Chapter 12: Criminal Law, Procedure, and Administration

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Criminal Law, Procedure, and Administration

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A. COURT DECISIONS

§12.1. Admissibility of photographs: Prejudicial evidence and the discretion of trial judges. Two opportunities to pass on the admissibility of photographs in criminal cases were presented the Supreme Judicial Court during the 1956 Survey year. In the widely publicized case of Commonwealth v. Makarewicz, the defendant assigned as error, among others, the admission into evidence of several "enlarged color photographs produced upon a screen," illustrating testimony of a pathologist. The defendant objected to the use and introduction of the colored slides as exhibits because of their inflammatory and prejudicial nature. The Supreme Judicial Court rather summarily rejected this contention, holding that the admission of the photographs was a matter of discretion with the trial court.

The scope of appellate review of the admissibility of photographs, even if enlarged or in color, seems very limited. The Court pointed out that "no question is raised as to the identification of the slides or as to their being fair representations of the conditions which the pathologist discovered in the autopsy." And the Court asserted that "their admissibility has been disposed of by a long line of cases which are cited in Commonwealth v. Gray, 314 Mass. 96, 98." The possible problem of the enlargement of the photographs as bearing on their

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§12.1. 1 333 Mass. 575, 132 N.E.2d 294 (1956). See also §§22.2 and 22.7, infra, for further discussion of this case.
2 333 Mass. at 579, 132 N.E.2d at 297.
3 The illustrated testimony included that "there was a laceration in the vagina although the hymen was intact. The anus was dilated and spermatozoa were present in the rectum." Ibid.
4 333 Mass. at 584, 132 N.E.2d at 299.
5 Ibid.
prejudicial nature was disposed of with a reference to Wigmore and to Commonwealth v. Noxon. The Noxon case held that where there is evidence from which a judge may find sufficient verification of the enlargements, that they are fair representations, and that the photographs will aid the jury in understanding the issues, they may be admitted. The Court in the Makarewicz case expanded the Noxon rule so that the trial judge's broad discretion to admit ordinary photographs exists also where the photographs are color enlargements. If the Noxon rule is the sole test, apparently the only requirement as to the relevancy of photographs which an appellate court will impose in Massachusetts is that photographs aid the jury in understanding the issues. In the Makarewicz case, although this was not spelled out by the Court, the color slides might be said to aid the jury in understanding the nature of the crime and thus in inferring what motives prompted the murder. The slides, by this interpretation, fulfill the admissibility requirements of the Supreme Judicial Court under the Noxon rule, now applicable to photographs in color.

The problem of giving all relevant data to the jury and yet not unduly exposing them to material likely to result in emotional rather than logical reactions is a serious one in criminal cases. If a jury views in color, in a dimly lighted courtroom, projected slides enlarging mutilations of a young girl's body, such a vivid experience may impress them with a desire to make someone pay for so heinous a crime. The only person over whom the jury has any power is the defendant: and we can only speculate as to the effect of this emotional reaction on the proper execution by the jury of their duty to determine impartially the guilt or innocence of the defendant.

During the 1956 Survey year, a related problem of admissibility of photographs came before the Court in Commonwealth v. Valcourt. The defendant was charged with arson. He argued that because he had admitted the fact of the fire, and because the jury had taken a view of the premises, photographs of the burned building should have been excluded by the trial judge. The Supreme Judicial Court held that there was no error in admitting the photographs. "The photographs of the burned building were plainly admissible to aid the jury in understanding the nature of the fire even though they had viewed the premises." The Court then asserted, "Despite the admissions of the defendants with respect to the fire, the Commonwealth was entitled to prove its case." An interesting opinion to read in connection with the Valcourt and Makarewicz approaches is the 1956 Florida Supreme Court decision of

6 3 Wigmore on Evidence §795 (3d ed. 1940).
8 See, for example, Gilbert v. West End Ry., 160 Mass. 403, 36 N.E. 60 (1894), sustaining the trial judge's refusal to admit the photographs; Swart v. Boston, 288 Mass. 542, 193 N.E. 360 (1943), sustaining the trial judge's admission of photographs.
10 335 Mass. at 712, 133 N.E.2d at 222.
11 Ibid.
Dyken v. Florida, a case which, in general, combines the factual elements of both the Valcourt and Makarewicz cases. The record in the Dyken case disclosed a brutal and shocking murder. An "indescribably horrible photograph" of the deceased lying on a mortuary slab was admitted into evidence. The defendant appealed from conviction of murder in the first degree without recommendation of mercy, and the conviction was reversed on the sole ground that the photograph was improperly admitted. The Court answered the contention of the state that the photograph, since it showed the location of the fatal shotgun wound, was properly admitted:

The location of the wound was freely conceded and abundantly proved by other evidence. The photograph did not include any part of the locus of the crime and was too far in time and space therefrom to have any independent probative value. We agree with appellant that the introduction of this photograph in evidence could have no purpose or effect other than to inflame the minds of the jurors. We cannot say, in a first degree murder case without recommendation of mercy, that an error of this character and magnitude was not prejudicial.

