REMARKS OF COUNSEL.

IMPROPER REMARKS OF COUNSEL.

The function of a trial is to deposit in the minds of jurors certain beliefs as to facts. These beliefs may be produced by the assertions of witnesses and others; and the receptivity of the jurors' minds to them, and to the inferences to be drawn from them, may be affected by manifestations of the attitude of judge or counsel. Certain facts are irrelevant, and for that reason to be excluded from consideration. Certain facts are not merely irrelevant, but otherwise prejudicial to a party. They may seem to the jury to have a significance which they in fact do not have. They may expose a conduct or a character of the party which estranges sympathy; which even awakens repulsion and dislike. The witnesses are not the only persons who make assertions and express appreciations and feelings before the jury. The attorney who manages the case for one of the parties, calls witnesses, states what he offers to prove by them, formulates questions to them, debates before the court the admissibility of proposed pieces of evidence, discusses questions of law, makes formal addresses to the jury, has various opportunities of affecting their minds, of some of which he may legitimately, but of others only illegitimately take advantage. In vain would be the rules of evidence, in vain, indeed, the rules of substantive law, if counsel could not be obliged to observe the bounds of decorum and propriety while exercising the great influence insep-

1As to the judicial character of the district attorney, see Com. v. Nicely 130 Pa. 270; Com. v. Bruner, 11 Pa. CC. 428.

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arable from their function. We shall in this paper, deal with the manner in which advocates may be compelled to maintain a just demeanor.

THE PLAINTIFF'S OPENING.

The counsel who, in a civil or criminal case, makes the address introductory of the evidence, may abuse his opportunity by making assertions beneficial to the party or detrimental to the opposite party. He may state, e.g. in a murder case that he will prove, _inter alia_ that other persons than the deceased for whose killing the trial proceeds, disappeared and were killed by the defendant, when he has no expectation of being able to do so, or of being permitted to do so. Possibly exception might be taken, immediately upon the remark's being made, but an exception not taken until, the evidence being offered, proof of the disappearance and killing of these other persons is proposed, and the court excludes it, will be too late. Two reasons have been assigned for the conclusion; (1) there is no method by which an exception could be sealed days after they were made to remarks of the district attorney; and objection should have been made at the time. (2) To allow an objection to the statement by the district attorney of what he was going to prove, would require the trial judge to anticipate the course of the trial, and decide on the admissibility of evidence in advance of its being offered. However, there may be cases in which objection can be made to remarks in the preliminary address, cases of injurious misrepresentations and unfair attack.

THE DEFENDANT'S OPENING.

The preliminary address of the counsel for the defendant is similar in purpose to that of the counsel for plaintiff. It is to indicate how the defendant expects to meet the case made for the plaintiff. Counsel may honestly expect to prove a certain fact; and may, when time for proof comes, find himself unable to make it, or the court may exclude the offer to prove it. Nothing reprehensible will have been done. But, doubtless the counsel may in other ways offend against fairness and propriety, and the opposite party will when he does so, be entitled to redress. He may: e. g. misrepresent important evidence already given by the plaintiff. He may say of a certain person, not the plaintiff, that

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^Com. v. Mudgett, 174 Pa. 211, 256. Several days intervened between the remarks of the district attorney and the exclusion of the evidence and request for an exception to the remarks.
he was a man of bad temper and abusive; although positive evidence of that fact had not been given. He may say that this person had done a certain dishonest act, of which there had been no evidence, and which is irrelevant.  

THE PLAINTIFF'S ARGUMENT AFTER THE EVIDENCE.

It is in the argument of the plaintiff, or in a criminal case, the prosecuting attorney, that remarks of an objectionable sort are likely to be found.

THE DEFENDANTS.

The defendant's counsel in addressing the jury may make statements of fact not supported by any evidence, and the verdict may subsequently be for the defendant.  

IMPROPER REMARKS AS TO WEALTH OR POVERTY.

It can rarely be relevant that the plaintiff is poor, or that the defendant is rich. Such a fact may tend to incline the jury less scrupulously to consider the facts, and to heed the court's instruction concerning the law. To prove the fact therefore would be inappropriate. For an advocate to assert the fact without proof, is more reprehensible. It is improper, in a civil case, to tell the jury that the plaintiff is a poor widow, that he is a poor working man, while the defendant is the richest man in the county, that he is poor. In an ejectment in which the controversy was as to the location of a line, defendant's counsel said in his address to the jury that the plaintiff represented one of the richest families of the valley, one of whom lives in a castle on River street. He referred to the defendant as "a man in poverty who has nothing except his little farm he bought 53 years ago." The court below declined to interfere. The supreme court refuses to reverse, saying that allusions to wealth or poverty "are proper when they are made in a spirit of fairness, and for the purpose of stimulating the jury to a careful discharge of their duty." In an action for compensation by the housekeeper of the decedent, counsel for plaintiff, in discussing the admissibility of evidence as to the extent of the estate of the decedent,

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4 Myers v. Devens, 2 Kulp, 312; 1 Del. 448.
5 Id.
6 Carpenter v. Lancaster 22 Lanc, 339.
7 Moore v. Neubert, 21 Super. 144. The action was trespass for the deprivation of water.
stated that he wanted to show him worth $150,000, etc. The court refused to withdraw a juror.  

**FAILURE OF DEFENDANT TO FURNISH EVIDENCE.**

Occasionally the prosecuting counsel in a criminal case, refers to the fact that the defendant has not testified. The 10th section of the act of May 23d, 1887, directs that the neglect or refusal of the defendant to testify shall not be "treated as creating any presumption against him or be adversely referred to by court or counsel during the trial". The forbidden reference need not be in the formal address of the district attorney. In a murder case, the defendant offered to prove, by another person, that his physical condition at the time of the killing with an axe was such that he could not have caused it. The district attorney, in objecting to the evidence, stated that the rule required the best evidence, which would be that of the defendant himself, he being a competent witness. The defendant being convicted, a new trial was granted. "The prohibition" says the court, "does not apply merely to addresses made in summing up. The law strictly enjoins against any comment or reference during the trial".  

But, since the wife of a defendant may testify for him, and since no statute forbids a reference to his failure to call her, it is not wrong for the district attorney to remark upon his failure to call her.

**REFERENCE TO DECISIONS.**

At the second trial of assumpsit the former judgment in which had been reversed by the supreme court, counsel for the plaintiff for whom the verdict subsequently went, stated in his argument, that the reversal of the former judgment was not unanimous. This, said the court, "to use the mildest term, was unseemly. The record of a court of record, as every lawyer is presumed to know, is the only evidence of its proceedings; no statement dehors the record is permitted to impeach it." The court also complains that its judgment was being submitted for review to the jury, its weight to be determined by the unanimity or want of unanimity; and that the court did not rebuke this method of trial. "We think it better to adhere to the consti-

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9Thompson v. Stevens, 71 Pa. 161  
tutional mode of trial, which certainly does not recognize the jury as a court of appeals from our judgments.'

"Reference by counsel of plaintiff to a former trial of the same case, resulting in plaintiff's favor, and also to the award of arbitrators in his favor, is improper." Reference may be made by an offer of evidence. An action had been brought by A against a traction company, for injuries arising from falling into a hole in a bridge. The judgment on a verdict for $6000 having been reversed, A sued the township for the same injury. Her counsel offered to prove the former verdict of $6000, the reversal by the supreme court, on the ground that not the traction company, but the township, was bound to keep the bridge in repair. For reference, in his opening argument to the jury, by the plaintiff's counsel, in an appeal from the justice of the peace to the fact that the justice had decided for the plaintiff, the appellate court will reverse a judgment for him. In an action for negligence counsel for plaintiff referred to a verdict in another case. Sharwood J. discharged the jury from further consideration of the case.

CRITICISMS OF THE TRIAL JUDGES.

Criticisms by counsel of the views of the law expressed by the trial judge, in the trial are improper. "No verdict rendered in view of any criticism of the legal opinions announced by the court on the trial, or in the charge, or in view of any comparison of the merits of the judge upon the bench with those of any of his predecessors, would be suffered to stand till the ink that records it should be dry."'

USING PICTORIAL CARICATURES.

