THE TRIAL OF CASES IN PENNSYLVANIA.

In this article no attempt will be made to point out the road to success in the trial of cases. That has often been done by those better qualified by experience and ability for the task. The only purpose here is to consider the points of practice that arise from the time a case is called until the verdict of the jury has been passed upon by the trial court. Although some points of practice will be treated which may not be familiar even to trial of lawyers of some experience, the general subject will be outlined for the benefit of the young member of the bar who has not yet tried his first case.

PREPARATION.

The importance of preparing a case as soon as it is at issue, *i. e.*, taking down in writing the statements of the witnesses and making a digest of the authorities on the questions of law involved, has been too often urged to make repetition necessary here. After the case has been ordered down for trial, it will, sooner or later (in Philadelphia County, about two or three years later) appear upon the printed trial list, to which each member of the bar of course subscribes. Different counties have different methods of disposing of the cases upon this list. In some, the cases are taken up in the order in which they are printed; and every case upon the list is thus disposed of before the jury trial period is closed. In Philadelphia County, fifteen or twenty cases are set down for trial on each day of the week in each court room. If the case is not called on the day on which it is set, it has another chance on the following day. If it is not called then, it does not appear upon the list again that term. This is one of the most trying features to both litigants and counsel in Philadelphia practice, and often results in a case not being heard for a year or more after it first appears upon the list. There is no way of telling whether a case that is set for a certain day will be reached or not. Often a case well ahead on the

list may be on trial, with every indication of taking several hours to finish, when the parties may settle, or a juror be withdrawn, with the result that the whole list may break down, and those who have gone away, with the assurance that their cases will not be reached for some time, find that their cases have been called and their chance for trial lost. The only safe plan is to keep parties and witnesses in the court room, or within call, though it often requires more than human tact to keep them in proper frame of mind during the long delays. This is perhaps the most exhausting part of the trial lawyer's work.

CONTINUANCES.

Each county has its own rules on this subject, and the lawyer should, of course, consult and be familiar with local rules of court. In Philadelphia County every case that is reached must be tried. The courts will not allow a case to be continued or, as we say here, "marked not reached" by agreement of counsel. If there is a good legal ground for having the case so marked, application must be made to the court at the last previous call of the current motion list. If such application is not made, the case will be stricken from the list when it is called, unless the legal ground for the continuance has arisen subsequently to the call of the last previous current motion list. A case once stricken off the list must be ordered down again, which usually means that it will take a year or two before it appears again. The granting or refusal of a motion for a continuance is discretionary with the court.[1]

ATTACHING WITNESSES.

Witnesses should be served with a subpœna at least five days previous to the day assigned for the trial. If, on arriving at the court room, counsel finds that any witness who has been so served is not there, he may have him brought in by attachment. If he secures the attachment within an hour after the opening of court, and it fails to produce the witness, this is a legal ground for having the case marked "not reached." An

[1] Bank v. Hazard, 231 Pa. 552.

attachment may also be secured with the same effect if a witness, who has been in attendance, departs without leave. To secure an attachment the court may be interrupted at any time. The attorney should take the person who has served the subpœna, or who knows that the witness was present, to the bar of the court, and state to the trial judge that he wishes an attachment. The person who knows the facts will then be sworn and briefly examined by the judge, who will immediately order an attachment, which the clerk will issue; and it may be served at once.

Striking the Jury.

When the case has been called, the court officer will give counsel a printed list of the jurors serving on the panel for that term. As the jurors are called to the box he should note their names and numbers on this printed list. They will take seats in the jury-box in the order in which they are called. If either side is not satisfied with the first twelve men, eight more may be called, who will take seats in the front of the court room. It is then incumbent upon each counsel to strike four names from the list of twenty who have been drawn. It is not necessary to assign any cause in striking these names. A man may be taken out of the box because counsel does not like his looks or his occupation, or for any other reason whatever. The court crier will hand a printed list, first to the counsel for the plaintiff, who will strike one name, and then to the counsel for the defendant, and so on, alternately, until eight names are struck off. Either counsel may waive his right to any or all of his four challenges, in which case the court officer will strike the required number. The twelve men remaining will take their places in the box and compose the jury for the trial of the case.

