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Evidence

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EVIDENCE

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INTRODUCTION

THIS article is not intended to constitute a comprehensive review of all evidence cases decided in Pennsylvania in the past ten years. The cases selected, of necessity, have been limited. They have been chosen because they affect either a field of special interest or one of special confusion. Cases dealing with applications of the parol evidence rule and with constitutional issues in criminal prosecutions have been omitted entirely because they are covered elsewhere in this Survey.

PRESUMPTIONS AND INFERENCES

Presumption of Due Care

During the past ten years, many decisions have considered the presumptions of due care afforded decedents, minors, and persons suffering from amnesia with respect to the facts of an accident. The law is clear that this presumption is irrelevant to the issue of the adversaries' negligence.

In *Gregory v. Atlantic Ref. Co.*,[1] the court held that the plaintiff starts with the presumption of due care, but that the presumption does not establish the defendant's negligence. The court said that the presumption of due care shifts to the defendant the burden of proving the plaintiff's contributory negligence. This language is largely meaningless since the defendant always has this burden.[2] In *Yania v. Bigan*,[3] a wrongful death action, the plaintiff alleged that the defendant had caused decedent's drowning by enticing him to jump into a water-filled trench and then failing to rescue him. In sustaining defendant's demurrer, the supreme court stated in a dictum that although the law presumed that plaintiff's decedent was not negligent, the presumption created no inference that the defendant was negligent.

Fegely v. Costello[4] considered the effect of the presumption afforded a decedent pedestrian who had been struck by the defendant's car.

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1. 391 Pa. 399, 137 A.2d 450 (1958).
2. Sullivan v. Allegheny County, 187 Pa. Super. 370, 144 A.2d 498 (1958).
3. 397 Pa. 316, 155 A.2d 343 (1959).
4. 417 Pa. 448, 208 A.2d 243 (1965).

Plaintiff showed that when decedent was struck he was lying on the road, but failed to show that the defendant was or should have been aware that the object on the road was a man crawling along the edge of the highway. The court affirmed the judgment of nonsuit, reciting the general rule that no inference of negligence arose even though the decedent was presumed to have exercised due care.

In the cases during the past year where the presumption has been invoked, several problems have arisen with respect to the quantum of testimony necessary to sustain the plaintiff's burden of proving negligence. *Williams v. Flemington Transp. Co.*[5] was an action for wrongful death arising out of a collision between the decedent's truck and a truck stalled partly on the highway. As the decedent approached the truck, the driver of a third truck, traveling in the opposite direction and desiring to warn him of the danger, flashed his headlights on and off. The court discussed at length the elements of the presumption of due care to which the decedent was entitled. These included, in the absence of evidence to the contrary, a presumption that he exercised due care while driving within the assured clear distance, a presumption that he slowed down when blinded by the headlights, and a presumption that he heeded the warning.[6] On appeal, the defendant contended that the presumption had been overcome by evidence of the great damage to decedent's truck and its 150-feet-long skid marks. The court held that the question was properly submitted to the jury. This holding was in accord with the statement of the rule in *Lear v. Shirk's Motor Express Corp.*[7] that where the evidence of contributory negligence is part of the defense, the matter then becomes a jury question. Although the *Lear* court did state that where the presumption is rebutted by evidence in the plaintiff's own case a directed verdict is justified, the plaintiff's own circumstantial evidence did not conclusively rebut the presumption and the plaintiff was entitled to have the question considered by the jury. This was true even though the inferences to be drawn in favor of the plaintiff were not the only possible inferences under the evidence.

Several recent cases also have considered the presumption of due

5. 417 Pa. 26, 207 A.2d 762 (1965).

6. The breadth of the presumptions held to operate in the decedent's favor were in accordance with Keasey v. Pittsburgh & L.E.R.R., 404 Pa. 63, 170 A.2d 328 (1961), where the presumption of due care accorded the decedent in a railroad crossing accident included stopping, looking and listening, proceeding with due care, obeying whatever warning signals were visible or audible, and obeying the speed limits. The court said that every rule that one can conceive which is designed to protect and preserve human life is presumed to have been respected by the decedent.

7. 397 Pa. 144, 152 A.2d 883 (1959).

care afforded children. In *Callaway v. Greenawalt*,[8] a four-year-old child was struck by the defendant's car. The evidence showed that the child had walked into the defendant's path from between two parked cars. While the court did not discuss the presumption against contributory negligence, its holding makes it apparent that the presumption is not a substitute for evidence of the defendant's negligence. The court held that the defendant's statement, "I didn't see the kid," was insufficient evidence of negligence and that a compulsory nonsuit was properly entered.

Zernell v. Miley[9] involved a similar fact situation in which a seven-year-old child was struck by the defendant's car when he ran into the street after a ball. In reversing a nonsuit, the court set forth the usual rule that the minor plaintiff was rebuttably presumed to be incapable of negligence.[10] Although the defendant's testimony, when he was called as on cross-examination, was that the plaintiff ran from between two parked cars, other witnesses for the plaintiff testified that the child was on the highway and visible to the driver for a sufficient period of time to give him the opportunity to avoid the accident. This was held sufficient to take the case to the jury.[11] In *Amato v. Landy*,[12] a per curiam opinion; the lower court's refusal to charge that there could be no contributory negligence by the seven-year-old plaintiff was affirmed.

The presumption of due care operates similarly where the party has no recollection of the accident by reason of amnesia. In *Hallbauer v. Zarfoss*,[13] the plaintiff fell down the defendant's stairs but remembered nothing about the accident. The court stated that "the fact that wife-plaintiff's mind is a blank as to the happening of the accident and its incidence created a rebuttable presumption that she did all that the law required with respect to her own safety."[14]

Mack v. Ferebee[15] applied the presumption in favor of a pedestrian whose testimony was that his mind was blank as to the accident. The plaintiff had no recollection except that he was standing on a safety island. He called as a witness a policeman who testified that he had found a spot of blood very close to the end of the safety island. He also called the defendant who testified that he heard a bump and then

8. 418 Pa. 349, 211 A.2d 435 (1965).
9. 417 Pa. 17, 208 A.2d 264 (1965).
10. Kuhns v. Brugger, 390 Pa. 331, 135 A.2d 395 (1957).
11. This case is also discussed under the Calling a Witness as on Cross-examination section, *infra* p. 592 at note 404.
12. 416 Pa. 115, 204 A.2d 914 (1964).
13. 191 Pa. Super. 171, 156 A.2d 542 (1959).
14. *Id.* at 178, 156 A.2d at 545.
15. 204 Pa. Super. 129, 203 A.2d 350 (1964).

saw plaintiff lying on the street. The court held that this evidence was sufficient for a jury to find negligence and, further, that since the plaintiff had amnesia, he was entitled to the rebuttable presumption of due care.

In a somewhat questionable decision, the supreme court in *Lyons v. Bodek Estate*[16] held that a presumption does not arise if the "inability" to testify arises by reason of the party's incompetence under the "Dead Man's Act."[17] The case has not been cited since, nor has the court had occasion to re-evaluate its holding. However, it would seem that the party's lips are just as effectively sealed by the act as they are by death or amnesia.

The Inference from Failure to Call Witnesses

The effect of a party's failure to call witnesses has been stated as follows: "Where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and, without satisfactory explanation he fails to do so, the jury may draw an inference that it would be unfavorable to him."[18] This rule has been applied in both criminal and civil cases.[19]

Where the witness is equally available to both sides, no inference may be drawn.[20] For example, in the divorce action of *Green v. Green*,[21] the plaintiff husband's failure to call an alleged witness to the wife's throwing of a beer bottle at him did not give rise to the inference since the witness was equally available to the wife. In *Raffaele v. Andrews*,[22] a similar case, the inference did not arise.[23]

The relationship between the party and the witness must be considered in determining whether the witness is under the control of the party against whom the inference is sought. In *Geiger v. Schneyer*,[24] where the motorist's husband was a passenger at the time of the collision but was not called and no explanation was given for this failure to call him, the jury was entitled to draw an inference that his testimony

16. 393 Pa. 131, 142 A.2d 199 (1958).

17. Act of May 23, 1887, P.L. 158, § 5(e), PURDON'S PA. STAT. ANN. tit. 28, § 322 (1958).

18. Haas v. Kasnot, 371 Pa. 580, 584-85, 92 A.2d 171, 173 (1952); Gaffney v. Collins, 204 Pa. Super. 212, 203 A.2d 588 (1964); Wills v. Hardcastle, 19 Pa. Super. 525 (1901).

19. Commonwealth v. Trignani, 185 Pa. Super. 332, 138 A.2d 215, *aff'd per curiam*, 393 Pa. 140, 143 A.2d 160 (1958).

20. Haas v. Kasnot, 377 Pa. 440, 105 A.2d 74 (1954).

21. 182 Pa. Super. 287, 126 A.2d 477 (1956).

22. 197 Pa. Super. 368, 178 A.2d 847 (1962).

23. The court also stated that the presumption does not apply where the defendant does not call the witness because he is satisfied that the plaintiff has not met the burden of proof. This reasoning does not seem sound.

24. 398 Pa. 69, 157 A.2d 56 (1960).

would have been unfavorable to his wife. On the other hand, a mere family relationship does not necessitate the application of the rule. Where the defendant in *Commonwealth v. Black*[25] did not call his father to testify as to the contents of an alleged statement, an instruction to the jury that it could draw an unfavorable inference from this failure was held to constitute prejudicial error. The court stated that although relationship is important, it alone is not determinative of the witness' availability. In addition, said the court, it is error to permit the inference unless it is apparent that the witness had knowledge of the testimony suggested. The court stated that here, although the witness was in the room when the statement was made, this alone did not show that he heard it.[26]

The inference may be destroyed by calling the other party as on cross-examination or by calling a witness within the control of the opposing party.[27] The inference may be lost depending upon the extent to which the calling party questions the witness and the scope of his testimony. The court considered this problem in *Beers v. Muth*,[28] but applied the general rule that where a party fails to produce evidence within his control, the jury is permitted to draw an inference against him. In *Beers*, the plaintiff called the defendant as on cross-examination but questioned him very briefly. The questions were whether the defendant was driving the car, whether he felt he was competent to gauge comparative speeds and what rate of speed he was maintaining. The defendant did not take the stand in his own case. Plaintiff requested an instruction that the jury might infer from the defendant's failure to testify in his own behalf that his testimony would have been unfavorable. This was refused on the ground that the calling of the defendant as on cross-examination excluded the application of the general rule. The supreme court reversed and granted a new trial, stating

25. 186 Pa. Super. 160, 142 A.2d 495 (1958).

26. The lawyer-client relationship may mean that the lawyer as a witness is within the client's control. In Williams v. Philadelphia Transp. Co., 415 Pa. 370, 203 A.2d 665 (1964), the defendant did not call a lawyer who had represented him in prior relevant proceedings and who was present in court. The charge that the jury could infer that his testimony would not have been favorable to the defendant was affirmed.

In Commonwealth v. Campbell, 196 Pa. Super. 380, 175 A.2d 324 (1961), where a defendant attempted to invoke the rule against the Commonwealth, the court refused to permit the inference since the Commonwealth had no more control over the witness than did the defendant.

In an otherwise poorly reasoned opinion, the court in Davidson v. Davidson, 191 Pa. Super. 305, 156 A.2d 549 (1959), held that to invoke the inference, first it must be shown that the witness is informed and competent, and second, that if the witness is available to both sides no inference may be drawn.

27. Piwoz v. Iannocone, 406 Pa. 588, 178 A.2d 707 (1962).

28. 395 Pa. 624, 151 A.2d 465 (1959).

that the brief appearance of the defendant as a witness did not take the case out of the general rule and that the requested instruction should have been given.

Where, however, the plaintiff calls the defendant as on cross-examination and he is examined and testifies fully as to all pertinent matters within his knowledge, no adverse inference may be drawn.[29]

The *Beers* case was reexamined by the supreme court last year. In *Evans v. Philadelphia Transp. Co.*,[30] a wrongful death action was brought after the decedent fell on the defendant's railway tracks and was killed by its train. Plaintiff called the defendant's motorman and examined him as to certain facts.[31] The trial court charged that the defendant's failure to recall this witness and to question him about circumstances not covered in the plaintiff's case gave rise to an unfavorable inference. The supreme court affirmed the grant of a new trial on the ground that this instruction was prejudicial. The court distinguished *Beers* on the ground that it involved a very limited examination of the defendant. The majority opinion in *Evans*, however, stated that the witness was asked "every possible question concerning the occurrence except at what point he applied the brakes to stop the train."[32] This was not the "limited" examination contemplated by the ruling in *Beers*. In a strongly worded dissent,[33] Justice Musmanno posed some of the many questions which might have been put to the witness by the plaintiff, but which were not, presumably because the witness was adverse. For example, he suggested that the question as to why the motorman did not apply his brakes when he saw an object on the track was an important one which necessitated either an answer or an adverse inference from defendant's failure to answer.

It is not completely clear, under present law, what permissible inference may be drawn against a party who fails to call a witness who has already testified and is within his control. It is clear that where an opponent is called as on cross-examination and asked a few very limited questions to establish only ownership, control or some other limited facet of the case, his failure to testify in his own case will result in the court's permitting the inference to be drawn. Where, however, the ques-

29. Piwoz v. Iannocone, 406 Pa. 588, 178 A.2d 707 (1962). In this case the court also held that the instruction stating that the failure raised "an implication in the eyes of the law" rather than an "inference" constituted fundamental and prejudicial error. 406 Pa. at 596, 178 A.2d at 711.

30. 418 Pa. 567, 212 A.2d 440 (1965).

31. A request to call the motorman as on cross-examination was denied since he was an employee.

32. 418 Pa. at 579, 212 A.2d at 446.

33. *Id.* at 581, 212 A.2d at 446.

tions concern details of the occurrence, and even though the examination may not exhaust all possible questions, the inference may not be drawn from the witness' failure to re-testify. One would think that the logical rule would turn on whether there were questions remaining unanswered after the calling of the adverse witness. If additional unanswered questions, logically arising from the transaction and within the knowledge of the witness, are material to the decision, the inference should be permitted if the witness is not recalled.

BURDEN OF PROOF

Circumstantial Evidence

A landmark supreme court decision in the past decade is *Smith v. Bell Tel. Co.*[34] This case redefined the burden of proof of negligence which a party must meet when his evidence is circumstantial. In overruling prior decisions, the court in *Smith* established a new standard:

> [W]hen a party who has the burden of proof relies upon circumstantial evidence and inferences reasonably deducible therefrom, such evidence, in order to prevail, must be adequate to establish the conclusion sought and must so preponderate in favor of that conclusion as to outweigh in the mind of the fact-finder any other evidence and reasonable inferences therefrom which are inconsistent therewith.[35]

The court stated further that "it is not necessary, under Pennsylvania law, that every fact or circumstance point unerringly to liability; it is enough that there be sufficient facts for the jury to say reasonably that the preponderance favors liability."[36] The *Smith* court specifically rejected the formula that circumstances must be so strong as to preclude the possibility of the injury occurring in any way other than that claimed by the plaintiff. The court pointed out that if that were the rule there would never be anything for a jury to determine, since there would be only one reasonable inference.[37]

Following the *Smith* decision, the court has applied its rule with substantial consistency.[38] *Lewis v. United States Rubber Co.*,[39] an

34. 397 Pa. 134, 153 A.2d 477 (1959).
35. *Id.* at 139, 153 A.2d at 480.
36. *Id.* at 138, 153 A.2d at 480.
37. *Id.* at 137, 153 A.2d at 479.
38. There have, of course, been cases in which the court has refused to apply the rule. See, *e.g.*, Johnston v. Dick, 401 Pa. 637, 165 A.2d 634 (1960), in which the court engages in legal semantics in holding that the rule cannot apply where the evidence is circumstantial "supposition" rather than circumstantial evidence.
39. 414 Pa. 626, 202 A.2d 20 (1964).

action by an auto mechanic against a tire manufacturer for injuries sustained when a tire exploded, affirmed the rule of the *Smith* case. There, the court held that the plaintiff had sustained his burden of proving negligence by circumstantial evidence where he showed his proper handling of the tire, the explosion, and an X-ray taken subsequent to the accident which disclosed a defect. There was no evidence, however, that the accident was caused by the defect. The supreme court held that the plaintiff was required to show only circumstances from which a reasonable conclusion could be drawn that the defendant's negligence was the cause of the accident. Certainty of proof is not required, nor need the plaintiff exclude the inference that the defendant was not negligent, provided the evidence is such that a reasonable inference of negligence can arise. *"It is not necessary . . . that every fact or circumstance point unerringly to liability."*[40]

In a poorly reasoned opinion rendered this year, *Cuthbert v. Philadelphia,*[41] the court employed language which now casts some doubt upon the previously well-established *Smith* rule. There, the plaintiff suffered personal injuries in a fall allegedly precipitated by a depression in the street. At trial, plaintiff testified that she "knew" she had tripped over this depression but admitted she had not seen it before she tripped or immediately thereafter; that the first time she saw it was on a return visit to "see what it was" that had caused her to fall. The supreme court, in reversing a judgment for the plaintiff, held that she failed to sustain her burden of proving that the defendant's negligence was the proximate cause of her injury. Unfortunately, the court failed to recognize the competency issue raised by the plaintiff's testimony. Its decision would appear more logical had it been predicated on the witness' failure to demonstrate a necessary requisite for competency, that of observation.[42] The court might have concluded that since plaintiff failed to observe the defect, she was not competent to testify to its existence or to its being the cause of her fall.

Although the majority in *Cuthbert* cited *Smith,* it did so for the proposition that a jury may not be permitted to reach a verdict on the basis of speculation or conjecture.[43] However, the court, in defining

40. *Id.* at 631, 202 A.2d at 23, quoting from Smith v. Bell Tel. Co., 397 Pa. 134, 138, 153 A.2d 477, 480 (1959).

41. 417 Pa. 610, 209 A.2d 261 (1965).

42. It should be noted, however, that observation is not limited to sight, but extends to any of the senses, one of which might very well be applicable here. See 2 WIGMORE, EVIDENCE § 656 (3d ed. 1940).

43. Interestingly, the court also cited for this proposition Schofield v. King, 388 Pa. 132, 130 A.2d 93 (1957), a case specifically overruled in *Smith,* for its formula that "the circumstances must be so strong as to preclude the possibility of injury in any other way

the plaintiff's burden of proving proximate cause, stated that "he must eliminate those other causes, if any, as were fairly suggested by the evidence."[44] The only cases cited by the court to sustain this declaration are cases decided either prior to *Smith* or cases not apposite to the decision here.

Justice Musmanno's dissent in *Cuthbert*[45] strongly questioned the possible effect of the majority opinion on the *Smith* rule. He set forth the plaintiff's testimony describing the defect with particularity, including her identification of the defect on a photograph in evidence and her testimony that she knew what she tripped over. He argued that the majority's suggestion that possibly the plaintiff tripped over a properly maintained section of trolley rail is no more reasonable a guess than that she may have been struck by an automobile, pushed by her sister, or that the earth may have suddenly subsided.

Prior to *Cuthbert*, the rule was clear that a nonsuit would not be granted merely because possibilities may exist other than those alleged by the party having the burden of proof. It had been within the jury's province to determine the correct conclusion, and the requirement has been only that, while the plaintiff's contention must preponderate and outweigh the others inconsistent with it, it need not exclude all other possibilities. It is hoped that the court's language in *Cuthbert* will not be interpreted in future cases as a reversion to the prior law.

Exclusive Control and Res Ipsa Loquitur

Over the past decade, the doctrine of exclusive control has come within the exclusive control of Chief Justice Bell. *Shaw v. Irvin*[46] was an action for personal injuries sustained when a truck bed suddenly dropped and struck the plaintiff. The plaintiff proved no negligence but contended that the doctrine applied. A special concurring opinion[47] filed by the chief justice reiterated the requisites for the application of the doctrine; these requisites had been set forth previously in *Izzi v. Philadelphia Transp. Co.*[48] In each of these opinions, Chief Justice Bell stated that the doctrine is a "dangerous" one to be applied only under very unusual conditions and only because of necessity. In *Izzi*, the court held that neither exclusive control nor *res ipsa loquitur*

and provide as the only reasonable inference the conclusion plaintiff advances." 397 Pa. 134, 137 & n.1, 153 A.2d 477, 479 & n.1 (1959).

44. 417 Pa. at 614-15, 209 A.2d at 263-64.

45. *Id.* at 617, 209 A.2d at 265.

46. 418 Pa. 251, 210 A.2d 285 (1965).

47. *Id.* at 252, 210 A.2d at 285.

48. 412 Pa. 559, 195 A.2d 784 (1963).

applied to an accident which occurred when poles on a trackless trolley became disconnected. The opinion made it clear that exclusive control alone is not sufficient to apply the doctrine; all of the following elements are needed:

> (a) where the thing which caused the accident is under the exclusive control of or was made or manufactured by the defendant;[49] *and* (b) the accident or injury would ordinarily not happen if the defendant exercised due care, or made or manufactured the article with due care; *and* (c) where the evidence of the cause of the injury or accident is not equally available to both parties, but is exclusively accessible to and within the possession of the defendant; *and* (d) the accident itself is very unusual or exceptional and the likelihood or harm to plaintiff or one of his class could reasonably have been foreseen and prevented by the exercise of due care; *and* (e) the general principles of negligence have not theretofore been applied to such facts.[50]

Interestingly enough, Justice Bell, also wrote the majority opinion in *Miller v. Hickey*,[51] a four-three decision holding that the doctrine did not apply in an action to recover for personal injuries sustained when a fire escape gave way. The doctrine was described there as follows:

> When the thing which causes the injury is shown to be under the management of the defendants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from the want of care.[52]

In *Miller*, Justice Bell stated that great care must be exercised to limit and restrict the rule "to cases (a) which are exceptional, and (b) where the evidence of the cause of the accident is not equally available to both parties but is peculiarly or exclusively accessible to and within the possession of the defendant."[53]

It is significant that in the *Miller* case no mention was made of the fifth requirement stated in *Izzi, i.e.*, that the general principles of negligence have not theretofore been applied to such facts. Nor was this

49. 418 Pa. at 256, 210 A.2d at 287. The opinion notes that to satisfy this requirement plaintiff must prove defendant had both exclusive control of the injuring agency and exclusive management over the circumstances of the accident.

50. *Id.* at 256, 210 A.2d at 287.

51. 368 Pa. 317, 81 A.2d 910 (1951).

52. *Id.* at 331, 81 A.2d at 917.

53. *Id.* at 331-32, 81 A.2d at 917. It is questionable whether the plaintiff in *Miller* relied on the doctrine.

requirement set forth in *Loch v. Confair*,[54] where the court held that the plaintiffs were entitled to the benefit of the doctrine of *res ipsa loquitur* and exclusive control in a suit against the bottler and retailer of a bottle of carbonated beverage which exploded. The court invoked the doctrine because it would be beyond the plaintiffs' ability to ascertain and establish which of many possible causes had resulted in the explosion. The burden then shifted to the defendants to show that they had not been negligent.

The court refused to extend the application of the doctrine in *Braccia v. Coca-Cola Bottling Co.*,[55] an exploding bottle case in which the plaintiff sued the bottler but not the retailer. The court held that the principle of *Loch v. Confair* could not be applied in the absence of proof by the plaintiff to negate the possibility of negligence by the retailer. The court said that the doctrine of exclusive control, the effect of which is to cast upon the defendant the burden of proving no negligence, is not applicable where the plaintiff's evidence does not exclude the inference that he or a third party may have caused the injury.[56]

The requirement set forth in *Izzi* and *Shaw*, that the facts must be ones to which general principles of negligence have not been applied, makes it clear that the court does not now intend to extend the applicability of this part of the doctrine. The reason for engrafting the new requirement onto the doctrine does not appear in the decisions, except perhaps in the court's categorization of the doctrine as "dangerous." Obviously, in the absence of re-evaluation of the purposes for which the doctrine was established, it cannot be invoked except in cases to which it has previously been held applicable, or in cases involving fact situations which have never before arisen.

Mathis v. Lukens Steel Co.[57] changed the rule that an independent contractor's employee who has been injured as the result of a dangerous condition has the burden of proving the property owner's failure to notify the contractor of the danger. In the employee's action against the building owner for injuries resulting from contact with a high tension wire, the court held that the plaintiff did not have the burden of proving that the building owner did not notify the contractor. Thus, the court expressly overruled *Engle v. Reider*.[58] The court

54. 372 Pa. 212, 93 A.2d 451 (1953).

55. 398 Pa. 386, 157 A.2d 747 (1960).

56. The superior court so held in Silverman v. Oil City Glass Bottle Co., 203 Pa. Super. 400, 199 A.2d 509 (1964), where a pickle processor sued the bottler for damages to his product resulting from breakage.

57. 415 Pa. 262, 203 A.2d 482 (1964).

