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What Remarks by a Lawyer in His Opening Statement are Prejudicial?

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burden of the obligation which he may thrust upon them. It is submitted that this is no more or less than any creditor must do to protect himself in dealing with any debtor. The statement of Judge Brewer, in *Gartside Coal Co. v. Maxwell,* is pregnant with good sense. "I think the true rule to be this: that where persons knowingly and fraudulently assume a corporate existence, or pretend to have a corporate existence, they can be held liable as individuals; but where they are acting in good faith . . . and where the corporation assumes to transact business for a series of years and the assumed corporate existence is not challenged by the state, then they cannot be held liable as partners."

It is therefore submitted that a denial of corporate existence should not be permitted for the purpose of imposing partnership liability on stockholders in respect to contractual claims no matter how fatal the defect in the corporate organization where there has been a formation of an association as a corporation in good faith and for a legitimate business enterprise, provided that the pseudo-corporation clearly purports to be a corporation and that the party dealing with it cannot show that for valid reasons, he did not deal with it as such.

Such a rule will lead to no injustice towards the creditor because he can inspect the credit of the group with which he deals, and furthermore it will obviate a contrary doctrine which is harsh, unjust, and discordant with sound economic considerations.

A. W. PETCHAFT, '33.

WHAT REMARKS BY A LAWYER IN HIS OPENING STATEMENT ARE PREJUDICIAL?

Procedural law does not normally present such an interesting field for debate on conflicting views as does substantive law. But the state of the law on such a question as, what remarks by counsel in his opening statement will be prejudicial, is often of far more practical importance to a lawyer than the status of some question of substantive law, because a particular question of substantive law may not arise in more than one of a thousand cases while the trial of every case before a jury includes an opening statement by each party which may make a lasting impression on the jury. The cases dealing with the problem evince a notable absence of clear thinking, precise terminology and consistent application of principles to similar fact-situations. Textbooks dealing with the subject of trials generally enunciate the proposition that the opening statement of counsel should

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acquaint the jury with the nature of his claims in the case and should not go beyond that purpose. But such general statements as this are of little practical value to a lawyer. A great many remarks are not technically proper, yet they have no actual effect on the case, that is, they are not "prejudicial" so as to be ground for reversal. The textbooks generally say also that where an objection to an improper remark is overruled the ruling is ground for reversal if it was of such a nature as to bring about an improper verdict; and that even where the court sustained the objection and instructed the jury to disregard the remark the verdict will be reversed if the prejudicial effect does not appear to have been erased by the action of the court. Concerning these general rules there is little conflict. The difficulty arises when the courts attempt to apply these general principles to specific fact-situations.

Scripps v. Reilly[1] is an old case cited to a great extent in the textbooks. The Michigan court went to great pains in declaring rules as to what may be said in an opening statement. But, as a matter of fact, the circumstances were relatively simple and it should have required little argument to arrive at the conclusion that there was prejudicial error. The suit was one against a newspaper for publishing a libel. Plaintiff's counsel read, in his opening statement, some libels published by the defendant which libellous matter had nothing to do with the plaintiff or the case, apparently for the purpose of showing merely that defendant frequently published libelous matter in his newspaper. Defendant objected, but the objections were overruled. Some of these articles were not even offered as evidence, although it is clear that if they had been, they would have been excluded. Yet the court did not instruct the jury at the end of the case to disregard them. The device attempted, then, was one of presenting to the jury, under guise of an opening statement, evidence which was clearly inadmissible and calculated to prejudice the minds of the jurors. The chief value of this case consists in its detailed statement of the applicable rules.

But when the very tribunal which decided the above case came to apply these rules to the facts in the case of *Porter v. Throop*[2] a few years later, it seems to have gone astray. In that case a will was contested on the ground that it had been procured by the undue influence of the testatrix's son, the proponent. Counsel for contestants was permitted, over the objections of proponent's attorney, to relate in his opening statement how the proponent had also used undue influence on his brother in making his will. As the court itself admits, no attorney could be-

[1] (1877) 35 Mich. 371.
[2] (1882) 47 Mich. 313, 11 N. W. 174.