In a case for criminal conspiracy, for conspiring to prevent certain miners from working for X, counsel for the commonwealth, in his argument to the jury, exhibited a copy of "Puck", containing an illustration representing a laborer and his family seated about a table, in the center of which was a porridge dish, from the bottom of which were tubes leading to the mouths of

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12Phila. Trust, etc. Co. v. P. & E. R. R. 177 Pa. 38, There was a reversal, but for other causes.
13Jones v. Cleveland, 8 Kulp, 461.
16Stern v. Germantown, etc. R. way Co. 28 Leg. Int. 30.
17Newman v. Com. 8 Sadler, 127.
certain figures under the table, designated as “walking delegates”, “agitators”. The supreme court could not say that the court was wrong in permitting this.

ACCUSING DEFENDANT OF IMPROPERLY INFLUENCING WITNESSES

If in a personal injury case against the Pennsylvania Railroad, the counsel for plaintiff, without evidence to justify it, says, “They,” the defendants, may bully the venal, but the day has come when they must cease the attempted system of terrorizing witnesses who swear against them” and “if ever corruption was resorted to in a case, this is the case” this may make it the duty of the court to withdraw a juror.

ATTACKING CHARACTER OF DEFENDANT.

An allegation that the character of the defendant in a murder case is bad, because he has furnished no evidence of good character, is improper. No inference can legitimately be drawn from the non-production by the defendant of evidence of good character. The district attorney stated in his final argument, that evidence of good character had no bearing on the question, and its introduction was for an improper purpose. There being no evidence of good character offered by the defendant in a murder case, the district attorney in the closing address said, the defendant had passed through town on a trip for plunder, that he had no taste for anything else than crime, that he was a reprobate who had never done a right thing in his life, that he had dedicated his name to the evil which he followed. But a casual reference to a former conviction, made by the district attorney, but which, in the court’s opinion, could not hurt the prisoner, was not cause for a new trial.

MISCELLANEOUS STATEMENTS.

In a liquor case, the district attorney stated in his final address, nothing brings into disrepute courts of justice more than

18Linderman v. Linderman, 7 Woodw. 60.
21Com. v. Smith, 2 Super. 474. No reversal because record did not show error in the court.
23Com. v. Hanlon, 8 Phila. 423. But the court alludes to the omission to call the attention of the court to the improper remark, at the time, and to the taking the chance of a favorable verdict. The court says that had the district attorney orally offered to prove the former conviction of the defendant, the court would neither discharge a juror nor grant a new trial.
what has been done [by the defendant] in this case; no court in christendom or heathendom ever held such sales [by a club] to be legal; every citizen in Monongahela, if he wanted, could go to this bar every day in the year, and obtain liquor. We have a bar here open Sunday, Monday, or any other day. If defendant had had time to go back to Germany, and the trustees [of the club] were here, there would be no testimony about sales of liquor by trustees..

TENDING TO INDUCE LESS THAN DUE RESPECT FOR DEFENCE.

In a murder case, the district attorney, referring to the defence of insanity, offered by the defendant, told the jury that they could not make any mistake in convicting, because if the prisoner was insane, the governor, the court and himself would secure a commission to inquire into the facts, and would see that no injustice was done. At the argument of the motion for a new trial he admitted that this language was calculated to affect the minds of the jurors, and he joined in the request that the verdict be set aside. It was set aside for this and other reasons. Language which intimidates the jury should not be indulged in. In a suit for injury resulting from a defective sidewalk, the plaintiff's counsel told the jury, in his final speech, "If you can find from this testimony, that this walk was good, we will have this testimony engrossed and put your names to it and hang it up in the court house, and call the attention of every person to it and say to them that that is the kind of walk you must have and that kind of a walk you must walk over." In these foolish words, the superior court thought that it discovered intimidation and therefore, that a juror should have been withdrawn. In his opening the district attorney said "I have no doubt what the opinion of those jurors was, who were challenged because of their opinion." In his address to the jury in a personal injury case, the injury arising at a crossing, the counsel for plaintiff said, the crossing "was a death trap put there by these men for the pur-

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24Com. vs. Smith, 2 Super, 474. The court did not reverse because the record did not show improper conduct on the part of the court.
26McCloskey v. Dubois Borough, 4 Super. 181.
27Com. v. Windish, 176 Pa. 167. No reversible error because the attention of the court was not called to it until just before verdict, on a motion to withdraw a juror. The court had had no chance to admonish the jury, or obtain a retraction of the district attorney. The remark also was not on the record.
pose of taking the lives of their fellow men." In an action for personal injury, from a jolt arising from a derailment of a car in which plaintiff was a passenger, his counsel in a closing address, said there were accidents after accidents on the road and it was time the public should be protected against this company. In a personal injury case, plaintiff's counsel stated in the closing address, that defendant had admitted that damages to the extent of $9,000 or $10,000 had been sustained.

ASSAILING CHARACTER OF WITNESSES WITHOUT EVIDENCE.

Saying of a witness, without evidence, that he is "bumming around town," the dollar he expects to get is the only dollar he has earned in many a year; calling the defendant's (a railroad) detective a ghoul with a human face but the heart of a beast; saying of two witnesses, that "they are lying with the hope of being paid for their dishonest and dastardly service. These two infamous persons should be avoided" will be cause for withdrawing a juror.

PRODUCING BIAS FOR PLAINTIFF.

In an action on a promissory note, the counsel for plaintiff reminded the jury that she was before them in the garb of her religion, and that it was for them to consider her appearance. In an action for personal injuries from defective sidewalk against the city, the counsel for plaintiff said to the jury "the lot owner is finally liable, and the Lehigh and Wilkes-Barre Coal Co. owns the lot". A verdict and judgment for the plaintiff was reversed. In a murder case, charging defendant, without evidence, with having tried to obtain for improper purposes, the marriage certificate of his wife, daughter of the deceased. In the same case predicting that, when convicted, the defendant will confess before he goes to his God, that what he said was false.

MAKING STATEMENTS NOT SUPPORTED BY ANY EVIDENCE.

When the counsel makes statements of facts, useful to his client, which are not in evidence, he commits a wrong e.g., saying

32 Groff v. Groff, 21 Lanc. 137. Some slight latitude must be allowed to counsel, said the court, or no verdict could stand.
that the averments in the plaintiff's declaration, were those of his counsel and not his own. In an appeal from a jury of view to assess damages for the widening of a street, counsel for the plaintiff, in his final address, referred to the fact that sewering and paving would likely be done at the expense of the plaintiff, and stated what, in his opinion, the probable cost would be, although no evidence on these points had been given. In an action of trespass by A, for the sale to him, when intoxicated, of liquor, his counsel stated, in the final argument, that defendant's selling liquor to plaintiff caused the ruin of the home of his mother; that on the night of the sale in question, defendant closed his saloon at 12 o'clock, the evidence being that it was closed at 11.10 o'clock.

EXPERIMENT.

In his closing address, the plaintiff's counsel presented an illustration of a physical fact. The jury, says Green J. simply saw the natural and self evident fact that a column of water higher than another, of the same circumference, will discharge itself with more force than a lower column. The counsel might have argued that such is the fact, and therefore he could show the actual occurrence. "It was an illustration merely and not an experiment" concludes the justice, with astonishing shrewdness.

ESTABLISHING THE FACT THAT THE REMARKS WERE MADE.

