THE AMERICAN LAW REGISTER

FOUNDED 1852.

UNIVERSITY OF PENNSYLVANIA

DEPARTMENT OF LAW

VOL. { 49 O. S. / 40 N. S. } JANUARY, 1901. No. 1.

THE THREE PRESENT MENACES: THE GENERAL ISSUE. THE GENERAL VERDICT. PERSONAL JUSTICE.*

I.

THE GENERAL ISSUE.

It is not a paradox but a clear truth, which has the closest relation to your conduct of your profession, that whilst the substance of your science is a body of intellectual labor, is learning of the highest order in other words, arranged and moulded into a scheme, the most important of your functions as a lawyer involves the use of that which is not law, in any sense, but only a method, applicable to every sphere of man, a method of presentation. In all intercourse in life there must be observed this art of presentation. It does not form a part of what is dealt in, but only the manner in which the substantial thing itself is produced to your view, that you may reach conclusions upon it. It is, as Selden said of Logic, "the means both of attaining to, and of regu-

*An address delivered before the Law Department of the University of Pennsylvania, December 14, 1900, by Hon. W. W. Wiltbank, Judge of the Court of Common Pleas, No. 2, Philadelphia. Upon request of the editors, the author has given his permission to its publication.

lating, the other sciences." (*Essay of Fleta,* 128.) If you are not a pleader you may be a sound lawyer in the mastery of the learning of the ages, but you lack the function or power which is necessary to your action as a practitioner and you must remain obscure in the ranks of your class and no more powerful than an intelligent layman. Pleading is not the law; is outside of the law; is not specially related to the law. Pleading, when correct, displays and emphasizes the law, which exists independently of its agency and can never be interpreted, enlarged, abated, or in any degree affected thereby. Pleading may be likened to the telescope which makes manifest the stars and other structures of our universe, whether of high origin or of man's hand. If you do not correctly employ this agency you can never make manifest the fixed and enlightening principles of the law which illumine the highest plane of human development and you have no power as a practitioner. To practice you must plead. Everything in the administration of justice, where there is a contest, depends on pleading. And so far as it is employed in its association with the science of law, it has become a science in itself, a subsidiary science, a logic or special application, exercising faculties which are not often aroused in the study of law alone. All this you already know, and for the science it may be safely assumed that you feel the respect and admiration natural to a learned man in the contemplation of that form of intellectual power which has most attracted him. It is at this point that I wish to refer to the state of mind of some men as to pleading, and to the status of the science itself. You doubtless now also know enough of the history of the practice of the law to have measured the prejudice which has slowly undermined the reputation of what was a long while winning favor, and at length gained the respect and fear of the laity, and the reverent awe of the initiated. Pleading and special pleading have come to be discredited. In no court in England or America to-day could you frame the record in a cause in what Baron Parke would have pronounced the only proper form; and the achievement of a surrejoinder has for years been absolutely impossible. Yet a surrejoinder was well reached in Professor Minor's example for students (*Minor's*

Institutes IV, 554-555), which is approved and reproduced to us by Perry (*Pleading, 227*). And Reeves abstracts from Mayn (634) the case of Aleyne de Newton's writ of annuity against the Abbot of Burton-upon-Trent, in which they went on to reply, rejoin and surrejoin (*II,221,Finlason,* 1896). The *London Times* of nineteen years ago (October 8, 1881), shows the report of a committee appointed by the Chancellor, which recommends that cases be disposed of without pleadings of any nature (*Thayer, Evid.,* 367). Some scant respect is yet afforded what we call a general issue, but special pleading, or the gradual elimination by written altercation of matter not directly pertinent to the thing disputed has been abandoned. Yet we are told that this means merely the accomplishment of an abandonment or disuse in form; that the abandonment or disuse of the substance or necessary habit of special pleading—a habit as essential as the habit of speech—has not been accomplished, and is impossible; and it is complained that the result has been waste of time in all manner of pleading *ore tenus.* The process which once went on in the chambers of the specialists like Sergeant Saunders, and thus prepared a cause for the Judges to await them as they made the circuit, is now postponed till the trial opens, and most of the rulings at nisi prius upon offers of proof are rulings upon pleaders mutually debating at bar so as to reach an issue of fact. Our trials are vastly longer in consequence; and much of this would be avoided if the written pleadings were still precise, as of old. Your attention may be called to other considerations of the situation which are of greater weight.