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lieve that in the contest of one will evidence as to undue influence used by the same proponent in procuring another will would be admissible; his only possible purpose in referring to the other will in his opening address would be to prejudice the minds of the jury against the proponent. Yet the court held that these statements were not sufficiently prejudicial to reverse the judgment of the trial court. No stronger argument showing the prejudicial character of these remarks can be found than in the very opinion of the court, in which it says:

> To offer to prove that the proponent who in this proceeding was charged with improper conduct in procuring to be made in his favor a will by his mother, had been guilty in another case of the like disreputable conduct, whereby he had forced the inclination of his diseased and feeble brother, was well calculated to impress the jury unfavorably against his case. How far their minds would be poisoned by the assertion it would be impossible to know; but the statement of respectable counsel that the damaging fact was susceptible of proof would almost inevitably, in the minds of those unaccustomed to an investigation of legal facts, attach suspicion to the conduct of the party accused, and place him at a disadvantage not justified by the law. It would compel him to take up the burden of defending his actions and motives, before they had been in any legal manner attacked or impugned, and while all legal presumptions were in their favor.
>
> But the opening went beyond the charge against the proponent; it was pregnant also with insinuation against Dr. Farrand and Mr. Swift. These gentlemen were the subscribing witnesses to the will on trial; and the opening had the same tendency to impair the confidence of the jury in them as witnesses that it had to fix upon the proponent the suspicion of improper conduct. "These same parties," the jury were told, "who have been guilty of procuring and witnessing a will which Mrs. Porter executed either when *non compos* or when her inclinations were forced, we shall proceed to show, unless the court prevents us on the objection of our brethren on the other side, who will naturally fear the truth, have been guilty of exactly the same conduct in the case of the feeble and dying brother. Remember this when they come upon the stand as witnesses; for we must expect that persons who will be guilty of such transactions will support them by their evidence if possible." This is what the opening, though couched in perfectly respectful language, must be understood to suggest; and so the jury

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must have understood it. We are not surprised that when the offer was subsequently made to put in the evidence, and it was objected to, no attempt was made to support it. The offer and objection had put the contestants in the attitude of being apparently willing to investigate the alleged misconduct in connection with the will of George Porter, and proponent in the attitude of apparently fearing the truth respecting it.

Whichever side began the case with a prejudice in the minds of the jury against his adversary was possessed of an advantage which might in the end prove controlling. If that advantage was obtained by putting before the jury damaging facts which could not be investigated in the case, and which for that reason it was improper for counsel to assert, it was an unfair and illegal advantage, and the court should have interposed to prevent it, with promptness and efficiency.

The trial court failed to perform this duty, and the question now is whether the judgment should be reversed for that cause. Upon this question we have not been entirely free from doubt.

After admitting all this and after referring to the case of *Scripps v. Reilly,* the court nevertheless decides it will not reverse the judgment of the trial court, reaching its weak conclusion in the following words:

> With considerable hesitation the court has reached the conclusion that this difference in the cases requires of us in this a different judgment. The circuit judge ought to have perceived his error and corrected it, but under the circumstances we are not agreed that we should interfere.

Buck v. St. Louis Union Trust Co.[3] was not as strong a case as the above case of *Porter v. Throop.* Yet the Missouri Supreme Court properly held that the remarks of counsel were prejudicial. That also was a will contest. In his opening statement proponent's attorney said, over contestant's objection, that contestant was a spendthrift son, that he never helped support the family, and that the family had been compelled to leave town to get rid of him or of his attempts to get the family money. The court held this prejudicial and quoted from another case saying that, "Trial judges should repress needless scandal and gratuitous attacks upon the character of parties to proceedings." On like ground, the remarks in the *Porter* case should have been held prejudicial.

[3] (1916) 267 Mo. 644, 185 S. W. 208.

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On the same ground the judgment of the trial court in *Pioneer Reserve Ass'n v. Jones*[4] was reversed. The action was brought on an insurance policy. Plaintiff's attorney said that defendant's own president had had one of defendant's policies and that it had not been paid when he died. Of course, there was no connection between that fact and this suit. The only purpose was to instill in the jurors' minds a distrust of the defendant company. An objection to these remarks was sustained. But the decision was reversed eventually, on the ground that the ruling could not erase the prejudice already in the jurors' minds.

