed a miscarriage of justice at the trial under review (plaintiff having asserted, in the court below, that this witness was dead). Defendant's answer was entirely insufficient to meet the averments of the petition, and the appellate tribunal, without further investigation, returned the record to the court below, with permission to consider the after-discovered evidence, and with directions to enter such judgment as law and right required. An order of this kind, under the Pennsylvania cases, "effectually opens the judgment and reinstates the motion for a new trial, with leave to the trial court to act thereon as 'right and justice under the law may require'".[25]

§ 369. **Why general rules have been discussed from Pennsylvania standpoint.**—You may think I have cited Pennsylvania cases more often than one ought to in dealing with law in general. I understand that law students are supposed to be instructed on the rules of an ideal jurisdiction; but, on due consideration, perhaps you will not blame me for looking upon this state as the one and only ideal jurisdiction. Seriously, however, general rules can be as well discussed from the Pennsylvania standpoint as from any other, and since most of you will practice here, my dealing with them from that point of view will, in all probability, be of more practical use to you than if I had roamed afield in numerous jurisdictions.

[24] 267 Pa. 278.
[25] Id. 285.

LECTURE XIII.

CONSTITUTIONAL GUARANTIES.

Constitutional guaranties of jury trial to be discussed. (370)
Magna Charta guaranteed trial,
According to modes existing prior to present form of jury trial. (§ 371)
Jury trial:
As we now have it; developed later. (§ 372)
American colonies thought it inalienable heritage. (§ 372)
State constitutions generally guaranteed it; (§ 373)
Federal constitution originally guaranteed it,
In criminal cases only, (§ 373)
Impeachments excepted, (§ 373)
In civil cases involving over $20, added by amendment. (§ 374)
This federal amendment applies only to federal courts; (§ 375)
State can still regulate and restrict right in state courts. (§ 375)
By 14th federal amendment, no state can deprive one of life, liberty or property without due process of law. (§ 376)
Due process of law means law of land: (§ 377)
In states it is law of state; (§ 377)
Does not guarantee jury trial in states. (§ 377)
Historical development to be considered; (§ 378)
Many changes since Magna Charta. (§ 378)
Constitutional provisions of colonies,
Basis of federal amendments. (§ 379)
Meaning is, according to construction of law in England prior to American Revolution and in the United States since then. (§ 380)
Meaning subject to changing conditions and customs. (§ 381)
In federal constitution,
It is kind of procedure proper to nature of case and sanctioned by customs and usage of courts. (§ 382)

It means no person or class shall be denied same protection enjoyed by other person or class in same place and like circumstances. (§ 383)

It is complied with by trial according to settled course of judicial proceeding in state. (§ 384)

In Pennsylvania:

Jury trial has been guaranteed to be "as heretofore", in all her constitutions. (§ 385)

In criminal proceedings, trial by jury of vicinage is guaranteed. (§ 386)

"As heretofore" means substantially a unanimous verdict by twelve jurors chosen from the vicinage. (§ 387)

With challenges for cause, etc., etc. (§ 387)

Not guaranteed in cases where it was not matter of right when constitution was adopted. (§ 388)

Where there were several constitutions, right refers to practice before last constitution. (§ 389)

But prior practice must have been lawful. (§ 390)

Right not guaranteed in new statutory proceedings, not in accord with common law; (§ 391)

Summary conviction not unconstitutional if jury trial may be asserted on appeal; (§ 391)

Summary proceedings alone not permitted where jury trial was previously required. (§ 391)

Changes of non-essential features permissible. (§ 392)

But changes must not take away the right. (§ 393)

Changes are essential to preservation of right. (§ 394)

Legislature may define and change limits of vicinage from which jurors are to be chosen. (§ 395)

Change of venue permissible by trial court or Supreme Court. (§ 396)

Where court of two judges, officially interested in result, disagree, Supreme Court will send new judge to hear case. (§ 396)

Change of venue; proper practice. (§ 397)

Jury trial may be waived:

In civil cases. (§ 398)

In criminal cases, decisions are conflicting as to power to waive right; (§ 399)

May not be waived where jury is essential to jurisdiction. (§ 399)
Constitutional provisions of states, allowing waiver of jury trial, collected. (§ 400)

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§ 370. **Constitutional provisions dealing with jury trial to be discussed.**—The first and principle topic I shall discuss in this lecture is the meaning of the various constitutional provisions—national and state—which deal with trial by jury.

§ 371. **Magna Charta guaranteed trial according to the then existing modes.**—Magna Charta[1] provided that no man should be deprived of life, liberty or property unless "by the lawful judgment of his peers and by the law of the land." While this has been popularly accepted as a guaranty of trial by jury, yet, as we have seen[2] such trials, in their present form, did not come into existence until sometime later; and the phrase—"lawful judgment of his peers and the law of the land"—when used, meant nothing more than a guaranty of the right to trial according to one of the then existing modes—or, as Bigelow says, by "duel, ordeal, or compurgation in criminal cases, and duel, witnesses, charters, or recognition in property cases."[3] In the words of Mr. Justice WILLIAMS of the Supreme Court of Pennsylvania, in Smith v. Times Pub. Co.,[4] "It [Magna Charta] simply protected Englishmen

[1] 1215 A. D.

[2] Lectures I to III, supra.

[3] Bigelow, Hist. of Proced. 155; Taylor, Due Proc. of Law, sec. 4. Bigelow evidently means, by the word "charters" in the above quotation, to include the constitutions of Clarendon and the forms of trial there guaranteed, and, perhaps, the assizes of Henry II and other forms of trial arising through or proceeding from the sovereign rather than having common law origin.

[4] 178 Pa. 481, 506.

from the power of secret, irresponsible tribunals and conceded the jurisdiction of the legally established courts over all causes."

§ 372. **Jury trial developed later: American colonies thought it inalienable heritage.**—The modes of procedure gradually changed, through the centuries which elapsed from the granting of King John's charter to the founding of the early English colonies in America; at the latter time trial by jury, as we now know it, had replaced the other forms, and that institution was looked upon by the settlers as their inalienable heritage.

§ 373. **Jury trial generally embodied in state constitutions; only in criminal cases in original federal constitution, impeachments excepted.**—When the colonies became independent states, trial by jury was embodied in their several constitutions, as one of the fundamental rights of the individual; but the Constitution of the United States, as originally adopted, did not refer at all to such right in civil cases—it merely provided[5] that "the trial of all crimes, except in cases of impeachment, shall be by jury"; this provision was subsequently enlarged by the 6th Amendment, which, so far as prosecutions for offenses against the laws of the United States are concerned, guaranteed to the accused trial by an "impartial jury of the state and district wherein the crime shall have been committed."

§ 374. **Jury trial in civil cases involving over twenty dollars added to federal constitution by amendment.**—The omission from the federal constitution of all reference to trial by jury in civil cases caused considerable opposition to ratification,[6] and, subsequently, by the 7th Amend-

[5] Art. III, sec. 2.

[6] See the Federalist.

ment, it was provided that, "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," and the 5th Amendment guaranteed "due process of law" generally.

§ 375. **Federal constitutional amendments above recited apply only to federal courts; states could still regulate and restrict right in state courts.**—These provisions secured trial by jury, at some stage of litigation, in accordance with the customs and practices of the English law, as they stood at the time of the adoption of our constitution,[7] in all suits where purely legal rights are involved, but they apply only to actions in the United States courts, and do not prohibit the states from regulating and restricting the right of trial by jury in their own courts.[8]

§ 376. **By 14th federal amendment a state cannot deprive one of life, liberty or property without due process of law.**—The 14th Amendment to the federal constitution provides that "no state" shall make or enforce any law which abridges the privileges of citizens of the United States, "nor deprive any person of life, liberty or property without due process of law".

§ 377. **Due process of law means law of land; in the state it is law of state; does not guarantee jury trial in states.**—In Walker v. Sauvinet,[8a] it is said: "A trial by jury, in suits at common law pending in state courts is not a privilege or immunity of national citizenship which the states are forbidden.....to abridge. A state cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in

[7] Hopt. v. Utah, 120 U. S. 430, 433.

[8] Pearson v. Yewdall, 95 U. S. 294.

[8a] 92 U. S. 90.

the state courts, affecting the property of persons, must be by jury. This requirement of the constitution is met if the trial is had according to the settled course of judicial proceedings. Due process of law is process according to the law of the land. This process in the states is regulated by the law of the state."

§ 378. **Due process of law; historical development to be considered; many changes in law since Magna Charta.** —In connection with the right to trial by jury, much has been written on the meaning and effect of this phrase "due process of law"; and it may be well for us to consider its historical development and some of the authorities in point. The phrase appears in the statute of 28 Edw. III, c. 3, which, in revising Magna Charta, provides that "no man.....shall be put out of his land or tenements, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought to answer by due process of law"; but what constituted due process at that time[9] was far different from 1215, when the original charter was granted. Likewise there were many changes in the laws and customs between 1688, the date of the English revolution, and the period when the various colonies declared their independence; at the latter time, Blackstone's Commentaries constituted the accepted guide to the common law, in both England and America.

§ 379. **Constitutional provisions of colonies basis of federal amendment.**—When the colonies withdrew their allegiance to England, and adopted separate constitutions of their own, they inserted provisions to the effect that no man's liberty or property should be interfered with except by the "laws of the state"—Connecticut—, or the "law of

[9] 1355 A. D.

the land"—Maryland and North Carolina—, or the "law of the land or the judgment of his peers"—Pennsylvania, Virginia, Vermont, South Carolina, Massachusetts, New Hampshire—;[10] and these provisions subsequently formed the basis of the 5th Amendment to the Constitution of the United States, wherein it is provided, inter alia, that no person shall "be deprived of life, liberty or property without due process of law."[11] The last phrase also appears in the 14th Amendment, as we have seen.

§ 380. **Due process of law means according to construction of law in England prior to American Revolution and in the United States since then.**—The words "due process of law" are not to be understood in the limited sense they had in the days of Magna Charta, or even at the time of its revision during the reign of Edward III, but rather in accordance with the construction placed by Blackstone upon the common law, as it existed just prior to the American Revolution, and with the subsequent development of the law in this country. Therefore, Mr. Justice GRAY said, in Lowe v. Kansas:[12] "Whether the mode of proceeding.....was due process of law, depends upon the question whether it was in substantial accord with the law and usage of England before the Declaration of Independence, and in this country since it became a nation, in similar cases."

§ 381. **Due process of law; meaning of phrase subject to changing conditions and customs.**—In Hurtado v. California,[13] the following language of Mr. Justice MATTHEWS

[10] See Taylor, Due Process of Law, p. 14.

[11] Murray v. Hoboken Land & Imp. Co. (U. S.), 18 Howard, 272, 277; Davidson v. New Orleans, 96 U. S. 97.

[12] 163 U. S. 81.

[13] 110 U. S. 516, 530.

suggests the principles which must be applied in the construction of the phrase in question; there, after referring to the various ancient modes of trial, it is said: "When we add to this that the primitive grand jury heard no witnesses in support of the truth of the charges to be preferred, but presented upon their own knowledge, or indicted upon common fame and general suspicion, we shall be ready to acknowledge that it is better not to go too far back into antiquity for the best securities of our 'ancient liberties'. It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government." That the meaning of the phrase "due process of law" is subject to changing conditions and customs is recognized in Twining v. New Jersey,[14] where it was said by Mr. Justice MOODY: "It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practiced by our ancestors, is an essential element of due process of law; if that were so, the procedure of the first half of the 17th century would be fastened upon American jurisprudence like a straight jacket, only to be loosed by constitutional amendment."

§ 382. **Due process of law: in federal constitution is kind of procedure proper to nature of case and sanctioned by customs and usage of courts.**—As to the re-

[14] 211 U. S. 78, 101; see especially Com. v. Maxwell, 271 Pa. 378, where the subject is discussed learnedly and comprehensively by Mr. Justice SCHAFFER.

quirements of due process of law guaranteeing trial by jury, in Ex Parte Wall,[15] the federal Supreme Court said: "It is a mistaken idea that due process of law requires a plenary suit and a trial by jury in all cases where property or personal rights are involved. The important right of personal liberty is generally determined by a single judge, on a writ of habeas corpus.....Conflicting claims of creditors, amounting to thousands of dollars, are often settled by the courts on affidavits or depositions alone; and the courts of chancery, bankruptcy, probate, and admiralty administer immense fields of jurisdiction without trial by jury. In all cases, that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts."

§ 383. **Due process of law: it means no person or class shall be denied same protection enjoyed by other person or class in same place and under like circumstances.**— Mr. Justice SHIRAS, of the United States Supreme Court, discusses the provisions we are now considering in Hallinger v. Davis,[16] where he says: "That phrase [due process of law] is found in both the Fifth and Fourteenth Amendments. In the Fifth Amendment the provision is only a limitation of the power of the general government; it has no application to the legislation of the several states (Barron v. Baltimore, 7 Pet. 243); but in the Fourteenth Amendment the provision is extended in terms to the states.....The meaning and effect of this clause have already received the frequent attention of this court. In Murray v. Hoboken Land and Improvement Co., 18 How. 272, the historical and critical meaning of these words

[15] 107 U. S. 265, 289.
[16] 146 U. S. 314, 319.

was examined. The question involved was the validity of an Act of Congress giving a summary remedy, by a distress warrant, against the property of an official defaulter. It was contended that such a proceeding was an infringement of the Fifth Amendment, but this court held that, 'tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the states at the time of the adoption of this Amendment, the proceedings authorized by the Act of Congress cannot be denied to be due process of law.'..... In Davidson v. New Orleans, 96 U. S. 97, an assessment of certain real estate in New Orleans for draining the swamps of that city was resisted, and brought into this court by a writ of error to the Supreme Court of the State of Louisiana. In the opinion of the court, delivered by Mr. Justice MILLER, will be found an elaborate discussion of this provision as found in Magna Charta and in the Fifth and Fourteenth Amendments to the Constitution of the United States. The conclusion reached by the court was that 'it is not possible to hold that a party has, without due process of law, been deprived of his property, when as regards the issues affecting it, he has, by the laws of the state, a fair trail in a court of justice, according to the modes of proceeding applicable to such a case'..... 'There is nothing in the Constitution to prevent any state from adopting any system of laws or judicature it sees fit, for all or any part of its territory. If the state of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the state, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the Fourteenth Amendment, be a denial to

any person of the equal protection of the laws. If every person residing or being in either portion of the state would be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to; for, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. *On one side of this line there may be a right of trial by jury, and on the other side no such right.'"*

§ 384. **Due process of law: federal requirement is complied with by trial according to settled course of judicial proceeding in state.**—We may see from what has already been said that, so far as the federal constitution is concerned, any recognized proceeding under the common law will satisfy the requirements of due process;[17] and, in absence of a constitutional provision to the contrary, a state may provide for the trial of persons accused of offenses against its laws, either without a jury or before one of fewer than twelve jurors,[18] or that failure in certain cases to demand such a trial shall be a waiver of the right;[19] for, as previously said, the requirement of due process is complied with if a trial is had according to the settled

[17] Eilenbecker v. Dist. Court of Plymouth County, 134 U. S. 31; Interstate Commerce Commission v. Brimson, 154 U. S. 447.

[18] In re Meador, 16 Fed. Cases, No. 9375; French v. Barber Asphalt Paving Co., 181 U. S. 324; Com. v. Fisher, 213 Pa. 48.

[19] Pearson v. Yewdall, 95 U. S. 294; Huber v. Reily, 53 Pa. p. 112.

course of judicial proceedings in the state.[20] Most of the states, however, have their own fundamental guarantees of trial by jury.

§ 385. **Jury trial: has been guaranteed to be "as heretofore" by all Constitutions of Pennsylvania.**—Pennsylvania has recognized the right of trial by jury in its organic law ever since Penn's charter, provisions guaranteeing such right being embodied in all subsequent constitutions. Section 6 of the Bill of Rights in our present Constitution, adopted in 1873, provides that "trial by jury shall be as heretofore, and the right thereof remain inviolate"; this is copied verbatim from the Constitutions of 1838[21] and 1790,[22] and was taken, except the last clause, from the provision in the Constitution of 1776.[23] See also clause XI of last mentioned Constitution, which provided that, "In controversies respecting property and in suits between man and man, the parties have a right to trial by jury, which ought to be held sacred."

§ 386. **Jury trial: guaranteed in criminal prosecutions by jury of vicinage.**—Section 9 of article I of the Pennsylvania Constitution of 1873 provides that "in all criminal prosecutions the accused hath a right to.....a speedy public trial by an impartial jury of the vicinage", corresponding provisions being found in the earlier constitutions of 1776,[24] 1790[25] and 1838.[26]

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[20] It was there provided (in 1682) that "all trials shall be by twelve men, and as near as may be peers or equals, and of the neighborhood." Duke of Yorke's Book of Laws, 100.

[21] Art. IX, sec 6.

[22] Art. IX, sec. 6.

[23] Sec. 25.

[24] Cl. IX.

[25] Art. IX, sec. 9.

[26] Art. IX, sec. 9.

§ 387. **Jury trial: "as heretofore" means a unanimous verdict by twelve jurors, chosen from the vicinage, with challenges for cause, argument of counsel, etc.**—These several provisions mean that the jury shall continue to be a tribunal for determining questions of fact in controversies between individuals, and in actions and prosecutions brought by the Commonwealth, the substantial requirement being that the membership shall consist of twelve good and lawful jurors, chosen from the vicinage, whose verdict must be unanimous.[27] Mr. Justice DEAN, in his interesting concurring opinion in Smith v. Times, well states the meaning of the provisions thus:[28] "The plaintiff has a right to trial by jury as heretofore; that is, twelve men[29] must be called from the panel drawn from the body of the county;[30] in their selection, he has a right of challenge peremptorily and for cause; the jury shall see the witnesses, hear the evidence, the arguments of counsel, the charges of the court; then they can render a verdict, if the whole twelve be agreed; and, if the court .....approve the verdict....., the plaintiff has a right to the fruits of his judgment. This is 'trial by jury as heretofore', the right whereof is to 'remain inviolate.'"

§ 388. **Jury trial: not guaranteed in cases where it was not a matter of right when constitution was adopted.**—Although several states have incorporated in their organic law what we might consider serious departures from the material requirements of trial by jury (as we shall later on point out and discuss), yet similar guarantees to those of Pennsylvania have been embodied in the constitutions

[27] Wynkoop v. Cooch, 89 Pa. 450; Smith v. Times Pub. Co., 178 Pa. 481; Com. v. Collins, 268 Pa. 295.

[28] Page 528.

[29] Or women: Com. v. Maxwell, 271 Pa. 378.

[30] See Com. v. Collins, 268 Pa. 295.

of most of the American Commonwealths; but it has been generally held by our appellate courts that these provisions do not guarantee trial by jury in all classes of cases. The Supreme Court of Pennsylvania very recently ruled[31] that, in cases falling within a class where trial by jury was not a matter of right when the Constitution was adopted, "its declaration that 'trial by jury shall be as heretofore' has no application."

§ 389. **Jury trial: where there were several constitutions, right refers to practice before last constitution.**— In Lavery v. Commonwealth,[32] sustaining the constitutionality of an Act of May 1, 1861,[33] providing for trials, at the election of the defendant, of certain offenses, before a justice of the peace and six jurors, the opinion of the lower court, affirmed Per Curiam, states: "If it were necessary for a determination of the case it might possibly well be argued that, when the Constitution of 1873 said that 'trial by jury shall be as heretofore', 'heretofore' might mean before the adoption of the Constitution of 1873, not before the Constitutions of 1776, 1790 or 1838, but before the Constitution of 1873. This Act of Assembly was in operation in 1861, twelve years prior to the adoption of the Constitution of 1873; hence, in technical strictness, permission to a justice of the peace to try an offense before a jury of six, in accordance with that Act of Assembly, would leave trial by jury as heretofore; that is, prior to the adoption of the Constitution of 1873." Following this same thought, Mr. Justice DEAN, in his concurring opinion, in Smith v. Times[34] says: "Where there have been several constitutions [as in Pennsylvania] the right of

[31] Fleming's Est., 265 Pa. 399, 407-8.
[32] 101 Pa. 560, 564.
[33] P. L. 682.
[34] 178 Pa. 481, 522.

trial by jury has reference to its existence and practice before the last one."

§ 390. **Jury trial: but it seems that practice under last constitution must have been lawful.**—This, however, opens a very interesting inquiry, namely, must we not, in such a case, ascertain whether the alleged departure, from the right of trial by jury, lawfully existed prior to the last constitution; that is, whether the departure in question was legal, according to the fundamental law at that time? For, in my opinion, that would be the proper test; and, of course, such an inquiry would necessitate an examination of prior constitutions.

§ 391. **Jury trial: right thereto not guaranteed in new statutory proceedings which are not in accord with common law: summary proceedings alone not permitted where jury trial was previously required; summary convictions not unconstitutional if jury trial may be asserted on appeal.**—The sole requirement is that the right to jury trial, in its accustomed form, shall be secured; the legislatures may withhold such right from new proceedings, created by statute, which are not in accord with the common law.[35] Moreover, there is no limitation on the power of the legislature which prevents it from inaugurating new modes of redress for civil wrongs;[36] and an act providing for a summary trial in the first instance is not unconstitutional, if the right of trial by jury may be asserted subsequently on appeal to a higher court;[37] but the legislature cannot authorize summary procedure alone, in controversies properly triable by a jury at common law, or according to

[35] Rhines v. Clark, 51 Pa. 96; Wynkoop v. Cooch, 89 Pa. 450.

[36] Von Swartow v. Com., 24 Pa. 131; Byers and Davis v. Com., 42 Pa. 89; Hurtado v. People, 110 U. S. 516.

[37] Haines v. Levin, 51 Pa. 412; Com. v. McCann, 174 Pa. 19.

the practice of the particular jurisdiction as it existed prior to the adoption of the Constitution.[38] In Byers & Davis v. Commonwealth,[39] the Supreme Court of Pennsylvania, writing upon this point, said: "These acts [referring to various summary conviction statutes] were in force in 1776. In view of them, the first constitution was made, and it declared, not that trials by jury should be in all cases, but as theretofore; and, when that gave place to the later constitutions, they undertook to preserve only that right which had been enjoyed.....We do not mean to be understood as asserting there may not be legislation, conferring upon magistrates a power to convict summarily, which would be in violation of the constitution. [For] Undoubtedly there may. We speak only of the case before us. Vagrants, including rogues and vagabonds, and those who frequent public places for unlawful purposes, are liable to summary conviction and punishment, notwithstanding anything contained in the constitution, for they were so liable before the constitution was adopted." These last few words illustrate the point to be kept in mind.

