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Trial-Informing Jury of Liability Insurance-Curing of Prejudice

RECENT CASE NOTES

TRIAL—INFORMING JURY OF LIABILITY INSURANCE—CURING OF PREJUDICE.—In tort action against motorist, plaintiff recovered $3,400.00 for death of twelve year old girl. Appellant assigns alleged misconduct of plaintiff's counsel in eliciting testimony from his witness on redirect examination that insurance agent had investigated accident after questioning prospective jurors on voir

dire concerning their acquaintance with the insurance agent and their connection with a mutual automobile insurance company. Held, that error, if any, was cured by instruction to jury to disregard the testimony and not allow themselves to be prejudiced by it or the voir dire examination.[1]

The general rule that evidence[2] which shows, or which might lead the jury to infer, that the defendant in an action for a personal injury is protected by liability insurance is inadmissable, because it is not relevant to the question of his liability and because it is thought to create in the mind of the juror a prejudice[3] in favor of the plaintiff is by the majority of courts relaxed enough to permit the plaintiff's attorney, in good faith,[4] to question the prospective juror on voir dire concerning his interest in liability insurance companies.[5] This is the position adopted by the Indiana courts.[6] In view of the number of people who are interested as agents, employees, and shareholders in stock companies, or participants in mutual companies[7] this protection seems not unwarranted.[8] Of course, this privilege must be exercised with at least apparent good faith[9] and the attorney who seeks to prejudice the jury by the voir dire examination, is in danger of having a judgment in his favor reversed.[10] As has been said,[11] "the line of demarcation cannot be

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[1] Clevenger v. Kern (1935), — Ind. —, 197 N. E. 731.

[2] This rule is applicable not only to evidence, strictly speaking, but also to questions or statements by counsel.

[3] Taggart v. Keebler (1926), 198 Ind. 633, 154 N. E. 485.

[4] Inland Steel Co. v. Gillespie (1914), 181 Ind. 633, 104 N. E. 76, Martin v. Lilly (1918), 188 Ind. 139, 145, 121 N. E. 443.

[5] A list supporting the minority view is given in: Inland Steel Co. v. Gillespie (1914), 181 Ind. 633, 646, 104 N. E. 443. Cases supporting the majority rule may be found. 56 A. L. R. 1454 (1928), 74 A. L. R. 860 (1931), 95 A. L. R. 404 (1935). In 95 A. L. R. 404, the majority rule is spoken of as "the almost universal view."

[6] Annadall v. Union Cement & Lime Co. (1908), 42 Ind. App. 264, 84 N. E. 359; Goff v. Kokomo Brass Works (1909), 43 Ind. App. 642, 88 N. E. 312; Beyer v. Saffron (1925), 84 Ind. App. 512, 151 N. E. 620; M. O'Connor & Co. v. Gillaspy (1908), 170 Ind. 428, 83 N. E. 738, Ft. Wayne Checker Cab Co. v. Davis (1929), 90 Ind. App. 30, 165 N. E. 764, Marmon Motor Car Co. v. Schafer (1931), 93 Ind. App. 588, 178 N. E. 863.

[7] In M. O'Connor & Co. v. Gillaspy, supra, the court said. "It is a matter of common knowledge that numerous companies are engaged in such insurance in this state."

[8] In Goff v. Kokomo Brass Works, supra, the court quoted with approval from Spoonick v. Basher-Brooks Co. (1903), 89 Minn. 354, 358, 94 N. W 1079, "it would be impossible to say that any person connected with the indemnifying company as stockholder or otherwise could be a proper person to sit as a juror in a case the result of which might be of pecuniary interest to such company."

M. O'Connor & Co. v. Gillaspy, supra, gave as a further reason: "The examination of jurors on their voir dire is not only for the purpose of exposing grounds of challenge for cause, if any exist, but also to elicit such facts as will enable counsel to exercise their right of peremptory challenge intelligently"

[9] For a discussion of the objectivity of the "good faith" of counsel, see 17 Iowa Law Review 501.

[10] Evansville Gas & Electric Light Co. v. Robertson, Admx. (1913), 55 Ind. App. 351, 100 N. E. 689; Inland Steel v. Gillespie, supra; Martin v. Lilly, supra.

[11] Faber v. Reiss Coal Co. (1905), 124 Wis. 554, 102 N. W 1049.

readily drawn," and in the final analysis the conduct of the voir dire must, and should, be left largely to the discretion of the trial judge.[12]

The proposition that as a general rule the mention of insurance during the examination of witnesses is improper and prejudicial is almost universally accepted[13]; the question in dispute is whether the mention of insurance is so prejudicial that an instruction to the jury to disregard it as irrelevant fails to cure the impropriety and remove the prejudice.

If the injection of liability insurance is incurably prejudicial, the appellant in the principal case was entitled to have the submission set aside, and the refusal of the trial court to grant appellant's motion to set aside the submission was error necessitating reversal. However, if the injection is not incurably prejudicial, appellant was not entitled to have the submission set aside. In the absence of a specific motion to strike the answer and instruct the jury to disregard it, it will be assumed, in the absence of a showing to the contrary, that the jury heeded the general instruction given by the trial judge, upon appellant's request, to the effect that the question of defendant's (appellant) liability[14] insurance was not relevant.

