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Final Argument: Conduct of Virginia Counsel

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FINAL ARGUMENT: CONDUCT OF VIRGINIA COUNSEL

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I.

Introduction: Scope of Argument

While the purpose, function and scope of final argument have ben variously described,[1] it is fair to say that is more than a mere summary of the evidence adduced at trial. Its true purpose is to pull all of the evidence together into a clear, coherent whole, under the law as given in the court's instructions, and, perhaps most of all, to persuade the jury that the facts presented in evidence justify, under the law applicable to the case, a verdict for the advocate's client. But since the art of persuasion has from time immemorial lent itself to emotional appeal,[2] it is not surprising to find repeated attempts by counsel to win verdicts by appealing to irrelevant matters and human prejudice instead of attempting to convince juries that they are justified in having the verdict because the facts and the law logically dicate the result. The result of such attempts is error, sometimes harmless, but often reversible, along with new trials and concomitant expenses.

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1 2 BELLI, MODERN TRIALS 1656 et seq. (1954); BUSCH, TRIAL PROCEDURE MATERIALS 504 (1961); CUTLER, SUCCESSFUL TRIAL TACTICS 189-191 (1949); GOLDSTEIN, TRIAL TECHNIQUE 607 (1935); 4 SCHWEITZER, CYCLOPEDIA OF TRIAL PRACTICE §§ 714-725 (1954); VOGEL, FINAL ARGUMENT 4 (PLI pamphlet 1954).

2 The use of emotion in arguing to the jury is soundly condemned in ARISTOTLE, RHETORIC 1-11 (Buckley trans. 1750). In CICERO, DE ORATORE §§ 234-239 (Sutton transl., Rackham, ed. 1942) its use is mentioned, but not condemned as strongly as in Aristotle. In QUINTILLIAN, INSTITUTES OF ORATORY, Bk, II, Ch. 15 (Watson transl. 1856) its use is mentioned as a technique in argument. Contrary to popular belief "rhetoric," as defined and explained by Aristotle, is a closely knit system of logic which, if adopted by trial lawyers, would aid forensic argument immeasurably.

Yet the task of convincing juries is not sterile; it is not limited merely to a prosaic review of the evidence coupled with statements that the evidence meets the requirements of the law the judge has given to the jury. The advocate may, using the evidence as a basis, make inferences, deductions and conclusions. In a word, he may argue. Probably the most succinct statement of the scope of final argument has been given by Virginia's Supreme Court of Appeals in *Virginia Electric & Power Company v. Jayne,* as follows:

> . . . To require counsel to confine their discussions before the jury to the law and the evidence is no hardship, but is in furtherance of justice, and of the prompt disposition of controversies based upon law and the evidence, subjected, of course, to any fair analysis or criticisms which the ingenuity of counsel may devise.[3]

It has also been said that it is legitimate argument for counsel to state all proper inferences from the evidence and draw conclusions from the evidence according to his own system of reasoning.[4]

Such, then, is the function and scope of final argument. But what is arguing *under* the law? Under what circumstances does the advocate depart from the evidence? What remarks are irrelevant or prejudicial? When will the mention of insurance cause a mistrial or reversal? What is necessary to preserve the record for an appeal on a point of improper argument? These questions, and others of similar import, make it worthwhile to examine in detail errors made by Virginia counsel in the final argument of civil cases.

II.

Arguing the Law

It has been stated that counsel is permitted to argue the evidence *under* the law. Is it ever permissible for coun-

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[3] 151 Va. 694, 704; 144 S.E. 638, 641 (1928), *rev'ing* on other grounds.