Has it occurred to you in your reading to ask, what is the trend and significance of the alleged reforms in pleading? These have been said to be, the simplification of the method of proceeding and the securing of a wider or broader justice, so that scholasticism, which is cramping and ungenerous and exclusive of the many, may be dismissed, and the worthy litigant may have the benefit of the exhibition of all conceivable things that are to be shown in his behalf. We hear to-day of the benefit of the open door in international commerce. The object which many declare they discover in the alleged reforms is to secure to the unlearned the open door

in the practice of the law, so that he may offer his untrained and honest brain for ministration at the bar of the court, and propound his various and unclassified suggestions as they bubble up in his worthy and self-respecting head, for estimate and appraisement by the Judge, as if they were of scientific value and thus worthy of estimation and appraisement. This is certainly the consequence which has been pointed at in the manner of pleading *ore tenus*. The expression—"General"—with many of us has magic: it signifies that which is beneficent, as the antithetic—"Special"—provokes a frown.

How are you to examine this state of things, and characterize it and decide whether it is good or bad? If you examine it historically you will find it to be a process which has gone on for all historic ages, and will go on while civilization continues; if you correctly characterize it you will drop the word reform, and suppress adjectives of belittlement, and instead, call it a development. How you are to say that it is good, or is bad, I hope to show ere I close this paper. We will begin the examination by instantly showing certain elements of bad condition. The result of the new course has been the prevalence of two strongly marked features or circumstances of jurisprudence. They are, I admit, to-day two menaces to jurisprudence of which, I also admit, we must beware; and with these menaces must be reckoned a third which is neither a circumstance nor a feature but a doctrine or informing spirit which has produced the change and now influences quite too deeply as I confess I think the administration of the law. The two menaces are the General Issue and the General Verdict, and the third menace is the doctrine of Personal Justice. Shall we fear these three?

The General Issue is a menace because it admits of retort, which is wild or loose retaliation, in the stead of answer, which is a pertinent and logical meeting of a proposition advanced.

Let us rest for a few moments on a discussion of pleading. One need not be anxious that the statement of demand should be defended from attack, whether the attack of those who decry procedure in the manner of the intelligent laity, a class

represented by Bentham and Lieber, or of lawyers themselves who grow impatient over the scruples of Chitty or of Baron Parke. The scientific lawyer should concede at once that any form of statement will serve. The proper statutes of amendment save elaboration of this point. I do not think that a case can be indicated in which it has been determined that upon successful demurrer to a declaration or count a final judgment has gone in favor of defendant where any relevant fact has been alleged, and is insisted upon, however imperfectly. Besides which, the statement may be excluded from my disquisition, and must be regarded as not pleading, so far as the discussion and conclusions I have in view are concerned. It may, indeed, be argued technically that in no case is the statement a step in pleading, and this upon a line of reasoning which may as well be briefly sketched now. Let us keep in mind certain basic or fundamental principles. What is the object of pleading? It is, immediately, to produce a question for dispute and resolution, in other words what is known as an issue upon which one stakes his case, and it is, mediately, to invoke a final adverse judgment. Pleading would never be entered upon unless a final adverse judgment was in view, and a final adverse judgment would never be reached without an issue, because an issue represents a contest between parties, and courts do not enter adverse judgment where there are no parties contending. What, then, is the final adverse judgment? It is the ascertainment and sanction of a status; in dower the status of widowhood, in partition the status of coparcenary, in assumpsit the status of contractual obligation, etc., etc. You will observe that a final adverse judgment is not the establishment of a status, if by that is meant the creation or setting up of a status, because the status has existed, but has been disputed, before the pleadings produced the issue, by which one party affirmed and the other denied it. This final judgment is an ascertainment in the sense that it discloses, or recognizes as it were, in the sense that it clears up, a status; and it is a sanction in the sense that it is the support, or power, or life, or the impregnability of the status as between the parties related to the cause; as between these the status is beyond attack and hence is the ground of writs