The court may hear and remember the remarks, and, its attention being called to them it may administer redress. But it may not hear, being preoccupied with the writing of a charge or otherwise. Or, having heard, it may not, when it is appealed to by the aggrieved party, recollect the remarks. If it does not recollect them, and they are not otherwise established, the court cannot withdraw a juror, or grant a new trial. That they were

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36Wallace v. Railway Co., 52 Pitts L. J. 190.
37Buchanan v. City of Chester, 9 Del. 328. The court refused a new trial, remarking "The address was well calculated to produce a verdict to the fullest amount justified by the evidence but I cannot say that it transgressed the bounds of a proper discussion."
38Littell v. Young, 5 Super, 205.
39Hoffman v. R. R. Co. 143 Pa. 503.
40Myers v. Devens 2 Kulp, 317. In Szuchy v. Lehigh Traction Co. 12 Luz. Leg. Reg. 123, the remarks not having been objected to at the time nor taken down, the court said it could not now say what they were, and refused a new trial.
made may be proved by the admission of the counsel. In Walsh v. Wilkes-Barre" at the close of the discussion to the jury, the defendant's counsel filed an affidavit, averring that the plaintiff's counsel had said so and so, and asked that a juror be withdrawn. The court appealed to the plaintiff's counsel and asked whether he admitted having made the statement. He replied "yes sir". This was sufficient to require the court to continue the case. The court is chary of receiving the affidavits of persons, as proof, or the alleged stenographic notes of a person privately employed by the complaining counsel. Nevertheless, the affidavit of opposing counsel has been occasionally employed, and the court has been held obliged, perhaps because the counsel whose words were impeached, has not denied the affidavit, to take notice of the improper words thus proved. But, if under an order of the court, the court stenographer takes notes of the remarks of counsel, those notes may be relied on by the court, as evidence that the remarks were made. Indeed it is said that the party has a right to have the stenographer enter upon his notes any objectionable remarks made by the opposite counsel on the argument. In a prosecution for burglary an affidavit of counsel for defendant charging the utterance of certain remarks by the private counsel of the prosecution, was filed. The court declined to certify to the correctness of the statements in the affidavit of the language used. Rice, P. J., said it may be questioned whether the remarks could be put on the record by an exception after the trial. But the refusal of the judge to certify to the correctness of the affidavit requires the overruling of the assign-

61215 Pa. 226. In Wagner v. Hazle Township, 215 Pa. 219, the record showed a request to withdraw a juror because of a remark of the plaintiff's counsel which is stated by the asking party. It was made in an offer of evidence.

62In Com. v. Weber 167 Pa. 153, the remarks of counsel were taken down by a private stenographer. The counsel impeached denied that he made them as taken down. The stenographer was examined under oath, but did not testify with positiveness as to the accuracy of his notes. The supreme court censures the employment of a private stenographer, and using his notes not in the court below, but on appeal.

64Henry v. Huff, 143 Pa. 548. It is said to be the duty of counsel as soon as the opposing counsel makes improper remarks in his argument to call the attention at once, of the court to them. "Then the words can be taken down by the official reporter, and be made the subject of ruling by the court, and review here." Com. v. Weber, 167 Pa. 153.
ment of error, based on the improper remarks of counsel.\textsuperscript{46}

THE AVAILABLE REMEDIES. REMARKS NOT SUFFICIENTLY NOXIOUS.

The remarks objected to, may be considered by the court to be innocuous in themselves\textsuperscript{46}, to have been made so by qualifying remarks of the party, by the discussion of parties or by the admonitions of the court to the jury. A statement by counsel for defendant that a certain person [not the plaintiff] had taken $4000 dishonestly in a certain negotiation, was, said the court, "entirely outside the case and ought not to have been made. But we are not satisfied that it tended to prejudice the minds of the jurors." * * * the jury could not help seeing that his dishonesty, whether proved or not, had nothing to do with the case\textsuperscript{7}.

In Henry v. Huff,\textsuperscript{48} the opposite counsel [the plaintiff's] in discussing the case before the jury, explained so fully and distinctly, the irrelevancy of the observation complained of, and the court so fully cautioned the jury, as to have satisfied the court that the withdrawal of a juror, or other interference was made unnecessary. It refused a new trial, and the supreme court did not reverse for this reason. Plaintiff's counsel having in the closing address, stated a fact as of his own knowledge, of which there was no evidence, defendant's counsel immediately objected. The plaintiff's counsel when stopped and corrected by the court, apologized for his action, admitted his error, and told the jury that he had no right to make the statement, and that they should disregard it. The court, thinking an injurious effect prevented, allowed the trial to proceed. It saw no reason for granting a new trial\textsuperscript{6}. An observation as to the poverty of the plaintiff and wealth of the defendant having been made by plaintiff's counsel, the counsel for defendant asked the court to

\textsuperscript{46}Com. v. Church, 17 Super. 39.
\textsuperscript{46}Buchanan v. City of Chester, 9 Delaware 328; Groff v. Groff 21 Lanc. 137. If counsel for one party states what X, if he could have testified would probably have said, he thereby justifies statements by the opposite council, of his opinion as to what X would have said. Wallace v. Railway Co. 52 Pitts. Leg. J. 190.
\textsuperscript{7}Myers v. Devens 2 Kulp, 312, Rice P. J. A new trial was refused to the plaintiff.
\textsuperscript{6}143 Pa. 548.
\textsuperscript{6}Ruddy v. Ruddy, 5 Kulp, 123. Rice P. J., said a new trial should be allowed only when the court has reason to fear that the injurious effect of counsel's remark "was not wholly destroyed." Cf. Dougherty v. Railway Co., 213 Pa. 346.
withdraw a juror. The court refused, saying it would explain that to the jury. In its charge, it said the reference of plaintiff's counsel was improper, but that it felt that the jury could decide the case without being influenced by such a consideration; and admonished them to free their minds from consideration of the financial standing of the parties. The superior court unable to say that defendants had suffered any injury in view of the modest verdict ($50.00) and of the language of the court at the beginning of the charge, refused to reverse. In a murder case, private counsel for the commonwealth, had said there had been false swearing on one side or the other and when the jury had found out on which side it was, they would have banished the last shade of the last glimmer of the last shadow of a doubt. He also said "this trial will go very far to show whether every merchant or mechanic is to be safe from masked villains." When the court was about to charge the jury, it was asked by defendant's counsel to rule on these remarks. Of the second it said "This flight of oratory must not have any effect upon the jury," and as to the first it said "Mr. Cessna always makes that remark in criminal cases. In view of the remarks made by adverse counsel, this needs no correction." It was held that there was here no cause for reversal.

COURT ADMONISHES JURY TO DISREGARD.

The mischief that improper remarks would tend to produce, may be averted by the subsequent retraction before the jury of the remarks by the counsel making them; or by the direction of the court to disregard them, with expression more or less strong, of disapprobation of the making of them. In a murder case, the district attorney had in the final address made observations not supported by the evidence; that defendant knew that there was to be beer at the house of the murdered man, that night; and that he had ran away from his own family and was lying up at the house of deceased. These statements were subsequently withdrawn and corrected by the district attorney in the presence of the jury, and "the charge of the court fully protected the prisoner's cause from any injury it might have received from the inadvertent remarks of the district attorney". Hence it was

51Com. v. Nicely, 130 Pa. 261. [See remarks about the district attorney or his substitute being a judicial officer.]
not error for the court to decline, though requested by the defendant’s counsel, to withdraw a juror. *If an opportunity is given to the defendant’s counsel to reply to the district attorney’s speech and to point out any mistatements in it, this may be a sufficient corrective. The counsel for plaintiff, while addressing the jury, read an extract from a minute book. The defendant’s counsel objected to the reading of the extract, or to commenting upon it, because it had not been read to the jury as evidence. The court charged the jury to take notice of such parts of the book only as had been read to them.

WITHDRAWING JUROR.

In cases in which the remarks are not retracted or cannot be so retracted as to abolish their effect on the jury; in which no order of the court, no advise to the jury, will probably obliterate the improper impressions in the minds of the jurors, the only available remedy is to prevent the jury’s deciding the case by withdrawing a juror, or, having allowed it to return a verdict, to set the verdict aside. In an extreme case, the court may of its own motion, withdraw a juror, but ordinarily it will not do so, unless the party affected adversely by the remarks complained of requests the court so to do. Its refusal in a proper case to grant the request is a reason for reversal. A juror was withdrawn, for allusion by the district attorney, to the omission of the defendant to testify for himself.

ARRÊST OF JUDGMENT.

In a criminal case, larceny and receiving stolen goods, objectionable remarks were made in his closing address by the di-

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52 Com. v. Greason, 204 Pa. 64. The court may when its attention is directed to the improper remarks of the district attorney (a murder case) determine “whether the line of remarks shall continue, be modified or discontinued altogether, and whether any explanation or correction of what has been already said shall be made.” Com. v. Windish, 176 Pa. 167.

53 Com. v. McMahon, 14 Super. 621, malicious burning.

54 Manchester v. Reserve Township 4 Pa. 35. Plaintiff alleged the instruction as error in the supreme court. The court said that if plaintiff was surprised, he might have asked the court to withdraw a juror.

55 Hale v. Hale, 32 Super. 37. The principle was here applied to improper remarks of the plaintiff as a witness.

56 Com. v. Draper 2. Chest. 424. A new trial was granted for the same cause in Com. v. Holtham, i Lack. L. N. 370, after the court had declined to withdraw a juror, and had instructed the jury not to consider the omission of defendant to testify.
strict attorney. No objection was made to them, they were not taken down by the official stenographer. The court was not asked to do anything with respect to them. After the verdict of guilty they were for the first time complained of in a motion in arrest of judgment. The motion was refused. 