58. 366 Pa. 411, 77 A.2d 621 (1951). In this case the plaintiff had to show affirmatively that the landowner did not notify the contractor.

reasoned that to place the burden of proving this sort of negative proposition upon a person who ordinarily cannot know what transpired between two other persons is "unrealistic, unreasonable and unjust."[59]

Conflicting Testimony

The effect of conflicting testimony has been the subject of several decisions during the past ten years. Much confusion has been created by the old case of *Mudano v. Philadelphia Rapid Transit Co.*,[60] a case frequently cited for the proposition that the case may not be submitted to the jury where the plaintiff's evidence contains contradictory statements. It is questionable whether *Mudano* is still valid,[61] but because of its widespread misuse an examination of the opinion might help to clarify its meaning. *Mudano* concerned contradictory testimony by the plaintiff's medical experts. Although the court agreed that ordinarily it is for the jury to reconcile contradictory testimony, it analogized the testimony to cases where the plaintiff's uncorroborated testimony is so internally conflicting as to render it impossible to make an essential finding therefrom. The court said that since the plaintiff is speaking through his expert witnesses and since the jury cannot draw upon its own experience to determine medical questions, the rule to be applied is the one applicable to the plaintiff's internally conflicting testimony. The opinion was limited to contradictory testimony of expert witnesses.

The cases interpreting *Mudano* have been numerous. In *Campbell v. Gladden*,[62] the court refused to apply the *Mudano* rule although the plaintiff's physicians had contradicted each other. There, the court distinguished *Mudano* on the ground that while the experts in the earlier case conflicted on their direct examinations, in *Campbell* the contradiction was elicited on cross-examination.[63] In *Cohen v. Food Fair Stores, Inc.*,[64] the plaintiff himself admitted damaging facts, and the court held that the conflict was for the jury.

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59. 415 Pa. at 272, 203 A.2d at 488. This case is also of interest because the plaintiff's "negative testimony" that he did not see the danger sign was held to be a positive refutation of the defendant's testimony that the sign was there.

60. 289 Pa. 51, 137 Atl. 104 (1927).

61. See Luckenbach v. Egan, 418 Pa. 221, 210 A.2d 264 (1965), discussed in text *infra* at note 69.

62. 383 Pa. 144, 118 A.2d 133 (1955).

63. In *Mudano*, the analogy was probably intended to be limited to those situations where such testimony is conflicting on direct examination, not to apply where it is contradicted on cross-examination. Green v. Philadelphia, 279 Pa. 389, 124 Atl. 134 (1924), held that in the latter situation the jury was entitled to resolve the question. In Stevenson v. Pennsylvania Sports & Enterprises, Inc., 372 Pa. 157, 93 A.2d 236 (1952), conflict in the plaintiff's testimony was for the jury to resolve.

64. 190 Pa. Super. 620, 155 A.2d 441 (1959).

In *Parker v. Yellow Cab Co.*,[65] where different versions appeared in the plaintiff's case, it was again held that the witnesses' credibility and the resolution of their conflicting testimony were matters for the jury's determination. In *Green v. Prise*,[66] the court overruled a judgment n.o.v. granted because of contradictions in the testimony of the plaintiff's witnesses, holding that if such a contradiction exists, the jury may reconcile the testimony or may accept part of it and reject the rest.

Pascale v. Simmons,[67] a personal injury action arising out of a motor vehicle collision, rejected the defendant's contention that the case should not have been submitted to the jury because plaintiff's own testimony contained a statement by the defendant that defendant's brakes had failed. Defendant contended that such evidence was exculpatory. The court stated that a jury question exists where one part of plaintiff's testimony is favorable and another is not. The court said that to take the case from the jury merely because a witness tells the whole truth and relates what the defendant has stated would make the trial a "game of wits and not a candid disclosure of reality."[68]

Last year, in *Luckenbach v. Egan*,[69] the court again attempted to clarify the law with respect to conflicting testimony. In this personal injury action the plaintiff's testimony conflicted and a charge was given that the jury was not permitted to take part of the plaintiff's story and put it together with part of the defendant's, or vice-versa. The supreme court held that the charge was improper and that a jury need not reject all of a witness' testimony where one part is unacceptable. It is for the jury to reconcile conflicting statements.[70]

Hopefully, the confusion surrounding conflicting testimony finally has been eliminated. To the extent that *Mudano* is still law, it clearly can be applied only where the testimony of an essential witness, probably only that of an expert, directly conflicts with that of another witness called by the same party. Even in this situation, it seems no more improper to have the jury resolve the conflict than it does where the conflict stems from witnesses produced by opposing parties. Refusing to allow the jury to determine this conflict results in the court's deciding in favor of the expert who disagrees with his party's position. In all other areas, however, the law is clear that conflicts in testimony, wherever they arise, are within the province of the jury.

65. 391 Pa. 566, 137 A.2d 317 (1958).
66. 404 Pa. 71, 170 A.2d 318 (1961).
67. 406 Pa. 476, 178 A.2d 549 (1962).
68. *Id.* at 483, 178 A.2d at 553.
69. 418 Pa. 221, 210 A.2d 265 (1965).
70. Chief Justice Bell dissented on the ground that the charge was correct. *Id.* at 225, 210 A.2d at 266.

Voluntariness of Confessions

A most serious problem facing the appellate courts is the burden of proof required to determine whether or not a criminal defendant's confession is voluntary. The decision of the United States Supreme Court in *Jackson v. Denno*,[71] requiring an independent hearing on the issue of voluntariness, leaves this question unanswered.[72]

In two recent cases reviewing the voluntariness of confessions, the Pennsylvania Superior Court has not determined this issue. In *Commonwealth ex rel. Gaito v. Maroney*,[73] a review of a habeas corpus proceeding, the majority affirmed per curiam a holding that defendant's confession, given in the hospital a few hours after he had undergone major surgery, was voluntary. In his dissenting opinion, Judge Hoffman noted that the problem of burden of proof was left unanswered by *Jackson*.[74] *Commonwealth ex rel. Donnell v. Myers*,[75] held a confession involuntary where it was given after eleven successive days of solitary confinement. During that time the defendant was chained, handcuffed, restricted to a few feet of movement, and weakened by lack of food. The court noted the problem of burden of proof but stated that it need not decide the question, since it was satisfied that whatever the burden of proof, the record did not support a finding of voluntariness.

Relevancy

Evidence of Other Crimes

The admission at trial of evidence concerning other crimes committed by the defendant often gives rise to problems in criminal cases.[76] The resolution of these issues depends in large measure upon the purpose for which this evidence was introduced, its method of introduction and the instruction, if any, of the trial court with respect to the use of the testimony by the jury. Although the general rule is that evidence of other crimes is not admissile to prove that the defendant's char-

71. 378 U.S. 368 (1964).

72. In dissent, Mr. Justice Black raises the problem but states that the Court has not said that the state has the burden of proving this issue beyond a reasonable doubt. He says that if voluntariness may be decided merely on a preponderance of the evidence, it is a distinct disadvantage to the defendant and suggests that the Court should not leave this important question in doubt. *Id.* at 401.

73. 206 Pa. Super. 113, 210 A.2d 907 (1965).

74. *Id.* at 113, 210 A.2d at 907. The dissent, however, is based on the ground that the confession given was not voluntary and that the petitioner was not informed of his right to counsel or of his right to remain silent.

75. 206 Pa. Super. 324, 213 A.2d 98 (1965).

76. The use of testimony concerning other crimes for impeachment purposes, or in connection with fixing a penalty in murder cases is discussed elsewhere in this article.

acter was such that he was likely to commit a particular crime, there are instances in which evidence of other crimes is held to be relevant.

This year, in two companion cases in which the superior court reviewed convictions of abortion and of conspiracy to bring about an abortion, issues were raised concerning the admission of testimony of other crimes. In the first case, *Commonwealth v. Kulik*,[77] the prosecution in its case in chief attempted to introduce testimony of a woman other than the prosecutrix to show that the defendant had made similar attempts to perform an abortion on her at about the same time as the one in question. The defendant's objection to this testimony was sustained. Thereafter, defendant in his case testified and implied that he did not have the knowledge necessary to perform an abortion. As rebuttal, the court then admitted the testimony of the second woman for the purpose of discrediting the defendant's testimony. An instruction to the jury limited its use of the testimony to this purpose. On appeal, it was held that under these circumstances the testimony concerning the alleged other crime was proper to impeach the defendant. The court did not hold that the testimony showed a course of conduct which was relevant to the crime in issue. Approximately one month later, in *Commonwealth v. Sindel*,[78] the court considered the same fact situation. There, the defendant physician was charged with conspiracy and abortion; Kulik, his co-defendant, was charged with conspiracy to commit abortion. The physician's defense was that he treated the victim in the course of his medical practice and there was not a conspiracy to commit an abortion. The Commonwealth introduced evidence of another abortion, which these same defendants allegedly had carried out under similar circumstances, to show that it was the defendant physician's intention to perform an abortion on the prosecutrix and not merely to render medical treatment in an isolated situation. The superior court stated that the second victim's testimony was proper to estalish the defendant's intent, and that the testimony fell within the rule which allows evidence of other crimes which are not too distant in time and which show a common plan, scheme, motive or design.[79] Evidence of the similar crime in the second case was relevant because the physician claimed that he was called upon to treat the prosecutrix but that in no way was he involved in an abortion. Therefore, evidence of another abortion carried out in exactly the same manner was relevant

77. 205 Pa. Super. 174, 208 A.2d 287 (1965).
78. 205 Pa. Super. 355, 208 A.2d 894 (1965).
79. The convictions were reversed, however, because evidence of the defendant physician's admission by silence was held to be improper. (See discussion under Hearsay, *infra* pp. 541-42.)

to connect him with his co-defendant and to show their common scheme.

In *Commonwealth v. Bell*,[80] a murder prosecution, the defendant gave two statements to the police. The first admitted not only the killing for which he was being tried but also his participation in a later killing; the second statement, given six days later, referred only to the homicide for which he was being tried. At trial, a police officer testified that there were two statements. The second statement was admitted in its entirety, as well as that part of the first one referring to this killing. On cross-examination of this witness, defense counsel pressed him repeatedly as to why the second statement had been taken. The officer finally answered that the original statement also contained an admission of guilt in a later homicide. Defendant was found guilty and the death penalty was imposed.

The issue raised on appeal was whether this evidence improperly influenced the jury. The court held that it did not. The reasoning employed was that the officer's answer was "invited" by defense counsel, and also that the evidence was not prejudicial since the appeal questioned only the imposition of the death penalty and not the finding of guilt. The court stated that the reference to the other homicide did not prejudice the defendant, since under the Split Verdict Act[81] the jury, in determining the defendant's penalty, properly would have considered evidence of the commission of other crimes. This evidence may consist of records of convictions[82] or the defendant's own admissions of guilt.[83] In dissent, Justice Musmanno[84] argued that it was unfair to penalize the client for the imprudence of his lawyer, that the Split Verdict Act was not intended to have the jury consider crimes committed after the offense for which the defendant is tried, and that the defendant's mere admission did not make him guilty of the killing admitted.

The superior court in *Commonwealth v. McKenna*[85] held that the defendant, who had been convicted of conspiracy and blackmail, was not prejudiced by a co-conspirator's testimony that the defendant had told him he had brought the blackmail statement "out of jail"

80. 417 Pa. 291, 208 A.2d 465 (1965).

81. Act of Dec. 1, 1959, P.L. 1621, § 1, PURDON'S PA. STAT. ANN. tit. 18, § 4701 (1963).

82. Commonwealth *ex rel.* Norman v. Banmiller, 395 Pa. 232, 149 A.2d 881 (1959), specifically held that records of convictions of other crimes before and after the crime for which the defendant was on trial were proper evidence for this purpose.

83. See a related issue on crimes before and after the crime for which the defendant is being tried in Commonwealth v. McIntyre, 417 Pa. 415, 208 A.2d 257 (1965).

84. 417 Pa. at 297-99, 208 A.2d at 469.

85. 206 Pa. Super. 317, 213 A.2d 223 (1965).

with him.[86] The statement had allegedly been given to the defendant by a fellow prisoner who testified for the defense and who was very evasive about contact with the defendant. Cross-examination was permitted to establish their close contact. The court stated that evidence of this defendant's presence in prison and contact with the person from whom he had allegedly received this statement was relevant to establish an essential link in the chain of the crime.

In a habeas corpus proceeding in which a defendant convicted of first degree murder contended that the introduction of testimony concerning the killing of the victim's son constituted a denial of due process, the supreme court in *Commonwealth ex rel. Ross v. Maroney*[87] held that the evidence was proper since the killing of the son was an essential, inseparable part and parcel of the killing of the mother.[88]

An appeal from a murder conviction, *Commonwealth v. Coyle*,[89] raised a variety of evidentiary issues. In 1958, the defendant and his brother committed armed robbery in Massachusetts and fled to Philadelphia to hide. In 1959, they committed various robberies in Philadelphia. To avoid apprehension, they customarily stole milk in the early morning. One morning, a policeman discovered William Coyle, defendant's brother, stealing milk while the defendant kept watch. One brother shot and fatally wounded the policeman. The supreme court held that since the Split Verdict Act is not retroactive[90] it was not error to admit other crimes into evidence with respect to penalty prior to the verdict on guilt. In addition, the prior crimes need not be "convictions" and an admission by the accused is admissible for this purpose.[91] The court held further that evidence of the previous crimes, the armed robbery and the stealing of the milk, was admissible to establish malice, intent and motive,[92] as well as to estalish the intimacy, confederacy and concerted actions of the brothers. The evidence dis-

86. The case is also interesting because an attorney was permitted to testify as to communications with a client (not the defendant) and the defendant could not assert the privilege since it belonged to another. The court also noted that the lawyer was entitled to rebut attacks by his client on his professional competence, irrespective of any privileged communications. 206 Pa. Super. at 322, 213 A.2d at 226.

87. 416 Pa. 86, 204 A.2d 756 (1964).

88. See Commonwealth v. Ross, 413 Pa. 35, 195 A.2d 81 (1963)

89. 415 Pa. 379, 203 A.2d 782 (1964).

90. Commonwealth v. Scoleri, 399 Pa. 110, 160 A.2d 215 (1960). Coyle's trial was concluded prior to December 1, 1959, the effective date of the Split Verdict Act. 415 Pa. at 388, 203 A.2d at 787.

91. 415 Pa. at 386, 203 A.2d at 787.

92. The court cited Commonwealth v. Wable, 382 Pa. 80, 84, 114 A.2d 334, 336 (1955), for the propositions that special circumstances sometimes exist with respect to other crimes and that other crimes are admissible when they tend to prove a common scheme, plan or design embracing the commission of two or more crimes.

cussed in this case included evidence of the robbery which occurred five and one-half months before the murder. With respect to evidence concerning the escape and concealment of the defendant and his brother, the court said this was proper to show consciousness of guilt, notwithstanding reference to their stealing a car, holding the occupants hostage, and having a gun battle with the police. The court noted that this evidence was proper, not for purposes of establishing guilt of these other crimes, but to show the consciousness of guilt of the homicide and the means employed to escape arrest. The court distinguished the case of *Scoleri v. Banmiller*.[93] The court further held that it was not error, under the act of 1911,[94] to cross-examine the defendant concerning the commission of other crimes since these other crimes had a direct connection with the crime involved.[95]

References to Insurance

In a per curiam opinion in *Bortz v. Henne*,[96] the supreme court affirmed a holding that where the plaintiff, on cross-examination, referred to what he told an "adjuster," this did not inject the issue of liability insurance into the trial so as to constitute prejudicial error. The reference here fell within the exception, to the general rule which requires a new trial when the plaintiff or his witness or his counsel refers to insurance. The court said that this was not a deliberate or intentional attempt to influence the jury but was an unintentional, inconsequential reference to insurance which was not sufficient to prejudice or influence the jury and was cured by the court's instant admonition.

In *Nicholson v. Garris*,[97] a four-three decision, a new trial was granted because of a reference to insurance. There, while cross-examining the defendant, plaintiff's counsel produced defendant's income tax return and asked questions concerning expenses for various

93. 310 F.2d 720 (3d Cir. 1962), deciding a case arising prior to the Split Verdict Act, holding that evidence of other crimes was violative of due process since the jury could not ignore the evidence in determining guilt.

94. Act of March 15, 1911, P.L. 20, PURDON'S PA. STAT. ANN. tit. 19, § 711 (1954).

95. The district attorney argued to the jury that the defendant had attempted to kill a car owner during his escape, but this was held to be proper because it indicated that the defendant attempted to kill and destroy witnesses to his criminal activity during his attempt to escape. The court also held that the search without a search warrant was not illegal; that the fact defendant was found to be mentally ill after the trial did not warrant granting a new trial; that the defendant was not denied the right to counsel but that he had intelligently waived it; and that the defendant was entitled to a new trial on the sole question of voluntariness of his statements.

96. 415 Pa. 150, 204 A.2d 52 (1964).

97. 418 Pa. 146, 210 A.2d 164 (1965).

items, one of which was "insurance." An objection to the question was sustained and the jury was instructed to disregard the reference. The court held that the reference was intentional and therefore prejudicial and that it made no difference that the defendant was a public carrier which was required by law to carry insurance. The court affirmed the granting of a new trial. In a dissent by Justice O'Brien,[98] it was argued that the term "insurance" did not necessarily mean liability insurance and that the question was not an intentional attempt to inject the issue of insurance. He suggests that holding that the use of the mere word "insurance" requires a new trial is characteristic of the "insurance syndrome" from which the court is suffering.[99]

It is, of course, the general rule in a trespass action that the fact that defendant is insured is irrelevant and that the injection of this issue is so prejudicial that it calls for the withdrawal of a juror.[100] This rule has been interpreted generally to mean that the introduction of the fact of insurance by the plaintiff, his counsel or his questions to witnesses or jurors is grounds for reversal. An exception to the general rule, however, arises when the reference to insurance is so vague and indefinite as to preclude any prejudicial effects.[101] Another case discussing the exception to the general prohibition against raising the term "insurance" was *Deeney v. Krauss*.[102] There were two references to insurance, both of which were made by the defendant on cross-examination. In response to a question about whether he had given a statement to anyone other than the police, the defendant replied "the insurance representative." On further cross-examination, the defendant was asked whether there had been any conversation when he drove the plaintiff to the hospital. He replied, "we were trying to tell her we were taking her to the hospital and we had insurance."[103] On each occasion, the court instructed the jury to ignore the reference. The court in *Deeney* held that these references fell within the exception rather than the general rule. It was pointed out that the defendant's second answer was not responsive and that there was no indication that plaintiff's counsel intended to elicit such a reply. With respect to the first reference, the court said that there was nothing to indicate that the reference was to the company with which the defendant was insured.

98. *Id.* at 153, 210 A.2d at 167.

99. *Ibid.*

100. Harriett v. Ballas, 383 Pa. 124, 117 A.2d 693 (1955); Kaplan v. Loev, 327 Pa. 465, 194 Atl. 653 (1937); Lenahan v. Pittston Coal Mining Co., 221 Pa. 626, 70 Atl. 884 (1908).

101. Richardson v. Wilkes-Barre Transit Corp., 172 Pa. Super. 636, 95 A.2d 365 (1953); Cain v. Kohlman, 344 Pa. 63, 22 A.2d 667 (1941).

102. 394 Pa. 380, 147 A.2d 369 (1959).

103. *Id.* at 382, 147 A.2d at 371.

The court's reasoning is more logically explained in terms of responsibility for the reference. It was apparent in the *Deeney* case that the plaintiff was not responsible for the injection of the issue of insurance.

Where the defendant is an entity of such size that the injection of insurance would make little difference in the outcome of the verdict, the court has considered this factor in denying a new trial. In *Strout v. American Stores Co.*,[104] the court upheld the questioning of defendant's witness about the identity of his employer, although it was "Liberty Mutual Insurance Company." The court also noted that counsel has the right to ask the occupation of the witness. In *Fleischman v. Reading*[105] the plaintiff was cross-examined at length on a statement he had signed in the hospital. The court affirmed the denial of a motion for withdrawal of a juror based on the redirect question asking who took the statement and plaintiff's reply "an insurance man." Here, too, the court pointed out that since the defendant was a municipality, the question of insurance was of little significance to the jury. In addition, the court said that where a statement is used, and the plaintiff denies much of the statement, a question of credibility is involved and it is proper to show that it was an adjuster who took it. Similarly, in *Lemmon v. Bufalino*,[106] the defendants objected to being required to call their insurance adjuster to put the plaintiff's statement into evidence where she had denied that it was correct. The supreme court held that this requirement was proper.

An interesting fact situation arose last year in *Trimble v. Merloe*,[107] a personal injury action in which the plaintiff appealed from the grant of a new trial. In a four-three decision, the supreme court affirmed because the issue of insurance had been improperly injected into the case. The manner in which insurance had been injected was a novel tactical approach by the plaintiff's counsel. In his closing address, he told the jury that jurors often ask why insurance is not mentioned and explained to them that it was not important whether a defendant was insured or not, whether he was rich or poor, but that the law expected the jury to arrive at a verdict not based upon any factor which might prejudice them. The majority held that this reference to insurance constituted a conscious and deliberate effort by plaintiff's counsel to build his case and verdict by inferences, allusions and insinuations of insurance. The minority opinion[108] pointed out that the statement of

104. 385 Pa. 230, 122 A.2d 797 (1956).
105. 388 Pa. 183, 130 A.2d 429 (1957).
106. 204 Pa. Super. 481, 205 A.2d 680 (1964).
107. 413 Pa. 408, 197 A.2d 457 (1964).
108. *Id.* at 414, 197 A.2d at 460.

plaintiff's counsel was a correct statement of the law and argued that to tell the jury it should not consider insurance was not reversible error.[109]

The holdings in the various cases in which insurance has been injected make it apparent that certain factors will be considered by the court in determining whether the reference is so prejudicial as to necessitate the granting of a new trial. Among these are: (1) Which party introduced the evidence? (2) Was the reference an intentional attempt to prejudice the jury? (3) Is the insured party of such apparent financial means that the knowledge of insurance would not tend to influence the verdict?

Offers of Settlement

In another area concerning prejudicial testimony, the superior court applied the general rule that an offer of settlement is not admissible as an admission. Such testimony traditionally has been excluded because of the desire to encourage settlements. In *Rankin v. Phillippe*,[110] it was held that an offer to print a retraction of an alleged libel as part of a proposed settlement was not admissible. In *Commonwealth v. Luciano*,[111] an offer to settle a fornication and bastardy prosecution was held to be within the general rule; the defendant's offer to compromise and settle the action was inadmissible either as an admission or for impeachment. The court, in reversing the conviction, noted that a fornication and bastardy prosecution differs from the usual kind of criminal action—since the case is more civil than criminal in nature, the usual rule excluding offers of compromise applies. The court was careful to point out, however, that its holding decides nothing with respect to other criminal cases in which offers to settle may be construed as bribes to prevent further prosecution.

Intoxication

Evidence concerning intoxication and drinking was considered again by the supreme court in *Vignoli v. Standard Motor Freight, Inc.*,[112] a personal injury action arising out of a collision of two tractor trailers. Plaintiff wished to cross-examine the defendant's driver concerning his intoxication or drinking. Plaintiff and his witnesses could testify

109. See also a dictum in Finney v. G. C. Murphy Co., 400 Pa. 46, 161 A.2d 385 (1960), where defense counsel in his closing argument mentioned that there was insurance.
110. 206 Pa. Super. 27, 211 A.2d 56 (1965).
111. 205 Pa. Super. 397, 208 A.2d 881 (1965).
112. 418 Pa. 214, 210 A.2d 271 (1965).

only that the driver was acting "funny." The court held that it was not error to refuse this cross-examination since the evidence was too prejudicial and plaintiff's testimony of intoxication was not legally sufficient. The general rule is that while proof of intoxication is relevant where reckless or careless driving is in issue, evidence of drinking is so prejudicial that it is not admissible unless it reasonably establishes a degree of intoxication which proves unfitness to drive.[113]

In *Wentworth v. Doliner*,[114] no evidence was produced to show that the plaintiff had been drinking. There, the court held that permitting questions about drinking was reversible error. The court's admonition to the jury to disregard a state trooper's hearsay testimony that the plaintiff had been drinking was insufficient to cure the error. The court pointed out with respect to defense counsel's questioning of the plaintiff concerning drinking that sometimes mere questions can be as damning as proof.

There have been some instances in which the court has felt that the testimony of intoxication was so prejudicial that it has approved rebuttal tactics which might otherwise have necessitated the withdrawal of a juror. In *Walbert v. Farina*,[115] plaintiff introduced into evidence, over defendant's objection, a police officer's testimony that the defendant was intoxicated. On cross-examination, defense counsel asked whether he knew that the defendant had been acquitted of involuntary manslaughter arising out of the alleged drunkenness.[116] Although an objection to this question was sustained and the jury instructed to disregard it, the court refused to withdraw a juror. On appeal the court's ruling was held to have been proper.

An extension of the rule prohibiting testimony of intoxication arose in *Cook v. Philadelphia Transp. Co.*[117] Here the defendant bus company wished to show that the plaintiff pedestrian had come from a place called the "Crazy Bar." The trial court ruled that no reference to this name was to be permitted at trial because it suggested the use of intoxicants or inebriety. The supreme court affirmed on the basis that the connotations of the name "Crazy Bar" were such that the plaintiff would have been prejudiced by its use. In noting that certain

113. Wentworth v. Deliner, 399 Pa. 356, 160 A.2d 562 (1960); Fisher v. Dye, 386 Pa. 141, 125 A.2d 472 (1956); Critzer v. Donovan, 289 Pa. 381, 137 Atl. 665 (1927) (evidence of mere odor of alcohol held improper).

