TRIAL BY JURY IN GERMANY.

THE organization of the courts in Germany and the rules of procedure, both civil and criminal, are regulated by imperial law.[1] The ordinary courts are four in number and, taken in descending order, are the following: the *Reichsgericht*, the *Oberlandesgerichte*, the *Landgerichte* and the *Amtsgerichte*. There is but one *Reichsgericht*. Its seat is at Leipzig. With respect to the remaining courts, their number increases with the decrease in extent of their local jurisdiction, the most numerous being of course the *Amtsgerichte*. All the ordinary courts, with the exception of the *Amtsgerichte*, are collegiate, and all, without exception, have both civil and criminal jurisdiction.

Trial by jury is known, according to German law, only in criminal procedure and, further, is limited to cases which lie within the competence of a single court. This court is the *Schwurgericht*. It is not specifically mentioned in the law among the ordinary courts of Germany. At the same time it does not belong to what are known as "special courts." The law of judicial organization (*Gerichtsverfassungsgesetz*) provides for the erection of *Schwurgerichte* "*bei den Landgerichten*," *i.e.* at the seat of, and out of members of, the *Landgerichte*. These *Schwurgerichte* are not permanent courts. They are constituted periodically, their session, when not expressly fixed by state law, being determined by the state judicial administration (*Landesjustizverwaltung*). Strictly speaking, they belong to the *Landgerichte*. They are, in a way, secondary organs through which a part of the activity of the *Landgerichte* is manifested.

The *Schwurgericht* is composed of three learned judges and twelve laymen called to serve as jurors. The judges are appointed by the president of the *Oberlandesgericht* in whose jurisdiction the

[1] Gerichtsverfassungsgesetz of January 27, 1877, with amendments of May 17, 1898; Civilprozessordnung of January 30, 1877, with amendments of May 17, 1898; and Strafprozessordnung of February, 1877. In the notes these laws will be referred to as GVG, CPO and StPO respectively. For good discussions of the German judicial system, see Laband, Deutsches Staatsrecht, 1901, vol. iii, pp. 335 *et seq.*, and Garner, "The German Judiciary," POLITICAL SCIENCE QUARTERLY, vol. xvii, p. 490, and vol. xviii, p. 512.

court is erected. One of these judges, chosen to serve as president during the single session, is selected from the associate justices of the *Oberlandesgericht*, or from the members of the *Landgericht*. The other two judges are always taken from the *Landgericht*. The mode of selecting the jurors is set forth below. The jurisdiction of the *Schwurgericht* is limited to criminal cases and extends over all criminal cases for which the other courts are not competent. Broadly speaking, all the more serious crimes, with the exception of treason, are tried before the *Schwurgericht* and are therefore tried by jury.

I.

"The office of juror is an honorary office. It may be held only by a German." [1] The juror, therefore, receives no pay for his services. He may, however, without violating the law, accept such a refunding of his travelling expenses as state legislation may provide for. Before the law of judicial organization went into effect, the rule obtained, in several of the German states, that no man could serve as juror unless he were a subject of that particular state. The imperial law has removed this limitation. Any man possessed of citizenship in the Empire, no matter to which state he may belong, is competent for jury service, provided no question other than that of citizenship arises. The participation of a non-German as juror would render the proceeding void.[2]

In determining who may serve as juror, the law approaches the subject from the negative side, designating in the first place those who are incompetent[3]; in the second place, those who, though legally competent, should not be summoned; and in the third place, those who, though competent and summoned, may refuse the summons.

Under the first category may be grouped three classes of persons: (1) persons who have forfeited the right to serve, as the result of a criminal judgment; (2) persons against whom trial has

[1] GVG, sec. 81.

[2] The definition of a "German" is fixed by the imperial law of June 1, 1870. See, on effect of participation of a "Nichtdeutscher," Löwe, Komm. z. StPO, p. 52, note 3 to GVG, sec. 31.

[3] By "competent" is meant legal competence merely. Mental or physical capacity is not drawn into question in this first category.

begun on a criminal charge which may lead to a divestment of civic honors (*Ehrenrechte*), or of the right to be invested with public office[1]; and (3) persons who, as the effect of a judicial decree or order, are restricted in the disposition of their property.[2] These persons alone are incompetent. The category is thus narrowly limited, because the law would reduce to a minimum the number of cases in which the validity of a judgment may be contested on the ground of the participation of an incompetent juror.[3]

To the second category — *viz.* those who should not be summoned — belong two groups of persons, each group comprising several classes. The first group[4] embraces: (1) persons who, at the time the jury list is made up, have not reached the full age of thirty years; (2) persons who, at the time the list is made up, have not resided two full years in the commune (*Gemeinde*); (3) persons who are receiving, or who have received in the three years immediately preceding the making up of the list, support from public charities for themselves or for their families; (4) persons who, by reason of mental or bodily infirmity, are incapacitated for service; and, finally, (5) servants (*Dienstboten*).[5] The persons composing this group are to be eliminated in the interest of the administration of justice. They are persons who, by reason of their youth, dependent position or personal characteristics, cannot be assumed to possess the qualifications requisite for the proper performance of the functions of juror.

The second group in this category is composed of nine classes of persons, whose exemption is not in the interests of the administration of justice but in the interests of the public service, state or imperial.[6] These classes comprise the following persons: (1) ministers of state; (2) members of the senates of the free cities; (3) imperial officials who at any time may be retired from active

[1] Disability begins only with the actual opening of the trial, *i.e.* at the moment when the man is "put in jeopardy." A preliminary examination or the mere fact of arrest does not effect such incompetence. See GVG, sec. 32, and Struckman und Koch, Komm. z. CPO, notes to GVG, sec. 32.

[2] This refers particularly to spendthrifts and bankrupts.

[3] See Motiven, GVG, pp. 43, 44. [4] GVG, secs. 33 and 85, cl. 2.

[5] No attempt has been made in the law to define this term "servant." The definition must be sought in the civil law and in custom. Such definition may, therefore, vary in different parts of the Empire. See Motiven, GVG, pp. 44, 45.