§ 392. **Jury trial: changes of non-essential features permissible.**—In the words of Mr. Justice MITCHELL, in Smith v. Times Publishing Company,[39a] "The jury is above everything a practical part of the administration of justice, and changes of non-essential features, in order to adapt it to the habits and convenience of the people, have therefore always been made without hesitation, even in this country, under the restrictions of our constitutions."

[38] Linderman v. Reber (Pa.), 1 Woodw. 82; Flint River Steam Boat Co. v. Roberts, 2 Fla. 102, 48 Am. Dec. 178; Bank of Missouri v. Anderson, 1 Mo. 244; Dacres v. Oregon, etc., Co., 1 Wash. St. 525, 529.

[39] 42 Pa. 89, 96.

[39a] 278 Pa. 481, 500.

§ 393. **Jury trial: changes must not take away the right.**—The constitutional provisions in question remain unbreached so long as trial by jury is not substantially impaired, although it be made subject to new modes.[40] Writing upon this point, in Warren v. Commonwealth, 37 Pa. 45, 53, Justice THOMPSON stated: "It is a mistake, that is often made, to suppose that every modification of its accompanying powers detracts from the right [of trial by jury]. This is too narrow and rigid a rule for the practical workings of the constitution and the rights guaranteed by it in the particular in question. There is no violation of the right unless the remedy is denied, or so clogged as not conveniently to be enjoyed.....The framers of the Constitution.....undoubtedly knew and intended that legislation must provide the forms under which the right was to be enjoyed, and they meant no more than that it should be enjoyed under regulations which should not take away the right."

§ 394. **Jury trial: changes are essential to preservation of right.**—The most recent case on the subject in hand is Ex Parte Peterson;[40a] there complicated mutual accounts were involved, and a nisi prius judge, in advance of trial, appointed an auditor to clarify the issues and make tentative findings thereon. The defendant, claiming this was an undue interference with trial by a jury, asked for a writ of mandamus, or prohibition, to restrain the audit. The application was denied by the Supreme Court of the United States, in a most interesting opinion by Justice BRANDEIS, with three other justices dissenting. In the course of the majority opinion, it is said that, after the auditor had determined which items were in dispute

[40] Sedgwick on Stat. and Const. Law, 2d. ed., 496; Biddle v. Com., 13 S. & R. 405, 410.

[40a] 253 U. S. 300.

and which were not, he might state his "judgment and express an opinion" on the former, and that his report could "be admitted at the trial before the jury as prima facie evidence both of the evidentiary facts and of the conclusions of fact therein set forth"; and, finally, that all of this did not infringe the command of the 7th Amendment that "the right of trial by jury shall be preserved". In this latter connection, Justice BRANDEIS says that the "command" in question "does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence," adding, "New devices may be used to adapt the ancient institution [of trial by jury] to present needs and to make of it an efficient instrument in the administration of justice". Then the learned justice adds these significant words: "Indeed, such changes are essential to the preservation of the right; and the limitation imposed by the amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with." While the procedural parts of this decision are not binding on state courts, I have no doubt they will be sympathetically viewed by those tribunals; and I am confident that the portions of the opinion which deal with general constitutional principles will be convincing to all.

§ 395. **Jury trial: legislature may define and change limits of vicinage from which jurors are to be chosen.**— The latest utterance of the Supreme Court of Pennsylvania, relating to the general principles we have been discussing, was quite recently made by Chief Justice BROWN,[41] with whom I had the honor and benefit of associating as

[41] Com. v. Collins, 268 Pa. 295, 299.

a colleague for eleven years. The case turned on the meaning of the before-mentioned constitutional provision, that in all criminal prosecutions the accused shall have the right to trial by "a jury of the vicinage." The offense was committed near the division line of one county, and the trial took place in an adjoining county, under an act of Assembly[42] which provided that, "in order to obviate the difficulty of proof as to all offenses committed near the boundaries of counties", the offender may be indicted and tried in either county. Defendant, who stood convicted, contended, on his appeal, that he could not constitutionally be tried outside of the county wherein the crime was committed, the locus being actually known. In overruling this contention, the Chief Justice, so learnedly, and yet—considering the importance of the points involved—so concisely, discusses several of the matters which we have been considering, that I shall quote rather generously from his opinion. He states: "The real question is,.....Were the triers of the prisoner selected from a panel of jurors summoned from the vicinage as that constitutional term is to be interpreted in limiting the territory from which they were required to come? By the common law all offenses were inquired into and tried in the county where they were committed, and the visne or neighborhood from which a sheriff was required to return a panel of jurors was interpreted as meaning county;[43] but parliament could have changed or made exceptions to this common law rule, and the legislatures of the different states can do likewise, in the absence of constitutional limitations upon them. Prior to 1776 the provincial assembly, free from any constitutional restriction, enacted that for certain offenses committed on rivers in the province, dividing counties,

[42] Act of March 31, 1860, sec. 48, P. L. 427, 441.

[43] 4 Blackstone, 350.

the offenders could be prosecuted and tried in either of the counties opposite the points in the river where the offenses were committed, but this cannot now be permissible if the word vicinage, as used in section 9, article I, of the constitution must be read as meaning county. The primary and literal meaning of vicinage is neighborhood or vicinity, but neither of these terms definitely indicates just what territory it embraces. What to one mind might be the neighborhood or vicinity within which an act is committed, might to another be regarded as far distant from it. A county, on the other hand, is a definitely designated territory. Originally it was the domain of a count or earl, but now is a definite sub-division of the state, for political or administrative purposes, having fixed boundaries as established by the legislature, and what is embraced within it cannot be a matter of doubt or uncertainty. In this respect its meaning is vitally different from that of a vicinity. They are not equivalent terms, and, for the reasons stated, cannot be so regarded.[44] With the measurably vague and indefinite meaning of vicinage, as applied to the territory from which jurors are to be summoned to inquire into offenses committed along the boundary line of two counties, when uncertainty exists as to which side of the line was the scene of the crime, the legislature, in the passage of the 48th section of the Act of March 31, 1860, merely defined what should be regarded as the vicinage, having limits as fixed and definite as those of either of the counties. A part of each county, a strip of five hundred yards, becomes part of the vicinage, or neighborhood, in which the crime is committed, and the state may prosecute and try the offender in either county. When the election is made, the jurors are summoned from the county in

[44] Ex Parte McNeeley, 36 W. Va. 84.

which the offender is tried, for it is of the vicinage as definitely fixed by the legislature. That body could have declared the vicinage to be coterminus with the county, but it has not done so. On the contrary, to obviate the difficulty of proving in which of two adjoining counties an offence is committed, the vicinage is extended for a specific space on each side of the boundary line, and there is nothing in our constitution forbidding the legislature from so fixing it." Here we have what is avowedly treated as a departure from the common law rule—that a crime must be tried within the confines of the county where committed—held to be constitutional, and a conviction thereunder for murder of the first degree, sustained; which strikingly bears out what has been said concerning the right of the legislature to make changes in the rules governing trial by jury, so long as the chief essentials of that institution are left intact.

§ 396. **Jury trial: change of venue permissible, by trial court or Supreme Court.**—At this point, it may not be out of place to tell you that in Pennsylvania (and I have no doubt in many other states) a change of venue is permitted by the constitution[45] and provided for by legislation. Our statute[46] provides that in criminal prosecutions the venue may be changed on application of the defendant, when the judge in the district is a near relative of either the prosecutor or defendant, or has knowledge of facts which make it necessary he should be a witness; or, in cases of felony, when it is made to appear to the satisfaction of the court that, from undue excitement, or prejudice against defendant in the county where the offense was committed, he is not guaranteed justice, or "that there

[45] Art. III, sec. 23.

[46] Act of March 18, 1875, P. L. 30.

is a combination against him, instigated by influential persons, by reason of which he cannot obtain a fair trial"; or whenever it is impossible to secure an impartial jury in the county where the offense was committed; or, finally when, on a second trial for murder, the evidence on the former trial having been published in the county, the regular panel of jurors is exhausted without obtaining a jury. In such cases, the court wherein the indictment is pending may order the case tried in some "adjoining or convenient county," transmitting the whole record there. The Supreme Court also has power, where it is made clear to it that, either because of an excited or inflamed condition of the public mind, or for any sufficient cause, a defendant cannot have a fair trial in the county where the indictment was found, to remove the case to another county for purposes of trial. In civil cases, the statute provides[47] that whenever the judge who is required to hear the case or any near relative of his is personally interested, whenever the county itself, a municipality therein, the officials thereof, or a large part of the inhabitants, are interested parties, and such prejudice exists that a fair trial will be denied, or whenever a party to the cause has "such influence over the minds of the inhabitants" of the county or they are so prejudiced against the applicant that a fair trial cannot be obtained, and, in certain instances where two juries have failed to agree, and finally, "whenever it should be made to appear to the court that a fair and impartial trial cannot be had" in the county in which a cause is pending, a change of venue may be granted; and the State Supreme Court has recently held that, where two judges, officially interested, are divided as to the entry of a judgment or decree, if they,

[47] Act of March 30, 1875, P. L. 35.

comprising the trial court, fail to call in a judge from some other court to decide the case, it, on appeal, will do so.[48]

§ 397. **Jury trial: change of venue, proper practice.**—If you desire a change of venue, the proper practice is either to proceed under the Acts of Assembly, by filing a petition in the court where the indictment or case is pending, or by directly petitioning the Supreme Court. In the latter event, you ask for a rule to show cause why a certiorari should not be allowed; if the rule is made absolute, the entire record is removed to the Supreme Court, and, if that tribunal is satisfied from the pleadings, which consist of a petition and answer, that you are entitled to a change of venue, it will be granted and the case certified to another county; otherwise it will be denied and the record sent back to the county from which it came.[49]

§ 398. **Jury trial: may be waived in civil cases.**—So far as the states are concerned, the right to trial by jury, generally speaking, may be waived in all civil cases;[50] and this is expressly recognized by article V, section 27, of the Constitution of Pennsylvania, which provides that "the parties, by agreement filed, may in any civil case dispense with trial by jury and submit the decision of such case to the court having jurisdiction thereof".[51] In United States v. Rathbone,[52] it was determined that the right to trial by jury, secured by the Constitution of the United

[48] Summers v. Kramer, 271 Pa. 189.

[49] Com. v. Smith, 185 Pa. 553; Com. v. Ronemus, 205 Pa. 420.

[50] North British Ins. Co. v. Lathrop, 63 Federal 508; Lummis v. Big Sandy Land, etc., Co., 188 Pa. 27; Flanders v. Tweed, 76 U. S. 425; Wright v. Barber, 270 Pa. 186, 189.

[51] See Act of April 22, 1874, P. L. 109, 110, and N. Y. & Pa. Co. v. N. Y. C. R. R., 267 Pa. 64, 78.

[52] 2 Paine 578.

States, was for the benefit of parties litigating in courts of justice, and might accordingly be waived.[53]

§ 399. **Jury trial: in criminal cases, decisions are conflicting as to power to waive right; may not be waived where jury is essential to jurisdiction.**—There are criminal cases which hold the general rule to be, a defendant cannot waive a jury trial if the proceeding is such that the jury is an essential part of the court having jurisdiction to try the offense charged;[54] but other decisions hold that, where there is statutory authority for waiving a jury trial, it is not unconstitutional, and a defendant is bound by his waiver.[55] The Supreme Court of the United States has expressly ruled[56] that a state statute, which confers on one charged with crime the right to waive trial by jury and to elect to be tried by a judge alone, also granting power to the courts to try the accused in such manner, is not in conflict with the federal constitution.

§ 400. **Jury trial: constitutional provisions of states allowing waiver of jury trial.**—A number of states have inserted in their constitutions provisions authorizing waivers of trial by jury in both civil and criminal cases. Arkansas allows[57] trial by jury to be waived in all cases, in the manner prescribed by law. According to the organic law of California[58] trial by jury may be waived in criminal

[53] Bank of Columbia v. Okely, 17 U. S. 235, 243.

[54] Paulsen v. People, 195 Ill. 507; State v. Maine, 27 Conn. 281; Ford v. Com., 82 Va. 553; U. S. v. Taylor, 11 Fed. 470; Hallinger v. Davis, 146 U. S. 314; Com. v. Shaw, 1 Pitts. Rep. 492; Com. v. Byers, 5 Pa. C. C. R. 295.

[55] State v. Worden, 46 Conn. 349; Hallinger v. Davis, 146 U. S. 314. See Lavery v. Com., 101 Pa. 560, 565.

[56] Hallinger v. Davis, supra.

[57] Art. II, sec. 7, const. 1874.

[58] Art. I, sec. 7, const. 1879.

cases, not amounting to felony, and in all civil actions, by consent of the parties: a similar provision is found in the constitution of Idaho.[59] In Minnesota,[60] jury trial of any case may be waived. Montana[61] allows jury trials to be waived in all civil cases and in criminal cases not amounting to felony. In Virginia,[62] where a plea of guilty has been entered, the court may hear the case without a jury; and this is also the Pennsylvania rule. The Wisconsin rule[63] is that jury trials may be waived in all cases; and, under the organic law of Arizona,[64] provision may be made for waiving jury trial in civil cases by consent of the parties; while Nevada[65] and New York[66] permit such trials to be waived in civil cases. In Utah[67] jury trial of all civil cases is waived unless demanded; and Washington[68] permits waivers in that class of cases.

[59] Art. I, sec. 7, const. 1889.
[60] Art. I, sec. 4, const. 1857.
[61] Art. III, sec. 23, const. 1889.
[62] Art. I, sec. 8, const. 1902.
[63] Art. I, sec. 5, const. 1848.
[64] Art. II, sec. 23, const. 1910.
[65] Art. I, sec. 3, const. 1864.
[66] Art. I, sec. 2, const. 1894.
[67] Art. I, sec. 10, const. 1895.
[68] Art. I, sec. 21, const. 1889.

LECTURE XIV.

NUMBER OF JURORS REQUIRED; UNANIMITY OF JURORS; RULES OF CONDUCT GOVERNING JURY TRIALS: CONCLUDING WORD TO LAWYERS

Requirement of twelve jurors:
- Origin of number, speculation on. (§ 401)
- In criminal cases:
  - In misdemeanors, (§ 402)
    - Defendant may waive full complement of twelve jurors (§ 402)
  - In higher grades of crime,
    - Defendant may not waive jury trial; (§ 403)
    - Defendant may not be tried by fewer than twelve jurors. (§ 403)
- In civil cases:
  - Trial may be by fewer than twelve jurors, (§ 404)
    - By agreement of parties, (§ 404)
    - By constitutional mandate; (§ 404)
      - State constitutional provisions enumerated. (§ 404)
  - Unanimous verdict of twelve jurors required in Pennsylvania. (§ 405)
    - Unless waived by parties. (§ 405)
  - Excused by constitutional mandate in other states; (§ 406)
    - State constitutional provisions enumerated. (§ 406)
- Origins of unanimity rule suggested. (§ 407)
- Variations in number of jurors required to render verdict in foreign countries. (§ 408)
- Unanimity rule, reasons for and against, to be considered: (§ 409)
  - Unanimity rule has persisted through centuries; (§ 410)
  - Hard on parties and juries when new trial required; (§ 410)
  - Enforced delay through operation of rule aids deliberation; (§ 410)
  - Unanimity brings more general satisfaction; (§ 410)
    - May account for origin of unanimity, (§ 410)
    - And long continuance of rule. (§ 410)

Mr. Choate's reasons in support of rule:
Less than unanimity makes hasty verdict; (§ 411)
Discussion leads to true verdict; (§ 411)
Unanimity a safeguard of property; (§ 411)
Accepting verdict by less than all would tend to exclude influence of more conservative jurors. (§ 411)
Curative measures where jury cannot agree:
When jurors disagree, Pennsylvania statute allows court to enter judgment on evidence where binding instructions would have been proper; (§ 412)
Unanimity might be varied in minor cases,
By statute or constitution. (§ 412)
Ways of keeping jurors above reproach, to be discussed: (§ 413)
In capital cases, jurors may not separate,
Even by consent of defendant; (§ 414)
Temporary separation may often be permitted, (§ 414)
In case of absolute necessity; (§ 414)
But not after trial is closed. (§ 414)
In misdemeanors and felonies not capital,
Separation is permitted, (§ 415)
In discretion of court, (§ 415)
With caution as to conduct. (§ 415)
Request of court to caution jurors,
Should be made at side bar. (§ 416)
In criminal cases generally,
Reading newspapers or letters is permitted, (§ 417)
In discretion of court, (§ 417)
Verdict will not be disturbed unless prejudicial matter exists. (§ 417)
In civil cases, same rules apply; (§ 418)
If discretion of court is not properly exercised, verdict will be set aside on appeal. (§ 418)
Separation of jurors in civil cases,
After retirement to deliberate, not permitted. (§ 418)
Suspicion of misconduct on part of jury will not ordinarily disturb verdict. (§ 419)
Attempted bribery not sufficient to halt trial,
Where defendant is not involved or harmed, (§ 420)
But jurors should be properly cautioned. (§ 420)
Modern judicial tendency is as above stated. (§ 421)

Misconduct of jurors,
Must be made known at once, (§ 422)
Or it may be treated as waived. (§ 422)
Proper practice in such case:
Withdrawal of juror; (§ 423)
Exception for purpose of appeal; (§ 423)
Motion for new trial supported by depositions; (§ 424)
Affidavits of jurors admissible to support their verdict, (§ 424)
But as a rule not to impeach it; (§ 424)
This rule is sometimes departed from. (§ 424)
Exception allowed in interest of justice and public policy, (§ 425)
Especially of overt acts, not inhering in verdict; (§ 425)
Exceptional case cited,
Where depositions of jurors were received. (§ 426)
Lawyers play an important part in upholding organized society. (§ 427)
The jury system one of its most important props. (§ 428)
Duty of lawyers to keep it wholesome and efficient. (§ 428)

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§ 401. **Requirement of twelve jurors: speculation on origin of that number.**—There may well be justifiable curiosity as to the reason for having twelve jurors instead of a greater or fewer number. The explanation given in the Guide to English Juries,[1] and by Forsyth,[2] is that twelve was chosen in analogy to the twelve prophets and twelve disciples; also the twelve stones referred to in Bible history; and the institution of twelve judges, selected in ancient days to try and determine matters of law, are stated as a possible precedent. In addition, there might be mentioned the code of the XII tables, or compilation of the customary law of Rome,[3] and the fact that twelve was a favorite number for constituting a court among the

[1] Page 379.
[2] Page 199.
[3] Lesser, p. 38.

Scandinavian nations. Some writers think that, in the days when jurors informed each other of facts within their knowledge, by this custom, twelve witnesses, or jurors, became adopted among the Anglo-Saxon and Normans as the quantum of persons sufficient to establish the credibility of a party to a transaction, or of one accused of an offense, and that, subsequently, when independent witnesses, with a knowledge of the facts, were produced to give evidence upon which the jury was required to pass, the original number of twelve jurors was naturally retained.[4]

§ 402. **In criminal cases: misdemeanors, defendant may waive full complement of twelve jurors.**—The Pennsylvania criminal rule is that, when a defendant pleads not guilty, he puts himself on the country for trial by a common law jury; but in cases of misdemeanor, he may waive the full complement of twelve jurors and other requisites of such a trial; although, in this state, it cannot be done by one charged with a felony.[5]

§ 403. **In higher grades of crime, defendant may not waive jury trial, or submit to trial by fewer than twelve jurors.**—Ohio, also, holds that, "upon the trial of an issue raised by a plea of not guilty in the higher grades of crime, it is not within the power of the accused to waive a trial by jury and by consent submit to the facts found by the court, so as to authorize a legal judgment and sentence

[4] Forsyth, pp. 197, 199.

[5] Lavery v. Com., 101 Pa. 560, 566; but see Com. v. Beard, 48 Pa. Superior Ct. pp. 319, 321-2; also 43 L. R. A. 33 et seq., note. In Com. v. Maxwell, 271 Pa. 378, Mr. Justice SCHAFFER states that the Duke of Yorke's Laws, which were in force in Pennsylvania in the seventeenth century, authorized juries of fewer than twelve members in certain classes of cases, and he traces the historical development down to the general requirement of twelve jurors.

on such findings";[6] and I think this may be said to be the general rule. In a murder case, the New York Court of Appeals[7] held to the same rule, saying: "The conclusion necessarily follows that the consent of the plaintiff in error [defendant] to the withdrawal of one juror and that the remaining eleven might render a verdict, could not lawfully be recognized by the court, and was a nullity. If a deficiency of one juror might be waived, there appears to be no good reason why a deficiency of eleven might not be; and it is difficult to say why, upon the same principle, the entire panel might not be dispensed with, and the trial committed to the court alone. It would be a highly dangerous innovation, in reference to criminal cases, upon the ancient and invaluable institution of trial by jury, and the constitution and laws establishing and securing that mode of trial, for the court to allow of any number short of a full panel of twelve jurors, and we think it ought not to be tolerated."

§ 404. **In civil cases: trial may be by fewer than twelve, by agreement of parties, or by constitutional mandate; state constitutional provisions enumerated.**—As a general rule, in civil cases, American jurisdictions permit the parties, by agreement, to submit the controversy to fewer than twelve jurors,[8] or to the court; and this is frequently provided for by statute. Moreover, many states have inserted constitutional provisions for trial by fewer than twelve jurors. In Arizona,[9] provision may be made by law

[6] Williams v. State, 12 Ohio St. 622.

[7] Cancemi v. People, 18 N. Y. 128, 138.

[8] Krugh v. Lycoming Fire Ins. Co., 77 Pa. 15; Carman v. Newell, 1 Den. (N. Y.) 25; Corthell v. Mead, 19 Col. 386; Kreuchi v. Dehler, 50 Ill. 176; Rindskopf v. State, 34 Wis. 217; see also Berry v. Kenny, 5 B. Mon. (Ky.) 120.