114. 399 Pa. 356, 160 A.2d 562 (1960).

115. 199 Pa. Super. 361, 185 A.2d 825 (1962).

116. The general rule precludes evidence of acquittal in criminal cases in a civil action arising out of the same facts. See discussion under The Use of Criminal Convictions in Civil Actions, *infra* p. 550.

117. 414 Pa. 154, 199 A.2d 446 (1964).

phrases awaken and produce certain psychological reactions, the court stated: "The incomparable poetic-dramatic bard has told the world that a rose by any other name would smell as sweet, but no one can doubt that if a rose were called Limburger Cheese, its fragrance would diminish in the nostrils of the average smeller. Such is the power of imagination."[118]

Other Questions of Relevancy

In *Commonwealth v. Smoker*,[119] a defendant was convicted of involuntary manslaughter when he fell asleep in his automobile and crossed to the wrong side of the road. The superior court affirmed the refusal of defendant's offer to prove that two months after the occurrence a defect was discovered in the automobile which would have permitted the escape of carbon monoxide into the car. The court restated the general rule concerning the relevancy of the condition of a thing at a prior or subsequent time to show what its condition was at the time in question, and approved Wigmore's suggestion[120] that the matter should be left entirely to the trial court's discretion. With respect to the necessity of showing that there has been no change in condition during the prior or subsequent intervening time, Wigmore says there is no fixed rule.[121] The court's quotation from Wigmore points out that there are both cases in which a preliminary showing of lack of change is required and cases in which evidence is received without any preliminary showing as to lack of change, thus leaving it to the opponent to prove change by way of rebuttal. Whether it should be required, the court says, must depend entirely on the case at hand.

In *Brandon v. Peoples Natural Gas Co.*,[122] the supreme court affirmed the holding of the court below that evidence of gas leaks discovered subsequent to a fire and explosion was not relevant to show that the gas leaks existed a few hours earlier. The court pointed out that the time interval between the observation offered and the time at which the leaks must have existed to establish liability was a matter of hours and that the subject matter was not of a type that ordinarily changes in a short interval. On the other hand, the court said that since there was intense heat and falling debris in the interval, it could not say that the lower court abused its discretion in deciding that such

118. *Id.* at 160, 199 A.2d at 449.
119. 204 Pa. Super. 265, 203 A.2d 358 (1964).
120. 2 WIGMORE, EVIDENCE § 437, at 417 (3d ed. 1940).
121. *Id.* at 414.
122. 417 Pa. 128, 207 A.2d 469 (1965).

evidence was improper in the absence of accompanying proof that there was no change.

The court's quotation of Wigmore in both *Smoker* and *Brandon* may be some basis for a more liberal view in the future. The rule, until the present time, has been that stated in *Nestor v. George*.[123] That case, also cited by the court, held that the existence of a thing or condition at a particular time cannot be proved by its existence at a subsequent time unless accompanied by proof that it has not changed in the interval. The *Brandon* court says, however, that since this is a matter of relevancy, the circumstances of each case must be considered. Although the rule in *Topelski v. Universal So. Side Autos, Inc.*[124] was stated to be that announced in *Nestor*, the court actually approved testimony of the condition of automobile brakes twenty days after the event in question. In supporting admission of the evidence, the court held it was relevant in the absence of testimony that the car was used in the interim. This holding would seem to be more in accord with the position suggested by Wigmore whereby the necessity of proving change becomes a matter of rebuttal rather than a condition precedent to the admission of the testimony.

However, one year after *Topelski*, the court in *Murray v. Siegal*,[125] a personal injury case involving an allegedly defective sidewalk, again strictly interpreted the rule set forth in *Nestor* by disallowing testimony of a condition twenty-five months after the accident because it was not accompanied by proof that there was no change in the interim. Plaintiff's attempt to have his expert testify that the defective condition had existed for several years was not permitted by the court.

Whether the *Brandon* case may be a forerunner for a rule that evidence of prior or subsequent conditions may be received without testimony to show that there has been no change in the time elapsed remains to be seen. The court's ruling, however, does seem to make it clear that this is a matter within the discretion of the trial judge. It would certainly seem that the case is authority for the admissibility of such testimony where, in the opinion of the trial court, the matter has relevancy, even without testimony of no change.

Lascoskie v. Burks County Trust Co.[126] reiterated the general rule that the admission of photographs is largely within the discretion of the trial judge. The court affirmed a nonsuit and the exclusion of pho-

123. 354 Pa. 19, 46 A.2d 469 (1946).
124. 407 Pa. 339, 180 A.2d 414 (1962).
125. 413 Pa. 23, 195 A.2d 790 (1963).
126. 417 Pa. 53, 208 A.2d 463 (1965).

tographs of a sidewalk defect which were possibly misleading because taken at ground level with no indication of what would appear at eye level.

In *Collins v. Zediker*,[127] the court overruled an opinion granting a nonsuit on the basis that there was no evidence that the plaintiff continued to look as she proceeded to cross the highway. The court said that the plaintiff's testimony that she saw no lights was positive testimony and its weight was for the jury.

In *Durika v. School Dist.*[128] a view by the jury took place after a dwelling house had been moved to a different location and the court instructed the jury that the view was only for the jury to better understand the testimony of the witnesses. The allowance of the view in the condemnation proceeding was upheld on the basis that a view is a matter within the court's discretion.

In *Wood v. Conneaut Lake Park, Inc.*,[129] an interesting relevancy problem is mentioned only in the minority opinion.[130] In this action plaintiff sustained personal injuries while riding on defendant's roller coaster. Evidence was presented that 1,297,802 persons had ridden on the roller coaster without injury. This evidence apparently was that of a defense witness who testified that that number of persons had ridden and that there was no record of any prior accident. The majority opinion does not deal with the problem of relevance. The minority suggests that there should have been proof that the conditions during the other rides were the same as those present in the instant case.

HEARSAY

Definition

While most hearsay problems in cases considered by the appellate courts involve exceptions to the rule rather than applications of the rule itself, several noteworthy cases decided in the past ten years dealt with the definition of hearsay.

One of the best analyses of the rule is found in *Ryman's Case*,[131] where extrajudicial declarations were offered for the purpose of proving that the declarant was mentally sound. In an opinion reversing the exclusion of this testimony by the trial court, the superior court pointed out that the hearsay rule had no application to the utterances

127. 417 Pa. 569, 208 A.2d 841 (1965).
128. 415 Pa. 480, 203 A.2d 474 (1964).
129. 417 Pa. 58, 209 A.2d 268 (1965).
130. *Id.* at 68-72, 209 A.2d at 273-75.
131. 139 Pa. Super. 212, 11 A.2d 677 (1940).

in issue. Quoting from Wigmore, the court said "the prohibition of the Hearsay Rule, then, *does not apply to all words or utterances merely as such.* . . . The Hearsay Rule excludes extrajudicial utterances only when offered for a special purpose, namely as *assertions to evidence the truth of the matter asserted.*"[132] The court explained that the hearsay rule does not exclude statements which are relevant without reference to their truth. In overruling the trial court's exclusion of the proffered testimony, the court further pointed out that there is no principle of evidence which excludes testimony because it is "self serving."

The case of *Rinker Appeal*[133] affords an excellent example of statements which fall both within and without the application of the hearsay rule. The case concerned a petition to have children declared neglected by their mother. Two examples of hearsay testimony were allowed by the lower court and excluded by the superior court on appeal. The first was a printed statement made by one of the mother's male companions to the district attorney, a probation officer and a stenographer. Its relevance apparently depended upon the truth of the matters asserted in the statement, and the court held its admission improper. Of a similar character was the testimony by a welfare worker of various stories and remarks made by the mother's neighbors, which the court said also constituted hearsay. On the other hand, the trial court admitted statements made by the children to other people. This type of statement, ruled the court, was not hearsay because its relevance was not the truth of the statements but what was in the minds of the children and the impact upon them of their mother's conduct. This, in itself, would be a relevant fact for the court to consider in this type of proceeding.

In 1955, the supreme court, in a per curiam opinion, affirmed the use of an extrajudicial utterance of a much more questionable nature. In *Whitfield v. Reading Co.*,[134] a personal injury action, a defense witness testified to a statement obtained from the plaintiff in the hospital. The court allowed the witness to testify that he had received approval from plaintiff's physician prior to taking the statement. The per curiam opinion stated that this extrajudicial statement was not offered to prove its truth, but merely as the basis for the witness' subsequent conduct. The relevance of the statement for the suggested purpose seems questionable.

132. *Id.* at 221, 11 A.2d at 682.
133. 180 Pa. Super. 143, 117 A.2d 780 (1955).
134. 380 Pa. 566, 112 A.2d 113 (1955).

The problem of police reports as hearsay was again considered by the supreme court in *Johnson v. Peoples Cab Co.*,[135] where a diagram drawn by a police officer who arived five or ten minutes after the collision was admitted into evidence. The report showed the point of the collision and also stated that one of the vehicles involved had gone through a stop sign. In holding that this evidence was hearsay and that its admission constituted prejudicial error, the court affirmed its earlier ruling in *Haas v. Kasnot*[136] and stated that "no one may testify to what somebody else told him. He may only relate what is within the sphere of his own memory brought to him by the couriers of his own senses."[137] In considering the implications of the decisions concerning police reports in *Johnson* and in earlier cases, it should be remembered that not all testimony of this type is improper. For example, such testimony is competent with respect to those things which the officer personally observed. Similarly, where a party has made a statement to the police officer, such testimony, if offered against that party, would properly qualify under the admission exception to the hearsay rule. In any specific instance, therefore, it is necessary to determine whether the statement, if hearsay, does fall within one of the many exceptions to the rule.

In 1960, the supreme court held in *Finney v. G. C. Murphy Co.*[138] that the admission of hearsay testimony, over objection, constituted prejudicial error. Here, the plaintiff sought damages for personal injuries sustained when he slipped and fell on an alleged oily substance on the floor of defendant's store. The testimony showed that the defendant applied a substance called "Mycosheen" to its floors once a week. The trial court permitted the sales representative of the product's manufacturer to testify that the product contained no oil, although his knowledge was not personal and admittedly was derived from others. On appeal, the plaintiff's contention that the testimony was hearsay was sustained and a new trial was granted.

In *Grantham v. Goetz*,[139] a malpractice suit, the court upheld the exclusion from evidence of literature accompanying a drug which had been administered to the plaintiff. The literature, which set forth certain cautions and warnings, was permitted into evidence for viewing

135. 386 Pa. 513, 126 A.2d 720 (1956).
136. 371 Pa. 580, 92 A.2d 171 (1952). The second appeal of this case is reported in Haas v. Kasnot, 377 Pa. 440, 105 A.2d 74 (1954).
137. 386 Pa. at 515, 126 A.2d at 721.
138. 400 Pa. 46, 161 A.2d 385 (1960). Final disposition of this case is reported in Finney v. G. C. Murphy Co., 406 Pa. 555, 178 A.2d 719 (1962).
139. 401 Pa. 349, 164 A.2d 225 (1961).

by expert witnesses but not submitted to the jury. The opinion approving the trial court's action stated that the literature constituted hearsay because it contained medical data based on statements by persons out of court and not subject to cross-examination. However, the possible relevance of the warnings to show that the defendant doctor had been notified of the dangers inherent in the drug, rather than to prove the truth of the statements, was not considered by the court.

In *Commonwealth v. Perdok*,[140] the supreme court considered the radar provisions of the Motor Vehicle Code, which state that an official certificate showing that accuracy tests have been made within a required period and that the radar apparatus was accurate shall be competent and prima facie evidence of accuracy.[141] The court stated that although the finding of accuracy is provided for by the statute, the provisions are silent with respect to establishing that the testing apparatus has been approved by the Secretary of Revenue, as required by the code. The court held that since the statement on the face of the certificate indicating such approval was hearsay, the certificate was not competent to prove this requisite. The court noted further that the document could not qualify under the business records exception to the hearsay rule since no evidence had been introduced to show the identity and mode of its preparation or that it was prepared in the regular course of business at or near the time of the event.

Telephone Calls to Alleged Gamblers

An interesting line of cases deals with the use of extrajudicial statements made by unidentified persons in telephone calls to alleged gambling establishments; surprisingly enough, the courts, in approving the use of such testimony, do not discuss the obvious hearsay aspect of the testimony. For example, this year in *Commonwealth v. Ametrane*,[142] the court, in holding that the evidence was sufficient to support a conviction, stated that the evidence included numerous telephone calls in which the callers asked for "Joe" (defendant's first name) and either attempted to place bets or asked the results of races. The opinion stated merely that evidence of telephone calls received by law enforcement officials during a raid is admissible.[143]

140. 411 Pa. 301, 192 A.2d 221 (1963).

141. Act of April 29, 1959, P.L. 58, § 1002, as amended, PURDON'S PA. STAT. ANN. tit. 75, § 1002(d)(2) (Supp. 1964).

142. 205 Pa. Super. 567, 210 A.2d 902 (1965).

143. This case is also discussed under Expert Testimony *infra* p. 565, for its holding that a county detective is qualified to express his opinion that the defendant was a "bookie."

A review of the prior cases, including those relied upon in *Ametrane*, reveals that the court has never considered the hearsay aspects of the declarations by telephone callers. In *Commonwealth v. Mattero*,[144] evidence concerning callers placing bets by telephone calls answered by the police was held proper to establish the corpus delicti even though the calls did not connect the defendants therein with the betting. The court did not discuss the hearsay problem but merely relied on *Commonwealth v. Palace*,[145] a questionable decision which allowed into evidence the contents of one telephone call. The discussion of this type of testimony in *Palace* indicates reliance upon cases dealing with authentication and with the general proposition that a business establishment may be bound by the response of the person who answers the telephone on its behalf. Such reasoning, of course, had no application in *Palace*, where the court was relying on the credibility of an unknown declarant who initiates the call and not on the apparent authority of one who answers the telephone of a business establishment.[146]

In *Commonwealth v. McDade*,[147] the superior court reversed the sustaining of a demurrer in a bookmaking case where there was evidence of approximately twenty-eight telephone calls with inquiries about the races and requests to place bets. Similarly, in *Commonwealth v. Tselepis*,[148] the court merely stated that telephone calls received by police during a raid are admissible. In that case a defendant apparently did object on the grounds of hearsay, but the court did not consider the problem except to cite the *Mattero* case.

Significantly, the one case which does discuss the basis for the admission of such telephone calls, the *Palace* case, is based on a faulty rationale. Since only one telephone call was involved in *Palace*, it is clear that the evidence was hearsay. In the cases which have followed *Palace*, and which have cited it as authority for admitting evidence of such telephone calls, there may, in fact, be a sound legal basis for the admission of the testimony as not violative of the hearsay rule. It can be argued that where a number of telephone calls are received, that fact alone, irrespective of the truth of the declarations or of the credibility of each of the callers, is logically relevant to establish circumstantially that the receiving location is a gambling establishment. Under this analysis, the evidence does not fall within the prohibition

144. 183 Pa. Super. 548, 132 A.2d 905 (1957).
145. 164 Pa. Super. 58, 63 A.2d 511 (1949).
146. The same rationale appears in Commonwealth v. Prezioso, 157 Pa. Super. 80, 41 A.2d 350 (1945).
147. 197 Pa. Super. 522, 180 A.2d 86 (1962).
148. 198 Pa. Super. 449, 181 A.2d 710 (1962).

of the hearsay rule because it is not being offered to establish the truth of the extrajudicial utterances.[149]

Perhaps one should not quarrel with a supportable rule of law merely because it is founded on an improper basis. If, however, in the future the court would analyze the hearsay problem in this type of evidence, it would certainly help to justify the existing rule.

Admissions

By Conduct

Commonwealth v. Coyle[150] is the most recent supreme court case in which evidence admitted to establish consciousness of guilt by showing flight was held to be proper. The court stated the rule as follows: "When a person commits a crime, knows that he is wanted therefor, and flees or conceals himself, such conduct is evidence of consciousness of guilt, and may form the basis in connection with other proof from which guilt may be inferred . . . ."[151]

The evidence admitted in *Coyle* related to the defendant's flight after an alleged killing and to his course of conduct until he was captured. It included, among other things, the defendant's theft of a car, an armed robbery, apprehension by the police, an ensuing gun battle and escape, and his final surender after a second gun battle. The court held that evidence of the commission of other crimes in the pattern of flight was proper, not to establish guilt of these crimes, but rather to show the defendant's consciousness of guilt for the particular crime involved and the means employed to escape arrest for that particular crime. The court said that all of these acts had a clear and definite connection with the crime involved and that the evidence thereof was properly for the jury's consideration.

In the same category as admissions by conduct are those cases dealing with false or misleading statements made by a defendant subsequent to the crime, escapes from confinement, attempts by the defendant to commit suicide, and attempts by an accused to conceal his identity.[152] Most of the cases which have discussed the problems deal with either flight subsequent to the crime or fabricated or misleading statements made to the police, each of which has been held to be properly admissible to show the defendant's consciousness of guilt and, therefore, the guilt itself. In *Commonwealth v. Homeyer*,[153] a murder prosecution

149. See, *e.g.*, the rationale in State v. Tolisano, 136 Conn. 210, 70 A.2d 118 (1949).
150. 415 Pa. 379, 203 A.2d 782 (1964).
151. *Id.* at 393, 203 A.2d at 789.
152. Commonwealth v. Giacobbe, 341 Pa. 187, 19 A.2d 71 (1941).
153. 373 Pa. 150, 94 A.2d 743 (1953).

in which the defendant was found guilty on the basis of circumstantial evidence, which included his wife's head encased in buried concrete in his home, the defendant had told a series of conflicting stories concerning his wife's whereabouts to various friends and neighbors. The court held that these conflicting narrations, as well as his attempt to commit suicide after his apprehension, were admissible. The court stated the general proposition that flight, manifestations of mental distress, fear before, during, or after discovery of the crime, or an attempt to commit suicide at such times are admissible in evidence. In *Commonwealth v. Sauders*,[154] the defendant's conflicting statements were likewise held admissible in a murder prosecution. Also, in *Commonwealth v. Whiting*,[155] evidence of the defendant's hurried exit after the alleged murder and his subsequent false and misleading statements to the police were admissible as indicating his consciousness of guilt.

Although the court in *Coyle* speaks in terms of the defendant's knowing that he is wanted for the crime and thereafter fleeing or concealing himself,[156] the cases do not seem to require any evidence that the defendant was accused or apprehended prior to flight. The law in Pennsylvania seems to be that the flight or other conduct indicative of consciousness of guilt will be admitted, leaving the problem of explaining away the conduct to the defendant.

By Silence

A subject closely related to admissions by conduct is that of admissions by silence, or tacit admissions. Here, also, the testimony is relevant to establish the accused's consciousness of guilt. The applicable law and its bases are set forth in the leading case of *Commonwealth v. Vallone*.[157] There, the rule was stated to be that when an incriminating statement which naturally calls for a denial is made in the presence and hearing of a person who neither challenges nor contradicts it, although he has opportunity and liberty to speak, the statement and his failure to deny it are admissible as an implied admission of the truth of the charges thus made. The justification for the rule rests on the assumption that since an innocent person ordinarily will spontaneously refute false accusations, the failure to do so is indicative to guilt. The accusatory statement itself is hearsay, but it is admissible to show the defendant's reaction to the statement. The probative value of the

154. 390 Pa. 379, 134 A.2d 890 (1957).
155. 409 Pa. 492, 187 A.2d 563 (1963).
156. 415 Pa. at 393, 203 A.2d at 789.
157. 347 Pa. 419, 32 A.2d 889 (1943).

statement stems not from the credibility of the accuser, but from the silence of the accused.

The *Vallone* case sets forth both those factors which are to be considered by the court prior to admitting the accusation into evidence and those factors which are for the jury to consider in deciding the weight to be given to the defendant's failure to respond. The supreme court stated that the only preliminary questions for the trial judge are whether the statements were such as would naturally call for a denial and whether it was reasonably apparent to the defendant that he had the opportunity and liberty to speak. Any reasons then advanced by the accused to explain his silence are for the jury's consideration. In *Vallone,* the silence was held to be admissible despite the fact that the accusatory statement was made under the following circumstances: (1) The meeting was "deliberately staged" for the purpose of procuring evidence; (2) The accusation was made at a relatively formal proceeding; (3) Defendant was under arrest at the time; (4) Defendant was present under compulsion; (5) The other persons present were "hostile" to defendant; (6) Defendant was not asked any questions until after the meeting. Although Chief Justice Maxey wrote a well-reasoned dissent[158] urging that the accused's silence not be used against him except in extraordinary circumstances, the rule of *Vallone* has continued to be the law in Pennsylvania.

During the last ten years, many cases have raised the question of admissions by silence. In 1959, *Commonwealth ex rel. Stevens v. Myers,*[159] restated the general rule set forth in *Vallone,* but held that the propriety of admitting an alleged tacit admission could not be raised in a habeas corpus proceeding.

In 1962, the problem was raised again in *Commonwealth v. Ford,*[160] where the defendant unsuccessfully contended that the trial court erred in admitting evidence of his silence after accusations by the victim and an alleged accomplice. Some question was raised about whether the defendant's silence followed his having been warned of his right to remain silent. With respect to this question, the superior court stated that the defendant's rights were protected by the instruction to the jury not to construe the silence as an admission if they found that it resulted from his accepting the advice that he did not have to speak.

In 1963, in *Commonwealth v. Reis*[161] the court, in a per curiam

158. *Id.* at 424, 32 A.2d at 892.
159. 398 Pa. 23, 156 A.2d 527 (1959).
160. 199 Pa. Super. 102, 184 A.2d 401 (1962).
161. 202 Pa. Super. 159, 195 A.2d 287 (1963).

opinion on a petition to suppress evidence of a tacit admission, held that incriminatory statements made by two of the defendant's alleged confederates which were read to the defendant by police officers after she was in custody and to which she made no denial were properly admissible in evidence. In *Commonwealth v. Gomino*,[162] the court upheld the introduction of evidence of an alleged admission by silence despite the defendant's contention that he was under the influence of drugs at the time the accusation was made. Here, again, the court reaffirmed *Vallone* and held that the question of whether the defendant was physically and mentally competent to deny the accusations was purely a question of fact for the jury. That same year, in *Commonwealth v. Vento*,[163] the supreme court disapproved the use of a statement made by an alleged accomplice out of the defendant's presence. The court approved the *Vallone* rule, but noted that since the confession of the accomplice was not made in the defendant's presence and since he vehemently denied it when it was later read to him, it could not be justified as a tacit admission.[164]

Last year, in *Commonwealth v. Staino*,[165] a conviction of burglary and larceny was affirmed where a confession of one of the alleged burglars was read to one of the defendants and he made "no answer and no comment." In *Commonwealth v. Sindel*,[166] however, the court reversed a physician's conviction of abortion where the alleged victim's statement was read to him and he remained silent. The basis for the holding was that there was nothing in the statement which implicated this defendant, and that it referred to matters of which he would have no knowledge. The court concluded, therefore, that the defendant physician had no obligation to reply. The interesting question raised in *Sindel*, but not disposed of by the court, was whether the defendant's silence was justified, since to allow it into evidence would be violative of the privilege against self-incrimination. This question has not yet been specifically decided by the court, although the indication in *Sindel* is that the defendants were not relying on the privilege when they remained mute. With the present status of the law regarding the constitutional rights of a criminal defendant, *quaere* whether the doctrine of admission by silence in criminal cases is consistent with the

162. 200 Pa. Super. 160, 188 A.2d 784 (1963).

163. 410 Pa. 350, 189 A.2d 161 (1963).

164. *Id.* at 353, 189 A.2d at 163. The actual holding of the court reversed the conviction and granted a new trial for failure to charge on the relevancy of a prior consonant declaration (the confession) by the witness-accomplice. Such was prejudicial error, since the confession was made after the termination of the alleged conspiracy between the accomplice and the defendant.

165. 204 Pa. Super. 319, 204 A.2d 664 (1964).

166. 205 Pa. Super. 355, 208 A.2d 894 (1965).

privilege against self-incrimination. It certainly seems probable that the court will be faced with this issue in the near future.

The Pennsylvania courts have applied much stricter requirements concerning admissions by silence in civil cases. In *Smith v. American Stores Co.*,[167] an action to recover for personal injuries sustained when the plaintiff fell in the defendant's store, the court refused to allow the jury to consider an alleged admission by silence. Although the superior court cited the *Vallone* rule as being applicable, it stated that "the maxim 'silence gives consent' is not an invariable and precise rule of evidence."[168] The court further noted that where one is accused of negligence giving rise to a civil action, if he is restrained by fear or doubt as to his rights or by the belief that his interest will be best served by his silence, then no inference of assent can be drawn from that silence. "Nothing can be more dangerous than this kind of evidence; it should always be received with caution . . . ."[169] Therefore, an accusation made to an employee suggesting that he had done something improper and his subsequent silence were held to have been properly excluded.