Of course, an assiduous advocate could distinguish the facts of the Florida case and the two Massachusetts cases, but the requirement of "independent probative value" seems a stricter requisite for admissibility of photographs than that they "aid the jury in understanding the issues," which is little more than a statement of the purpose of evidence in general. The Florida approach would seem to emphasize the possible prejudice to the defendant and to protect him even at the appellate level to the extent of reversing a trial court.

The Makarewicz opinion stated, "In passing we pause to note that all the evidence was such as to indicate that the crime was committed with such extreme atrocity and violence that these slides could add little to inflame or prejudice the jury." The Florida Supreme Court stated that "the record before us discloses a shocking and brutal crime." No further comment was made as to the effect of such a crime on the issue of admissibility of photographs that are "indescribably horrible."

The key difference between the two approaches is in the practical effect of the respective tests of each jurisdiction. The Massachusetts decisions place responsibility squarely on the trial judge to safeguard both the right of the Commonwealth to submit all relevant evidence and the right of the defendant to be free from unduly prejudicial and inflammatory material of slight probative value. Whatever the trial judge's ultimate decision in reconciling these conflicting rights, it

12 So.2d 866 (Fla. 1956).
13 Ibid.
14 Ibid.
16 89 So.2d 866.
seems unlikely that he will be reversed on appeal. Therefore the wise Massachusetts practitioner seeking exclusion of photographs will emphasize in argument to the trial judge the balancing of interests involved in admitting such photographs — pointing out, of course, their great prejudice and little relevance. The trial court needs all the help available in making a decision with such weighty consequences to the defendant.

§12.2. Procedure in criminal cases: Strict application and its consequences. During the 1956 Survey year, a number of serious criminal cases have been decided wherein the Supreme Judicial Court, at least purportedly, rested its decision on failure of counsel to observe proper procedural requirements. A review of these decisions should suggest to the practitioner the need for caution in handling procedural matters. Moreover, careful analysis of the cases raises the question whether the Court would allow substantial injustice in a criminal case despite improper procedural steps.

In Commonwealth v. Riley\(^1\) the defendant, before filing a general plea of not guilty in the Superior Court, but after filing a general plea of not guilty in the District Court, filed a motion to quash and a plea in abatement. He alleged (1) that the District Court refused to allow him to cross-examine witnesses at the hearing on the issuance of process on the complaint and (2) that the judge who issued the complaint refused to disqualify himself from hearing the case.

The Supreme Judicial Court sustained the action of the Superior Court in denying the motion and overruling the plea. The Court pointed out that the errors alleged by the defendant were not in the nature of formal defects apparent on the fact of process to which a motion to quash lies, and, if the defects were formal, even objections to formal defects cannot be taken for the first time in the Superior Court. The conclusion was that the defendant's objections were waived by the plea of not guilty in the District Court, in analogy with a line of cases where objections were raised to improper procedural methods by a grand jury in bringing in an indictment.\(^2\)

One of the analogous indictment cases cited explains the conclusion more fully: "At common law, matter in abatement must be pleaded before a plea of 'not guilty'; after such a plea it is too late to plead in abatement and the same rule applies to a motion to quash."\(^3\) Thus it would seem that the rule is based on the technical distinction at common law between pleas in abatement and pleas to the merits.\(^4\)

\(^1\) 333 Mass. 414, 131 N.E.2d 171 (1956).
\(^3\) Commonwealth v. Lombardo, 271 Mass. 41, 44, 170 N.E. 813 (1930).
\(^4\) The first appearance of this rule in criminal cases seems to be in Commonwealth v. Lewis, 1 Metc. 151 (Mass. 1840), wherein Justice Dewey said at page 152: "... the allegation ... is a mere descriptio personae, or addition, and if erroneous as such the only remedy is by a plea in abatement. The plea of not guilty was a..."
Although the issuance of process, like the indictment, is only a preliminary step in the criminal process, a man's reputation is often irreparably affected even by preliminary steps through the application of the old adage "where there's smoke . . . ." His rights, therefore, should not be abridged by technicalities. But the procedures may be defended on the ground that when a case reaches the Supreme Judicial Court such damage is already done and the petit jury trial is not affected by the grand jury or by any other preliminary error.\(^5\) However, it is to be noted that the Court in the Riley case, before raising the procedural issue, fully discussed the merits of the defendant's contention and held that the defendant had no right to cross-examine.

