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Improper Remarks of the District Attorney

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CONCLUSIONS

1. Article 74 of the Criminal Code, as interpreted, does not result in a full accomplishment of the desired end, that is, support of a family by the husband or wife charged with that responsibility.

2. An amendment, similar to the one suggested, should lead to more effective enforcement of Article 74 of the Criminal Code. This would allow prosecution either at the domicile of the person owing the duty of support or at the justifiably established residence of the person to whom the duty of support is owed.

3. The restrictions on extradition impair the effectiveness of such a provision where the husband goes to another state. There seems to be little that can be done about this in strictly non-support cases.

4. A liberal interpretation of the *desertion* provision of Article 74 would achieve a desirable result in those cases where the husband's intent could be shown at the time he left. This would

a. Allow prosecution for desertion at the former family domicile, and,

b. Allow extradition in the event the defendant left the state as he would then be a fugitive from justice.

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IMPROPER REMARKS OF THE DISTRICT ATTORNEY

Article 381 of the Code of Criminal Procedure states the general rule that "Counsel may argue to the jury both the law and the evidence of the case, but must confine themselves to matters as to which evidence has been received; and *counsel shall refrain from any appeal to prejudice.*"[1] A survey of the jurisprudence indicates that some improper remarks are held

1. This article, as written, applies to defense counsels as well as prosecuting attorneys. Obviously, in a criminal trial, counsel for the defendant cannot make such an appeal to prejudice as would cause the verdict to be set aside on appeal. If the jury or court errs in being swayed by the prejudicial appeals of defense counsel and the result is an acquittal for the accused, the matter is settled, for the principle of double jeopardy prevents an appeal by the state. Due process of law demands that the defendant have a fair trial, and errors in the proceedings of a criminal trial that prejudice this right of the accused result in the denial of due process. The converse of this is not true; mistakes in the trial that result in the acquittal of the defendant are not reversible errors. See State v. Schiro, 143 La. 841, 79 So. 426 (1918).

"incurable," or reversible error per se. In other instances the prejudicial effect may be "cured" by instructions to disregard from the trial judge to the jury. Still a third category of remarks, seemingly intemperate, have been held to be proper, and non-prejudicial in effect. This comment will deal with the two most common types of incurable remarks.

Comment by the District Attorney on the Failure of the Defendant to Testify

The rule is well settled in Louisiana that the district attorney cannot comment in such a manner as to direct the attention of the jury to the fact that the defendant has not taken the witness stand in his own behalf, and that no instruction or charge by the trial judge to the jury will erase the prejudicial effect of such a remark. The language used by the Louisiana Supreme Court in two cases[2] seems to stand for the proposition that an instruction by the trial judge cures the prejudice resulting from a comment by the district attorney on the silence of the defendant. A careful analysis, however, indicates that in one case[3] the statement by the court was purely gratuitous dictum, while in the

2. State v. Varnado, 126 La. 732, 52 So. 1006 (1910); State v. Broughton, 158 La. 1045, 105 So. 59 (1925).

3. In State v. Broughton, 158 La. 1045, 1050, 105 So. 59, 60 (1925), counsel for the state urged on the court the argument that the instructions of the trial judge cured the remark by the district attorney on the failure of the defendant to testify. The court declared, "It is not important, however, in this case, whether the prejudice arising from such a comment may be removed by instructions from the court, for the court gave no instructions at the time the remark was made. . . ." Later in the opinion is found this language, "Defendant was entitled, at least, to an instruction that the remark was improper, and that the jury should disregard it, and the instruction should have been given, when the objection was urged and the request for instructions made. *As this was not done,* it follows that the verdict and the sentence appealed from will have to be set aside." (Italics supplied). Since no instruction to disregard had actually been given by the trial judge, the statement of the court, at most, is inferential dictum authority.