or orders in the nature of vindication and execution. A jury finds certain facts and renders a verdict, we will say, for the plaintiff; on this verdict a court enters judgment; this judgment ascertains and sanctions a pre-existing status till then in dispute, and this ascertainment and sanction are beyond attack, and hence writs may issue upon it; accordingly we have writs of execution whereby the property of the party charged is held to answer by way of compensation of breach of the obligation or of violation of the status. In most cases this ascertainment of a status puts a litigant in position to act upon a right, which pending the contest his adversary has kept under. Now such a right must be founded in fact and in law; this one feels sure will not be questioned; a man's right of any kind must flow from his situation among, and relation to, other men, and must be countenanced by the law of the land; but whilst this is so, it is not less clear that the ascertainment of a right by a court must result from a dispute of fact alone, or from a dispute of law alone, or from a dispute involving both. There is no pleading save where the dispute involves a fact or facts.

We will pause for a moment to take our bearings. It will be kept in mind that what we are determining is that the statement of demand may be declared to be no part of the pleading when the proposition is tested technically. To advance then, take the case of the ascertainment by the court of a right founded necessarily in fact and in law, but disputed in respect of the law alone. There is thus shut out all doubt as to the fact. The statement of claim serves as the datum, or exhibit of a status in fact, which is agreed to by the demurrer; and the conclusion of law is the only object of the later controversy. Where there is no question of fact in the case there can be no contention after statement filed, save by way of demurrer; and a demurrer to a statement may be successful or unsuccessful; if successful, it merely blocks an advance *modo et forma* on the plaintiff's part. This does not ascertain a status or right, and hence the judgment is not final. But all pleading is the means to a final judgment, and hence in the case supposed the pleading has not yet begun. In order to dispose of this topic as a whole, let us assume the demurrer to be unsuccessful.

What then? The defendant suffers under a judgment on the merits, or he has leave to plead over. If he pleads over, he must open the way to an issue of fact; whilst if he does not plead over, he loses by his own default and no issue arises upon the statement. In these several situations, you will observe, the statement is not in any sense a pleading, because not part of a contest as to fact. An argument pro and con upon a naked question of law, is not pleading in the technical sense of the common lawyer, whether written or merely oral; if written, it is a brief; if oral, it is that form of argument which is called pleading, just as an oration of Cicero's or the Declaration of Independence may be called pleading. They are pronounced to gain a point in principle.

This leads up to two suggestions, one of merely general interest as we pass on, the other of more weighty import; the first being that these views of the statement of demand do not arise upon any other step in the pleading as known to the common law, and as known to us when still there were steps, that is to say, before the general issue was prescribed by statute, because upon plea pleaded to a statement of demand the facts at once become involved in the inquiry, and accordingly the framing of an issue is inaugurated and in due course, and so a final judgment may be looked for. Thus if the mutual altercation were to run to a plea, or to any stage beyond a plea, and a demurrer were filed thereto, a judgment thereon might well be final, because the effect of the demurrer might be the ascertainment of facts in favor of one or other of the parties, and the law would be applied to that state of fact according as the argument upon the demurrer resulted. Here would be the ascertainment by a court of a status founded in both law and fact. In speaking of a demurrer I always mean demurrer to the substance of pleading, never to the form; a demurrer to form is not worthy of the name, or of the long attention of any court.

The other suggestion of the two up to which we have led is, as I see the matter, that pleading advances upon assertions of fact, or denial of assertions, and never advances when questions of law only are raised; pleading stops upon the interposition of a demurrer. A demurrer is no plea.

Hainton v. *Jeffreys,* 10 *Mod.* 280. We must, therefore, see that pleadings are designed for the marshalling of questions of fact, and it is my wish to remind you that these questions must be marshalled by special pleading in writing, as parts of the record, or by altercations in court by counsel at bar when they offer evidence under a general issue. The first-named process is in the control of learned men, who leave their offices in the course of the labor only to appeal now and then to the court on demurrer, and it reaches its result, the issue involved, before the jury is called; the second is a process which the jury witnesses, and which is directed by the Judge in ruling upon the offers of proof. One of these may be better than the other. No matter how this may be, each is a form of special pleading, and one or other form is as necessary to a judicial contest upon fact as is language itself.