In addition to these eight peremptory challenges, any juror may be challenged for cause, as that he is interested in the proceeding, or is related to, or employed by either of the parties. It is generally well, as soon as the twelve or twenty men are called, to ask, before striking any names, whether any one of them is interested in the case, or, if one of the parties be a corporation, whether any of them is a stockholder or an employee.

By the Act of 1834,[2] every juror must declare in open court anything that he knows relative to the controversy. But the fact that a juror is a relative of a witness is not a ground for challenge, and if he is excluded on this ground, a new trial will be granted.[3] If a jury has not been properly selected, a new trial will be granted, whether either side has been prejudiced thereby or not.[4]

Opening.

After the jury has been sworn, counsel for the plaintiff waits until the trial judge signifies that he is ready for the case to proceed, which he generally does by a nod. Thereupon counsel (if there are two it is usually the junior) rises and with the customary formula, "With submission to the court, gentlemen of the jury," tells what the case is about. It has become almost the universal practice to do this as briefly as possible and without any oratorical flourishes or embellishments. In a complicated case the opening may take some time, and often, where they are admitted to be correct, may be illustrated by maps or photographs. It is an important part of the proceeding, as from counsel's opening address the jury receive their first impression of the case. But the opening must be strictly confined to a statement of facts, as nothing in the way of argument will be allowed.

Witnesses.

Immediately after the conclusion of the opening address, the first witness is called.

A witness need not testify until he has received his witness fee[5] and mileage.[6] A party testifying on his own behalf, or as

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[2] P. L. 369.

[3] Hinnerschitz v. Borough, 19 D. R. 1080.

[4] Scranton v. Gore, 124 Pa. 595.

[5] The usual witness fee is one dollar and fifty cents a day. The general Act of 1907, fixing the compensation of witnesses at this amount, does not repeal a local act fixing it in some counties at one dollar. Fleming v. Bush, 43 Sup. Ct. 405. As a result of this decision practically all the local acts were repealed by the last legislature. Witnesses' costs in depositions on a rule for a new trial are taxable as costs in the suit. Smith v. Levy, 19 D. R. 435.

[6] Three cents for each mile he must travel in going to court and returning.

next friend, is not entitled to witness fees or mileage. Nor when attending in his own suit is he entitled to witness fees or mileage, if called in any other case at the same time. And no witness is allowed more than a single compensation, no matter in how many suits he may be called upon to testify.

When a witness is called to the stand, he may be either sworn or affirmed. Neither counsel nor court may inquire into his opinion on matters of religion. He does not have to state that he believes in a God.[7]

Proofs.

In certain cases, as in suits upon promissory notes or writings in the nature of suretyship undertakings, it is sufficient to offer the paper in evidence and rest, without calling any witnesses. Almost every county court has a rule (in Philadelphia, Rule 1) covering this point of the execution of certain writings when there has been no denial of the execution in the affidavit of defense. In such cases the introduction of the paper makes out a *prima facie* case, and the defendant must then introduce his defence. After addressing the jury, counsel simply turns to the court and says: "I offer in evidence the note [or whatever it may be, describing it] and the plaintiff rests."

It is not necessary to sustain all of the averments of the declaration. If the evidence supports one which will entitle the plaintiff to a verdict, it is sufficient.[8]

On the other hand, the law, true to its motto that equality is equity, extends the same privilege to the defendant. Except by special rule of court (as in Allegheny County), the defendant is not confined at the trial to the matter set forth in the affidavit of defense. But just as the plaintiff's proofs must not vary materially from his allegations, so a defendant cannot set up a defense inconsistent with his affidavit.

The affidavit of defense is not part of the pleadings and cannot be read in evidence.[9] Formerly if the plaintiff wished

[7] Comm. v. Tresca, 45 Sup. Ct. 619.
[8] Goldie v. R. R. Co., 44 Sup. Ct. 350.
[9] Mullen v. Insurance Co., 182 Pa. 150.

to read the affidavit of defense to the jury, it was necessary to offer it in evidence, in which case the plaintiff would be bound by the other statements in the affidavit as well as by those which he wished to read. Many courts, however, have recently passed a rule providing that everything in the plaintiff's declaration not denied in the defendant's affidavit of defense must be taken as admitted, and affidavits may not be offered as admissions, without binding the plaintiff on the points on which denials are set up. The present practice seems to be that a part of the affidavit of defense may be offered in evidence as an admission, without offering the whole, and the plaintiff will not be bound by any statements in the affidavit except those for which he offers it.[10]

Most formal matters, such as the correctness of book accounts filed with the plaintiff's statement, the existence of a partnership, or of an incorporation[11] are admitted unless put in issue by the pleadings.