In *Burton v. Horn & Hardart Baking Co.*,[170] an action for personal injuries sustained when plaintiff slipped and fell on the wet steps of defendant's store, an accusation made by plaintiff's daughter to the defendant's manager and his silence were similarly excluded. The court noted that the silence may well have been motivated by a desire to avoid arguing with a customer.

In 1963, two civil cases arose in which admissions by silence were considered. First, in *Chambers v. Montgomery*,[171] the supreme court approved evidence of an admission by silence. It should be noted, however, that *Chambers* involved a civil action for assault and battery, and although the court said that the rule that "silence gives consent" is applicable in civil proceedings, the conduct involved there also constitutes a crime. The same court, however, in *Levin v. Van Horn*,[172] refused to allow such evidence in a medical malpractice action. The court upheld the exclusion of evidence of unanswered accusations made to the doctor which stated that he was responsible for the plaintiff's condition and charged him with malpractice.[173] The supreme

167. 156 Pa. Super. 375, 40 A.2d 696 (1945).

168. *Id.* at 379, 40 A.2d at 698.

169. *Id.* at 380, 40 A.2d at 698. Strangely enough, the courts do not apply this rationale in criminal cases.

170. 371 Pa. 60, 88 A.2d 873 (1952).

171. 411 Pa. 339, 192 A.2d 355 (1963).

172. 412 Pa. 322, 194 A.2d 419 (1963).

173. The court also excluded a check sent by the physician to the plaintiff, which was offered in evidence as an admission. *Id.* at 328-29, 194 A.2d at 422.

court also pointed out that where one is restrained by fear or doubt or by the belief that his interests will be best promoted by his silence, no inference can be drawn from the silence. The court noted that this kind of evidence is dangerous and should never be received unless the declarations are such that they naturally call for a refutation.

The state of the law in Pennsylvania with respect to admissions by silence is puzzling, to say the least. In criminal cases admissions are admitted rather freely with the safeguard that the jury may determine their merit. In civil cases, however, the court becomes concerned with the dangers inherent in this type of testimony. It would certainly seem appropriate for the appellate courts to re-examine their rulings in this field.

Res Gestae

A common exception to the hearsay rule, that of statements within the *res gestae,* has been the subject of several interesting decisions during the last ten years. Under this exception, of course, statements which are relevant solely for the purpose of proving their truth are nevertheless admissible.

In *Campbell v. Gladden,*[174] the court reaffirmed a prior holding[175] that merely because a statement was made in response to a question does not exclude it from being part of the *res gestae.* In this wrongful death action, a critical issue on liability was whether the decedent had struck the tractor or the tractor had suddenly backed into the decedent's car. The evidence objected to by the defense was the testimony of a witness who arrived at the scene five or ten seconds after the impact and at a time when the plaintiff's decedent was lying on the road and bleeding from the nose and mouth. When the witness asked him what had happened, he replied, "They must have backed out in front of me." The court affirmed the allowance of the testimony as a spontaneous statement and stated that it is always pertinent in such problems to inquire:

> Were the circumstance of the case such as to preclude the possibility of a shrewd and self-calculating answer? In the case at bar would a person in Campbell's [the decedent] condition as above described be likely to deliberate, reflect, weigh, counterweigh and concoct evidence in anticipation of some possible law suit?[176]

The court said that any exclamation which is uttered "before the dust and smoke of the mishap which gave it birth subsides, and while the

174. 383 Pa. 144, 118 A.2d 133 (1955).
175. Commonwealth v. Harris, 351 Pa. 325, 41 A.2d 688 (1945).
176. 383 Pa. at 147-48, 118 A.2d at 135.

agony and the hurt of the misfortune is yet unspent" is admissible in evidence as part of the *res gestae.*

That the event which causes the spontaneous utterance need not be one involving physical impact, but may result from emotional shock as well, was demonstrated in the holding of the court in *Commonwealth v. Friedman.*[177] There, in a prosecution for bribery, the court approved a declaration made by a baseball player to whom the bribe had been offered. The declaration had been made to a companion a few moments after the event that "someone had asked him to throw a ball game" and at a time when the declarant, according to the witness, seemed terribly upset and started to weep and cry. The court's holding is not clear as to whether the statement constituted a part of the *res gestae* or was in itself relevant as showing a prompt complaint. In its *res gestae* analysis, however, the court pointed out that the apparent condition of the declarant's mind is the test of the admissibility of the declaration. To render it admissible, the state of mind of the declarant must be induced by the shock of the occurrence so that his spontaneous declaration is integrated with the occurrence itself.[178]

That closeness in time to the startling event does not of itself necessitate the admission of the declaration under the *res gestae* exception is demonstrated in the case of *Maier v. Pittsburgh Rys.*[179] There the court reversed the admission of a statement although it occurred within a few minutes after the event. In finding that the statement lacked the necessary spontaneity, the court noted that the event itself was not sufficiently shocking to permit the subsequent statement as a spontaneous declaration. In *Commonwealth v. Soudani,*[180] however, a declaration made forty-five minutes after an assault was held proper.

In determining whether the declaration is spontaneous, it is important to consider the physical and mental condition of the declarant at the time. In *Barkman v. Erie Indem. Co.,*[181] the declaration concerned how the accident had occurred and was made within five minutes after the event. There, the court held that since the declarant was severely hurt at the time of the statement, it was properly admissible as part of the *res gestae.* In *Commonwealth v. Stokes,*[182] where the

177. 193 Pa. Super. 640, 165 A.2d 678 (1960).

178. The court's second analysis, likening this crime to one of rape where the sincerity of the accuser is tested by prompt outcry, indicated that the statement is not hearsay because the declarant knows it first-hand. This analysis is not well reasoned.

179. 194 Pa. Super. 523, 168 A.2d 632 (1961).

180. 190 Pa. Super. 628, 155 A.2d 227 (1959), *modified on other grounds,* 398 Pa. 546, 159 A.2d 687 (1960).

181. 198 Pa. Super. 379, 181 A.2d 874 (1962).

182. 409 Pa. 268, 186 A.2d 5 (1962).

murder victim made a statement to the police within five minutes of an attack, but when she was in a hysterical condition, her declaration was held properly to fall within the *res gestae* exception.

This year, in *Wilf v. Philadelphia Modeling & Charm School, Inc.*,[183] an action to recover damages resulting from broken water pipes, plaintiff sought to introduce statements made by the man who had been working on the pipes when they broke. The declarations were made some time after the pipes broke but while the water was still dripping. The court held that the exclusion of this testimony was proper since there must be no break in the continuity of the litigated acts which would afford time for reflection. The court noted several events in which the declarant had engaged subsequent to the breaking and stated that these negated the idea of a spontaneous utterance "contemporaneous" with the act.

Hospital Records

Certain problems concerning the admissibility of hospital records under the Uniform Business Records as Evidence Act[184] have been considered by the Pennsylvania courts within the last ten-year period, and it seems clear that upon proper proof, the admission of "facts" will be permitted. The admissibility of "opinions," however, has not been fully resolved.

Clearly, the Uniform Business Records as Evidence Act vests the trial court with discretion in deciding whether to admit the records. The relevant section of the act provides:

> A record of an act, condition or event shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and *if, in the opinion of the court, the sources of information, method* and *time of preparation were such as to justify its admission.*[185]

It is necessary in interpreting the court's opinions to consider the case of *Paxos v. Jarka Corp.*,[186] which antedated the act but which has been consistently reaffirmed as the leading case on hospital records. An analysis of *Paxos* reveals that necessity is an important factor in

183. 205 Pa. Super. 196, 208 A.2d 294 (1965).
184. Act of May 4, 1939, P.L. 42 (No. 35), §§ 1-4, PURDON'S PA. STAT. ANN. tit. 28, §§ 91(a)-(d) (1958).
185. Act of May 4, 1939, P.L. 42 (No. 35), § 2, PURDON'S PA. STAT. ANN. tit. 28, § 91(b) (1958). (Emphasis added.)
186. 314 Pa. 148, 171 Atl. 468 (1934).

allowing admission. The court set forth three requirements which must be present to justify the admission of hospital records: (1) They must be made contemporaneously with the acts they purport to relate to; (2) At the time of making no motive to falsify must have existed; (3) There must exist knowledge by the persons responsible for the statements.[187]

In *Paxos*, the records offered included both facts and opinions. The opinions concerned the causal relationship between a fractured vertebra suffered by the plaintiff and the fall of a hatch covering onto him. The court discussed the problems inherent in admitting such opinion hearsay testimony into evidence without an inquiry into the author's qualifications or into the facts upon which the opinion is based. Since the opinions were not those of physicians but of interns and students, they were held to have been improperly admitted.

Despite the volume of cases which has been decided concerning hospital records,[188] the problem considered in *Paxos* concerning opinion testimony has not yet been resolved. Although some attempts have been made at explanation, no decision has defined satisfactorily the extent to which hospital records may be used.

In 1959, some confusion was caused by the language of the court in *Hagopian v. Eskandarian*,[189] where plaintiff attempted to set aside a conveyance on the ground that he was incompetent at the time of the execution. In support of his claim, plaintiff offered the medical records of the Veteran's Administration which stated, *inter alia*, that his condition had been diagnosed as "dementia praecox, mixed type with strong paranoid trend [not competent]." The medical record entries covered the time span during which the plaintiff had signed the agreements in question. In affirming the exclusion of these medical records under both the Uniform Business Records as Evidence Act[190] and the Federal Official Records Act,[191] the superior court cited *Paxos*, and listed the same three elements which must be present: (1) The entries must be contemporaneous with the acts; (2) They must be *ante litem motam*; and (3) They must be made by a person having knowledge of the facts set forth.[192] The court said that the records could not qualify because

187. *Id.* at 153, 171 Atl. at 470.

188. *E.g.*, Freedman v. Mutual Life Ins. Co., 343 Pa. 404, 21 A.2d 81 (1941); Platt v. John Hancock Mut. Life Ins. Co., 361 Pa. 652, 66 A.2d 266 (1949).

189. 396 Pa. 401, 153 A.2d 897 (1959).

190. Act of May 4, 1939, P.L. 42 (No. 35), §§ 1-4, PURDON'S PA. STAT. ANN. tit. 28, §§ 91(a)-(d) (1958).

191. Act of May 24, 1951, P.L. 393, § 1, PURDON'S PA. STAT. ANN. tit. 28, § 121 (1958).

192. 396 Pa. at 406, 153 A.2d at 900.

there was no assurance that the entries were made on the dates shown, that they were made by the signatories, or that the signatories were physicians.

The confusion raised by the court's decision in *Hagopian* was reduced, however, in *Fauceglia v. Harry*.[193] There, plaintiff denied on cross-examination that he had ever had previous difficulty with his back or headaches which required medical treatment; he specifically stated that he had consulted no physician for these conditions while in the service and that he had never been X-rayed. Defendant then introduced into evidence certain excerpts from the plaintiff's army medical records which contradicted the plaintiff's testimony and which were produced and identified by a custodian of the Veteran's Administration. The custodian was unable to state exactly who made the entries, but, based on his personal experience, he stated that they would have been made by a medical officer. The trial court excluded all entries concerning medical opinion and permitted the introduction of only such entries as would have been within the knowledge of a layman. Following a verdict for the defendant, plaintiff moved for a new trial, assigning the admission of these records as error. The court, relying heavily on *Hagopian*, granted the new trial.[194]

Justice Cohen, for the supreme court, reviewed the subject of hospital records and reversed the grant of a new trial. The court specifically rejected the requirements that the identity of the individual who made the entries must be established and that the entrant must have had personal knowledge.[195] The court held that the records were admissible under either the Uniform Business Records as Evidence Act or the Federal Official Records Act. The opinion discussed the general purposes of the Uniform Business Records as Evidence Act and noted that to require the custodian to have personal knowledge of the identity of the recorder would defeat the purpose of the act. The circumstantial guarantee of trustworthiness in business records, the court said, arises from the regularity with which they are kept; with official records the element of trustworthiness is supplied by the existence of an official duty.[196]

The court explained the "confusing language" in *Hagopian* as an inadvertent error.[197] It noted that the language there which reads that the records "must have been made by a person having knowledge of

193. 409 Pa. 155, 185 A.2d 598 (1962).
194. 5 Mercer County L.J. 203, 204 (C.P. Mercer County, Pa. 1960).
195. 409 Pa. at 161, 185 A.2d at 601.
196. *Id.* at 160, 185 A.2d at 601.
197. *Id.* at 163, 185 A.2d at 602.

the facts set forth" was an inaccurate substitution for the correct language in *Paxos* which set forth knowledge of the "person responsible for the statement."

The decision in *Fauceglia,* however, does not resolve the problem of admitting statements of opinion contained in hospital records, even where the identity of the author as a physician is established.

A review of the many cases affirming the admission of hospital records leaves the question unanswered. In none of these cases has the use of hospital records been permitted to replace the requirement of expert medical testimony where the opinion set forth in the records is at issue in the case. In other words, where a party has the burden of proving a medical opinion, he has not been permitted to satisfy his burden by the use of hospital records.[198] It is to be noted, however, that in *Hagopian* plaintiff sought to accomplish this very end. The hospital records were offered to satisfy his burden of proving his incompetence. Although the court in *Hagopian* neither decided the case on this basis nor discussed the issue, perhaps its reticence in permitting the use of hospital records to supplant medical testimony affords a better explanation for its rejection of the evidence.

The *Fauceglia* case has established that in order to admit hospital records, it is not necessary to show that the entrant must have personal knowledge. The holding, however, is concerned solely with this problem and Justice Cohen carefully pointed out that only the admissibility of facts, and not medical opinion, was at issue.[199]

Perhaps the solution to the problems inherent in permitting opinion evidence to be offered by way of hospital records, where the party offering the opinion has the burden of proving it as a necessary issue in his case, would be to employ the "necessity" test suggested in *Paxos.*[200] Under that test, if the physician who authored the records is available, it would be necessary to call him. If, on the other hand, the physician is not available, the person offering his opinion should be obliged to

198. For example, in Freedman v. Mutual Life Ins. Co., 343 Pa. 404, 21 A.2d 81 (1941), the issue was whether the decedent had been guilty of fraud in his application for a policy of insurance. The hospital records admitted indicated that he had been treated for what apparently was a heart ailment. The fact of treatment itself was sufficient to establish plaintiff's fraud.

In Platt v. John Hancock Mut. Life Ins. Co., 261 Pa. 652, 66 A.2d 266 (1949), the same issue existed where the applicant had been treated for tuberculosis.

In Rockwell v. Stone, 404 Pa. 561, 173 A.2d 48 (1961), anesthesia charts were admitted. There the court refused to consider on appeal the propriety of the admission, but, in fact, the charts were introduced to show certain facts rather than opinions.

199. 314 Pa. at 155, 171 Atl. at 471.

200. It has been suggested that this should not be required since the opposing party can call him if he desires. McCormick, Evidence § 286, at 602 (1954).

show the physician's qualifications before being permitted to introduce his opinion.[201] While the opponent then would not be afforded the opportunity to question the basis of the opinion, perhaps sufficient protection could be afforded by a proper instruction to the jury concerning the weight to be given to such declarations.

The scope of the factual information admissible by way of hospital records apparently is still governed by the statement in *Commonwealth v. Harris.*[202] In *DeMichlieu v. Holfelder,*[203] decided after *Fauceglia,* the court noted the *Harris* case as controlling. In *Harris,* an attempt was made to admit a hospital record for the statement in the patient's history that he had been shot "by a white man." The court held that such a statement is not properly admissible under the Uniform Business Records as Evidence Act[204] as part of the hospital record, since this type of information is not a matter within the hospital's regular course of business. The court gave this example: a statement by a patient that he had a prior heart condition would properly be part of the hospital's business, whereas a statement that he had seen *A* shoot *B* would not. Therefore, in determining the scope of the admissibility of hospital records, it is necessary to be sure that the statement refers to something within the hospital's usual course of business.[205]

Other Business Records

In addition to the cases on hospital records, there have been several decisions of interest on the exception to the hearsay rule dealing with business records. In *Henderson v. Zubik,*[206] despite the fact that the act requires that the entry be made at or near the time of the event,[207] book entries were admitted although they were not made until some time after the event to which they referred. The admission of these entries was found to be properly within the court's discretion under the act.[208] In *Panama Canal Co. v. Stockard & Co.,*[209] shipping documents were held to be admissible even though the records had been prepared by persons from slips submitted to them by others.

201. 314 Pa. at 153-54, 171 Atl. at 470-71.
202. 351 Pa. 325, 41 A.2d 688 (1945).
203. 410 Pa. 483, 189 A.2d 882 (1963).
204. Act of May 4, 1939, P.L. 42 (No. 35), § 2, PURDON'S PA. STAT. ANN. tit 28, § 91(b) (1958).
205. 351 Pa. at 331, 41 A.2d at 691-92.
206. 390 Pa. 521, 136 A.2d 124 (1957).
207. Act of May 4, 1939, P.L. 42 (No. 35), § 2, PURDON'S PA. STAT. ANN. tit. 28, § 91(b) (1958).
208. 390 Pa. at 524, 136 A.2d at 126.
209. 391 Pa. 374, 137 A.2d 793 (1958).

Apparently, the person making the entry did not have personal knowledge, but the person supplying the information had a duty to know and to supply correct information. In *Underhill v. Catalano*,[210] business records were excluded where the entrant had no knowledge of the facts set forth and there was no proof as to the source of the information. The information set forth in *Underhill* concerned the plaintiff's physical condition and noted the place where the accident had occurred. There was no proof, however, as to the source of the information nor was the purpose of the entry clear. In addition, the information did not relate to the business of the employer. The court held the admission of the record improper because there was no proof of knowledge of the person responsible for the statement.

In *Gallizzi v. Scavo*,[211] a per curiam opinion, records were held admissible although the original sheets from which they had been copied had been destroyed. In *Murray v. Siegal*,[212] plaintiff attempted to introduce a letter as a business record. The court held that since the letter was not prepared in the regular course of business, since it was not at or near the time of the recorded events and since it was *post litem motam*, it was not admissible as a business record.

The Use of Criminal Convictions in Civil Actions[213]

During the past ten years, there has been a total reversal of the previously existing law in Pennsylvania concerning the use of criminal convictions as evidence in a civil case. Before 1956, the law of Pennsylvania was clearly in accord with that of the majority of jurisdictions respecting the use of criminal convictions. Up to that time criminal convictions were not admissible in civil actions based on the same occurrence.[214] In 1956, the superior court in *Mineo v. Eureka Sec. Fire & Marine Ins. Co.*[215] set forth a new and different rule. The case involved a suit to recover on fire insurance policies purchased by the proprietors of a restaurant who were convicted of arson. After their arrest, the assureds assigned their interests in the policies to Mineo, who brought suit. The court held that it was not error to admit into evidence the records of the assureds' convictions and that, on the basis thereof, the

210. 185 Pa. Super. 155, 137 A.2d 857 (1958).
211. 406 Pa. 629, 179 A.2d 638 (1962).
212. 413 Pa. 17, 195 A.2d 794 (1963).
213. Although this heading would properly fall under the discussion of Hearsay, the development of the law in this field has been particularly significant and it is therefore treated separately.
214. Zubrod v. Kuhn, 357 Pa. 200, 53 A.2d 604 (1947).
215. 182 Pa. Super. 75, 125 A.2d 612 (1956).

defendants were entitled to judgment n.o.v. The court pointed out that judgments of acquittal or *nolle prosequi* in a criminal action are not admissible in a civil case as evidence of the fact that the plaintiff in a civil action did not cause the loss[216] and also that in a civil action to recover damages for assault and battery, the record of the defendant's conviction in criminal court is admissible.[217] The court in *Mineo* distinguished its case from *Zubrod*[218] on the basis that it is the criminal record of the plaintiff which was involved and not that of the defendant, as in the assault and battery conviction.

The supreme court has now approved *Mineo* and, further, has abandoned the distinction between plaintiff and defendant as a basis for admitting the criminal conviction in the civil action. In 1963 in *Pennsylvania Turnpike Comm'n v. United States Fid. & Guar. Co.*,[219] suit was brought against a surety for liability on a bond where the principal had been convicted in criminal proceedings. The court refused to allow relitigation of the same issue after the bonded officer had been convicted in criminal proceedings and held this conviction conclusive as to the principal's civil liability. Significantly, it was the conviction of the defendant's principal which was put into evidence and held to be conclusive against the defense. The court says that the principle of collateral estoppel prevents the surety from relitigating the same issue.

This year, *Hurtt v. Stirone*[220] specifically held that in addition to the holding of the *Mineo* case that a plaintiff could not benefit in a civil action from a criminal act of which he had been convicted, the law is that a defendant may not benefit from a felony of which he has been convicted by avoiding his obligation of restitution. The court says that this rule was implicit in the ruling of the *Pennsylvania Turnpike Comm'n* case and "We now directly so hold."[221] The court states, further: "We are equally of the opinion that when one has been convicted of a felony, the result of which is of financial benefit to him, the record of his guilt should bar his avoidance of restitution therefor."[222]

Hurtt was an action by the trustee in bankruptcy of the victim of Stirone's extortion to recover monies allegedly paid as the result of the

216. Bobereski v. Insurance Co., 105 Pa. Super. 585, 161 Atl. 412 (1932).
217. Zubrod v. Kuhn, 357 Pa. 200, 53 A.2d 604 (1947).
218. *Ibid*
219. 343 Pa. 543, 23 A.2d 416 (1942).
220. 416 Pa. 493, 206 A.2d 624 (1965), 26 U. PITT. L. REV. 873.
221. *Id.* at 498, 206 A.2d at 626
222. *Ibid*

extortion threats. Stirone had been convicted of extortion in federal court under the Federal Anti-Racketeering Law—the extortion there being the same as that alleged in the civil action as the basis for plaintiff's claim for restitution.[223] In holding that proof of the conviction of the extortion is conclusive evidence of the fact of the extortion in the civil action, the majority opinion recognizes that the weight of authority excludes evidence of criminal convictions in cvil cases. It says, however, that the tendency of recent decisions is away from enforcing the rigid rule and that each case should be decided on its facts. The court goes on to say that it recognizes a valid distinction in cases involving the records of convictions of relatively minor offenses, such as traffic violations and lesser misdemeanors.

In *Hurtt* there are dissents by both Justice Cohen[224] and Justice Musmanno.[225] Justice Cohen's dissent is based on the grounds that the decision is equivalent to the doctrine of collateral estoppel and that since there is not substantial identity of the parties this should not be applied. In addition, he points out the difficulty of the distinction suggested between major and minor crimes. Justice Musmanno's dissent argues that the decision is unfair and improper because the issues in criminal and civil cases are different, the facts frequently differ and often the cases are presented in different ways. In addition, Justice Musmanno points out that jury verdicts may be wrong.

The *Hurtt* case does not discuss the problems which may be raised in holding a criminal conviction to be admissible in a civil case. For example, in a criminal case the defendant who has a criminal record may elect not to take the stand or to testify, because of the possible prejudice of having the jury hear his record of convictions which may be offered for impeachment purposes. In a civil case the defendant is faced with no such election. *Quaere* whether the absolute rule as now announced in Pennsylvania really affords the defendant in a civil case, who has not testified in the criminal case arising out of the same facts, a fair opportunity to present his side.[226]

223. The record of the defendant's conviction was placed in evidence, over objection, as some evidence of duress and also to impeach the defendant's credibility. In its charge, however, the trial court stated that the record of defendant's conviction was conclusive evidence of the fact of extortion and directed a verdict for the plaintiff.

224. 416 Pa. at 501, 206 A.2d at 627.

225. *Id.* at 500, 206 A.2d at 628.

226. It should be noted with the discussion of these cases that in Shoup v. Mannino, 188 Pa. Super. 457, 149 A.2d 678 (1959), a criminal court acquittal mentioned by the plaintiff's counsel was held not to be error by the superior court. In *Shoup*, the defendant elicited evidence that the plaintiff had been found to be "slightly" under the influence of alcohol, both on cross-examination of the plaintiff and by the testimony of the physician who had examined her. In cross-examining the physician, plaintiff's counsel asked whether he

The problem of murderers taking benefits from the estate of the victim was also considered this year. Previously *Greifer's Estate*[227] had held that a wife convicted of the murder of her husband was not permitted to receive benefits under a trust which her husband had created for her benefit. Not considering the question of evidence, the court held that the wife was barred by the common-law principle that a person will not be permitted to profit by his own wrong, particularly by his own crime. The court in the *Pennsylvania Turnpike Comm'n* case explains both *Greifer* and *Mineo* as involving questions of public policy and as attempts to benefit from the fruits of crime. The same question arose this year in *Kravitz Estate*,[228] where a wife, convicted of murdering her husband, presented a claim to the husband's residuary estate at the audit of his executor's account. The claim was disallowed and the wife appealed. The supreme court held that the record of conviction of the wife for murder of her husband was not merely prima facie evidence thereof, but was a conclusive bar to her right to take under or against her husband's will; that neither the question of murder nor of her guilt could be relitigated in orphans' court.