4. In State v. Varnado, 126 La. 732, 741, 52 So. 1006, 1009 (1910), the district attorney remarked, " 'The testimony of Ricks, or R. S. Varnado, or both, in regard to the killing of Amacker, was to be taken for true, because nobody has taken the stand to deny it.' " The trial judge evidently thought that the remark was prejudicial and reversible error, because the judge proposed to discharge the jury. The defendant objected to this, and the trial judge charged the jury to the effect that the silence of the defendant was to create no presumption against him. The supreme court, in holding that no error had been committed, said, "Counsel for the accused in objecting to the discharge of the jury must have considered that any prejudicial effect of the remarks . . . had been removed by the instruction of the court. *It is not clear that the remarks were intended as a comment on the failure of the accused to testify* and we think the prompt action of the court removed any possible prejudicial effect. . . . " (126 La. 732, 742, 52 So. 1006, 1010). In view of the many Louisiana cases holding that the remark

other[4] the court expressed doubt as to whether the remark was, in fact, on the silence of the defendant.

In *State v. Robinson*,[5] a case illustrative of the many Louisiana cases in point,[6] the district attorney remarked to the jury, " 'Gentlemen of the jury, the accused has confessed he shot John Hase, the party whom he is charged with having killed, and this confession has been proven by the old man, Robert Turpin; and gentlemen of the jury, (pointing finger at the defendant) he has not denied it. He has the right under the law, and.' " At this point defense counsel objected to the remark, and the trial judge immediately charged the jury that under the law the defendant was not required to take the witness stand in his own behalf, and that his failure to do so could not be construed against him. The Supreme Court, in reversing the verdict, said, "It is absurd therefore, to suppose that any judicial declaration will remove the effect of the language which has found lodgement in the minds of the jurors, spent its force, and subserved its purposes of creating prejudice against the accused."[7]

Another important decision was rendered in *State v. Sinigal*.[8] In that case, the district attorney said, " 'That young boy did not take the stand as a witness, . . . and the old woman did not take the stand as a witness, and nobody else was purported to know anything about the facts of the case testified that any other persons than these persons named were present at that scene that morning. . . .' " When the defense counsel objected, the district attorney explained, " 'I . . . have simply counted over to the jury the number of witnesses who testified to a certain state of facts.' " The court,[9] in holding that this remark constituted

must refer to the failure of the defendant himself to testify before it is considered by the court as reversible error, this case could not be authority for any proposition that such remark is cured by instruction from the trial judge. As it was said in State v. Marceaux, 50 La. Ann. 1137, 1145, 24 So. 611, 614 (1898), "The failure of the defendant to go up on the stand to testify (not his failure to place other parties on the stand, or his failure to introduce evidence to establish a certain fact) was the subject of direct comment. . . . We are in accord with the Supreme Court of Mississippi when it says that the wrong once done cannot be undone by mere admissions of the district attorney or attempted correction by the court."

5. 112 La. 939, 36 So. 811 (1904).

6. State v. Marceaux, 50 La. Ann. 1137, 24 So. 611 (1898); State v Sinigal, 138 La. 469, 70 So. 478 (1915); State v. Richardson, 175 La. 823, 144 So. 587 (1932).

7. State v. Robinson, 112 La. 939, 942, 36 So. 811, 812 (1904). See also State v. Marceaux, 50 La. Ann. 1137, 1146, 24 So. 611, 615 (1898), where the court said, " . . . the wrong once done cannot be undone by mere admissions of the district attorney or attempted correction by the court."

8. 138 La. 469, 70 So. 478 (1915).

9. 138 La. 469, 477, 70 So. 478, 481 (1915).

reversible error despite the charge of the trial judge to the jury to ignore the remark of the district attorney, said, "The naming, by the district attorney to the jury, of the defendants who had not taken the witness stand might well have been construed by the jury against those defendants. And the prosecuting officer should not have made such comment . . . .' "[10]

The Louisiana rule that this type of comment constitutes incurable error has been limited to cases in which the remark directly focused the attention of the jury on the fact that the defendant *himself*[11] had not taken the stand as a witness in his own behalf. For example, a statement of the district attorney is proper if it merely points up the failure of the defense to call the wife[12] or mother[13] of the defendant as a witness, or only directs attention to the weakness of the defense generally.[14]

The language in numerous Louisiana cases[15] indicates that the intention of the district attorney at the time he made the remark is controlling as to whether the remark was on the failure of the defendant to testify or not. In this regard, it is submitted that the proper test is the one adopted by the court in *Reddick v. State*,[16] that the intention of the counsel is immaterial if in fact he used such language as could be reasonably construed to be a comment on the failure of the accused to testify. Actually, it is the prejudicial effect on the jury and not the prosecutor's ulterior motive which renders the comment reversible error.