At the trial of an action in assumpsit, the pleadings in a prior equity suit between the same parties are admissible for the purpose of contradiction or to effect credibility. But they will not estop parties from taking a position in the case on trial different from that which they took in the prior suit.[12]

Questions of variance between *allegato* and *probato* must be raised at the trial. It is too late to raise them afterwards, particularly where the variance is of a kind that could be cured by amending.[13]

Finally, on this question of proofs, it may be well to call attention to a rule which seems to be little known and is frequently disregarded. The rule is that if oral testimony is not contradicted, and is not inherently improbable, the court must instruct the jury to believe it. Of course, if a witness or witnesses are interested, or if there exists any other ground for questioning their credibility, the case must go to the jury, even though the testimony is uncontradicted.[14]

[10] Mellon Bank v. Peoples' Bank, 226 Pa. 261.
[11] Act of 1911, No. 295.
[12] Lindsay v. Dutton, 227 Pa. 208.
[13] Brillinger v. R. R. Co., 229 Pa. 182.
[14] Bank v. Hoffman, 229 Pa. 429; Lonser v. R. R., 196 Pa. 616.

Examination and Cross-Examination.

Every law student knows that leading questions are not allowed in examining counsel's own witnesses, but are allowed in cross-examination. Very few courts, however, in these days enforce the rule with the strictness with which it used to be enforced. It has become customary, in order to save time, to get over the preliminary matters rapidly by the use of leading questions. As, for instance, after the witness has given his name, "You live at such and such a number on —— street, and are an employee of the defendant company, are you not?" or "You were the motorman of the car at the time this accident occurred?" But when the gist of the witness's testimony has been reached, leading questions are and should be promptly ruled out. Many lawyers dodge the difficulty by using some such formula as, "Now tell us, in your own way, what you know about this dispute," or as the case may be. This is slipshod, however, and usually wastes time. Very few witnesses can tell a clear and consecutive story, and will be soon interrupted by counsel or court. It is a most useful, in fact an important part of an advocate's equipment to be able to bring out a witness's testimony concisely and in the most effective form by proper questions. In passing, it may be said that there is much apparent confusion as to just what a leading question is. Some lawyers seem to think they satisfy all requirements by putting their questions in the alternative form, as, for instance, "Did you, or did you not, hear the defendant say that he would accept plaintiff's offer"? This is of course a mistaken idea. The form of the question has nothing to do with it. The test is whether the question suggests the answer.[15]

Either counsel may call the opposing party for cross-examination before he has been examined in chief, but a witness of the other side may not be so called. If an opposing witness is called to the stand, the side calling him makes him its own, and is bound by what he says. There are certain exceptions to this rule, where the witness has an interest adverse to

[15] A flagrant example of a leading question may be found in Backman v. Railway, 227 Pa. 277.

the party calling him.[16] Counsel may not cross-examine his own witness unless the witness has surprised him. If witness tells a story on the stand which differs from what he had previously told counsel or if he be hostile, this may be explained to the court. Counsel who called him may then cross-examine him, and, if necessary, disprove his statement. Other witnesses may even be called to show that he has contradicted himself.[17]

A defendant will not be allowed to bring out his defense in the cross-examination of the plaintiff's witnesses. There are rare exceptions when it is part of the *res gestae,*[18] but the general rule is strictly followed and applies equally to the proof and offering in evidence of papers which are part of the defense.[19]

Depositions taken before trial may be read to the jury by counsel. Sometimes one counsel will read the examination in chief, and the other the cross-examination. If the depositions be offered at the trial by the opposing counsel he makes the witness his own.[20]

It is undoubtedly bad policy to offer too many objections to questions asked; but, on the other hand, failure to make an objection in time may be fatal. If testimony has been received without objection, and the court subsequently refuses to strike it out, such action is not reviewable on appeal.[21] And it is important to note, also, that a question of law not raised in the court below cannot be considered on appeal.[22] But the attorney should be careful not to give the ground of his objections unless he has to, for the appellate court will confine him to the ground specified at the trial.[23]

If a witness on cross-examination has been asked an immaterial and irrelevant question, another witness cannot be called

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[16] See Act of March 30, 1911, No. 39.