[6] GVG, sec. 34.

service; (4) state officials who at any time may, by state legislation, be retired from active service; (5) judicial officials and state prosecuting attorneys; (6) ministerial officers (*Vollstreckungsbeamte*) of the courts or of the police; (7) persons employed in a public capacity in the service of religion; (8) teachers in the public schools; (9) military persons belonging to the active army or active marine. In addition to the persons above specified, the several states may designate, by law, certain higher administrative officials who shall not be summoned. Imperial officials may be excluded from jury service by state legislation.[1] Attorneys are not numbered among those who shall not be summoned to jury duty, nor are notaries, unless by the provision of a state law they are classed among the ministerial officers of the court.[2]

Under the third category, *viz.* those who, though competent and summoned, may refuse to serve, fall the following six classes of persons[3]; (1) members of a German legislative assembly; (2) persons who have already served as jurors during the year; (3) physicians[4]: (4) apothecaries who have no assistants; (5) persons who, at the time the jury list is made up, have completed the sixty-fifth year of their life, or expect to complete it during the course of the year; and (6) persons who present credible testimony to the effect that they are unable to bear the expense connected with jury service.

To sum up: the law, so far as eligibility and liability to jury duty are concerned, distinguishes three general groups of persons: (1) those who can not serve; (2) those who should not serve; and (3) those who need not serve. The participation of one of the first group renders the proceedings void. A non-observance of the law with respect to the second and third groups does not, in itself, involve such a result.

II.

While the empanelling of the jury is the first step in the actual trial of a specific case before the *Schwurgericht*, it is the last step in a rather complicated process of selection. This process is intimately bound up with the method of constituting certain mixed

[1] See GVG, Protokoll, p. 384.
[2] See Staudinger in the *Deutsche Notariat-Zeitung* for 1880, p. 195.
[3] GVG, sec. 35. [4] Including dentists and veterinaries.

courts which I have not yet mentioned and which are known in the German judicial system as *Schöffengerichte*. It becomes necessary, therefore, to deal somewhat at length with these mixed courts.

The *Schöffengerichte* are courts which stand in much the same relation to the *Amtsgerichte* as that in which the *Schwurgerichte* stand to the *Landgerichte*. The *Schöffengericht* is made up of the judge of the *Amtsgericht*, as president, and two lay members, known as *Schöffen*, from whom the court derives its name. This court is competent to try minor offenses. No *Schöffe* serves more than five days in the year. A considerable number of men is therefore required during the year for the performance of the duties connected with this office. What has been said above with reference to eligibility and liability to jury duty applies also to the office of *Schöffe*. Inasmuch as the list of persons who are eligible to service as *Schöffen* is made the basis of the list from which the jury is finally selected, it is necessary to explain the process by which the *Schöffen* list is constructed.

The presiding official in each commune, or of such political corporation as corresponds to the commune in the administrative organization of the state, must each year prepare a list of those persons in the commune who may be summoned to serve as *Schöffen*, excluding of course those who are incompetent and those who should not be summoned, but not excluding those who may be entitled to refuse service. This list is exhibited for public inspection for one week, the date of such exhibition having been previously published. During this period of inspection, protests asserting the incorrectness or incompleteness of the list may be made in writing, or they may be made orally and recorded. Any person has a right to enter protest, whether he be the party affected or not.[1] The presiding official in the commune then sends the list, together with the protests and such remarks as the circumstances seem to demand, to the judge of the *Amtsgericht* in the district to which the commune belongs.[2]

[1] Should some one other than the party affected make the protest, as a rule a hearing of the party himself is required.

[2] Should the existence of further defects in the list be brought, no matter in what way, to the knowledge of the presiding official of the commune, he must notify the judge of the *Amtsgericht*, who shall make the necessary corrections.

At the seat of the *Amtsgericht* there meets yearly a committee composed of the judge of the *Amtsgericht*, as president, an administrative official of the state designated by the state government, and seven "trustworthy men" (*Vertrauensmänner*). These *Vertrauensmänner* are elected by the representative body of the district, as provided for by state law, and are to be chosen from the inhabitants of the judicial district of the *Amtsgericht*. Having satisfied himself that the requirements of the law with respect to the public inspection of the commune lists and the opportunity for protests have been properly met, the judge of the *Amtsgericht* combines all the commune lists handed in to him and lays the grand list thus formed before the committee. This committee — the president, the administrative official and at least three *Vertrauensmänner* being present — passes upon the protests made against the commune lists, and its decision, from which there is no appeal, is made a matter of record. From the "primary list," thus corrected, the committee chooses the requisite number of persons to serve as *Schöffen*. Inasmuch as the same qualifications are required for eligibility to jury duty and to duty as *Schöffe*, this primary list serves the double purpose of providing the names of those persons who may be summoned for either function.[1]

Unlike the *Schöffen*, the jurors may not be chosen immediately by the committee. They are selected by a process which must be more fully outlined. Every year the number of jurors required for each *Schwurgericht*, and also the distribution of this number among the several *Amtsgericht* districts, are determined by the state administration of justice (*Landesjustizverwaltung*).[2] Out of the primary list from which it chooses the *Schöffen* for the ensuing year, the committee, at the same time, constructs a list of persons, whom it proposes for jury duty. This list of proposed jurors, which is called the "*Vorschlagsliste*," must contain three times the number of names assigned to the *Amtsgericht* district by the state administration of justice. This *Vorschlagsliste*, together with the protests relating to the persons named therein,[3] is sent to

[1] The same person, however, may not be summoned both as juror and as *Schöffe* during the same year.

[2] The number will depend on the number of sessions to be held by each *Schwurgericht* during the year.

