THE TRIAL OF CASES IN PENNSYLVANIA.*

The first part of this article discussed a number of matters of practice which arise in the preparation and conduct of a trial, such as continuances, attaching witnesses, striking the jury, the opening, the calling of witnesses, the manner of proof, examination and cross-examination of witnesses, production of documents, and improper remarks of counsel. The next point of interest has to do with

EXCEPTIONS.

The question of exceptions was for many years a vexed and troublesome one,[48] but the matter has now been simplified by statute.[49] Before this Act, the practice in taking exceptions was in confusion. An exception was not necessary to the entry of judgment for want of a sufficient affidavit of defense, but it was necessary to the refusal to enter judgment for want of a sufficient affidavit of defense. There was no exception to the entry of a nonsuit, but only to the refusal to take it off. There was no exception to the refusal to enter a nonsuit; the defendant had to ask for binding instructions and except to the refusal to grant them. There was no exception to the refusal of a motion for a new trial, although there was to the refusal to take off a nonsuit. The action of the court in disposing of a motion for judgment n. o. v. not only required an exception, but if the exception were not printed in the appellant's paper book, the appeal was quashed. These and other similar points are illustrated by many reported decisions.[50].

It was within the discretion of the trial judge, or at any rate within his power, to refuse any exception asked for. If

* For the first part of this article see 60 University of Pennsylvania Law Review 181 (December, 1911).

[48] It will well repay any Pennsylvania lawyer to read a letter on this subject, published in the report of the Pennsylvania Bar Association for 1909, page 130.

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

[50] See Weitz v. Banfield, 226 Pa. 241; Schmidt v. P. R. T. Co., 42 Sup. Ct. 168; Lee v. Sherman, 43 Sup. Ct. 557; Gas Co. v. Oil Co., 43 Sup. Ct. 619.

counsel really wished his exception, an awkward and tedious method was provided under which he could secure and serve a special writ by the Statute of Westminster,[51] setting forth the circumstances of the case and commanding the judge, if he be true, to affix his seal to the bill of exceptions prayed for. The judge could then file his answer and the question had to be argued, and passed on by a higher court.[52] Cumbersome devices, known as bills of exceptions, were necessary in every trial in order to get the record properly before the higher court on appeal, although this practice had become more or less obsolete, on account of the use of official stenographers, and the Supreme Court rule[53] authorizing the approval of the stenographic notes by the trial judge.[54]

Under the Act of 1911, exceptions must be taken to the rulings of the trial judge, as before, but it is not necessary to ask the judge to grant them. Counsel simply instructs the stenographer to note the exception on the record. Exceptions to rulings should be taken promptly, as it will probably be too late to get them afterwards. The Act does not state this in so many words, but the language of the first section strongly implies it, and the inference is strengthened by the language of the second section. The further provisions of the Act in regard to exceptions are noted below.

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[51] 2 Edw. I, cap. 31.

[52] Comm. v. Donnelly, 40 Sup. Ct. 116; Conrow v. Schloss, 55 Pa. 28; Morris v. Buckley, 8 S. & R. 211; Drexel v. Man, 6 W. & S. 386.

[53] Number 22.

[54] See Mr. Justice Williams' illuminating review of the whole subject in Rosenthal v. Ehrlicher, 154 Pa. 396. The difficulties under the old practice will be readily understood by a glance through the notes in 1 P. & L. Cross-Reference Annual, 278 *et seq.*

In Big Run Road, 47 Sup. Ct. 166, it is said that exceptions are only allowed by statute. The general statute of 13 Edw. 1, ch. 31, gave them in all common law proceedings, meaning practically, in jury trials. In other proceedings statutes must specifically provide for exceptions or *certiorari* will be the only form of appeal. Now the Act of 1911 does away with exceptions except in jury trials, thus requiring the court on an appeal which as there are no exceptions cannot be a writ of error and must therefore be a *certiorari*, to consider other matters beside the regularity of the record. This situation is new, it seems to be an anomaly, it may be unconstitutional (Art. V, Sec. 3), but it certainly affords a great relief to the practitioner.

It is to be noted, however, that in Davis v. Fleshman, 232 Pa. 409, the Supreme Court said that an exception should have been taken to a judgment entered on demurrer. As this case was decided after the Act of 1911 was passed, although no reference to the Act is made, it raised a possible question as to whether the Act will be held to apply only to jury trials.