The defendant had contended that the statute gives the right to cross-examine, in its provision that when a complaint for a misdemeanor is received, "the person against whom such complaint is made, shall . . . upon request in writing, seasonably made, be given an opportunity to be heard personally or by counsel in opposition to the issuance of any process based on such complaint."\(^6\)

The Court relied on legislative history, without citation, to reject this contention: "The statute, first enacted in 1943 in permissive form, gave a statutory basis for a practice sometime theretofore followed by the judge or clerk of allowing the attorney for the prospective defendant to state relevant circumstances which might be thought to bear on the propriety of the issuance of process."\(^7\)

Thus, whatever "opportunity to be heard" may mean in other contexts, no right to cross-examine is given by the phrase as used in G.L., c. 218, §35A.

Objections to strict adherence to rules of procedure are more striking where, as in Newton v. Commonwealth,\(^8\) a sentence of life imprisonment is involved. In the Newton case, petitioner sought, pro se, a writ of error on the ground that he was not properly represented by counsel. The new court-appointed counsel took only a single exception to the findings, rulings, and order for judgment of the single justice of the Supreme Judicial Court, hearing the substitute
petition. The Court, in effect, disposes of the petition in three sentences:

No attempt was made to point out any particular error on which the petitioner intended to rely. It is well settled as a matter of State practice that an exception of that sort is not valid and must be overruled. . . . This rule of practice alone requires that the exceptions be overruled, and we so hold.9

The rationale of this requirement of particularizing the exception seems to be found in the opinions10 deciding that a single exception to a general finding does not raise the question whether the evidence warrants the finding,11 unless the subsidiary facts on which the general finding is based are conceded or otherwise established.12

These cases emphasize that questions of law and fact must be separated because no exception lies to a finding of fact.13 The point is also made that "An exception must call to the attention of the judge the particular errors alleged in order that if possible he may correct it. . . . [The] judge . . . might have made further express findings of fact."14

This rule, while obviously proper and necessary in civil proceedings, could lead to injustice in criminal proceedings if a man's freedom is made dependent on the procedural competence of his counsel.15

11 The proper way to raise this question is by an exception to the denial of a requested ruling that such a finding would not be warranted. Barton v. Cambridge, 318 Mass. 420, 424, 61 N.E.2d 830, 833 (1945).
12 Leshefsky v. American Employers' Insurance Co., 293 Mass. 164, 199 N.E. 395 (1936). The reasoning of the Leshefsky rule is stated to be that "the separation of the questions of fact and of law involved thereon has been largely made."
13 Sreda v. Kessel, 310 Mass. 588, 38 N.E.2d 932 (1942). Chief Justice Field says here that ". . . it is a general principle of practice in such cases that an exception does not lie to a finding of fact by the judge since findings of fact are not subject to review, and, though questions of law are involved therein, there must be a separation of such questions of law if they are to be reviewed . . . although the general findings for the plaintiff against the defendant doubtless apply rulings that such findings are permissible as a matter of law, it has been settled by many decisions that an exception to such a finding is not sufficient to bring such an implied ruling before us for review."
15 Some states have reached the result of strictly applying this procedural rule by statute. For example, Texas requires that objections filed to a trial court's charge shall point out the specific errors complained of. Otherwise the errors will not be considered on appeal. See Tex. Ann. Code Crim. Proc., art. 735 (Vernon, 1916). Prior to this enactment the Texas Court had relaxed this requirement when the trial court had committed a "fundamental" error in failing to charge as to the effect of certain testimony. Thornley v. State, 36 Tex. Crim. 118, 34 S.W. 264, rehearing granted, 35 S.W. 981, 61 Am. St. Rep. 836 (1896). But the statute is now strictly construed in criminal cases. Bell v. State, 99 Tex. Crim. 61, 268 S.W. 168 (1925); Taylor v. State, 89 Tex. Crim. 174, 230 S.W. 176 (1921). The Texas rule also seems to be followed in People v. Chapman, 281 Ill. App. 313 (1935); Graf v. State,
is particularly true when the exception seems to be on the ground that the findings and ruling were not supported by the evidence and the error is failure by counsel to request a ruling to that effect and except to its denial. While in a civil case justice delayed may be justice denied, that argument has no merit in criminal cases as a reason for not granting a new trial. But the Court, not content with such a curt dismissal, went on to say, "but in a case as serious as this it seems proper to add that in any event a careful examination of the record has disclosed no error." The opinion then proceeds with a full discussion of the merits.