Although there is little semblance of accord in the decisions as to whether or not a mention of insurance is incurably prejudicial[15] the preferable, and probably the prevailing, rule seems to be that unless the mention of insurance was made or induced by plaintiff's attorney wilfully, or in bad faith,[16] the discretion of the trial court as to whether an instruction will remove the prejudice will not be disturbed so long as it does not affirmatively appear from the record that the jury was prejudiced. This seems to be the rule in Indiana.[17]

This rule places the primary responsibility for the conduct of the trial upon the trial judge, who is best able to weigh the probable effect of the information concerning defendant's liability insurance upon the jury; but permits the court of review to correct cases of flagrant violations. Under such a rule, each case depends largely upon its peculiar facts, and the relative preponderance of the evidence,[18] the size of the verdict,[19] the conduct of the

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12 In Marmon Motor Car Co. v. Schafer, supra, the court said, "The inflection of the voice or the expression of the face may carry some innuendo, which only the trial judge is capable of passing upon. Where the trial court has passed on the question in a motion for a new trial, an appellate tribunal should be slow in reversing, especially so in the absence of a positive showing on an abuse of discretion."

13 Support of the general rule is found in cases cited in: 56 A. L. R. 1419 (1928), 74 A. L. R. 850 (1931), 95 A. L. R. 389 (1935).

According to a 4-3 decision in Jessup v. Davis (1926), 115 Neb. 1, 211 N. W 190, 56 A. L. R. 1403, Nebraska has refused to adopt the general rule.

14 Central Coal & Coke Co. v. Orwig (1921), 150 Ark. 635, 235 S. W 390; Ontil v. Poli (1923), 100 Conn. 64, 123 Atl. 272.

15 A perusal of the cases cited in the Current Digest for the last two years showed twelve decisions holding the prejudice was removed by trial court's instruction, and five decisions holding that the prejudice was not removed.

16 Taggart v. Keebler (1926), 198 Ind. 633, 154 N. E. 485.

17 Burford v. Dantrick (1913), 55 Ind. App. 384, 103 N. E. 953, Home Telephone Co. v. Weir (1913), 53 Ind. App. 466, 101 N. E. 1020.

18 Martin v. Lilly, supra.

19 Knuckler v. Weathersby, D. C. (1934), 72 Fed. 2nd 69; Brown McClain Transfer Co. v. Major's Adm'r (1933), — Ky. —, 65 S. W 2nd 992, 996.

attorney,[20] the manner in which the mention of insurance came out[21] and the action of the judge in attempting to cure the prejudice,[22] all are important in determining whether or not the prejudice which is assumed to arise on the mention of insurance was removed.

In the principal case, regardless of whether or not we agree with the holding "that the facts and circumstances as presented by the record in this case do not warrant its reversal," we have no quarrel with the court's conception and statement of the law. L. W

CRIMINAL LAW—EMBEZZLEMENT—INTENT TO DEFRAUD.—Defendant was cashier in charge of trust affairs for a bank. The bank was the guardian of Mary A. Yoder. Defendant bought some bonds for $430.33 and sold them to the ward's estate for $2,000.00. Defendant was indicted under Sec. 10—1704 Burns Indiana Statutes, Annotated (1933) for embezzling $1,569.67 of the ward's funds and convicted. Defendant appeals. Held, that such a sale by a guardian to his ward is criminal even if the guardian believed that he was within his rights in doing so.[1]

The relation of guardian and ward is fiduciary,[2] and a fiduciary is required to exercise absolute good faith.[3] Because of this relation the transactions between guardian and ward are watched with jealous care.[4] The guardian when acting officially must act solely for his beneficiary, and the law will look with disfavor on transactions between a guardian and his ward.[5] So where a ward subsequently attacks a transaction between guardian and ward, the law will presume fraud, on the grounds of public policy, and leave it to the defendant to rebut the presumption.[6] So where a guardian acquires an interest adverse to that of his ward he may be removed,[7] nor will he be allowed to retain any advantage derived from this adverse interest.[8]

In the instant case we have a prosecution for embezzlement. Embezzlement is the fraudulent appropriation or conversion of the goods of another by one who is rightfully in possession of them.[9] The embezzlement statutes were primarily intended to reach and punish the fraudulent conversion of property which could not be punished as larceny because of the absence of a trespass and their object must be borne in mind in construing them.[10] There can be no embezzlement under the statutes where there is no intent to defraud,[11]

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20 Scott v. Vaugh (1934), — Kan. —, 37 P 2nd 1012.
21 Smith v. Sabin (1934), — Cal. App. —, 31 P 2nd 230.
22 Burns v. Getty (1933), — Idaho —, 24, P 2nd 31.
1 Yoder v. State (1935), 194 N. E. 645 (Ind).
2 Bogert, Trusts (1921), 34.
3 Flynn v. Colbert (1925), 251 Mass. 489, 146 N. E. 784.
4 Euler v. Euler (1913), 55 Ind. App. 547, 102 N. E. 856.
5 National Surety Co. v. State (1913), 181 Ind. 54, 103 N. E. 108.
6 National Surety Co. v. State (1913), 181 Ind. 54, 103 N. E. 108.
7 Sec. 2233, California Civil Code (1931).
8 Taylor v. Calvert (1893), 138 Ind. 67, 37 N. E. 534.
9 State v. Ensley (1909), 177 Ind. 501, 97 N. E. 113, Axtell v. State (1911), 173 Ind. 713, 91 N. E. 354.
10 Commonwealth v. Hays (1859), 80 Mass. 64.
11 Ridge v. State (1923), 192 Ind. 639, 137 N. E. 759.