NONSUIT.

When the plaintiff's testimony is completed, counsel for the defendant may ask the court to enter a nonsuit, if he thinks that the testimony, admitting it to be true, has not made out a legal cause of action. As a nonsuit is not a bar to entering another suit for the same cause of action, it is sometimes good policy for counsel, if he is sure of his ground, not to ask for one, but to offer no testimony and ask for binding instructions for the defendant instead. This may be safer than introducing testimony for the defense and asking for binding instructions after the defense has closed, because it occasionally happens that a weak plaintiff's case may be strengthened by the cross-examination of the defendant's witnesses.[54a]

A nonsuit is ordinarily only justified when there is no evidence for the plaintiff which makes out a legal claim. If the testimony offered on behalf of the plaintiff is inconsistent or contradictory, it is the province of the jury to reconcile the conflicting statements. If the testimony given at a former trial is contradictory of the testimony given at the second trial, even this would not justify the entry of a nonsuit. So, when the witness has given a signed statement before trial, and contradicts it on the stand, his credibility is for the jury.[55] But if the plaintiff's own testimony fails to make out a case, the court may enter a nonsuit, even though he have another witness whose testimony does make out a case. This rule does not work the other way, however, as where a plaintiff's own testimony has made out his case, he is entitled to go to the jury, even if his witnesses contradict him.[56]

A nonsuit is a judgment[57] and cannot be attacked collaterally.[58]

[54a] See Hudson v. R. R. Co., 232 Pa. 278. In this case the plaintiff's evidence was not sufficient to entitle him to go to the jury; but the defendant instead of asking for a non-suit offered testimony which turned out to be favorable to the plaintiff. The court had to submit the case to the jury, and they brought in a verdict for the plaintiff! It is interesting to speculate upon the Supreme Court's action if the defendant had asked for a nonsuit and it had been refused.

[55] Danko v. Ry. Co., 230 Pa. 295.

[56] Adams v. Transit Co., 45 Sup. Ct. 623.

[57] Act of Feb. 21, 1767, 1 Sm. L. 271, and Act of March 18, 1909, P. L. 35.

[58] Hofstetter v. Kaufman, 11 S. & R. 146.

The trial judge probably has the right to enter a nonsuit without being requested to do so by counsel for the defendant. At any rate, it is frequently done. But the judge may not of his own motion enter a nonsuit simply because counsel for the plaintiff is not in court when the case is called for trial.[59]

The plaintiff may suffer a voluntary nonsuit at any time prior to the announcement of the jury's verdict. It is often advisable for the plaintiff's counsel to do this, if he finds that the case is going against him for a reason which would not exist, or could be met in a second trial, as, for instance, if some of his witnesses go back on him, or the defendant develops facts with which he was not familiar and which would prevent a recovery. Counsel may simply announce to the court that he desires to suffer a voluntary nonsuit, and the case comes to an end at once. Neither the entry of a voluntary nor of a compulsory nonsuit will prevent the plaintiff from instituting another suit for the same cause of action if the statute of limitations has not expired. But he must first pay the costs.[59a] In Philadelphia County the new suit must take the same court, term and number as the original one.

It is within the discretion of the trial judge to permit the plaintiff to introduce additional evidence after a motion for a nonsuit has been made.[59b]

If a compulsory nonsuit is entered, the plaintiff should promptly prepare and file *a motion to take it off*.[60] A copy of

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[59] Acts of March 11, 1863, P. L. 76; March 11, 1875, P. L. 6, and March 18, 1909, P. L. 35.

[59a] Henry v. Stock, 20 Dist. R. 981.

[59b] Hastings v. Thompson, 47 Sup. Ct. 424.

[60] This motion should be in the following form:

A B	}	C. P. No. 7.
v.		June Term, 1912.
C D	}	No. 777.

And now, A B, the plaintiff, by his counsel, X Y, moves the court to take off the nonsuit in the above case, and, in support of the said motion, files the following reasons:

1. The learned trial judge erred in entering the said nonsuit.
2. The learned trial judge erred in refusing to admit in evidence (whatever may have been offered), or in refusing to allow the plaintiff's witness, John Doe, to testify (or as the case may be).

