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Remarks about Appeal as Prejudicial in Criminal Cases

agreement into a court decree gives it the same force as the decree,[20] this rule would also apply when an arbitration clause is involved. Perhaps, incorporation by reference, or approval of the agreement containing the clause would be sufficient.

The use of arbitration in separation agreements is at present relatively untested because of the lack of instances in which it has been judicially noted. Much is written about the current congestion prevalent on court dockets. Courts themselves should relieve this congestion whenever possible.[21] Incorporation of the arbitration clause of a separation agreement into a court decree and subsequent enforcement thereof would aid in relieving this problem in the field of domestic relations. This practice might be applied also to resolve disputes arising when alimony payments need to be adjusted to meet changing circumstances. It is submitted that an arbitration clause in a separation agreement is a tailor-made technique for settling marital disputes in a private forum.

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REMARKS ABOUT APPEAL AS PREJUDICIAL IN CRIMINAL CASES

Remarks in court in a criminal case regarding the right of a defendant to appeal raise the question of whether such remarks lessen the jury's sense of responsibility with resultant prejudice to the accused. This problem was dealt with in *State v. Clark*,[1] a recent rape case from Oregon in which the defendant was convicted and appealed. The trial court gave the following instruction to the jury:

> "If the defendant here is dissatisfied with the rulings of this court as to the law, he has the right of appeal to the Supreme Court and that Court can correct any mistakes which this court may make as to the law of the case. . . ."[2]

The Supreme Court of Oregon affirmed the conviction stating that

[20]Richards v. Richards, 85 Ga. App. 605, 69 S.E.2d 911, 913 (1952); Davis v. Davis, 229 Ind. 414, 99 N.E.2d 77 (1951).

[21]"Finally, any doubts as to the construction of the Act [arbitration] ought to be resolved in line with its liberal policy of promoting arbitration both to accord with the original intention of the parties and to help ease the current congestion of court calendars." Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 410 (2d Cir. 1959).

[1]362 P.2d 335 (Ore. 1961).
[2]Ibid.

while the giving of the instruction was error, it was not prejudicial error so as to justify reversal. However, the court noted that the possibility of prejudicial error in certain situations was sufficiently great to warrant discontinuance of the practice of giving the instruction.[3]

Although the court did little to explain the decision, it did state that the challenged instruction was not made "with the intent to cause a jury to shirk its responsibility in deciding the facts, but rather with the intent to impress upon the jury its responsibility to accept the law as it comes from the court."[4] The court said that it is not every error that justifies reversal and pointed out that in view of the entire record there was no probability of prejudice in this case.[5]

Although remarks in court concerning a defendant's right of appeal are generally undesirable, there are two views in the United States as to whether the giving of such instructions constitutes reversible error. Under one view a conviction will not be reversed unless the appellate court finds there was the probability of prejudicial error,[6] while under the other view, the possibility of prejudicial error results in automatic reversal.[7].

Jurisdictions in accord with the principal case simply take the view that remarks concerning a defendant's future relief do not constitute substantial harm so as to warrant reversal.[8] The Oregon Supreme Court seems to couch its decision in terms of probability. That is, even if the instructions complained of had not been given, the jury probably would have found the defendant guilty.[9] California explains in a similar situation that "the jury in all probability would have rendered a verdict of guilty."[10]

Those jurisdictions which take the view that such instructions automatically constitute reversible error state that a jury should not con-

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[3]Id. at 336.

[4]Ibid.

[5]Ibid.

[6]Fiorella v. City of Birmingham, 35 Ala. App. 384, 48 So. 2d 761, 766 (1950); People v. Danford, 14 Cal. App. 442, 112 Pac. 474 (1910); State v. Satcher, 124 La. 1015, 50 So. 835 (1909); State v. Seaman, 10 N.J. Super. 439, 77 A.2d 284 (1950); State v. Leaks, 126 N.J.L. 115, 18 A.2d 33 (1941).

[7]Holt v. State, 2 Ga. App. 383, 58 S.E. 511 (1907); People v. Silverman, 252 App. Div. 149, 297 N.Y. Supp. 449 (2d Dep't 1937); People v. Santini, 221 App. Div. 139, 222 N.Y. Supp. 683 (1st Dep't 1937); People v. Sherwood, 271 N.Y. 427, 3 N.E.2d 581, 584 (1936). Cf., Coward v. Commonwealth, 164 Va. 639, 178 S.E. 797 (1935).

[8]State v. Seaman, supra note 6 at 286.

[9]362 P.2d at 336.