The case of *State v. Robertson*[17] is interesting for its amusing aspects. In that case the district attorney was visualizing to the jury the scene of the crime, at which time the widow of the deceased had confronted the defendant, and said to him, " 'It must have been an accident.' " The district attorney, continuing,

10. 138 La. 469, 478, 70 So. 478, 481 (1915).
11. State v. Marceaux, 50 La. Ann. 1137, 24 So. 611 (1898).
12. State v. Brown, 118 La. 373, 42 So. 969 (1907); State v. Todd, 173 La. 23, 136 So. 76 (1931).
13. State v. Simmons, 167 La. 963, 120 So. 612 (1929).
14. State v. Lewis, 156 La. 985, 101 So. 386 (1924). In this case the district attorney remarked, "There is no evidence except on one side." The court, in holding there was no error, said, "An accused may through different sources, other than by taking the stand himself, establish a defense or offer extenuating circumstances in mitigation of the crime charged. The language used by the district attorney amounted to nothing more than an expression of opinion as to the weight of the evidence. . . . "
15. For example, see State v. Varnado, 126 La. 732, 742, 52 So. 1006, 1010 (1910), where the court said, in holding that no error was committed, "It is not clear that the remarks were *intended* as a comment on the failure of the *accused* to testify. . . . " (Italics supplied.)
16. 72 Miss. 1008, 16 So. 490 (1895).
17. 133 La. 806, 63 So. 363 (1913).

said, " 'Was there any answer? No answer then, and no answer to you, gentlemen of the jury, even yet.' " Here the defense counsel interrupted the district attorney with an objection, and the district attorney concluded, " ' . . . from a single witness sworn in this case.' " The court[18] held that the remark was not prejudicial because the inference was not plain that it was a comment on the failure of the defendant himself to testify.

While it is generally held, as in Louisiana, that it is improper and highly prejudicial for the prosecuting attorney to comment upon the failure of the accused to take the stand,[19] the Louisiana view that such comments are incurable reversible error has not been followed. "The weight of authority seems to be that comments of the prosecuting attorney on the failure of the defendant to testify in a criminal case, though highly improper, may under some circumstances work no injury, where the trial judge promptly intervenes, excluding the comments and admonishing the jury to disregard them. In other words, comments of that kind stand on very much the same footing as other improper arguments and whether they call for reversal or not depends on whether, after a full consideration of all the circumstances, including the action of the trial judge at the time they were made, the appellate court is of the opinion no prejudice resulted."[20]

Pertinent to the Louisiana jurisprudence is the provision of Act 157 of 1916[21] that states, "In the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offenses, a person so charged shall, at his own request, but not otherwise, be deemed a competent witness; *and his neglect or refusal to testify shall not create any presumption against him.*" (Italics supplied.) Insofar as this section of the statute applies to criminal cases, it has been superseded by Article 461 of the Criminal Code of Procedure of 1928.[22]

18. 133 La. 806, 821, 63 So. 363, 369 (1913).

19. Note (1933) 84 A. L. R. 785, "Under statutes expressly prohibiting comment on the failure of the accused to testify, and under those providing that his failure to become a witness in his own behalf shall create no presumption against him, and under other statutes of similar import, it is generally held that it is improper and prejudicial for the prosecuting attorney, in the course of the trial, to comment on or make any reference to the fact that the accused did not testify as a witness in his own behalf."

20. Note (1933) 84 A. L. R. 795.

21. La. R. S. (1950) § 13:3665.

22. "The competent witness in any criminal proceeding, in court, or before a person having authority to receive evidence, shall be a person of proper understanding, but; . . . . Third. In the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offenses, a person so charged shall, at his own request, but not otherwise, be deemed a competent witness."