The exact questions presented by the *Kravitz* case were all ones of first impression. The court also reviewed the various acts preceding the present Slayer's Act[229] as well as the various cases which had been decided under previous statutes. The appellant[230] was found guilty of

knew that the plaintiff had been acquitted in the criminal case based on the same facts. This testimony, on motion of defense counsel, was stricken from the record, but defendant later asserted it as grounds for a new trial. The superior court cited the *Mineo* case for the proposition that an acquittal in a criminal case merely shows that there has been no proof of guilt beyond a reasonable doubt. The court went on to say, however, that since the defendant raised this issue himself, plaintiff was allowed to rebut it and that since the defendant failed to move for the withdrawal of a juror at the time, he could not now raise the matter.

In Jamison v. Ardes, 408 Pa. 188, 182 A.2d 497 (1962), a wrongful death and survival action against the defendant motorist, the fact that the defendant had been exonerated at a coroner's inquest was admitted.

227. 333 Pa. 278, 5 A.2d 118 (1939).

228. 418 Pa. 319, 211 A.2d 443 (1965).

229. In this case, of course, the applicable act is the Slayer's Act, August 5, 1941, P.L. 816, §§ 1-16, PURDON'S PA. STAT. ANN. tit. 20, §§ 3441-56 (1964), which provides as follows:

§ 3442. Slayer not to acquire property as result of slaying

No Slayer shall in any way acquire any property or receive any benefit as the result of the death of the decedent, but such property shall pass as provided in the sections following.

§ 3454. Record of conviction as evidence

The record of his conviction of having participated in the wilful and unlawful killing of the decedent shall be admissible in evidence against a claimant of property in any civil action arising under this act.

§ 3455. Broad construction; policy of state

This act shall not be considered penal in nature, but shall be construed broadly in order to effect the policy of this State that no person shall be allowed to profit by his own wrong, wherever committed.

230. Plaintiff in the orphans' court below was the appellant.

murder of her husband, Max Kravitz. She did not testify in the criminal case. In the civil action she offered (a) to take the witness stand in support of her claim, (b) to testify that she was innocent of the murder of her husband, and (c) to support her claim of innocence by the testimony of additional witnesses. The judge refused to permit this issue to be relitigated and held that the findings of the jury and the sentence of the criminal court were conclusive of her guilt and that under the Slayer's Act she was not entitled to that part of the estate which her husband had bequeathed to her in his will.

The court reviewed the cases decided prior to the present act, *Carpenter's Estate*[231] and *Tarlo's Estate*,[232] after reviewing *Pennsylvania Turnpike Comm'n* case as well as *Mineo* and *Greifer*. The court affirmed the court below, holding that to allow the issue of murder to be relitigated would be a mockery of law and justice. In addition, the court said that the correct rule in "slayer" cases is that the record of the conviction includes the indictment, the verdict of the jury, the judgment and sentence of the court, and any decision, order and judgment of the Pennsylvania Supreme Court and of the Supreme Court of the United States. The court held that the record of conviction for the murder of her husband and judgment of sentence of Mrs. Kravitz was not merely prima facie evidence thereof, but constituted a "conclusive bar" to her right to take under or against her husband's will. Further, neither the question of "murder" nor of her guilt or innocence of the crime may be relitigated in the orphans' court. The court cited with approval its discussions in the *Pennsylvania Turnpike Comm'n* case and in *Hurtt v. Stirone*.[233] Note that the statute sets forth merely that the conviction shall be admissible as evidence; it is the supreme court which declares that it shall be conclusive.

In *Kravitz*, a dissent[234] by Justice Cohen, in which Justice Musmanno joined, characterized as improper the majority's development of a common-law rule of evidence that a criminal conviction in a civil proceeding conclusively proves facts which must necessarily have been established in the criminal proceeding, even though there is no substantial identity of the parties. The dissent said that the rule is unjust

231. 170 Pa. 203, 32 Atl. 637 (1895). A son was allowed to inherit from his father's estate after murdering his father because under the then existing act, his right was not destroyed.

232. 315 Pa. 321, 172 Atl. 139 (1934). This case, decided under the act of 1917, allowed the heirs of one who murdered his wife and daughter and then committed suicide to inherit through him his daughter's estate because he had not been "finally adjudged guilty . . . of murder." As a result of the *Tarlo* decision the legislature repealed the Intestate Act of 1917 and enacted the present Slayer's Act of 1941.

233. 416 Pa. 493, 206 A.2d 624 (1965).

234. 418 Pa. at 329, 211 A.2d at 448.

because it unduly emphasizes the policy of diminishing litigation; it does not sufficiently take into account the fallibility of juries, advocates and judges; further, only the criminal is bound by the "truth" established in a criminal proceeding.[235]

COMPETENCY—DEAD MAN'S ACT[236]

Removal of Disqualification

In reviewing the appellate court cases decided under the Dead Man's Act within the past ten years, it becomes apparent that the court has attempted to alleviate some of the inequities resulting from a rigid interpretation of the statute. In recent years there has been a growing disfavor with the provisions of the act.[237]

This year the Pennsylvania Supreme Court considered some problems arising under the Dead Man's Act when there has been pre-trial discovery of the surviving, otherwise incompetent witness. In *Anderson v. Hughes*,[238] the plaintiff was injured when his automobile was struck from the rear by a truck operated by Ford, a co-defendant, and owned by the now deceased defendant, Hughes. Prior to Hughes' death, the plaintiff's deposition had been taken and interrogatories were submitted to him. Plaintiff was permitted to testify at trial, but the court instructed the jury to consider this testimony only in determining Ford's negligence.

The supreme court, in reviewing the refusal of plaintiff's motion for a new trial as against both defendants, considered the plaintiff's competency with respect to the decedent. Although the court states that the lower court erred both in excluding plaintiff's testimony and in instructing the jury to disregard it, the error was not reversible.[239] The court notes that under the rule of *Perlis v. Kuhns*,[240] objections to the competency of a party to testify at trial are waived by the filing of inter-

235. The thrust of the dissent is on other grounds. Justice Cohen pointed out that the court has not properly interpreted the provisions of the statute. He stated that the history of the act makes it clear that the legislature did not choose to make the criminal conviction conclusive, but merely made it admissible in evidence; it codified the rule that the conviction is admissible but not conclusive on the question as to whether one is a slayer for purposes of inheritance and left the ultimate fact to be determined by the orphans' court.

236. Act of May 23, 1887, P.L. 158, § 5(e), PURDON'S PA. STAT. ANN. tit. 28, § 322 (1958) [hereinafter cited as Dead Man's Act].

237. 35 PA. BAR ASS'N Q. 179, 183 (1964).

238. 417 Pa. 87, 208 A.2d 789 (1965).

239. The court cited with approval Roshe v. McCoy, 397 Pa. 615, 156 A.2d 307 (1959), and Perlis v. Kuhns, 202 Pa. Super. 80, 195 A.2d 156 (1963).

240. 202 Pa. Super. 80, 195 A.2d 156 (1963).

rogatories even though the answers are not offered in evidence. Earlier, *Roshe v. McCoy*[241] had held that a surviving party became competent when the decedent's deposition was offered in evidence by his representative.

Although *Anderson* did not result in a new trial,[242] the issue involving the competency of the surviving party whose deposition precedes the death is one which the court has not yet considered under the present Dead Man's Act. Whereas both the *Perlis* and *Roshe* decisions may be explained in terms of waivers of the provisions of the act, this rationale cannot be applied to *Anderson*. In *Anderson* nothing occurred subsequent to the death of the decedent which can be interpreted as a waiver. Both the interrogatories and the deposition of the surviving party were taken prior to the death of the decedent. Dictum in *Anderson* suggests two further advances in the trend of the courts to restrict the insulation afforded by the provisions of the Dead Man's Act and to apply the general rule of competency when faced with apparently inequitable situations. The first step, of course, is the use of the deposition of the surviving witness where the deposition has been taken prior to the death of the decedent. The logical answer to the question would seem to be (in accordance with the court's statement in *Anderson*) that the deposition may properly be introduced into evidence if the witness is now incompetent since, at the time of the deposition, the witness was competent, but now "unavailable."[243] The second problem was before the court in *Anderson*. That is, where discovery procedures have been utilized to glean information from an adverse party at a time when the witness was competent, will the provisions of the Dead Man's Act operate to deprive the witness of the competency to testify after his opponent has died? This question is answered in the negative by the court. In asserting that such a witness is competent to testify it would

241. 397 Pa. 615, 156 A.2d 307 (1959).

242. The error was harmless; since the jury found for the driver, the master was not liable. 417 Pa. at 90, 208 A.2d at 792.

243. There are several early decisions arising under the act of 1895, relating to the physician-patient privilege, and under the act of 1869, the predecessor to the present Dead Man's Act. These decisions hold that where a deposition has been taken at a time when the witness was competent, the deposition may be properly introduced into evidence if the witness becomes incompetent by the time of trial. Wells v. New England Mut. Life Ins. Co., 187 Pa. 166 (1898) (deposition of physician taken prior to the act of 1895 held competent at trial after passage of act); Galbraith v. Zimmerman, 100 Pa. 374 (1882) (dictum, deposition of interested witness taken prior to the death admissible even though witness barred from testifying because one of the parties had died); Evans v. Reed, 84 Pa. 254 (1877) (record of testimony taken at prior trial when witness was competent permitted even though witness himself was incompetent under act of 1869); Pratt v. Patterson, 81 Pa. 114 (1876) (notes of plaintiff's testimony at former trial held admissible in later trial where plaintiff was incompetent).

seem that the court is concerned more with equitable considerations than with waiver. While some mention is made of the plaintiff's contention that the dead man's rule was waived because the deposition had been used at trial for cross-examination of the plaintiff, the court apparently does not rely on this to support its assertion.

In *Hosfeld Estate*,[244] the supreme court reaffirmed the rule that where one is called "as of cross-examination" he is then competent to testify as to all relevant matters.[245] The court stated that calling Hosfeld as on cross-examination removed any disqualification under the so-called Dead Man's Act. Significantly, the court's opinion renders his testimony competent as to all matters and not merely matters relevant to the questions asked during the examination in chief.

The decisions in *Roshe v. McCoy*,[246] *Perlis v. Kuhns*,[247] and *Anderson v. Hughes*[248] make it clear that a decedent's estate may waive the benefit of the Dead Man's Act where interrogatories are filed or depositions are taken of a surviving party by the estate. *Anderson* would seem to indicate that the use of depositions or interrogatories at a time prior to death and when the witness was competent will remove the incompetency. The questions remaining, however, are whether other forms of pre-trial discovery will also eliminate the disqualification. For example, will a demand under the Rules of Civil Procedure for production of documents[249] or for a medical examination[250] have the same effect as propounding interrogatories? Under *Perlis* it is clear that the interrogatories need not be used nor need they disclose anything as to the liability of the parties. It would seem logical, then, that other forms of pre-trial discovery should render the surviving party competent.

General Considerations

In decisions handed down within the past ten years, the court has considered other problems raised by the provisions of the Dead Man's Act. While most persons tend to think of the decedent's personal representative as the person for whose benefit the act applies, this is not always so. While it is usually the decedent's personal representative who

244. 414 Pa. 602, 202 A.2d 69 (1964).
245. *Id.* at 604-05, 202 A.2d at 71. The opinion is somewhat confusing because the court refers to the fact that the "testimony" of the witness was adverse rather than his interest. *Id.* at 604, 202 A.2d at 71. *Accord*, Commonwealth Trust Co. v. Szabo, 391 Pa. 272, 138 A.2d 85 (1957).
246. 397 Pa. 615, 156 A.2d 307 (1959).
247. 202 Pa. Super. 80, 195 A.2d 156 (1963).
248. 417 Pa. 87, 208 A.2d 789 (1965).
249. PA. R. CIV. P. 4009.
250. PA. R. CIV. P. 4010.

represents his interest on the record, the interest may be represented by another individual. For example, in *Rogan Estate*,[251] the decedent's donee represented the interest of the decedent, and the sole legatee under the will was rendered incompetent; and in *Pronzato v. Guerrina*,[252] a suit in equity by decedent's executrix against decedent's son to cancel an assignment, it was held that the interest of the legatees was adverse to the claim of the son claiming through assignment. There, the legatees were incompetent to testify. On the other hand, in *Hendrickson Estate*,[253] the court, in dealing again with an alleged gift, held that the decedent's interest was represented by the decedent's personal representative and that the decedent's daughter was incompetent under the act. There, the daughter (alleged owner as a donee) claimed that a ring had been a gift not from the decedent but from her mother. Thus, the situation is distinguishable from the other cases where the decedent himself had been the donor. In *Lieber v. Eurich*,[254] a controversy between decedent's grantees and certain claimants by adverse possession, it was held that the adverse possessors were incompetent to testify even though the matters had nothing to do with transactions with the decedent and that his grantees were entitled to the protection of the Dead Man's Act. It is to be noted also that cross-examination as to pre-death occurrences waives the incompetence under the Dead Man's Act.[255]

Cases Involving Surviving Partners and Related Decisions

The courts have dealt with two other major fields in which they have restricted the scope of the incompetency imposed by the act. The decisions deal with the first exception provided in the act itself concerning actions against surviving parties and cases in which there are multiple parties or mutiple causes of action, only one of which is affected by the alleged incompetency.

In 1956, in *Mozino v. Canuso*,[256] the court dealt with an issue arising under the first exception set forth in section 5(e).[257] Here the plaintiff brought an assumpsit action for damages resulting from the defendant

251. 404 Pa. 205, 171 A.2d 177 (1961).
252. 400 Pa. 521, 163 A.2d 297 (1960).
253. 388 Pa. 39, 130 A.2d 143 (1957).
254. 201 Pa. Super. 186, 192 A.2d 159 (1963).
255. Hughes v. Bailey, 202 Pa. Super. 263, 195 A.2d 281 (1963).
256. 384 Pa. 220, 120 A.2d 300 (1956).
257. The Dead Man's Act exception reads: "unless the proceeding is by or against the surviving or remaining partners."

partnership's alleged breach of an oral contract under which the partnership was given permission to remove fill from the plaintiff's land. Plaintiff claimed the defendants failed to restore the land to a certain condition as provided in the contract. After the suit had been filed, one of the two partners died and plaintiff amended his complaint to include only the surviving partner and disclaimed any rights against the deceased partner or his estate. At the trial, plaintiff was permitted to testify over objection to his competency and won the verdict. Plaintiff appealed from the granting of a new trial, but the new trial was affirmed by the supreme court. In its opinion, however, the court ruled on the question of the plaintiff's competency and held that he was competent to testify.

In holding that the plaintiff was not incompetent under section 5(e) of the act of 1887, the court states that "the thing or contract in action must be such that the deceased partner, if living, would have been a material and relevant witness concerning matters related thereto."[258] Under this test, the court found that since the dealings here occurred between the plaintiff and the survivor, the plaintiff was competent to testify. The court does not rely solely on the section 5(e) exception, but introduces the test that the decedent must have been a material and relevant witness.

A year later, *Kuhns v. Brugger*[259] raised the problem of testimony to be considered where one of the defendants had died prior to the trial. In a dictum the court says that certain portions of the testimony are incompetent with respect to the decedent's estate. Although the court eliminated the testimony of the plaintiff and co-defendant under the Dead Man's Act, it found sufficient other testimony to sustain the verdict against the estate. The court did not discuss whether the decedent would have been a material witness had he been living.

In 1963, in two cases decided on the same day, the superior court approved the broader interpretation of *Mozino* and then restricted it to its facts. In *Hepler v. Atts*,[260] suit was brought by purchasers of land against the deceased grantor's estate for damages resulting from defective title to part of the tract. The superior court granted a new trial because of the rejection in the trial court of the testimony of one of the purchasers concerning the value of the tract. The court held that he was not disqualified from testifying as to the value of the property

258. 384 Pa. at 225, 120 A.2d at 302.
259. 390 Pa. 331, 135 A.2d 395 (1957).
260. 201 Pa. Super. 236, 192 A.2d 138 (1963).

during the decedent's lifetime, since this was not an "occurrence" between them and also held that restrictive interpretations may no longer be proper since the opinion of the supreme court in *Mozino*.

On the same day as *Hepler*, in *Lieber v. Eurich*,[261] the court restricted the *Mozino* opinion and refused to apply its test in an action to determine whether an easement by prescription existed in the defendant's favor. Here the plaintiff's grantors were dead at the time of the trial, and the defendant, an adverse user, was permitted to testify at the trial concerning his use of the easement dating before the death. In holding that the defendant was incompetent, the court said he should not have been permitted to testify to any relative matters occurring before the death of the plaintiff's grantor "even though they be independent matters or facts which in no way may be regarded as transactions with, or communications by, the decedents."[262] In a note filed with the opinion,[263] the court says that *Mozino* indicates that a witness is incompetent only as to matters which the decedent might have refuted had he been living, but says that it was decided on other grounds and is limited to surviving partners where the deceased partner was no longer an interested party.

Finally, in *Perlis v. Kuhns*,[264] in a dictum, the superior court cites *Kuhns v. Brugger*[265] for the proposition that in trespass actions against the wrong-doer's administrator a plaintiff is not competent to testify as to any matter which occurred prior to the death.

Although the supreme court has not had occasion again to rule upon the issue involved in *Mozino*,[266] the interpretations of the superior court have restricted it to the narrow interpretation involving surviving partners where the transaction has been solely with the living partner. It remains to be seen whether the test advanced in *Mozino*, that the decedent would have been a material witness had he lived, will be applied in other fact situations.

Cases Involving Multiple Parties or Multiple Actions

In its decisions during the last ten years, the supreme court has faced a variety of cases in which a witness was incompetent as to one

261. 201 Pa. Super. 186, 192 A.2d 159 (1963).
262. *Id.* at 188, 192 A.2d at 160.
263. *Id.* at 188 n.1, 192 A.2d at 160 n.1.
264. 202 Pa. Super. 80, 195 A.2d 156 (1963).
265. 390 Pa. 331, 135 A.2d 395 (1957).
266. In Lyons v. Bodeck Estate, 393 Pa. 131, 142 A.2d 199 (1958), where a tenant brought suit against the estate of the deceased owner of an apartment house for injuries sustained on the premises, the court refused to allow the surviving plaintiff to testify, but did discuss the issue of whether the decedent may have been a material witness.

defendant but not as to another or as to one cause of action but not as to another where the two have been consolidated for trial.

In 1955, in the case of *Dennick v. Scheiwer*,[267] the court considered consolidated wrongful death and survival actions. With respect to witnesses against the decedent's estate in a wrongful death action, there is no problem of incompetency since no interest is passed from the decedent. However, the court held that the defendant was a competent witness in the survival action as well as in the wrongful death action because "to tell the jury to listen to the defendant in one claim and close its ears in the other might be technically correct but practically senseless."[268]

Two years later, in *Kuhns v. Brugger*,[269] the court faced an analogous problem. This case involved a personal injury action in which one of two twelve-year-old cousins shot the other with his grandfather's gun while playing in their grandfather's home. After the grandfather's death, plaintiff sued his cousin and the estate of the grandfather. The plaintiff and the original defendant were competent to testify against each other, but neither was competent to testify against the estate. The supreme court held that the testimony of the survivors was not admissible against the grandfather's estate, but that the court had correctly instructed the jury not to consider this testimony in determining the liability of the estate. The question was raised on appeal whether it was error to refuse to grant a severance because of the alleged prejudice to the estate resulting from the incompetent testimony, but the court avoided this question on technical grounds.[270] The court did not attempt to use the same rationale as it had in *Dennick*, but avoided the issue.

In 1959, in *Thomas v. Tomay*,[271] the court again refused to decide the same issue. Here in two consolidated actions wherein the defendant had died, each plaintiff testified in the companion case on behalf of the other. The supreme court noted that the problem of whether each plaintiff was in fact competent to testify for the other had not been raised.[272] With respect to the problem of the resultant prejudice because of the testimony allowed, the court held that since the adminis-

267. 381 Pa. 200, 113 A.2d 318 (1955).
268. *Id.* at 202, 113 A.2d at 319.
269. 390 Pa. 331, 135 A.2d 395 (1957).
270. The question had not been raised in the "Statement of Questions" as required by Pa. Sup. Ct. R. 59. The dissent by Justice Bell argued that the court should decide the question anyway. 390 Pa. at 357, 135 A.2d at 409.
271. 394 Pa. 299, 147 A.2d 321 (1959).
272. The administratrix of the decedent's estate had conceded this point. *Id.* at 304, 147 A.2d at 326.

tratrix had failed to insist on separate actions, she could not contend an appeal that the consolidation constituted error.

In *Sollinger v. Himchak*,[273] a decision similar to *Thomas*, the supreme court affirmed the allowance of testimony by surviving passengers. Here the additional defendant died before trial and plaintiffs were permitted to testify with a cautionary instruction by the judge to the jury. The court affirmed this procedure on the ground that no severance had been requested and held, in addition, that the testimony was not prejudicial.

It seems apparent that eventually the court will be faced with the problem of holding either that a severance is necessary where there are separate plaintiffs or, as in the wrongful death and survival cases, that the incompetency should not apply where the decedent is an additional defendant. Apparently, the court has avoided making this decision because it is concerned with the inequitable results which may occur where the incompetency exists. One possible solution to the dilemma may be that suggested by Justice Musmanno in his dissent in *Lyons v. Bodek Estate*,[274] in which he suggests that the Dead Man's Act should not apply at all to actions in tort. Although it seems unlikely that the court will reverse its position on this point after so many years, it would appear to be the only equitable solution short of repeal.

Opinion Testimony

Expert Testimony

The Pennsylvania courts continue to take a dim view of opinion testimony. The supreme court in *Commonwealth v. Jordan*[275] directed trial courts, thereafter, to use the following instruction: "An opinion is only an opinion. It creates no fact. . . . Because of this, opinion evidence is considered of a low grade and not entitled to much weight against positive testimony of actual facts."[276] The court's opinion of the use of psychiatric testimony to establish insanity as a defense in this murder case was so low, in fact, that it informed the jury that the psychiatrist's testimony was "merely opinion testimony," considered by the law to be the "lowest type" of testimony, "unsatisfactory in character," and "that bad as it is, the court permits it because nothing better is available." In affirming the guilty verdict, the court approved this instruction on

273. 402 Pa. 232, 166 A.2d 531 (1961).
274. 393 Pa. 131, 133, 142 A.2d 199, 200 (1958).
275. 407 Pa. 575, 181 A.2d 310 (1962).
276. This was the language quoted in Commonwealth v. Heller, 369 Pa. 457, 461, 87 A.2d 287, 289 (1952), from earlier cases.

the ground that the doctor had relied upon erroneous and insufficient information which the defendant had given him. The court compared its own factual findings with the history given to the psychiatrist and commented that the psychiatrist failed to perform certain diagnostic tests, and that in view of these considerations, the value of the testimony was very questionable and the trial court's charge was correct. It was not considered that the "facts" relied upon by the court to attack the bases of the psychiatrist's opinion were not determined until after the instructions were given. Further, since the psychiatrist apparently felt qualified to form an opinion without the benefit of the suggested tests, the court's analysis seems inappropriate.

With respect to the necessity for expert testimony, the superior court held in *Augustine v. E. M. Brown, Inc.*[277] that where property damage allegedly resulted from blasting operations, lay testimony was insufficient to sustain the plaintiff's burden of proving causation. In *Commonwealth v. Fisher*,[278] the court held that lay testimony was sufficient to establish that a procedure was "an induced abortion." Although the prosecution called a medical expert, the court stated that one was not necessary. The expert admitted that he could not make his diagnosis from only the physical examination. The court said that his opinion, which was based upon the victim's history as well as upon the physical and laboratory examinations, was properly admitted.

The admissibility of expert testimony is within the trial court's discretion. In *Weisman v. Sauder Chevrolet Co.*,[279] however, the supreme court ruled that it was improper to exclude an expert's testimony. Here, plaintiff's decedent was killed while his car was being chain-towed by the defendant. At trial plaintiff called a towing expert having twenty years' experience. He sought to question this witness on proper towing methods and speeds. The trial court excluded the testimony on the ground that the jury was as capable of determining these questions as an expert. The supreme court stated that many technical factors might enter into determining the proper way to tow a disabled car and that plaintiff's expert did not lack competence merely because he had not done chain-towing for fifteen years. The court concluded that the expert testimony should have been admitted.

The court considered the sufficiency of expert testimony in *Smail v. Flock*,[280] a wrongful death and survival action arising from a collision

277. 205 Pa. Super. 33, 206 A.2d 399 (1965).
278. 204 Pa. Super. 255, 203 A.2d 364 (1964).
279. 402 Pa. 272, 167 A.2d 308 (1961).
280. 407 Pa. 148, 180 A.2d 59 (1962).

between decedent's automobile and defendant's truck. Defendant offered to prove that his expert, a heavy equipment appraiser, examined the truck and discovered a broken spindle which "could very properly account for the truck turning over . . . ."[281] An objection was sustained both in the lower court and on appeal. There, the supreme court stated:

> Moreover, expert testimony, to have any evidentiary value, must state with some positiveness that a given state of affairs is the result of a given cause. It is not enough to say that something *could* have happened. . . . Expert testimony must assert that it is the professional opinion of the witness that the result in question came from the cause alleged.[282]

A similar question was raised in *Moyer v. Ford Motor Co.*,[283] an action brought by an automobile owner against the manufacturer for breach of warranty. Plaintiff alleged that two months after he purchased the car, it suddenly veered out of control and crashed. His expert, an automobile mechanic who testified on the basis of hypothetical questions, gave an opinion that the accident was caused by a locked or frozen wheel which in turn could have been caused by several factors. When he was asked if these possibilities would be matters of factory maintenance, he responded "I would assume so." The court held that the expert's testimony was insufficient to establish causation and that an expert must assert that, in his opinion, the result "actually came," not "might have come," from the cause alleged.