-GRANTING NEW TRIAL.

If the court thinks that the improper remark tended wrongly to influence, and therefore may have wrongly influenced the verdict, and that the complaining party, the defendant usually, was not guilty of laches in not seeking redress at the time, it may not having withdrawn a juror, but allowed the verdict to be reported to the court, award a new trial if new trial was refused because plaintiff failed to make immediate objection, when defendant’s counsel improperly stated, what defendant had told her counsel concerning the declarations of her husband in his lifetime. No error is committed in stating in an opening address, before the evidence is given, what the party expects to prove, if made in good faith, although the court subsequently, when the evidence is offered, rejects it. A new trial was granted, when the remark of the district attorney, probably produced induced the verdict, when he admitted it did, and joined with counsel of defendant in asking for a new trial. Probably in every case a new trial will be granted when the district attorney, in violation of the statute makes observations on the failure of the defendant to testify for himself, or when he without evidence, represents the character of the accused to have been bad or refers to previous convictions. A new trial was refused, although a reason assigned for a new trial was, that defendant’s counsel falsely asserted to the jury that plaintiff’s case consisted of towers of falsehood, and that plaintiff’s counsel, who was also his chief wit-

57 Com. v. Livingston, 5 Dist. 666.

58 Com. v. Bruner 11 Pa. C. C. 428. There was no request here to withdraw a juror, nor apparently any exception to the remarks made at the time.

59 Myers v. Devens 2 Kulp 312. The court also did not remember that the remarks had been made, and there was no record of them.

60 Myers v. Deverns 2 Kulp, 312.

61 Com. v. Smith, 10 Phila. 189.


63 Com. v. Hanlon 8 Phila. 423. But, when allusion to a previous conviction is incidental and vague, and the court thinks it could not have injured the defendant a new trial will not be granted.
ness, was unfriendly to the defendant and that the court erred in not rebuking and in not permitting plaintiff's counsel to rebuke the defendant's counsel, and for these remarks. The stenographer's notes revealed nothing of the matter complained of, or of a request to the court to rebuke the offending counsel.

GUAGING EFFECT.

Sometimes as reason for withdrawing a juror, or setting aside of the verdict, either by the trial or the appellate court, is stated that the effect of an improper remark cannot be extinguished. "It is one thing," says Orlady, J. "to prevent the entry of an influence into the mind, and quite another to dislodge it; as well might one attempt to brush off with the hand a stain of ink from a piece of white linen; one in the very nature of things, is just as impossible as the other." But in other cases, the corrective effect of retraction by the offending counsel, of admonition by the court is recognized as sufficing to justify the permitting of the verdict to stand. Of a remark which "ought not to have been made," Rice, P. J. said, on a motion for a new trial, "we are not satisfied that it tended to prejudice the minds of the jurors." Allusions to the wealth or poverty of parties, to the strength of corporations and the helplessness of individuals, are proper when made with fair spirit and for the purpose of stimulating the jury to do its duty; but when made for the purpose of inflaming prejudices, they are improper. The trial judge must exercise a discretion.

WHEN OBJEETING PARTY HAS TAKEN CHANCES.

One of the remedies which the defendant has, when improper remarks are made by the counsel for the plaintiff, is to ask the court to withdraw a juror and to continue the case. This saves him from a verdict which might be tainted by the improper influence. It also punishes the plaintiff for the sin of his counsel, a kind of vicarious suffering not infrequent in the administration of the law. If a party neglects to call the attention of the court to the improper remarks of counsel, and ask for the continuance

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64 Connellee v. Zeigler 16 York, 169.
67 Myers v. Devens, 2 Kulp, 312.
of the case, he takes the chance that the verdict will be favorable. Having done so, should the verdict be unfavorable, he cannot ask to have it set aside, either by the trial court or by the appellate court. If, counsel having called the attention of the court to the objectionable statements, the court offers to withdraw a juror, and the counsel declines the offer, he cannot obtain a new trial.

ON APPEAL.

The appellate court will take notice of no misstatements of counsel, unless they have been in some way put on the record and the trial court has failed to do in respect to them what, in the opinion of the appellate court, it should have done. If counsel for the defence, in a homicide case, instead of calling the attention of the trial court to the improper remarks of counsel for the commonwealth, in his closing argument, simply has them taken down by a private stenographer, and, not asking a continuance or appropriate instruction to the jury, assigns the remarks for error in the supreme court, that court will not sustain the assignment "That counsel on one side may go into court with their own stenographer, and take down the address of the opposing counsel, to be made the subject of criticism and objection, not at the trial (nor even on a motion for a new trial) but afterwards in this court, is as unfair to the court below, and so obviously prejudicial to an even handed administration of justice that we dismiss these assignments without further notice."

The stenographer's notes showed that after the evidence was closed (but whether before or after the charge of the court

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Of. Manchester v. Reserve Township 4 Pa. 35.
Cf. Manchester v. Reserve Township 4 Pa. 35.
7Jones v. Cleveland, 8 Kulp, 461.
8Com. v McMahon 14 Super. 621. The records not showing that the remarks alleged, were made, and the counsel accused denying that he made them, the supreme court refused to reverse. Guckavan v. Tration Co. 203 Pa. 521. Littell v. Young, 5 Super. 205. Com. v. Smith, 2 Super. 474. If the remarks are embodied only in the reasons for a new trial, they are not properly a part of the record. Com. vs. Eisenhower, 181 Pa. 470.
10Com. v Weber, 167 Pa. 153, Dean J. In the opening argument the district attorney made an improper remark. So far as the record shows, the attention of the trial judge was not called to it, until some time before verdict, when he was asked to withdraw a juror. The supreme court would not reverse. Com. v. Windish, 176 Pa. 167.
does not appear) counsel for defendant in a liquor selling case asked to have the remarks of the district attorney in his argument placed on the record. Then follows a statement that the district attorney made remarks—a, b, c, d, and e. The notes then show that an exception to these remarks was then noted, and bill sealed for the defendant. The assignment of error was that the court erred in permitting counsel to make the remarks. But, since the court does not show affirmatively that the court "permitted" the remarks, or that its attention was called to them at the time they were made, or at any time when it could have prevented their harmful effect, or that it was asked to do anything concerning them, the supreme court refused to reverse.

It is not the use of improper observations by counsel, that constitutes error but, the improper manner in which the court acts in respect to them. It may be enough in some cases, for the court to express its disapproval of the remarks, and to admonish the jury to disregard them. If this is not enough, then it remains simply to dismiss a juror and continue the case when the improper remarks were made by the plaintiff or in a criminal case the prosecution. If the defendant asking the court to continue the case, it refuses to do so, when, in the opinion of the appellate court, it should have done so, the refusal will be reversible error. If the trial court, failing when it ought, to continue the case, after withdrawing a juror, grants a new trial, the verdict having gone for the peccant party, it of course effectually corrects its error.

Com. v. Smith, 2 Super, 474.

In McCloskey v. Dubois Borough, 4 Super. 181, the court, on motion for a new trial, noticed the improper remarks, alleged to have been made, but, since otherwise they were not on the record, the supreme court refrained from ruling upon them.

Holden v. Pa. R. R. 169 Pa. 1. The supreme court said "inasmuch as there was no other efficacious remedy available to correct the mischief done, it was the plain duty of the court to withdraw a juror and continue the cause."

Com. v. McMahon, 14 Super. 621, Orlady says the corrective is "in the charge of the court or in a motion for a new trial" failing to note withdrawing a juror. In Com. v. Tappe, 153 Pa. 498, complaint was made of the manner in which the district attorney argued the case (murder) to the jury. This, says Paxson, C. J., was for the consideration of the trial court on a motion for a new trial. It was not reviewable in the supreme court, because the manner of the district attorney does not come up with the record."
WHEN COURT WILL REVERSE.