Article 461 is substantially the same as the above quoted statute, but the words, "and his neglect or refusal to testify shall not create any presumption against him" are not present in the codal provision. The absence of this language has provided a basis for the contention that the law has changed[23] so as to allow the prosecuting attorney to comment on the failure of the accused to take the stand in his own behalf. However, a summary examination of the cases[24] decided both before and after the adoption of the Code of Criminal Procedure indicates that no change has been brought about by this omission in Article 461. Indeed there is considerable authority for the view that a constitutional amendment would be necessary to effect a change in the law on this subject.[25]

The prohibition of comment on the silence of the accused has been the subject of much criticism,[26] and a review of its constitutional aspects may be enlightening. The case of *Adamson v. People of California*[27] held that nothing in the Federal Constitution forbids counsel for the state from commenting on the failure of the accused to take the witness stand in his own behalf. Relying on a state constitutional provision,[28] as well as statutory authority,[29] the prosecuting attorney commented on the fact that the accused had not taken the witness stand in his own defense. The defendant was an ex-convict and refused to testify because of fear that his past record would be disclosed to the jury on cross-examination. It is well settled that once the defendant takes

23. Note (1948) 8 LOUISIANA LAW REVIEW 423. See also State v. Davis, 214 La. 831, 845, 39 So.(2d) 76, 80 (1949), wherein is found the language, "The state urges also that there is no law in this state either in the Constitution or in the statutes which sanctions the rule that the district attorney and that judge must not discuss or comment on the defendant's failure to testify. In support of this contention the State has presented to the court a most interesting and lucid discussion of the historical basis for the rule in England and its evolution in this country, and a logical argument for the contention that the rule does not exist in this state. However, inasmuch as we consider that the statement of the assistant district attorney was not a comment on the failure of the accused to testify, we do not decide the case on the basis of this contention."

24. State v. Marceaux, 50 La. Ann. 1137, 24 So. 611 (1898); State v. Sinigal, 138 La. 469, 70 So. 478 (1915); State v. Richardson, 175 La. 823, 144 So. 587 (1932); State v. Broughton, 158 La. 1045, 105 So. 59 (1925); State v. Glauson, 165 La. 270, 115 So. 484 (1928); State v. Antoine, 189 La. 619, 180 So. 465 (1938); State v. Goldstein, 187 La. 353, 174 So. 873 (1937).

25. Note (1948) 8 LOUISIANA LAW REVIEW 423, Comment (1932) 31 Mich. L. Rev. 40.

26. See Wigmore on Evidence (3 ed. 1940) 425, § 2272a, for arguments pro and con.

27. 332 U. S. 46, 67 S. Ct. 1672, 91 L. Ed. 1903 (1947).

28. Calif. Const., Art. 1, § 13.

29. Calif. Pen. Code (Deering, 1937) § 1323.

the witness stand, he is subject to the same rules as any other witness,[30] and evidence of past crimes may be used to impeach his testimony as a witness. On appeal to the Supreme Court of the United States, defendant contended that his rights under the Fifth Amendment[31] of the Federal Constitution were violated in that the comment of the district attorney indirectly coerced him to take the stand in his own defense. The Supreme Court held that the Fifth Amendment of the Federal Constitution was not applicable to the states by virtue of either the due process clause or the privileges and immunities clause of the Fourteenth Amendment. This opinion makes it clear that the prohibition against comment on the silence of the accused is grounded on statutory and constitutional provisions of the states.

In *State v. Ferguson*,[32] it was held that if the privilege of the defendant to refrain from testifying in his own behalf were merely statutory, as distinguished from constitutional, the district attorney could remark on the silence of the accused. In *State v. Wolf*,[33] it was held that an amended state statute[34] which permitted the prosecuting attorney to comment on the silence of the defendant was unconstitutional, being in violation of the Constitution of South Dakota.[35] During the course of its opinion, the Supreme Court of South Dakota said, "It is quite clear that this court is committed to the rule that it is a violation of *consitutional* rights to permit comment on the failure of the accused to testify. If such is the law, it is equally clear that such consti-

30. State v. Bischoff, 146 La. 748, 84 So. 41 (1919); State v. McCollough, 149 La. 1061, 90 So. 404 (1922); State v. Vastine, 172 La. 137, 133 So. 389 (1931).