X Y,
Counsel for plaintiff.

this motion should be sent to the trial judge, and another copy served on counsel for the defendant. The original may be given to the clerk of the court, who will see that the case appears upon the next motion list. In the argument before the court *in banc* the plaintiff should be prepared with his paper book, containing a copy of the docket entries, the plaintiff's statement and the defendant's affidavit of defense, if any, the motion to take off the nonsuit, and a brief of authorities. If the nonsuit is taken off, the case will go back to its old place on the trial list.

Points for Charge.

Immediately after the close of all of the testimony, any requests which either counsel may have to make to the presiding judge for instructions to the jury on the points of law involved must be handed up. The judge will not ordinarily accept them after the speeches to the jury have begun.[61] These points should be prepared before the trial of the case, although it is always well to leave a blank space for the preparation of any point or points that may develop during the trial, and it is generally customary to end them with a request for binding instructions.[62] When the judge has completed the charge to the jury, he will take up the points submitted and pass upon them. If required by counsel, he will pass upon each one separately. Some judges read all of the points, saying at the end of each, "That is affirmed," or "That is refused," occasionally qualifying his answers. Other judges only read the points which they affirm. This is undoubtedly the better practice. As a matter of fact, jurors do not often seem to pay much attention to the reading of the points, and it

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[61] Everett v. Sturges, 46 Sup. Ct. 612.

[62] They may be drawn in the following form:

A. B.	)	C. P. No. 7.
v.	}	June Term, 1912.
C. D.	)	No. 777.

(Plaintiff's or) Defendant's Points for Charge.

The learned trial judge is requested to charge the jury on behalf of the defendant as follows:

(Make a separate paragraph of each point and number them consecutively.) The last paragraph may be as follows:

Under all the evidence the verdict must be for the defendant.

X Y,
Counsel for defendant.

is to be feared that many counsel prepare their points with a view, solely, of having some ground for an appeal should the case go against them. This cannot be too strongly deprecated. Points should be drawn to assist the judge, and to aid in a correct application of the law, rather than to trap him and becloud the issue. It is proper, and often advisable, to support the points submitted by references to authorities which sustain them.

It is reversible error for the trial judge to fail to read and affirm a proper point on the ground that it was sufficiently covered in his charge.[63]

Closing Addresses.

Immediately after the points are submitted, counsel make their final speeches to the jury. The practice in different counties in this connection is different. For instance, in Chester County there are only two closing addresses,—the first by counsel for the defendant, and the last by counsel for the plaintiff. This matter is regulated by rules of court. In Philadelphia County, the counsel for the plaintiff makes the first speech, is followed by counsel for the defendant, and may then be heard in reply to the points made in the defendant's counsel's address. Only one counsel may speak on either side. If counsel for the defendant makes no address to the jury, counsel for the plaintiff is confined to his first speech. Counsel for the defendant sometimes shrewdly avails himself of this rule, when the plaintiff's counsel has made but little effort in his opening remarks, with the obvious intention of saving himself for his speech in reply. As a matter of fact, however, it may be doubted whether the addresses of counsel have as much effect upon the verdict as they once had, and experience would rather indicate that modern juries will ordinarily be more moved by gratitude to the counsel who is brief than they will be impressed by the oratory of counsel who is eloquent. When the defendant produces no testimony there are only two speeches, the first by counsel for the plaintiff, and the last by counsel for the defendant.

It is not quite correct to speak of counsel for plaintiff hav-

[63] McNess v. Aims, 231 Pa. 386. This decision seems to have been overlooked in Kaufman v. Ins. Co., 231 Pa. 642.

ing the first speech, as the rule is that counsel of the party "having the burden of proof" shall speak first.

There is no time limit to the addresses of counsel, except by rule of court. Ordinarily, this matter is within the discretion of the trial judge.

If counsel is stopped by the trial judge in the course of his address, or is prevented from arguing to the jury in a manner which he believes to be proper, he should except at once to the action of the court.[64] On the other hand, if the opposing counsel believes that unfair arguments or improper remarks are being made to the jury, or that counsel is not confining himself to the evidence in the case, he may, and should, interrupt the address at any time and appeal to the court. If necessary, he may ask to have the remarks placed upon the notes, and take an exception to the judge's ruling thereon. If the judge will not instruct the stenographer to take the remarks down, counsel's only recourse is to write them out himself, or get some one to do it for him, and make an affidavit covering the facts, to be used in the subsequent motion for a new trial or on appeal.