The case of *O'Connell v. Dow*[5] affords a good illustration of the practical value to an over-zealous attorney of bringing to the jury's attention through the opening statement some fact which was inadmissible as evidence and which may produce a prejudicial effect on the minds of the jurors. There the judge told counsel in advance of the trial that he could not introduce evidence in a will contest that petitioner, who was the executor, had been found guilty of many offenses and had been disbarred on that account. Nevertheless counsel stated this fact in his opening statement, apparently with the intention to prejudice the jury. Counsel for the petitioner, of course, objected, and the court instructed the jury to decide the case on the evidence, not on the opening statement. The appellate court held that this was not ground for reversal since the trial court did all it could to remove the prejudice. But it seems that in such a case, where it is clear that an attorney knows that certain evidence is inadmissible and he refers to it in his opening statement merely to get what advantage he can, a new trial should be granted if there is any possibility that the remark influenced the jury in its verdict; such intentional misconduct should be penalized. However, it would be difficult to assert that this case was wrongly decided since the question of whether the remark appears to have been harmful can only be decided after a review of the entire record showing the weight of the evidence on each side.

An appellate court is just as likely to make the mistake of reversing too readily as that of being too lenient, if it makes the mistake of becoming so technical that it attributes to a remark a possible harmful effect which in the ordinary course of events it would not have. In *Kansas City Southern Ry. v. Murphy*[6] a farmer sued a railroad company for injuries to his mule. His attorney, in opening, said that the defendant will "probably present the same old stereotyped defense" that the mule was on the track and the crew did not have time to see it. Although an

[4] (1903) 111 Ill. App. 156.
[5] (1902) 182 Mass. 541, 66 N. E. 788.
[6] (1905) 74 Ark. 256, 85 S. W. 428.

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objection to this remark was improperly overruled, the majority of the appellate court properly held that this was not such an improper remark as to have a prejudicial effect. But some courts probably would have reached the opposite result, as did a dissenting judge. He points out that the testimony of the engineer and fireman was such that unless the jury disbelieved them, it would have been bound to render a verdict for the defendant. He goes on to observe that the expression, "same old stereotyped defense," must then have meant to the jury that the witnesses for defendant were not to be believed because their testimony was made up in advance. To attribute to these few obscure words such a meaning and to say that they had such a profound signification to the jury, as this dissenting judge does, seems to be giving to them a weight far out of proportion to their ordinary significance. The majority opinion therefore presents a more reasonable interpretation.

The mere fact that some matter mentioned by counsel in his opening statement is found to have no proper bearing on the case so that evidence of it would have been, or has been, excluded does not render the statement of that fact prejudicial, unless it is of a highly prejudicial or inflammatory character. In an action for personal injuries sustained in falling down an elevator shaft, plaintiff's lawyer stated that he expected to show this was not the first time a person had fallen down that shaft and that at least one person had been killed before. Evidence of such fact was rejected during the trial as immaterial. Although the trial judge did not warn the jury to disregard that fact the appellate court found that this was not such prejudicial matter as to justify a new trial.[7] In an action against a city for injuries received in tripping on a defective sidewalk, plaintiff's lawyer remarked that another street nearby was in the same condition. Evidence of such fact was inadmissible in this case. Opposing counsel's objection to this remark was overruled, and the higher court found no prejudicial error to exist.[8] The Michigan court declared: "It would be a very narrow rule which restricted them [counsel] to a statement of such facts as should turn out to be admissible under the strict rules governing the admission of testimony." This seems to be the reasonable policy followed by courts generally. In a later case[9] this court, however, seems to have gone to the extreme in its application of the rule of liberality regarding the opening statement. A lawyer said, in an action for injuries sustained due to a defective street: "Since that time and since the accident, *of course, we cannot show it to*

[7] Marden, Luse & Co. v. Leary (1891) 137 Ill. 319, 26 N. E. 1092.
[8] Campbell v. City of Kalamazoo (1890) 80 Mich. 655, 45 N. W. 652.
[9] Warren v. City of Flint (1905) 140 Mich. 57, 104 N. W. 652.