31. U. S. Const. Amend. V says that no person "shall be compelled in any criminal case to be a witness against himself." See also La. Const. of 1921, Art. I, § 11.

32. 226 Iowa 361, 283 N. W. 917 (1939).

33. 64 S. D. 178, 266 N. W. 116, 104 A. L. R. 464 (1936).

34. S. D. Comp. Laws (1929) § 4879 (before amendment) was as follows: "In the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of any crime, . . . the person charged shall, at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him." Note the similarity between this South Dakota statute and La. Act 157 of 1916. The South Dakota statute was amended by Chapter 93 of the 1927 Session Laws of South Dakota; the pertinent changes are as follows: ". . . the person charged shall, at his own request, but not otherwise, be a competent witness, and his failure to testify in his own behalf, is hereby declared to be a proper subject of comment by the prosecuting attorney in his closing argument, without any previous reference thereto having been made in argument either on behalf of the state or the defendant, the attorney for the defendant may thereafter, if he so request the court, argue upon such comment for such time as the court shall fix." Amended in S. D. Code (1939) § 34.3633.

35. S. D. Const., Art. VI, § 9, says, "No person shall be compelled in any criminal case to give evidence against himself."

tutional rights cannot be abrogated, abridged, or curtailed by the mere passage of a statute by the legislative branch of the state government. . . . It may be that the right to comment upon the failure of the accused to exercise his right to become witness in his own behalf should be conferred upon the prosecutors as the matter of public policy; *but if prosecutors are to have such right, it must be conferred upon them by constitutional amendment.* . . . Until the Constitutions are changed, it cannot and must not be made by legislative enactment or judicial interpretation."[36] (Italics supplied.) In view of the above authorities, it is submitted that statute law of Louisiana could not be changed so as to allow comment on the failure of the defendant to testify without a constitutional amendment. It is significant that the Louisiana legislature, by a large majority, voted to exclude from the Code of Criminal Procedure a provision that would enable the prosecuting attorney to comment on the failure of the defendant to take the witness stand in his own behalf.[37]

Appeals to Racial Prejudice

Appeal to racial prejudice by the district attorney is another error which cannot be cured by an instruction of the trial judge. In the case of *State v. Moore*,[38] a very good illustration of this rule, the district attorney said to the negro defendant, "Then you struck him because he was a white man." The Louisiana Supreme Court held that the remark was reversible error, and declared, "In our opinion, the remark of the district attorney, framed as a question, was an appeal to race prejudice, was highly prejudicial to the rights of the accused, and entitled them to a new trial . . . We recognize the general rule to be that a verdict should not be set aside on account of improper remarks by the prosecuting attorney when the jury is instructed to disregard such remarks. However, even conceding that the instructions in this case were given at the time the statement was made, we think that the appeal to race prejudice constituted such an error

36. See opinion by Justice Cardozo in Matter of Doyle, 257 N. Y. 244, 256, 177 N. E. 489, 491, 87 A. L. R. 418 (1931), where the court said, in reference to the self incrimination clause of the New York Constitution, "The privilege may not be violated because in a particular case its restraints are inconvenient or because the supposed malefactor may be a subject of public execration or because the disclosure of his wrongdoing will promote the public weal. It is a barrier . . . interposed by the sovereign people of the state; and neither legislators nor judges are free to overleap it."

