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Criminal Law–Trial Procedure–Improper Remarks of Prosecutor as Grounds for Reversal

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rights than any other individual at a criminal trial, seem to contradict one of the basic reasons asserted in support of the public's right to attend such trials, that is to insure that the defendant is fairly dealt with and not unjustly condemned. *State v. Sheppard*, 100 Ohio App. 345, 128 N.E.2d 471, *aff'd*, 165 Ohio St. 293, 135 N.E.2d 340 (1955). As advanced in New York, *Post Corp. v. Liebowitz*, 163 N.Y.S.2d 409, 148 N.E.2d 256 (1957), "the function of publicity of a trial especially in the form of newspaper reporting and comment, is one of the fundamental safeguards of a free society." What better means would be available to subject the trial to the fullest public scrutiny?

The court's decision in this case falls within the majority view upholding the exclusion of the public from a criminal trial in this instance. For a similar case see *State v. Poindexter*, *supra.*

It is submitted that, in the majority of these cases comprising the exceptions to the general rule as to public trial, the word "public" has been given the interpretation of "not secret". Since it was the intention of the lawmakers to do away with secret trials, the courts have effectuated that purpose. However, the presence of the press in the courtroom, especially in the cases dealing with these exceptions, might contribute an added incentive towards a fair trial and certainly there could be no question of great concern as to the public nature of the trial.

G. D. G.

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CRIMINAL LAW—TRIAL PROCEDURE—IMPROPER REMARKS OF PROSECUTOR AS GROUNDS FOR REVERSAL.—From a judgment on conviction for first degree murder, defendant sought a writ of error. *Held*, reversing the criminal court, although the evidence presented a jury question, conviction should be reversed because of admission of prejudicial evidence and because of highly prejudicial conduct on the part of the prosecuting attorney. *People v. Dukes*, 146 N.E.2d 14 (III. 1947).

In a criminal case the prosecuting attorney is placed in an anomalous position. It is not only his duty to convict the defendant but also, as an officer of the court, he must safeguard the rights of all. *Cf. State v. Lewis*, 133 W. Va. 584, 57 S.E.2d 510 (1949). A prosecuting attorney may prosecute vigorously, so long as he deals
fairly with the accused, but he should never assume the role of a partisan eager to convict. Here an attempt will be made to investigate the nature of improper remarks by the prosecution and the circumstances under which such remarks may lead to reversal or disciplinary action.

The principal case illustrates some of the most common types of misconduct by the prosecution's argument of matters not in evidence and the inflammatory appeal by suggesting that the jury convict because of matters external to the trial record. There, although the record disclosed nothing concerning the character of the deceased, the prosecutor continually extolled his virtues. In his closing argument prosecutor referred to an alias when there was no evidence thereof. Also, argument of an inflammatory nature was introduced to the effect that the deceased left a wife and family.

It is universally held that appellate courts have the power to review the conduct of the prosecutor if the proper procedure is followed. *Ippolito v. United States*, 108 F.2d 668 (6th Cir. 1940); *State v. Hawley*, 229 N.C. 167, 48 S.E.2d 35 (1948). All that is necessary to effectuate the review is that the defense counsel make timely objections, since by a failure to do so it is presumed that the defendant did not think his case was harmed. See *e.g.*, *State v. Simon*, 132 W. Va. 322, 52 S.E.2d 725 (1949); *Espy v. State*, 54 Wyo. 291, 92 P.2d 549 (1939). However, the finding of some misconduct does not necessarily lead to reversal. The appellate court must be convinced that the misconduct was prejudicial to the defendant. *United States v. Weiss*, 103 F.2d 345 (2d Cir. 1939); *State v. Curotz*, 93 S.E.2d 519 (W. Va. 1956); *People v. Wayne*, 117 Cal. App. 2d 268, 256 P.2d 62 (1953).