The sufficiency of expert testimony was also considered in *Wood v. Conneaut Lake Park, Inc.*,[284] where plaintiff sued for personal injuries sustained while riding on defendant's roller coaster. His expert, a professor of civil engineering, testified that there was a serious violation of good, sound engineering features in defendant's roller coaster and that the track was not adequately banked. The defendant, on the other hand, produced five experts, three of whom were builders or operators of roller coasters, who testified that the construction was sound and that the course was safe. The supreme court, in a 4-3 decision, reversed a verdict for the plaintiff and entered judgment n.o.v. It held that plaintiff had not sufficiently sustained his burden of proving the defendant's negligence. The majority stressed the fact that the plaintiff's expert based his opinion upon the proper construction of a railroad or

281. *Id.* at 152, 180 A.2d at 60.
282. *Id.* at 152-53, 180 A.2d at 61.
283. 205 Pa. Super. 384, 209 A.2d 43 (1965).
284. 417 Pa. 58, 209 A.2d 268 (1965).

highway. The court found the analogy inapplicable and pointed out that plaintiff's expert had no experience with roller coasters. In effect, the court held that as a matter of law the expert's opinion was not sufficiently competent to be considered by the jury.[285]

Where the expert admits that he is not qualified to give an opinion, his testimony must be stricken. In *Gottlob v. Hillegas*,[286] a personal injury action, a specialist in peripheral vascular diseases had treated the plaintiff for blood clots in her legs. In his testimony he stated: "I am not qualified to talk about the heart itself." The superior court held it was not error to strike his testimony concerning causal connection. It would seem wise for parties relying upon expert testimony to warn their experts against undue modesty.

The superior court apparently believes that bookmaking "involves some technical knowledge, skill, training or experience not common to the ordinary layman."[287] In *Commonwealth v. Ametrane*,[288] a county detective was allowed to testify as an expert that the defendant was a "bookie." The fact that his expert opinion was offered on the ultimate issue to be decided did not bar it.[289] The court said that the detective's qualifications of several years of investigating gambling activities rendered him "admirably suited" to interpret the evidence.[290]

In connection with the "expertise" of police officers, the supreme court takes a dimmer view of their qualifications in civil cases. In *Brodie v. Philadelphia Transp. Co.*,[291] an action was brought for injuries resulting from a collision between a trolley car and an automobile. An officer from the accident investigation division, who arrived at the scene approximately two hours later and observed certain physical markings on the roadway, was called as a witness. Counsel was permitted to elicit his opinion that at the time of the occurrence the trolley car was traveling thirty miles an hour, was not under control,

285. The opinion was probably influenced by the opinion writer's view that a judgment n.o.v. should have been entered on the ground of voluntary assumption of risk.

286. 195 Pa. Super. 453, 171 A.2d 868 (1961).

287. This is the language used in Hayes Creek Country Club, Inc. v. Central Penn Quarry Stripping & Constr. Co., 407 Pa. 464, 181 A.2d 301, 308 (1962), which did not involve bookmaking, to define the proper field for the use of expert testimony. The court affirmed on the opinion of President Judge Campbell, specially presiding. The opinion is not reproduced in the official reporter, but does appear in 181 A.2d at 303.

288. 205 Pa. Super. 567, 210 A.2d 902 (1965).

289. Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1, 68 A.2d 517 (1949), and Commonwealth v. Nasuti, 180 Pa. Super. 279, 119 A.2d 642 (1956), both hold that expert opinion on the ultimate issue is admissible.

290. In Commonwealth v. Mattero, 183 Pa. Super. 548, 132 A.2d 905 (1957), the court allowed without comment expert testimony by a police officer that certain slips were of the type carried by bookmakers, not by players.

291. 415 Pa. 296, 203 A.2d 657 (1964).

and was traveling too fast for conditions. This opinion, held the court, was grossly speculative and an invasion of the jury's exclusive prerogative.

In the earlier case of *Smith v. Clark*,[292] the supreme court likewise disallowed an investigating police officer's opinion as to the cause of an accident. His opinion testimony was that the cause was the driver's "failure *to react* to make a left curve . . . ."[293] The court held this testimony totally unnecessary and inadmissible, necessitating a reversal of the judgment.[294]

The use of an actuarial expert was also considered in the *Brodie* case. The court, overruling prior law,[295] approved the use of an actuarial expert to explain present worth and to illustrate (on a blackboard) to the jury how it should be calculated. A party may use accepted tables or the testimony of a qualified expert, provided that the trial court instructs that this evidence is not conclusive, that there is a marked difference between life expectancy and work expectancy, that health habits and occupation are important factors, that a person's earnings may cease or be curtailed by illness, accident and so forth, and that with increased age, earnings in most instances decline.[296]

Several recent decisions have concerned medical experts. In *Brantlinger Will*,[297] the battle of the medical experts was between a physician who had treated the testatrix a year prior to the execution of the will and the physician who was treating her when the will was made. The court held that little weight was to be given to the testimony of the physician whose treatment antedated the will and who testified that she was incompetent.[298]

An ophthalmologist's testimony concerning the effect of flashing headlights on the eyes of the driver of an approaching truck was ad-

292. 411 Pa. 142, 190 A.2d 441 (1963).

293. *Id.* at 147, 190 A.2d at 443.

294. The court was undoubtedly influenced by the issue of intoxication present in this case, since the plaintiff, a minor, had brought suit on the basis that defendants had served him intoxicants and thus caused his injury. Since an essential element of the plaintiff's case was that he failed to negotiate a curve due to his intoxication, the court seemed to have been influenced by the fact that the opinion was on the ultimate issue.

295. McCaffrey v. Schwartz, 285 Pa. 561, 132 Atl. 810 (1926), was expressly overruled by the court. 415 Pa. at 303, 203 A.2d at 660.

296. In connection with present worth, the court also held that interest must be computed simply at the lawful rate of six per cent only, and that the use of both six per cent and four per cent by the expert was not proper.

297. 418 Pa. 236, 210 A.2d 246 (1965).

298. This case also affirmed the general rule that attesting witnesses may give their opinions of the mental condition of the testatrix. Although the attesting witnesses were of the opinion that she was not competent, this opinion was not binding or conclusive on the question of the will's validity, since once the will is proven it is prima facie valid and the burden of proving lack of testamentary capacity is on the contestant.

mitted in *Williams v. Flemington Transp. Co.*[299] The substance of his testimony was that exposure to a bright beam of light temporarily removes the power to see dim objects. The ophthalmologist admitted that because many factors were not known to him, he was unable to express an opinion as to whether the decedent was blinded. The court held that the admission of his testimony, under the circumstances, was not reversible error.

Laurelli v. Shapiro[300] was an action for injuries received by the driver of a fire truck which was struck by defendant's automobile. Defendant contended that the trial court erred in permitting "plaintiff's doctors to testify that plaintiff actually had the pain he complained of and to testify further as to the severity of the alleged pain."[301] The court held that it was proper for the doctor to so testify, and quoted with approval the following statement:

> A physician may testify as to visible symptoms and indications manifesting pain and suffering; and where the injured person complains of pain and there are no external indications of physical injury, he may give his opinion, based on the general appearance and actions of the plaintiff, as to whether the pain is real, feigned or imaginary. Persons who saw or were in attendance upon the plaintiff after the injury may also testify as to his suffering and to its extent.[302]

The supreme court distinguished the case of *Littman v. Bell Tel. Co.*,[303] where testimony that the plaintiff "suffered the pain that he complained of" was held improper.[304] The distinction was that the doctor in *Littman* was merely relating the plaintiff's complaints of pain. Where, however, the doctor bases his conclusion on what he personally observes and discovers, his testimony is competent. Therefore, it was proper for the doctor in *Shapiro* to testify that the plaintiff was in "severe pain, very severe pain" and that his pains were "characteristic and so agonizing that I do not think anybody could fake a pain of . . . those

299. 417 Pa. 26, 207 A.2d 762 (1965). See discussion of the facts under Presumptions and Inferences, *supra* p. 510.

300. 416 Pa. 308, 206 A.2d 308 (1965).

301. *Id.* at 312, 206 A.2d at 310.

302. 15 AM. JUR. *Damages* § 336 (1938). (Footnotes omitted.)

303. 315 Pa. 370, 172 Atl. 687 (1934).

304. See also Lutz v. Scranton, 140 Pa. Super. 139, 13 A.2d 121 (1940), where the doctor's testimony that in his opinion plaintiff suffered pain was held not to constitute reversible error, since no attempt was made to indicate the intensity of the pain or its precise nature; Ferne v. Chadderton, 363 Pa. 191, 69 A.2d 104 (1949), where the court held it was not error to allow a physician to testify that decedent suffered pain. The court said that had the doctor doubted its existence he would not have administered repeated shots of morphine.

two conditions."[305] The court cannot now prevent the doctor from so testifying; it is for the jury to decide whether the physician has been deceived.

A troublesome question is whether a party can call his opponent's expert as his own witness.[306] In *Evans v. Otis Elevator Co.*,[307] a personal injury action for the negligent inspection of an elevator, plaintiff called an expert witness who was examined and cross-examined. Defendant desired to call this same expert as his own expert witness and to testify as to facts in the case. The witness refused to so testify and the trial judge recognized his right and "privilege" not to do so; the trial judge also refused to allow the defendant to examine the expert factually. The supreme court affirmed the recognition of an expert's privilege to refuse to testify as to his opinion.[308] The refusal to permit the factual examination was justified on the ground that it was cumulative.[309]

Hypothetical Questions

The use of hypothetical questions in eliciting the opinion of expert witnesses has been the subject of several interesting decisions in the past decade. Where the expert has had no personal observation of the necessary facts, the hypothesiser is permitted to supply him with facts on which he may base his opinion. Where he has had some observation, the hypothesiser is permitted to afford him any additional necessary facts. The jury is entitled to know the facts on which the expert relies in order that they may evaluate his opinion in light of their acceptance or rejection of its bases. Obviously, where a hypothetical question is used, the facts it includes must be reasonably supportable by the record.

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305. 416 Pa. at 314, 206 A.2d at 311.

306. See Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455 (1962).

307. 403 Pa. 13, 168 A.2d 573 (1961).

308. Citing Pennsylvania Co. for Ins. on Lives & Granting Annuities v. Philadelphia, 262 Pa. 439, 105 Atl. 630 (1918), where the court held that a private litigant has no right "to compel a citizen to give up the product of his brain . . . . [I]t is a matter of bargain" for the expert and the party. *Id.* at 442, 105 Atl. at 630.

309. Subsection (b) was added to PA. R. CIV. P. Rule 4010 in 1964. It provides:

> (b) If requested by the person examined, the party causing the examination to be made either pursuant to or without an order of the court, shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions. After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical condition. If a party refuses to deliver such report the court on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial.

Whether a party demanding a copy of his opponent's physical examination of himself can then call the examining physician as an expert witness and use his report as factual has not been decided.

An improper hypothetical question was considered in *Karavas v. Poulos*,[310] an action for personal injuries sustained when the plaintiff fell while attempting to sit down on a stool at a restaurant counter. Plaintiff contended that his initial injury was aggravated when a bartender picked him up and placed him on a chair but did not immediately arrange to have him taken to a hospital. To support this contention, the plaintiff desired to ask a hypothetical question of his medical witness to establish the aggravation. The supreme court affirmed the refusal to permit the hypothetical question because it did not include plaintiff's witness' uncontradicted testimony that after he left the defendant's restaurant he was driven in a truck for several miles in a sitting position. This was an important factor to be considered by the doctor since it might have caused the aggravation. The hypothetical question was improper, therefore, because "it should embrace all material facts."[311]

In *Battistone v. Benedetti*,[312] an action for damages caused by a furnace explosion, the defendants objected to the hypothetical question asked of plaintiff's expert because it failed to include contradictions proved by the defense. The lower court overruled this contention and stated that such questions rarely include the assertions of both sides. The court quoted with approval the description of a hypothetical question:[313]

> As, however, it is the province of the jury to determine the facts, an expert cannot be asked his opinion upon the whole evidence in the case where that is conflicting. But a party may state specifically the particular facts he believes to be shown by evidence or such acts as the jury would be warranted in finding from the evidence, and ask the opinion of the expert on such facts, assuming them to be true. The other side may likewise put a hypothetical question based upon such facts as he alleges are shown by the evidence or the jury would be justified in finding from the evidence. Neither side is required in putting the hypothetical question to include therein any other facts than those which he may reasonably deem established by the evidence.[314]

An analysis of this quotation reveals it to be compatible with the *Karavas* holding. Considering both cases, it is obvious that the question need not include contradictions of the questioner's testimony, but

310. 381 Pa. 358, 113 A.2d 300 (1955).

311. This was in accordance with prior law. See, *e.g.*, Roberts v. Pitt Publishing Co., 330 Pa. 44, 198 Atl. 668 (1938).

312. 385 Pa. 163, 122 A.2d 536 (1956).

313. As described in Gillman v. Media, M.A. & C. Elec. Ry., 224 Pa. 267, 274, 73 Atl. 342, 344 (1909).

314. 385 Pa. at 170, 122 A.2d at 539.

that it must include evidence shown by the record which is uncontradicted and which the jury would not be justified in disregarding. The supreme court so stated in *Donaldson v. Maffucci*,[315] where the attempted hypothetical question was not a full statement of all material facts.[316]

The question may not include matters which are not in the record or are not warranted by it. In *Murray v. Siegal*,[317] an action for personal injuries sustained when the plaintiff fell into a hole, the court ruled that the plaintiff's civil engineer was not permitted to answer hypothetical questions which assumed facts not in evidence or omitted material facts. The court further stated that this witness' opinion was largely based upon facts garnered from his own personal inspection long after the accident occurred and not in the record. The latter ruling seems questionable since the expert's testimony on the condition at the time of the examination twenty-five months after the accident was offered and refused as irrelevant because no testimony was offered to show that the condition had not changed. The court, however, refused to allow the expert's opinion that the condition had existed for several years to provide this missing link.[318]

Hayes Creek Country Club, Inc. v. Central Penn Quarry Stripping & Constr. Co.[319] considered the expert testimony of a hydraulic engineer and the hypothetical question submitted to him. The expert was present in court and heard all of the testimony of plaintiff's witnesses. The hypothetical question included some of this testimony but excluded a great number of variables which might have been present. The supreme court held that an objection to the hypothetical question was without merit. The court said that so long as the basic facts are set forth and the answer of the expert is properly restricted and related thereto, the testimony is competent. The court pointed out that if the defendant desired he could raise other conditions or variables by his own hypothetical question on cross-examination and that the answer by the engineer under the circumstances went to the sufficiency rather than to the competency of the evidence. The expert in *Hayes* also testified from his own experience and investigation as well as from assumed facts. The use of this testimony in addition to the use of the

315. 397 Pa. 548, 156 A.2d 835 (1959).

316. There, the court also ruled that the expert must be qualified before such a question is submitted to him and that his qualifications are a matter within the discretion of the trial court.

317. 413 Pa. 23, 195 A.2d 790 (1963).

318. See discussion of this case under Relevancy, *supra* p. 532.

319. 407 Pa. 464, 181 A.2d 301 (1962).

testimony which he had heard during trial makes it clear that the only requisite is that the facts employed be in evidence and that the jury know the facts on which the expert is basing his opinion. One interesting question permitted by the *Hayes* court was "can you state whether or not such an embankment would be one that a prudent man would construct under those conditions?"[320] Though the question solicited an opinion on the ultimate issue of negligence, it was approved by the court on the basis that the matter involved some technical knowledge, skill, training or experience not common to the ordinary layman.

De Marco v. Frommyer Brick Co.[321] dealt with the basis of the testimony of the plaintiff's medical expert. There the court held that the physician's opinion respecting plaintiff's condition was proper even though he used hospital reports which were not in evidence. While the doctor admitted, on cross-examination, that he used medical records as a corroborative ingredient in his opinion, he stated that, even excluding the records, his answer to the hypothetical question would be the same.

Gordon v. State Farm Life Ins. Co.[322] was a suit to recover on an accident policy where death allegedly resulted from "external, violent and accidental means." The plaintiff's testimony presented circumstantial evidence that the insured's car left the highway, fell thirty-three feet down an embankment, spurted fifteen feet, capsized, then regained its wheels, and that the motor of the car was still running when decedent's dead body was found at the rear of the car in a muddy field; there was also evidence that the decedent had attempted to extricate his car from the mud. The plaintiff produced two physicians who testified, in answer to hypothetical questions, that in their opinions the death was the result of the automobile accident. Defendant's expert witness, a pathologist, testified that he was of the opinion that the death was the result of over-exertion. The supreme court sustained a verdict rendered for the plaintiff. The defendant objected that plaintiff's hypothetical questions failed to include all the pertinent factors. In answer, the supreme court stated that it is the obligation of opposing counsel to object in such a manner as to permit the question to be amended, and that defense counsel has full opportunity to put his own hypothetical questions to the plaintiff's doctors. This ruling is significant because the objecting party can no longer rely upon the exclusion of the testimony on the ground that the hypothetical question failed

320. 181 A.2d at 308. This case was not reported fully in the official reporter.
321. 203 Pa. Super. 486, 201 A.2d 234 (1964).
322. 415 Pa. 256, 203 A.2d 320 (1964).

to include all pertinent facts; he now has the obligation to include, by way of objection or on cross-examination, the facts he asserts to be necessary.[323] In considering the defendant's contention that it was necessary to include, in the hypothetical question asked of plaintiff's doctor, the information that a young woman, not decedent's wife, may have been in the car with him, the court stated "that a 21-year old youth should be literally frightened to death because he was with a woman not his legal spouse is simply an exaggeration which can lay no claim to verisimilitude."[324]

IMPEACHMENT

Scope

It has long been the rule in Pennsylvania that a party may be cross-examined freely as to all matters relevant and material to the issues in this case.[325] The cross-examination of witnesses, however, must be limited to matters raised on direct examination. Although these are matters within the discretion of the trial court, occasionally their misinterpretation gives rise to prejudicial error.

In *Okotkewicz v. Pittsburgh Rys.*,[326] the court found prejudicial error resulting from cross-examination of a witness beyond the proper scope. Here, in a suit arising from a collision between plaintiff's car and defendant's street car, the plaintiff called the chief of police, who had investigated the accident, as a witness. Plaintiff asked this witness only four questions. These questions were limited to the witness' interrogation of the street car operator concerning the speed of the street car. On cross-examination, defense counsel asked nothing about the street car's speed. However, he was permitted, over objection, to question the witness about admissions of the plaintiff which the witness allegedly had related to the street car operator. The chief denied that part of the conversation. Defense counsel then asked if he had stated to the driver that the plaintiff said he could not see the street car. The witness replied that he had not. On rebuttal, defendant was permitted to introduce the testimony of a witness to the alleged conversation who testified that the police chief had related certain information that he secured from the plaintiff. The supreme court held that the cross-ex-

323. It would seem, however, that where the hypothetical question is so lacking in facts as to render the opinion expressed immaterial, the court on appeal may nevertheless exclude the testimony.

324. 415 Pa. at 260, 203 A.2d at 322.

325. Agate v. Dunlevy, 398 Pa. 26, 156 A.2d 530 (1959); Jess v. McMurray, 394 Pa. 526, 147 A.2d 420 (1959); McKeen v. S. S. Kresge Co., 195 Pa. Super. 236, 171 A.2d 582 (1961).

326. 397 Pa. 303, 155 A.2d 192 (1959).

amination obviously exceeded proper bounds and should have been excluded. The questions sought to elicit information which was properly a part of the defense. This was highly improper, particularly with respect to the inquiry as to whether the witness had stated that the plaintiff told him he could not see the street car. The court pointed out that if the witness' expected response was yes, it would have been a matter of defense and the defendant should have called this witness in his own case. On the other hand, if it was anticipated that the answer to the question would be no, as it actually was, the imputation that the witness had so stated, even though denied, might have put an improper suggestion into the minds of the jurors. The court added further that the rebuttal testimony compounded the error and that justice required that a new trial be granted.

Although a party may be bound by the uncontradicted testimony of his own witness, the rule does not apply where the testimony is improperly elicited on cross examination. In *Stawczyk v. Ehrenreich*,[327] plaintiffs sought to prove a causal connection between trauma and malignant cancer. Plaintiffs called as their witness the general surgeon who had operated on the wife. He testified as to the surgery but was not questioned about the causal relationship. On cross-examination, defense counsel qualified the surgeon as an expert on cancer and then asked him whether a causal relationship existed. Over objection, the doctor was permitted to testify that, in his opinion, trauma had no relationship to cancer. Plaintiffs moved to strike this testimony and offered to prove by two other physicians that there was a causal connection. The trial court refused, holding that plaintiffs were bound by the surgeon's opinion. The superior court affirmed the granting of a new trial because the cross-examination of the surgeon was not limited to matters germane to the direct examination. It stated that the defendant could have called the surgeon as his witness as part of his defense.[328]

The impeachment of expert testimony by extrinsic evidence was considered in *Schwartz v. Feldman*,[329] and *Steiner v. Ostroff*.[330] In *Schwartz*, the plaintiff's physician testified that the plaintiff's defective hearing was the result of his accident with the defendant. The defendant's physician testified that it was impossible for any expert to determine whether a hearing loss was so caused. The superior court

327. 191 Pa. Super. 195, 156 A.2d 371 (1959).

328. The expert's refusal to testify under similar circumstances has been upheld. See discussion under OPINION TESTIMONY, *infra* p. 562.

329. 196 Pa. Super. 492, 175 A.2d 153 (1961).

330. 197 Pa. Super. 461, 178 A.2d 799 (1962).

held that the defendant's physician's testimony was proper impeachment because it showed that plaintiff's expert's opinion was based on conjecture. In *Steiner*, where the plaintiff's physician stated that the accident had caused phlebitis, the opinion of the defendant's physician that the condition could possibly have been caused by previous operations was held to be proper impeaching testimony.[331]

In *Eisert v. Jones*,[332] the defendant, on direct examination, testified to the speed of an oncoming vehicle. The court also admitted her statement to the police that "it seemed to me it was coming very fast." On cross-examination an objection was sustained to the question "how long had you been driving before this accident?" The supreme court affirmed the granting of a new trial because of this ruling and for the court's failure to charge the jury on how it should have evaluated the defendant's estimate of the plaintiff's speed. The limitation of cross-examination here was improper because it bore on the defendant's ability to judge speed; this constituted basic error.

The definition of the scope of cross-examination of a witness was unusually broad in *Commonwealth v. Mickens*,[333] a prosecution for robbery and assault and battery. Here a defense witness testified to certain circumstances surrounding the commission of the crime, but on cross-examination was evasive about how this information was acquired. The superior court held it proper for the district attorney to ask the witness whether he had participated with the defendant in the crime. The court stated that upon cross-examination of an adverse witness,

> every circumstance relating to which he has testified or which is within his knowledge may be developed, including any matter germane to direct examination, qualifying or destroying it, or tending to develop facts which may have been improperly suppressed or ignored by the adverse party.[334]

The court stated that the trial judge must be given much latitude to determine the scope of cross-examination. The holding may be justified by the fact that the questions related to proper impeaching material, the witness's ability to observe and possible bias or improper motive.

The important distinction between impeachment by cross-examination and impeachment by extrinsic evidence is that extrinsic evidence

331. The standard of definiteness in expert testimony for impeachment purposes differs from the usual rule. See discussion under Opinion Testimony, *infra* p. 562.

332. 399 Pa. 204, 159 A.2d 723 (1960).

333. 201 Pa. Super. 48, 191 A.2d 719 (1963).

334. *Id.* at 52, 191 A.2d at 723.

may not be used to impeach a witness on a collateral issue. In *Commonwealth v. Kettering*,[335] the court condemned the use of extrinsic evidence to contradict the defendant on a collateral issue. On cross-examination the defendant was asked if he was in Jeannette, Pennsylvania, on a certain date, not the date of the offense, to which he replied "I don't know." In rebuttal the Commonwealth was permitted to introduce the testimony of two witnesses that they saw the defendant's car in Jeannette on that date. This testimony was offered as "going to defendant's credibility." The court stated that "whether a fact inquired of on cross-examination is collateral is to be determined by its admissibility if offered by the cross-examining party as part of his case."[336] The admission of the testimony in rebuttal was held to be prejudicial error which, together with other errors in the charge, necessitated the grant of a new trial.