37. Louisiana Senate Journal (June 13, 1928) 295, 297, 310; Louisiana House Journal (June 19, 1928) 544, 545.

38. 212 La. 943, 945, 33 So. (2d) 691, 692 (1947).

as could not be cured by the judge's instructions to disregard."[39]

It is significant that the general jurisprudence is more liberal than that of Louisiana in regard to the effect of improper appeal to racial prejudice, holding that such comment is reversible error *unless* its effect is counteracted by a proper instruction to disregard.[40] Possibly the Louisiana Supreme Court, in adopting the more stringent rule that appeal to racial prejudice is reversible error per se, has taken judicial notice of the tense situation existing between whites and negroes in the South. In *State v. Bessa*,[41] the supreme court said, "Why did the district attorney bring up the matter of blood if it did not draw the color line? . . . The court thinks it knows enough about the situation between the whites and negroes in Louisiana to know that the average white man is prone to be prejudiced in such a case without being exhorted thereto by a law officer of the government, and that, such an appeal having been once made, the effects thereof cannot be counteracted by any mere cautionary words of sober reason that may be uttered by the judge."

Two cases appear to distinguish between the situation in which the negro defendant is charged with a crime inflicted on another negro, and the situation in which the victim is a white person. In one of these cases, *State v. Thomas*,[42] the negro defendant was charged with the murder of another negro. The district attorney said, "Look at the crowd. . . attending this trial. They did not come here for idle curiosity. A verdict of guilty as charged would meet with their sentiments, and deter negroes from the commission of other crimes." In this case there was an immediate charge by the trial judge telling the jury to ignore the remarks of the district attorney. The supreme court held that there was no error, and in the course of the opinion said, "Under the circumstances of this particular case, we are of the opinion that the effect of any prejudice which may have arisen from the remarks made was removed entirely from the

39. 212 La. 943, 947, 33 So. (2d) 691, 692 (1947). See also State v. Bessa, 115 La. 259, 264, 38 So. 985, 987 (1905), where the court said, regarding an appeal to racial prejudice, ". . . such an appeal having been once made, the effects thereof cannot be counteracted by any mere cautionary words of sober reason that may be uttered by the judge."

40. Note (1932) 78 A. L. R. 1440, "It is a general rule, applicable in civil and in criminal cases alike, that an improper appeal by counsel to racial, religious, social or political prejudices, resulting injuriously to the adverse party, is ground for granting a new trial or reversing a judgment where the effect of the improper appeal was not sufficiently counteracted by action in the trial court. . . ."

41. 115 La. 259, 264, 38 So. 985, 987 (1905).

42. 161 La. 1010, 1014, 109 So. 819, 821 (1926).

minds of the jury, by the instruction of the court. . . . *The case, however, in our opinion, would have been different had the defendant been charged with the murder of a white man,* as a distinct and unjustifiable appeal to race prejudice would have been the result, and the presumption of injury to the accused would have been so strong that it could not be cured by the action of the court in instructing the jury to disregard the remarks of the *state's attorney. . . .*"[43] (Italics supplied.)

The possibility of such a distinction, dependent only upon whether the victim was white or colored, was definitely rejected, however, in the more recent case of *State v. Bedford.*[44] The defendant was a young negro girl charged with the murder of a negro man, and the Louisiana Supreme Court, in holding that certain of the remarks constituted an appeal to racial prejudice, succinctly concluded, "*This is so even though defendant is a negro girl who was convicted of having killed a negro man by a jury composed of white men.*"[45] (Italics supplied.)

It is indicated in at least two cases that appeal to anti-negro prejudice is more serious than attempts to invoke prejudice against other races or nationalities. In *State v. Rodasta,*[46] the dis-

43. 161 La. 1010, 1015, 109 So. 819, 821 (1926). See also State v. Satcher, 124 La. 1015, 1023, 50 So. 835, 838 (1909), where the negro defendant was charged with killing another negro. The district attorney remarked, "I want to say to you that it seems to me that human life is wonderfully cheap in Jackson Parish, especially if that human life is a negro life . . . If a negro kills a negro, he usually graduates by killing a white man." This remark was followed by an immediate charge from the trial judge, and on appeal, the supreme court, holding that no error had been committed, said, "the court having instructed the jury . . . we find no sufficient reason for assuming that its instructions were not heeded." 124 La. 1015, 1024, 50 So. 835, 838 (1909).