[3] It is to be observed that the decision of the committee with respect to protests is final in connection with the choice of *Schöffen* only.

the president of the *Landgericht*. This official now calls a session of the *Landgericht*, in which five members of the court, including the president himself and four judges named by him, take part. The sitting is not public, nor is the presence of the clerk of the court necessary.[1] These five members of the *Landgericht* render a final decision with respect to the protests transmitted to them by the committee, and choose from the *Vorschlagsliste*, by absolute majority vote, two lists of jurors: (1) a list of chief jurors (*Hauptgeschworenen*), and (2) a list of substitute jurors (*Hülfsgeschworenen*). These two lists, known as "year-lists," are kept separate and distinct. The substitute jurors, whose duties will be explained below, must be chosen from among the persons living at, or in the immediate vicinity of, the place where the *Schwurgericht* has its seat.[2]

At least two weeks before the session of the *Schwurgericht* begins, in an open sitting of the *Landgericht* in which the president of the court and two members shall take part, and in the presence of the public prosecutor, thirty chief jurors are selected by lot from the year-list of *Hauptgeschworenen*.[3] Jurors who have already served in an earlier session of the court during the same year are not, as a rule, subjected to the drawing; their names are again placed in the urn only upon their own motion. The list of thirty jurors is known as the "verdict list" (*Spruchliste*). It is put into the hands of the judge who has been appointed president of the *Schwurgericht* for the coming session.

The jurors drawn in the *Spruchliste* are summoned, by order of the president appointed for that session of the *Schwurgericht*, to appear at the opening sitting of the court; and they are informed, in the summons, of the legal consequences of a failure to respond. The summons is issued by and in the name of the public prosecutor. Jurors who do not appear at the proper time or who fail to obey the summons, without good and sufficient excuse,

[1] This fraction of the *Landgericht* is not to be confused with the *Strafkammer* or criminal chamber of that court.

[2] This provision is one of mere utility. Persons living in the vicinity of the court can be summoned with less delay, and can serve with less personal inconvenience, than could persons living at some distance from the seat of the court.

[3] The lots are drawn by the president of the court, and a record is kept by the clerk.

may be fined in any sum from five to one thousand marks, plus the costs.[1]

The various steps in the process of choosing jurors for any session of the *Schwurgericht* may be indicated, then, by the four lists which are formed: (1) the primary list of all persons who are eligible to serve; (2) the *Vorschlagsliste* of names proposed as jurors for the ensuing year; (3) the year-list of *Hauptgeschworenen* and the year-list of *Hülfsgeschworenen;* and (4) the *Spruchliste* of thirty chief jurors, from which the jury of twelve men is to be drawn for the trial of a specific case.

III.

The jurors named in the *Spruchliste* having responded to the summons, the president of the *Schwurgericht* makes known to them the name of the accused person and informs them of the nature of the act of which said person is accused. He then states the grounds upon which a juror is to be excluded from participation in a particular trial, and calls upon each juror to declare any circumstances which would exclude him from service in the cause about to be tried.[2] The omission of such a request on the part of the president will not support a demand for revision of sentence, unless it can be shown that a juror who should have been excluded actually took part in the trial.[3] The president then calls the roll, and the names of the jurors present (leaving out, of course, any who should be excluded) are written upon tickets and deposited by the president himself, or by the clerk, in an urn. The law expressly declares[4] that in no circumstances can the court proceed to the selection of a jury, unless at least twenty-four jurors are present who are qualified to sit in the case. This

[1] GVG, secs. 96, 56.

[2] It is assumed that no juror is present against whom a charge of incompetence would properly lie. That question has already been disposed of in constructing the year-list. The grounds of exclusion referred to in the text do not go to the competence of the person to serve as juror in any case, but only to the appropriateness of his serving in this particular case. Grounds of exclusion, *e.g.*, would exist where a juror had an interest, direct or remote, in the case, or where he was related to one of the parties, *etc.* See StPO, secs. 22, 32 and 317, cl. 3.

[3] See StPO, sec. 377, nos. 1, 2; Löwe, pp. 817–819.

[4] StPO, sec. 280, cl. 1.

rule cannot be waived, even by agreement of the parties to proceed with a less number of names in the urn. Should it be found, upon counting the tickets, that there are not twenty-four jurors present and qualified, a sufficient number of names is drawn from the year-list of substitute jurors (*Hülfsgeschworenen*) to fill out the number to thirty.[1] The drawing is by lot and must take place in open court.[2]

If twenty-four or more names be found in the urn, the president states the exact number and informs the public prosecutor and the defendant of the number of challenges to which each is entitled. There may be as many challenges as the names in the urn exceed twelve in number. This rule, however, admits of an exception. For, in addition to the twelve who constitute the regular jury, one or more persons may be drawn by lot at the same time to act as supplementary jurors. These men sit in the case, take part in the trial, and have the same right in proposing motions as the other jurors. Under ordinary circumstances they are not allowed to retire with the jury for deliberation, and they do not participate in finding the verdict; but should one of the regular jurors be suddenly incapacitated for service, by reason of illness or from some other cause, his place is taken by a supplementary juror, and the trial (the necessity for a new one being thus avoided) proceeds without delay. It need hardly be said that, in such a contingency, the supplementary juror becomes a regular juror and participates both in the deliberation and in the finding of a verdict. When supplementary jurors are drawn, the number of challenges is reduced by as many as there are supplementary jurors chosen.[3]

[1] That is, at least seven *Hülfsgeschworenen* must always be drawn.

[2] Most of the German jurists are agreed that, if it appears that the requisite number of jurors will not be present on the opening day of the session, a number of substitute jurors may be drawn before that day, provided the drawing takes place in the court. This would save a subsequent delay. See Löwe, note 7*a* to StPO, sec. 280, cl. 2; von Schwarze, Komm. StPO, p. 444; Dalcke, Komm. p. 190; H. Meyer, in Holtzendorff's Handbuch des dt. Strafprozessrechts, vol. ii, p. 121; Keller, Komm. p. 359; Stenglein, Komm. p. 486, note 3; Isenbart, Komm. note 13 to StPO, sec. 280. For contrary view, Puchelt, Komm. p. 454.

[3] For example, if one supplementary juror is to be drawn, there will be as many challenges allowed as the number of names in the urn exceeds thirteen. Each additional supplementary juror reduces the number of challenges by one.

The challenges are divided equally between the prosecution and the defense.[1] If there be an odd challenge remaining, it goes to the defense. Where there are several defendants, and no agreement can be reached among them as to the distribution of the challenges, the court divides the challenges due to the defense equally between the defendants, assigning the odd challenge, should one exist, by lot.