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you—now since that time it [the street] was first closed up and then filled in." The attorney in effect admitted that he knew this fact was not admissible as evidence and his only purpose was to inform the jury of this fact in order that they might consider it in rendering their verdict, even though the law prohibits them from doing so. Where a lawyer gains any advantage in the outcome of the case through such tactics a new trial should be granted. In an Indiana case[10] a laborer brought suit against his employer, a quarry company, to recover for the injuries he received from falling rock. His attorney said, in the course of his opening statement, that many other employees of defendant were continually being hurt in the same manner, referring to specific instances, and that the only way to induce quarry owners in general and the defendant in particular to use reasonable safeguards was to make them pay fully for injuries. He asked, among other things, whether the jury would give this man what was right or whether they would say, "Go on killing men; go on rolling stones down on men, and killing them." Objections to these remarks were overruled. The Supreme Court held these remarks to be prejudicial. At first glance, this decision might seem in conflict with those referred to previously. One might receive the impression that the reason for holding these remarks prejudicial is that they referred to facts which cannot be introduced as evidence because not sufficiently material or competent. But the real reason is that the reference to prior accidents was made in connection with the reckless character of this and other quarry owners clearly for the purpose of kindling a hatred for this quarry company in the minds of the jury. The lawyer said to the jury in effect: "Here is one of these heartless wealthy quarry companies that murders its workmen, and if you don't believe it, I will refer you to specific instances; now the only way to get even with them is to make them pay as much as possible; otherwise they will go on killing men."[11]

The class of prejudicial remarks in opening statements which arises most frequently in everyday practice is that of including remarks as to the relative financial condition of the parties, such as plaintiff's needy circumstances or defendant's wealth or ability to pay. In *McCarthy v. Spring Valley Coal Co.*,[12] the attorney for plaintiff, suing for personal injuries, merely referred

[10] Perry, Mathews-Buskirk Stone Co. v. Wilson (1903) 160 Ind. 435, 67 N. E. 183.

[11] Accord: Rocky Mountain Fuel Co. v. Bakarick (1919) 66 Colo. 275, 180 Pac. 754; Elliott v. Detroit United Ry. Co. (1924) 226 Mich. 92, 197 N. W. 562; West Lumber Co. v. Hunt (Tex. Civ. App. 1920) 219 S. W. 1106; P. Lorillard Co. v. Clay (1920) 127 Va. 734, 104 S. E. 384; Burroughs v. Postal Teleg. Co. (1917) 199 Mich. 672, 165 N. W. 707.

[12] (1908) 232 Ill. 483, 83 N. E. 957.

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to the fact that the plaintiff had a wife and children. This remark was regarded as so prejudicial that a new trial was granted even though the trial court sustained the objection to it, because the harmful effect could not be removed from the jury's mind. In a breach of contract case[13] plaintiff's counsel, in opening, said that the defendant was worth a quarter of a million dollars and that there was no reason why a man that wealthy should fail to live up to his contracts. This remark, also, was held to be so prejudicial that sustaining an objection to it could not erase the prejudicial effect from the jurors' minds. In another case[14] counsel said that the defendant railroad had absolutely confiscated the property of "this poor man" (his client) and referred to the poverty of his client. This, too, was so prejudicial as to warrant the granting of a new trial despite the fact that the trial judge had sustained the objection to it. In a personal injury suit against a railroad,[15] counsel said, "The defendant in this case is a soulless corporation, making millions of dollars every day. Its money is worth 150 cents on the dollar, and Heck Smith's [plaintiff] money is only worth 100 cents to the dollar. Notwithstanding the great wealth of this soulless corporation, it doesn't know who owns it; whether it is J. Pierpont Morgan & Co., or J. W. Gates, the great trust magnate, God Almighty only knows." Later on, he said: "To show how this great soulless corporation treats widow women, a widow woman brought suit against this company down in Hart county"—Opposing counsel objected. Then he replied, "I will give you $2.50 to let me tell the story." The Kentucky Court of Appeals was undoubtedly correct in granting a new trial. No ruling or instruction could eliminate the prejudice of the jury which had been created to a high degree by these remarks.[16] But where the prejudicial character of the remark relating to the financial condition of a party is only of a slight degree, a

[13] McKenna v. McKenna (1905) 118 Ill. App. 240.