It will now be understood why, for the purpose of this disquisition, I am not anxious to defend any form of statement of demand from attack whether of the superficial or of the respectable class of critics, and also that, whether or not technically it may be regarded as of the pleadings in a cause, I do not include the statement in the discussion and conclusions which I have in view. A good pleader asks if any part of a statement is sufficient in law; if it is, he does not deign to be interested in any other part. Paston, J., in *Y. B.* 19, *H.* 6, 50, 7, ruled that if a bill be good in substance it is enough; "car un bill n' ad aucu forme." This meant the petition, or statement, which 28 Edw. III, c. 8, speaks of indifferently as "a bill of trespass" and "a writ of trespass." I assume a statement or datum to be present, and thereupon I proceed to select two words, one of which shall signify alike the general issue and a line of special pleading, and the other of which shall signify all other forms of counter-statement—one of which shall signify accuracy and the other inaccuracy. The best words for this purpose are Answer and Retort: these have the sanction of etymology and of the precedents.

It is worth while to glance for a few minutes at the precedents for my use of the word *answer* as meaning a valid plea.

7 H. 4, folio 6. Debt by a Woman: Defendant pleads, That she is outlawed at the suit of J. S., and the plaintiff pleads No such Record and she was outlawed at the suit of N. S., and she shall not be *Answered,* for it is not material at whose suit she was outlawed. Kitchin on Courts, 4th edit., 464.

3 H. 6, folio 3. Debt against Executors: to plead Fully Administered and so Nothing in their Hands, is not double: for *one Answer* makes an end of all, that is that they have Assets. K. 448.

14 H. 4, folio 45. Trespass of his Servant taken the Defendant justifies for that the Father of him which is said to be Servant held of J. S. in Knight-Service, and that he died and the land descended to the Infant called Servant being within age, and that the Defendant by the commandment of the said J. S. seised him: the Plaintiff saith Of his own wrong without such cause: and by Cheney and Hull for that, that the Defendant hath alleged Special matter, that is, Tenure by Knights Service, the Plaintiff ought to *answer* to the Special matter, and this is no plea. K. 447.

12 Edw. 1, folio 10. If the Defendant justifie by License or Commandment of the Plaintiff, the Plaintiff shall not say Of his own Wrong without such cause, nor if parcel be of record, for these ought to be *answered* specially. K. 444.

2 H. 5, folio 1. Replegeare, the Defendant avows as Bayliff for that a Prior held of his Manor by Fealty and Rent, the Plaintiff saith, Of his own Wrong without such case: it is no Plea: for here he ought to *answer* the substance which is material, that is to say the Lordship. K. 443.

13 H. 7, folio 13. Trespass, the Defendant justifies for Common appendant and gives in Evidence that he hath Common by reason of Neighbourhood; it is not good, for it is not *answerable* to the matter in Issue. K. 241.

Y. B. Edw. II, 507. A woman claimed dower, alleging that her husband had endowed her *assensu patris,* and put forward a deed which showed the assent. The defendant traversed; some discussion followed as to how the issue was to be tried, and as to the effect of the deed. Counsel for defendant said, "The deed which you show effects nothing beyond entitling you to an *answer.*" Counsel for plaintiff.

"True, but he can only have such issue as the deed requires." *Thayer, Evid.* I, 14.

Much at times depends upon definition, but definition only serves as a temporary anchorage; and one of the mistakes which John Austin made was to assume that it served once and forever, and that a decision or judgment must go in one way, because words depended on meant but one thing. We have learned otherwise, first in the Court of Chancery, in which at an early day it was ascertained that according to equity definitions did not define. Next, the Probate Courts administered relief in the solving of latent ambiguities. And finally the administration at law of the doctrine of the intent of the parties made the circuit complete. You recall the case of the I promise-never-to-pay-note. 2 *Atkyns,* 32. *Allan* v. *Mawson,* 4 *Camp.* 115. And in *Piper* v. *the Trust Co.,* 140 *Pa. St.* 233, real estate legally passed under the description of money. We have learned to treat statutes, contracts, wills, even libels and jurats quite otherwise than as meaning what they say in order that we may secure the saying of what they mean. I need not enlarge upon this because I only want to add that just now a definition will serve us. It is Retort which I wish to define. Answer I have already described as a pertinent and logical meeting of a proposition advanced, and we will leave it there. Retort has been called by the French, A Twist Backward, or Back, a Return by a Twisting and Curving.