The names are drawn from the urn by the president of the court, in the presence of the defendant, of the prosecutor and of the clerk of the court. The name is at once read aloud, whereupon the prosecutor must declare, by calling out the word "*angenommen*" or "*abgelehnt*," his acceptance or rejection of the juror. Following the declaration of the prosecutor comes the declaration of the defendant. By the observance of this order the defendant is given an advantage; for, should the prosecutor reject a name which chanced also to be unacceptable to the defendant, the challenge of the defense is saved for subsequent use. The challenges are all peremptory. Causes for rejection may not be given. When a declaration is once made, it cannot be withdrawn if another name has been already drawn or if the drawing is ended. The drawing is ended when twelve men (thirteen, fourteen, *etc.*, if supplementary jurors are chosen[2]) have been accepted, or when the number of challenges has been exhausted.

The jury, including the supplementary jurors, is sworn, not as a body but individually, by the president in open court and in the presence of the accused. With the seating of the jurors, which takes place in the order in which they have been accepted, the court is ready to proceed with the trial.

An attempt to follow the procedure through its various stages would transgress the limits set for the present paper. A single word, however, must be inserted. When a witness is under ex-

[1] The number of challenges due the prosecutor is wholly independent of the number of defendants. The division is between the prosecution and the defense, not between the persons concerned. Where the word "prosecutor" is used in this paper, the public prosecutor (*Staatsanwalt*) is of course meant.

[2] Whether, and in what number, supplementary jurors shall be chosen lies wholly within the discretion of the court. The parties have no right to be heard in the matter, although it involves a material limitation of the right of challenge. See Löwe, notes 6 and 7 to GVG, sec. 194.

amination, any juror may request the president of the court to have a certain question or certain questions put to the witness. Such question must be put and must be answered, unless in the opinion of the president it be "irrelevant, incompetent or immaterial."

IV.

The case goes to the jury in the form of a list of questions which the jury must answer in bringing in its verdict. These questions are prepared by the president, and must "exhaust the indictment." That is to say, in framing the questions no material element of the crime with which the defendant is charged should be left out; for since the jury, in rendering its verdict, is confined to answering the questions submitted to it, a failure to incorporate in these questions certain essential elements might easily result in at least a partial acquittal. The decision of the question of guilt (*Schuldfrage*) in all its phases belongs to the jury alone. The exercise of the judicial power in such a way as to affect even indirectly, that is, by a manipulation of the questions, this function of the jury, would be regarded as an unwarrantable interference in the prerogatives of that body. It would amount to a participation of the court in finding the verdict, a practice which the law of criminal procedure excludes on principle in trials before the *Schwurgericht*. For this reason the law requires that the questions submitted to the jury shall cover all the material points in the accusation, not alone that the full measure of guilt may be reached, but that the determination of the existence and of the degree of such guilt may be made by the jury rather than by the court. A further safeguard is found in the right granted to the prosecutor, to the defendant and to each juror to move an amendment to the questions, either by way of correction or addition.[1] The questions are to be so worded that they may be answered by "yes" or "no."

Three kinds of questions are mentioned in the law[2]: principal

[1] A motion to include contingent or subsidiary questions can be denied only on the ground that the proposed question is not legally permissible, or is in content of no legal significance and can have no influence on the judgment. It should be remarked that a juror cannot demand the putting of a question relating to the existence of mitigating circumstances. [2] StPO, secs. 293, 294, 295.

questions (*Hauptfragen*), auxiliary questions (*Hülfsfragen*) and subsidiary questions (*Nebenfragen*). The *Hauptfrage* must go directly to the question of guilt. It begins always with the words: "Is the defendant N. N. guilty . . . ?" and it must define the crime in the exact phraseology of the criminal law, as well as specify the elements which serve to identify the act, *e.g.* time, place and the person accused. The evidence, however, may develop circumstances and conditions which make it doubtful whether the degree of guilt is that asserted by the prosecutor. This makes it necessary to append to the *Hauptfrage* auxiliary questions, designed to fix the exact nature of the crime or, as the Germans express it, the "*Schuldform.*"[1] These contingent questions are to be answered, of course, only in case the *Hauptfrage* is denied. Should it appear, further, from the evidence that circumstances exist which may affect the penalty, increasing or diminishing it, or which may, in fact, annul the penality (*Strafbarkeit*) of the act altogether, subsidiary questions so framed as directly to develop these points must be appended to the principal or auxiliary question to which they are related. Each question, of whatever sort, must relate to one defendant only and to but one criminal act, even if several identical acts are charged. A failure to observe this rule will render the judgment void. All the questions are drafted by the president of the court and must be read aloud in open court. Should a motion to that effect be made by the prosecutor, by the defendant or by one of the jurors, the questions must be reduced to writing and a copy furnished to the prosecutor, the defense and the jury.[2] On request of these parties a brief recess may be taken for scanning the questions.

[1] If, *e.g.*, the defendant is accused of murder, and it appears from the evidence that he may have been guilty of manslaughter only, then an auxiliary question would be submitted to the jury: "If N. N. is not guilty of murder, is he guilty of manslaughter?" The decisions of the courts are not in accord as to the permissibility of such questions as the above. The latest decisions favor it, however, on the ground that in submitting such an auxiliary question no new and different act of the accused is brought under examination. Both *Hauptfrage* and *Nebenfrage* deal with an alleged killing. The difference is in the element of premeditation.

[2] A refusal on the part of the president will not render the proceeding void. The fact that copies of the questions are furnished to the parties and to the jury does not release the president from the obligation to read the questions aloud in open court.

When the questions have been definitely fixed, the arguments of the attorneys for either side are heard. These arguments must be confined strictly to the matters developed in the questions. Then follows the instruction (*Belehrung*) of the jury by the president of the court. In many of the German states it had been the rule, imitating the provision of the French law,[1] that the president of the court should prepare the jurors for a decision of the matter before them by a comprehensive presentation of the results of the evidence. The German code of criminal procedure, however, has preferred to substitute a simple final word of instruction regarding the law. In this *Belehrung* all discussion with respect to the value of the testimony presented at the trial, all reference to the weight which should be given to any evidence brought forward, is to be rigidly excluded. In the main the learned judge must confine himself to explaining the application of the criminal law involved in the case, to a statement of the meaning and bearing of the questions, and to such an exposition of the rules of criminal procedure as may seem by the circumstances to be required. The jury may also be reminded of its duties and the scope of its powers. In general, the theory on which the instruction is based may be summed up in the words of the motives to the code of criminal procedure, page 202: "The instruction should fix in the mind of the jury the particular status (*Lage*) of the matter which is to be decided." The instruction cannot be made the subject of argument by either party. What the attorneys may have said in addressing the jury is taken into account by the president only in so far as may be necessary for the correction of a false exposition of the law.[2]

Instruction of the jury is obligatory. That is to say, the president of the court has no option in the matter: he must instruct. It may happen, in simple cases, that no material exists for such instruction. In such a contingency, the president must formally state that fact. It is not permissible to substitute instruction given in an earlier proceeding. Should one of the legal points touched upon in the instruction be a disputed point, *i.e.* should jurists

[1] Code d'instruction criminelle, art. 336.