A third case is frightening, at least at first glance, and emphasizes the attention counsel must pay to statutory provisions dealing with periods within which various legal steps must be taken. In Commonwealth v. Rodriguez the defendant, following his conviction for murder in the second degree, attempted to appeal under G.L., c. 278, §33B. That section provides that one desiring to appeal "shall, within twenty days after the verdict, file his claim of appeal." Defendant's counsel applied for and was granted two extensions of this time by the Superior Court judge. His appeal was filed within the extensions but more than three months after the verdict. The Supreme Judicial Court declared: "the time requirement within which an appeal may be taken under §33B is mandatory ... and could not be extended either by consent of the parties or by the court. ... It follows that the appeal is not rightly here and this court has no jurisdiction over the case." Such treatment might be thought quite severe were it not for the final sentence of the opinion: "We might add that a careful examination of the record reveals no error in the conduct of the trial."

In the Rodriguez case, a strict application of procedural rules beg-
comes even more disturbing. The failure to file an appeal within the time allotted, despite the trial judge’s invitation to error by granting the extensions, was held to deprive the court of jurisdiction. Jurisdiction is a prerequisite to examination of the merits. Technically, the court, having established that it had no jurisdiction, could not correct any error it found.

However, it may be hoped that the Supreme Judicial Court has stated a principle in another case decided during the 1956 Survey year which furnishes possible means for overlooking procedural technicalities if injustice would result from strict adherence to them and which indicates a reason for the Court’s careful notations that it had examined the merits and found no error.

In *Commonwealth v. Conroy* the defendant tried to raise in the Supreme Judicial Court for the first time a question of error in his sentence. The defendant was found guilty on three indictments, one of which was attempted larceny. He was sentenced to three concurrent terms of from six to eight years. But the maximum sentence for attempted larceny is two and a half years. The Court reiterated the rule that a defendant may not raise a question of law for the first time in a brief filed in the Supreme Judicial Court. Despite this rule, the Court pointed out that “[i]n appropriate instances this court has and will exercise the power to set aside a verdict or finding in order to prevent a miscarriage of justice when a decisive matter has not been raised at the trial.”

This broad statement, at least as a statement, certainly appears to cover a failure to properly except, and other cases so indicate. It may also be hoped that a court would consider it a miscarriage of justice where both a trial judge and counsel for defendant took steps they felt sufficient to save defendant’s rights on appeal but the appeal was not within the mandatory time limit. This of course postulates that reversible error appears in the record and that the Court will assume jurisdiction despite its disclaimer in the *Rodriquez* case. Difficulties may arise, however, because the decisions cited by the Court, despite the broad language in the *Conroy* case, merely raised issues of exceptions improperly taken or lack of jurisdiction in the trial courts. Furthermore, while all the former decisions cited assume such power, none finds sufficient warrant for its exercise.

22 *333 Mass. 751, 133 N.E.2d 246 (1956).*
26 *Commonwealth v. Andler, 247 Mass. 580, 142 N.E. 921 (1924).*
The tone of the Court's language apparently indicates that much lies within the discretion of the Supreme Judicial Court.\(^\text{28}\) The lesson to be learned by the practitioner, however, is to be precise in procedural matters. If through inadvertence, proper procedural steps are not taken, it would be worth while for counsel to argue that strict adherence to procedural rules will result in such a miscarriage of justice as to appeal to the discretion of the Supreme Judicial Court.\(^\text{29}\)

\section*{§12.3. Evidence: Defendant's credibility, prior nol. prossed actions.}

An apparently novel and certainly interesting point is raised by \textit{Commonwealth v. Rondoni}.\(^\text{1}\) The defendant in that case was convicted by a jury of abuse of a female child and appealed, assigning as error, among others, the submission to the jury of a document purporting to be a record of his conviction in Connecticut of a crime. The document offered contained a statement that Rondoni had appeared to answer to an information by the state's attorney charging him with the crime of "assault, intent to kill, and theft";\(^\text{2}\) that he pleaded not guilty to each count; that these counts were nol. prossed; that the state's attorney, with the consent of the court, "filed an added third count charging carrying weapon [sic], and the prisoner for plea said 'guilty' to said added third count."\(^\text{3}\)