[9] Art. II, sec. 23, const. 1910.

for a jury under twelve, in courts not of record. In California[10] and Idaho,[11] in civil actions and prosecutions for misdemeanor, the parties may agree on a number fewer than twelve. In Colorado,[12] the jury may consist of fewer than twelve in civil cases. In Iowa,[13] trial by jury of fewer than twelve may be had in the inferior courts. In Louisiana,[14] trial in criminal cases, where the penalty is not hard labor or death, may be fewer than twelve. In Missouri,[15] both criminal and civil cases may be tried by fewer than twelve. In Montana,[16] trial may be had before fewer than twelve in civil cases, and of criminal charges not amounting to felony. In Nebraska,[17] the legislature may authorize trial by fewer than twelve. In New Jersey,[18] trial by fewer than twelve may be authorized where the sum in dispute does not exceed $50. In New Mexico,[19] jury trial in inferior courts may be before a jury of six. In North Dakota,[20] trial in civil cases in courts not of record may be by fewer than twelve jurors. In Oklahoma,[21] trial in courts not of record shall be before six men. In South Dakota,[22] trial in courts not of record may be before fewer than twelve. In Utah,[23] in courts of general jurisdiction, except in capital cases, a jury shall con-

[10] Art. I, sec. 7, const. 1879.
[11] Art. I, sec. 7, const. 1889.
[12] Art. II, sec. 23, const. 1876.
[13] Art. I, sec. 9, const. 1857.
[14] Art. 9, const. 1898.
[15] Art. II, sec. 28, const. 1875.
[16] Art. III, sec. 23, const. 1889.
[17] Art. I, sec. 6, const. 1875.
[18] Art. I, sec. 7, const. 1844.
[19] Art. II, sec. 12, const. 1910.
[20] Art. I, sec. 7, const. 1889.
[21] Art. II, sec. 19, const. 1907.
[22] Art. VI, sec. 6, const. 1889.
[23] Art. I, sec. 10, const. 1895.

sist of eight; in courts of inferior jurisdiction, four jurors. In Virginia,[24] the legislature may provide, except in capital cases, for juries under twelve, but not fewer than five. In Washington,[25] the legislature may provide for a jury of any number fewer than twelve in courts not of record. In Wyoming,[26] in civil cases and criminal cases, in courts not of record, the jury may consist of fewer than twelve.

§ 405. **In civil cases, unanimous verdict of twelve jurors required in Pennsylvania, unless waived by parties.**— Of course, in all civil cases, as already stated, the parties may waive trial by jury, or any of its ordinary attributes; but, in the absence of such a waiver, our Pennsylvania constitution calls for a common law jury of twelve men. Speaking on this point, Mr. Justice MITCHELL, of whose learning Pennsylvania may well be proud, in Smith v. The Times Company,[27] said: "The provision of the constitution is that 'trial by jury shall be as heretofore, and the right thereof remain inviolate.' The same or very similar language is contained in the constitution of nearly every state, and the uniform construction by judges and text writers has been that the phrase 'shall be as heretofore' refers to the method of trial itself and means that it shall be preserved with its substantial elements, while the second phrase, 'the right thereof shall remain inviolate', refers to the right to a jury trial before the *final* decision, in all cases where it would have existed at the time of the adoption of the constitution.....Trial by jury is by twelve free and lawful men, who are not of kin to either party, for the purpose of establishing the truth of the matter in issue.....Legislation which merely points out

[24] Art. I, sec. 8, const. 1902.
[25] Art. I, sec. 21, const. 1889.
[26] Art. I, sec. 9, const. 1889.
[27] 178 Pa. 481, 498.

the mode of arriving at this object, but does not rob it of any of its essential ingredients, cannot be considered an infringement of the right (Dowling v. The State, 5 Sm. & M. 685).....and all the authorities agree that the substantial features, which are to be 'as heretofore', are the number twelve and the unanimity of the verdict. These cannot be altered, and the uniform result of the very numerous cases growing out of legislative attempts to make juries of less number, or to authorize less than the whole to render a verdict, is that, as to all matters which were the subject of jury trials at the date of the constitution, the right which is to remain inviolate is to a jury 'as heretofore' of twelve men who shall render a unanimous verdict. Matters not at that time entitled to jury trial, and matters arising under subsequent statutes prescribing a different proceeding, are not included. 'The constitutional provisions do not exceed the right, they only secure it in cases in which it was a matter of right before; but in doing this they preserve the historical jury of twelve men, with all its incidents': Cooley, Const. Limitations, 504 (ed. 1890), and see Black on Const. Law, 451, and cases there cited."

§ 406. **List of states abolishing unanimity rule by constitutions.**—The excerpt which I have just read is a good statement of Pennsylvania law; but several states have special constitutional provisions abolishing the unanimity rule and permitting a verdict by fewer than the whole number of jurors. In Arizona,[28] the legislature may authorize a verdict by nine or more jurors in civil cases in courts not of record; while California[29] allows three-fourths of the jury to render a verdict in civil actions. In

[28] Art. II, sec. 23, const. 1910.

[29] Art. I, sec. 7, const. 1879.

Idaho,[30] three-fourths of the jury may return a verdict in civil actions, and the legislature is given authority to provide for a verdict of five-sixths of the jury in cases of misdemeanor. According to Minnesota's constitution,[31] the legislature may provide that five-sixths of the jury in civil actions may return a verdict, after not fewer than six hours' deliberation. Mississippi[32] empowers the legislature to provide that, in civil suits, nine or more jurors may agree on the verdict. Missouri[33] permits two-thirds of the jury to return a verdict in civil cases in courts not of record; and three-fourths in courts of record. Montana[34] provides that, in civil actions and criminal cases, not amounting to felony two-thirds of the jury may return a verdict. The organic law of Nevada[35] states that three-fourths of the jury, sitting in civil cases, may return a verdict; but the legislature may, by a two-thirds vote require a unanimous verdict, notwithstanding the constitutional provision In New Mexico,[36] the legislature has power to provide for verdicts in civil trials in inferior courts by a jury of six; and Ohio[37] grants the legislature the right to authorize a verdict by three-fourths in civil cases. Oklahoma's constitution[38] provides that, in civil cases, and in criminal cases not amounting to felony, three-fourths of the jury may return a verdict, which must be in writing and signed by each juror concurring therein.

[30] Art. I, sec. 7, const. 1889.

[31] Art. I, sec. 4, const. 1857.

[32] Art. III, sec. 31, const. 1890, amendment 1916.

[33] Art. II, sec. 28, const. 1875, amendment 1900.

[34] Art. III, sec. 23, const. 1889.

[35] Art. I, sec. 3, const. 1864.

[36] Art. II, sec. 12, const. 1910.

[37] Art. I, sec. 5, const. 1851, amendment 1912.

[38] Art. II, sec. 19, const. 1907.

Utah[39] permits a verdict, in civil cases, by three-fourths of the jurors; while South Dakota[40] allows the legislature to provide for a similar verdict in the like class of cases.

§ 407. **Suggested origin of the unanimity rule.**—The rule requiring a unanimous verdict has been variously accounted for. Pomeroy[41] traces it to the early requirement that twelve compurgators must agree in their views. Forsyth regards the rule as intimately connected with the ancient predecessors of juries, or bodies of witnesses, and with the conception, common in primitive society, that safety is to be found in the number of witnesses rather than the character of their testimony.[42] The same idea appears in the requirement of the United States Constitution[43] that two witnesses are essential to convict of treason; and the requirement by statutes, in some states, of two attesting witnesses to a will. The civil law required five witnesses to prove payment of a debt secured by a written instrument. The afforcing of the jury, which occurred in the old days of the secta, marks an intermediate stage in the development of that institution to its present form. You will recall that, under this practice, where the members were not unanimous, new ones were added until twelve were found to be of the same opinion; from that point to the unanimous twelve, as we now have it, was a natural step, which, however, was not taken without long delay. Many writers think the system of afforcement the true origin of the unanimity rule, and it well may be.

[39] Art. I, sec. 10, const. 1895.
[40] Art. VI, sec. 6, const. 1889.
[41] Mun. L., sec. 135.
[42] Pages 197-8.
[43] Art. III, sec. 3.

§ 408. **Variations of unanimity rule in foreign countries.**—In some old English cases, we find the verdict of eleven jurors, out of twelve, accepted; but it was definitely decided in the reign of Edward III that the verdict must be the unanimous opinion of the whole jury. Lesser, in his work on the history of the jury system, published in 1894,[44] tells us that in Scotland a criminal jury consists of fifteen members, a majority of whom may convict, while the civil jury has but twelve members, and the unanimity rule prevails. Portugal has a jury of six, and it takes at least two-thirds to find a verdict. Italy provides for trial by jury in criminal cases, a majority being sufficient to convict. In Sweden, a regular jury is never summoned except in cases involving the liberty of the press, but it has a tribunal consisting of a judge and seven to twelve assessors, the latter elected by the people, who, if they differ from the judge, can out-vote him. This form of jury has existed for many centuries; a verdict can be rendered by half of the members and the judge, but if the judge joins with the minority, a new trial takes place. Norway has trial by jury in criminal cases, and the majority rule prevails. In Switzerland, crimes against the federal government are tried by jury; while in Russia (prior to the revolution), all criminal offenses involving severe penalties, except those against the government, were tried by jury. Prussia had trial by jury in certain criminal cases, and in the German Empire this right was guaranteed, except in cases of treason, political crimes and offenses of the press.

§ 409. **Reasons which may be urged for and against unanimity rule to be considered.**—Of course, that which may be a perfectly safe rule for people of other lands—

[44] Page 155.

of a different temperament and with historical development differing from our own—is not much of a guide for us, but it would be interesting to know what results have been obtained in the American jurisdictions, which permit a departure from the unanimity rule, and I regret that the data are not at hand. We of the law should have some ideas on the subject, however, for it forms a topic of frequent discussion; with this thought in mind, I shall devote a few moments to the consideration of reasons which may be urged both against and in favor of the prevailing system.

§ 410. **Unanimity rule has persisted through centuries; hard on parties and juries when new trial required; enforced delay aids deliberation; unanimity brings more satisfaction; may account for origin and long continuance of rule.**—Whenever you see a custom that has taken form after centuries of development, and which has persisted through other centuries, you can safely conclude that it has substantial reasons to support it. Of course, the unanimity rule is sometimes hard on jurors—when delaying verdicts,—and it is also hard on parties litigant, when its working requires the retrial of cases; but, admitting all this, the enforced delay, in reaching verdicts, tends to make for thorough discussion and mature deliberation in each case. The chief point in favor of the rule, however, is that, on the average, its application is bound to bring a greater degree of general satisfaction and public contentment than could be obtained througth any other system. Courts are constituted not only to determine individual cases, but, by furnishing an organized means of adjustment, to maintain the tranquillity of society; and it seems plain that the average litigant, or accused defendant, who has to submit his case to a legal tribunal,

when he knows that twelve of his fellow men have united in its decision, will accept the verdict with much better grace than one reached by a split jury, as also will the community at large, in cases of general interest. This, probably, more than any other reason, accounts for the origin and long continuance of the unanimity rule.

§ 411. **Mr. Choate's reasons: less than unanimity makes hasty verdict; discussion leads to true verdict; unanimity a safeguard of property; accepting a verdict by less than all would tend to exclude influence of more conservative, deliberate and just jurors.**—The late Joseph H. Choate, in an address to the New York Bar Association, from which I have quoted before, speaking on this subject, well said: "The secrets of the jury room generally leak out after the jurors are discharged, and it very rarely happens that a majority, and seldom that two-thirds, or even three-quarters, are not united on the first ballot, whereas, if you make their vote decisive, you will have a hasty verdict; while experience has shown that intelligent discussion in the jury room is just as effective as it is anywhere else, and often results in converting the majority to the real truth. The prejudices of juries, so far as it affects their conduct, is always, and naturally, for the weak against the strong, for the poor against the rich, for the individual against the corporation, and it sometimes sways the whole to the very verge, and even beyond the verge, of injustice; if you break down the barrier which lies in the rule of unanimity, and which has heretofore for ages been the only sufficient safeguard of property, you will be likely to cause a great deal more injustice than you will cure by such a danger. Imagine a jury aroused to even just indignation by the oppression, or misconduct, of a rich individual or gigantic corporation against an

unfortunate plaintiff, and not restrained by the cooler sense and judgment of the three or four most conservative or intelligent of their number, and you can easily foresee what havoc they would make with the rights of property. It takes no prophet to foretell that the great contests in the courts in the coming generation are to be against and in defense of the right of property, and I can conceive of no more destructive and fatal weapon, which its adversaries could secure in advance, than the abolition of this rule of unanimity, excluding practically the votes of the more conservative, the more deliberate, the more just members of the tribunal."

§ 412. **Curative measures: when jurors disagree, Pennsylvania statute allows court to enter judgment on evidence where binding instructions would have been proper; unanimity might be varied in minor cases, by statute or constitution.**—Pennsylvania, as you no doubt know, has an act of assembly[44a] permitting litigants in the civil courts, when the jurors disagree, to enter a rule for judgment on the evidence; and, under such circumstances, if the court is convinced that, as a matter of law, it should have given binding instructions for the party asking judgment, it will make his rule absolute. For instance, if the court, upon consideration, reaches the conclusion that either a nonsuit or binding instructions ought to have been granted, instead of allowing a new trial, and again taking the evidence all over, it will give final judgment accordingly. This, as a curative measure, is a step in the right direction; and it may be that others are due—even that the unanimity rule may be varied in certain classes of cases of minor importance, so as to allow a verdict by fewer than twelve jurors. But,

[44a] Act of April 20, 1911, P. L. 70.

it seems to me that, as a general proposition, the requirement of a unanimous finding makes for the public weal, and should be retained.

§ 413. **Ways of keeping jurors above reproach, to be discussed.**—Before closing this lecture, I shall discuss a practical aspect of the subject in hand. It is the right of every litigant in the civil courts, and of both the Commonwealth and defendants in the criminal courts, to have the jurors kept above reproach, so that a unanimous verdict, in the true sense of that term, may be reached; therefore, you, as lawyers, should know, at least in a general way, the practical extent of that right and how you may enforce it.

§ 414. **In capital cases, jurors may not separate, even by consent of defendant; temporary separation may often be permitted, in case of absolute necessity, but not after trial is closed.**—In capital cases the jurors must be kept together, by an officer, and not allowed to separate, from the time they are impaneled and sworn.[45] It is not permissible to allow a separation even by the consent of, or at the request of, the defendant; he may not be placed in the position of having to consent, or, perhaps, of prejudicing the jury against him by withholding his consent. This rule does not apply, however, to a temporary separation in cases of absolute necessity, where the jurors are in charge of, or in sight of, an officer, and are not allowed to communicate with other persons, if the court is convinced that no harm can come to the defendant by reason of the separation of the jurors;[45a] but, under the decisions

[45] Peiffer v. Com., 15 Pa. 468; Com. v. Fisher, 226 Pa. 189. The Act of May 5, 1921, P. L. 384, sec. 1, provides: "No separation for rest or sleep of men and women serving upon any jury shall work a mistrial in any civil or criminal case, if such jury is at all times in charge of a tipstaff."

[45a] Com. v. Insano, 268 Pa. 1, 6; Com. v. Blakeley, 273 Pa. 100, 107.

to date, any separation whatever after the case has been finally submitted to the jury, for the purpose of arriving at their verdict, will be fatal.

§ 415. **In misdemeanors and felonies not capital, separation permitted in discretion of court, with caution as to conduct.**—In misdemeanors and felonies not capital, it is within the discretion of the trial court to determine whether or not the jurors may separate;[46] but, where they are permitted to part, the judge usually admonishes them not to hold conversations among themselves or with other persons concerning the case on trial.[47]

§ 416. **Request to court to caution jurors should be made at side-bar.**—Should circumstances make it desirable, you may request the judge to hold the jury together during the trial, or, if they are to separate, to admonish them; but, when that course is pursued, it is good policy to make the request at side-bar, before the empanelling of the jury is entered upon, and out of hearing of the prospective jurors, in order to guard against the possibility of their conceiving that you mistrust them in any particular.

§ 417. **Reading newspapers or letters permitted, in discretion of court; verdict will not be disturbed unless prejudicial matter exists.**—The reading of newspapers or letters by the jurors, during the trial, or receiving newspapers with accounts of or comments on the case, is permissible, in the discretion of the court, and a verdict will not be disturbed if the papers in question contain nothing calculated to mislead or affect improperly the minds of the jurors to the prejudice of either party liti-

[46] McCreary v. Com., 29 Pa. 323; Com. v. Swift, 44 Pa. Superior Ct. 546, 551; Com. v. Simon, 44 Pa. Superior Ct. 538.

[47] McCreary v. Com., 29 Pa. 323.

gant;[48] nevertheless, such a course of conduct on the part of jurors should be avoided or guarded against so far as possible.

§ 418. **Same rules apply in civil suits; if discretion of court is not properly exercised, verdict will be set aside on appeal; separation of jurors after they have retired to deliberate not permitted.**—The same general rules apply to civil suits; but there the court has larger discretion. Where such discretion is not properly exercised, however, upon a showing of gross misconduct by jurors, or on the part of those who have them in charge, a verdict will be set aside. The most notable case in Pennsylvania, on the point now under discussion, is Mix v. North American Company;[49] there the Supreme Court reversed for an abuse of discretion on the part of the trial court, in not granting a new trial because of misconduct of the jurors. It was shown that, during the actual deliberations of the jury, after they had been sent out to find their verdict, they played poker and other games of cards; that they were allowed to separate for the purpose of telephoning, and to visit public offices; that the members of the jury were talked to by outsiders, and that one of them, during the course of the trial, discussed the case in a cigar store. In reversing, the appellate court said that, when the attention of the trial judge was first called to the alleged improper conduct of the jury, during the trial, it was his duty to halt the proceedings and make a searching investigation; after which, he either could have withdrawn a juror or proceeded with the case, as his best judgment might dictate. The court also said that the

[48] Com. v. Chauncey, 2 Ashmead 90; Com. v. Deutsch, 72 Pa. Superior Ct. 298; but see Mattox v. U. S. 146 U. S. 140, 151.

[49] 209 Pa. 636.

separation of a jury is "not allowed in any case after they have retired to deliberate upon their verdict, until they have found it"; adding, however, that while this rule has been held not to apply in all its severity in civil suits "yet such separation is a deviation from duty and order" even in that class of cases.

§ 419. **Suspicion of misconduct on part of jury will not ordinarily disturb verdict.**—The jurors should always be kept free from suspicion of extraneous or improper influences; but, unless it is shown that there was misconduct or irregularity on their part, or on the part of others, of such a character as to affect their impartiality, or incapacitate or disqualify them from the proper performance of their duties, it will not as a rule be allowed to disturb the verdict.[50] The mere appearance of evil, which, on investigation, fails to convince the court that anything prejudicial to the defendant actually occurred, will not be held sufficient to warrant the setting aside of a verdict of conviction. For instance, in Commonwealth v. Deutsch,[51] there were numerous allegations of misconduct, which were alleged to have affected the jury; but the trial judge certified that, on investigation, he believed that none of them had, in fact, influenced the jury in rendering their verdict, and the court refused a new trial. On appeal, the Superior Court affirmed.

§ 420. **Attempted bribery not sufficient to halt trial, where defendant is not involved or harmed, but jurors should be properly cautioned.**—In the case just referred to, the jurors were allowed to separate during the trial, and an attempt was made to bribe one of them, the briber actually handing him a package containing $50. The

[50] Com. v. Tilly, 33 Pa. Superior Ct. 35.

[51] 72 Pa. Superior Ct. 298.

juror, however, upon ascertaining what was in the package, returned it to the culprit. There were also allegations that members of the jury had received and read newspapers containing stories prejudicial to the defendants. The trial judge (HAUSE, J., of Chester County), having obtained knowledge of the attempted embracery, examined the man approached by the briber, and subsequently examined all other members of the jury, in the presence of each other; but, being convinced of the honesty of the jurors, that no material harm had been done to the cause of the defendants and that the bribery had not been traced to any of them, after instructing the jurors that they must base their verdict on the evidence alone, and should not permit the unfortunate occurrence of the attempted bribe to have any effect upon the discharge of their duties, he proceeded with the trial. This course was approved on appeal.

§ 421. **Modern judicial tendency not to interfere with course of trial unless defendant is involved in misconduct or material harm has been done to him by the alleged misconduct.**—I cite the Deutsch case as illustrative of the modern judicial tendency not to interfere with the course of trial in criminal cases, on complaints of misconduct, unless it satisfactorily appears the defendant himself was responsible for the matters complained of, or that they will materially harm him; a tendency which is now sufficiently established to call for notice.

§ 422. **Misconduct of jury must be made known at once, or it may be treated as waived.**—If a defendant obtains knowledge during the course of his trial of any irregularities or misconduct of the jury, which he believes will work to his prejudice, it is his duty immediately to lay the matter before the trial judge; for if, with this knowledge,

he permits the case to go to verdict, he may be held to have waived the misconduct. A party "is not allowed to take the chance of a favorable verdict and yet reserve the right to impeach it for known irregularities."[52]

§ 423. **Proper practice in case of misconduct of jurors; withdrawal of juror; exception for purpose of appeal.**—The proper practice in such cases is to make a motion for the withdrawal of a juror. This may be done openly before the jury, or, if counsel think it more expedient, he can simply request the district attorney to accompany him to side bar, and, after obtaining permission from the court, make the motion there. In any event, counsel must be careful to see that his motion and reasons are taken down by the stenographer, and, if the motion is refused, that an exception is entered on the record, so as to put himself in position to urge the matter on appeal

§ 424. **Misconduct of jurors, proper practice; motion for new trial supported by depositions; affidavits of jurors admissible to support, but, as a rule, not to impeach their verdict; this rule is sometimes departed from.**—When the verdict goes against your client, and you are satisfied the jurors were guilty of misconduct, or were affected by the misconduct of others, the proper practice is to enter a rule for a new trial, and, if necessary, to take depositions in support of the averments of your petition; but, usually in such a proceeding, the jurors themselves are not permitted to invalidate the verdict by their own testimony,[53] the rule being that the affidavits of jurors are admissible to support, but not to impeach,

[52] Per Daly, Ch. J., in Walsh v. Matchett (N. Y.), 6 Misc. 114; cf. People v. Flack, 57 Hun. 83, 96.

[53] Com. v. Clay, 56 Pa. Superior Ct. 427, 464; Cluggage v. Swan, 4 Binney 150; Holt v. U. S., 218 U. S. 245.

their verdicts.[54] This rule, however, is sometimes departed from.