Charge of the Court.

Immediately after the addresses to the jury are concluded, the trial judge instructs the jury on the application of the law to the facts presented. Under the old practice it was imperative for counsel to follow this charge with the greatest care, as an exception was rarely, if ever allowed to the charge as a whole, and as soon as the judge finished counsel had to specify those parts of the charge to which exception was taken. It obviously worked a hardship on counsel who were not expert in taking shorthand notes, as it was very difficult to write down one part of the judge's charge without missing the part that immediately followed.

Now, however, by the Act of May 11, 1911, *exception may be taken to the charge in its entirety.* The second section of the Act seems to require counsel to give the reasons for his exceptions at the time he takes them. It is not clear whether this

[64] Wilkins v. Anderson, 11 Pa. 399.

means that the reasons must be taken down upon the notes, or whether they are merely required, in order to give the judge a chance to correct his charge, if he believes that the reasons advanced by counsel in taking the exceptions are well founded.

Exception may be taken to the charge on the ground that in its entirety it was inadequate, but counsel should ask the trial judge to correct any omissions.[65]

The old practice required that the judge's attention be called to any mistake he may have made in referring to the testimony, immediately at the conclusion of the charge, or no point could be made of the mistake on appeal.[66] It is presumable that these cases are still in effect, and any slips or mis-statements in the judge's charge must be called to the judge's attention by counsel before the jury retire, and if they are not corrected, exceptions must be noted.[67]

The Act of 1911 provides that exceptions may be granted after the jury has retired by leave of court. This must mean that exceptions may be granted at the discretion of the trial judge at any time before an appeal is taken. Just what the legal situation would be if counsel asked for an exception to mis-statements in the charge, after the jury had retired, or after the verdict had been found, when it would be too late, of course, to correct the error, is a matter of some doubt.

However, the safe and proper practice, under the Act of 1911, as before, is to direct the judge's attention, before the jury retire, to any parts of the charge which counsel may feel to be incorrect, or to any omissions in the summary of the evidence, which counsel may believe to be important, and to note on the record separate exceptions, so far as possible, to the different portions of the charge, specifying them, which counsel may believe to be erroneous. Remember, the general rule is that objections not made in the court below cannot be raised on appeal. There may be exceptions to this rule,[68] but they are rare.

[65] Comm. v. Huston, 46 Sup. Ct. 172; Newingham v. Blair, 232 Pa. 511.

[66] Berkley v. Maurer, 41 Sup. Ct. 171; Brown v. Ry. Co., 43 Sup. Ct. 61; Road Co. v. County, 228 Pa. 1.

[67] Howlis v. Hurwitz, 232 Pa. 154.

[68] As in Kelley v. Traction Co., 204 Pa. 623.

If the trial judge affirms a point which is not quite consistent with his general charge, there will be no reversal, unless the appellate court believes the unqualified affirmance affected the verdict. This is in line with the usual rule that error not resulting in injury will not be reversed.[69]

THE RECORD.

It has always been the practice, before the jury retired, to ask the trial judge to direct that the testimony and the charge of the court be reduced to writing and filed. This was necessary, in order to get them in the record. Under the Act of 1911, however, the testimony must be transcribed and filed, whether directed by the court or not, if an appeal is taken, or if either party request the stenographer to do so and pay him for a copy. The Act speaks only of the evidence and does not mention the charge. It is to be presumed that it will be interpreted to include the charge, but the safe practice[70] will be to make the request to the trial judge, as heretofore, when counsel wishes to have the evidence and charge of the court on the record.

When the stenographer's notes have been filed, each counsel will be notified in accordance with the provisions of the Act of 1911, and they then have fifteen days in which to make objection, if they believe any part of the notes to be incorrect. After corrections have been made by agreement or by order of the trial judge, or if no objections have been entered within fifteen days, the transcript shall be certified.[71] It has been the practice in most counties, under rule of court, for counsel to present the transcript to the judge for his signature within ten days after

[69] Jackson v. P. R. R. Co., 228 Pa. 566.