[2] A statement contrary to fact or a wrong quotation of the testimony by one of the attorneys is to be corrected, if at all, at the close of the argument.

and decisions differ on the question, the president must call attention to the fact and lay before the jury the different views held. He is also considered bound to give his own personal opinion on the point at issue. He may not, however, confine himself to the utterances of his own views.[1] Should a diversity of opinion exist in the court, the president is not to state this fact, but is simply to say that the point of law is not free from dispute.[2]

The instruction is not made a part of the record, though at the time the code of criminal procedure was framed it was attempted to incorporate such a provision in the law. Neither party has a right to move the recording of any part of the instruction. It follows, of course, from the fact that there is no documentary evidence to fix the content of the charge to the jury, that the judgment cannot be contested on the ground of anything contained therein nor on the ground of any omission. That, in his instruction, the president may have exceeded his authority or given a false interpretation of the law will not, therefore, support a plea for revision. Moreover, the jury is in no wise bound by the instruction of the presiding judge. On the contrary, according to the theory of the code of criminal procedure, the jury is called to take an independent part in considering the criminal law in the case.[3] It is the function of the jury to decide not only whether the accused has been proven guilty as charged, and whether or not mitigating circumstances exist, but also whether the act falls within the definition of a crime under the law. As Löwe puts it, the jury must decide "über die Subsumtion der bewiesenen Tatsachen unter das Strafgesetz; sie entscheiden darüber: ob der Angeklagte *vor dem Gesetze* schuldig ist."[4]

[1] Compare here H. Meyer, in Holtzendorff, vol. ii, p. 187; Stenglein, note 1 to StPO, sec. 300; Dalcke, Fragestellung, p. 114; von Kries, p. 620. The writer follows the view of Löwe.

[2] The jurists are not agreed as to whether the president is not bound, should he find the other two judges against him, to give the opinion of the court, being then at liberty to add his own opinion. At any rate, it seems settled that he is under no obligation to ascertain whether a difference does exist in the bosom of the court.

[3] See H. Meyer in Holtzendorff, vol. ii, p. 188; Stenglein, note 3 to StPO, sec. 300; von Kries, p. 621; also Dalcke, Fragestellung, p. 116.

[4] In determining the powers of the jury, the StPO does not draw a sharp distinction between the decision of the question of fact and the decision of the question of law.

V.

Having completed his instruction, the president signs the questions with his own hand and delivers them to the jury. The defendant is removed from the court-room and the jury retires for deliberation.[1] All persons, including the supplementary jurors, are excluded from the jury-room. In cases of necessity an officer of the court may be admitted, but under no circumstances may the president enter the chamber. With respect to the admission of books, papers and other articles connected with the case, great diversity of opinion prevails. The law provides that "articles, which have been laid before the jury for their inspection during the trial, may be delivered to them in the jury-room."[2] Neither the decisions of the courts nor the views of commentators agree as to the content and extent of this rule. Practice also varies. In the debate over the framing of the law, it was contended without contradiction that it was permissible for the jury to send for law books, particularly for such books as the criminal code and the law of criminal procedure. The *Reichsgericht* has held that the delivery of commentaries to the jury is not to be allowed.[3] In any case the jury has no claim either to the inspection of articles or to the consultation of books of law. The matter is wholly in the discretion of the court.

On reaching the jury-room, the jurors proceed to the election of their foreman. The law stipulates that the vote shall be by written ballot. The object of this provision is to prevent what takes place frequently in the organization of assemblies, *viz.* the election of a man merely because he chances to be nominated or proposed for it. A simple majority is sufficient to elect. In case of a tie, the vote of the oldest juror decides.

The code of criminal procedure makes no attempt to regulate the method of deliberation or of voting in the jury-room. The law of judicial organization, however, contains two provisions:

[1] The retirement of the jury is compulsory. The jurors may not, as in England and America, "render a verdict without leaving their seats."

[2] StPO, sec. 302.

[3] Decision of Reichsgericht, II Strafsenat, April 20, 1886, reported in Rechtsprechung des deutschen Reichsgerichts in Strafsachen, vol. viii, p. 301. See also Reichsgericht I, November 29, 1886, *ibid.*, vol. viii, p. 721.

(1) that the order of voting shall follow that in which the jurors were drawn; and (2) that each juror must vote on every question. The foreman votes last. No juror may refuse to declare himself, even though the votes cast before his turn to vote is reached may already show a majority sufficient to decide. No record is kept, either with respect to the election of the foreman or with respect to the deliberation and vote of the jury.

It has been previously remarked that the questions are to be so framed that they may be answered by "yes" or "no." While the law, in conformity to this provision, declares that the jurors have to answer the proposed questions with "yes" or "no," a clause is inserted to the effect that the jurors "have the right to answer a question partly in the affirmative and partly in the negative."[1] The answer must leave no doubt as to which part of the question is affirmed and which denied. It is very evident that here is an opportunity for no end of confusion, especially when the questions involve relationships or deal with circumstances and conditions more or less intricate. Should doubt arise as to which part of a question is actually affirmed and which part denied, such doubt is not to be resolved by judicial interpretation. The jury must retire to deliberate again and to remedy the defect. No special formula is laid down for these cases of partial affirmation and partial denial. The Prussian law of May 3, 1852, article 91, prescribes the use of the words: "Yes, but it is not proven that . . ." This formula is generally recommended by German jurists.