§ 425. **Proper practice to show alleged misconduct of jury; juror may testify in interest of justice and public policy, where overt acts of misconduct do not inhere in the verdict.**—In Mattox v. United States,[55] Chief Justice FULLER, citing Chief Justice TANEY, states: The case "presents the question whether the affidavits of jurors, impeaching their verdict, ought to be received. It would, perhaps, hardly be safe to lay down any general rule upon this subject; unquestionably such evidence ought always to be received with great caution; but cases might arise in which it would be impossible to refuse them without violating the plainest principles of justice.....Public policy, which forbids the reception of the affidavits, depositions or sworn statements of jurors to impeach their verdicts, may, in the interest of justice, create an exception to its own rule, while, at the same time, necessity of great caution in the use of such evidence is enforced." The opinion then goes on to state that "public policy forbids a matter resting in the personal consciousness of one juror should be received to overthrow the verdict", but that overt acts which do not "essentially inhere in the verdict" and which were open to the knowledge of all the jurors, may be inquired into through the testimony of a member of the jury. The Supreme Court of Pennsylvania made a practically similar ruling in Commonwealth v. Green.[56]

§ 426. **Exceptional case cited where deposition of jurors showing misconduct were received.**—The general rule is, as before stated, that jurors cannot be heard to im-

[54] Moses v. Central Park, etc., R. R. (N. Y.), 3 Misc. 322.
[55] 146 U. S. 140, 148.
[56] 126 Pa. 531, 536.

peach their own verdict; but this, like other such rules, is open to exception in the interests of justice. It must, however, be a most unusual case where a departure will be allowed. In Mix v. North American Company,[57] to which I called attention before, the depositions of jurors, in support of a motion for new trial, showing the misconduct of the jury, were received and considered.

§ 427. **Lawyers play an important part in upholding organized society.**—In closing this course of lectures, I would not be true to my subject were I to neglect to impress on you the importance of the position you are about to occupy as American lawyers. Throughout these dissertations, I have tried to avoid sermonizing, and shall not indulge in that form of instruction now; I do want you to feel, however, that you are preparing yourselves, not merely to earn a livelihood, but for work of a most honorable and useful kind. You are to perform a real part in holding together organized society, and never at any time in the history of modern civilization has the responsibility placed on those charged with the administration and formulation of the law been so great as today. Your share of the burden can best be borne by making yourselves thoroughly good lawyers, and by so conducting your professional careers that you will command the regard of the bench and the admiration of your brothers at the bar, as well as the respect of your clients and the members of the community in which you practice. This can be accomplished only by living cleanly and working intelligently and hard; the last of these suggestions, more than any other, marks the road to professional success.

§ 428. **The jury system most important prop of organized society; duty of lawyers to keep it wholesome and**

[57] 209 Pa. 636, 642.

efficient.—Our institutions are on trial today, and are probably under as fierce an attack as they ever shall have to endure; a most important one of them is the jury system. As has been well said by others, it is the means of letting the people participate in the actual administration of their laws. It must be kept wholesome and efficient, so that all may continue to have confidence in its working ability and trust in its power for good. I want you, the lawyers of the future, to grow in understanding of this great historic institution, to believe in its worth, and to do your utmost to keep it high in the regard of the public and the esteem of the profession.

THE END.

APPENDIX NO. 1.

Number of Peremptory Challenges Allowed in the Trial of Criminal Cases.

In the following lists the various criminal offenses are classified under three headings, "A" being those in which six (6) challenges are allowed, "B" those in which eight (8) challenges are allowed, and "C", those in which twenty (20) challenges are allowed. The offenses comprehended in each list are arranged alphabetically, and each offense, —beginning with the one named at the head of the first list and running consecutively to the one at the end of the last list,—is given a section number, for convenience in using the index described and explained in the last paragraph of this introduction.

The above classification is based upon the following statutory provisions: The Act of July 9, 1901, P. L. 629, provides that "In all trials for misdemeanors, except for perjury, forgery and misdemeanors triable exclusively in the courts of oyer and terminer and general jail delivery, the commonwealth and the defendant shall each be entitled to six peremptory challenges; in the trial of felonies, other than those triable exclusively in the courts of oyer and terminer and general jail delivery, and in the trial of persons charged with perjury and forgery, the commonwealth and the defendant shall each be entitled to eight peremptory challenges, and in the trial of misdemeanors and felonies, triable exclusively in the courts of oyer and terminer and general jail delivery,

the commonwealth and the defendant shall each be entitled to twenty peremptory challenges."

Under Act March 31, 1860, P. L. 427, Sec. 31, the court of oyer and terminer and general jail delivery has exclusive jurisdiction of murder, manslaughter and other homicides, and accessories thereto; treason; sodomy, buggery, rape, robbery or their counsellors or abettors; arson, mayhem and their counsellors and abettors; burglary; concealment of death of bastards; receiving, harboring or concealing any robber, burglar, felon or thief, or receiving or buying feloniously acquired goods. By Act July 2, 1901, P. L. 605, kidnapping to extort money, or aiding therein, is also added to the above list.

Section 32 of the Act of March 31, 1860, P. L. 427, provides: "The courts of quarter sessions of the peace shall have jurisdiction.....to inquire of, hear, determine and punish, in due form of law, all such crimes, misdemeanors and offenses whereof exclusive jurisdiction is not given .....to the courts of oyer and terminer."

By Joint Resolutions adopted July 25, 1917, P. L. 1188, and May 27, 1921, P. L. 1187, a commission was appointed to revise the Penal Code of Pennsylvania. The report of this body, filed March 14, 1921, suggests changes which, if enacted into law, will affect the classifications of crimes and thus change the number of challenges allowed in some offenses. As to the nature of these proposed changes, reference is made to page 5 of the report, which states:

"In the Code of 1860, and in the subsequent penal legislation, no general principle has been followed differentiating felonies and misdemeanors. Some offenses are made felonies while other offenses more severely punished are called misdemeanors. In the proposed act, a definite principle has been followed. All crimes which are punished

by a maximum penalty of five or more years are made felonies; all offenses to which a lesser term of imprisonment is attached are made misdemeanors."

By section 182 of Act March 31, 1860, P. L. 382, punishment for second offenses, other than second degree murder, may be double the term prescribed for the crime charged. This provision is recommended for re-enactment in the new code.

In order that the following tables may continue to be of some use to the profession, should the new criminal code be adopted the maximum term of imprisonment for each offense is given; and, under the proposed change, when determining the nature of an offence, whether a felony or misdemeanor, the practitioner will be guided by the length of the term, disregarding the present listed classification. Full explanation of how to arrive at the punishment in instances where no specific penalty has been named will be found after the lists appearing below.

How to Use the Following Lists.

For the convenience of the profession, an index has been placed at the head of the following lists of subjects of offenses, so that by referring to any topic one sees at a glance the particular section or sections where the relevant statutes may be found in the respective lists. To illustrate, the index word "Automobiles" refers to sections 15, 122, 248, 253 and 266. By turning to these numbers respectively, it will be seen that the first two are under the six challenge list (see each time the head of the page on which the number is found) and refer to various statutes, the violation of which is made a misdemeanor; numbers 248 and 253 are under the eight challenge list, and refer to larceny of

motor vehicles and to perjury committed under the motor vehicle laws, which the acts cited make a felony; while number 266 refers to the punishment of one charged with receiving stolen motor vehicles, which is also made a felony, but which, under section 31 of the Act of March 31, 1860, P. L. 427, is triable exclusively in the court of oyer and terminer, where twenty challenges are allowed.

APPENDIX NO. 1

CLASSIFIED LIST OF STATUTES DEALING WITH CRIMINAL OFFENSES; FOR USE IN DETERMINING NUMBER OF PEREMPTORY CHALLENGES ALLOWED AT TRIALS THEREOF.

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APPENDIX NO. 1

"A" SIX PEREMPTORY CHALLENGES.

§ 1. **Abortion:**
Advertisement or sale of medicine to procure abortion or prevent conception:
March 16, 1870, P. L. 39, § 2 (6 mos.).
May 12, 1897, P. L. 63, § 2 (1 yr.).

§ 2. **Academic degrees:**
Fraudulent:
May 19, 1871, P. L. 271, § 1 (6 mos.).

§ 3. **Accessories:**
June 3, 1893, P. L. 286, § 1 (Accessories before fact, provided as principals; after fact, 2 yrs.).

§ 4. **Adultery:**
March 31, 1860, P. L. 382, § 36 (1 yr.).

§ 5. **Advertisements:**
Misleading:
March 20, 1913, P. L. 6, § 1 (60 dys.).
May 5, 1921, P. L. 382, §§ 1-5 (90 dys.).
Treatment of generative organs:
July 21, 1919, P. L. 1084, § 2 (1 yr.).
Without consent of publisher:
June 10, 1913, P. L. 467, §§ 1, 2 (fine only).

§ 6. **Agriculture:**
Violation of acts relating to:
Audits, etc.:
June 12, 1919, P. L. 466, § 18 (6 mos.).
Bureau of markets:
July 9, 1919, P. L. 809, §§ 11, 13 (1 yr.).
Chestnut blight:
June 14, 1911, P. L. 922, § 5 (1 mo.).
Diseased animals:
May 9, 1889, P. L. 151, § 2 (3 mos.).
May 2, 1901, P. L. 121, § 3 (fine only).
April 5, 1905, P. L. 106, § 4 (30 dys.).
July 22, 1913, P. L. 928, § 39 (90 dys.).
May 28, 1915, P. L. 587, § 21 (1 yr.).

Agriculture—Cont'd.

Fertilizers:
April 23, 1909, P. L. 143, § 2 (fine only).
May 1, 1909, P. L. 344, § 5 (fine only).
May 20, 1913, P. L. 240, § 2 (2 mos.).
June 1, 1915, P. L. 678, § 6 (fine only).
Potatoes:
April 18, 1919, P. L. 71, § 5 (fine only).
Seeds, Regulating sale of:
April 26, 1921, P. L. 316, § 13 (fine only).
Trees and plants:
June 29, 1917, P. L. 657, § 22 (fine only).

§ 7. **American Legion:**
Unlawful use of insignia:
March 31, 1921, P. L. 89 (60 dys.).

§ 8. **Animals:**
Cruelty to: See Cruelty to Animals.
Diseased: See Agriculture—Diseased.
Food.—Adulterating: (See Pure Food).
False registration of:
May 19, 1887, P. L. 130, § 1 (1 yr.).
Killing or maiming:
April 24, 1903, P. L. 296, § 1 (3 yrs.).
Mad dogs:
March 27, 1903, P. L. 100, § 4 (fine only).

§ 9. **Architects:**
Practice:
July 12, 1919, P. L. 933, § 14 (6 mos.).

§ 10. **Assault and Battery:**
March 31, 1860, P. L. 382, § 97 (1 yr.).
Aggravated Assaults:
March 31, 1860, P. L. 382, § 98 (3 yrs.).
Electors at polls:
April 6, 1870, P. L. 53, § 9 (1 yr.).
Intent to ravish:
March 31, 1860, P. L. 382, § 93 (5 yrs.).
Wantonly pointing or discharging firearms at another:
May 8, 1876, P. L. 146, § 1 (1 yr.).

§ 11. **Athletic Contests:**
Procuring defeat in:
April 13, 1921, P. L. 140, § 3 (5 yrs.).

"A" Six Peremptory Challenges

§ 12. **Athletic Exhibitions:**
Limiting time of participants:
April 11, 1903, P. L. 166, § 2 (2 yrs.).

§ 13. **Attempts:**
March 31, 1860, P. L. 427, § 50 (common law punishment, as in case of indictment for attempt to commit act, as a felony or misdemeanor according to the deed attempted). See also §§ 238 and 259 infra.

§ 14. **Auctioneers:**
Regulations:
April 6, 1833, P. L. 170, § 3 (fine only).
April 9, 1859, P. L. 435, § 9 (30 dys.).
February 24, 1847, P. L. 164, § 2 (fine only).

§ 15. **Automobiles and Motorcycles:**
Burning to collect insurance:
July 7, 1919, P. L. 722 (5 yrs.).
Duty to persons they injure:
May 24, 1917, P. L. 303; supplemented by Act June 30, 1919, P. L. 678, § 23 (1 yr.).
Operation and registration of:
June 28, 1917, P. L. 646, § 2 (30 dys.).
June 30, 1919, P. L. 678, § 23 (1 yr.); 34, 35 (60 dys.).
May 16, 1921, P. L. 582, §§ 2, 3 (1 yr.).
Removal from garage with intent to defraud:
June 5, 1913, P. L. 419, § 1 (3 mos.).
Second hand, sale, etc.:
June 30, 1919, P. L. 702, § 10; amended May 16, 1921, P. L. 657, § 6 (3 yrs.).

§ 16. **Baggage smashing:**
February 12, 1870, P. L. 15, § 1 (fine only).

§ 17. **Balloons:**
Containing fire:
May 6, 1915, P. L. 260, § 2 (60 dys.).

§ 18. **Bankers:**
Fraudulent issue of notes:
May 1, 1861, P. L. 503, § 36 (10 yrs.).
General duties:
June 12, 1907, P. L. 525, § 4 (1 yr.).
June 19, 1911, P. L. 1060, § 10 (2 yrs.).
Receiving deposits while insolvent:
May 9, 1889, P. L. 145, § 1 (3 yrs.).

Bankers—Cont'd.

Violation of oath by officers:
April 16, 1850, P. L. 477, § 16 (3 yrs.).

§ 19. **Barratry:**
March 31, 1860, P. L. 382, § 9 (1 yr.).

§ 20. **Bastard:**
Concealing death of:
March 31, 1860, P. L. 382, § 89 (3 yrs.).
Non-support of:
July 11, 1917, P. L. 773, § 1 (6 mos.).

§ 21. **Bawdy House:**
Keeping or knowingly leasing for this purpose:
March 31, 1860, P. L. 382, § 43 (2 yrs.).
July 26, 1913, P. L. 1369, § 7 (2 yrs.). (Repealed by Act May 25, 1921, P. L. 1113).
Male bawds:
April 18, 1905, P. L. 202, § 1 (3 yrs.).

§ 22. **Beneficial and Fraternal Societies:**
False statements:
May 20, 1921, P. L. 916, § 24 (1 yr.).
False rumors—Publication of:
May 20, 1921, P. L. 916, § 26 (fine only).
Soliciting membership in unauthorized society:
May 20, 1921, P. L. 916, § 25 (fine only).

§ 23. **Bigamy:**
March 27, 1903, P. L. 102, §§ 2, 3 (2 yrs.).

§ 24. **Billposting:**
Mutilating or tearing down show bills or defacing walls, etc.:
May 6, 1887, P. L. 87, § 1 (fine only).

§ 25. **Blackmailing:**
See Extortion.

§ 26. **Blasphemy:**
March 31, 1860, P. L. 382, § 30 (3 mo.).

§ 27. **Board of Health:**
Regulations, violations of:
April 27, 1905, P. L. 312, § 16 (1 mo.).
April 26, 1907, P. L. 123, § 5 (fine only).
June 7, 1911, P. L. 679, § 2 (fine only).
Vital statistics, failure to register:
June 7, 1915, P. L. 900, § 22 (fine only).

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§ 28. **Bottles:**
Refilling:
April 28, 1889, P. L. 96, § 2 (3 mos.).
May 8, 1889, P. L. 131, § 2 (6 mos.).

§ 29. **Bribery:**
Burgess:
May 2, 1901, P. L. 120, §§ 1, 2 (5 yrs.).
Candidate for office; county superintendent:
May 18, 1911, P. L. 309, § 710 (1 yr.).
Councilman:
May 23, 1874, P. L. 230, §§ 8, 9 (5 yrs.).
May 2, 1901, P. L. 120, § 1 (5 yrs.).
Election officers, etc.:
July 12, 1913, P. L. 719, § 23 (3 yrs.).
Electors:
March 31, 1860, P. L. 382, § 50 (6 mos.); § 51 (2 yrs.).
May 9, 1889, P. L. 162, § 1 (1 yr.).
June 8, 1881, P. L. 70, §§ 1, 2, 5 (3 mos.).
Executive committee:
June 8, 1881, P. L. 70, § 6 (6 mos.).
Procuring employment in mines:
June 15, 1897, P. L. 157, § 1 (6 mos.).
Public officers, judges, jurors, etc.:
March 31, 1860, P. L. 382, § 48 (5 yrs.).
April 29, 1874, P. L. 115, §§ 1, 2 (2 yrs.).
Referees and arbitrators:
June 16, 1836, P. L. 715, § 51 (penalty not specified).
School director or officers:
May 18, 1911, P. L. 309, §§ 710, 2803 (1 yr.).

§ 30. **Bucket Shops:**
June 1, 1907, P. L. 359, § 2 (6 mos.); § 5 (fine only).

§ 31. **Building regulations:**
June 7, 1895, P. L. 178, § 10 (3 mos.).
April 15, 1907, P. L. 81, § 4 (6 mos.).
June 7, 1907, P. L. 441, § 6 (3 mos.).
June 9, 1911, P. L. 746, § 8 (3 mos.).

§ 32. **Burglary:**
Possession of tools:
March 14, 1905, P. L. 38, § 1 (3 yrs.).

§ 33. **Burning:**
Buildings: (See Arson).
March 31, 1860, P. L. 382, § 138 (10 yrs.).

Burning—Cont'd.

Intent to defraud insurance companies:
March 31, 1860, P. L. 382, § 139 (7 yrs.).
Woodland:
March 31, 1860, P. L. 382, § 140 (1 yr.).
April 9, 1869, P. L. 786, § 1 (1 yr.).
June 9, 1911, P. L. 861, § 1 (6 mos.).

§ 34. **Business:**
Carrying on, under fictitious name:
June 28, 1917, P. L. 645, § 3 (1 yr.).
Cancellation of certificate, false statement:
June 20, 1919, P. L. 542, § 3 (1 yr.).

§ 35. **Camp Meeting:**
Sale of goods near:
May 8, 1878, P. L. 46, § 2 (6 mos.).

§ 36. **Cemeteries:**
Destroying flowers etc.:
May 19, 1879, P. L. 64, § 1 (1 yr.).

§ 37. **Cesspools:**
Casting rubbish into:
April 8, 1867, P. L. 938, § 1 (2 yrs.).

§ 38. **Checks:**
Not sufficient funds:
April 18, 1919, P. L. 70, § 2 (2 yrs.).

§ 39. **Children:**
Cruelty to (see Cruelty to Children).
Desertion of (see Desertion).
Illegitimate—Refusal to support:
July 11, 1917, P. L. 773, § 1 (6 mos.).
Illegal employment of:
April 23, 1915, P. L. 174, § 1 (90 dys.).

§ 40. **Cigarettes:**
Selling or furnishing to minors:
May 17, 1921, P. L. 911, § 1 (1 yr. 3d offense).

§ 41. **Civil Service:**
Regulations—Violations of:
May 23, 1907, P. L. 206, § 26 (2 yrs.).

§ 42. **Claim Adjusters:**
License:
April 25, 1921, P. L. 276, § 8 (fine only).

§ 43. **Coal Mining:**
See Mining.

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§ 44. **Cock Fighting:**
March 12, 1830, P. L. 80, § 1 (30 dys.).
§ 45. **Cold Storage:**
June 26, 1919, P. L. 670, § 12 (1 yr.).
§ 46. **Compounding Crimes:**
March 31, 1860, P. L. 382, § 10 (3 yrs.).
§ 47. **Conspiracy:**
To indict and defraud generally:
March 31, 1860, P. L. 382, § 127 (3 yrs.); § 128 (2 yrs.)
June 17, 1913, P. L. 507, § 6 (3 yrs.).
§ 48. **Constables:**
May 14, 1915, P. L. 312, Art. 3, Ch. 7, § 5 (30 dys.).
§ 49. **Conversion:**
May 18, 1917, P. L. 241, § 1 (5 yrs.).
§ 50. **Convict Labor:**
Violation of regulations:
June 18, 1897, P. L. 170, § 4 (1 yr.).
§ 51. **Counterfeiting:**
Issuing unauthorized currency:
March 31, 1860, P. L. 382, § 68 (6 mos.).
Tools—Making or possessing:
March 3, 1860, P. L. 382, § 161 (6 yrs.).
Trade Marks:
March 31, 1860, P. L. 382, §§ 172, 174 (1 yr.); § 173 (2 yrs.).
Uttering counterfeit money:
March 31, 1860, P. L. 382, § 160 (5 yrs.).
§ 52. **Cruelty to Animals:**
April 24, 1903, P. L. 296, § 1 (3 yrs.).
March 31, 1860, P. L. 382, § 46 (1 yr.).
March 29, 1869, P. L. 22, § 2 (1 yr.).
§ 53. **Cruelty to Children:**
Abandonment:
March 3, 1860, P. L. 382, § 45 (1 yr.).
Apprentices:
March 3, 1860, P. L. 382, § 90 (2 yrs.).
§ 54. **Deadly Weapons:**
Concealed:
March 18, 1875, P. L. 33, § 1 (1 yr.).
Manufacture and sale of toy weapons:
June 11, 1885, P. L. 111, § 1 (1 yr.).

Deadly Weapons—Cont'd.
Pointing weapon:
May 8, 1876, P. L. 146, § 1 (1 yr.).

§ 55. **Dentistry:**
Advertising:
May 5, 1921, P. L. 399, §§ 7, 8 (6 mos.).
Practicing without license:
May 7, 1907, P. L. 164, § 8 (6 mos.).
May 3, 1915, P. L. 219, § 8 (6 mos.).
March 19, 1921, P. L. 40, § 8 (6 mos.).

§ 56. **Desertion** and non-support:
July 12, 1919, P. L. 939, § 2 (1 yr.).

§ 57. **Discrimination** by public resorts:
July 18, 1917, P. L. 1068, § 5 (90 dys.).

§ 58. **Disorderly conduct:**
May 2, 1901, P. L. 132, § 1 (30 dys.).

§ 59. **Disorderly houses:**
March 31, 1860, P. L. 382, § 42 (1 yr.).

§ 60. **Distribution of samples:**
May 8, 1907, P. L. 181, (1 yr.).

§ 61. **Disturbing Public Meetings:**
March 31, 1860, P. L. 382, § 31 (3 mos.).

§ 62. **Dogs:**
Violation of Regulations:
July 11, 1917, P. L. 818, § 35 (3 mos.).

§ 63. **Donations:**
Soliciting:
June 20, 1919, P. L. 505, § 13 (1 yr.).

§ 64. **Driving:**
While intoxicated:
May 24, 1917, P. L. 295 (3 mos.).

§ 65. **Drugs:**
See Pure Food and Drugs.

§ 66. **Duelling and Challenging:**
March 31, 1860, P. L. 382, § 25 (3 yrs.); § 26 (2 yrs.); §§ 27, 28 (1 yr.).

§ 67. **Election Laws,** violation of:
Altering voting list:
January 30, 1874, P. L. 31, § 19 (2 yrs.).
Assault on electors:
April 6, 1870, P. L. 53, § 9 (1 yr.).
Assessment of expenses—public offices:
June 13, 1883, P. L. 96, § 2 (fine only).