This intellectual twist is a disease at last, and we will examine the disease briefly by way of making and fostering a dislike for it. Answer, or legitimate pleading, may be general or special, and valuable in either case; but retort is general only and has no power to concentrate inquiry. In answer the issue is material ex necessitate: In retort it is more likely to be wide of the mark than material because it is chosen from the broad field of associate ideas and not from the narrow channel of logical sequence.

If you fail to see the answer, or abandon it in a spirit of sophistry, or eccentricity, or malevolence, or in ignorance, retort is sure to flourish, and the reason is that unless one of two disputants elects to remain silent there must always be a counterthrust. Retort is an intellectual parry; a parry

is a diversion of an inquiry from its logical end. The availability of retort is much the greater. A plausible retort is oftener at hand than an answer that can be sustained, and accordingly the clients are oftener ready with it, especially women and the laity, than the profession. This is because they are not trained. It must be observed that retort provokes retort, and that then only the skilled can use it with success. When women and the laity fall to it they find disorder, contradiction, confusion, defeat. Consider how rarely the real or true cause is stated for any line of conduct. The laity may with reason wonder at the many points upon which cases are won; the victory they most frequently deprecate has involved the method of parry, although they mistakenly find it usually due to technicality, or what they call the vice of special pleading. Parry sometimes makes for truth, but much more often it is in perversion of truth. Special pleading has been discredited and thus has admitted the efficacy of retort *ore tenus*. The law (as by a peculiar courtesy we call that which is not law) of contributory negligence in any common-law court,—for the doctrine of contributory negligence is only just in Admiralty,—is largely retort, or perverted answer. The defendant wins upon showing that while he was responsibly careless I was a trifle, and mainly an unimportant trifle, careless also; in most cases without damage to him,—mere kitchen dialectics.

These are light and kindly things to be said of retort, but they disclose the salient features of the disease and they show a bad thing. After all is said either way I am sure that there is one deep truth which illustrates the fundamental unanimity of lawyers, and that is, howsoever many men may detest the general issue, and again, howsoever many other men may abhor special pleading, yet they all unite in a contempt for retort.

I wish to illustrate this by reporting in my own way the case of *Myers* v. *Urich,* which arose in 1790, and is in the first of Binney 25.

James Kelly as assignee of Abraham Ebersoll procured a foreign attachment against one Myers, and attached moneys due on bond by one Urich to Myers. He got judgment against Myers in due course in August, 1790, and a *scire*

facias issued against Urich the garnishee to August, 1791, whereon judgment was entered against Urich in the November next after.

Thus you see the debt was established in August, 1790; the assets were adjudged in November, 1791. No execution issued.

In the meanwhile Urich paid Kelly a large part of the amount due, and after the judgment of 1791 he paid him the balance. Thus you see the attaching creditor got the money, but without the cognizance of Myers, whose money it was.

The Act of Assembly of 1705, *An Act about Attachments* 1 *Sm. Laws,* 45-46, had been disregarded by Urich. That act provided in effect that a garnishee was not compellable to pay in such case till bond had been furnished conditioned to answer to the garnishee's creditor if within a year and a day the latter should disprove or avoid the alleged indebtedness to the attaching party. This bond had not been required by, or given to, Urich.

Myers, therefore, in November Term, 1792, sued Urich for his debt; Urich *retorted* that he had paid: he said no more than payment, but craved leave to show the foreign attachment; this was the General Issue and Myers could only join; only at the trial could he first show that this had not been such a payment as was pleadable because not made upon execution or after bond procured. Proofs were taken, and it was seen that Urich had failed to *answer* and that his retort had in it no element of answer because it did not show that he had paid Myers or had been compelled by law to pay a stranger to the contract.

The efficacy of special pleading as above the general issue settled the case on review, in forcing the other side to throw up the brief: thus, said Duncan for Myers, if this point had proceeded on special plea I would not have been brought to court, because a skilled pleader would have shown Urich in chambers that he had no case that could be validly pleaded, and there would have been a settlement on his advice or a speedy judgment; as it is this system of the General Issue, this idle word payment, has put us to a jury, the loss of time and the vexation, and then to an imposition upon the court in banc; for observe:

Our demand is shown; upon it a plea must be,—

a. That Urich paid for account of Myers.

b. That he paid under attachment in law, *Baker* v. *Hill,* 3 *Keble* 627.

c. That the Act of Assembly had been followed. *Scarpe* v. *Young, Lutw.* 985.

d. That pledges had been found. 1 *Brown* 162. *Dyer* 196, *pl.* 42.

e. And that execution had issued upon the judgment. *Spink* v. *Tenant,* 1 *Roll. Rep.* 105.

