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ment, or either, unless the statute limits the proceeding to an indictment.

Third, that the action is begun by filing a petition in the circuit court, or other court of competent jurisdiction, setting up the facts which constitute a violation of the law, and praying judgment against the defendant for the maximum fine imposed.

Fourth, that upon a trial, the defendant, by a plea of Not Guilty, puts in issue every material allegation of the petition.

Fifth, that the jury must be instructed to find the defendant guilty beyond a reasonable doubt.

Sixth, that a unanimous verdict is necessary.

Seventh, if a defendant is convicted and desires an appeal to the Court of Appeals, he has two years in which to file the transcript of record in the office of the clerk of that court.

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HOW TO EXPLAIN TO YOUR CLIENT WHY YOU LOST HIS CASE.

By E. Polk Johnson.

In response to a request of the Editor that I prepare an article for early publication in the Kentucky Law Journal, I am forced to appear in court with a plea for a continuance on the ground that I have not had time to prepare my case. It seems fortunate, however, that there is an opportunity afforded to supply the lack of an article of my own by something far more interesting from the pen of another, even though the article has already appeared in print. To every young lawyer, and especially to the students who hope soon to surprise the bench, the bar and their clients with their forensic knowledge and eloquence, the article in question is worthy of the most careful study. In the "Reminiscences of Gen. Basil W. Duke," the following is found:

> "Some thirty or more years ago, Byron Bacon, a member of the Louisville bar, at a meeting of the Kentucky Bar Association responded to the toast: 'How to Explain to Your Client Why You Lost His Case.'"

The fact that the response was delivered so long ago, renders it fresh today, if a paradoxical statement be permitted. As Gen.

Duke states, "it is something that does not lose its flavor with age."

Mr. Bacon's response was as follows:

"I deprecate any thought that I respond because, from a more extended experience than my legal brethren, I bring to the solution of this question the exhaustive learning and skill of the specialist. The characteristic modesty of our profession forbids that I should arrogate to myself to instruct the eminent lawyers around me, wherein they doubtless have attained that perfection which only long practice can give.

"I assume, therefore, that the subject was proposed for the edification of novitiates—those 'young gentlemen' to whom Blackstone so often and so feelingly alludes, who, after a long and laborious course of study, have been found, upon an examination by the sages of the law, not to have 'fought a duel with deadly weapons since the adoption of the present Constitution,' and have been admitted to our ranks.

"To them, then, I shall offer briefly, some suggestions upon this point, hoping that they may not find them of practical value upon the termination of their first case. The question as framed, is not unlike that with which Charles II. long puzzled the Royal Society. He demanded the cause of certain phenomena, the existence of which he falsely assumed. The answer was simply the denial of the existence of the phenomena. What lawyer ever attempted to explain the failure of a case upon the hypothesis that he had lost it? That a lawyer cannot lose a case is as well established a maxim as that the King can do no wrong, or, that a tenant cannot deny his landlord's title. Eliminate this error, and our question is of easy solution.

"Coke tells us that law is the 'perfection of human reason'; Burke, that it is 'the pride of the human intellect; the collected reason of ages, combining the principles of eternal justice with the infinite variety of human concerns; the most excellent, yea, the exactest of the sciences'; and the eloquent Hooker, that 'her seat is the bosom of God, her voice the harmony of the spheres; all things in Heaven and on earth do her homage—the least as feeling her care, the greatest as not exempt from her power.' But we know that, if it be the purest of reason, the exactest of the sciences, its administration is not always entrusted to the severest of logicians or the exactest of scientists.

"If, oblivious of this, you shall have assured your client of success in the simplest case, the hour of his disappointment will be that of your tribulation, and professional experience can extend to you no solace or aid.

"But your client's cause has resulted unfavorably. You, of course, are never to blame; the fault is that of the judge, the jury or your client himself, and it may be of all three. It becomes your duty to divert the tide of his wrath into those channels where it can do the least possible harm. If he be a crank and shoots the judge or cripples a juror, they fall as blessed martyrs and their places and their mantles are easily filled; but not so readily your place or your mantle. As one of America's sweetest poets, Mr. George M. Davie, has expressed it in a touching tribute to our professional and social worth, unequalled for delicacy of sentiment, boldness of imagery, and beauty of diction, in the whole range of English poetry:

'Judges and juries may flourish or may fade,
A vote can make them as a vote has made;
But the bold barrister, a country's pride,
When once destroyed, can never be supplied.'

"The selection, then, of a target for your client (I use the word 'target' metaphorically) must rest upon the peculiar facts and circumstances of the case and the 'sound discretion,' as the venerated Story has it, of the counsel. But avoid, if possible, imputing the blame to your client, for, although this has been attended with very happy results, yet his mood, at such times, is apt to be homicidal, and, moreover, you should bear in mind that there your aim is to conciliate.

" 'Who wrote that note?' demanded the Indiana lawyer who, under the old system of procedure, had declared in covenant as on a writing obligatory, and gone out of court on a variance.

" 'I got Squire Brown to write it,' answered his sorely perplexed and discomfited client.

" 'I thought so,' sneered the learned counsel. 'Didn't you know that no d—m magistrate could write a promissory note that would fit a declaration?'

"First, as to the jury. Upon this head I need not enlarge, only remind you that you are not held by the profession as committed or estopped by an eulogium, however glowing, which you may have pronounced during the trial on their intelligence and integrity. It is only in the capacity of a scape-

goat that the American juror attains the full measure of his utility, and as such he will ever be regarded by our profession with gratitude not unmingled with affection.

"But it is to the judge that we turn in this extremity, with unwavering confidence. The serenity and grandmotherly benignity enthroned upon his visage is to the layman that placidity of surface which indicates fathomless depths of legal lore; to the lawyer, it bespeaks the phlegmatic temperament of one whose mission is to bear unmurmuringly the burdens of others.

"It comes upon you like a revelation that your weeks of study, your elaborate preparation, your voluminous brief, are all for naught; that the impetuous torrent of your eloquence has dashed itself against his skull, only to envelope it in fog and mist, and 'more in sorrow than in anger' you confess that the presumption that every man knows the law cannot be indulged in his favor. Even your luminous exposition has failed to enlighten him. You need not spare him. He thrives upon abuse. Year in and year out, he bears the anathemas of disappointed lawyers and litigants with the stolid indifference of Sancho Panza's ass in the valley of the pack-stones, or beneath the missiles of the galley-slaves, and society comes finally to regard him pretty much as Sancho did his ass. It berates him, overtasks him, half starves him, and loves him.

"But seriously considered, our question is only a long-standing and harmless jest of the bar, meaningless in actual practice. The lawyer is untiring in his client's behalf and the client knows, be the result what it may, that he has had the full measure of his lawyer's industry, zeal and ability and requires no explanation. Lord Erskine said that in his maiden speech he felt his children tugging at his gown and heard them cry 'now, father, is the time for bread.' The British bar applauded the sentiment. The American lawyer, throughout the case, feels his client tugging at his gown and, if unsuccessful, is sustained by the consciousness that he has done his whole duty as God has given him to see and perform it: and, should he want further consolation, he can open that oldest of all the books of the law and there read these words which may soothe his wounded spirit and, perhaps, best answer the question of to-night:

" 'I returned and saw under the sun that the race is not to the swift, nor the battle to the strong: neither yet bread to the wise, nor yet riches to men of understanding, nor yet favor to men of skill, but time and chance happeneth to them all.' "