Election laws—Cont'd.

Assessment—Illegal:
January 30, 1874, P. L. 31, § 19 (2 yrs.).
Assisting voter:
July 12, 1913, P. L. 719, § 23 (1 yr.).
Ballot:
Removal from book:
July 9, 1919, P. L. 839, § 3 (1 yr.).
Wrongful possession of:
June 10, 1893, P. L. 419, § 35 (1 yr.).
Betting on elections:
March 24, 1817, 6 Sm. L. 462, § 2 (fine only).
July 2, 1839, P. L. 519, § 118 (fine only).
Bribery:
March 31, 1860, P. L. 382, § 50 (6 mos.); § 51 (2 yrs.).
June 8, 1881, P. L. 70, §§ 1-5 (3 mos.); § 6, (6 mos.).
May 9, 1889, P. L. 162, § 1 (1 yr.).
July 12, 1913, P. L. 719, § 23 (3 yrs.).
Defacing or destroying ballots, papers or tickets:
July 2, 1839, P. L. 519, § 106 (3 yrs.).
January 30, 1874, P. L. 31, § 19 (2 yrs.).
June 10, 1893, P. L. 419, § 31 (3 mos.).
Disclosing ballots:
April 29, 1903, P. L. 338, § 6 (3 mos.).
Disturbing elections:
July 2, 1839, P. L. 519, § 110 (2 yrs.); §§ 111, 113 (fine only).
Election officers:
Acting without oath:
June 29, 1881, P. L. 128, § 2 (fine only).
Drunkenness of:
May 19, 1887, P. L. 126, § 1 (30 dys.).
Fraud:
July 2, 1839, P. L. 519, §§ 98-104 (fine only).
July 12, 1913, P. L. 719, § 23 (3 yrs.).
July 9, 1919, P. L. 839, § 5 (3 yrs.).
Disclosing votes:
January 30, 1874, P. L. 31, § 19 (2 yrs.).
Excluding watchers:
July 12, 1913, P. L. 719, §§ 21, 22 (1 yr).

Election laws—Cont'd.

Illegal entries on list:
June 18, 1915, P. L. 1027, § 2 (5 yrs.).
Opening tickets:
July 2, 1839, P. L. 519, § 105 (3 mos.).
Receiving votes without proof:
April 17, 1866, P. L. 969, § 3 (2 yrs.).
April 17, 1869, P. L. 49, § 6 (1 yr.).
January 30, 1874, P. L. 31, § 12 (1 yr.).
Refusal to administer or take oath:
January 30, 1874, P. L. 31, § 9 (1 yr.).
Refusal of ballot:
July 12, 1913, P. L. 719, § 23 (2 yrs.).
July 10, 1919, P. L. 857, § 51 (5 yrs.).
Violation of duty:
July 2, 1839, P. L. 519, § 127 (fine only).
June 13, 1840, P. L. 683, § 15 (fine only).
April 17, 1869, P. L. 49, § 14 (2 yrs.).
January 30, 1874, P. L. 31, § 19 (fine only).
June 29, 1881, P. L. 128, § 2 (1 yr.).
March 5, 1906, P. L. 63, § 14 (1 yr.; 5 yrs.).
June 18, 1915, P. L. 1027, § 2 (1 yr.).
July 10, 1919, P. L. 857, § 51 (2 yrs.).

Employees—Assessment for political purposes;
July 15, 1897, P. L. 275, § 2 (1 yr.).

Expenses, illegal:
April 18, 1874, P. L. 64, § 2 (1 yr.).
March 5, 1906, P. L. 78, § 14 (2 yrs.).

False affidavit or name to petition:
July 12, 1913, P. L. 719, § 23 (1 yr.).

False entries on books:
May 25, 1921, P. L. 1125, § 15 (3 yrs.).

False or forged certificates:
July 2, 1839, P. L. 519, § 125 (2 yrs.).

False name on ballot, etc.:
June 13, 1883, P. L. 92, § 1 (1 yr.).

False registration:
March 5, 1906, P. L. 63, § 14 (2 yrs.).
June 18, 1915, P. L. 1027, § 2 (5 yrs.).
July 10, 1919, P. L. 857, § 51 (3 yrs.).

False naturalization certificate:
April 17, 1869, P. L. 49, § 38 (1 yr.).
January 30, 1874, P. L. 31, § 21 (2 yrs.).

Election laws—Cont'd.

June 18, 1915, P. L. 1027, § 2 (3 yrs.).
July 10, 1919, P. L. 857, § 51 (3 yrs.).

Forgery of receipts or certificates:
July 2, 1839, P. L. 519, § 125 (2 yrs.).
June 10, 1893, P. L. 419, § 32 (1 yr.).

Fraud in assisting voter:
July 12, 1913, P. L. 719, § 23 (1 yr.).

Illegal signature to nomination petition:
July 12, 1913, P. L. 719, § 23 (fine only).
July 24, 1913, P. L. 1001, § 20 (fine only).

Liquor, sale or gift of:
March 13, 1872, P. L. 24, § 2 (100 dys.).

Overseers—Intimidating:
January 30, 1874, P. L. 31, § 4 (1 yr.); § 19 (2 yrs.).

Perjury. See under "B".

Political assessments:
June 13, 1883, P. L. 96, §§ 1, 2 (fine only).
July 15, 1897, P. L. 275, § 2 (1 yr.).

Policemen present at polling place:
July 12, 1913, P. L. 719, § 23 (1 yr.).

Prothonotary or sheriff:
False naturalization paper:
January 30, 1874, P. L. 31, § 20 (3 yrs.).
Refusal to perform duty:
July 2, 1839, P. L. 519, § 126 (12 mos.).

Subpœna—Refusal to obey:
July 10, 1919, P. L. 857, § 51 (fine only).

Tax receipts improperly obtained:
July 15, 1897, P. L. 276, § 4 (6 mos.).

Vote—Illegal:
April 6, 1870, P. L. 53, §§ 6, 7 (5 yrs.).
July 12, 1897, P. L. 257, § 1 (5 yrs.).
July 14, 1897, P. L. 261, § 1 (5 yrs.).
April 29, 1903, P. L. 338, § 6 (3 mos.).
July 12, 1913, P. L. 719, § 23 (3 yrs.).
July 25, 1913, P. L. 1043, § 12 (1 yr.).
July 10, 1919, P. L. 857, § 51 (5 yrs.).
July 15, 1919, P. L. 966, § 3 (90 dys.).

Voters—Intimidation of:
January 30, 1874, P. L. 31, § 19 (2 yrs.).

Election Laws—Cont'd.

Watchers:

Excluding from polls:

July 24, 1913, P. L. 1001, § 18 (1 yr.).

Intimidation of:

July 24, 1913, P. L. 1001, § 19 (1 yr.).

§ 68. **Elevators:**

Running in disregard of notice from bureau of inspection:

May 28, 1907, P. L. 297, § 4 (3 mos.).

§ 69. **Embezzlement:**

Attorneys in fact:

March 31, 1860, P. L. 382, § 115 (2 yrs. by § 121).

Bankers, brokers, attorneys, etc.:

March 31, 1860, P. L. 382, § 114 (2 yrs. by § 121).

April 16, 1850, P. L. 477, § 20 (5 yrs.).

April 23, 1909, P. L. 169, § 1 (5 yrs.).

Consignee or factor:

March 31, 1860, P. L. 412, § 125 (5 yrs.).

Guardian:

April 22, 1863, P. L. 531, § 1 (2 yrs.).

Member or officers of militia or national guard:

May 24, 1887, P. L. 182, § 4 (1 yr.).

June 22, 1917, P. L. 628, § 23 (5 yrs.).

May 17, 1921, P. L. 869, § 39 (5 yrs.).

Officers of corporations:

June 12, 1878, P. L. 196, § 1 (6 yrs.).

Officers, etc., of insurance companies:

May 17, 1921, P. L. 682, § 345 (5 yrs.).

Public officers:

May 27, 1841, P. L. 400, § 10 (2 yrs.).

March 31, 1860, P. L. 382, § 65 (5 yrs.).

Receiving deposits with knowledge of insolvency:

May 9, 1889, P. L. 145, § 1 (3 yrs.).

Servants:

See Larceny.

Tax collectors:

June 3, 1885, P. L. 72, § 1 (5 yrs.).

Transporters:

March 31, 1860, P. L. 382, § 126 (1 yr.).

Trustees:

March 31, 1860, P. L. 382, § 113 (2 yrs. by § 121).

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§ 70. **Embracery:**
March 31, 1860, P. L. 382, § 13 (1 yr.).

§ 71. **Employment agency:**
Conducting without license:
April 25, 1907, P. L. 106, § 13 (1 yr.).
Violation of act:
June 7, 1915, P. L. 888, § 21 (1 yr.).

§ 72. **Engineers and Surveyors:**
License:
May 25, 1921, P. L. 1131, § 30 (3 mos.).

§ 73. **Enlistment:**
Enlisting men in this state for military service in other states:
March 11, 1864, P. L. 6, § 1 (12 mos.).

§ 74. **Escape:**
Aiding or permitting prisoners to escape:
March 31, 1860, P. L. 382, § 4 (2 yrs.); Id. § 5, (5 yrs.); Id. § 6 (1 yr.); Id. § 7 (2 yrs.).
June 23, 1897, P. L. 201, § 1 (3 mos.).
Convicts:
March 31, 1860, P. L. 382, § 3 (1 or 2 yrs. or repetition of original sentence).
June 10, 1885, P. L. 79, §§ 1, 2. (Same as original term).
Obstructing legal process:
March 31, 1860, P. L. 382, § 8 (1 yr.).
Prisoner employed outside jail:
May 25, 1907, P. L. 247, § 7. (Term dependent on original sentence).

§ 75. **Escheat:**
Refusal to furnish evidence:
April 21, 1921, P. L. 223, § 9 (1 yr.).

§ 76. **Exhibition of Deformities:**
June 25, 1895, P. L. 291 (6 mos.).

§ 77. **Explosives:**
Blasting powder:
April 24, 1901, P. L. 97, § 4 (fine only).
Carrying in public conveyances:
May 6, 1874, P. L. 121, § 1 (30 dys.).
May 23, 1878, P. L. 102, § 1 (3 mos.).
Failure to label:
April 22, 1850, P. L. 538, § 9 (6 mos.).

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Explosives—Cont'd.

Manufacture and sale of toy deadly weapons:
June 11, 1885, P. L. 111, § 1 (1 yr.).
Use at wedding:
July 11, 1917, P. L. 817, §§ 1, 2 (60 dys.).

§ 78. **Extortion:**
March 31, 1860, P. L. 382, § 12 (1 yr.).
May 27, 1897, P. L. 111, § 1 (3 yrs.).
June 9, 1911, P. L. 833, § 1 (3 yrs.).

§ 79. **False accounts by fiduciaries:**
May 16, 1919, P. L. 169, § 6 (6 mos.).

§ 80. **False affidavits:**
See Perjury, under "B."

§ 81. **False Alarms:**
February 28, 1865, P. L. 238, § 1 (2 yrs.).
May 22, 1895, P. L. 112, § 1 (1 yr.).
April 13, 1921, P. L. 140, (2 yrs.).

§ 82. **False certificate of insanity:**
March 23, 1876, P. L. 8, § 1 (1 yr.).
April 26, 1917, P. L. 100, § 1. (No time fixed).

§ 83. **False entries:**
Public record:
March 31, 1860, P. L. 382, § 15 (2 yrs.).

§ 84. **False impersonation:**
May 29, 1893, P. L. 174, §§ 2, 3 (1 yr.).
May 5, 1897(P. L. 39, § 1 (2 yrs.).
May 17, 1917, P. L. 208, § 9 (6 mos.).

§ 85. **False messages:**
March 31, 1860, P. L. 382, § 176 (1 yr.).

§ 86. **False oaths:**
June 2, 1915, P. L. 762, § 19. (Penalty not specified.)

§ 87. **False or misleading statements:**
Advertising:
March 20, 1913, P. L. 6, § 1 (60 dys.).
Financial matters:
June 12, 1878, P. L. 196, § 4 (6 yrs.).
May 8, 1907, P. L. 180, § 1 (2 yrs.).
May 8, 1913, P. L. 161, §§ 1-4 (1 yr.).
May 16, 1919, P. L. 169, § 6 (6 mos.).
Partners:
April 12, 1917, P. L. 67, §§ 4, 5 (fine only).
Sale of Kosher meat:
July 21, 1919, P. L. 1063, § 1 (1 yr.).

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§ 88. **False pretences:**
Cheating by:
March 31, 1860, P. L. 382, § 111 (3 yrs.).
Checks:
April 18, 1919, P. L. 70, § 2 (2 yrs.).
Obtaining hotel accommodations by:
June 12, 1913, P. L. 481, § 8 (3 mos.).

§ 89. **False recommendations:**
Use of:
June 22, 1897, P. L. 184, § 1 (6 mos.).

§ 90. **False reports by fiduciaries:**
May 16, 1919, P. L. 169, § 6 (6 mos.).

§ 91. **False weights:**
April 3, 1872, P. L. 772, § 1 (6 mos.).
May 8, 1876, P. L. 136, § 1 (6 mos.).
May 18, 1878, P. L. 67, § 2 (fine only).
June 5, 1883, P. L. 78, § 1 (3 mos.).
April 11, 1901, P. L. 77, § 3 (fine only).
April 21, 1921, P. L. 265, § 1 (1 yr.).

§ 92. **Fast driving:**
Where speed is wanton and furious:
March 31, 1860, P. L. 382, § 29 (5 yrs.).

§ 93. **Fees:**
Illegal:
March 31, 1876, P. L. 13, § 3 (refund).
June 22, 1883, P. L. 139, § 3 (refund).

§ 94. **Fictitious name:**
See Partnership.

§ 95. **Fire alarm telegraph:**
False alarms and interference with system:
April 13, 1921, P. L. 140, § 1 (2 yrs.).
Wilful interference with:
February 28, 1865, P. L. 238, § 1 (2 yrs.).

§ 96. **Fire Arms:**
Sale to minors:
June 10, 1881, P. L. 111, § 1 (fine only).
Shooting on hospital or park grounds:
June 6, 1913, P. L. 454, § 1 (25 dys.).
Shooting human being by mistake for game:
May 20, 1921, P. L. 968, §§ 3, 4 (5 yrs.).
Use at wedding:
July 11, 1917, P. L. 817, §§ 1, 2 (60 dys.).

§ 97. **Fire crackers:**
Manufacture or sale of, etc.:
June 19, 1901, P. L. 577, § 1 (1 yr.).
March 24, 1905, P. L. 49, § 1, 2 (6 mos.).
June 1, 1911, P. L. 554, §§ 1-6 (6 mos.).

§ 98. **Fire Escapes:**
May 20, 1913, P. L. 272, § 2 (2 mos.).

§ 99. **Fish Laws:**
Violation. (Jurisdiction given to justices of peace).

§ 100. **Food:**
(See Pure Food Laws).

§ 101. **Forcible Entry and Detainer:**
March 31, 1860, P. L. 382, §§ 21-22 (1 yr.).

§ 102. **Forest Reservations:**
Cutting trees:
May 5, 1911, P. L. 163, § 2 (3 mos.).
Fires—Starting of:
May 5, 1911, P. L. 163, § 1 (6 mos.).
Fire Warden—Neglect of duty:
June 3, 1915, P. L. 797, § 1001 (3 mos.).
Fire Warden—Refusal to aid:
June 3, 1915, P .L .797, §§ 1002, 3, 4 (1 mo.).
Mutilation of property:
May 5, 1911, P. L. 163, § 3 (30 dys.).

§ 103. **Forests and Timber:**
Cutting, setting fire to, injuring, destroying, unlawfully purchasing:
April 10, 1862, P. L. 383, § 5 (3 yrs.).
April 9, 1869, P. L. 786, § 1 (1 yr.).
June 11, 1879, P. L. 162, § 1 (12 mos.).
May 23, 1887, P. L. 166, § 1 (2 yrs.).
June 9, 1911, P. L. 861, §§ 1 (6 mos.), 2-4 (3 mos.).
Obstructing navigable streams:
June 13, 1883, P. L. 95, § 2 (fine only).
Removing and secreting:
April 19, 1864, P. L. 480, § 4 (2 yrs.).

§ 104. **Fornication and Bastardy:**
March 31, 1860, P. L. 382, § 37. (fine and support.)

§ 105. **Fortune Telling:**
April 8, 1861, P. L. 270, §§ 1, 2, 5, 6 (2 yrs.; second offense 5 yrs.).

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§ 106. **Fraudulent Accounts and Statements:**
Officer of corporation:
June 12, 1878, P. L. 196, §§ 2, 5 (6 yrs.).
Reports or entries of banks:
May 8, 1907, P. L. 180, § 1 (2 yrs.).
April 23, 1909, P. L. 171, § 1 (5 yrs.).
Teachers' retirement fund records:
July 18, 1917, P. L. 1043, § 19. (punishment as in other cases of fraud.)

§ 107. **Fraudulent acknowledgment:**
Deeds, judgments, etc.:
March 31, 1860, P. L. 382, § 16 (7 yrs.).

§ 108. **Frauds:**
Check—Delivery with intent to defraud:
April 18, 1919, P. L. 70 (2 yrs.).
Concealing goods from officer:
May 20, 1913, P. L. 246, § 3 (1 yr.).
Confession of judgment:
June 23, 1897, P. L. 193, § 1 (2 yrs.).
Creditors—list of:
April 22, 1903, P. L. 242, § 1 (1 yr.).
May 23, 1919, P. L. 262, § 8 (fine only.).
Excessive use of conveyance:
April 27, 1909, P. L. 248, § 1 (30 dys.).
Lodging house keepers:
March 31, 1860, P. L. 382, § 112 (3 mos.).
Misbranding metals:
June 15, 1897, P. L. 163, §§ 1, 2 (3 mos.).
June 22, 1897, P. L. 186, §§ 1-4 (3 mos.).
Use of word "consul" or coat of arms without authority:
April 15, 1913, P. L. 74, § 1 (1 yr.).

§ 109. **Fugitives:**
False information:
April 24, 1878, P. L. 137, § 6 (1 yr.).
Removal without requisition:
Id., § 3 (1 yr.).

§ 110. **Gambling:**
March 31, 1860, P. L. 382, § 55 (1 yr.); § 56 (5 yrs.); § 57 (fine only).
April 2, 1870, P. L. 46, § 1 (discretion of court).
May 22, 1895, P. L. 99, § 1 (1 yr.).

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§ 111. **Game Laws:**
Preserves, entering or injuring:
May 10, 1921, P. L. 430, § 4 (1 yr.).
Shooting human being in mistake for game:
May 20, 1921, P. L. 968, § 3 (5 yrs.).
Violation of:
June 26, 1895, P. L. 391, § 3 (fine only).
June 27, 1895, P. L. 403, § 1 (90 dys.), § 2 (20 dys.).

§ 112. **Generative Organs:**
Advertisement of treatment of diseases of:
July 21, 1919, P. L. 1084, § 2 (1 yr.).

§ 113. **Gypsies:**
May 6, 1909, P. L. 445, § 2 (30 dys.).

§ 114. **Highways:**
Extortion from travellers:
July 14, 1917, P. L. 840, § 845 (fine only).
Obstructions and nuisances:
July 14, 1917, P. L. 840, § 846 (fine only).
Signs; imitating, destroying, etc.:
July 14, 1917, P. L. 840, §§ 737-39 (60 dys.).
April 14, 1921, P. L. 145, (60 dys.).

§ 115. **Horses:**
Excessive use of:
April 27, 1909, P. L. 248, § 1 (30 dys.).
Racing:
June 6, 1893, P. L. 344, § 2 (6 mos.).

§ 116. **Hotels, etc.:**
Employment of women:
March 28, 1878, P. L. 9, § 2 (1 yr.).

§ 117. **Importing criminals:**
March 31, 1860, P. L. 382, § 71 (1 yr.).

§ 118. **Incest:**
March 31, 1860, P. L. 382, § 39 (3 yrs.).

§ 119. **Insane Asylum:**
False certificates:
March 23, 1876, P. L. 8, § 1 (1 yr.).
April 26, 1917, P. L. 100, § 1 (penalty not specified).
Sale of goods:
May 28, 1907, P. L. 290, § 4 (fine only).
Unlawful detention:
May 8, 1883, P. L. 21, § 12 (penalty not specified).
Violation of rules:
May 8, 1883, P. L. 21, § 15 (penalty not specified).

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§ 120. **Insignia:**

Unlawful use of:

June 10, 1897, P. L. 139, § 1 (fine only).
March 5, 1903, P. L. 14, § 1 (60 dys.).
March 27, 1903, P. L. 106, § 1 (60 dys.).
March 28, 1907, P. L. 35, § 2 (3 yrs.).
March 31, 1921, P. L. 89, (60 dys.).

§ 121. **Insolvency:** (See also Embezzlement).

Fraudulent:

March 18, 1816, 6 Sm. L. 353, § 1 (3 yrs.).
March 31, 1860, P. L. 382, §§ 131, 132, 139 (3 yrs. and 7 yrs.); § 134 (2 yrs.).
June 23, 1897, P. L. 193, § 1 (2 yrs.).

§ 122. **Insurance:**

Agents acting without license:

May 17, 1921, P. L. 789, §§ 604, 623 (fine only).

Acting for unauthorized company:

May 17, 1921, P. L. 789, §§ 606, 631 (fine only); § 632 (1 yr.).

Acting for fictitious company:

Id. § 607 (1 yr.).

False representation to procure insurance:

June 1, 1911, P. L. 581, § 29 (6 mos.).

Foreign companies, tax on contract:

July 6, 1917, P. L. 723, § 2 (fine only).

Fraud and misrepresentation:

July 11, 1917, P. L. 804, § 10 (6 mos.).
May 17, 1921, P. L. 682, §§ 347-349, 414 (1 yr.). § 350 (6 mos.).
May 17, 1921, P. L. 789, §§ 637-639 (6 mos.).

Issuing policies without authority:

May 17, 1921, P. L. 789, § 632 (1 yr.).
May 17, 1921, P. L. 682, § 628 (fine only).

Licenses for claim adjusters:

April 25, 1921, P. L. 276, § 8 (fine only).

Motor vehicles:

May 10, 1921, P. L. 442, § 9 (6 mos.).

Officers of company—Interest in contract:

May 17, 1921, P. L. 682, § 407 (fine only).