The Court upheld the conviction. General Laws, c. 233, §69 provides: "The records and judicial proceedings of a court of another state or of the United States shall be admissible in evidence in this commonwealth [under certain conditions]."\(^\text{4}\) General Laws, c. 233, §21 provides: "The conviction of a witness of a crime may be shown to affect his credibility . . . " Here the judge allowed information to go to the jury which they were not entitled to see\(^\text{5}\) and which seems extremely prejudicial. The nol. prossed charges were much more serious than the count on which the defendant was convicted. The record might indicate that the defendant and the Connecticut state's

\(^{28}\) The discretion is probably as broad as is that of the trial judge on motion for new trial where no exception to the alleged error has been taken. See \textit{Commonwealth v. McKnight}, 289 Mass. 530, 538, 195 N.E. 499, 502 (1935).

\(^{29}\) Remedies other than the type discussed in this section may of course be available. See G.L., c. 250, §9 for possible use of the writ of error, and see the discussion of the scope of the writ of error in 1954 Ann. Surv. Mass. Law, §15.6.
 attorney had made some sort of an agreement that the defendant would plead guilty to the less serious count if the state's attorney nol. prossed the two more serious counts.

Although the defendant was not convicted on the first two counts, their presence in the record could only indicate that he had been in serious trouble previously and this may have been an important factor in the deliberations of the jury. The judge, having admitted the whole record, told the jury to ignore the prejudicial part. There is no question that it is proper, in the judge's discretion, to allow a record of conviction to go to the jury room, and it may be conceded that decisions, too numerous to list, have held that prejudicial error is cured by instructions to disregard.

In Commonwealth v. Giacomazza, for example, where the defendant was charged with murder and where the jury was told to disregard certain harmful testimony, the Court said, "It must be assumed that the jury followed the instructions of the judge and disregarded this testimony . . ." 

The point is that every trial lawyer knows that harmful evidence is rarely, if ever, disregarded. Once in the mind of a juror, it stays there. Granting that such evidence sometimes gets into a trial by accident, it seems unfortunate to permit its intentional introduction.

This is particularly true in a case like Rondoni, where, as Defendant's Brief points out, "there are no material witnesses except the accuser and the accused, and consequently credibility becomes the sole issue." 

There is a statement in the case of Commonwealth v. Donaruma where the issue was whether the judge could refuse to send to a jury a complete indictment which indicated that a co-defendant of the present defendant had been acquitted in a previous trial, which might seem to support the Supreme Judicial Court's position in this case. There the Court said: "It was discretionary with the judge either to deny the request of the defendant or to grant it with full instructions to the jury to disregard . . . [certain portions] . . . and to consider only what was charged in the second count." The Rondoni opinion does not cite the language of this case. This may be because the actual holding was that there was no error when the trial judge detached certain portions from the indictment. The dictum indicating that the indictment could be submitted in toto, with instructions to disregard,

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6 The Court cites Forcier v. Hopkins, 329 Mass. 668, 672, 110 N.E.2d 126, 128 (1953), which in turn cites Portland v. Ruud, holding: "It was discretionary with the trial court whether the 'insurance papers' should be sent to or withheld from the jury." 242 Mass. 272, 276, 136 N.E. 75, 76 (1922).
7 The Court in the Rondoni decision cites five cases for this proposition.
8 311 Mass. 456, 42 N.E.2d 506 (1942). This is the latest case cited by the Court and the quotation is paraphrased in the opinion.
9 311 Mass. at 465, 42 N.E.2d at 512.
10 Defendant's Brief, p. 6.
12 260 Mass. at 239, 157 N.E. at 540.
is further weakened by the only authority cited for it, which holds that a lower court record showing conviction could be submitted to the jury in the court to which appeal was taken. But the reason why such record can be submitted is that "inasmuch as no appeal can be taken from the judgment of the inferior court unless that court finds the accused guilty . . . the record of such finding, if sent to the jury, adds nothing to the knowledge of the jury . . . ." The record in the Rondoni case certainly added to the jury's knowledge.

It may be noted that the Donaruma case allowed a judge to detach certain portions of the document sent to the jury; the obvious query is why was this not done here. Defendant's Brief states that the trial judge instructed the jury that "if it were possible to eliminate this from the records he would do so." In the light of the Donaruma case, such was legally possible. Even if it were physically impossible to detach inadmissible parts because to do so would mar the admissible parts a method of partial masking should be available. If trial judges are to be allowed to admit such material intentionally, a clarification of the area of their discretion in tearing or masking portions might prove helpful.