In an offer of evidence of a record of a former trial, the counsel for the plaintiff stated the verdict for the plaintiff, §6000. The defendant objected and moved that a juror be withdrawn. The court denied the request. It does not appear whether the court admonished the jury in respect to the offer, which, presumably was rejected by the court. For refusing to withdraw a juror, the judgment was reversed. In the opening argument for the plaintiff, in an appeal from a justice's judgment, counsel stated that the justice's judgment had been for the plaintiff. Counsel for the defendant immediately asked that a juror be withdrawn. The offending counsel asked that his remarks be not considered by the jury. His colleague however said he could not see how such a remark in the opening argument could affect jurors. The court ruled that the case was the same as if an offer of evidence that the judgment was for the plaintiff had been made; and remarking that it would tell the jury to dismiss the remarks from their minds, refused the motion to withdraw a juror. It made no subsequent reference to the matter. The judgment was reversed by the supreme court, observing that in the case before it while one counsel requests that the objectionable remark be retracted, the other contends for the propriety of the remark, treats it as a frivolous complaint here, and that the court gave the jury no definite direction to disregard it.

WHEN COURT WILL NOT REVERSE.

The alleged wrong of the district attorney being a misstatement of a material fact, the appellate court will not take the pains of making an analysis of the evidence, in order to decide whether

\[\text{77Wagner v. Hazel Township, 215 Pa. 219. When counsel willfully and intentionally offers wholly irrelevant and incompetent evidence, or makes improper statements, as to the facts in his address to the jury, clearly unsupported by the evidence, and harmful to the opposite party, it is the plain duty of the court judge, of his own motion, to reprimand counsel, and withdraw a juror. In no other way can justice be administered and the rights of the injured party be protected. The imposition of costs will remind the client that he has an attorney unfaithful to him as well as to the court.}\]

\[\text{78Fisher v. Pa. Co, 34 Super. 500. In Thompson v. Stevens 71 Pa. 161, in supporting an offer of evidence, plaintiff's counsel said that he wanted to show that the decedent's estate was $150,000, his interests scattered, etc. The court refused to withdraw a juror. Whether it shall withdraw a juror or not, was said by Sharswood J. to be exclusively in the discretion of the court below, and not reversible in the supreme court.}\]
it was a misstatement or an improper inference. It is for the
trial court to see that the trial is conducted in a legal and orderly
manner, and unless its discretion is abused, its order is not the
subject of appeal. Hence if an opportunity is given to the de-
defendant’s counsel to reply to the alleged misstatement of the
district attorney; if whether they are misstatements or not can
be known only after an analysis of all the evidence, the appellate
court will not reverse, not having the remarks of the district attorney before it, although, objection being made to these re-
marks, when they were made, the court ordered defendant’s
counsel to withhold corrections until the close of the district at-
torney’s argument. The court will not reverse for improper
references to the fact that the defendant in a murder case, has
tendered no evidence of good character, when no objection at the
time was made; no erroneous ruling made by the court; no of-
official and trustworthy report of the words used, on the record.

In a personal injury case, plaintiff’s counsel stated in the final
speech that defendant admitted that damages to the extent of
$9,000 or $10,000 had been suffered. He was at once interrupt-
ted and said that what he meant was that the testimony was
uncontradicted as to loss from inability to work and from expenses
incurred because of the injuries. The court in its charge stated
that no amount had been admitted by the defendant, and that the
amount spoken of as admitted, was the amount claimed. The
verdict was for $12,000. The supreme court says the “error of
counsel was thus corrected, without having prejudiced the de-
fence.” In an action against the endorser of a promissory note,
(whose son was the maker) plaintiff’s counsel said in his argu-
ment, “the father and son got together. The son transferred
all his property to the father, and the father took it all, and thus
defeated his son’s creditors. You gentlemen see how it was done.
I leave it to you.” These remarks, says the supreme court, were
not so violative of propriety as to warrant a reversal. The tes-
timony was brief, and plaintiff’s contention was not an unfair
inference from the whole. The jury could not be misled or

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80 Com. v. McMahon, 14 Super. 621.
have secured the necessary relief.
81 Dougherty v. Railway Co. 213 Pa., 346. The trial court had refused
to withdraw a juror.
prejudiced thereby. In his closing address plaintiff's counsel made certain improper statements. The stenographer’s notes show that Mr. Rowands, counsel for defendant, called the attention of the court, in the presence of the jury, to the following misstatement, and that he made the ‘following corrections’. He did not ask the court to correct the statements or to caution the jury concerning them, nor to withdraw a juror, nor did he at the time take any exception to the court’s failure to do so. Not being on the record the appellate court could not consider them. For improper remarks of the district attorney in a murder case, there can be no reversal, unless the court below has neglected some duty. Its attention should be called to them at once, and the action of the court may then become the subject of an exception. Unless the court’s attention is called to the alleged improper remarks at the time, they cannot be considered on error.

MOOT COURT.

IMMANUEL SERGEANT vs. THOMAS FAGAN.

Landlord and Tenant Removing Fixtures under a New Lease.

STATEMENT OF FACTS.

Sergeant let a building containing a store and a dwelling house to Fagan for four years. Fagan after the first year introduced shelves, counters, etc., so fastening them that they would ordinarily be regarded as a part of the building. Toward the end of the fourth year, Fagan accepted a new lease for five years at an increased rent and he continued in possession upon the close of the first term, under the second lease. In the middle of the second term, Fagan began to remove the fixtures. This is a bill in equity to enjoin him, on the ground that the fixtures are now inseparable from the building.

LOKUTA for Complainant.

MOFFETT for Respondent.

Brewing Co. v. Weiss 23 Super. 519. The court further observes that the trial judge did not think it necessary to give special attention to the exception, but left the whole question to the jury, in a fair and adequate charge.

Littell v. Young, 5 Super. 205.

Com. v. Ezell, 212 Pa. 293.

OPINION OF THE COURT.

JACKSON, J.—It is conceded by both parties to this suit that the property over which the controversy arises is trade fixtures. It is further conceded that trade fixtures are removable by the tenant, who erected them, during the term in which they were erected. The only question which we are called upon to decide is whether the tenant forfeits his right to remove the fixtures when he makes a new lease at an increased rental and does not make any provision in the new lease for the removal of the fixtures.

The character of the annexation is not material so long as the fixtures can be removed without destroying or materially changing the premises. In this case it is said the fixtures were so fastened as to ordinarily be considered a part of the building, but there is no evidence to show that they were fastened any differently than fixtures of like character and for the same business are always fastened. The intent of the tenant when he introduced the fixtures is far more important than the manner in which they are fastened. In Seger v. Pettit 77 Pa. 437, it is said: "Where the tenant puts in fixtures or conveniences for his own comfort it is not presumed that he intended them as permanent improvements to be left for the landlord; as a general rule the tenant may remove them during the term." Trickett on Landlord and Tenant, page 485, says: Where the relation of landlord and tenant exists there is an improbability that the latter will intend in excess of his contract obligation to benefit the landlord by increasing the value of the premises to his own detriment: Hence where there is an improvement, or addition is made which is physically removable without destroying the substantial identity of the state of the premises after its removal with their state before making the improvement or addition, the presumption is that the tenant in making it intended to remain its owner." Where the tenant introduces trade fixtures for the benefit of his business the law in favor of trade presumes that he meant to remove them before the end of his term, and it is only on leaving them that the intention to make a gift to the landlord is imputed to him. 53 Pa. 271.

In 19 Cyc. 1068, it is stated as a general rule, that a new lease implies the termination of a prior tenancy; and that neither on principle or right does the tenant have a right to remove fixtures which were introduced during the prior tenancy, unless the new lease expressly reserves to him that right. "The new lease includes the fixtures, the latter having become the property of the landlord, because his former conditional title by the tenant's act becomes absolute, and because the tenant is estopped to deny the landlord's title." This rule is well supported by the cases cited by the learned counsel for the plaintiff. But for cases directly repudiating this doctrine see Kerr vs. Kingsbury, 39 Mich. 150; Radey vs. McCurdy, 209 Pa. 306; Second Natl. Bank vs. O. E. Merrill Co., 69 Wis. 501.

Williams on Landlord and Tenant, page 54, paragraph 158, says: "It has been held that if a tenant at the close of his term renews his lease he should take care to reserve his right to remove fixtures as he had under the old tenancy." But he cites no Pennsylvania cases in support
of this doctrine, and furthermore the lease in this case was not renewed at the close of the first lease but some considerable time before the end of the first lease. It might be shown to be the intention of the tenant to abandon his fixtures to his landlord, if he did not remove his fixtures or make an effort to secure a new lease until the expiration of the first lease. But these facts do not exist in this case.