Problems of both cross-examination and extrinsic evidence were raised in *Bruno v. Brown*.[337] The plaintiff had been involved in three automobile accidents in addition to the one from which this case arose and had sued and recovered damages for injuries allegedly received in one in 1953. In 1961 plaintiff was deposed and denied having been involved in the 1953 accident; similarly at the first trial of the instant case he denied this accident until confronted with the complaint. He then changed his testimony and attempted to explain his denial. In the second trial plaintiff admitted his involvement in all other accidents. On cross-examination, defense counsel attempted to impeach his credibility by showing his false testimony in the deposition and at the first trial. The trial court sustained an objection to these questions. The supreme court recognized the general rule that a trial should not be confused through the introduction of collateral matters but held that the proposed questions were proper.[338] The court stated that testimony at prior trials, at examination before trials, in depositions, and statements in interrogatories or pleadings are proper subjects of cross-examination for impeachment and that, under the circumstances, in *Bruno*, the cross-examination was proper even though it did not con-

335. 180 Pa. Super. 247, 119 A.2d 580 (1956).

336. This is the classical approach. See McCormick, Evidence § 47 (1954); 3 Wigmore, Evidence § 1003 (1940). It should be remembered that in addition to substantive issues in the case, facts which impeach or disqualify the witness are independently provable, *e.g.*, facts showing bias, interest, conviction for crime, and lack of capacity or opportunity for knowledge.

337. 414 Pa. 361, 200 A.2d 405 (1964).

338. The use, here, of the term "collateral" is not intended to refer to the prohibition of extrinsic testimony but rather to the prohibition of going beyond the proper scope of cross-examination.

tradict the plaintiff's testimony. The cross-examination offered was very relevant to the plaintiff's credibility and his inclination to testify falsely under oath.

The second issue determined in *Bruno* concerned the defendant's offer of extrinsic evidence to impeach the plaintiff. Plaintiff was asked on cross-examination if he had claimed a back injury in the 1953 accident. He answered "I did not have any back injury whatsoever" and asserted that he had been disabled for only a short period of time. The court refused the defendant's offer of the testimony of three witnesses: a physician who examined the plaintiff after the 1953 accident who would testify that the plaintiff complained of a back injury at that time; an insurance adjuster who investigated the 1953 accident who would testify that the plaintiff then complained of a severe back injury; and a juror at the trial of the 1953 accident who would testify that, at the trial, the plaintiff complained of a prolonged and lengthy disability. The supreme court held that the exclusion of this testimony was error. The court pointed out that the rejected testimony was not admissible to support an inference of a pre-existing condition since there was no testimony to connect the injuries in the two accidents. The court held, however, that the testimony was relevant to aid the jury in assessing plaintiff's credibility in his testimony about his present back injuries. The reasoning of the court seems questionable since the testimony seems to fall within the court's definition of "collateral."

In *Commonwealth v. Boggio*,[339] a prosecution for bastardy, the defendant offered a witness to testify that he had had intercourse with the prosecutrix sometime between 1959 and 1962 (the conception having taken place in 1962). When the evidence was rejected as not within the possible period of the conception, the defendant offered it to attack the credibility of the prosecutrix since she had testified that she had never had intercourse except with the defendant. The superior court affirmed the exclusion of this testimony. The rule in Pennsylvania is that particular acts of misconduct are not provable by extrinsic testimony; they also are not provable merely to contradict the witness' statements. Although the court did not mention the word "collateral," the case is an example of the prohibition against impeachment on collateral matters.

Even matters which traditionally are permitted on the cross-examination may be excluded where the judge believes it is necessary for the safety of the witness. In *Commonwealth v. Cohen*,[340] the defendant

339. 204 Pa. Super. 434, 205 A.2d 694 (1964).
340. 203 Pa. Super. 34, 199 A.2d 139 (1964).

argued that he was prejudiced by the court's refusal to permit him to cross-examine a witness about her residence. The record indicated that the witness was being followed by a private investigator employed by defense counsel. The superior court upheld the exclusion because the safety of the witness was properly a matter of concern for the court, and the matter was within the trial judge's discretion.

The scope of cross-examination of a character witness was considered in *Commonwealth v. Jenkins*[341] and in *Commonwealth v. Butts*.[342] In *Butts*, a prosecution for involuntary manslaughter arising from the operation of a motor vehicle while intoxicated, the defendant's witness, a fellow employee, testified that the defendant had a fine reputation as a sober, careful, law-abiding citizen. On cross-examination the district attorney elicited that the witness had been drinking with the defendant on the day of the accident. The defendant appealed, assigning as error the fact that this form of cross-examination had been permitted.

The superior court agreed with the defendant's statement of the law that character may be discredited only by evidence of general reputation, not by evidence of particular acts of misconduct, and that questions asked of a witness to elicit facts showing that the defendant committed a crime for which he is not on trial at the time are improper. However, in this case neither of these two elements of impropriety were present. The cross-examination was not aimed at uncovering a crime which the defendant had committed, but rather at misconduct of the witness. Nor was the purpose of the cross-examination to impeach the character of the defendant; the purpose was to impeach the credibility of the witness by showing that, since the witness and the defendant were "drinking buddies," the witness' standards of what constituted sobriety in a person were unsound. The court quoted with approval the opinion of the lower court:

> What could go more directly to the credibility of a witness who testified that defendant had an unimpeachable reputation for sobriety and peacefulness than the fact that this witness . . . and defendant embarked on the drinking spree, which preceded and apparently led to this tragic accident . . . .[343]

Absent some proof of the extent and frequency of the drinking, however, the court's reasoning that the witness' standard for sobriety would

341. 413 Pa. 606, 198 A.2d 497 (1964).
342. 204 Pa. Super. 302, 204 A.2d 481 (1964).
343. *Id.* at 311, 204 A.2d at 486.

be affected by the fact that he had been drinking with the defendant, does not seem to follow.

The supreme court in *Jenkins* reversed a murder conviction on the ground that the cross-examination of the character witness was prejudicial. The defendant's grandmother was called to testify to his previous good reputation in the community. On cross-examination the prosecution was permitted, over objection, to ask the following questions: "You had heard, hadn't you, that he was arrested as a juvenile for burglary, malicious mischief . . . . You had heard that, hadn't you?" and "You have heard, haven't you, that . . . he had been arrested on a couple of charges of larceny . . . ?" The purpose of the questions was to call the jury's attention to particular acts of misconduct by the defendant. The court specifically disapproved the allowance of these questions and held them to be prejudicial. Character witnesses may be questioned as to whether or not they ever heard "persons in the neighborhood" attribute particular offenses to the defendant. Such questions are allowed in order to test the accuracy of the witness's testimony by showing that he or she is not familiar with the reputation. However, questions which obviously are for the purpose of showing the commission of a specific crime or crimes for which the defendant is not presently accused are prejudicial and are not legitimate cross-examination. The Commonwealth's contention that the prefatory words "you have heard" were sufficient to justify them was dismissed by the court because the witness could have "heard" the matters from the defendant himself, from his counsel, or as a spectator or interested party at a hearing, and not from persons in the neighborhood. The cross-examination in *Jenkins* was further tainted by the question: "And you say this person with such a fine reputation, you arrested him, didn't you because he threatened to kill you?" The court stated that although the objection to the question was sustained, the harm had been done and the jury had "received the message."[344] The motion to withdraw a juror should have been sustained. Still another impropriety tainted the cross-examination of this witness, reference to the defendant's juvenile court record. This is specifically prohibited by statute,[345] and although cross-examination technically may not constitute the "use" of the adjudication, the inquiry accomplished the harm which the statute intended to prevent.

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344. 413 Pa. at 608, 198 A.2d at 498.

345. Juvenile Court Act, June 2, 1933, P.L. 1433, § 19, PURDON'S PA. STAT. ANN. tit. 11, § 261 (1965).

Prior Convictions

Whenever a person takes the witness stand and offers testimony, his testimony may be impeached by showing prior convictions of felonies or misdemeanors in the nature of *crimen falsi*. This, of course, is true whether the witness is a stranger to the case or a party, including a criminal defendant.[346]

Keough v. Republic Fuel & Burner Co.,[347] a wrongful death action, held that there is no absolute right to introduce criminal records against a defendant who has testified in a civil case. The liability turned on whether the accident was caused by the decedent's darting out into the street or by the defendant's negligence. Some "slight" contradiction existed between the driver's testimony and that of another witness. After the driver had testified, plaintiff offered to show his convictions for larceny in 1937, attempted larceny in 1940, attempted robbery and assault in 1942, receiving stolen goods in 1944, and burglary and larceny in 1944. The date of the trial was 1954. The supreme court stated that the admissibility of such testimony is within the discretion of the trial judge, who must determine whether its probative value is outweighed by the risk of undue prejudice. The trial judge must also consider the remoteness of the prior convictions. Justice Musmanno, in his dissent,[348] argued that since the issue of credibility was the very foundation of the case and since remoteness is not, of itself, an exclud-

346. The use of criminal convictions to impeach should not be confused with the related problems in criminal cases, where testimony of other crimes may be relevant to prove the crime, or may be admitted in murder cases for the purpose of determining penalty. Whether the circuit court's opinion in United States *ex. rel.* Scoleri v. Banmiller, 310 F.2d 720 (3d Cir. 1962), affects the propriety of the admission of prior convictions for impeachment purposes has not been determined. That case held that the admission of a defendant's record in a trial for a capital offense prior to a determination of guilt deprived the defendant of due process of law. The court, in *Scoleri*, suggested that the jury cannot possibly consider evidence for one purpose without being influenced in its determination of the defendant's guilt. This rationale seems to apply equally to the use of such evidence for impeachment.

But see United States *ex rel.* Rucker v. Myers, 311 F.2d 311 (3d Cir. 1962), where, in distinguishing *Scoleri*, the court reasoned that with a cautionary instruction, a prior criminal record would have been admissible to attack the defendant's credibility had he testified. In United States *ex rel.* Stoner v. Myers, 219 F. Supp. 908 (E.D. Pa. 1963), the court considered the constitutionality of introducing a criminal record in a trial for burglary and larceny. There, however, the court refused to decide that issue since it was not raised in the court below. The court did state that *Scoleri* was limited to death cases and to its own facts. Also, in Commonwealth *ex rel.* Prater v. Myers, 226 F. Supp. 19 (E.D. Pa. 1964), a prosecution for burglary, rape and sodomy, the court distinguished *Scoleri* and approved the reference to a prior offense made by the defendant's own character witnesses on cross-examination.

347. 382 Pa. 593, 116 A.2d 671 (1955).

348. *Id.* at 597, 116 A.2d at 673.

ing criterion, the jury should have been permitted to hear this evidence.

The one distinction between the use of prior crimes to impeach the criminal defendant and its use to impeach others is that unless the criminal defendant waives the provisions of the Act of 1911,[349] he may not be cross-examined about crimes; the impeaching evidence must be offered by some extrinsic means. Where, in *Commonwealth v. Petrulli*,[350] the defendant testified in his own behalf that he never had been convicted of a crime in Allegheny County, the superior court approved the cross-examination wherein he was asked whether he had been convicted of a crime in McKeesport. The superior court said that the defendant had put his own reputation or character in issue by his evidence.[351]

In order to be used as valid impeaching evidence, the defendant must have been convicted of the prior crimes; neither a verdict nor plea of guilty, without more, will suffice for this purpose. In *Commonwealth v. Finkelstein*,[352] the defense counsel attempted to cross-examine a Commonwealth's witness about various crimes to which he had pleaded guilty. The court held that the crimes must be ones for which a sentence has been imposed; "conviction" must be given its strict technical meaning.[353] A conviction upon a plea of *nolo contendere* had the same force and effect as a conviction on a plea of guilty. In *Commonwealth v. Snyder*,[354] where the homicide defendant testified on his own behalf, the Commonwealth offered in evidence his plea of *nolo contendere* entered eight years before to an indictment charging embezzlement. The superior court held the evidence proper.

In *Commonwealth v. Negri*,[355] a murder case, the court considered the effect of the Split-Verdict Act[356] on admitting, for impeachment, evidence of the defendant's prior convictions. Since the defendant had testified, the court held that it was proper to admit rebuttal evidence of his prior convictions for breaking and entering, receiving stolen goods and bank robbery to impeach him. The court reached this

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349. Act of March 15, 1911, P.L. 20, § 1, PURDON'S PA. STAT. ANN. tit. 19, § 711 (1964).

350. 182 Pa. Super. 625, 128 A.2d 108 (1956).

351. This is one method by which the defendant may waive the benefit of the Act of March 15, 1911, P.L. 20, § 1, PURDON'S PA. STAT. ANN. tit. 19, § 711 (1964).

352. 191 Pa. Super. 328, 156 A.2d 888 (1959).

353. Note that the rule with respect to other crimes for impeachment purposes is different from that with respect to other relevant crimes. Where the other crime is relevant, even the defendant's admission will suffice. See Commonwealth v. Coyle, 415 Pa. 379, 203 A.2d 782 (1964).

354. 408 Pa. 253, 182 A.2d 495 (1962).

355. 414 Pa. 21, 198 A.2d 595 (1964).

356. Act of March 15, 1911, P.L. 20, § 1, PURDON'S PA. STAT. ANN. tit. 19, § 711 (1964).

conclusion even though the jury had not yet determined the defendant's guilt when the evidence was admitted.

Commonwealth v. Wright,[357] discussed the important question of the necessity for instructing the jury on the limited purpose for which impeaching evidence of prior convictions may be considered. Although no such instruction was requested,[358] the court said that in every case it is extremely important that the jury clearly understand the limited purpose of such evidence. Seemingly, the failure to give such an instruction constitutes basic error even where, as here, the purpose of the testimony is stated by the court at the time of its admission.[359]

Where the record of the conviction does not clearly identify the witness, it is improper to admit the impeaching testimony. In *Commonwealth v. Young*,[360] Thomas Young, the defendant in a murder prosecution, took the stand. To impeach him, the Commonwealth introduced a record of a conviction for robbery through the testimony of the clerk of courts of the county where the conviction took place. The clerk's testimony consisted of a transcript, an indictment, and a guilty plea by "Thomas Young," a nineteen-year-old Negro male. No other evidence was introduced to show that "Thomas Young" was the defendant. The trial court held that the identity of names in the absence of contradiction—defendant did not take the stand in surrebuttal to deny that he was the person involved—was sufficient to support a finding that he was the same person. The supreme court reversed, disallowing this testimony and stressing the danger of evidence establishing prior convictions of serious crimes. This evidence, the court said, "can, and often does, destroy a witness's credibility and significantly influences the outcome of the trial."[361] For this reason testimony other than a similarity in name is necessary to establish identity.

Surprise

Several cases within the past decade have considered the situations in which counsel seeks to plead "surprise" and to cross-examine and impeach his own witness. The leading case in Pennsylvania defining

357. 415 Pa. 55, 202 A.2d 79 (1964).

358. Although the trial court stated that defense counsel requested that the instruction be omitted, the appellate court noted that the record did not support the contention.

359. The *Wright* case also held that illegally obtained evidence may not be used in cross-examination of the defendant. Such evidence cannot be used to discredit the defendant's voluntary testimony unless three elements are present: (1) The defendant elects to take the stand; (2) The testimony must do more than deny the elements of the crime for which he is being tried; (3) The illegal evidence may be received only to the extent that it does not admit acts which are the essential elements of the crime charged.

360. 418 Pa. 359, 211 A.2d 440 (1965).

361. *Id.* at 361-62, 211 A.2d at 441.

the requirements for this tactic is *Selden v. Metropolitan Life Ins. Co.*[362] The case sets forth the following requirements for the plea:

1. The plea is placed upon the record out of the hearing of the jury by counsel's stating the facts upon which the plea is based, usually a prior inconsistent statement. The plea should be made as soon as counsel is surprised; he may not wait until subsequent "surprises" follow.

2. The court has discretion whether to sustain the plea subject to the following rules: (a) "Surprise" does not mean "disappointment," but "taken unawares." The plea must show the prior statement or things upon which counsel relies and by which he was "taken unawares." (b) The plea must show counsel's right to rely upon the antecedent statement. It must rest upon some kind of a representation by the witness, so that counsel was thereby induced to call him. Counsel may not rely upon a prior oral statement of the witness unless made in the presence of the party or his counsel; but where the antecedent statement of the witness is in a writing "subscribed by him," or under oath, this is a continuing inducement and need not have been made in the presence of the party or counsel. (c) The antecedent statement must be contradictory of, or inconsistent with, the testimony of the witness prior to the plea, otherwise there is nothing about which to be surprised.

3. Where the court allows the plea, counsel may then cross-examine his witness concerning the antecedent statement and lay the foundation to impeach the witness. The sole purpose is to impeach the witness. Clearly there must be something in the witness' testimony, which, if not disbelieved by the jury, will be harmful to the party calling him.[363]

The *Selden* court made it clear that a party may not avail himself of a pretext of surprise in order to disclose to the jury the witness' contradictory statements when such statements are otherwise incompetent as evidence. The mere fact that a witness has failed to testify as expected does not warrant the plea. Further, where the side calling the witness is on notice that he will not testify consistently with previous statements, he cannot be impeached on the ground of surprise.[364]

In *Commonwealth v. Smith*,[365] the court held that the Common-

362. 157 Pa. Super. 500, 43 A.2d 571 (1945).

363. Merely because the witness answers "I don't remember" is insufficient because it is not prejudicial. If there is no testimony which needs to be neutralized, there is no excuse for cross-examination to impeach or discredit it.

364. *But see* 3 WIGMORE, EVIDENCE §§ 896-905 (3d ed. 1940), suggesting that the prohibition is not supportable logically and that it should not apply here. In Wigmore's view the matter should be left to the discretion of the trial court.

365. 178 Pa. Super. 251, 115 A.2d 782 (1955).

wealth was properly permitted to plead surprise and to cross-examine its witness. Here, in an involuntary manslaughter prosecution resulting from the defendant's driving of an automobile, a written statement signed by a passenger in the defendant's car was given to the police. The Commonwealth called this passenger as its witness, but his testimony conflicted with the prior statement of defendant's speed, of the distance from which the oncoming car was first seen, of the time when the defendant first applied his brakes, etc. The Commonwealth pleaded surprise, and was granted permission to cross-examine the witness on the basis of the prior statement. The superior court affirmed this ruling, stating that the district attorney proved genuine surprise when he showed the statement upon which he relied and its contradiction of the testimony in material respects. He had a right to rely upon the statement since it was "in writing and subscribed" by the witness. The district attorney had not previously interviewed the witness, but the court said he had the right to rely on the witness' testimony being the same as his signed written statement. The court dismissed the defendant's complaint that the statement itself was permitted to be read to the jury with no explanation by the trial judge of its purpose. Although the court said its sole purpose was to impeach the witness, it held that the defendant's failure to request a precautionary instruction precluded his raising the question on appeal.

In *Commonwealth v. Turner*,[366] a murder prosecution, the plea of surprise was improperly permitted. At defendant's first trial, the witness' confession was permitted into evidence; at the second and third trials he testified in person for the Commonwealth. At the fourth trial, however, he refused to testify and was not called, but the court erroneously permitted the use of his recorded testimony. After the fourth trial but before the fifth, the witness repudiated all his testimony against Turner; this recantation was reduced to writing, signed by him in the presence of prison officials and notarized. His affidavit was filed with the court and a copy of it was submitted to the district attorney. When the district attorney visited him prior to the fifth trial, he affirmed his repudiation of his former testimony and stated that he would refuse to testify against Turner. Nevertheless, the district attorney called the witness; he refused to answer. The Commonwealth then attempted to persuade the judge that his former testimony be permitted to be read in evidence as that of an unavailable witness; the court refused. Then, the district attorney pleaded surprise and was given leave to cross-examine the witness. The supreme court held that

366. 389 Pa. 239, 133 A.2d 187 (1957).

this ruling was improper since there was obviously no surprise. It stated that the Commonwealth intentionally and deliberately set the stage for this request to get before the jury prior contradictory statements of the witness helpful to the prosecution. That, said the court, is never permissible. Additional error was committed when the trial court overruled the defendant's request that the district attorney be required to state, of record, those antecedent conflicting statements of the witness upon which he had relied and whereby he was "taken unawares" at trial. The court, in *Turner,* quoted with approval the character of the rule: "[I]t is fundamental . . . that the party offering the witness be really surprised at his testimony."[367] The court said that "surprise, in its legal connotation, does not embrace disappointment or . . . frustration on the part of the one seeking to have a witness testify otherwise than he has indicated he will do."[368] In addition the plea was improper because the witness had said nothing harmful to the Commonwealth and, therefore, there was no purpose in permitting the impeachment. The court stated that it was wholly unrealistic to pretend that as the statement of the witness was read to him the jury was capable of eradicating the former testimony from their minds. This, said the court, constituted basic and crucial error; the conviction was not permitted to stand.

In *Chuplis v. Steve Shalamanda Coal Co.,*[369] the court held that although the statement of the witness upon which counsel relied was oral, a plea of surprise was proper because it was made in the presence of an adjuster for the Workman's Compensation Bureau and that for this purpose he was a representative of the Commonwealth, the calling party. In *Wright v. Rickman,*[370] the court held that surprise may be pleaded only where the unfavorable testimony is elicited on direct examination; plaintiff could not claim surprise where the witness testified adversely on cross-examination.[371]

367. *Id.* at 253, 133 A.2d at 193, quoting Young v. United States, 97 F.2d 200, 205 (5th Cir. 1938).

368. *Id.* at 253-54, 133 A.2d at 193.

369. 192 Pa. Super. 76, 159 A.2d 520 (1960).

370. 197 Pa. Super. 603, 179 A.2d 677 (1962).

371. For cases holding that a hostile witness may be cross-examined without a plea of surprise, see Commonwealth v. Gurreri, 197 Pa. Super. 329, 178 A.2d 808 (1962); Commonwealth v. Bartell, 184 Pa. Super. 528, 136 A.2d 166 (1957); Commonwealth v. Joseph, 182 Pa. Super. 617, 128 A.2d 121 (1956), where the plea of surprise was also stated to be proper because the district attorney had the right to assume the witness would not perjure himself despite his prior renunciation. Interestingly, the *Seldon* court referred to the cross-examination of a "hostile" or "reluctant" witness to "refresh his recollection."

The interrogation of a hostile witness by leading questions is ordinarily permitted. 3 WIGMORE, EVIDENCE § 769 (3d ed. 1940). This device, however, cannot be used to convert prior extrajudicial statements from hearsay into substantive evidence.

Rehabilitation by Prior Consonant Statements

The rehabilitation of a witness whose credibility has been attacked is a subject which has caused some confusion. Basically, in the absence of an attack on credibility no bolstering of the witness' testimony is permitted. To be admissible, the supporting testimony must meet the attack on the witness' credibility with relative directness.[372]

The supreme court has defined prior consonant statements, the most common form of rehabilitating testimony, as follows:

> [A] prior declaration of a witness whose testimony has been attacked and whose credibility stands impeached, which, considering the impeachment, the court will allow to be proved by a person to whom the declaration was made, in order to support the credibility of the witness, and which, but for the existence of such impeachment, would ordinarily be excluded as hearsay.[373]

Most commonly a prior consonant statement is offered where the witness has been impeached by a prior inconsistent statement. If the witness concedes having made the prior inconsistent statement, there is no basis for the admission of a prior consonant declaration.[374] The admission of a prior consonant statement is proper only where the witness denies the substance of the impeaching testimony. This situation has presented the courts with two major problems during the past ten years: first, whether the prior consonant declaration is admissible at all;[375] and, second, whether the failure to give a cautionary instruction on the use of this testimony is prejudicial error.[376]

Risbon v. Cottom[377] reviewed the law on the use of prior consonant statements. Here, in an action for personal injuries sustained in a head-on collision, the plaintiff testified that the defendant had crossed

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Perhaps a satisfactory test for admitting the prior consonant statements of one's own witness is whether it is offered in good faith, *i.e.*, not where the witness was called solely for the purpose of introducing the extra-judicial statement.

372. See discussion in McCormick, Evidence § 49 (1954); 3 Wigmore, Evidence §§ 1100-44 (1940).

373. Lyke v. Lehigh Valley R.R., 236 Pa. 38, 84 Atl. 595 (1912), is the leading Pennsylvania case on the use of prior consonant statements; this opinion sets forth the rationale for the use of such testimony.

374. See Commonwealth v. White, 340 Pa. 139, 16 A.2d 407 (1940), where the court pointed out that once the self-contradiction is admitted, it cannot be explained away by another consistent statement; the offer does not meet the attack, since no matter how many times the consistent story may have been told, the inconsistent one is not erased.

375. The testimony in this instance is proper where the trial judge, in the exercise of his discretion, is convinced that the credibility of the witness has been impeached in such a manner and to such an extent that it is entitled to support by rebuttal evidence.

376. The proper instruction to the jury is that the consonant statement is not to be considered as proof of its truth, but is merely to support the witness' credibility.

377. 387 Pa. 155, 127 A.2d 101 (1956).

the center line of the highway. On cross-examination, the plaintiff was asked whether he had stated to the defendant fifteen days after the collision that he had no recollection as to how it had occurred; that his mind was a blank in this regard. The plaintiff denied this statement. When the defendant took the stand, he testified that the plaintiff had admitted that he had no recollection of the accident. On rebuttal, plaintiff's witness, an investigating state police officer, was permitted to testify that the plaintiff had described the collision to him a week after it happened. The plaintiff's statement to which the police officer testified was entirely consistent with his testimony at the trial. The reviewing court affirmed the use of this prior consonant statement, and cited *Lyke v. Lehigh Valley R.R.*[378] as controlling. The court said that the real purpose and effect of the defendant's testimony was to impeach the plaintiff's credibility by ascribing to him a deliberate fabrication of his testimony at trial. This suggestion of "recent fabrication" justified the admission of the consonant statement by the trial judge in the exercise of sound discretion.[379]

However, the court failed to instruct the jury that the state policeman's testimony was not substantive proof but might be considered merely to support the plaintiff's credibility. The opinion stated that "such an instruction should, of course, have been given,"[380] but that since the defendant did not raise the question in a timely manner, it would not be considered on appeal.