§12.4. Possession of stolen goods: Effect on issue of knowledge. The defendant in Commonwealth v. Kelley was found in possession of stolen money under extremely suspicious circumstances fifty-four days after a robbery. The issue at his trial was whether the defendant received the stolen money, "knowing it to have been stolen." The defendant introduced no evidence to explain his possession of the money. The trial judge charged the jury: "You may consider his possession of the stolen bills, if you find those bills that were in his possession to be part of the loot taken in the robbery, and his failure to account for how he came into possession of the bills on the issue as to whether he had guilty knowledge when he received the bills

15 Defendant's Brief, p. 5.

2 These circumstances included a voluntary reference to the robbery by the defendant when an agent of the Federal Bureau of Investigation interviewed him three and a half hours after the robbery. After the money was found in his possession, the defendant refused to explain and challenged the FBI to think anything they wanted to. He admitted that the money had not come from his employment or from gambling, his only apparent sources of income. These circumstances seemingly outweighed defendant's contention that fifty-four days was too long a lapse of time to be within the rule allowing an inference of guilty knowledge to be drawn from recent possession. See Commonwealth v. Montgomery, 11 Metc. 534, 537 (Mass. 1846), for the suggestion that other evidence may be necessary in cases of a long lapse. Commonwealth v. Coyne, 228 Mass. 269, 117 N.E. 337 (1917), although not cited by the Court, holds that two months is not as a matter of law too long a lapse, and supports the Court's rejection of the defendant's contention. Other jurisdictions also hold that whether possession is recent depends on the facts of the case. See, for example, State v. Giardano, 121 N.J.L. 469, 3 A.2d 290 (1939); State v. Denison, 252 Mo. 572, 178 S.W.2d 449 (1945).
8 G.L., c. 266, §60.
that they were stolen in the robbery." 4 Exceptions were taken to this portion of the charge and to the denials of a motion for a directed verdict and a requested charge that such possession could not be considered on the issue of defendant's knowledge that the property was stolen.

The Supreme Judicial Court sustained the denial of the defendant's exceptions and held that "possession of recently stolen property puts the burden of explanation on one charged with having stolen it . . . and the same principle applies to one charged with having received property knowing it to have been stolen." 5

A point of interest to the bar is the meaning of the phrase "burden of explanation." The Massachusetts cases cited by the Court, although they speak in terms of sending the case to the jury in the absence of explanation of possession, 6 do not use the term "burden of explanation."

The language of the opinion of the Court indicates that the jury may infer from the fact of possession the further fact of knowledge. 7 The language of the trial court's charge, although not quoted by the Court, also clearly indicates that the trial court did not require that an artificial force be given to a finding of possession, compelling the jury to find the requisite knowledge if they found possession. 8 The judge was allowing, not compelling, a finding.

Other Massachusetts decisions are not free from ambiguity of phrase although their holdings seem clear. In Commonwealth v. Taylor 9 the Court said, "but under our decisions the jury were to determine whether the proof offered was sufficient, in the absence of any explanation, to raise a presumption sufficiently satisfactory to convince them of his guilt." 10 Despite the use of the term "presumption," its context indicates that no artificial compelling force was imposed on the jury. A presumption in its technical sense compels a finding. Hence, it cannot compel and at the same time allow the jury to determine whether it is "sufficiently satisfactory to them." Such language indicates that what was meant was an inference. 11

4 Record, p. 9.
7 The trial court's charge spoke of "lack of explanation." Record, p. 9. The Kelley decision cited a federal case which discussed the effect of possession. Defendant "knew that the cars were stolen, and although it might have justified the inference, it compelled no finding to that effect, even though he failed to give a satisfactory explanation." McAdams v. United States, 74 F.2d 37, 41 (8th Cir. 1934). See also People v. Bardell, 388 Ill. 482, 58 N.E.2d 24 (1945); Pengleton v. Commonwealth, 294 Ky. 484, 172 S.W.2d 52 (1943).
8 "... lack of explanation or unsatisfactory explanation of possession of recently stolen property, permits the jury to draw an inference of the essential element of that particular crime, of guilty knowledge . . . ." Record, p. 9.
9 210 Mass. 443, 97 N.E. 94 (1912).
10 210 Mass. at 444, 97 N.E. at 94.
11 See also Commonwealth v. McGarty, 114 Mass. 299, 302 (1873), where the Court uses the word "presumption" and in the very next sentence uses the word "inference."
The Court cites cases which sustain this position. In *Commonwealth v. Peopcik*, it is said: “It was nevertheless a question of fact for the jury to decide upon all the evidence, including the defendant’s possession of the stolen property and the inferences to be drawn from this circumstance, whether the defendant received the goods, knowing them to be stolen.” Decisions in other states have held that an inference and not a presumption should be drawn from the fact of possession to the fact of knowledge, though the term “presumption” is also loosely used.