The code of criminal procedure does not make it clear whether the jurors, in rendering their verdict, have not the right to go beyond the mere affirmation or negation of the questions. When this code was being debated in committee (*Justizkommission*) of the Reichstag, it was proposed that a clause be inserted as follows:

> The jurors may append to their answers to the questions submitted to them special additions in the form of a more detailed explanation of those answers. The court, after hearing the public prosecutor, is to decide what importance is to be assigned to these additions and is to take them into account accordingly in pronouncing judgment.

[1] StPO, sec. 305.

The proposition was not adopted. Its rejection can hardly be justified from the standpoint of the general theory underlying the code of criminal procedure. This law assigns to the jury the decision of the question of guilt in its entire content. To limit the jurors, in rendering their verdict, to the mere content of the specific questions laid before them, to seek to withhold from them the right to examine the matter also from such points of view as have not been suggested in those questions, is therefore hardly in accordance with the fundamental principle upon which the function of the jury rests. Yet this is precisely the position into which the jurors are forced, by being compelled to confine themselves to answering the questions laid before them; and this is the cause of acquittals which the jurors neither justify nor desire.

It must not be inferred from what has just been said that, should the jury nevertheless append an explanation to the answer to a question, such an explanation may be regarded as non-existent and may be wholly ignored by the court. On the contrary, if it should appear from such an addition that the jury had misunderstood the question, the court must take cognizance of that fact, even though brought to its attention by an incorrect mode of procedure, and must send the jury back to their room for further deliberation. This whole question — whether the jurors may append explanatory clauses to their answers and what is the legal effect of such additions — is a matter of strenuous debate and disagreement.[1]

The verdict is prepared by the foreman and must be so written down, in his own hand, that the proper answer is placed beside each question. It should be noted that the questions form an integral part of the verdict. The foreman must also sign the verdict.[2] A failure on the part of the foreman to sign the verdict will send the jury back for a correction of this defect.

[1] See Löwe, notes to StPO, sec. 305; von Schwarze, p. 470 von Bomhard, p. 227; Stenglein, Komm. note 7 to StPO, sec. 305; Hellweg-Dochow, p. 326; Isenbart, note 107 to StPO, sec. 305; von Kries, p. 625; also Keller, pp. 396, 406; Thilo, p. 364; Boitus, p. 321; Dalcke, Komm. p. 211, Fragestellung, pp. 130 *et seq.*; Puchelt, p. 487; H. Meyer, in Holtzendorff, vol. ii, p. 299.

[2] The verdict may be signed as a whole. Should the foreman, however, sign one answer, he must sign each of the others also; otherwise these latter are regarded as unsigned, and the verdict will be held incomplete by the court. It will not do to sign one answer and then sign the verdict as a whole.

The jurors have not the right, in place of rendering a verdict, to demand further evidence. Should they nevertheless make such a request, the court is at liberty to take cognizance of it and may re-open the trial. If the jurors, before the verdict has been announced to the court, feel that further instruction is necessary, a motion to that effect is made. The president recalls the jury to the court-room and imparts the desired instruction. A motion for such instruction must be transmitted to the president, if only a single juror considers it necessary. The individual juror must not be put in a position where he is compelled to vote on a matter with respect to which he believes himself incompetent to judge intelligently without further instruction.[1]

A unanimous vote is not required in finding a verdict. The law[2] prescribes that for the affirmation of the question of guilt (*Schuldfrage*), a majority of two-thirds is necessary. That is, it takes eight votes to convict. If the vote, therefore, stands seven for conviction and five for acquittal, the defendant must be declared to be acquitted. The same majority of two-thirds is required for the affirmation of a question as to the existence of circumstances increasing the penality (*Strafbarkeit*) of the offense. On the other hand, a question as to the existence of circumstances lessening, or wholly removing, the penality is regarded as affirmed when only five vote "yes."[3] A question relating to the existence of "mitigating circumstances," however, since it belongs to the domain of penalty (*Straffrage*) rather than to that of guilt (*Schuldfrage*) or penality (*Strafbarkeit*), requires, for its denial, a simple majority. That is, seven votes will suffice to deny. In case of a tie on such a question, it is considered as answered in the affirmative. In connection with every answer unfavorable to the defendant it must be stated expressly in the verdict that the question was decided by the majority required by law. The court is thus in a position to determine whether the legal provisions have been met, or whether, on the other hand, the verdict may not set forth as affirmed a question which, under the law, should be

[1] Löwe, note 1 to StPO, sec. 306; Keller, p. 397; Hellweg-Dochow, p. 327; Stenglein, note 2 to StPO, sec. 306; Bennecke, p. 608, note 10. The question is a disputed one. See, *e.g.*, von Bomhard, p. 228; Dalcke, Komm. p. 208; Fragestellung, p. 117.

[2] StPO, sec. 262, cl. 1; and 297, cl. 2.

[3] See RGer. IV, June 8, 1886; Rspr. in Strafsachen, vol. viii, p. 441.

regarded as denied, or *vice versa*. The actual vote, *i.e.* the exact number voting for and the exact number voting against, must not be given. The verdict must state simply that the question was decided by a majority of more than seven votes, or more than six votes, as the law may require.[1]

VI.

The verdict is announced to the court[2] — the jury having returned to the court-room for that purpose — by the foreman, who must begin by reciting the formula: "Upon my honor and conscience I certify as the verdict of the jurors . . ."[3] He then reads the questions together with the answers. The verdict as read is signed by the president and by the clerk of the court[4] before it is made known to the defendant.

If the court — not the president alone — is of the opinion that the verdict does not fulfil the requirements of the law as to its form, or that it is obscure, incomplete or contradictory in substance, the president requests the jury to return to the jury-room to remedy the defect. Such an order is permissible so long as the court has not yet pronounced its judgment based on the verdict.[5] Inasmuch as the content of the questions constitutes, at the same time, the content of the verdict, it makes no difference whether the defect attaches to the answers or to the questions.[6] In the latter case, an amendment of the questions must be made.

[1] See, however, RGer. I, November 16, 1899; Entscheidungen, vol. xxxii, p. 372. An infraction of this provision would not entail nullity of the judgment.

[2] This announcement to the court is to be distinguished from the notification of the defendant. When the jury returns to the court-room for the purpose of announcing the verdict to the court, the defendant is not present.