[17] Koller v. Insurance Co., 41 Sup. Ct. 48.

[18] Smith v. Traction Co., 202 Pa. 54.

[19] Aug v. Darlington, 185 Pa. 111.

[20] Bank v. Hazard, *supra.*

[21] McDyer v. Ry. Co., 227 Pa. 641.

[22] DeHaven's Estate, 41 Sup. Ct. 382. But this does not apply to a statute not pleaded.

[23] Roebling v. Amusement Co., 231 Pa. 261.

in rebuttal to contradict his answer.[24] If testimony given by a witness is not responsive to the question asked, or is otherwise improper, counsel should ask the court to strike it from the record. When the testimony is clearly improper the court has no discretion to refuse such a request.[25]

The examination of experts is too large a question to take up here, but it may be said, in a general way, that an expert cannot be asked to give an opinion based on testimony which is conflicting or on a state of facts not supported in some measure, by the evidence.[26] It is customary to frame a hypothetical question, upon which the expert may give his opinion. Care should be taken that this question is based on the evidence given, and that it includes nothing not in evidence. It is proper to ask physicians in negligence cases, whether from their examination of the plaintiff and the history of the case which the plaintiff has given, they can form an opinion as to the cause of the plaintiff's condition. If they say yes, the next question will be what opinion they have formed. It is not proper for an expert to testify from authorities. He must give his own opinion, though he may afterwards explain why he has formed it. But it is proper under cross-examination for counsel to use books. For instance, counsel may ask the expert whether he has read So-and-so's work on the subject and whether he agrees with it, or deems it to be authoritative. Counsel may then read excerpts from the work in the form of questions addressed to the witness. If opposing counsel have any doubt as to whether a witness is an expert or not, he may cross-examine the witness on his qualifications, and the court will pass on the question before the witness will be allowed to give his opinion.

Infants of any age may be allowed to testify. The only test is the intelligence of the infant and his understanding of the oath. On this point he may be cross-examined by counsel before giving his testimony, although the examination is usually conducted by the court.[27]

[24] Buck v. McKeesport, 227 Pa. 10.
[25] Pauza v. Coal Co., 231 Pa. 577.
[26] McDyer v. Ry. Co., *supra;* Ziegler v. Simplex Co., 228 Pa. 64.
[27] Comm. v. Farman, 211 Pa. 549.

The failure to introduce testimony within the control of a party and likely to be offered if favorable, warrants the inference that the testimony, if produced, would be unfavorable, and may be commented on to the jury.[28]

A witness may refresh his memory by using any memorandum prepared by himself. If opposing counsel has any doubt as to the propriety of the memorandum produced, he may examine the witness about it and object, before the latter will be allowed to proceed.

Production of Documents.

Papers are proved by showing them to the witness and asking him if the signature is his. They are not to be offered in evidence, however, until the testimony of the witness is completed, unless they are to be made a subject of examination. They cannot be proved or offered in cross-examination. Papers must always be shown to the opposing counsel before offered in evidence. They may not be objected to until so offered. Showing papers to witness for identification is not objectionable.

If the other side fails to produce papers, after due notice, copies may be offered in evidence. Before offering the copies, counsel will state in open court, so that the stenographer may get it on his notes, "I call on the other side to produce the following papers (naming them), in accordance with notice served on such and such a day." Notice is essential.[29] In a recent case[30] the defendant called on the plaintiff to produce an original paper at the trial, although he had not given notice to produce. The plaintiff stated that it had never received the original. The court thereupon allowed the defendant to introduce a copy, in spite of the fact that no notice had been given, as the plaintiff's objection was not that it had not received notice to produce, but that it had never received the original paper. This decision is undoubtedly open to criticism.

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[28] Green v. Brooks, 215 Pa. 492.
[29] Reddelien v. Atkinson, 46 Sup. Ct. 159.
[30] Press Co. v. News Agency, 44 Sup. Ct. 428.

Signatures to documents may be proved by any person acquainted with the signer's handwriting or by experts. The ordinary questions to the former are, "Have you seen him write", or "Have you seen what he has written"?[31]

When the plaintiff has died after suit brought and the action is continued by his personal representative, the letters testamentary should be offered in evidence at the opening of the trial.