44. 193 La. 104, 113, 190 So. 347, 350 (1939).

45. 193 La. 104, 108, 190 So. 347, 348 (1938), where the district attorney said, of the negro girl defendant who was under 17 years of age, "there is no provision (for punishment) for the colored girl, so far as I know. Anything less than a capital crime will fall under the supervision of a Juvenile Court, and a Juvenile Court may do nothing with a person of color, a girl under seventeen years of age, other than to turn her over to some responsible person who will care for her and look after her. . . ." The supreme court, in holding that reversible error had been committed, said, "We do not think the instructions of the trial judge were such as to efface from the minds of the jurors the impression made by the prejudicial statements of the district attorney. . . . In these circumstances, the trial judge could not and he did not make any serious effort to disabuse the minds of the jurors of the harmful effect of the statement. . . . In the first place, the statement emphasized the fact that the defendant was of the negro race, which was in itself an appeal to race prejudice. . . . It does not require any considerable argument to support the proposition that the statement of the district attorney must have been extremely harmful to the cause of the defendant." 193 La. 104, 113, 190 So. 347, 350 (1938).

46. 173 La. 623, 637, 138 So. 124, 128 (1931). Cf. State v. Lee, 116 La. 607, 615, 40 So. 914, 917 (1906). In this case, the district attorney, in urging the jury

trict attorney, in explaining his theory of the case to the jury, said, ". . . Remember this gentlemen, and I'm not saying this to be snobbish; I am not saying this as a reflection on him, but the man's position in society, his breeding, his family were not the equal of her family, they are not of the same race. She married beneath herself." The defendant was of Italian extraction. The court held that the remark was not an appeal to racial prejudice. In comparison with these two cases, consider the case of *State v. Moore*,[47] where the defendant was a negro, and the court held the remark, "Then you struck him because he was a white man," to be reversible error, incurable by instructions from the trial judge. It is significant that no Louisiana case was found in which the court held a remark to be reversible appeal to racial prejudice, except where the defendant was a negro. A probable rationale of these cases is that the court, having taken judicial cognizance of the position of the negro in the South, feels that there is a greater danger that prejudice will result from an appeal to racial difference if the defendant is a negro than if the defendant is merely of another nationality. The generality of this distinction is weakened by decisions in other Southern states holding appeals to prejudice against others than negroes, that is, Italians[48] and Jews,[49] to be reversible error.

Even limiting the problem to the admittedly serious comment upon the fact that the accused is a negro, it is impossible to lay down a categorical test whereby one can tell when a particular remark is sufficiently pointed to constitute an appeal to racial prejudice.[50] The somewhat nebulous line of distinction can

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to believe the witnesses for the state, said, "You must believe the testimony of these two white boys, two American citizens . . . ." The court held that the district attorney had properly used this language to distinguish between the witnesses for the state, and the negro and Italian witnesses for the defendant.

47. 212 La. 943, 945, 33 So. (2d) 691, 692 (1947).

48. Logi v State, 168 Ark. 793, 271 S.W. 451, 78 A.L.R. 1446 (1925), where the court held remarks of the district attorney concerning Italian immigrant to be reversible error. See further State v. Risso, 131 La. 946, 60 So. 625 (1913).

49. Golden v. State, 23 Okla. Crim. Rep. 243, 214 Pac. 946, 78 A.L.R. 1442 (1923), where the court held remarks of the district attorney to be reversible error when he went outside the record and misquoted scriptures in a manner calculated to inflame and prejudice the minds of the jurors against the accused because he was a Jew.

50. Note (1932) 78 A. L. R. 1440, "The distinction between references to race, religion, social status, or political affiliation which do not, because of their nature and the attendant circumstances, constitute an appeal to prejudice, and such references which, though conceded to be appeals to prejudice, are nevertheless held to cause no injury, is rather nebulous. However, courts treat such alleged appeals to prejudice from both standpoints. . . ."

best be approximated by comparing some of the remarks that have been held non-prejudicial and some of those which have been held prejudicial in the absence of instructions by the judge.