The authorities seem to agree that where the tenant gets a new lease, if he removes the fixtures during the first lease, and reinstates them during his new lease they shall be his the same as under the first lease. Justice Cooley, in Kerr vs. Kingsbury, supra, says: "What could possibly be more absurd than a rule of law which should in effect say to the tenant who is about to obtain a renewal:—"If you will be at the expense and trouble of, and incur the loss of, removing your erections during the term and afterwards bringing them back again, they shall be yours, otherwise you will be deemed to have abandoned them to your landlord." He also says that in his opinion "a new lease ought not to be considered as including the fixtures unless from the lease itself an understanding to that effect is plainly inferable." In Donnelly v. Frick and Lindsay Co., 207 Pa. 597, Justice Brown says: "It is only when the tenant leaves without removing them during the term that the intention of making a gift of them to the landlord is to be imputed to him; that the same rule applies where by permission of the landlord, even without formal renewal or extension of the lease, the tenant continues to remain in possession for a definite or indefinite length of time. During such period, in the absence of any agreement to the contrary, his intention as to the fixtures remains unchanged, and his right to remove them is unaffected by his holding over."

In Radey v. McCurdy, 209 Pa. 306, a case very similar to the one now under discussion, the lower court having held that the tenant had forfeited his fixtures by not removing them during his first lease, Justice Brown said: "Though this has been declared to be the law by some courts, and the learned judge had authority outside of this State to sustain him, we cannot subscribe to such a doctrine as being either in harmony with reason or consistent with fair dealing between man and man. It will profit nothing to review the very many cases brought to our attention by the learned counsel for the appellee to support the decree of the lower court. It is sufficient to say that none of our own do so." It is to be noted that in this case also there were stipulations as to a new rate of rental.

Since, therefore, the supreme court of Pennsylvania has decided numerous cases, some of which are in every material fact identical with the case before us, in favor of the tenant's right to remove his trade fixtures during his new lease, and since these decisions all seem in perfect harmony with justice, we must dismiss this bill with the costs to the petitioner. Bill dismissed.

OPINION OF SUPERIOR COURT.

The opinion of the learned court below justifies the dismissal of the bill. Decree affirmed.
JOHN TOLSON vs. F. & M. BANK.

Payment of Forged Checks by Banks. Depositor's Negligence.

STATEMENT OF FACTS.

Tolson for seven years had kept his money on deposit in the defendant bank. On July 13th, 1907, a check for $2000.00 purporting to be Tolston's was presented to the bank by the payee and paid. Tolston did not get his checks for a period of 3 months. Then on receiving the checks from the bank he discovered this one. It was a forgery. The bank if apprised that the check was forged, could at any time within one month have recovered the money from the payee. He has since left the country. Tolston sues for the $2,000.00.

BRUCE, for the Plaintiff.

BUTLER, for the Defendant, filed no brief.

OPINION OF THE COURT.

SILVERMAN, J.—We think the question to be decided here is whether the Bank was guilty of negligence in paying the $2,000.00 on the check which later was discovered to be a forgery, or whether the depositor, Tolston, was negligent in not notifying the Bank within one month of receiving and discovering the error. If the Bank was negligent, it cannot relieve itself of the consequence of its acts by taking advantage of the subsequent negligence of the depositor. Banks are unquestionably liable for the negligence of their servants and officers, no matter what care they may have taken to obtain trustworthy men. The Second National Bank of Erie, Pa. v. Smith, 8 Phila, 77. What omissions and commissions on the part of a bank would constitute negligence, if found to exist at all? What duty does a bank owe its depositors? No doubt that of due care and diligence. Iron City Nat. Bank v. Fort Pitt Bank, 159 Pa. 46. In what portion of the transaction could the bank have been guilty of these? Namely in that of not detecting the forged signature of Tolston, since a bank is bound to know the signature of its depositors. Robb v. Penna. Co., 3 Pa. Superior, 260. But can we say that there was any difference between the plaintiff's signature and that of the forger which could be detected by the eye? Could not the signature of the forger be such complete facsimile of plaintiff's signature as to be impossible of detection even by an expert? In the absence of any evidence, it must be assumed that the forgery was of such character that the bank, acting with due care and diligence, was deceived by it. Myers v. Southwestern Nat. Bank, 193 Pa. 13,

It is the duty and well established custom of every banking institution, that after checks have been drawn upon it purporting to be issued by a depositor, to deliver the checks to the depositor as vouchers in its account, in order that the credits entered upon its books may be allowed by the depositor. Upon such presentation, it is his duty to examine and accept or reject the signatures, and to return the rejected checks. For this he should be given a reasonable time. A failure on the part of the depositor to do this, prevents him from disputing the bank's credit on account of the checks. Leather Manufacturer's Bank v. Morgan, 117
What is a reasonable time? In Gloucester Bank v. Salem Bank, 17 Mass. 44, the court said: "There must be some limitation to the right in point of time, and the true rule is, that the party receiving such checks must examine them as soon as he has an opportunity, and return them immediately. If he does not, he is negligent, and negligence will defeat his right of action, * * * and if he receives them in payment and continues silent after he has had sufficient opportunity to examine them, he should be considered as having adopted them as his own."

The depositor must repudiate as soon as he ought to have discovered the forgery, otherwise he will be regarded as accepting the check. Unnecessary delay under such circumstances is unreasonable, and unreasonable delay is negligence, which throws the burden of the loss upon him who is guilty of it rather than upon one who is not. What is reasonable must in every case depend upon circumstances; but until a reasonable time has in fact elapsed, the law will not impute negligence on account of delay. Leather Manufacturer's Bank v. Morgan 117 U. S. 111. As to whether one month's delay in not notifying a bank of a forgery of such a large sum of money as $2000 is reasonable or not, is a matter of fact which should be left to the jury. But we think one month is more than reasonable time for any man to be silent and inactive upon such forged check. In Iron City National Bank v. Fort Pitt Bank, 159 Pa. 51, Mitchell, J., says: "It is always a good defence that the loss complained of was the result of the complainant's own fault or neglect, and it would require a statute in very explicit terms to do away with so universal a rule of law, founded on so incontestable a principle of justice."

The plaintiff, by his negligence in failing to notify the bank within one month of the error, namely the forgery, caused it to pretermit an opportunity to obtain indemnity for itself from the forger, and therefore it is eminently proper to cast the resulting loss upon the depositor, whose inaction has caused it.

Judgment for Defendant.

OPINION OF SUPREME COURT.

If the learned court had intended to say—as it probably did not—that the bank was liable to the depositor for the amount of the deposit paid out upon a forged check, only if it was negligent in so doing, only if exercising due diligence, it would have detected the fact that the check was a forgery, it would have been in error. However careful the bank may have been in paying the check, it is answerable to the depositor for the money thus paid, unless the depositor himself has been negligent. 5 Cyc., 544.

The depositor may have been negligent, either in the drawing of a check, so as to expose it to undetectable alteration, or in giving the appearance of authority in the drawer of the check, to draw it in his name, etc., or in the failure, after knowledge that the check has been paid, to give timely notice to the bank that it was a forgery. But when no such negligence of the depositor intervenes, the bank must pay him back his money despite its previous payment to one who has presented the forged
check. "No payment by a bank on a forged signature of a depositor as drawer of a check, or on a forged endorsement of his payee, can affect him. His right is to get back from the bank whatever he has deposited with it less what has been properly paid out on his orders. The responsibility of the bank to the depositor is absolute, and it can retain no money deposited with it by him, to reimburse it for any mispayment it has made out of such deposit" etc. McNeely Co. v. Bank of N. America, 221 Pa. 589, Myers v. Southwestern National Bank, 193 Pa. 1, contains nothing to the contrary.

Although the bank cannot excuse itself from paying back the deposit to the depositor, by showing that it has honored checks, purporting to have been drawn by him, it may excuse itself by showing further, that he failed in a reasonable time after learning of the payment, to advise the bank that the check was a forgery. Tolston did not discover that the bank had paid a forged check until 3 months after the payment. He was during that time, in no default. But after discovering the forgery, he for some obscure reason, neglected for more than a month to inform the bank. In the absence of explanatory facts, this we think, was an unreasonable delay, and should be pronounced to be such by the court. Had the bank had the knowledge before the expiration of this month, it might, as appears, have effectively taken measures to recover the money from the forger, or his beneficiaries or his friends. The burden was indeed not upon it to show that it might. McNeely Co. v. Bank of N. America, supra, nor, probably, would the most explicit evidence that it could not, be admissible. But the bank has shown that it could at any time within one month after Tolston's discovery of the fact that the forged check had been paid, have secured the money. Since either the bank or Tolston must lose, and since neither would have been compelled to lose, had Tolston been diligent, the loss must fall upon him.