[10]People v. Cabaltero, 31 Cal. App. 2d 52, 87 P.2d 364, 369 (1939); People v. Stembridge, 99 Cal. App. 2d 15, 221 P.2d 212, 217 (1950).

sider such matters as appeal, because the knowledge of future review by other authorities may lead the jury to evade its responsibilities and compromise on the question of guilt. The possibility of lessening the seriousness of the jury's determination is based upon the theory that if the jury incorrectly convicts an innocent man, the mistake may still be corrected by a higher court.[11] This is the New York rule on the propriety of giving instructions similar to those in the principal case. In *People v. Silverman* the New York court held that prejudice arose from references to the defendant's right of appeal stating that "if the jury made a mistake the error might also be cured by an appeal."[12] The logic of such reasoning is not of recent origin. The early Georgia case of *Hodges v. State* noted that "the fact that a defendant, in a criminal case, may take up his case to the Supreme Court is no reason why he should not have meted out to him, by the Court and Jury, the full measure of his legal rights."[13]

The courts following the New York rule seem to couch their opinions in terms of "possibility" of prejudice to the accused. The test is whether the remarks "might have"[14] or possibly did influence the jury in the verdict returned as to its nature, character, degree, or amount. The significance of possible injury to a defendant is recognized in a Georgia statute that makes a mistrial mandatory if reference is made in court to subsequent relief open to the accused.[15]

In a similar although not identical situation, the prosecution's remarks to a jury regarding appeal have been held to constitute reversible error. Due to the nature of our adversary system this situation arises more frequently than that in the principal case, but the possible effect upon the jury seems indistinguishable. Analogous to the question raised in the principal case, there are two main views. Those jurisdictions that follow Oregon would say that such remarks are unnecessary and improper but not so prejudicial as to justify reversal.[16] Jurisdictions adhering to the New York rule would reverse and remand. In the New York case of *People v. Esposito* the prosecutor said, "I wish to call your attention to the fact that defendant can appeal from

[11]Kelly v. State, 210 Ind. 380, 3 N.E.2d 65 (1936); Davis v. State, 200 Ind. 88, 161 N.E. 375, 383 (1928).

[12]77 A.2d at 287.

[13]15 Ga. 117, 118 (1854).

[14]Pait v. State, 112 So. 2d 380, 386 (Fla. 1959); McCall v. State, 120 Fla. 707, 163 So. 38 (1935).

[15]Ga. Code Ann. § 27-2206 (Supp. 1961); Wilson v. State, 212 Ga. 157, 91 S.E.2d 16 (1956); McKuhen v. State, 120 Ga. App. 75, 115 S.E.2d 625 (Ct. App. 1960).

[16]Norris v. State, 16 Ala. App. 126, 75 So. 718 (1917); State v. Merryman, 78 Ariz. 73, 283 P.2d 239 (1955); People v. Nolan, 126 Cal. App. 623, 14 P.2d 880 (1932).

this decision of yours to the Court of Appeals, but the prosecution cannot."[17] The appellate court reversed the conviction. In another New York case, *People v. Johnson,* the court held that the jury has nothing to do with appeals and that the jurors have a sufficient task to perform in finding the truth and returning a verdict without regard to alternate consequences.[18]

However, in the area of remarks by prosecutors a distinction may be made from the situation presented in the principal case in that errors by counsel in making such remarks can sometimes be overcome by the court's admonishing the jury to disregard them.[19] On the other hand, some courts feel that withdrawal of the remarks by the court does not cure the error committed, and hold that the impression of such remarks on the minds of the jurors entitles the defendant to a new trial.[20]

Reviewing courts are frequently confronted with the determination of whether improper remarks made during the course of a trial are prejudicial or merely harmless. Occasionally, the conclusion is quite obvious. For example, the misreading of a defendant's Christian name in the charge is clearly incorrect, but not reversible error.[21] whereas the failure to instruct as to guilt beyond a reasonable doubt constitutes prejudice.[22] Unfortunately, not all errors are so easily classified. In some situations one judge may consider particular remarks prejudicial while another would consider them harmless.

When either court or counsel have made improper remarks about a criminal defendant's right to future relief, the New York rule requiring reversal is preferable because it insures to the accused an absolutely impartial trial.[23] The "possibility" of prejudice as a basis for remand seems more in keeping with other well-established protections provided for the criminally accused, such as the requirement of proof of guilt beyond a reasonable doubt, which is buttressed by the shielding presumption of innocence. The use of a "probability" test, as in the principal case, may result in a trial in which the reason-

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[17]224 N.Y. 370, 121 N.E. 344, 346 (1918). See also People v. Friedt, 280 App. Div. 836, 113 N.Y.S.2d 889 (2d Dep't 1952); People v. Teiper, 186 App. Div. 830, 175 N.Y. Supp. 197 (4th Dep't 1919).

[18]284 N.Y. 182, 30 N.E.2d 465 (1940).

[19]State v. Benjamin, 309 S.W.2d 602 (Mo. 1958); Gray v. State, 191 Tenn. 526, 235 S.W.2d 20 (1950).

[20]State v. Hawley, 229 N.C. 167, 48 S.E.2d 35, 36 (1948).

[21]State v. Gilliam, 351 S.W.2d 723 (Mo. 1961).

[22]Pollard v. State, 155 Tex. Crim. 488, 237 S.W.2d 301 (1951).

[23]People v. Johnson, supra note 18.