[14] Illinois Central R. R. v. Seitz (1903) 111 Ill. App. 242.

[15] Louisville & N. R. R. Co. v. Smith (1905) 27 Ky. Law Rep. 257, 84 S. W. 755.

[16] In the following cases remarks in either the opening or closing address of counsel referring in some way to the relative financial conditions of the parties were held to be prejudicial so as to justify a reversal of the case: Stark v. Brown (Tex. Civ. App. 1917) 193 S. W. 716; Kurtz v. Evans (1916) 201 Ill. App. 180; Dougherty v. Spring Valley Coal Co. (1917) 204 Ill. App. 140; Davis v. Stowe Tp. (1917) 256 Pa. 86, 100 Atl. 529; Chess & Wymond Co. v. Wallis (1918) 134 Ark. 136, 203 S. W. 274; Kaufman v. Helmick (1918) 212 Ill. App. 10; Western Indemnity Co. v. MacKechnie (Tex. Civ. App. 1919) 214 S. W. 456; McDonnell v. Merrill (1920) 79 N. H. 379, 109 Atl. 264; Home Life & Accident Co. v. Jordan (Tex. Civ. App. 1921) 231 S. W. 802; Kokomo Steel & Wire Co. v. Ramsmeyer (1921) 190 Ind. 192, 128 N. E. 844; City of Waco v. Odle (Tex. Civ. App. 1924)

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stern instruction promptly given by the judge may erase the prejudicial effect which otherwise the remark might have had on the jury. Such was the case in *McKee v. St. Louis Transit Co.*[17] There the plaintiff's lawyer merely referred to the poor appearance of plaintiff and his clothing. Upon objection the court properly said: "This matter must be determined on the facts in evidence before you, irrespective of the clothing of the plaintiff or the position of the defendant." Where the remark is of only a slightly prejudicial character and, on objection, the judge promptly gives an adequate instruction, the theory upon which an appellate court proceeds in holding that there is no prejudicial effect, is that in such a close case the trial judge is more capable than anyone else to decide whether an instruction will be sufficient, because he has heard all the evidence and can observe all the parties as well as the jury and their apparent reactions, and has before him all the other circumstances in the trial of the case.[18]

Where an action is brought against a party who is covered by insurance, that is, where an insurance company will have to pay the judgment, attorneys repeatedly try to let the jury understand in one way or another that the case is one involving an insurance company. This should not be permitted from any viewpoint. The only purpose is to let the jury know that the defendant, or, the party who will have to pay, is easily able to satisfy the judgment. It is the jury's knowledge of the fact of insurance in itself which produces the harmful effect and this cannot be erased by rulings or instruction of the trial judge. In *Rinehart & Dennis Co. v. Brown,*[19] a personal injury case, plaintiff's counsel brought to the jury's attention in his opening state-

257 S. W. 310; Metropolitan Life Ins. Co. v. Carter (1924) 212 Ala. 212, 102 So. 130; Vanarsdol v. Farlow (1925) 200 Iowa 495, 203 N. W. 794; Crow v. Monroe (Tex. Civ. App. 1925) 273 S. W. 886.

In the following cases the remarks were held to be of too slight a degree to be prejudicial: Kenna v. Calumet, H. & S. E. R. R. Co. (1917) 206 Ill. App. 17; Knighton v. Cushman-Rankin Co. (1923) 80 N. H. 546, 119 Atl. 797; Adams v. Adams (Tex. Civ. App. 1923) 253 S. W. 605; Grobe v. Energy Coal & Supply Co. (1925) 217 Mo. App. 342, 275 S. W. 67.

[17] (1904) 108 Mo. App. 470, 83 S. W. 1013.

[18] So in an action against a street railway company for injuries, plaintiff's counsel in his closing statement referred to defendant's attorney as a highly priced corporation lawyer. The court instructed the jury to disregard this. The court of appeals held that any possible prejudice was removed. Paul v. Dunham (Mo. App. 1919) 214 S. W. 263.

Likewise, a remark in an opening statement that the act, on account of which suit is brought, is a crime is not prejudicial even though it is improper, where the court said that the jury should not consider that fact. Lamp v. Lannegan (Iowa 1922) 188 N. W. 982.