We do not say that had the bank been as negligent in not discovering that the check that it was about to pay was forged as was Tolston, in failing for a month to notify the bank, the latter could have transferred the loss to him. It does not appear that the bank was negligent. Forgeries may impose on the most vigilant and suspicious persons. Myers v. Southwestern Nat. Bank, 193 Pa. 1.

The clear opinion of the learned court of common pleas amply vindicates its judgment.

Judgment affirmed.

TOMKINS v. GOODYEAR.

Kick of Horse—Intervening Fright.

KING for Plaintiff.

BUTLER for Defendant.

OPINION OF THE COURT.

BRUCE, J.—This is an action in trespass—to recover damages for injuries inflicted by the kick of a horse—and a fall occasioned by such kick. From the facts of the case it appears that the horse of the de-
fendant was allowed by him to be loose upon a street for four hours in
the afternoon, and the plaintiff while walking on the street was kicked
by the horse. In fright he fled precipitately and fell into an open cellar.

There is no doubt that if the plaintiff had only asked for damages
for the injury inflicted from the kick of the horse, he could recover,
in the absence of contributory negligence on his part. In Goodman v.
Guy, 15 Pa. 188, the court laid down the rule “if the owner of a horse
suffers him to go at large in the streets of a populous city, he is an-
swerable for a personal injury done by it to an individual, without proof
that the owner knew the horse was vicious”. The same rule, we think,
would apply to any village in Pennsylvania. In Dickson v. McCoy, 39
N. Y., 400, the liability of the owner of the horse was affirmed, whether
the horse was vicious or not.

In Dolfinger v. Fishback, 12 Bush. (Ky.) 475, a horse was left un-
hitched and walked away, and ran into the plaintiff and injured her. The
court held that “it was culpable negligence to leave a horse of vicious
habits or even unknown habits, standing upon a populous street thronged
with persons or carriages without some one to watch or control him”.
If it is culpable negligence to allow a horse to stand upon the street un-
attended, it is surely the same degree of negligence to allow him to walk
upon the street unattended for in both instances the horse is at liberty to
injure passers-by.

The plaintiff not only sues for injuries inflicted by the kick but asks
for compensation in damages on account of the injuries received from
the fall into the open cellar, which he claims was occasioned by the fact
that after being kicked he had to flee for safety and while doing so fell
down the open cellar. The plaintiff could recover if the horse had kicked
him down the cellar. In such a case the kick would have been the prox-
imate cause of the injury under the cases expounding the doctrine of
proximate cause. But here the fall in the cellar was not due to the fact
that the plaintiff was kicked there by the horse, but in fright, no doubt
anticipating that he would be pursued by the animal, he fled and in this
act he fell down the cellar-door. There is no doubt that when the plain-
tiff was kicked, he was put in a position—to choose between two things,
to stand his ground and be kicked again, or to flee to a place of safety.
Under the circumstances he no doubt used all of the ordinary care that
he was able to exercise in choosing between the two undesirable alter-
natives. In Harris v. Clinton, 7 Mest. 666 (Mich) it is said, “If the defend-
ant has so acted as to induce the plaintiff, acting with reasonable prudence,
to incur the danger or if the plaintiff by the defendant’s negligence is
placed in a situation of peril, to escape which he voluntarily incurs an-
other danger, the defendant is liable, although the plaintiff may not in the
emergency have pursued the course which ordinary prudence would have
dictated”. We think this case is directly in point. In the Syllabus of
United States Reports Vol. III. under the head of Proximate Causes
cases are cited to the effect that “where the wrong of a defendant places
the plaintiff in a dilemma such wrong is deemed the cause of the injury,
for which the plaintiff may recover”. In 147 Pa. 404, it is held that
“when a person has been put in sudden peril by the negligent act of anoth-
er and in an instinctive effort to escape from that peril, falls on another, it is immaterial whether under different circumstances he might and ought to have seen and avoided the latter danger”. In the English Case Law Digest, Vol. 10-23 it is held that “a man is not necessarily to be regarded as having caused or contributed to his own injury by acting in a manner prima facie dangerous and imprudent if there is evidence of acts or omissions by which he might have been put off of his guard”. There is no doubt that the circumstances in the case at bar, are such as to put the plaintiff off his guard and in fleeing from the injury one cannot see that he was in any way guilty of negligence that could prevent recovery. The rule for determining proximate cause as laid down in 1 Sadler 383 is “that it must be the natural and probable consequence of the negligence, such a consequence as might have been foreseen as likely to follow from the act.” Cf. also, 42 L. R. A. 280; 148 Mass, 261.

“One guilty of an act of negligence will be held to have foreseen and to be responsible for whatever consequences resulted from his negligence, without the intervention of some other independent agency disconnected from the primary fault and self operating, although in advance the actual result may have seemed impossible,” 142 Pa.,388. In 62 Pa. 353, it is said, “In determining accountability for the consequences of a wrongful act the immediate and not the remote cause is to be considered. The question is did the cause alleged produce its effects without another cause intervening, or was it made to operate only through or by means of this intervening cause? The maxim is not to be controlled by time or distance but by the succession of events.” Cf. also, 72 Iowa, 709.

From the authorities we think that the negligent act of the defendant in allowing his horse to run at large and his kick of plaintiff was the proximate cause of the injuries inflicted by the fall into the cellar for which the plaintiff claims damages.

OPINION OF SUPREME COURT.

This judgment is affirmed upon the careful opinion of the learned court below.

Affirmed.

IN RE ESTATE OF JOHN BOWMAN.

Divorce—Adultery—Validity of Marriage with Paramour.

STATEMENT OF FACTS.

Mrs. Sarah Bowman secured a divorce from her husband in 1905, on the ground of adultery, Mary Freeman being named as co-respondent. John Bowman continued to cohabit with Mary Freeman for some time. Then both moved to California, where they lived apart for two years, and then were married. They returned to Bedford, Pa., in 1908. Bowman died within the year, leaving personality to the amount of $10,000. His former wife claimed one-half absolutely, and a brother of Bowman, Thomas Bowman, claimed the other half as sole heir. John Bowman had a child by Mary Freeman after their marriage in California.

WOODWARD for Claimant.
COOK, J.—The plaintiff in this case claims that the marriage of Jno. Bowman to Mary Freeman was void in Pennsylvania, and that the child born to them is not able to take of the estate of the decedent on the ground that it is considered by the Pennsylvania courts to be illegitimate.

From the facts, it is evident that Sara Bowman, his divorced wife can have no claim to any share of the $10,000 because she has been divorced from her husband absolutely. In cases of divorce a vinculo matrimoni all the rights depending on the marriage such as dower, curtesy, right to participate in the estate of former husband, who died intestate, are divested.

Long on Domestic Relations, Chapter 6, sec. 143.

An absolute divorce is an absolute severance of the former relations existing between the parties and all the rights which obtained between them have been deposed and cast assunder by the divorce.

The next point of the case is as to the validity of the marriage between John Bowman and Mary Freeman, the co-respondent. That their marriage was valid in California is certain. The question is as to the validity of the marriage in Pennsylvania.

The act of March 13, 1815, Sec. 9, provides that the wife or husband who shall have been guilty of the crime of adultery shall not marry the person with whom the crime of adultery was committed, during the life of the former wife or husband; but nothing herein contained shall be construed to extend to or affect, or render illegitimate any of the children born of the body of the wife during coverture.

On the face of this it is apparent that the husband of the divorced wife could not marry the co-respondent in this state. But they were not married in Pennsylvania. They went to California and had been citizens of that state for two years before they were married there. If their marriage had taken place immediately after reaching California and they had returned to Pennsylvania, it would not have been difficult to believe that their marriage there was in order to evade the Pennsylvania statute. Yet if this had been their intention, would they have gone so far distant from Pennsylvania?