Since the Massachusetts Court does not actually hold that there is a technical presumption arising from such possession it follows that such possession is not prima facie evidence of knowledge. Furthermore, since the jury merely “considers possession,” the fact finder may refuse to draw the inference of knowledge despite the absence of evidence that defendant had no knowledge. Therefore, the defendant has a “burden of explanation” only in a limited sense. To better his position with the jury, the defendant has the burden of introducing evidence. The “burden of proof” on the issue of knowledge is not shifted to the defendant.

An interesting question is raised by these observations. What would happen in a criminal case if counsel for the Commonwealth quoted directly from this opinion and asked the trial judge to charge that if the jury finds the defendant to be in recent possession of stolen property the defendant has the “burden of explanation” of that possession? The ground for objection to such a charge would be that Massachusetts case law holds that possession justifies an inference of knowledge but has no other evidentiary effect. The term “burden of explanation” in a vacuum, defendant could argue, implies that more than inferential weight is to be given the fact of possession and

ence.” See *9 Wigmore on Evidence §2490* (3d ed. 1940) for the proper effect of a presumption and its distinction from an inference.

12 *251 Mass. 369, 146 N.E. 661 (1925).
14 A case cited in the Kelley opinion characterizes the relation between possession and knowledge as a presumption, as prima facie evidence, and as an inference—all in the same paragraph. *Wilkerson v. United States*, *41 F.2d 654, 657* (7th Cir. 1930). Another case cited specifically held: “It created at no time any presumption of law that the defendant knew that the cars were stolen, and although it might have justified the inference, it compelled no finding to that effect, even though he failed to give a satisfactory explanation.” *McAdams v. United States* *74 F.2d 37, 41* (8th Cir. 1934). See also *Pengleton v. Commonwealth*, *294 Ky. 484, 172 S.W.2d 52* (1943), and *People v. Bardell*, *388 Ill. 482, 58 N.E.2d 24* (1945).
15 See *Cook v. Farm Service Stores, Inc.*, *301 Mass. 564, 17 N.E.2d 890* (1939), for a discussion of what constitutes prima facie evidence. One of its elements is an artificial legal force compelling the jury, i.e., in effect, it includes a presumption.
16 The very nature of an inference, as distinct from a presumption, is that the fact finder may or may not find. He is not compelled to find. See *3 Wigmore on Evidence §2490* (3d ed. 1940).
such a phrase is easily confused with the technical burden of proof. The similarity of these phrases, defendant would continue, might lead the jury to believe that the burden of proof on the issue of knowledge had shifted to the defendant.

B. Legislation

§12.5. The wire-tapping problem. In 1952, the Law School of the University of Chicago received a grant from the Ford Foundation for the purpose of conducting a three-year research program in law and the behavioral sciences. In considering the problem of whether or not the jury conceives its function in the same way that the legal profession does, and to what extent, if any, it comprehends and follows the instructions from the trial judge, the directors of the program decided that it might be helpful to record some actual jury deliberations. In connection with this experiment, the consent of Judge Delmas C. Hill of the United States District Court for the District of Kansas was obtained. A set of rules governing procedure was formulated including provisions that permission of the judge, both counsel, and the United States Attorney, in any case where the federal government was a party, were conditions precedent; that only civil cases would be recorded; and that adequate safeguards would be maintained so that the identity of the jurors and the cases would remain secret.

In the spring of 1954, recordings were made of five or six cases. The jurors were not notified that their deliberations were being recorded, but all the above safeguards were observed.

When news of the recordings leaked out, public opinion both pro and con was expounded. The Subcommittee on Internal Security of the United States Senate held a hearing on October 12 and 13, 1955, to discuss the project's actions. At the conclusion of the hearing, Senators Eastland and Jenner pledged themselves to promote legislation making eavesdropping of this nature a criminal offense. Acts of 1956, c. 48 is obviously the result of the publicity which followed the news of the experiment. The act adds Section 99A to G.L., c. 272. It provides that any attempt to overhear the deliberations of a jury by use of a dictograph, dictaphone, or any similar device, with intent to procure any information relative to the conduct of such jury or any member, shall be punished by imprisonment for not more than five years or by a fine of not more than $5000, or both.