[19] (1923) 137 Va. 670, 120 S. E. 269.

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ment, and again on cross-examining a witness, the fact that the defendant was insured. Even though the trial court gave instructions to disregard such fact, the higher court granted a new trial. As the court says, "The reception of such evidence sometimes has a subtle influence that will act unconsciously upon the mind, and hence not be removed by instructions."[20] But in *Central Coal & Coke Co. v. Orwig*[21] counsel, in his opening statement, referred to a person sitting next to defendant's attorney as "an insurance agent." This man was not a witness and had nothing to do with the case. It is apparent that the only purpose of this remark was to inform the jury that the real defendant was an insurance company. The trial judge instructed the jury to disregard this remark and said that there was no evidence that the man was an insurance agent. The higher court held that although the remark was highly improper, it was not prejudicial, since it had been cured by the instruction.[22] The following language in the opinion is interesting as well as amusing: "The remarks of counsel were highly improper. But it does not occur to us that they were so flagrant as to produce a deep-seated and irremovable prejudice in the minds of the jury. To so hold would impeach the jury of a desire or willingness to give heed to the remarks of interested counsel, rather than follow the instructions of the impartial judge and this too, notwithstanding their oath to decide the case according to the instructions of the court and the evidence adduced by the witnesses." Such unrealistic opinions as this give the layman good reason for criticising the fictitious and theoretical reasoning of some judges. The court shuts its eyes to the practical results and declares, with finality, that, since the jury are under oath to obey the instructions of the judge, a proper instruction must be held to erase the harmful effect of the remark. But can the harmful character of such a remark be erased? The impression left in the jury's mind is indelible. Attempting to erase the fact of insurance from the minds of the jury by telling them to disregard it is like attempting to extinguish a fire by pouring oil on it. The mere knowledge of the juror that a judgment, if awarded, will be covered by insurance may work on his subconscious mind, even though he may intend to follow the judge's instructions; knowledge of this fact may remove from his mind any fear of rendering too large a judgment. There is another

[20] Accord: Standridge v. Martin (1919) 203 Ala. 486, 84 So. 266; Manigold v. Black River Traction Co. (1903) 81 App. Div. 381, 80 N. Y. S. 861; Coon v. Manley (Tex. Civ. App. 1917) 196 S. W. 606.

[21] (1921) 150 Ark. 635, 235 S. W. 390.

[22] Accord: Home Telephone Co. v. Weir (1913) 53 Ind. App. 466, 101 N. E. 1020.

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curious fact about this decision. The court mentioned two other cases in that state in which the judgments were reversed because of a mere reference to the fact of insurance in a roundabout way by counsel in impaneling the jury. But in this case, the court concludes, that the remark did not create an irremovable prejudice. So, this does not seem to be an instance in which a court is out of line with the cases in other jurisdictions, but simply an instance of a decision being out of line with other decisions of the same court. Of course, there are occasions when the fact of insurance unfortunately is so interwoven with some fact which is pertinent to the case that the plaintiff's lawyer can bring the fact of insurance to the jury's attention without objection.[23] It is also true that a lawyer may, in impaneling the jury, ask whether anyone is interested in a certain insurance company, even though his real purpose is to let them know that there is insurance in the case, because he is entitled to such information.

A lawyer will occasionally, when opening, tell the jury something about the history of the case. In *Vawter v. Hultz*,[24] a remark that the case had been removed to this county by defendant, without saying more, was properly held to be of no prejudicial effect. What reason the lawyer had for saying this, is not known, but there is no ground upon which it could be said that this was improper. But in *Pierce v. Brennan*,[25] on the retrial of a personal injury case plaintiff's lawyer told the jury that in the previous trial of the case his client had received a verdict, but that due to some misconduct of the jurors it had been sent back for a retrial. The court in the latter case held that since the lower court had told the jury to consider only the evidence in the case, the opening remarks of plaintiff's lawyer could have no prejudicial effect. The soundness of this decision is questionable. Would the jurors not say to themselves: "Here is a man who has received a verdict but due to some technical mistake in the course of the trial they have sent him back to have his case tried over again; the original verdict was probably right and unless the evidence is clearly against him we won't disturb it"? However, the decision may have been justified since it may have been that the weight of the evidence was on plaintiff's side and that the appellate court found that the jury would have reached the same decision even if this remark had not been made. But the court does not say anything regarding this or any other

[23] Belle of Nelson Distilling Co. v. Riggs (1898) 104 Ky. 1, 25 S. W. 99; Sims v. Martin (1925) 33 Ga. App. 486, 126 S. E. 872; Garvey v. Ladd (Mo. App. 1924) 266 S. W. 727.