The plaintiff has cited cases where it is held that in case of divorce on the ground of adultery and the husband and co-respondent go to another state and are married and immediately return, such marriages are void in Pennsylvania. We do not think this case comes under that class.

The act of March 13, 1815, was passed we think to guard against marriages of this sort inasmuch as they are contrary to good morals or public policy of the community wherein they would have been enforced.

In this case the period of time which elapsed before the marriage of the parties in California was so great that it should cast away all doubts as to their intention to evade the statute. These parties had become citizens of California. Marital rights are personal liberties which accrue through good citizenship. There is no question as to the general rule that a marriage which is valid by the law of the place where it is solemnized is valid everywhere.
But should the second marriage be invalid the act of March 13, 1815 in saying "but nothing herein contained shall be construed to extend to or affect or render illegitimate any of the children of the body of the wife during coverture," secures to the child born of the marriage a share of the estate.

To render a child illegitimate it must be begotten and born out of lawful wedlock. We think this child is perfectly legitimate since it was born in California during lawful wedlock and since the statute directly takes care of cases of this sort, declaring that nothing shall extend to them or render them illegitimate.

By the intestacy laws of Pennsylvania as given in pamphlet laws 314, if the second marriage were considered invalid, the second wife, Mary Freeman, would take 1/3 of the personalty absolutely and the children the other 2/3; and if the marriage were considered invalid, the child, being perfectly legitimate would take the whole estate as the direct descendant of decedent. In either case we cannot see how the brother could take of the estate.

We think that the 2nd wife, Mary Freeman, should receive 1/3 of the estate and that the daughter of the decedent and Mary Freemen should receive the other 2/3ds of the estate.

OPINION OF SUPREME COURT.

It is not surprising that the State of Pennsylvania should undertake to regulate the conduct of its own citizens, and, in particular should ordain that when a man and his wife, inhabitants of this state, are divorced for adultery, neither shall marry the person with whom he or she committed the adultery, during the life of the other divorced spouse, so long as the inhibited person is a citizen of the state.

But, Pennsylvania cannot prevent any citizen's migrating to another state, nor his becoming, by sufficiently long residence there a citizen of that state. Hence, if a person divorced for adultery with X, and X, go to another state which does not prohibit marriage between such persons, their marriage there will be valid in that state.

It seems however that, if they return to Pennsylvania, or if the property of either is in this state, and needs to be disposed of, the validity of the marriage will be determined, not by the law of the place where it occurred, but by the law of this state. Connor v. Connor, 6 Lack Jur. 43; Stull's estate 183, Pa. 625; Immendorf's Estate, 21 Pa. C. C. 268, 7 Dist. 449.

The prohibition of marriage imposed by the 9th section of the act of March 13th, 1815, 1 Stewart's Pardon, 1247, is a prohibition "during the life of the former wife or husband." It matters not therefore how long it occurs after the divorce, or after removal to another jurisdiction. John Bowman about three years after his divorce, was married to his paramour in California, while his wife was still alive. The courts of Pennsylvania cannot recognize this as a valid marriage.

It would normally follow, that Mary Freeman as widow and her child are not entitled to any part of the estate of John Bowman, who has died.
But the 9th section of the act of 1815 declares that "nothing herein contained shall be construed to extend or to affect, or render illegitimate any children born of the body of the wife during coverture." Although if John Bowman could not lawfully marry Mary Freeman, it is difficult to see how, with any propriety she could be called by the legislature his "wife" or be spoken of as under "coverture" she is evidently so spoken of and the purpose of the provision clearly is to prevent the taint of illegitimacy from attaching to children born to her during this "coverture."

Recognizing her want of right to share in the estate of John Bowman, Mary Freeman makes no claim to any part of it. The whole of it belongs to her child. The former wife having been divorced, is entitled to nothing, nor, in the presence of a child, is the brother of John. The whole fund is payable to the child.

Decree accordingly.

A.MOS KILDEA v. SAMUEL SONTAG.

Ejectment--Revival of Judgments after Death of Decedent.

STATEMENT OF THE CASE.

Wm. Sontag was defendant on a judgment for $1500, recovered Aug. 11th, 1901. He died Jan. 13th, 1902. On Aug. 19th, 1904, his sole heir, a son, John Sontag conveyed the land to his uncle, the defendant. On Apr. 21st, 1908, on an execution on the judgment, his farm was sold by the sheriff to Amos Kildea, who seeks by this ejectment to obtain possession.

AMBROSE for the Plaintiff.

FUNK for the Defendant.

FALLER, J. Originally in Pennsylvania, the debts of a decedent were liens upon his real estate, against all the world, indefinitely. This rule caused great inconvenience and uncertainty of titles. Statutes were passed, from time to time, requiring that the ordinary debts of a decedent be prosecuted to judgment within a specified time, which judgment would remain a lien on the real estate of the decedent for a certain period, at the expiration of which period it was necessary to revive the judgment to continue the lien. With the ordinary debts of a decedent, under the statute in force at present, it is necessary to proceed to judgment within two years from the death, which judgment becomes a lien on the real estate for five years, and unless revived at the expiration of the five years, the lien is lost.

But as to debts which were of record at the time of the death of a decedent, the legislation has been different.

In 1798 a statute was passed which placed a limitation on the duration of a lien which was of record at the death of the decedent, in favor of bona fide purchasers and subsequent judgment creditors.

In Jack vs. Jones, 5 Wharton 321, decided under this act, a judgment creditor of the heir had the benefit of the limitation. As to this there is some difference of opinion in the cases decided while this act was in force; but the rule of Jack vs. Jones would probably have been applied to a purchaser from the heir.
The Act of Feb. 24th, 1834, P & L Dig. Col. 1437, 25 sec., provides, in effect, that as against a bona fide purchaser, mortgagor, or other judgment creditor, of a decedent, the lien would endure for only five years, unless revived by sci. fa.

The Colenburg heirs, in Colenburg et. al. vs. Venter, 173 Pa. 113, had such a title as the heir in the case before us had, and therein, Ch. Justice Sterrett decided that it was not a marketable title. That decision was under the Act of Feb. 24th, 1834. Judge Green, in Weist vs. Koons, 2 Pa. C. C. 317, thought that under the 1834 act the limitation did not apply to purchasers from, or judgment creditors of, the heir.

The Act of June 18th, 1895, Pur. Dig. vol., 1, pg. 1108, sec. 120, amends the 25th section of the Act of Feb. 24th, 1834, by adding the words “or of his heirs and devisees,” so that the intention of the act as applied to the case before us is as follows: As against a bona fide purchaser from the heir of a decedent, against whose estate a judgment lien existed at the time of his death, the duration of the lien is limited to five years from the date of his death, unless it is revived in the regular way. Fuellhart vs. Blood, 7 Dist. Rep. 575.

A long line of cases agree, that a judgment which is a lien against the decedent at the time of his death is indefinite in duration as against his heirs and devisees, and that it need not be revived in order to be executed on the land held by them; Some of these are: Shearer v. Brinley, 76 Pa. 300; Middleton v. Middleton, 106 Pa. 252; Groover v. Boon, 124 Pa. 399; Siegler v. Schall, 209 Pa. 526. But prior to the Act of 1895, whether this same rule applied to purchasers from, or judgment creditors of, the heirs or devisees, was not definitely settled.

In the statement of facts it does not appear whether Samuel Sontag was served with a sci. fa. prior to this execution, or whether he had possession, or had put his deed on record, nor is it stated that there was a consideration. Therefore for the purpose of this decision these matters are not considered.

The defendant, then, was a bona fide purchaser, with at least constructive notice of the judgment against the land which he bought from the heir, John Sontag, since the conveyance took place within five years after the death of the decedent. To keep this judgment alive as against the defendant, it should have been revived within five years from the death of the decedent, according to the act of 1895. As it was, the judgment had lost its lien more than a year before the execution and sale, and therefore the plaintiff took nothing by the sheriff’s deed.

Judgment for the defendant.

OPINION OF SUPREME COURT.

It is unnecessary to add any thing to the lucid discussion of the learned court below. The act of June 18th, 1895, explicitly deprives a judgment against one dead since its recovery, of its lien, as against a purchaser from an heir, unless it is revived within five years after the death of the defendant. As the judgment against Wm. Sontag was not thus revived, the plaintiff therein had no power to cause a sale, upon it, of Samuel Sontag’s land.

Judgment affirmed.