By this rapid response of the General Court to the issue in question, the legislators have shown that they consider the benefits to be derived from such research to be outweighed by the probable consequences to the jury system as we know it today. Interestingly enough, however, the General Court rejected Senate Bill 624 which would have restricted the authority of the Attorney General and district attorneys to authorize wire tapping in criminal investigations.

crimes to the Criminal Information Bureau within the State Police, the creation of which was discussed in the 1955 ANNUAL SURVEY. The subject matter of the crimes required to be reported include crimes involving gaming, drug and narcotic violation, sale or possession of pornographic literature, or improper solicitation or use of funds for charitable purposes. The act also provides that the probation officer of the court must furnish to the clerk a description of the person convicted.

§12.7. Changes in the probation system. The most important legislation bearing on criminal administration passed during the 1956 SURVEY year was a continuation of the reorganization of the correctional system of the Commonwealth, earlier stages of which were discussed in the 1955 ANNUAL SURVEY. Acts of 1956, c. 731 was based on recommendations in the message from Governor Herter transmitting the second report of the committee appointed to study the correctional system. The suggestions it contained were crystallized in the bill submitted by the House committee. This act makes important alterations in the probation system and correctional and parole changes are also incorporated.

From the probation standpoint, probably the major structural change accomplished is the establishment of a Commissioner of Probation who is endowed with and given executive control and supervision of the probation service. Before this act was passed the administrative system of probation in Massachusetts consisted of a Commissioner of Probation and a Board of Probation. The Commissioner's powers were very limited; furthermore, he was appointed by the Board, served "during the pleasure" of the Board, and received such salary as the Board should decide. The new legislation abolishes the Board of Probation and gives the Commissioner the authority which the Board previously had, in addition to some new powers. A Committee on Probation is established to assist the Commissioner in coordinating the entire probational system.

The term of appointment of the Commissioner is set at six years, to which term he is appointed by the Committee on Probation. His salary is fixed at $12,000 a year. As a result of this new Section 19 the Commissioner is no longer dependent on the discretion of some other administrative body for the amount of his salary or for the length of his term of appointment.


2 This was the Wessell Committee, consisting of Nils Y. Wessell, President of Tufts University; Joseph E. Ragen, Warden, Illinois State Penitentiary; Will C. Turnbladh, Executive Director, National Probation and Parole Association; Robert J. Wright, Assistant General Secretary, The American Correctional Association and the Prison Association of New York.

3 House No. 3245.
5 Id. §21.
Under the new law no person can be appointed as probation officer unless his or her qualifications have been examined by the Commissioner and approved by him as meeting the standards established by the Committee on Probation. Prior to the enactment of Chapter 731 there was no necessity whatsoever for obtaining the approval of the Commissioner before appointing a probation officer.

The Commissioner may also recommend the appointment of additional probation personnel. Although the recommendation is subject to the approval of the court to which the recommendation is made, the individual case load assigned to each probation officer may be controlled by adoption of the Commissioner’s recommendations.

In addition to those powers of the Committee on Probation previously discussed, some of its other major duties include: the establishment of standards for the appointment of the Commissioner of Probation and the probation officers, and the fixing of salary schedules for probation officers.

As a result of this legislation the policies of probation and the administration of these policies have become more uniform under a centralized system. Such an arrangement is deemed more desirable than the previous system under which divergent standards and policies were adhered to and administered by the various courts throughout the Commonwealth. The trend toward a more centralized system is readily perceivable in this act of the legislature. For example, whereas formerly a probation officer had to meet only the standards thought sufficient by the individual judge who appointed him, under the new system all applicants must measure up to a specified statewide standard established by the Committee on Probation, and the Commissioner must approve all applicants as having met the established standards before they can be appointed.

Another improvement accomplished by this new legislation, as put into effect, is the raising of the quality of probation officers through stringent qualifications, established by the Committee on Probation. An applicant for the position of probation officer must have a bachelor’s degree from an accredited college or university plus one year of experience in case work or in teaching or in personnel work; or, as a substitute for experience, he must have one year in a graduate school of social work.

In general, the new legislation makes great strides toward improving the quality of probation work in Massachusetts.

6 Id. §§15, 14.
7 Id. §13.
8 These standards were not specifically set out in the drafting of this act. The establishment of such standards was left to the discretion of the Committee on Probation. However, the qualifications listed constitute the standards which have been established by the Committee on Probation in the exercise of their discretion.