Paying or receiving commissions for insuring employees, etc.:

May 17, 1921, P. L. 789, § 634 (6 mos.).

Insurance—Cont'd.

Rebates:
May 17, 1921, P. L. 789, §§ 636, 639 (6 mos.).
Reciprocal or exchange of contracts:
May 17, 1921, P. L. 682, § 1011 (fine only).
Steam boilers:
March 11, 1891, P. L. 5, § 3 (2 yrs.).
Unlawful procurement of proxies:
May 5, 1921, P. L. 350, § 2 (1 yr.).

§ 122a. **Investments:**
Sale of securities on installment plan:
May 5, 1921, P. L. 374, § 11 (1 yr.).

§ 123. **Involuntary Manslaughter:**
March 31, 1860, P. L. 382, § 79 (2 yrs.).

§ 124. **Junk Dealers:**
Purchase of junk from minors:
May 5, 1899, P. L. 247, § 1 (1 yr.).

§ 125. **Jury Wheel:**
Neglect to lock wheel:
April 14, 1834, P. L. 333, § 84 (fine only).

§ 126. **Justices of Peace:**
Keeping tavern:
February 22, 1802, 3 Sm. L. 490, § 2 (fine only).
Neglect of duties:
March 30, 1821, 7 Sm. L. 426, § 4 (misdemeanor in office, penalty not specified).
March 22, 1877, P. L. 13, § 2 (fine only).
June 1, 1915, P. L. 669, § 2 (fine only).

§ 127. **Labor and Industry regulations:**
Athletic Exhibitions:
April 11, 1903, P. L. 166, § 2 (2 yr.).
Employment agencies:
June 7, 1915, P. L. 888, § 21 (1 yr.).
False statements:
June 4, 1915, P. L. 833, § 21 (6 mos.).
Female Labor:
June 30, 1885, P. L. 202, § 1 (6 mos.).
May 2, 1905, P. L. 352, § 23 (60 dys.).
June 7, 1911, P. L. 677, § 3 (60 dys.).
July 25, 1913, P. L. 1024, § 18 (1 yr.) .
July 5, 1917, P. L. 686, § 8 (1 yr.).
Health and safety of employees:
June 7, 1915, P. L. 888, § 21 (1 yr.).

Labor and Industry Regulations—Cont'd.

Sanitary regulations:
July 26, 1913, P. L. 1363, § 8 (fine only).
July 9, 1919, P. L. 788, § 19 (fine only).
Soliciting pay for employment:
June 9, 1911, P. L. 746, § 1 (1 yr.).
Street railways—hours of labor:
March 24, 1887, P. L. 13, § 2 (6 mos.).

§ 128. **Larceny:**
Minerals:
May 8, 1876, P. L. 142, § 1 (1 yr.).

§ 129. **Lewdness:**
March 31, 1860, P. L. 382, § 44 (1 yr.).

§ 130. **Libel:**
March 31, 1860, P. L. 382, § 24 (1 yr.).
June 3, 1893, P. L. 273, § 1 (2 yrs.).
May 25, 1897, P. L. 85, § 1 (1 yr.).
Candidates:
June 26, 1895, P. L. 389, § 1 (6 mos.).
Financial institutions:
April 23, 1909, P. L. 171, § 1 (5 yrs.).

§ 131. **Liquors:**
Adulterated or misbranded:
April 14, 1863, P. L. 389, §§ 1, 5 (12 mos.).
June 2, 1881, P. L. 43, § 2 (1 yr.).
Non-alcoholic:
May 25, 1921, P. L. 116, (6 mos.).
Regulating licensing and sale of:
May 5, 1921, P. L. 407, § 6 (2 yrs.).
Id. § 8 (3 mos.).
Id. § 9 (90 dys.).
Id. § 11 (3 yrs.).
April 16, 1849, P. L. 657, § 17 (12 mos.).
July 22, 1913, P. L. 914, § 2 (fine only).
Sale near encampment:
April 12, 1875, P. L. 48, § 2 (10 dys.).
Premiums for labels:
June 12, 1913, P. L. 490, § 3 (3 mos.).
July 17, 1917, P. L. 1020, § 1 (3 mos.).
Sale to minors:
May 25, 1897, P. L. 93, § 1 (90 dys.).
May 20, 1913, P. L. 246, § 2 (60 dys.).
Sale on Sunday:
February 26, 1855, P. L. 53, § 3 (60 dys.).

Liquors—Cont'd.

Sale at places of amusement:
July 9, 1881, P. L. 162, § 2 (as misdemeanor).
Sale to person of intemperate habits:
May 8, 1854, P. L. 663, § 1 (60 dys.).
April 3, 1872, P. L. 843, § 25 (6 mos.).
April 22, 1903, P. L. 257, § 2 (60 dys.).

§ 132. **Livery Stable:**

Damage to or wrongful use of property by bailee:
March 22, 1887, P. L. 8, § 1 (20 dys.).
April 27, 1909, P. L. 248, § 1 (30 dys.).
June 13, 1911, P. L. 890, § 1 (3 mos.).

§ 133. **Lotteries:**

Offenses connected with:
March 31, 1860, P. L. 382, § 53 (1 yr.).
June 13, 1883, P. L. 90, § 1 (2 yrs.).
June 3, 1885, P. L. 55, § 1 (1 yr.).

§ 134. **Lunatics:**

Care and Maintenance of:
May 23, 1913, P. L. 297, § 3 (6 mos.).

§ 135. **Lying-in hospitals:**

License:
April 26, 1893, P. L. 24, § 3 (1 yr.).

§ 136. **Malicious Mischief and Trespass:**

Bailee of livery:
May 22, 1887, P. L. 8, § 1 (20 dys.).
Banks or walls:
March 31, 1860, P. L. 382, § 146 (1 yr.).
Books, maps, etc. of public libraries, etc.:
June 23, 1885, P. L. 138, § 1 (3 mos.).
July 20, 1917, P. L. 1143, § 29 (15 dys.).
Canals:
March 31, 1860, P. L. 382, § 144 (3 yrs.).
Capitol grounds:
March 31, 1860, P. L. 382, § 149 (6 mos.).
Cemeteries:
March 31, 1860, P. L. 382, § 47 (1 yr.).
May 19, 1879, P. L. 64, § 1 (1 yr.).
Embankments:
May 19, 1879, P. L. 65, § 1 (6 mos.).
Fences:
March 23, 1865, P. L. 42, § 1 (6 mos.).
June 22, 1917, P. L. 623, § 2 (6 mos.).

Malicious Mischief and Trespass—Cont'd.

Fire engine or hose:
March 31, 1860, P. L. 382, § 151 (3 yrs.).
Fruit trees, etc.:
March 30, 1860, P. L. 362, § 2 (60 dys.).
May 1, 1861, P. L. 478, § 2 (60 dys.).
April 8, 1867, P. L. 907, § 3 (60 dys.).
June 18, 1895, P. L. 196, § 1 (fine only).
Gas and water company property:
March 11, 1857, P. L. 77, § 15 (1 yr.).
April 29, 1874, P. L. 73, § 34, Clause 6 (1 yr.).
June 26, 1895, P. L. 319, § 1 (3 mos.).
House of correction—Destruction of property:
June 2, 1871, P. L. 1301, § 9 (1 yr.).
Ice ponds:
May 8, 1876, P. L. 137, § 1 (fine only).
Land marks:
March 31, 1860, P. L. 382, § 153 (1 yr.).
Locks:
March 31, 1860, P. L. 382, § 145 (3 mos.).
Id. § 146 (1 yr.).
Mines, flooding:
March 31, 1860, P. L. 382, § 150 (2 yrs.).
Mining on another's lands:
May 8, 1876, P. L. 142, § 1 (1 yr.).
Monuments:
May 9, 1889, P. L. 167, § 1 (1 yr.).
Oil wells:
July 6, 1917, P. L. 748, § 1 (3 yrs.).
Orchards, fruits, etc.:
March 30, 1860, P. L. 362, §§ 1, 2 (60 dys.).
June 18, 1895, P. L. 196, § 1 (fine only).
Privy wells:
April 8, 1867, P. L. 938, § 1 (2 yrs.).
Public lands:
May 18, 1887, P. L. 121, § 3 (6 mos.).
Railroad property:
March 31, 1860, P. L. 382, § 147 (1 yr.).
School buildings:
May 18, 1911, P. L. 309, § 628 (6 mos.).
Show bills, posters, etc.:
May 6, 1887, P. L. 87, § 1 (fine only).

Malicious Mischief and Trespass—Cont'd.

Side paths:
April 28, 1899, P. L. 78, § 1 (30 dys.).
Sign boards and guide posts:
July 14, 1917, P. L. 840, § 739 (60 dys.).
April 14, 1921, P. L. 145, § 3 (60 dys.).
Seeds and plants:
June 28, 1917, P. L. 657, § 1 (1 yr.).
State boundaries:
June 10, 1881, P. L. 118, § 2 (6 mos.).
Trees:
June 9, 1911, P. L. 861, § 2, 3 (3 mos.).
Trees, memorial:
May 5, 1921, P. L. 420, § 3 (3 mos.).
Tunnel companies, Property of:
July 15, 1897, P. L. 277, § 3 (punishable as a misdemeanor at common law).
Turnpike companies, roadway:
April 7, 1849, P. L. 461, § 3 (6 mos.).
Wells:
July 6, 1917, P. L. 748, § 1 (3 yrs.).
Windows, doors, etc.:
March 31, 1860, P. L. 382, § 148 (6 mos.).
Works of art:
March 31, 1860, P. L. 382, § 155 (6 mos.).

§ 137. **Manslaughter, involuntary:**
March 31, 1860, P. L. 382, § 79 (2 yrs.).

§ 138. **Marriage of intoxicated persons:**
May 8, 1854, P. L. 663, § 4 (60 dys.).

§ 140. **Mercantile licenses:**
Failure to obtain:
April 9, 1864, P. L. 375, § 1 (30 dys.).
Failure of public officer to perform duty:
March 4, 1824, P. L. 32, § 7 (fine only).
Transient merchants:
June 14, 1901, P. L. 563, § 2 (1 yr.).
May 17, 1917, P. L. 204, § 5 (5 dys.).

§ 141. **Midwife:**
Failure to obtain certificate:
June 5, 1913, P. L. 441, § 6 (60 dys.).

§ 142. **Military Orders:**
Unauthorized use of insignia or Army orders:
See Insignia, § 120.

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§ 143. **Militia:**

Embezzlement of funds:
June 22, 1917, P. L. 628, § 23 (5 yrs.).
Failure to return arms:
June 1, 1887, P. L. 283, § 5 (30 dys.).
Wilful injury to arms:
April 14, 1903, P. L. 186, § 5 (30 dys.).

§ 144. **Milk:**

See Pure Food and Drugs, § 190.

§ 145. **Mines:**

Anthracite coal mining, violation of laws relating to:
May 10, 1881, P. L. 17, § 6 (30 dys.).
May 29, 1901, P. L. 342, § 5 (6 mos.).
April 29, 1911, P. L. 102, § 2 (fine only).
June 9, 1911, P. L. 756, Art. 25, Rule 35 (3 mos.).
Id. Art. 26, §§ 1, 2 (3 mos.).
July 26, 1913, P. L. 1361, § 2 (fine only).
May 27, 1921, P. L. 1192, § 25 (1 yr.).
Id. P. L. 1198, § 7 (1 yr.).
Bribery:
June 15, 1897, P. L. 157, § 1 (6 mos.).
Employees passing danger signal.
June 9, 1911, P. L. 756, Art. 5, § 5 (3 mos.).
Employment of women and minors:
June 2, 1891, P. L. 176, Art. 9, § 3 (3 mos.).
June 9, 1911, P. L. 756, Art. 17, §§ 1, 2 (3 mos.).
Endangering lives of others:
March 3, 1870, P. L. 3, § 19 (discretion of court).
False maps:
June 2, 1891, P. L. 176, Art. 3, § 7 (3 mos.).
False weights:
June 1, 1883, P. L. 52, § 3 (3 mos.).
July 15, 1897, P. L. 286, § 2 (90 dys.).
May 28, 1907, P. L. 270, § 1 (1 yr.).
Fire boss, violation of duty:
June 9, 1911, P. L. 756, Art. 5, § 6 (3 mos.).
Fire proof construction:
June 15, 1911, P. L. 979, § 2 (10 dys.).
Foreman and assistant.—Violation of duty:
June 9, 1911, P. L. 756, Art. 4, § 24 (3 mos.).
Forging certificates:
June 2, 1891, P. L. 176, Art. 8, § 8 (1 yr.).
Id. Art. 12, (3 mos.).

Mines—Cont'd.

Id. Art. 17, § 4 (3 mos.).
June 9, 1911, P. L. 756, Art. 24, § 10 (1 yr.).
Inspector, violation of duty:
June 2, 1891, P. L. 176, Art. 17, § 5 (3 mos.).
May 17, 1921, P. L. 831, § 17 (30 dys.).
Larceny of coal in mines:
May 8, 1876, P. L. 142, § 1 (1 yr.).
Oil regulations, violation of:
June 9, 1911, P. L. 756, Art. 17, § 6 (3 mos.).
Pollution of stream:
June 27, 1913, P. L. 640, § 2 (1 mo.).
Record of coal:
July 25, 1913, P. L. 1038, § 2 (fine only).

§ 146. **Minors:**

(See also Junk Dealers).
Abandonment of:
May 29, 1907, P. L. 318, § 1 (2 yrs.).
Admission to places of amusement:
May 28, 1885, P. L. 27, § 4 (fine only).
Boarding:
May 28, 1885, P. L. 27, § 2 (fine only).
April 27, 1909, P. L. 211, § 5 (fine only).
Defective—Bringing into state:
July 11, 1917, P. L. 769, § 4 (fine only).
Distributing samples to:
May 2, 1901, P. L. 111, § 2 (20 dys.).
Employment of: (See also Mines).
May 16, 1901, P. L. 220, § 1 (3 yrs.).
May 2, 1905, P. L. 352, § 23 (60 dys.).
Id. P. L. 344, § 2 (fine only).
Id. P. L. 344, § 8 (7 yrs.).
April 15, 1913, P. L. 70, § 7 (90 dys.).
Eyes—care of:
June 5, 1913, P. L. 443, § 6 (30 dys.).
Misrepresenting age by:
May 20, 1913, P. L. 246, § 1 (60 dys.).
Permitting in house of ill repute:
May 29, 1907, P. L. 318, § 2 (2 yrs.).
Prostitution of:
May 28, 1885, P. L. 27, § 1 (5 yrs.).
March 24, 1909, P. L. 59, § 1 (1 yr.).

Minors—Cont'd.

Sale or barter of:
April 18, 1905, P. L. 213, § 1 (5 yrs.).
Selling or furnishing cigarettes to:
May 17, 1921, P. L. 911 (1 yr. 3d offense).
Selling liquor to:
May 25, 1897, P. L. 93, § 1 (90 dys.).
May 20, 1913, P. L. 246, § 2 (60 dys.).
Selling tobacco to:
July 10, 1901, P. L. 638, §§1-3 (30 dys.).

§ 147. **Monstrosities:**
June 25, 1895, P. L. 291, § 1 (6 mos.).

§ 148. **Money Loan Brokers:**
June 17, 1915, P. L. 1012, § 6 (6 mos.).

§ 149. **Mother's Assistance Fund:**
Unlawfully securing allowances from:
July 10, 1919, P. L. 893, § 17 (1 yr.).

§ 150. **Motor Vehicles:**
See Automobiles.

§ 151. **Mutilation and Destruction**—Fraudulent:
Corporate books:
June 12, 1878, P. L. 196, § 5 (6 yrs.).
Deeds or securities:
March 31, 1860, P. L. 382, § 129 (3 yrs.).
Firm books:
June 4, 1885, P. L. 74, § 1 (2 yrs.).

§ 152. **Names:**
Change of, out of court:
July 9, 1919, P. L. 822, §§ 1, 2 (fine only).

§ 153. **National Guard:**
Embezzlement of funds:
May 17, 1921, P. L. 869, § 39 (5 yrs.).

§ 154. **Navigation:**
Injury to buoy:
May 13, 1879, P. L. 60, § 1 (3 mos.).
Violation of regulations:
April 26, 1921, P. L. 297, § 2 (fine only).

§ 155. **Newspaper:**
Failure to publish ownership:
May 2, 1907, P. L. 157, § 3 (fine only).

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§ 156. **Nostrums:**
Advertising cure for venereal diseases and preventing conception:
March 16, 1870, P. L. 39, §§ 1, 2 (6 mos.).
May 12, 1897, P. L. 63, § 2 (1 yr.).
April 21, 1921, P. L. 242, § 3 (1 yr.).

§ 157. **Noxious Animals:**
Bounties, etc.:
May 23, 1919, P. L. 270, § 7 (fine; but see also Perjury, under "B").

§ 158. **Nuisances:**
Distributing samples:
May 8, 1907, P. L. 181 (1 yr.).
Maintaining:
March 31, 1860, P. L. 382, § 73 (abatement of nuisance).
April 2, 1870, P. L. 46, § 1 (abatement of nuisance).
May 19, 1897, P. L. 77, § 1 (abatement of nuisance and fine).
Obstructing highway:
July 14, 1917, P. L. 840, § 846 (fine only).

§ 159. **Nurses:**
Pretending registration:
June 20, 1919, P. L. 545, § 8 (fine only).

§ 160. **Obscene Literature:**
Exhibitions, etc.:
March 31, 1860, P. L. 382, § 40 (1 yr.).
May 6, 1887, P. L. 84, §§ 1-4 (1-2 yrs.).
May 12, 1897, P. L. 63, § 1 (1 yr.).
April 13, 1911, P. L. 64, § 2 (1 yr.).

§ 161. **Obstructing Process:**
March 31, 1860, P. L. 382, § 8 (1 yr.).

§ 162. **Oil Well:**
Regulating operating and abandonment:
May 26, 1891, P. L. 122, § 2 (6 mos.).
May 17, 1921, P. L. 912, § 6 (1 yr.).

§ 163. **Oleomargarine:**
Sale of:
May 24, 1883, P. L. 43, § 3 (30 dys.).
May 21, 1885, P. L. 22, § 4 (1 yr.).
May 23, 1893, P. L. 112, § 3 (2 yrs.).
May 29, 1901, P. L. 327, § 7 (3 mos. or 12 mos. for second offense).

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§ 164. **Opium Joints:**
June 10, 1885, P. L. 81, § 1 (1 yr.).

§ 165. **Osteopathy:**
Failure to comply with law:
March 19, 1909, P. L. 46, § 13 (90 dys.).

§ 166. **Oysters and Clams:**
Selling without license:
May 4, 1871, P. L. 250, § 4 (6 mos.).

§ 167. **Partnership:**
Conversion, false entries, etc.:
June 4, 1885, P. L. 74, § 1 (2 yrs.).
False statements:
April 12, 1917, P. L. 67, §§ 4, 5 (fine only).
Fictitious name—failure to register:
June 28, 1917, P. L. 645, §§ 3, 4 (1 yr.).
June 20, 1919, P. L. 542, § 3 (1 yr.).
July 9, 1919, P. L. 822, §§ 1, 2 (fine only).
Fraudulent appropriation or use of firm assets and name:
June 3, 1885, P. L. 60, § 1 (2 yrs.).

§ 168. **Pawnshops:**
Concealment of goods:
May 20, 1913, P. L. 246, § 3 (1 yr.).

§ 169. **Peddlers:**
Selling without license:
June 14, 1901, P. L. 563, § 2 (1 yr.).
May 17, 1917, P. L. 204, § 5 (5 dys.).

§ 170. **Perjury:**
See under list "B," § 253 below.

§ 171. **Personation:**
Acknowledgment of deed, etc:
March 31, 1860, P. L. 382, § 16 (7 yrs.).
Applicant for registration:
May 17, 1917, P. L. 208, § 9 (6 mos.).
Officer:
May 29, 1893, P. L. 174, §§ 2, 3 (1 yr.).
May 5, 1897, P. L. 39, § 1 (2 yrs.).

§ 172. **Petroleum:**
Regulation of sale:
May 15, 1874, P. L. 189, §§ 5, 7 (1 yr.).
Id. § 8 (1 yr.).
May 22, 1878, P. L. 104, § 7 (1 yr.).

Petroleum—Cont'd.
Id. § 8 (2 yrs.).
July 5, 1883, P. L. 186, § 6 (2 yrs.).
June 10, 1911, P. L. 869, § 2 (6 mos.).

§ 173. **Pharmacy:**
Relating to practice of, etc.:
May 17, 1917, P. L. 208, § 9 (6 mos.).
Id. § 13 (1 yr.).
Id. § 15 (fine only).
Id. § 21 (fine only).

§ 174. **Physician:**
Practicing without license:
June 3, 1911, P. L. 639, § 1 (1 yr.).

§ 175. **Pigeons:**
Unlawful killing:
May 16, 1891, P. L. 89, (fine only).

§ 176. **Pilots:**
Acting without license:
February 4, 1846, P. L. 30, § 1 (1 yr.).
June 9, 1911, P. L. 750, § 1 (1 yr.).

§ 177. **Poisons:**
Regulating sale of:
March 18, 1909, P. L. 39, § 1 (fine only).

§ 178. **Political assessments:**
July 15, 1897, P. L. 275, § 2 (1 yr.).

§ 179. **Pollution of Streams:**
June 24, 1895, P. L. 231, § 1 (60 dys.).
April 22, 1905, P. L. 260, § 10 (1 mo.).

§ 180. **Pool and Billiard Rooms:**
June 1, 1881, P. L. 37, § 1 (1 yr.).

§ 181. **Pool-selling:**
May 22, 1895, P. L. 99, § 1 (1 yr.).

§ 182. **Potato**—Wart disease:
Duty to report to Sec'y of Agriculture:
April 18, 1919, P. L. 71, § 5 (fine only).

§ 183. **Prizefighting:**
March 16, 1866, P. L. 210, (6 mos.; 1 yr.); (repealed as to certain counties by June 13, 1911, P. L. 902, § 1, and May 23, 1913, P. L. 348, § 1).
March 22, 1867, P. L. 39, § 1 (2 yrs.).

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§ 184. **Prostitution:**
Minors:
May 28, 1885, P. L. 27, § 1 (5 yrs.).
March 24, 1909, P. L. 59, § 1 (1 yr.).
Enticing female for purpose of:
May 1, 1909, P. L. 306, § 1 (5 yrs.).