Since improper remarks of the prosecutor are not in themselves grounds for reversal, the problem of the appellate courts is to determine whether and to what extent the jury was influenced by a given argument as it occurred at the trial. See *e.g.*, *Pierce v. United States*, 86 F.2d 949 (6th Cir. 1936); *People v. Swanson*, 278 App. Div. 846, 104 N.Y.S.2d 400 (1951). The actual effect of an argument on the jury is largely a matter of speculation, thus the necessity of considering each case on its own facts, rather than applying rigid rules, is frequently emphasized. Cf. *Pitts v. State*, 211 Miss. 268, 51 So. 2d 448 (1951); *People v. Alexander*, 92 Cal. App. 2d 230, 206 P.2d 657 (1949). Nevertheless, certain standards have been developed to aid the appellate courts in making their deter-
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minations. It has already been mentioned that the defendant must make timely objections to the improper evidence or remarks. State v. Lewis, supra. Another consideration is that the appellate court must rely only upon the record, while the trial judge actually heard the remarks and is better able to determine their effect on the jury. Thus every doubt as to the circumstances not appearing on the record must be resolved in favor of the view taken by the trial judge. E.g., State v. Lewis, 133 W. Va. 584, 57 S.E.2d 513 (1949); Commonwealth v. Turza, 340 Pa. 128, 16 A.2d 401 (1940); Lang v. State, 187 Fla. 128, 187 So. 786 (1939). Probably the most conclusive test is that if the appellate court determines that the misconduct is substantial, that is, that it probably influenced the jury, then reversal will follow unless it appears that the same verdict would have been returned if the improper argument had not been made. Pacman v. United States, 144 F.2d 562 (9th Cir. 1944); State v. Gilstrap, 205 S.C. 412, 416 S.E.2d 163 (1944); State v. Barone, 92 Utah 571, 70 P.2d 735 (1937).

The basic objective of reversal is to assure the defendant a fair trial and not to castigate the prosecutor. Cf. United States v. Lotsch, 102 F.2d 35 (2d Cir. 1939); People v. Stroble, 36 Cal. 2d 615, 226 P.2d 330 (1951). Thus reversal is merely a stopgap and not a preventive remedy. Improper remarks by prosecutors not only cause added expense to the state because of the necessity for new trial but also discredit judicial proceedings. As yet the courts have done little by way of deterring the initial misconduct except for a slight reprimand by the appellate courts. Cf. Tate v. Commonwealth, 258 Ky. 685, 80 S.W.2d 817 (1935); State v. Bundy, 44 S.W.2d 121 (Mo. 1931).

It is submitted that the courts can do more than has been done in the past to deter misconduct. One way of deterring overzealous prosecutors would be to make reversals mandatory for certain specified types of misconduct. But the problem here is formulating a statute specific enough without being unwieldy because of the unlimited types of misconduct. However, some of the more common types could be dealt with in this manner. Another method, referred to in several cases, would be to impose civil liability for improper remarks by abrogating the privilege based on relevancy. RESTATEMENT, TORTS § 582 (1938). Many statutes provide for removal from office of prosecuting attorneys for gross misconduct or violation of duty by order of court after hearing. W. Va. CODE c. 6, art. 6, § 5 (Michie 1955); Va. CODE §§ 15-500, 15-503 (1950). How-
ever, the courts generally have been disinclined to utilize this power in cases of improper remarks because of the severity of the penalty. See Note, The Imposition of Disciplinary Measures for the Misconduct of Attorneys, 52 Colum. L. Rev. 1039 (1952). Perhaps a compromise method could be found in contempt proceedings which would make available a wide range of sanctions. Contempt is a flexible, easily applied discipline, and has in fact been used to deter attorneys in both civil and criminal cases. See e.g., Sacher v. United States, 343 U.S. 1 (1952); Pace v. United States, 336 U.S. 155 (1949).

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DAMAGES—LOSS OF EARNINGS—FEDERAL INCOME TAX.—Action by administrator for wrongful death of decedent who was passenger in defendant's auto which collided at intersection with truck driven by one codefendant and owned by defendant truck line. Held, that trial court properly instructed jury to consider offsetting factor of probable income taxes on decedent's probable lifetime net earnings in assessing reasonable compensation for loss caused by destruction of decedent's earning capacity. Floyd v. Fruit Industries, 136 A.2d 918 (Conn. 1957).

The principal case represents an effort on the part of the forward-looking and learned Connecticut court to advance a principle unanswerable—restitutio in integrum—in the face of practical and mechanical difficulties as well as the prevailing line of authority. Prior American decisions have conceded that an unjust enrichment may accrue to the plaintiff when tax liability is not deducted from personal injury recoveries; however, they have regarded the calculation of future tax liability as too remote and speculative for submission to a jury. See, e.g., Southern Pac. Co. v. Guthrie, 186 F.2d 926 (9th Cir. 1951); Pfister v. City of Cleveland, 96 Ohio App. 185, 113 N.E.2d 366 (1953).

The objections to the principal case may conveniently be categorized into four groups. First, that consideration of intricate tax liability is a matter too complex and technical as well as speculative for consideration by a jury. See, e.g., Rouse v. New York C. & St. L. Ry., 349 III. App. 139, 110 N.E.2d 266 (1953); Stokes v. United States, 144 F.2d 83 (2d Cir. 1944). Second, that effective tax rates in this country fluctuate and the liability of an individual is governed by such intangibles as age, number and extent of personal deductions, etc. See, e.g., Dempsey v. Thompson, 363 Mo. 339,