[3] "Auf Ehreund Gewissen bezeuge ich als den Spruch der Geschworenen . . ." The omission of this formula will nullify the proceedings. RGer. IV, December 22, 1880; Rspr. in Strafsachen, vol. ii, p. 661. Different opinion held by von Kries, p. 625.

[4] StPO, sec. 308.

[5] StPO, sec. 309. The fact that the president and the clerk of the court have signed the verdict does not prevent the correction of errors therein.

[6] Thus the process of correction is set in motion if it develops that the questions have not exhausted the essential elements of the state of facts before the law (RGer. I, January 14, 1886, Entsch. vol. xii, p. 229, Rspr. vol. viii, p. 56, and RGer. IV, May 12, 1893, *Goltdammers Archiv*, vol. xli, p. 124); or that a question required by law has not been put (RGer. II, April 16, 1886, Rspr. vol. viii,

There is no express provision in the law for the case where the verdict itself does not show a material defect, but where nevertheless an explanation is given by the jury, or by one or more of the jurors, which suggests the existence of such a defect. A declaration of this kind certainly cannot be ignored by the court. For, as Löwe well says,[1] it would be in direct conflict with the end and aim of criminal procedure — *viz.* to establish the material truth of the matter — should the court base its judgment upon a verdict which, as the jury itself points out, is founded upon a misunderstanding or does not express the true intent of the jurors. The disregarding of such a declaration would be a subordination of law to form, whereas the function of form is merely to serve in the realization of the law. Moreover, the very nature of the procedure before the *Schwurgericht* — this rendering of a decision in the form of question and answer — enhances the liability to misunderstanding. For this reason the law allows the amendment of the verdict up to the very moment when the court pronounces its judgment. That a declaration or indication by the jury, or by a single juror, that a defect exists in the verdict must receive consideration, so long as judgment has not actually been pronounced, is a doctrine fully justified by the whole tenor of the law and by the principles of criminal procedure.[2]

p. 286); or that a question which should have been put as a *Hauptfrage* is put as a *Hülfsfrage* (RGer. II, March 20, 1891, Entsch. vol. xxi, p. 405). In these cases, however, such an error is set forth as would nullify the judgment. On the general subject of the process of correcting the verdict, see Freudenstein, in *Goltdammers Archiv*, vol. xxxiii, pp. 369 *et seq.*; Dalcke, Fragestellung, pp. 139 *et seq.*; Bischoff, in *Goltdammers Archiv*, vol. xlvi pp. 1 *et seq.*

[1] Note to StPO, sec. 309. Compare also Dalcke, Fragestellung, p. 140; Bischoff, cited above, p. 5; Stenglein, notes 6, 7 to StPO, sec. 309; Isenbart, note 128 to StPO, sec. 309; von Kries, p. 625.

[2] Here belongs, in particular, the case where a juror declares that the verdict as read does not conform to the finding of the jury, or does not express it fully or accurately; or where it is declared that the verdict was not constructed in harmony with the provisions of the law with reference to the number of votes necessary. To these cases is also related the case where it appears, from the declaration of the jury or of one of the jurors, that the verdict or the vote rests on a misconception of the question, or that the jury has materially erred in its deliberation with respect to its authority and duties. See RGer. III, January 8, 1883; Entsch. vol. vii, p. 434, Rspr. vol. v, p. 19. In all these cases, a further deliberation is required in order to establish the true mind of the jury. Otherwise, however, if it appears from the declaration of the jury that the jurors merely had a wrong

If it appears that the defect is purely formal, and the jury, sent out to remedy it, undertakes a material change in the verdict, a judgment cannot be based upon the verdict thus amended.[1] If, however, the jury is ordered by the court to retire for the correction of a defect in the matter of the verdict, the jury becomes to such a degree possessed again of the whole material content of the verdict that it may amend even the answers not affected with error.[2] In other words, the jury has absolute freedom, in the correction of a material defect, to reconsider and reconstruct the entire verdict. Even if several offenses, independent of each other, are involved, the jury is not bound by any part of its original verdict.[3] This holds where the defect consists merely in the omission of the answer to one of the questions.[4] Nor does it matter whether the amendment is in favor of the defendant or to his disadvantage; *e.g.* the jury may affirm a *Hauptfrage* or *Hülfsfrage* which it had previously denied.[5]

It is the province of the court to determine officially whether the defect in the verdict does not arise from an error in putting the questions. If it appears that there is occasion for amending or adding to these questions, then is the court not in any wise bound by the deliberation of the jury which may have taken place in the meantime. New questions, both *Hauptfragen* and *Hülfsfragen*, may be put, provided that they would have been proper when the list of questions was first fixed.[6]

If the new verdict also shows a defect such as falls within the provisions of the law already discussed, a defect either in form or matter, the same remedial process must be repeated. Should the

conception of the effect of their verdict, or that they were influenced by a wrong interpretation of a material legal principle. Such declarations are not to be considered. See RGer. I, March 3, 1896; Entsch. vol. xxviii, p. 242.

[1] See StPO, sec. 310. [2] See StPO, sec. 311; also Motiven, p. 204.

[3] See RGer. II, April 26, 1887, Rspr. vol. ix, p. 287; RGer. IV, April 27, 1888, Rspr. vol. x, p. 349, *Goltdammers Archiv*, vol. xxxvi, p. 188; RGer. IV, January 24, 1890, Entsch. vol. xx, p. 188; RGer. IV, October 10, 1893, Entsch. vol. xxiv, p. 302.

[4] RGer. IV, November 15, 1895, Entsch. vol. xxvii, p. 411.

[5] RGer. IV, January 24, 1890, Entsch. vol. xx, p. 188.