§ 185. **Proxies**—At meetings of insurance companies:
Giving or offering money to secure same:
May 5, 1921, P. L. 350, § 2 (1 yr.).

§ 186. **Public Health:**
Bottling non-alcoholic drinks:
May 10, 1921, P. L. 468, § 8 (60 dys.).
Eggs:
March 11, 1909, P. L. 13, § 4 (9 mos.).
May 23, 1919, P. L. 267, (9 mos.).
July 10, 1919, P. L. 900, (10 dys.).
Ethyl alcohol:
July 21, 1919, P. L. 1069, § 5 (fine only).
Methyl or wood alcohol:
July 17, 1919, P. L. 1031, (fine only).
Milk and Cream:
See Pure Food and Drugs.

§ 187. **Public officers:**
Appointing ineligible person to office:
April 15, 1834, P. L. 537, § 30 (fine only).
Contracts without advertising:
March 5, 1906, P. L. 75, § 3 (2 yrs.) .
May 23, 1913, P. L. 297, § 3 (6 mos.).
County commissioners:
June 17, 1913, P. L. 507, § 13 (1 yr.).
Court records—Failure to keep:
April 19, 1856, P. L. 458, § 3 (fine only).
Detaining records:
April 3, 1804, 4 Sm. L. 192, § 3 (imprisoned until records surrendered).
District Attorney—Misdemeanor in office:
March 31, 1860, P. L. 382, § 17 (1 yr.).
Embezzlement of public funds:
May 27, 1841, P. L. 400, § 10 (2 yrs.).
Fees—Accepting for services:
March 31, 1876, P. L. 13, § 3 (refund).
June 22, 1883, P. L. 139, § 3 (refund).
July 14, 1897, P. L. 266, § 3 (30 dys.).

Public officers—Cont'd.

Fees—Failure to account for:
May 20, 1921, P. L. 1006, § 3 (misdemeanor in office, penalty not specified), § 4 (7 yrs.).
Forestry department:
May 29, 1917, P. L. 309, § 1 (25 dys.).
Impersonation of:
May 5, 1897, P. L. 39, § 1 (2 yrs.).
Interest in contract:
April 15, 1834, P. L. 537, § 43 (fine only).
April 12, 1842, P. L. 488, § 2 (fine only).
March 31, 1860, P. L. 382, §§ 63 (1 yr.), 66, 67 (fine only).
May 15, 1874, P. L. 180, § 1 (fine only).
May 28, 1907, P. L. 262, § 1 (fine only).
July 8, 1919, P. L. 770, § 12 (6 mos.).
Loaning and depositing, etc., public money:
March 31, 1860, P. L. 382, § 62 (5 yrs.).
May 11, 1909, P. L. 519, § 2 (2 yrs.).
Mis-appropriating funds:
May 16, 1857, P. L. 535, § 1 (1 yr.).
Neglect of duty:
December 9, 1783, 2 Sm. L. 84, § 7 (fine only).
May 15, 1841, P. L. 393, § 9 (fine only).
April 4, 1870, P. L. 834, § 2 (fine only).
April 19, 1883, P. L. 9, § 9 (2 yrs.).
Overseers of poor:
June 25, 1885, P. L. 184, § 3 (misdemeanor in office, penalty not specified).
Political assessments:
June 13, 1883, P. L. 96, § 2 (fine only).
July 15, 1897, P. L. 275, § 2 (1 yr.).
Private dealing with public money:
April 12, 1842, P. L. 488, § 2 (fine only).
May 27, 1841, P. L. 400, § 10 (2 yrs.).
Recording deeds without registration:
May 2, 1899, P. L. 162, § 3 (fine only).
Sale of supplies:
April 23, 1903, P. L. 285, § 1 (1 yr.).
State treasurer:
April 13, 1870, P. L. 67, § 6 (removal from office).
May 9, 1874, P. L. 126, § 16 (removal from office).
May 11, 1909, P. L. 519, § 2 (2 yrs.).

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§ 188. **Public Service companies:**
False statements:
July 26, 1913, P. L. 1374, Art. 6, § 38 (5 yrs.).
Refusal to obey order of court:
June 3, 1915, P. L. 779, § 39 (18 mos.).

§ 189. **Public Works:**
Labor regulations:
July 26, 1897, P. L. 418, § 4 (fine only).

§ 190. **Pure Food and Drug Laws**—Adulteration, misbranding and sale of unwholesome food, drink and drugs:
Adulteration of drugs:
May 24, 1887, P. L. 189, § 9 (fine only).
May 8, 1909, P. L. 470, § 9 (fine only).
Animal food:
May 3, 1909, P. L. 395, § 6 (fine only).
Bakeries—Sanitation, etc.:
July 9, 1919, P. L. 788, § 19 (fine only).
Butter:
July 10, 1901, P. L. 643, § 8 (2 yrs.).
April 13, 1921, P. L. 129, § 4 (60 dys.).
Butterine:
May 10, 1921, P. L. 467, (3 mos.).
Coffee, mixed with chicory:
May 5, 1915, P. L. 247, § 2 (fine only).
Cold storage regulations:
June 26, 1919, P. L. 670, § 12 (1 yr.).
Coloring matter:
April 27, 1903, P. L. 324, § 3 (60 dys.).
Confectionery:
May 23, 1887, P. L. 157, § 1 (fine only).
Eggs—Decayed:
Inspection:
May 23, 1919, P. L. 267, § 1 (9 mos.).
Sale of:
March 11, 1909, P. L. 13, § 4 (9 mos.).
July 10, 1919, P. L. 900, § 3 (10 dys.).
Ethyl alcohol.
July 21, 1919, P. L. 1069, § 5 (fine only).
Formaline, use of:
April 27, 1903, P. L. 324, § 1 (60 dys.).
Fruit syrup:
April 26, 1905, P. L. 311, § 2 (60 dys.).

Pure Food and Drug Laws—Cont'd.

General prohibition:
March 31, 1860, P. L. 382, § 69 (6 mos.).
May 13, 1909, P. L. 520, § 7 (fine only).

Ice cream:
March 24, 1909, P. L. 63, § 6 (fine only).

Insecticides:
May 17, 1917, P. L. 224, § 9 (1 yr.).

Lard:
March 11, 1909, P. L. 17, § 3 (fine only).

Linseed oil:
April 29, 1913, P. L. 123, § 5 (60 dys.).
Id. § 7 (fine only).

Liquor:
April 14, 1863, P. L. 389, § 5 (12 mos.).

Meat and fish:
March 28, 1905, P. L. 64, § 1 (4 mos.).
April 6, 1911, P. L. 51, § 4 (60 dys.).
May 28, 1915, P. L. 587, § 21 (1 yr.).
July 21, 1919, P. L. 1063, § 1 (1 yr.).

Milk:
May 25, 1878, P. L. 144, § 1 (15 dys.).
Id. § 2 (8 dys.).
Id. § 4 (30 dys.).
July 7, 1885, P. L. 260, §§ 1, 3, 8 (30 dys.).
June 2, 1915, P. L. 735, § 3 (90 dys.).
April 19, 1901, P. L. 85, § 1 (60 dys.).
April 15, 1907, P. L. 63, § 2 (30 dys.).
May 23, 1919, P. L. 275, § 10 (30 dys.).
May 23, 1919, P. L. 278, § 3 (90 dys.).

Non-alcoholic drinks:
March 11, 1909, P. L. 15, § 5 (fine only).
May 10, 1921, P. L. 468, § 8 (60 dys.).
May 25, 1921, P. L. 1116, § 5 (6 mos.).

Oleomargarine:
May 10, 1921, P. L. 467, (1 yr.).

Paint, putty, turpentine:
June 1, 1915, P. L. 665, § 10 (fine only).

Regulating possession and sale of drugs:
May 24, 1887, P. L. 189, § 9 (fine only).
May 8, 1909, P. L. 487, § 2 (2 yrs.).
Id. § 3 (6 mos.).
May 17, 1917, P. L. 209, § 17 (fine only).

Pure Food and Drug Laws—Cont'd.

July 11, 1917, P. L. 758, § 12 (5 yrs.).
April 20, 1921, P. L. 152, § 2 (1 yr.).

Sheep, removal of hoofs:
June 20, 1901, P. L. 585, § 2 (1 yr.).

Vinegar:
June 11, 1891, P. L. 297, § 5 (100 dys.).
June 18, 1897, P. L. 168, § 4 (fine only).

Wood alcohol:
July 17, 1919, P. L. 1031, § 3 (fine only).

§ 191. **Race and Color:**

Refusal to accommodate on account of:
March 22, 1867, P. L. 38, § 2 (3 mos.).
May 19, 1887, P. L. 130, § 1 (fine only).

§ 192. **Railroads:**

Abandonment of locomotives:
March 22, 1877, P. L. 14, §§ 1, 3 (6 mos.).

Discrimination:
Race or color:
March 22, 1867, P. L. 38, § 2 (3 mos.).

Rates or facilities:
May 31, 1907, P. L. 352, § 2 (fine only).

Disobedience of employee resulting in death:
March 22, 1865, P. L. 30, § 1 (5 yrs.).

Distribution of cars—Interest in business supplied:
June 1, 1907, P. L. 359, § 2 (1 yr.).

Employees—Interference with:
March 22, 1877, P. L. 14, § 3 (6 mos.).

Fraud by agent:
May 1, 1861, P. L. 465, § 1 (5 yrs.).

Full crew law:
June 19, 1911, P. L. 1053, § 8 (fine only).

Issuing or using fraudulent tickets:
June 13, 1911, P. L. 903, §§ 1, 2 (10 dys.).

Malicious injury to property of:
March 31, 1860, P. L. 382, §§ 146, 147 (1 yr.).

Merger of competing lines:
May 31, 1907, P. L. 353, § 2 (fine only).

Mining or manufacturing forbidden:
May 31, 1907, P. L. 352, § 2 (fine only).

Obstructing tracks and injuring property:
March 22, 1877, P. L. 14, § 4 (1 yr.).

Railroads—Cont'd.

Officers—Interest in contract:
June 4, 1883, P. L. 72, § 3 (2 yrs.).
Passengers—Refusal to pay fare:
June 13, 1911, P. L. 903, § 1 (10 dys.).
Refusal to aid in movement of cars:
March 22, 1877, P. L. 14, § 2 (6 mos.).
Sign board—Erecting without permit:
June 21, 1919, P. L. 568, § 2 (fine only).
Stock—Issuing from dividends:
May 7, 1887, P. L. 94, § 5 (fine only).
Tickets:
Sale by purchaser:
June 13, 1911, P. L. 903, § 2 (10 dys.).
May 6, 1863, P. L. 582, §§ 3, 5 (1 yr.).
Sale by unauthorized person:
May 6, 1863, P. L. 582, § 3 (1 yr.).
Transportation of explosives:
April 22, 1850, P. L. 538, § 9 (6 mos.).
May 4, 1874, P. L. 121, § 1 (30 dys.).
May 23, 1878, P. L. 102, § 1 (3 mos.).

§ 193. **Rape:**
Assault with intent to rape:
March 31, 1860, P. L. 382, § 93 (5 yrs.).
Prostituting children under 16:
May 28, 1885, P. L. 27, § 1 (5 yrs.).

§ 194. **Receiving stolen goods:**
Purchasing from minors, etc., in certain counties:
April 11, 1866, P. L. 604, § 1 (1 yr.).
April 24, 1869, P. L. 1212, § 1 (1 yr.).
Fraudulently disposing of property:
March 31, 1860, P. L. 382, § 120 (2 yrs. by § 121).

§ 195. **Recorder of deeds:**
Failure to certify:
April 11, 1899, P. L. 41, § 3 (fine only).

§ 196. **Reformatories:**
Delivery of letters or articles to or receiving same from convicts:
June 24, 1895, P. L. 265, § 1 (3 mos.).

§ 197. **Re-hypothecation:**
June 10, 1881, P. L. 107, § 1 (5 yrs.).

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§ 198. **Riots:**
Destruction of buildings or machinery:
March 31, 1860, P. L. 382, § 19 (3 yrs.).
Id. § 20 (7 yrs.).
Place where liquor is sold:
April 16, 1849, P. L. 657, §§ 15-17 (12 mos.).

§ 199. **Rivers:**
Cutting ferry ropes:
February 8, 1766, 1 Sm. L. 266, § 1 (fine only).
Destruction of embankments:
May 19, 1879, P. L. 65, § 1 (6 mos.).
Obstruction of:
June 13, 1883, P. L. 95, § 2 (fine only).
June 25, 1913, P. L. 555, § 7 (1 yr.).

§ 200. **Roads and bridges:**
Engineer interested in contract:
July 8, 1919, P. L. 770, § 12 (6 mos.).
Driving on, while intoxicated:
May 24, 1917, P. L. 295, § 1 (3 mos.).
Injury to signs:
April 23, 1909, P. L. 171, § 1 (60 dys.).
July 14, 1917, P. L. 840, § 737-9 (60 dys.).
April 14, 1921, P. L. 145, (60 dys.).

§ 201. **Sale in Bulk:**
May 23, 1919, P. L. 262, § 4 (6 mos.), § 8 (fine only).

§ 202. **School Director:**
Failure to prohibit wearing of religious dress:
June 27, 1895, P. L. 395, § 2 (fine only).

§ 202a. **Second Offense:**
March 31, 1860, P. L. 382, § 182 (punishment for 2nd offense may be double that of 1st.).

§ 203. **Secretion** and removal of property with intent to defraud creditors:
April 22, 1903, P. L. 242, § 1 (1 yr.).

§ 204. **Seduction:**
March 31, 1860, P. L. 382, § 41 (3 yrs.).

§ 205. **Sepulchre:**
March 31, 1860, P. L. 382, § 47 (1 yr.).

§ 206. **Sheep:**
Removal of hoofs:
June 20, 1901, P. L. 585, § 2 (1 yr.).

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§ 207. **Sheriff:** (See also Election Laws,—prothonotary or sheriff).
Acting before recording commission:
April 15, 1834, P. L. 538, § 73 (6 mos.).

§ 208. **Signboards** at railroad crossing:
June 21, 1919, P. L. 568, § 2 (fine only).

§ 209. **Signs:**
On highways, imitating, destroying, etc.:
July 14, 1917, P. L. 840, §§ 737-39 (60 dys.).
April 14, 1921, P. L. 145, (60 dys.).

§ 210. **Soldiers' Commissions and Discharges:**
Withholding, mutilation or delivery to third persons, etc.:
April 30, 1885, P. L. 13, § 2 (3 mos.).

§ 211. **Steam engineers:**
Failure to obtain licenses:
April 18, 1899, P. L. 49, §§ 12, 13 (3 mos.).
April 4, 1905, P. L. 102, §§ 5, 12, 13 (3 mos.).
Unlawful Insurance:
March 11, 1891, P. L. 5, § 3 (2 yrs.).
Use without certificate of inspection:
May 7, 1864, P. L. 880, § 4 (2 yrs.).

§ 212. **Steamship tickets:**
Licenses to sell:
July 17, 1819, P. L. 1003, § 4 (1 yr.).

§ 213. **Stevedores:**
License:
April 6, 1870, P. L. 958, § 4 (1 yr.).
May 27, 1871, P. L. 1255, § 2 (6 mos.).

§ 214. **Stock brokers:**
Certificate:
June 4, 1915, P. L. 828, § 10 (6 mos.).
Sale of investment securities on installment plan:
May 5, 1921, P. L. 374, § 11 (1 yr.).

§ 215. **Street railways:**
Permitting employees to work more than twelve hours:
March 24, 1887, P. L. 13, § 2 (6 mos.).

§ 216. **Sunday laws:**
Selling liquor:
February 26, 1855, P. L. 53, § 3 (60 dys.).

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§ 217. **Taxes:**

Assessment

Omission of:

May 15, 1841, P. L. 393, § 3 (12 mos.).

May 11, 1921, P. L. 479, § 2 (1 yr.).

Within ten days of election:

April 17, 1869, P. L. 49, § 10 (3 mos.).

Collection—Neglect of duty by collector:

June 25, 1895, P. L. 296, § 4 (1 yr.).

July 9, 1897, P. L. 242, § 2 (fine only).

Embezzlement by collector:

June 3, 1885, P. L. 72, § 1 (5 yrs.).

False returns:

April 20, 1905, P. L. 246, § 6 (1 yr.).

June 17, 1913, P. L. 507, § 6 (3 yrs.).

Gasoline—Regulation of:

May 20, 1921, P. L. 1021, §§ 4-6 (1 yr.).

Report—Failure to make:

June 2, 1915, P. L. 728, § 1 (1 yr.).

May 11, 1921, P. L. 479, § 2 (1 yr.).

Transfer—Failure to pay:

June 4, 1915, P. L. 828, § 6 (6 mos.).

Stamp—Failure to cancel:

June 4, 1915, P. L. 828, § 7 (6 mos.).

Record—Failure to keep:

June 4, 1915, P. L. 828, § 15 (2 yrs.).

§ 218. **Telegrams:**

Forged:

March 31, 1860, P. L. 382, § 176 (1 yr.).

Revealing contents:

March 31, 1860, P. L. 382, § 72 (6 mos.).

July 10, 1901, P. L. 651, § 2 (6 mos.).

§ 219. **Theatres:**

Dangerous exhibitions:

June 1, 1883, P. L. 57, § 1 (penalty not specified).

Discrimination against soldiers in uniform:

May 5, 1911, P. L. 125, § 1 (1 yr.).

License—Failure to obtain:

May 20, 1913, P. L. 229, § 20 (fine only).

Producing play without consent of author:

May 29, 1901, P. L. 335, § 2 (3 mos.).

Tickets—Unlawful sale of:

June 13, 1883, P. L. 96, § 2 (3 mos.).

"A" Six Peremptory Challenges

§ 220. **Threatening Letters:**
March 31, 1860, P. L. 382, § 23 (3 yrs.).
May 8, 1876, P. L. 141, § 1 (3 yrs.).

§ 221. **Tobacco:** (See also Cigarettes).
Sale to persons under 16:
July 10, 1901, P. L. 638, § 3 (30 dys.).

§ 222. **Township plan:**
Recording, etc.:
May 16, 1921, P. L. 634, § 2 (fine only).

§ 223. **Trade Marks and Labels:**
Counterfeiting and vending goods fraudulently marked:
March 31, 1860, P. L. 382, §§ 172, 174 (1 yr.; § 173 2 yrs.); § 175 (fine only.).
Milk containers:
May 17, 1917, P. L. 221 (1 mo.).
May 4, 1889, P. L. 84, §§ 1, 3, 6 (30 dys.).
Unlawful use of union labels:
April 3, 1903, P. L. 134, § 3 (5 yrs.).

§ 224. **Trade Unions:**
Coercion or hindering of employees:
June 4, 1897, P. L. 116, § 1 (1 yr.).
Embezzlement by officers:
May 13, 1889, P. L. 194, § 6 (1 yr.).
Labels—Wrongful use of:
April 3, 1903, P. L. 134, § 3 (5 yrs.).
Seal—Refusal of officer to surrender:
May 13, 1889, P. L. 194, § 7 (6 mos.).

§ 225. **Tramps:**
April 30, 1879, P. L. 33, §§ 1 (12 mos.), 2 (3 yrs.).

§ 226. **Turnpike companies:**
Defrauding of toll:
June 4, 1879, P. L. 85, § 1 (30 dys.).
Injury to road:
April 7, 1849, P. L. 461, § 3 (6 mos.).

§ 227. **Undertakers:**
Registration and license:
June 7, 1895, P. L. 167, § 7 (1 yr.).

§ 228. **Veterinary surgeons:**
Registration:
May 5, 1915, P. L. 248, § 24 (fine only).

§ 230. **Water Companies:**
Pollution of water:
June 24, 1895, P. L. 231, § 1 (60 dys.).

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§ 231. **Weights and Measures:**
May 23, 1919, P. L. 278, § 3 (30 dys.).
April 21, 1921, P. L. 265, § 3 (1 yr.).
May 5, 1921, P. L. 389, § 9 (1 yr.).

§ 232. **Witnesses:**
Absconding:
February 24, 1870, P. L. 34, § 1 (2 yrs.).
Dissuading:
March 31, 1860, P. L. 382, § 11 (1 yr.).
Refusal to testify before legislative committees:
March 14, 1872, P. L. 25, § 1 (6 mos.).
May 17, 1883, P. L. 32, § 4 (6 mos.).

§ 233. **Women**—Employment of:
Mines:
June 2, 1891, P. L. 176, art. 9, § 3 (3 mos.).
June 9, 1911, P. L. 756, Art. 18, §§ 1, 2 (3 mos.).
See also Labor and Industry regulations.

"B" EIGHT PEREMPTORY CHALLENGES

§ 234. **Abortion:**
March 31, 1860, P. L. 382, § 87 (7 yrs.).
Id. § 88 (3 yrs.).

§ 235. **Accessories:**
Before the fact, to be dealt with as principals:
March 31, 1860, P. L. 427, § 44.
June 3, 1893, P. L. 286, § 1.
After the fact, how dealt with:
March 31, 1860, P. L. 427, § 45.
Two years where no punishment provided:
June 3, 1893, P. L. 286, § 1.

§ 236. **American Flag:**
Insulting or using same for advertising:
April 29, 1897, P. L. 34, (6 mos.).

§ 237. **Assault and Battery:**
Administering drugs:
March 31, 1860, P. L. 382, § 86 (5 yrs.).
April 24, 1901, P. L. 102, § 1 (10 yrs.).
Assault with intent to maim:
March 31, 1860, P. L. 382, § 83 (3 yrs.).
Explosives—Use of with intent to maim:
March 31, 1860, P. L. 382, § 84, 85 (3 yrs.).

Assault and Battery—Cont'd.

Intent to kill:
March 31, 1860, P. L. 382, § 81 (7 yrs.).
May 1, 1876, P. L. 92, § 1 (7 yrs.).
Intent to rob:
March 31, 1860, P. L. 382, § 102 (5 yrs.).

§ 238. **Attempts:**
March 31, 1860, P. L. 427, § 50 (common law punishment, as in case of indictment for attempt to commit act, as a felony or misdemeanor according to the deed attempted). See also § 13 supra and § 259 infra.

§ 239. **Blowing** up buildings etc., or attempting to do so. vessels:
March 31, 1860, P. L. 382, § 141 (3 yrs.).

§ 240. **Burglary in daytime:**
Entering dwelling, etc.:
March 13, 1901, P. L. 49, § 1 (10 yrs.).
Felonious use of nitro-glycerine, dynamite, etc.:
April 22, 1905, P. L. 279, § 1 (25 yrs.).
Railroad cars, breaking and entering:
May 23, 1887, P. L. 177, § 1 (4 yrs.).