[24] (1892) 112 Mo. 633, 20 S. W. 689.

[25] (1902) 88 Minn. 50, 92 N. W. 507.

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matter in the case, apart from a consideration of the instruction of the trial court which led it to believe that the remark had no prejudicial effect.

From the foregoing review it might appear that the cases on this subject are in hopeless conflict. This may be due partly to the fact that each case presents a different set of facts and circumstances. General rules, of course, are of little or no use on this subject. But the cases are not actually irreconcilable. There are certain factors not definitely mentioned in the cases which should be considered in the determination of each case and on the basis of which the great majority of the cases can be reconciled. The first and most important factor is the nature or subject of the remark itself. If the remark is directed at some personal characteristic of the other party, or to some acts proving some hateful characteristic, so as to cause the jury to have an unfriendly attitude toward him, or if it refers to his wealth, it will be more likely to be held prejudicial, depending, of course, on the gravity of the remark. On the other hand, if it refers merely to some fact which is excluded as evidence in the case by some rule of evidence it is more likely to be held harmless. The almost universal holding is that any reference to the fact of insurance where it has no actual connection with the case is prejudicial. The few cases holding that such a remark is not prejudicial or that it can be cured by instructions seem to be out of line. The second important factor is the action the trial judge has taken with reference to the remark, that is, whether the court overruled the objection to it or instructed the jury to disregard the remark or merely sustained the objection. If the objection to it was wrongly overruled the jury may be expected to consider it to the fullest extent, and therefore, if there is any real probability of the remark influencing the jury to reach an improper verdict, it will be held prejudicial. On the other hand there are many remarks the prejudicial character of which is cured if a proper instruction for their disregard is given. But there are very few cases in which a ruling merely sustaining the objection without any instruction can cure the prejudicial effect that would otherwise exist if the objection had been overruled. A third factor to be considered is the relative weight of the evidence on each side of the case. If the evidence on the side of the lawyer who made the remark so outweighs the evidence on the other side that in all probability the verdict would have been the same even if the remark had not been made, the statement cannot be said to have been "prejudicial" in its effect. On the other hand, if the evidence in favor of the winning party was very meager as compared with the evidence of the other side, this may properly lead a court to the decision that a remark which

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at first glance would not appear so highly prejudicial, did have a strong influence on the verdict of the jury. When there is a good amount of evidence on each side, the question of the prejudicial character of the remark must be determined on the basis of the other factors. But courts often lose sight of this consideration or at least neglect it in their opinions. The courts frequently speak of a remark as being prejudicial as if it were meant that a remark is either prejudicial or not prejudicial *per se* without regard to whether, in the particular case, it appears to have had a prejudicial effect. But, whether or not it is so indicated, what a court ordinarily means in saying that a remark was prejudicial, is that it had a prejudicial effect on the case, just as when the court, in speaking of the admission of improper evidence as prejudicial error, means that the admission was prejudicial as to the outcome of the case. There is a fourth factor which should be considered but which the courts frequently overlook. That is the apparent good or bad faith of the lawyer in making the remark. Probably the reason why this factor is seldom considered is that there are very few cases where it can be said absolutely that the lawyer acted in bad faith. But where it is clear that he did, such as where he says: "Now, I can't show you this fact in evidence but it did happen," or where the judge had warned him in advance that a certain fact could not be shown in evidence, any remark which in any probability may have led to an improper verdict should be held prejudicial. But after all these factors are taken into consideration, there are still some cases which cannot be rationalized. These, it must now be apparent, can be explained only in terms of disregard, wilful or unconscious, of applicable precedents or principles, or a misinterpretation of the prejudicial effect of a given remark.[26]

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[26] Such cases as Porter v. Throop and Central Coal & Coke Co. v. Orwig, above, afford good examples.

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