[70] See Harris v. Traction Co., 180 Pa. 184, and Brown v. Pitcairn, 47 Sup. Ct. 413.

[71] The form follows:

I, ..., official steongrapher of the Court of Common Pleas No. ...., of the County of ....., do hereby certify that the foregoing is a true and correct copy of the testimony and charge of the court and the exceptions in the above case.

The foregoing notes of the testimony, with the exceptions taken by counsel during the trial to the rejection or admission thereof of the charge, with the exceptions thereto, have been examined by me and are hereby approved.

.....,
Judge.

the verdict. All the courts have not adhered to this rule. For instance, in Philadelphia it has been the practice of Court of Common Pleas No. 4 for the stenographer to sign his certificate and file the testimony promptly, but for the trial judge not to approve the notes until after a new trial has been refused.

As the charge of the court is not brought on the record except by the direction of the trial judge, and as it is not included in the terms of the Act of 1911, it is quite possible that the old practice must still prevail, in order to get the transcript complete.[72]

The Jury.

Counsel should hand to the jury, before they retire, all documents that have been offered in evidence. The jury may not take out the notes of the testimony with them.[73] But they may take out all papers offered in evidence except depositions.[74] In all cases, except claims for unliquidated damages, counsel for the plaintiff should note on a piece of paper a *calculation of the plaintiff's claim,* with interest to the date of the trial, and give it to the jury. It is the duty of the court to see that this paper is what it purports to be.[75] Counsel should always have this calculation prepared before the trial, and hand it to the jury just before they retire.

As the jury may come back before a verdict is found to ask the trial judge for further instructions, it is well for counsel, in an important case, to keep in touch with the court room, in order that he may be present to see that the matter is properly taken on the notes, with his exceptions, if any.

Verdict.

The jury's verdict must be announced orally in open court. Written memoranda prepared in the jury room have no value.[76]

[72] Either the Act was drafted in ignorance of the case of Harris v. Traction Co., 180 Pa. 184, or the omission of any reference to the charge of the court can only be explained by the conclusion that the Act was drawn without ordinary care.

[73] Comm. v. Wilson, 19 Dist. R. 48.

[74] Alexander v. Janeson, 5 Binn. 238; Parson v. Watson, 4 Phila. 88.

[75] Frazier v. Funk, 15 S. & R. 26.

[76] Luke's Appeal, 20 Dist. R. 30.

When the verdict is delivered, it is the right of counsel to ask for a poll of the jury. But it is too late to move for a poll after the verdict has been announced and recorded.[77]

When the verdict rendered is not quite in the proper form, the trial judge has the power to correct it, and may recall the jury after they have separated for that purpose. Thus, where a jury found a sealed verdict " for —— dollars," it was held proper for the judge to re-assemble them the next morning and send them back to fix the amount.[78] But where the jury seal a verdict which is not in proper shape, and the court sends them back to reform it, and they return with a verdict which is contradictory to their first finding, it should be treated as a mistrial, and the jury discharged.[79]

If the twelve jurors sign a sealed verdict, and one is too sick to be present when it is delivered in open court the next day, the verdict is good.[80]

The trial court has no power to make a substantial correction in a verdict, or to do anything more than mould it into proper form.[81]

By the Act of April 6, 1859,[82] interest runs upon a verdict from the date it is entered.

If the verdict is excessive the appellate court may reverse on this ground.[83] Likewise the trial court may set it aside, or may reduce it. It is the duty of the trial court to control the amount of the verdict, and the appellate court will not interfere with its discretion.[84] A perverse verdict should be set aside, even if it is the third or fourth trial of the case.[85] Sometimes the trial court will make a conditional order, imposing terms on either

[77] Rettmund v. P. R. R. Co., 225 Pa. 410.

[78] Columbia Co. v. Atlantic Co., 43 Sup. Ct. 367; Blake v. Hunsberger, 46 Sup. Ct. 32.

[79] Beecher v. Newton, 46 Sup. Ct. 44.

[80] McDonald v. Burough, 20 Dist. R. 109.