§ 241. **Burning motor vehicle:**
July 7, 1919, P. L. 722, § 1 (5 yrs.).

§ 242. **Cemeteries:**
Malicious opening of tomb, vault, etc.:
May 5, 1911, P. L. 176, § 1 (10 yrs.).

§ 243. **Counterfeiting:** See also Forgery, § 247 below.
Advertising counterfeit money:
May 8, 1889, P. L. 127, §§ 1, 2 (5 yrs.).
Bank notes, checks, drafts:
March 31, 1860, P. L. 382, §§ 164, 165, 168 (5 yrs.).
Bonds and coupons:
January 7, 1867, P. L. 1369, §§ 2-3 (5 yrs.).
Coin:
March 31, 1860, P. L. 382, §§ 156-159 (5 yrs.).
Id. § 158 (3 yrs.).
Id. § 159 (5 yrs.).
Id. § 162 (3 yrs.).
Connecting parts of notes:
March 31, 1860, P. L. 382, § 166 (5 yrs.).
Currency, national:
January 7, 1867, P. L. 1369, § 1 (5 yrs.).

Counterfeiting—Cont'd.

Possession of ten counterfeit notes:
March 31, 1860, P. L. 382, § 167 (5 yrs.).

§ 244. **Elections:**

Corrupt swearing:
July 2, 1839, P. L. 519, § 124 (7 yrs.).

Voting by one not a citizen, also procuring one not a citizen to vote:
April 6, 1870, P. L. 53, §§ 6, 7 (5 yrs.).

§ 244a. **Escape:**

March 31, 1860, P. L. 382, § 3 (1 or 2 yrs. or repetition of original sentence).

§ 245. **Extortion:**

May 19, 1913, P. L. 222, § 1 (15 yrs.).

§ 246. **Flags:**

Malicious lowering of or injury to:
April 29, 1897, P. L. 34, § 1 (6 mos.).

Unlawful disfiguring and use of for advertising purposes:
May 23, 1907, P. L. 225, § 1 (6 mos.).

§ 247. **Forgery:**

Fraudulent making or altering of any written instrument:
March 31, 1860, P. L. 382, § 15 (2 yrs.).
Id. § 16 (7 yrs.).
Id. § 169 (10 yrs.).
Id. §§ 170-171 (7 yrs.).

§ 248. **Larceny:**

Bailee:
March 31, 1860, P. L. 382, § 108 (3 yrs.).

Bank bills and securities:
March 31, 1860, P. L. 382, § 104 (2 yrs.).

Crime and punishment:
March 31, 1860, P. L. 382, § 103 (3 yrs.).

Electric wire:
March 8, 1905, P. L. 33, § 1 (7 yrs.).

Fixtures:
March 31, 1860, P. L. 382, § 106 (3 yrs.).

From building:
March 31, 1860, P. L. 382, § 136 (4 yrs.).

From person:
March 31, 1860, P. L. 382, § 102 (5 yrs.).

Larceny—Cont'd.

Horses:
March 31, 1860, P. L. 382, § 105 (10 yrs.).
Insurance agent or broker:
May 17, 1921, P. L. 789, § 633 (3 yrs.).
Motor vehicles:
May 1, 1919, P. L. 99, (10 yrs.).
Servant:
March 31, 1860, P. L. 382, § 107 (3 yrs.).
Traps set by another:
May 17, 1921, P. L. 900, § 6 (3 yrs.).

§ 249. **Liquor,** narcotics, drugs, etc.:
Furnishing to convicts:
May 11, 1911, P. L. 274, § 5 (5 yrs.).

§ 250. **Malicious mischief:**
Explosives:
March 31, 1860, P. L. 382, § 141 (3 yrs.).
Journal boxes and air appliances:
June 1, 1911, P. L. 557, § 1 (5 yrs.).
Railroad tracks—injury to:
May 9, 1913, P. L. 186, § 1 (10 yrs.).

§ 251. **Narcotics:** (See also Liquor).
Unlawful administration of:
April 24, 1901, P. L. 102, § 1 (10 yrs.).

§ 252. **Pandering:**
See Prostitution, § 254 below.

§ 253. **Perjury and subornation thereof:**
Acknowledgment of deed:
May 28, 1715, 1 Sm. L. 90, § 7 (7 yrs.).
Automobile laws:
June 30, 1919, P. L. 702, § 10; Amended May 16, 1921, P. L. 657, § 6 (7 yrs.).
Bank officers:
April 3, 1840, P. L. 714, § 1 (6 yrs.).
June 19, 1911, P. L. 1060, § 4 (7 yrs.).
Certificate to insurance commissioner:
June 2, 1915, P. L. 771, § 19 (7 yrs.).
May 17, 1921, P. L. 682, § 647 (7 yrs.).
Election—Oath taken at:
July 2, 1839, P. L. 519, § 124 (7 yrs.).
January 30, 1874, P. L. 31, § 17 (7 yrs.).
March 5, 1906, P. L. 63, § 14 (2 yrs.).
June 18, 1915, P. L. 1027, § 2 (2 yrs.).
July 10, 1919, P. L. 857, § 51 (2 yrs.).

Perjury and subornation thereof—Cont'd.

Employment agencies:
June 7, 1915, P. L. 888, § 21 (1 yr.).
False affidavit as to age of minor:
May 2, 1905, P. L. 344, § 8 (7 yrs.).
False affidavits as to bounties:
May 23, 1919, P. L. 270, § 7 (7 yrs.).
False statements as to parentage:
July 11, 1917, P. L. 774, § 6 (7 yrs.).
False statements relating to beneficial society:
May 20, 1921, P. L. 916, § 24 (7 yrs.).
False tax reports:
June 17, 1913, P. L. 507, § 3 (7 yrs.).
False swearing to accounts:
May 20, 1921, P. L. 1006, § 4 (7 yrs.).
June 22, 1883, P. L. 139, § 4 (7 yrs.).
Hearing before auditor of school finances:
May 18, 1911, P. L. 309, § 2610 (7 yrs.).
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May 14, 1915, P. L. 312, § 16, Ch. 7, Art. 1 (7 yrs.).
Proceedings for failure to support bastard child:
July 11, 1917, P. L. 773, § 6 (7 yrs.).

§ 254. **Prostitution:**

Detention because of debt:
June 7, 1911, P. L. 698, § 4 (10 yrs.).
Enticing female for purpose of:
June 7, 1911, P. L. 698, § 1 (10 yrs.).
Placing wife in house of:
June 7, 1911, P. L. 698, § 2 (10 yrs.).
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June 7, 1911, P. L. 698, § 3 (10 yrs.).
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June 7, 1911, P. L. 698, § 5 (10 yrs.).

§ 255. **Railroads:**

Breaking or entering cars:
May 23, 1887, P. L. 177, § 1 (4 yrs.).

"B" EIGHT PEREMPTORY CHALLENGES

Railroads—Cont'd.

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June 1, 1911, P. L. 553, § 2; amended May 9, 1913, P. L. 186, (10 yrs.; death where murder proved).
Removal of waste or packing from journal-boxes:
June 10, 1901, P. L. 555, § 1; amended June 1, 1911, P. L. 557, § 1 (5 yrs.).

§ 256. **Sedition:**
June 26, 1919, P. L. 639, § 2 (20 yrs.); amended May 10, 1921, P. L. 435.

"C" TWENTY PEREMPTORY CHALLENGES

§ 257. **Accessories:**
Before the fact—To be tried as principals:
March 31, 1860, P. L. 427, §§ 44, 45.
June 3, 1893, P. L. 286, § 1.
(After the fact, 2 yrs. where no other punishment provided).

§ 258. **Arson:**
Burning or attempting to burn any factory, mill, or dwelling or outhouse that is parcel of such dwelling:
March 31, 1860, P. L. 382, § 137 (20 yrs.).

§ 259. **Attempts:**
March 31, 1860, P. L. 427, § 50 (common law punishment, as in case of indictment for attempt to commit act, as a felony or misdemeanor according to the deed attempted). See also §§ 13 and 238 supra.

§ 260. **Bastard:**
Concealing death of, where murder charged:
March 31, 1860, P. L. 382, § 89 (3 yrs.).

§ 261. **Burglary:**
March 31, 1860, P. L. 382, § 135 (10 yrs.).
March 13, 1901, P. L. 49, § 1 (10 yrs.).

§ 261a. **Escape:**
March 31, 1860, P. L. 382, § 3 (1 or 2 yrs. or repetition of original sentence).

§ 262. **Homicide:**
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First degree:
March 31, 1860, P. L. 382, §§ 74, 75 (death).

"C" TWENTY PEREMPTORY CHALLENGES

Homicide—Cont'd.
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Manslaughter—Voluntary:
March 31, 1860, P. L. 382, § 78 (12 yrs.).
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March 31, 1860, P. L. 382, § 77 (same as murder).
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§ 263. **Kidnapping:**
Enticing any child with intent to extort money for restoration:
March 31, 1860, P. L. 382, § 94 (7 yrs.).
February 25, 1875, P. L. 4, § 1 (25 yrs.).
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Id. § 1 (15 yrs.).
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Id. § 2 (25 yrs.).

§ 264. **Mayhem:**
March 31, 1860, P. L. 382, § 80 (5 yrs.).

§ 265. **Rape:**
May 19, 1887, P. L. 128, § 1 (15 yrs.).

§ 266. **Receiving Stolen goods:**
March 31, 1860, P. L. 382, § 120 (2 yrs. by § 121).
April 23, 1909, P. L. 159, § 1 (3 yrs.).
Motor vehicles:
May 1, 1919, P. L. 99 (10 yrs.).
Goods brought from another state:
June 20, 1919, P. L. 542 (3 yrs.).

§ 267. **Robbery:**
March 31, 1860, P. L. 382, § 101 (10 yrs.).
Id., § 102 (5 yrs.).
April 18, 1919, P. L. 61 (20 yrs.).
Bank robbers:
May 8, 1876, P. L. 139, § 1 (20 yrs.).
Train robbers:
June 25, 1895, P. L. 290, § 1 (15 yrs.).

§ 268. **Sodomy—Buggery:**
July 16, 1917, P. L. 1000, §§ 1-3 (5 and 10 yrs.).

§ 269. **Train wrecking:**
Death resulting from:
May 9, 1913, P. L. 186, § 1 (death).

"C" TWENTY PEREMPTORY CHALLENGES

§ 270. **Treason:**
March 31, 1860, P. L. 382, § 1 (12 yrs.).
Id. § 2 (6 yrs.).
April 18, 1861, P. L. 408, §§ 1, 2 (10 yrs.).
May 14, 1861, P. L. 745, § 4 (10 yrs.).
March 11, 1864, P. L. 6, § 1 (12 mos.).

Power of Courts to Impose Sentence Where Statutes Creates an Offense, But Provides No Specific Punishment and for Common Law Offenses.

Section 121 of the Act of March 31, 1860, P. L. 382, 411, provides that persons found guilty of misdemeanors under any preceding section, "wherein the nature and extent of the punishment is not specified, shall be sentenced to an imprisonment, not exceeding two years, or be fined in any amount not exceeding one thousand dollars, or both, or either, at the discretion of the court;" and section 178 is as follows: "Every felony, misdemeanor or offense whatever, not specially provided for by this act, may and shall be punished as heretofore." A provision like section 178 appears as early as the Act of April 5, 1790, section 7, 2 Sm. L. 531.

In Rogers v. Com., 5 S. & R. 462, 465, Duncan, J., says: "All misdemeanors and crimes not subjecting the offender to capital punishment, are punishable at the common law, at the discretion of the Court, with whipping and the pillory;" but this was changed by statute: see section 4 of the Act of April 5, 1790, 2 Sm. L. 531 (replacing a similar provision in earlier acts), which fixed a term of imprisonment not exceeding two years. Later this was extended by the Act of April 4, 1807, Sec. 1, 4 Sm. L. 393, to a maximum

of seven years. Subsequently the Criminal Procedure Act of 1860 (section 79, P. L. 427, 451) repealed the last mentioned statutes, leaving in their stead, as a guide to the punishment of offenses not otherwise covered, the above-quoted section 178 of the Criminal Code of 1860. Of course, since at that time the infliction of cruel punishments had been expressly prohibited by the constitution (see section 13 of Article IX of the constitution of 1838), the legislature did not mean by the use of the word "heretofore," in section 178 of the code, to go back to English common law punishments, but rather meant to indicate that the judges should take as their guide the limits of imprisonment theretofore existing in our law, even though the acts which determined them may have been formally repealed; this is also signified by the part of the Report of the Commissioners of the Penal Code of 1860 which explains the repealing clause of the Criminal Procedure Act.

The question of fixing the penalty for offenses where no specific punishment is provided, is discussed in Rogers v. Com., supra, where it was held that imprisonment for two years at hard labor could not be imposed for an assault with intent to pick a pocket, as, says the court, "it never could be the intention of the legislature to punish with greater severity an abortive attempt than a successful issue, or leave it in the power of the court to do so;" and this suggests the character of limitations on the courts in imposing sentences where the punishment falls within the general statutory provisions above quoted (see also Com. v. Chapman, infra). Instances of such sentences may be found in the following cases: In Com. v. Searle, 2 Bin. 332, publishing a forged note with intent to defraud was punished by three years at hard labor; in Lewis v. Com., 2 S. & R. 551, six years at hard labor in the penitentiary was imposed on one convicted of uttering a banknote with intent to de-

fraud; and in Cleary v. Com., 4 Pa. 210, two years' imprisonment was given for a like offense; in Collins v. Com., 3 S. & R. 220, conviction for conspiracy to defraud by passing worthless paper was punished by imprisonment for 2 years and 5 months; in Clellans v. Com., 8 Pa. 223, a nominal fine and sentence for three years was imposed for rioting, but the judgment was reversed because the sentence was to the penitentiary and not to the county jail.

The rule is that, where a statute creates an offense and names the punishment, or the punishment for a recognized offense is fixed either directly or by a general provision in a statute, only the penalty thus provided can be imposed: Com. v. Exler, 243 Pa. 155. On the other hand, in jurisdictions where the common law prevails, it has been generally held that, where a statute makes an act criminal without prescribing the mode of prosecution or penalty, and as to common law offenses not specially provided for by statute, the traditionary law controls both the procedure and punishment.

A very able discussion of the general subject of the power of our courts over common law offenses may be found in Com. v. Chapman, 13 Metc. (Mass.) 68, by Chief Justice Shaw. It is there said: "This was an indictment against the defendant for a false and malicious libel..... It is true that there is no statute of the Commonwealth declaring the writing or publishing of a.....malicious libel.....a punishable offense; but this goes little way toward settling the question. A great part of the municipal law of Massachusetts, both civil and criminal, is unwritten and traditionary.....To a very great extent the unwritten law constitutes the basis of our jurisprudence and furnishes the rules by which public and private rights are established and secured, the social rela-

tions of all persons regulated, their rights, duties and obligations determined, and all violations of duty redressed and punished; without its aid the written law, embracing the constitution and statute laws, would constitute but a lame, partial and impracticable system.....If it be asked, 'how are these customs or maxims constituting the common law to be known, and by whom is their validity to be determined?' Blackstone furnishes the answer; 'by the judges in the several courts of justice. They are the depositaries of the laws....who must decide in all cases of doubt, and who are bound by oath to decide according to the law of the land; their knowledge of that law is derived from experience and study.....and from being long personally accustomed to the judicial decisions of their predecessors.' 1 Bl. Com. 69. Of course, in coming to any such decision, judges are bound to resort to the best source of instruction, such as the records of courts of justice, well authenticated histories of trials and books of reports, digests, and brief statements of such decisions prepared by suitable persons, and the treatises of sages of the profession whose works have established reputation for correctness."

The rule laid down in the last mentioned case has been recognized in Pennsylvania. In Com. v. Sharpless, 2 S. & R. 91, 101, an indictment for exhibiting an obscene picture was sustained, the court saying, by Chief Justice Tilghman: "There is no act punishing the offense charged against the defendants, and therefore the case must be decided upon the principles of the common law." See also Com. v. McHale, 97 Pa. 397, 408, 409; Com. v. Mohn, 52 Pa. 243; Com. v. Cane, 2 Pars. Eq. 265, 268.

As to the extent the English common law prevails in Pennsylvania, see Morris's Lessee v. Vanderlin, 1 Dall. 64, 67; McCullough v. Houston, 1 Dall. 441, 444; Roberts's

Digest of Statutes in Force in Pennsylvania, 2d ed., p. X, and Act of January 28, 1777, 1 Smith's Laws 429.

INDETERMINATE SENTENCES:—The Act of June 19, 1911, P. L. 1055, provides, in section 6, that "Whenever any person, convicted in any court of this Commonwealth of any crime, shall be sentenced to imprisonment in any penitentiary of the State, the court, instead of pronouncing . . . a definite or fixed term of imprisonment, shall . . . sentence . . . for an indefinite term; stating in such sentence the minimum and maximum limits thereof; and the maximum limit shall never exceed the maximum time now or hereafter prescribed as a penalty for such offense." It will be observed that the provisions of this section apply to penitentiary sentences alone, and limit the maximum imprisonment to the term fixed by law; if no such term is otherwise provided by statute, it would seem that section 178 of the Criminal Code applies, and the ultimate maximum limit of imprisonment is to be determined by reference to laws and usages which existed prior to 1860. The minimum term, when none is fixed by statute, is entirely within the discretion of the court.

APPENDIX NO. 2.

Additional Data on Origin of Trial by Jury.

The following excerpts from Vol. IV., No. 4, revised edition of "Translations and Reprints from the Original Sources of European History," dealing with Ordeals and Compurgation, edited by Dr. Arthur C. Howland, professor of Ancient History at the University of Pennsylvania, and published by the Department of History of that institution, sustain, inter alia, the text of page 62, lecture 3.

§ A. **Differences between ancient and modern trials; burden of proof in latter; compurgation; duel; ordeals.** —"In the jurisprudence of the Middle Ages we do not find any trial in the modern sense of the word, no careful weighing of testimony followed by a decision in accordance with the evidence. The chief function of the court was to give a fore-judgment—the Beweisurteil—indicating which litigant was to have the privilege of offering proof as to the justice of his contention. Any form of compromise was unknown. One party was entirely in the right, the other absolutely in the wrong. The methods of proof were compurgation, ordeal and wager of battle, and the party on whom the burden of proof lay usually had the advantage in the subsequent proceedings. This was especially the case with compurgation, where compliance with the minute details of the prescribed forms insured complete success. In the ordeal this was less true, the result oftener depending on the attitude of those conducting the ceremony. The judicial duel and one form of the ordeal—

that of the cross[1]—were the only methods of procedure in which both sides were given the opportunity of proof. Throughout the Middle Ages the theory of the law placed the burden of proof on the negative side; and it may be counted a most important step in the progress of European civilization when the Germanic idea finally gave place to the Roman maxim that it is impossible to prove a negative, and that the necessity of producing evidence lies with the accuser. The barbarian system of negative proofs was worked out by means of oaths and of appeals to the judgment of God through ordeals and single combat."[2]

§ B. **Ordeals; different kinds; their end.**—"In the ordeal of the cross the two litigants were placed standing before a crucifix with their arms outstretched. The one who was able to maintain this position the longer won his case. This is the only form of ordeal in which both parties to the litigation were subjected to the same test. Consequently it partakes more of the nature of a duel, and does not leave so wide a discretion to the court."[3] Other ordeals are described[4] in the publication from which the above quotation is taken, and the measures which marked the abolition of that form of trial are there rather fully noted.[5]

§ C. **Compurgation; not resorted to in early times when proof of crime was plain; compurgators supporting losing cause punishable for perjury; end of compurgation and other forms of trial involving appeals to the judgment of God; original examples of compurgation, and**

[1] See § B of text, below.

[2] "Translations, etc., Original Sources of European Hist.," vol. IV, p. 2.

[3] Id., p. 15.

[4] Id., p. 7 et seq.; see also Maitland's Const'l. Hist. of Eng., p. 119, 129; and sections 49 and 50, Lecture II, supra.

[5] "Translations, etc., Original Sources of European Hist.," Vol. IV, p. 16 et seq.

where to be found; change in form of compurgatorial oath.—"Compurgation—or wager of law as it was more commonly called in England, from the legal phrase vadiare legem, to pledge or wage one's law—consisted in a litigant's furnishing the court satisfactory proof of the justice of his cause by means of his own oath supported by that of helpers or compurgators, who swore to the truth of their principal's assertions. This method of proof dates back to remote antiquity among the Germanic tribes, and on their conversion it was adopted by the church, which made such extensive use of it in its efforts to secure immunity of the clergy from secular jurisdiction that the process finally became known as canonical compurgation. The compurgators were originally kinsmen, who would have had to pay the wer-gild in case the accused had been convicted of the charge, but later custom permitted them to be neighbors or others acceptable to the court. Their number varied according to the gravity of the charge and the character of the accused. It is probable that even in the earliest times compurgation was not resorted to when the proof of the crime was plain and indubitable, and at a later period this rule was carefully enforced, it being left to the decretion of the judge whether the accused should be allowed this form of trial or not. Such permission was almost tantamount to acquittal, yet an effort was made to check the abuses of the system by the provision that compurgators who were so unfortunate as to support a losing cause should be punished as perjurers, that is, should have one hand cut off. Some codes, however, permitted the redemption of the hand by the payment of a money fine. At an early period, confidence in the system became weakened, but it was not until the revival of the study of Roman law about the middle of the 12th century that compurgation, together with most forms of appeal to the judgment of

God, began to lose ground in medieval jurisprudence. From that time on, it was discouraged by royal legislation. By 1300 it may be said to have disappeared from the king's court in France, though it still lingered for a long time in the provinces. In Germany it seems to have flourished as late as the 16th century, as also in most of the countries of northern Europe; while in England it was not formally abolished until 1833. In ecclesiastical courts the system was employed down to the 17th century, though the development of the inquisitorial process in the 13th century deprived it of most of its characteristic features."[6] Many interesting examples of trial by compurgation (taken from original sources) may be found, beginning at page 3 of the pamphlet from which the above quoted matter was excerpted; and these indicate, while the original form of compurgatorial oath was that the party for whom the oath helpers appeared "had given a true oath," yet, later, this was modified to one in which the helpers, or compurgators, simply swore "they believed he had spoken the truth."

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[6] "Translations, etc., Original Sources of European Hist.," Vol. IV, p. 2; see also Maitland's Const'l, Hist. of Eng., p. 116 et seq.

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