[6] RGer. III, October 13, 1880, Entsch. vol. ii, p. 361, Rspr. vol. ii, p. 332. The court may also re-open the case and hear testimony. See StPO, secs. 305, 243, cl. 3, and 245.

jury refuse to make such correction as the court considers requisite, then, since a defective verdict cannot support a judgment, the trial is suspended and the case must be reheard before a new jury. As to whether a stubborn jury may be fined by the court, under those sections of the law, already referred to in an earlier part of this paper, touching the punishment of jurors who neglect their duties, there is a great diversity of opinion.[1]

If the court has erred in attributing a defect to the original verdict and has therefore wrongfully ordered a correction of the same, this wrongful procedure does not impair the rights, either of the defendant or of the prosecutor, arising out of the first verdict. Logically, the party injured by the action of the court has a right to contest the judgment based on the later verdict. In such a contingency, the revising judge is to determine "whether the original verdict was affected with an error requiring correction."[2] Such a determination is possible, however, only when the earlier verdict has been clearly preserved in making up the new one. Hence the law expressly provides, that "the corrected verdict shall be written in such a manner that the original verdict remains recognizable."[3] Hence the first verdict may not be amended by means of penstrokes through clauses or words to be stricken out, nor by the insertion of words or clauses to be added. All those answers to which any correction is made must be written *de novo*, with a distinct reference to that part of the original verdict which it is the aim of the jury to alter.[4]

[1] Löwe, note 10 to StPO, sec. 309, holds that the jury may be fined. This is the view also of Dalcke, Komm. p. 212, Fragestellung, p. 142; of Thilo, p. 371; of Geyer, p. 766; of Stenglein, note 10 to StPO, sec. 309, Lehrbuch, p. 333; and of von Kries, p. 631, note 1. Keller denies the applicability of secs. 96 and 56, GVG, on which the above commentators rest their opinion, but he agrees as to the necessity for a new trial; see Keller, p. 405. Against the view of Löwe may be cited also: H. Meyer in Holtzendorff, vol. ii, p. 209; Isenbart, note 128 to StPO, sec. 309, who holds that the judgment must be pronounced even on a defective verdict; Freudenstein, *op. cit.*, p. 392; Bischoff, *op. cit.*, p. 16, who holds that a judgment of acquittal must be rendered, and Puchelt, p. 495, who says that the jury must remain in the jury-room until their task is properly accomplished.

[2] Motiven, p. 204. Compare RGer. III, October 13, 1880, Entsch. vol. ii, p. 361, Rspr. vol. ii, p. 332.

[3] StPO, sec. 312.

[4] See, however, RGer. III, April 30, 1881, Entsch. vol. iv, p. 122, Rspr. vol. iii, p. 257; RGer. III, May 24, 1886, Rspr. vol. viii, p. 383; RGer. II, December 16, 1890, *Goltdammers Archiv*, vol. xxxix, p. 56; RGer. II, September 24, 1895,

The new verdict must also be signed by the foreman of the jury.[1] When the jury has again returned to the court-room, the whole of the verdict — not merely the amended parts — must be announced to the court,[2] and the president, as well as the clerk of the court, must affix his signature, even though he may have signed the original verdict prior to the new deliberation of the jury. The defendant is now brought back into the court-room, and the verdict is made known to him by a reading of the answers to the questions, together with the declaration that they were made by the majority required by law. The reading is usually done by the clerk of the court.

If the court is unanimously of the opinion that the jury has, on the whole, erred to the disadvantage of the defendant, then the court, by decree and without giving the grounds of its decision, refers the case for a new trial before the *Schwurgericht* at its next session. In this matter the court proceeds on its own motion. Such a reference of the case is permissible up to the very pronouncing of the judgment. If several independent criminal acts or several defendants are involved in the case, then only those acts and those persons that are affected, in the view of the court, by the error of the jury are drawn into the second trial. In the new trial no juror may take part who has coöperated in rendering the earlier verdict.[3] A case once referred for a second trial before another session of the *Schwurgericht* may not be referred again. In the new trial judgment must be pronounced, even if the verdict is regarded as erroneous.[4]

BURT ESTES HOWARD.

BERLIN, June, 1904.

Goltdammers Archiv, vol. xliii, p. 381. Here it is held sufficient if, by means of the record of the trial, the first verdict and the variations of the second are distinguishable.

[1] Unless the foreman has written in the new verdict over his former signature. See RGer. III, May 24, 1886; RGer. II, December 16, 1890; RGer. II, September 24, 1895; and RGer. III, January 12, 1885.

[2] RGer. IV, November 15, 1895, *Juristische Wochenschrift*, vol. xxiv, p. 592.

[3] This does not apply to the supplementary jurors, who have taken part in the trial but not in the decision of the jury.

[4] This is the view of Löwe, note 8 to StPO, sec. 317. There seems to be no decision of the *Reichsgericht* touching this matter.

MUNICIPAL CORRUPTION.[1]

THIS is a work of a kind that was abundant in England during the eighteenth century but is now extinct there, while it flourishes in this country. Mental growths are no exception to the general laws of growth as regards distribution of species in time and space. Dying out in one region, a species may in another region find favoring conditions and perpetuate the type. In many respects the political ideas of our own times in this country reproduce species which belong to England's past. Mr. Steffens's work belongs to the same class as Burgh's *Political Disquisitions* published in 1774, Browne's *Estimate of the Manners and Principles of the Times* published in 1757, and innumerable tracts and essays now sunk into oblivion.

Mr. Steffens says of the articles collected in his book: "They were written for a purpose, they were published serially with a purpose, and they are reprinted now together to further the same purpose, which was — and is — to sound for the civic pride of an apparently shameless citizenship." Burgh said of his work that it was "calculated to draw the timely attention of government and people to a due consideration of the necessity and the means of reforming those errors, defects and abuses; of restoring the constitution and saving the state." Mr. Steffens puts the blame for misgovernment upon the apathy of American character. He says:

> We are responsible, not our leaders, since we follow them. We let them divert our loyalty from the United States to some "party"; we let them boss the party and turn our municipal democracies into autocracies and our republican nation into a plutocracy. We cheat our government and we let our leaders loot it, and we let them bribe and wheedle our sovereignty from us. . . . We break our own laws and rob our own government, the lady at the custom house, the lyncher with his rope, and the captain of industry with his bribe and his rebate. The spirit of graft and of lawlessness is the American spirit.

In the same style Browne argued that virtue was rotting out of the English stock from the development of a sordid commercialism which was corroding all the moral elements which are the true foundations

[1] The Shame of the Cities. By Lincoln Steffens. New York, McClure, Phillips & Co., 1904. 306 pp.