The defendant could prove none of these, and the case was nevertheless by the magic of that idle retort, Payment, carried to *nisi prius,* for the court in passing upon offers of proof to do the work which should have been done in the office of counsel. Thereupon, said Ingersoll for Urich, I give up the cause.

Special pleading in this instance might have got Myers his money in November Term, 1792.

The general issue in this instance kept Myers out of his money till December 28, 1801, when our Supreme Court entered judgment, a tribute of nine years to the efficacy of Retort.

If, therefore, the general issue always led to retort, and your choice lay between special pleading and the general issue, it is apparent that you would be steady advocates of special pleading in order to escape the menace of retort. And so far as retort is let in by the general issue the latter is a menace, as I began by saying. We will leave it for a few moments, that we may turn to the general verdict.

II.

The General Verdict.

Of the verdict of a jury Burke wrote a remarkable sentence in his *Essay towards an Abridgment of the British History.* It contains a truth which has not been noted more than once or twice in any century of the life of the common law and which is rarely had in mind to-day. He was describing the jury of the time before Bracton. "They

were," he said, "rather a sort of evidence than judges; and from hence is derived that singularity in our laws, that most of our judgments are given upon verdict, and not upon evidence, contrary to the laws of most other countries. Neither are our jurors bound, except by one particular statute, and in particular cases, to observe any positive testimony, but are at liberty to judge upon presumptions." *Vol. VI, 270. Edit. of* 1852.

The significance of this is startling, and its truth is shown in every respectable authority that is pertinent. Apart from the exercise of modern statutory functions a common law judge never finds facts, whilst, being arbiters of the fact, a jury at common law may find upon presumptions which it thinks the testimony warrants, but which you would say were in disregard of the testimony. Palpable error in disregarding the weight of the evidence is not corrected, but is punished by a common law judge, who must therefore have first discerned the facts to be the other way, but who does not enter judgment; he sends the issue to another jury and so dishonors its derelict predecessor. He thus violates the privilege of the jury. He dare not adjudge a state of fact, and he and his predecessors ever since our jurisprudence began have refused to do so. The law has nothing to do with the establishment of a status in fact among litigants; it makes the laymen, the citizens outside of the courts, do this and then it speaks. This and other things which may be said show you the narrow scope of the common law. It is an oracle to which litigants flock after they have made up the history to be passed upon in their struggle before twelve men of their own sort. And thus the people of the nation have a large part in the administration of justice. "Furthermore," says Professor Amos, "there is, no doubt, a scarcely conscious sentiment that the solemn act of awarding punishment demands the acquiescence of a representative body of the people as a whole; and that the jury, however casually chosen, forms such a representative body." (*The Science of Law, Ch. X.*) Only through the Church have the courts ever sanctioned a departure from this system and the usurpation of a power which never belonged to a judge non-pontifical. As the ecclesiastics, or judges pontifical as Selden

called them, would not let their own class be tried for crime by the law courts, so in respect of the laity as well as of their own class they extended the wider protection of defying the law courts when they administered equity. Now these ecclesiastics and their successors are the only judges who ever found facts. Do you observe that this is wholly illegal? A chancellor finds facts and enters judgment upon them. And the common law courts have submitted ever since the chancellor began the work, because, at first, the King, who was the fountain of the law, inspired the chancellor to declare what in conscience was right, and because afterwards we found that whether the sovereignty was or was not above the law a chancellor is a minister of justice. In Pennsylvania we bow to a chancellor, but we uphold the common law. Although we administer equity through common law forms and thus are sagacious and merciful, yet whilst we are acting under the common law we will not find facts; we instruct the jury as to the equities; in procedure which has not the form of an action at common law we go to a chancellor, that he may exercise the ancient function of the ecclesiastics and do what it is ever impossible to any common law judge to do.