Although the majority in *Risbon* pointed out that the statements used in rehabilitation were uttered upon a proper occasion to a proper person at a time when their ultimate effect on a later conversation (with the defendant) could not possibly have been foreseen, the opinion stated that no question as to the effect of a lapse of time between the event and the prior consonant statement was presented by the appeal and that no opinion was being expressed with regard thereto. In concurring, Justice Bell stated that the doctrine of consonant statements is a dangerous one and should be narrowly restricted; otherwise, the opportunity for easily manufactured false or self-serving evidence would be tremendous. He suggested that the use of such statements be limited only to rebut charges of recent fabrication, and then only if made

378. 236 Pa. 38, 84 Atl. 595 (1912).

379. The phrase "recent fabrication" used by the *Lyke* court may be misleading. It is not required to be recent with respect to the trial, but only more recent than the consonant statement. See 3 WIGMORE, EVIDENCE § 1129 (1945) and the explanation in *Lyke*.

380. 387 Pa. at 163, 127 A.2d at 105.

almost immediately after the occurrence and before any reason or motive to fabricate existed.[381]

Keefer v. Byers[382] considered the effect of the court's failure to instruct the jury on the limited purpose for which a prior consonant statement was admitted. Here, the impeachment of the plaintiff was posed on lengthy cross-examination by factually-laden questions, which strongly suggested that the plaintiff's version of the collision was a belated fabrication. The trial court permitted the plaintiff to call his son to testify, over objection, that the plaintiff had told him a few days after the accident, at the hospital, that the collision occurred in a manner similar to that to which the plaintiff had testified. The defendant did not request a cautionary instruction but the court below granted a new trial for its failure to so instruct. On appeal, the court first affirmed the allowance of the prior consonant statement as within the sound exercise of the trial judge's discretion. The court deemed this proper because the plaintiff's veracity, if not integrity, had been "interrogatingly impugned," and that, although no direct impeaching evidence was introduced at trial, the disparaging effects of the facts assumed by the cross-examiner's questions attacked his credibility no less harmfully than direct impeaching evidence. The holding of the case was that the trial court's failure to charge on the restricted use of consonant statement testimony did not constitute basic error where the complaining party neither requested the instruction nor called the omission to the court's attention.[383] The court stated further that the jurors could not have misunderstood the use of this testimony since they knew the son had not witnessed the accident.

Commonwealth v. Ford[384] is a poorly considered opinion affirming the use of a prior consonant statement. In this criminal action for assault and battery, aggravated assault and battery, assault and battery with intent to ravish, rape and conspiracy, the defense counsel attacked the credibility of the Commonwealth's witness by evidence of a prior inconsistent statement. The trial court then permitted the district attorney to show that this witness had made a prior consonant statement. This was affirmed by the superior court as in accord with "well

381. The court in *Lyke* said that whether the earlier declarations were made for the purpose of helping the plaintiff in a subsequent suit against the defendant was for the jury to consider in passing upon the weight of the evidence.

382. 398 Pa. 447, 159 A.2d 477 (1960).

383. The court incorrectly cited Risbon v. Cottom, 387 Pa. 155, 127 A.2d 101 (1956), for this proposition, since in that case the court refused to decide this issue.

384. 199 Pa. Super. 102, 184 A.2d 401 (1962).

established law." The opinion does not reveal whether the witness denied the inconsistency, nor does it show when the consonant statement was made; it makes no reference to the question of the testimony's being suggested to be a recent fabrication. The court did state that defense counsel's failure to request a limiting instruction precluded him from raising that issue on appeal.[385]

The court's failure to charge on the proper relevance of a prior consonant declaration in the absence of a specific request was held to be prejudicial error in *Commonwealth v. Vento*.[386] In this murder conviction, the court held that while the failure to so charge was not, in itself, sufficient to constitute error, where the prior declaration was a confession made by a co-conspirator after the conspiracy had terminated, the failure to instruct the jury required a reversal. The co-conspirator had given a confession to the police and testified as a witness for the Commonwealth in the trial against the defendant (the two had been jointly indicted but the Commonwealth had obtained a severance). The *Vento* court, citing *Risbon*, justified the admission of the confession on the ground that the witness' testimony was shaken by a vigorous cross-examination. The court failed to set forth any of the other requirements, particularly the witness' denial of the inconsistency or some suggestion that his testimony at trial was a belated fabrication. In granting a new trial, it stated that the jury might well have believed that the confession constituted evidence against the defendant, particularly since the court's charge mentioned the "statement" of the witness. The court reasoned that since in a joint trial, where a confession is admitted, the court is strictly required to charge the jury as to its use, a fortiori, similar precautionary instructions are required in a separate trial.[387]

In dictum, the court in *Commonwealth v. Miller*[388] dismissed the defendant's contention that the admission of the confession of a co-

385. The court also considered the defendant's contention that he should have been permitted to rehabilitate a defense witness whose credibility had been attacked by showing his convictions for burglary and aggravated robbery. There, it affirmed the refusal of defendant's offer to introduce testimony showing the witness' reputation for truth and veracity, since he had been permitted to show the witness' pardon. The court stated that this was clearly within the discretion of the trial judge. Further, although a defense witness was asked whether he had ever been arrested on certain charges (improper since the impeaching crime must be one for which a sentence has been imposed), this was cured when the witness admitted he had been convicted of the crime. Even though the inference may have been that the crime was rape rather than assault with intent to rape, the court said that the two are so closely related that it was permissible.

386. 410 Pa. 350, 189 A.2d 161 (1963).

387. Apparently a precautionary instruction was requested, but not on this point.

388. 205 Pa. Super. 297, 208 A.2d 867 (1965).

conspirator, not on trial, was reversible error. Here again, the co-conspirator testified for the Commonwealth and implicated the defendant. On cross-examination, the defendant offered into evidence a written statement in which the witness repudiated an earlier confession and declared that the defendant was innocent. On re-direct, the witness' confession was offered by the district attorney and admitted into evidence. The court stated that the prior statement was admissible to sustain the credibility of the witness. The opinion did not mention whether the witness admitted having made the statement, but apparently he did. Unfortunately, the court did not recognize that the use of the prior consonant statement in this instance in no way met the attack of the impeachment. If, in fact, the witness admitted the statement, his explanation but not his prior confession would have been a proper rebuttal.[389]

A closely related situation permitting the use of prior consonant statements to rehabilitate the witness arises when the implication of the recent fabrication is based on some corrupt motive or on bias. Here, obviously, the rehabilitation can meet the impeaching attack if it can be shown that the witness made the same statement before the motive to falsify arose. *Commonwealth v. Cohen*[390] contains an excellent analysis of the basis for the admission of such a prior consonant declaration. In this criminal action for conspiracy to cheat and defraud a union, the testimony of a Commonwealth witness was attacked on cross-examination as being biased and of recent fabrication. The witness had testified on direct examination that he had supported the defendant in his campaign for election as secretary-treasurer of the union and that he was paid and signed a receipt for 100 dollars. When a sheet was produced at trial, the figure 100 had been changed to 180, and the witness testified that it was not the same as when he wrote it. On cross-examination, defense counsel elicited that this witness previously had testified at a senate investigation concerning this matter, and that then the witness had pleaded the fifth amendment. It was further brought out that at the time of trial the witness was a member of an organization whose object was to oppose the defendant. The district attorney was then permitted to use a signed statement given to a senate committee investigator at a time when he was loyal to the defen-

389. The holding in this case was that the court's instruction to the jury suggesting that they had the right to draw an inference from the defendant's failure to call witnesses or to better defend himself was reversible error. The court did not decide the question which arose from an alleged comment by the district attorney on the defendant's election not to testify.

390. 203 Pa. Super. 34, 199 A.2d 139 (1964).

dant and prior to his pleading the fifth amendment. The statement recited the history of the transaction just as he described it in the present trial. The court stated that the prior consonant statement was properly admitted to offset the implication presented by defense counsel on cross-examination.[391]

Calling Witnesses as on Cross-Examination

Various problems have arisen during the past ten years under the statute providing for the calling of witnesses as on cross-examination.[392] These problems have concerned the right to call a witness as on cross-examination, the classes of witnesses which may be called, the permissible scope of examination, the effect on the witness' incompetency and on possible inferences to be drawn, and the right to contradict such testimony or the failure to so contradict.

Ordinarily, calling a witness as on cross-examination is a statutory right which must be granted upon request. There are some situations, however, where the trial judge has discretion to deny the request. In *Dunmore v. McMillan*[393] the court refused to consider the lower court's denial of such a request because the issue was not included in the "statement of questions" as required by supreme court rule 59.[394] The court did state in a footnote,[395] however, that the matter was discretionary. Even when the request is made at a stage where the trial judge has discretion, he must weigh the party's right to call witnesses against any possible prejudice which might result. In *Agate v. Dunlevy*,[396] plaintiff asked to call the defendant as on cross-examination after he had rested on the question of liability. The judge refused to allow the examination and later, during the defendant's case, limited cross-examination of the defendant to the testimony given on direct. The supreme court held that the judge's refusal to permit the defendant to be called as on cross-examination was an abuse of discretion. The court stated that such a request, even at the stage where it was made in *Agate*, must not be denied except for the most compelling reasons.

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391. It is to be noted that here the prior consonant statement was made four years after the actual transaction. Obviously there should be no requirement, as that suggested by Justice Bell in *Risbon*, that the statement must be made almost immediately after the occurrence since its relevance depends not on its proximity in time, but on its being made prior to the time when the apparent motive to falsify arose.

392. Act of May 23, 1887, P.L. 158, § 7, as amended, Purdon's Pa. Stat. Ann. tit. 28, § 381 (1958).

393. 396 Pa. 472, 152 A.2d 708 (1959).

394. Pa. Sup. Ct. R. 59.

395. 396 Pa. 474, n.1, 152 A.2d 710, n.1.

396. 398 Pa. 26, 156 A.2d 530 (1959).

The statute provides that in addition to either party, any person for whose immediate benefit the proceeding is brought or defended, a director or officer of a corporation, or any other person having an adverse interest, may be called as on cross-examination.[397] In *Puskarich v. Trustees of Zembo Temple*,[398] plaintiff attempted to call as on cross-examination the defendant's assistant superintendent in charge of the building and grounds where plaintiff allegedly was injured. The trial court's refusal to allow this witness was not within the provisions of the statute because he had no adverse interest. That an agent may become liable to a party as the result of a dereliction of duty is not sufficient to categorize him as a witness with an adverse interest within the meaning of the statute. Thus, in *Brown v. Popky*,[399] the court's refusal to permit the plaintiffs to call as on cross-examination the defendant's son, who managed the building in which the accident occurred, was held to be proper.

When a party is called as on cross-examination, he may then be cross-examined by his own counsel as to matters related to his "direct" testimony. His counsel may not, however, exceed the scope of the "direct" testimony to establish his main defense or case. *Rogan Estate*[400] involved a *citation* by the representative of a deceased joint depositor in a checking account against the surviving depositor and the bank. The surviving depositor was called as on cross-examination and testified as to the arrangements concerning the opening of the joint account. Counsel for the bank, using a series of highly leading questions which were permitted over objection, then cross-examined the witness and elicited matters which constituted the defense of both defendants. The court re-examined the principles underlying the prohibition against posing leading questions and noted that the prohibition does not depend upon the examiner's identity as the witness's own counsel but upon whether the witness is friendly to the counsel posing the questions. If so, leading questions should not be permitted even though counsel may represent another party. The court concluded that the questioning here was highly prejudicial to the plaintiff and granted a new trial. The rule is clear that although it is proper to cross-examine

397. Act of May 23, 1887, P.L. 158, § 7, as amended, PURDON'S PA. STAT. ANN. tit. 28, § 381 (1958).

398. 412 Pa. 313, 194 A.2d 208 (1963).

399. 413 Pa. 236, 196 A.2d 638 (1964). This case also held that the plaintiff was not permitted to use the son's deposition as a "managing agent" as substantive evidence. The court held that the status of the witness at the time of the deposition is taken governs its use and that the phrase "managing agent" refers to corporations and not to individuals. *Id.* at 334, 196 A.2d at 645.

400. 404 Pa. 205, 171 A.2d 177 (1961).

a witness who had been called by the other side as on cross-examination as to anything legitimately related to matters inquired about on the initial examination, the defendant will not be permitted to put in his defense or establish his case under the guise of cross-examination.

Rogan Estate is the leading Pennsylvania case for the proposition that the failure to contradict the testimony of a witness called as on cross-examination results in the calling party being bound by the testimony.[401] Although the statute states that "the adverse party calling such witnesses shall not be concluded by his testimony,"[402] the courts have ignored this provision in construing the effect of calling such a witness. With the exception of testimony which is so inherently improbable as to be unbelievable by reasonable men, to the extent that the testimony is not rebutted it is conclusively taken to be true. The circumstances themselves may constitute sufficient contradiction. The court so held in *Piwoz v. Iannacone*,[403] where it was said that the circumstances were more than sufficient to render the testimony incredible. Where the testimony is rebutted by other witnesses, of course, the issue becomes one for determination by the jury.[404] Thus, in *Guida v. Giller*[405] the plaintiff was not entitled to the presumption that an automobile was being used on the business of its owner, where plaintiff had called the defendant driver as on cross-examination and his unrebutted testimony showed that the automobile was not being used for the purposes of the owner. Plaintiff was bound by the driver's testimony. Similarly, where plaintiff in an action for inducing a breach of his employment contract called the defendant's vice-president as on cross-examination and his uncontradicted testimony was that he had never told anyone to fire the plaintiff, plaintiff was bound by this testimony and a judgment n.o.v. was affirmed.[406] It is not necessary, however, that the contradiction be in the form of direct testimony.

Calling a witness as on cross-examination may have certain other results independent of the testimony elicited. For example, in *Hosfeld Estate*[407] the court held, in accordance with prior law,[408] that calling an adverse witness as on cross-examination removed the disqualification which would otherwise apply under the Dead Man's Act. In addition,

401. For a recent decision, see Amate v. Landy, 416 Pa. 115, 204 A.2d 914 (1964).
402. Act of May 23, 1887, P.L. 158, § 7, as amended, PURDON'S PA. STAT. ANN. tit. 28, § 381 (1958).
403. 406 Pa. 588, 178 A.2d 707 (1962).
404. Zernell v. Miley, 417 Pa. 17, 208 A.2d 264 (1965).
405. 406 Pa. 111, 176 A.2d 903 (1962).
406. Capecci v. Liberty Corp., 406 Pa. 197, 176 A.2d 664 (1962).
407. 414 Pa. 602, 202 A.2d 69 (1964).
408. Commonwealth Trust Co. v. Szabo, 391 Pa. 272, 138 A.2d 85 (1957).

the superior court held last year in *Wilf v. Philadelphia Modeling & Charm School*[409] that where a defendant is called as on cross-examination the plaintiff cannot then invoke the doctrine of exclusive control.

It should be noted also that calling a defendant as on cross-examination may serve to destroy the inference which might otherwise arise from his failure to testify on his own behalf.[410] The rule seems to be that where the scope of the examination is very limited and the defendant fails to testify in his own case, the inference that his testimony would have been unfavorable had he testified for himself is not destroyed.[411] On the other hand, where the scope of the testimony elicited as on cross-examination is quite broad, it will serve to destroy the inference and the jury may not be instructed that it may draw the inference.[412]

Comment By Trial Judge

In Criminal Cases

Although it has long been the law in Pennsylvania that the trial judge may comment on the evidence in a criminal case and may even express his opinion as to the guilt or innocence of the defendant,[413] the supreme court this year reversed two murder convictions in which the lower courts had gone beyond the proper bounds of comment in their instructions.

In *Commonwealth v. Ott*,[414] the court's charge to the jury contained the following offending statement: "And my comment is that I am of the opinion that this defendant is guilty. But please understand, members of the jury, *that it's my duty* and it's my right to make a comment, under the law of Pennsylvania."[415] Although the judge did tell the jurors that they did not have to agree with his opinion, the court reversed the conviction because in no instance should a trial judge inform the jury that it is "his duty" to express an opinion that the defendant is guilty. The connotations of the term "duty," the court stated, may lead the jury to believe that a guilty verdict is its only

409. 205 Pa. Super. 196, 208 A.2d 294 (1965).
410. Haas v. Kasnot, 377 Pa. 440, 105 A.2d 74 (1954).
411. Beers v. Muth, 395 Pa. 624, 151 A.2d 465 (1959).
412. Evans v. Philadelphia Transp. Co., 418 Pa. 567, 212 A.2d 440 (1965).
413. Commonwealth v. Raymond, 412 Pa. 194, 194 A.2d 150 (1963), *cert. denied*, 377 U.S. 999 (1964); Commonwealth v. Chester, 410 Pa. 45, 188 A.2d 323 (1963); Commonwealth v. Romano, 392 Pa. 632, 141 A.2d 597 (1958); Commonwealth v. Cisneros, 381 Pa. 447, 113 A.2d 293 (1955); Commonwealth v. Chambers, 367 Pa. 159, 79 A.2d 201 (1951).
414. 417 Pa. 269, 207 A.2d 874 (1965).
415. *Id.* at 271, 207 A.2d at 875-76.

choice. The supreme court reviewed the prior cases and reaffirmed the general rule that the judge may express an opinion regarding the defendant's guilt or innocence, provided that he exercises this right fairly and temperately, that there is reasonable ground for any statement he makes, and that he clearly leaves to the jury the right to ultimately decide the facts. The court stated that there is some restriction on the trial judge when he does state his opinion, although the limitation is not clearly defined. The court does state, however, that the trial judge's right to comment should not be exercised "in a very close case." It is interesting to note that while the court refers to *Commonwealth v. Chambers*,[416] a case often cited as authority for the trial judge's right to comment, it does not specifically review the language in that earlier opinion.[417] To the extent that *Chambers* may have been authority for the view that the trial court sometimes has the "duty" to express an opinion, it seems clear that this is no longer valid law.

The court considered the same problem in the case of *Commonwealth v. Young*,[418] another murder prosecution.[419] Here the court's charge contained the following statement: "My comment, members of the jury, *and I have good reason for making it*, is that I think the defendant is guilty, and that it would be a miscarriage of justice to find him not guilty."[420] The supreme court held this charge to be improper on the basis that the italicized language permitted an inference by the jury that the judge possessed facts not known to the jurors and hence violated the rule allowing comment.

The special concurring opinion[421] in *Young*, filed by Justice Musmanno, compares the language of the charge attacked in *Commonwealth v. Cisneros*,[422] decided ten years earlier. In *Cisneros*, the language "a verdict of not guilty would be a miscarriage of justice" was approved despite the fact that the court had stated that this was its "conviction." Although the concurring opinion by Justice Musmanno suggests that this phrase is now disapproved, the majority limited its holding to the judge's comment implying undisclosed reasons for his

416. 367 Pa. 159, 79 A.2d 201 (1951).

417. In *Chambers* the court said that "it is always the privilege and sometimes the duty of a trial judge to express his own opinion . . . ." *Id.* at 164, 79 A.2d at 204.

418. 418 Pa. 359, 211 A.2d 440 (1965).

419. The factual situation in this case is quite interesting, in that the victim died as a result of shock and fright sustained during a holdup and without any physical contact. At the trial, medical experts testified that the victim's death was the result of this shock and fright.

420. 418 Pa. at 362, 211 A.2d at 441. (Emphasis added.)

421. *Id.* at 263, 211 A.2d at 442.

422. 381 Pa. 447, 113 A.2d 293 (1955).

opinion. In light of the relationship of judge to jury, a distinction between "I have good reason for making it" and "I have a conviction" is not tenable. In special concurring opinions to both *Young* and *Ott*[423] (joined in *Ott* by Justice Musmanno), Justice Roberts urged that it is "undesirable, unnecessary and unfair to allow the trial judge to inform the jury that, in his opinion, the defendant is guilty."[424] While neither *Ott* nor *Young* specifically overrule previous decisions, it does seem clear that, at least in murder cases, the court will scrutinize more closely a comment by a trial judge which sets forth his opinion that the defendant is guilty. Not only may he not inform the jury that it is his duty to state this opinion, but his charge must also make it clear that the issue of guilt is solely within the jury's province; his comment must not amount to a directed verdict.

The extent to which the judge may participate in the trial itself was raised in *Commonwealth v. McGuiness*.[425] The trial judge questioned the prosecutrix in a rape case and employed leading questions concerning her description of the crime. The superior court affirmed the conviction and noted that leading questions are proper when modesty and delicacy preclude full answers to general questioning and that this is especially true in a prosecution for rape. It should be noted, however, that since the trial in the court below was non-jury, the alleged prejudice resulting from the court's questions would be less harmful than it might have been in a jury trial.

The right of the trial court to question witnesses in criminal cases is established in Pennsylvania, but the judge must not exhibit such prejudice or bias as to preclude the possibility of a fair trial.[426] In fact, the supreme court has stated that in certain instances questions by the trial judge are even necessary.[427] The court has indicated, however, that the trial judge must not be too zealous in his participation in the trial. For example, in *Commonwealth v. McCoy*[428] a murder conviction was reversed because the trial court's charge described the defendant as a "man whose reputation before you is one that is steeped in crime, vicious crime. . . ."[429] The court not only held that such language

423. Commonwealth v. Young, 418 Pa. 359, 366, 211 A.2d 440, 443 (1965); Commonwealth v. Ott, 417 Pa. 269, 274, 207 A.2d 874, 877 (1965).

424. *Ibid.*

425. 204 Pa. Super. 75, 203 A.2d 326 (1964).

426. Commonwealth v. Carluccetti, 369 Pa. 190, 85 A.2d 391 (1952); Commonwealth v. Watts, 358 Pa. 92, 56 A.2d 81 (1948) (questions of an impeaching nature by the judge were held proper).

427. Commonwealth v. Jordan, 407 Pa. 575, 185 A.2d 310 (1962) (the judge questioned a psychiatrist who testified for the defense on the issue of sanity in a murder trial).

428. 401 Pa. 100, 162 A.2d 636 (1960).

429. *Id.* at 102, 162 A.2d at 638.

was improper, but specifically noted that the judge's participation in the trial was prejudicial and that questioning from the bench must not show bias or feeling or be unduly protracted.[430]

In Civil Cases

Although the statement of the general rule on comment by the civil trial judge and his participation in the trial is substantially identical to that for criminal cases,[431] the court is more lenient in applying the standard in civil actions.

In two cases decided within the last year, the superior court considered comment by the trial judge. In *Stack v. Tizer*,[432] the judge commented in his charge that he found no evidence in the case that the parties mutually abandoned the allegedly breached contract. Appellant and appellee agreed that there was some such evidence. Nevertheless the error of the trial court was held not to be of such material, prejudicial character as to warrant a new trial where the charge as a whole was fair.

The superior court held in *Eckels v. Klieger*[433] that where the judge stated that the defendants "concede that she [plaintiff] is entitled to a verdict . . . ,"[434] a general exception does not preserve the right to object.

In *Williams v. Philadelphia Transp. Co.*,[435] the supreme court ruled that the court's comment that there was nothing inconsistent between the prior statement read to the plaintiff on cross-examination and her testimony on direct was not improper. It further ruled that the defendant was not prejudiced by the court's statement that "in my opinion, there is nothing inconsistent because I know how those statements are taken and you know how they are taken . . . all of the questions and all of the answers are not put down."[436] In the same case, the trial judge gave to the jury the following charge on signatures which were alleged to be the same:

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430. The special concurring and dissenting opinion of Justice Musmanno sets forth in detail the actions of the trial judge, which included a comment that the district attorney had not completely developed the case and that he (the judge) would do so for him.

431. O'Toole v. Braddock Borough, 397 Pa. 562, 155 A.2d 848 (1959) (comment not justified by evidence held to constitute error); Miller v. Montgomery, 397 Pa. 94, 152 A.2d 757 (1959) (comment with hypothetical explanation not justified by evidence held to constitute error).

432. 204 Pa. Super. 203, 203 A.2d 403 (1964).

433. 205 Pa. Super. 526, 210 A.2d 899 (1965).

434. *Id.* at 530, 210 A.2d at 901.

435. 415 Pa. 370, 203 A.2d 665 (1964).

436. *Id.* at 372, 203 A.2d at 667.

> But I examined those signatures, and I am not by any means an expert, and this, *I caution you, is only my view and is in no way binding upon you,* but you take those signatures and you look at them, and if you can see any similarity in them, then you have a perception that is certainly far beyond mine.[437]

In the same charge the court told the jury: "but it is my right and my duty to give you my personal view . . . ."[438] The supreme court held that this was a correct and proper method of charging, since the judge told the jury that his opinion was not binding upon them.

437. *Id.* at 375, 203 A.2d at 668.
438. *Ibid.*