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Trial–Improper Conduct–Argument and Remarks of Counsel– Reversible Action

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STUDENT NOTES AND RECENT CASES

TRIAL—IMPROPER CONDUCT—ARGUMENT AND REMARKS OF COUNSEL—REVERSIBLE ERROR.—In a servant's personal injury action, based on negligence, in the opening statement, and again on cross examination of defendant's witnesses, and was again about to be introduced into the argument, notwithstanding instructions that the question of insurance had nothing to do with the case. The objections were made seasonably by defendant's counsel and were accompanied each time by a motion for the discharge of the jury. After a verdict for plaintiff, defendant appealed. *Held*, the improper conduct of plaintiff's counsel was sufficient to constitute reversible error. *Rhinehart & Dennis Co., Inc., v. Brown*, 120 S. E. 269 (Va. 1923).

This case followed the *dicta* in the earlier case of *P. Lorillard Co., v. Clay*, 127 Va. 734, 104 S. E. 384, which was, in substance, that a reference to the fact that D was protected with casualty insurance, while highly improper, was not reversible error as it was not objected to when made, and also the holdings in *Akin v. Lee*, 206 N. Y. 20, 99 N. E. 85; *Edward v. Earnest*, 206 Ala. 1, 89 S. 729; *Bishop v. Chicago R. R. Co.*, 289 Ill. 63, 124 N. E. 312, and many other cases from other jurisdictions. This first decision of its kind in Virginia, however, and there is no case directly in point in the West Virginia decisions. In the two reported decisions available, touching on the introduction of casualty insurance in tort actions based on negligence in West Virginia, *Walters v. Appalachian Power Company*, 75 W. Va. 676, 84 S. E. 617, and *Christie v. Mitchell*, 93 W. Va. 200, 116 S. E. 715, the question of improper conduct does not arise.

The general rule of evidence as to the inadmissibility of the fact of casualty insurance in tort actions based on negligence is too well settled to require comment.. WIGMORE, EVIDENCE, § 282, and cases cited. It was upon this rule that the reversal for improper conduct, consisting of the attempts of plaintiff's counsel to introduce in his argument and elsewhere that which the above

rule of evidence prevented him from introducing into the evidence, was based.

In the decisions of criminal cases in West Virginia, in which cases, historically at least, the rules of evidence should be applied with more vigor than in civil actions, we have one rule worded two ways. The first is that laid down in *State v. Shores*, 31 W. Va. 391, 7 S. E. 413, which held, "Counsel necessarily have great latitude in the argument of a case and it is, of course, within the discretion of the court to restrain them, but with this discretion of the court to restrain them, but with this discretion the appellate court will not interfere unless it clearly appears from the record that the rights of the prisoner were prejudiced by such line of argument." This holding was restated verbatim in *State v. Allen*, 45 W. Va. 65, 30 S. E. 209, and in *State v. Clifford*, 58 W. Va. 681, 52 S. E. 864, as the rule in this state. In no one of these three cases was the decision made on this point, showing that in the mind of the court the rights of the prisoner were not prejudiced by the line of argument objected to. Of the first two, the argument was made in reply to argument of opposing counsel and the third was rather more oratorical and irritating than prejudicial.

The second statement of the rule in point in criminal actions is that stated by the court in *State v. Huff*, 80 W. Va. 468, 92 S. E. 681, which was, "Remarks or conduct by a prosecuting attorney before the jury during the progress of a criminal trial will not constitute reversible error, especially where the jury are instructed to disregard the statements and conduct, unless it is manifest the rights of defendant were injuriously affected." Here however, as in the cases above cited, the remark made was in reply to argument of defendant's counsel, and the case did not turn on this point.

In the civil actions of West Virginia we also have two statements of the same rule. The first is that of *Landers v. Ohio River R. R. Co.*, 46 W. Va. 492, 33 S. E. 296, which was an action brought by an infant trespasser, by his next friend, for personal injuries caused by his summary removal from a moving train of defendant by a third person at the direction of the conductor. In that case a divided court held, "In order to authorize this court to revise errors predicated upon the abuse of counsel of the privilege of argument, it should be made to appear that the accused requested and was refused an instruction to the jury to disregard the unauthorized statements of the counsel," which is quoted verbatim from *Young v. State*, 19 Tex. App. 536, (Syl., point 2.) The ar-

gument objected to in the West Virginia case above consisted mainly in the statement that a railroad was, "as heartless as marble; that it had no wife, no child, no life; that its management through its agents was as devilish as it could be." And later, "Every inducement in trying to get them (other employees acting as witnesses for the defendant) to misrepresent the facts if there is a wrong committed, and make the railroad free from damages is used——."

It is apparent that the line of argument used in this case is not as prejudicial as that in the Virginia case first cited. But from the rule laid down by the West Virginia court, which would cover a case similar to the Virginia case if it arose in West Virginia, it logically follows that, if an instruction were requested and given, in a civil action, the appellate court would probably reverse, regardless of result. This view is strengthened by the other and latest decision in point in West Virginia, *Hodge v. Charleston Interrurban Railroad Company*, 79 W. Va. 174 90 S. E. 601. This case holds "Caution to counsel and judicial declaration that matter is not in evidence effects a substantial elimination of the remarks from jury consideration." While this was true on the facts of the cases last cited, it is clearly apparent that impressions and prejudices made on the minds of a jury by improper remarks and argument cannot always be eradicated by an instruction or a judicial declaration. (This situation in West Virginia seems all the more peculiar, since it was held as long as 1893 in *Neil et al v. Rogers Brothers Produce Company*, 38 W.Va.228, 18 S.E. 563, that the remark of the trial judge on the statements of defendant's witness, "They are clearly contradictory," to be reversible error on the ground that the error could only be obviated by discharging the jury. Although, of course, a jury ordinarily gives the remark of a judge much more weight than a remark of counsel.)

It is submitted that the rule of *Rhinehart & Dennis Co., v. Brown, supra*, is a more wholesome decision as it removes in a large measure the temptation from counsel to introduce material in their remarks and argument which is inadmissible in evidence. The rule should probably be qualified to this extent, that where it is clear beyond the shadow of a doubt that no prejudice arose from such conduct, reversal should not follow.

The efficacy of the rule in the case last cited may be weakened somewhat by the fact that the case was also reversible on the weight of the evidence.

—C. M. L., Jr.