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Courts—Misconduct of Counsel in Divorce Action Constituted Reversible Error

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COURTS—MISCONDUCT OF COUNSEL IN DIVORCE ACTION CONSTITUTED REVERSABLE ERROR

At trial on an issue of adultery, husband's counsel testified and referred repeatedly in summation to his presence at an evidence-producing raid, offered affidavit containing hearsay, and presented prejudicial facts to the jury in a question to which objection was sustained. Trial court entered interlocutory divorce decree on jury verdict for husband. *Held* (3-2): Reversed for new trial. *Weil v. Weil*, 283 App. Div. 33, 125 N. Y. S. 2d. 368 (1st Dep't 1953).

New York courts generally consider the following types of misconduct of counsel as grounds for reversal:

1. *Improper and prejudicial questions: Cosselmon v. Dunfee*, 172 N. Y. 507, 65 N. E. 494 (1902). (Counsel asked witness: "Do you know whether they carry insurance for accident to their employees?"); *Nicholas v. Rosenthal*, 283 App. Div. 9, 126 N. Y. S. 2d. 34 (1st Dep't 1953). (Questioning of witness who had not seen accident created impression that witness was withholding evidence).

2. *Inflammatory summation: Price v. Mullen*, 247 App. Div. 532, 288 N. Y. Supp. 828 (4th Dep't 1936). (Counsel called hostile witness "a crook."); *Walter v. Joline*, 136 App. Div. 426, 120 N. Y. Supp. 1025 (1st Dep't 1910). (Referred to absence of old witnesses at new trial).

3. *Offer of evidence counsel knows is inadmissible: Nicholas v. Rosenthal, supra.* (Offer of hearsay statement to create impression that jury was kept from seeing it by a legal technicality).

In many cases more than one prejudicial act is involved; in the instant case all of the above types of misconduct were present.

Courts are prone to reverse for such tactics upon a finding of "bad faith" on the part of offending counsel; i. e., where the injection of misconduct appears deliberate, especially where it continues after warning. *Halpern v. Nassau El. R. Co.*, 16 App. Div. 90, 45 N. Y. Supp. 134 (2d Dep't 1897). But see *Hoffman v. New York*, 84 Misc. 637, 653, 147 N. Y. Supp. 900, 909 (N. Y. City Ct. 1914), where the court found that references to extraneous matters were made in "palpably bad faith," but before setting aside the verdict, noted: "... [C]ounsel ... is a young man whom I hold in high regard and do not believe would be deliberately guilty of a violation of . . . professional standards . . ." (84 Misc. at 656, 147 N. Y. Supp. at 911).

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In the instant case the court did not specifically discuss counsel's motivation, but contended itself with a recital of the misconduct and concluded that under the circumstances a fair trial was impossible. The dissent noted that since counsel's allegedly inflammatory summation may have been provoked by statements made by opposing counsel, bad faith was not evident. But it has been held that provocation does not excuse or justify such misconduct. *Harris v. Eakins*, 201 App. Div. 257, 194 N. Y. Supp. 187 (1922).

Failure to interpose timely objections to misconduct at the trial may result in the courts' refusal to intervene. *Bennet v. Town of Wheeler*, 209 App. Div. 283, 204 N. Y. Supp. 695 (4th Dep't 1924). Refusal to reverse in the above case was based in part on the fact that no exception was taken during argument, but only after the jury had retired. Also, in *Freeman v. Zirger*, 125 Misc. 288, 210 N. Y. Supp. 715 (N. Y. City Ct. 1925), after an inflammatory summation by defendant's counsel, and a jury verdict for defendant following seven minutes' deliberation, the court held that where plaintiff failed to object, move for mistrial, or for withdrawal of a juror, trial court could not disturb the verdict. But in *New York Cent. R. R. Co. v. Johnson*, 279 U. S. 310 (1929), the Supreme Court held that a court on its own motion may reverse on grounds of public interest in a fair trial. This appears to be the general rule in New York. *Cosselmon v. Dunfee*, *supra*; *Nicholas v. Rosenthal*, *supra*.

In the instant case objection to an improper question was promptly sustained, but apparently the damage was irretrievable. No motion for mistrial appears to have been made. Objection to the summation was interposed only after the jury had returned with an unfavorable verdict. The dissent suggest that this was tardy. (283 App. Div. at 39, 125 N. Y. S. 2d at 373).

In a "close case," i. e., one in which the court concedes that a jury verdict for either party would be sustained by the evidence, it is difficult to show actual prejudice in the verdict; the probability that the jury was influenced is sufficient to warrant reversal. *Tassello v. Adley Express Co.*, 158 Misc. 836, 286 N. Y. Supp. 770 (Sup. Ct. 1936).

But where the verdict is clearly supported by the evidence, courts have refused to intervene. In *Bennet v. Town of Wheeler*, *supra*, where the trial court on its own motion warned the jury against any play to its emotions, the jury deliberated five hours, and ". . . evidently dealt with the case rationally . . .," the court could find no reason, ". . . aside from making an example *in terrorem* . . ." (209 App. Div. at 285, 204 N. Y. Supp. at 697),

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to reverse. But a strong dissent argued that the court could not assume the jury was not influenced, and urged a new trial because the remarks were *calculated* to prejudice the jury, “. . . and that is the single and sufficient reason for granting a new trial . . .” (209 App. Div. at 286, 204 N. Y. Supp. at 697).

In the instant case the appellate court expressly conceded that the jury verdict was adequately supported by the evidence (283 App. Div. at 37, 125 N. Y. S. 2d at 372). The decision appears, therefore, to represent a recognition of the particularly delicate nature of a divorce action, and indicates the propensity of the courts to utilize the power of reversal for a new trial on the ostensible grounds of prejudice as a disciplinary weapon against counsel. While such decisions are defensible on ethical grounds, they may have the practical effect of punishing an innocent litigant for the offenses of counsel.

Morton Mendelsohn

CRIMINAL LAW — PERJURY CONVICTION UPHeld DESPITE GRAND JURY MISCONDUCT LEADING TO INDICTMENT

Defendant, indicted for perjury as a result of statements made before a federal grand jury investigating espionage activities, appealed his subsequent conviction alleging irregularities in the grand jury proceedings and an improper charge to the jury. The conviction was reversed and remanded on the latter grounds. 191 F. 2d 246 (2d Cir. 1951), *cert. denied*, 343 U. S. 907 (1952). Instead of proceeding on the original indictment, the government returned a new indictment based on perjured testimony at the first trial. Defendant, again convicted, urges that perjurious statements made at a trial under an illegally procured indictment cannot be subsequently prosecuted. *Held* (2-1): Assuming without deciding that the first indictment was bad because of government misconduct, the court had jurisdiction over the crime and the person and the defendant could not lie with impunity. *U. S. v. Remington*, 208 F. 2d 567 (2d Cir. 1953), *cert. denied*, 74 Sup. Ct. 476 (1954).

The subsequent quashing of an indictment for failure to state an offense does not immunize a defendant from prosecution for perjury in the defense of that indictment as long as the court had jurisdiction over the alleged crime and the person. *U. S. v. Williams*, 341 U. S. 58 (1951). The majority admitted that the instant case was distinguishable because of the allegation of government misconduct but found no difficulty in extending the *Williams* doctrine in as much as the defendant had chosen to lie rather than attack the indictment for illegality.