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Appeal and Error--Reversals Because of Improper Remarks of Counsel in Argument Before Jury

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RECENT CASE COMMENTS

APPEAL AND ERROR—REVERSALS BECAUSE OF IMPROPER REMARKS OF COUNSEL IN ARGUMENT BEFORE JURY.—In a recent murder trial the statements by the attorney in his argument to the jury were to the effect that an accomplice of the defendant had been convicted, and that the defendant was a criminal, the attorney saying: "for the criminal when he gets ready to rob his victim fixes up an alibi and defense". The court told the jury to disregard these statements. The defendant was convicted of murder, and the supreme court refused to reverse.[1]

It is clear that no reversal should be made unless the defendant has been prejudiced by the improper remarks.[2] Telling the jury to disregard such statements nearly always cures the error.[3] However, the wrong is not always cured by the direction to disregard.[4] It seems that a rebuke to council is more effective in erasing the improper remarks from the minds of the jury than a bare command to disregard such remarks.[5] But even a rebuke and telling the jury to disregard the bad statements may not cure the prejudice.[6] In two recent West Virginia criminal cases it was held error to characterize the accused as guilty.[7] The final rule, we believe, to be deduced from the above statements is that the court may reverse for misconduct of the attorney if the court feels it should.

Plainly, in a murder case, the court is in a dilemma. If there is a reversal, the law will be subjected to the ever growing criticism that it enables criminals to escape on mere technicality. If there

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[1] State v. Hayes, 153 S. E. 496 (1930).

[2] State v. Allen, 45 W. Va. 65, 30 S. E. 209 (1898); State v. Shawn, 40 W. Va. 1, 20 S. E. 873 (1894); State v. Clifford, 58 W. Va. 681, 52 S. E. 864 (1906); State v. Huff, 80 W. Va. 468, 92 S. E. 681 (1917); Sande & Co. v. Norvell, 126 Va. 384, 101 S. E. 569 (1918).

[3] State v. Cooper, 74 W. Va. 472, 82 S. E. 358 (1914); Roberts v. U. S. Fuel Gas Co., 84 W. Va. 368, 99 S. E. 549 (1919); Harris v. Commonwealth, 133 Va. 700, 112 S. E. 753 (1922); Hinkel v. Commonwealth, 137 Va. 791, 119 S. E. 53 (1923).

[4] See Lorillard Co. v. Clay, 127 Va. 734, 104 S. E. 384 (1920). In Carter v. Walker, 165 S. W. 483 (Tex. 1914) there was a reversal because council purposely got a witness to state improper evidence, *i. e.*, that the defendant was insured. By analogy there should be a reversal if the attorney made a similar statement in his argument to the jury.

[5] See People v. Mull, 167 N. Y. 247, 255, 60 N. E. 629, 623 (1901).

[6] Note L. R. A. 1918 D 45, n. 149 and cases cited, THOMPSON, TRIALS (2d ed., Early 1912) § 960.

[7] See State v. Hively, 103 W. Va. 237, 240, 136 S. E. 862 (1927); State v. Brown, 104 W. Va. 93, 98, 138 S. E. 664 (1927).

is not a reversal, the court is met with the statement that it is better to let ninety-nine guilty men go free than to punish one innocent man.[8] Therefore the court is not free to correct this sort of misconduct.

While it is true that counsel should have great latitude in the argument of a case, due to their commendable enthusiasm, (which was probably the cause of the improper remarks in the principal case) and that it probably should not be reversible error even, for the prosecutor to say that he believed the accused was guilty, we believe that there should be censure of the attorney, and reversal, where there is prejudice, in every case where the attorney deliberately makes statements which could not be properly brought in as evidence. But, as we have indicated above, the court is not free always to reverse in such cases. As a cure for this particular sort of misconduct a stronger condemnation by the bar generally is suggested. That the bar, as well as the court, may be responsible for the status of justice, see *Reversals in Illinois Criminal Cases*[9] and Wigmore's article, *Unprogressive Bar, Unprogressive Legislature, Unprogressive Justice.*[10]

—HENRY K. HIGGINBOTHAM.

BANKS AND BANKING—BRANCH BANKS AS SEPARATE ENTITIES. —The plaintiff in the case of *Dean v. Eastern Shore Trust Company*[1] was a banking corporation operating several branches. The defendant drew a check on branch A which the payee promptly cashed at branch B. But before the instrument could reach branch A to be debited against the defendant he had countermanded payment. The plaintiff was allowed to bring suit on the check itself, the cashing branch being regarded as a separate entity for that purpose.

For most purposes the relation between parent bank and branch is that of principal and agent.[2] They are not usually regarded as separate entities. But it seems that for certain purposes they may be quite distinct. On similar facts the bank has been allowed to maintain an action for money had and received.[3] And

[8] See dissent in State v. Shawn, 40 W. Va. 1, 20 S. E. 873 (1894).
[9] (1929) 42 Harv. L. Rev. 566.
[10] (1925) 20 Ill. L. Rev. 271.

[1] 150 Atl. 797 (Md. 1930).
[2] Smith v. Lawson, 18 W. Va. 212, 41 Am. Rep. 688 (1881). See collection of cases in note (1927) 50 A. L. R. 1340, 1348-1349.
[3] Woodland v. Fear, 7 El. & Bl. 519, 119 Eng. Reprints 1339 (1857).