[81] Iron Co. v. Construction Co., 226 Pa. 445. In Comm. v. Huston, 46 Sup. Ct. 172, however, the trial judge was allowed to go very far in reforming the verdict.

[82] P. L. 381.

[83] Act of May 20, 1891, P. L. 101.

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

[85] Sloan v. Ry. Co., 231 Pa. 332.

or both parties, as, for instance, that a new trial will be granted unless a smaller amount is accepted. This is a proper exercise of the court's discretion.[86] In one case the Supreme Court followed the same practice.[87] If the lower court enters an order granting a new trial unless the plaintiff accepts a reduced verdict and is paid the same in ten days, if the plaintiff is not paid in the time specified, judgment may be entered for the full amount.[88] The verdict of a jury is not assignable for error.[89]

If the verdict is for less than one hundred dollars, there can be no recovery for costs, unless an affidavit had been filed before the suit was instituted stating that the plaintiff believed the damages to exceed that amount. The sworn statement of claim is not such an affidavit. The proper practice in such a case is for the defendant to enter a rule for judgment without costs, and have the same made absolute.[90] The rule applies equally to judgments entered and verdicts taken by agreement of counsel.[91]

Bills of Cost.

After the trial is concluded, a bill of costs (blanks may be procured at any law stationers), showing the names of the witnesses who attended, the days in which they were in attendance, the miles traveled, if any, and the number of subpœnas served, should be prepared at once and filed, and a copy served on the other side. In Philadelphia County this must be done within four days after the trial. The party filing the bill must sign an affidavit stating that the witnesses were actually present, and that they were material witnesses. The affidavit must be made by a party and not by an agent.[92]

If the bill is incorrect, the opposing party may file exceptions within four days, and the matter must then be heard before

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[86] Wirsing v. Smith, 222 Pa. 8.
[87] Osterling v. Carpenter, 230 Pa. 153.
[88] McLoughlin v. Kelly, 230 Pa. 251.
[89] Bank v. Hazard, *supra.*
[90] Bank v. Hill, 19 Dist. R. 805; Dengler v. Spear, 20 Dist. R. 690.
[91] Trajanowski v. Ins. Co., 20 Dist. R. 743.
[92] Law v. P. R. T. Co., 20 Dist. R. 783.

the prothonotary within forty-eight hours. As usual, local rules of court govern upon this point.

New Trial.

Motions for new trials must be made promptly (in Philadelphia within four days) after the verdict.[93] A copy of the motion should be furnished to the judge and one served on the opposing counsel. The case will appear upon the next new trial argument list, at which time counsel asking for the new trial should be ready with his brief, containing a copy of the docket entries, statement of the facts, copy of the declaration and the affidavit of defense, if any, and brief of law.

The refusal of a motion for a new trial is not assignable for error.[94] There is, of course, no exception either to the granting or the refusal of a new trial. Under the Act of 1911,[95] no exception is necessary to any decision of the court which appears of record. It is within the power of the court to order a new trial of its own motion.[96]

Under the Act of May 20, 1891,[97] the appellate court has the power to review the action of the court below in refusing to grant a new trial because of an alleged excessive verdict. It is difficult to see how this question could be raised on appeal if the action of the court in refusing a new trial is not assignable for error. As a matter of fact, however, the power is so seldom

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[93] The motion may be made in the following form:

A B	}	C. P. No. 7.
v.		June Term, 1911.
C D.	}	No. 777.

Motion and Reasons for a New Trial.

And now, ..., the defendant, moves for a new trial and assigns the following reasons in support of his motion:

1. Because the verdict was against the law.
2. Because the verdict was against the evidence.

(Note in separate paragraphs, numbering them consecutively, each reason, including rulings of the trial judge on the admission of evidence, points for charge, &c.)

X Y,
Attorney for defendant.

[94] Weitz v. Banfield, 226 Pa. 241.

[95] P. L. 279.

[96] Comm. v. Endrukat, 231 Pa. 529.

[97] P. L. 101.

exercised that the question is not one of great practical importance.[98]

JUDGMENT.

Judgment may not be entered on a verdict without special order of the court until the sum of four dollars required by the Act of Assembly of March 29, 1805, shall be paid by the party for whom the verdict is given, and the judgment shall be dated on the day it is entered. No judgment can be entered, of course, until after the motion for a new trial or judgment n. o. v. has been acted on by the court. If the judgment has been for the defendant, and the plaintiff wishes to appeal, he should enter the judgment himself and pay the jury fee.