Thus you see facts are found in the administration of justice by a body of men who are not judges at common law and who may find upon presumptions, which may be another way of saying that they may find without proof, and from this has arisen the apprehension as to the general verdict which is thought to be a menace because it is the juridical duty of a court to enter judgment upon it and not upon the facts. In this way it is conceivable that a judgment that A. is in default is wrong, because according to the facts A. is not in default, but not the less it must be held right because upon a regular and irreversible verdict.

The consideration that, in a way a jury sometimes also passes upon the law, heightens the effect of what we have disclosed, and the result as it might be stated by a disaffected critic, and as it has been stated by many, is that the community, through its unprofessional representatives, disposes of property, adjudges answerability in money, pronounces against integrity and honor, dooms to imprisonment, outside of the reach of the law, and with such recognition only of

the law as is involved in taking an oath to well and truly try an issue according to the evidence and in listening with respect to judicial instructions as the inquiry proceeds. This criticism comes from the losing party, who is sure that he was in the right; often from the winning party in order to glorify himself in winning against odds; it comes thus as of course; moreover it comes from the philosophic and well-furnished observer who has nothing at stake. If you pause at this moment to appreciate the breadth of the description I have given, does it not come from you? The jury gives no reason in the general verdict. It is not answerable for a verdict which a court thinks wrong. It concludes everything in uttering but one word, plaintiff or defendant. This power is thought by many to be a menace.

I offer, as an illustration of my hints, the case of *William Hopkins* v. *Lazarus Tilman,* reported in the 25th of the Georgia Reports, p. 212.

Action for breach of warranty to August Term, 1858. Hopkins sued Lazarus on the grouund that he had failed to observe his contract which was in writing, the vital part of which was as follows: "Received December 31, 1853, of William Hopkins six hundred and fifty dollars in full payment for a negro woman named Catharine, about seventeen years old, whom I warrant to be sound in body and mind."

Hopkins demanded damages, as the negress had been unsound at the time of sale.

Walter Ector swore that the girl was healthy at thirteen. Dr. Reese swore that he thought she was malingering in the spring or summer of 1853 or 1854; he apparently could not tell which. Dr. Hood testified that he saw her in the spring of 1854, and that he had no doubt she then had a fit. Milton Hopkins testified that she had a fit about February 1, 1854, and since that time she had had four other fits—had had about two fits every month; her fits were gradually growing worse, were severe, and her mind was impaired. Zimmerman Hopkins corroborated this. William Hood swore that he saw her in a fit in May, 1854. Plaintiff tendered a return of the negro at the end of May, 1854.

You exclude the testimony of Ector and Reese as one irrelevant, as not followed up; the other incompetent. You

must accept the deduction that, after the end of May, 1854, the negro did not get well, as otherwise the fact would have been shown. You have then only to consider whether the deduction that she was sound on the last of the year 1853, although one month later and continuously since she was not, was justifiable upon the proofs. The jury found that she was. How could you review this general verdict? Observe: there was no evidence that the negro Catharine of about seventeen years of age had been sound at any time after thirteen. There was the necessary implication that she was unsound from some time in February, 1854, continuously. There was the proof by witnesses that she had fits just a month after the warranty, growing more frequent and more serious up to the time of return tendered.

How could the plaintiff under the circumstances, for we must respect the circumstances, have more clearly shown the unsoundness? And do you think that if the jury had been confined to a special verdict the finding would have been the same? Could they have found that this radical defect had arisen between December 31, 1853, and February 1, 1854? had developed to this acute stage in thirty days? The Apellate Court declined to reverse the judgment. There was a like case in our state, arising forty-five years earlier. where a note was given for a negro boy sold for a term of years, and the jury found the boy unsound upon presumptions drawn from like evidence: *McDowell* v. *Burd,* 6 *Binn.* 198. These are notable precedents, and in the line of scientific or juridical propriety, and yet it must be allowed that *Hopkins v. Tilman* illustrates the menace that lies in the general verdict and should not be followed, as it is not followed, in actions of tort of the present time, especially in those which lie for injuries to the person, wherein are two grave dangers, the danger of a jury in a general verdict acting upon prejudice against corporations, and the danger even in the case of a proper verdict, of a jury's assessing the damages in excess of the due measure. Surely, it appears often that the revision of a general verdict as against the weight of the evidence is incumbent upon the court.

(To be Continued.)

William W. Wiltbank.