The following remarks have been treated as not constituting appeals to racial prejudice:

(1) The deceased "was shot in the head, and this negro (pointing and referring to the defendant) evidently ran, after he killed the deceased."[51]

(2) "If the jury do not convict in this case how is any white man's property to be free from the torch of a dissatisfied negro tenant?"[52]

(3) "I am sure that this jury will not be influenced by the testimony of this congregation of negro witnesses that Ben Howard, a big Mason and church member, has been able to procure the innocence of his son . . . ."[53]

(4) "During the reconstruction days when we had negro domination in this state, the Ku Klux Klan were organized and the best people of the state shouldered their guns for the protection of our white people. . . . Now we have no more negro domination, but a government by the white people, and hence no necessity for lynching. Every man . . . is entitled to and will have a fair and impartial trial, no matter what the charge might be, and the fact that this negro is given a fair trial is no reason why you should believe him innocent."[54]

(5) "Gentlemen, . . . If you find the accused not guilty, you will clear the negroes, but you will convict Mr. Henderson (the only witness for the state) of dirty, stinking, slimy perjury. . . ."[55]

(6) The district attorney, in questioning a prospective juror on his voir dire, asked him if his friendship for the deceased was the friendship "of a white man for a white man or a white man for a negro."[56]

The following remarks were held to constitute an appeal to racial prejudice, and to constitute reversible error. The full import of these decisions is weakened by the fact that in none of the cases were there instructions by the trial judge to ignore the

51. State v. Barnhart, 143 La. 596, 600, 78 So. 975, 977 (1918).
52. State v. Glauson, 165 La. 270, 281, 115 So. 484, 488 (1928).
53. State v. Howard, 120 La. 311, 316, 45 So. 260, 261 (1907).
54. State v. Petit, 119 La. 1013, 1016, 44 So. 848, 849 (1907).
55. State v. Johnson, 48 La. Ann. 87, 19 So. 213 (1896).
56. State v. Brady, 50 So. 806, 807, 124 La. 951, 953 (1909).

remarks. However, the remarks were apparently considered as reversible error per se:

(1) "I did lose control of myself; every drop of my white man's blood did boil in me and the white man's blood of other men in this court rose up in righteous indignation, when this negro woman on trial, in a crowded court-room in the parish of Grant, and in the town of Colfax, with its past history, used slanderous. . . language against the officers of Grant parish and against white men."[57]

(2) "Gentlemen of the jury, it is high time to put a stop to these murders by negro women, by hanging some of them . . . . The only way to put a stop to it is to bring a verdict of guilty as charged and have a hanging."[58]

(3) "Notwithstanding the fact that the prosecuting witness was a prostitute, she was a white woman and belonged to the same race to which their mothers belonged."[59]

(4) "The defendant should not be tried by the same law as a white man. . . . You can't try a negro by negro evidence the same as you can try a white man by white evidence."[60]

While it is not possible to draw a clear line between permissible and prejudicial racial comments, one fact stands out in bold relief—the prosecution should be extremely cautious to avoid the possibility of clouding the issue of guilt or innocence by allusions to the defendant's race.

LAWRENCE E. DONOHOE

THEFT—THE EFFECT OF INFLATION UPON THE VALUE-PENALTY RATIO

The difficulty of making the punishment fit the crime has long been a serious problem. This question has weighed heavily on the minds of laymen and lawyers alike. Public consciousness of the problem is clearly demonstrated by the laws and literature that have come down through the centuries.

Retribution was stressed by the Code of Hammurabi, 2250 B.C., which provided that, "If a man destroy the eye of another man, they shall destroy his eye."[1] Cicero evidenced a more hu-

57. State v. Jones, 127 La. 694, 697, 53 So. 959, 960 (1911).
58. State v. Brown, 148 La. 357, 358, 86 So. 912, 913 (1921).
59. State v. Perry, 124 La. 931, 942, 50 So. 799, 803 (1909).
60. State v. Brice, 163 La. 392, 393, 111 So. 798 (1927).
1. Cook, The Laws of Moses and the Code of Hammurabi (London, 1903) 249.