JUDGMENT N. O. V.

Under the Act of April 22, 1905,[99] if a point requesting binding instructions has been reserved or declined, the party presenting it may, within the time prescribed for moving for a new trial, file a motion for judgment notwithstanding the verdict.[100] If the motion is granted by the court, the judgment is then entered by the court itself, and does not have to be entered

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[98] Road Co. v. Cumberland Co., 225 Pa. 467; Bank v. Hazard, *supra*,

[99] P. L. 286.

[100] Such motion may be in the following form:

A B	}	C. P. No. 7.
v.		June Term, 1912.
C D.	}	No. 777.

And now, C D, the defendant, moves the court to have all the evidence taken upon the trial of the above case duly certified and filed, so as to become part of the record, and for judgment *non obstante veredicto* upon the whole record.

X Y,
Attorney for defendant.

In some counties, as in Chester, this motion takes the form of a rule allowed by the judge, as follows:

And now, to-wit, ..., on motion of X Y, attorney for defendant, a rule is hereby granted in the above stated case to show cause why judgment should not be entered for the defendant notwithstanding the verdict returnable.

By the court.

....., Judge.

This rule will be signed by the judge at side-bar or in chambers and the matter will then be heard on the next new trial argument list.

by counsel. The plaintiff may, of course, file such a motion as well as the defendant, although such cases are rare.

By the Act of April 20, 1911[101] a similar motion may be made when the jury have disagreed. The procedure would be the same, though naturally the words *non obstante veredicto* would have to be omitted. The court may order a new trial, or enter judgment.

Both a motion for a new trial and for judgment n. o. v. may be made together, and they will be heard by the court at the same time.

Discontinuance.

A discontinuance in strict law must be by leave of court, but it is the practice to assume such leave in the first instance.[102] Ordinarily a plaintiff may discontinue a suit and bring another at any time before the statute of limitations has run. This is done without application to the court by having the prothonotary write on the docket, "This suit is discontinued" and signing as attorney for the plaintiff. The costs, including an attorney's fee of three dollars for the attorney for the defendant, must be paid at the same time. The new suit will then take the same court, term and number as the old one. A new writ must be issued and new statement, &c., filed.

In a second suit, on the same cause of action, the fact that the first suit was discontinued without the defendant's knowledge or consent is no defense. If the discontinuance was improperly or illegally entered, the defendant should apply to the court to strike it off.[103]

If a case is settled, the plaintiff may send to the defendant an order[104] under which the defendant will have to pay the pro-

[101] P. L. 70.

[102] Consolidated National Bank v. McManus. 217 Pa. 190.

[103] Lindsay v. Dutton, 217 Pa. 148.

[104] This may be in form as follows:

A B v. C D.	}	C. P. No. 6. June Term, 1912. No. 666.

Prothonotary, C. P.

Mark the above case discontinued, settled and ended upon payment of prothonotary's costs only.

X. Y.
Attorney for Plaintiff.

thonotary's costs, but will not, of course, receive the counsel fee which is collected by the prothonotary from the plaintiff when a suit is merely discontinued. If the order simply says, "mark the above case discontinued and ended," the defendant is entitled to receive his fee and his costs. Such an order is usually entered by the plaintiff's attorney himself upon the docket, and of course before the prothonotary approves the order with his initials the plaintiff must pay the costs that are due. When the word "settled" is used the defendant receives no costs or fee, otherwise he does, unless the order read "upon payment of prothonotary's costs only." These statements apply equally where there has been a verdict and judgment and the defendant has paid the judgment or otherwise settled the case. As a rule the plaintiff will send to the defendant a statement of the prothonotary's costs, together with the amount of the judgment and interest. When the amount is received the plaintiff will then himself mark the judgment satisfied upon the docket or send the order to the counsel for the defendant.

If the defendant has been successful in the suit, an order should be filed just the same, as the costs constitute a judgment against the plaintiff and a lien against his real estate. The defendant may recover his costs by an execution (*fi. fa.*), and the prothonotary may recover his by suit.

Henry B. Patton.

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