Improper Remarks.

Improper remarks made by anybody during the course of the trial are a proper basis for a request to the trial judge to withdraw a juror. The withdrawal of a juror means, of course, that the case goes over for the term. Compliance with this request is largely discretionary with the trial judge, although recently the Pennsylvania appellate courts have been so strict in dealing with offenses of this kind that the request is more likely to be granted than not. If the court refuse to withdraw a juror, counsel must at once note an exception on the record, or he will not be allowed to raise the point on appeal.[32]

It is improper to state to the jury the amount of damages claimed.[33] And it is reversible error for either counsel or the trial judge in negligence cases to mention the amount sued for,[34] or in appeals from the award of a jury of view to mention the amount of the award.[35] It would seem that this rule applies equally to any action in which the claim is for unliquidated damages.[36].

The trial judge may use figures in illustrating to the jury. the proper method of computing damages, but this is a dangerous practice, and counsel should at once object and except.[37] The

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[31] The question of the proof of handwriting is exhaustively discussed in Berkley v. Maurer, 41 Sup. Ct. 171.

[32] Benson v. Ry. Co., 228 Pa. 290.

[33] Hollinger v. Ry. Co., 225 Pa. 419.

[34] Caruthers v. Ry. Co., 229 Pa. 558; Vivian v. Challenger, 45 Sup. Ct. 2.

[35] Fisher v. R. R., 227 Pa. 635.

[36] Fowler v. Gas Works, 227 Pa. 314, which was an action of assumpsit for breach of warranty.

[37] Reed v. Dyewood Co., 231 Pa. 431.

books contain many illustrations of other remarks, which are sufficiently improper to call for the withdrawal of a juror. A remark by a district attorney to a witness that her turn to go to jail had come is highly improper.[38] Political references in the address to the jury may be improper.[39] Even Biblical references, as not being within the evidence, may be condemned.[40] And a juror will be withdrawn if counsel for the plaintiff tells the jury that the defendant does not care what the verdict will be, as an insurance company will have to pay the damages.[41] However, the circumstances under which the remarks were made will always be considered.[42]

An improper remark of a witness may be just as much ground for withdrawing a juror as an improper remark of counsel.[43]

In many instances the trial judge will simply reprimand the offending counsel and warn the jury to disregard the remark. Often, indeed, counsel will withdraw the remark as soon as objection is made. In these cases the appellate courts are apt to be lenient,[44] but if the offense is deemed sufficiently serious to make a point of it on appeal, the objection must be accompanied by an exception on the record, or the refusal of the court to withdraw a juror may not be assigned for error.[45]

If a newspaper or newspapers during the course of a trial conspicuously comment on the evidence in such a way as to be likely to influence the jury, it is ground for an application to have a juror withdrawn.[46]

AMENDMENTS.

Amendments may be asked for at any time before or during the trial. If a mistake has been made in the amount claimed,

[38] Comm. v. Williams, 41 Sup. Ct. 326.
[39] Emery v. Printing Co., 19 Dist. R. 128.
[40] Keefer v. Mellott, 44 Sup. Ct. 471.
[41] Hollis v. Glass Co., 220 Pa. 49.
[42] Miller v. Transit Co., 231 Pa. 627.
[43] Surface v. Bentz, 228 Pa. 610.
[44] Brown v. Scranton, 231 Pa. 593.
[45] Comm. v. Polichinus, 229 Pa. 311.
[46] Fisher v. Fisher, 20 Dist. R. 33.

or in the name of one of the parties, or if one of the parties has died and there must be a substitution, or in any formal matter of this kind, it is sufficient to state the amendment at the bar of court and have it noted on the record. Counsel for the other side should, of course, always be consulted first before the request for the amendment is made. If the amendment is of a more serious nature, as of a change in the form of action, or one that may possibly vary the cause of action, objection will almost always be made; and if the court grants the amendment, opposing counsel may plead surprise, have the case continued, and require the party who has secured the amendment to pay all costs up to the time the amendment is allowed. In almost every such case the judge will grant the continuance, though the matter is discretionary.[47]

The granting of amendments during the trial is usually a matter within the discretion of the trial judge, but it is rarely justifiable for counsel to oppose an amendment, unless it actually finds him in some way unprepared.

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(*To be concluded.*)

[47] Roebling v. Amusement Co., *supra.*