[4] Burr v. Virginia Ry. & Power Co., 151 Va. 934, 145 S.E. 833 (1928).

sel to argue to the jury *what* law should be applied? May counsel re-read the instructions given by the court to the jury? Or is the matter of stating the law exclusively within the province of the court? Until 1902, the law of Virginia was in grave doubt as to whether or not it was the function of the jury to decide the law as well as the facts of a case. It was first said that, regardless of the rule in criminal cases, in a civil case it was for the judge alone to expound the law, and that where the court has instructed the jury on the law it was no more competent for the jury to encroach on the court by finding a verdict in defiance of the law than it was for the court to encroach on the jury by finding the facts. Thus it was not proper for counsel to argue against the instructions of the court to induce the jury to find a verdict in defiance of it.[5] And, no doubt, this is still a correct statement of the law. But a short time later in *Norfolk & W. R. R.* v. *Harman,*[6] the plaintiff was permitted to read to the jury cases illustrative of damages awarded in similar trials. In an interesting statement approving plaintiff's argument, the Court said:

> While it is the province of the court to give the law to the jury, it would be an unwarranted restriction upon the legitimate scope of argument. . .if not a flagrant act of usurpation, for a trial court to prohibit counsel. . . from referring to and reading from decisions in similar cases by courts of last resort. These are in fact the sources of correct information for bench, bar and jury. . . .[7]

The doubts thus engendered as to the propriety of counsel's reading law to the jury were resolved in *Newport News & O. P. Ry. & Electric Co.* v. *Bradford,*[8] where the trial court

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[5] Delaplane v. Crenshaw & Fisher, 15 Grat. (56 Va.) 457 (1860).

[6] 83 Va. 553, 8 S.E. 251 (1887), *overruled,* on the matter of reading law to the jury, in Newport News & O. P. Ry. & Elect. Co. v. Bradford, 100 Va. 231, 40 S.E. 900 (1902). *Cf.,* Allegheny Iron Co. v. Teaford, 96 Va. 372, 31 S.E. 525 (1898).

[7] Norfolk & W. R.R. v. Harman, *supra,* note 6, 83 Va. at 564, 8 S.E. at 252.

[8] 100 Va. 231, 40 S.E. 900 (1902).

had refused to permit defendant's counsel to read definitions of "reasonable time" and "contributory negligence" to the jury from reported cases. Answering defendant's claim of error, and firmly adhering to the rule that it is solely the court's function to instruct the jury on the law, the Court stated:

> It has been the settled rule in Virginia that it is the duty of the court to instruct the jury as to the law, and the duty of the jury to follow the law as laid down by the court, and it being, further the prevailing and proper practice for the court to give its instructions in writing, in advance of the argument, it would seem to follow as a necessary consequence that counsel should be confined in their argument from legal premises, to the propositions of law embodied in the court's instructions. To allow authorities to be read to the jury from the books would be calculated to confuse and mislead them, and cause them to disregard the court's instructions, and deduce from the books their own idea of the law, which they are not permitted to do. . .The due and speedy administration of justice, to say nothing of the duty which the court owes to its self-respect, demands that counsel should be confined in their argument before a jury, from legal premises, to the propositions of law embodied in the court's instructions, and should not be permitted to read authorities from the books.[9]

It follows, then, that once the court has instructed the jury on the law to be applied to a case, counsel may not make any argument in derrogation of such law. Thus, even though the reading from a reported case may be completely in accord with the court's instructions, it will constitute error upon proper objection being made.[10] And counsel's reading a statute which has no relevance to the case will, if the record is properly preserved, be considered as designed to mislead the jury and result in error.[11]

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[9] *Id.* 100 Va. at 240; 40 S.E. at 903.

[10] Piccolo v. Woodford, 184 Va. 432, 35 S.E.2d 393 (1945).

[11] Lemons v. Harris, 115 Va. 809, 80 S.E. 740 (1914). *rev'ing* on other grounds.

Yet it does not follow from the foregoing rules that counsel is absolutely prohibited from mentioning the law. No valid objection can be made to counsel's re-reading the instructions of the court, and it has been held permissible for counsel to read to the jury a complete instruction which the court has given only in substance.[12] It is not error for counsel to mention what the law has been, and then read from the instructions of the court to show what the law presently is. For example, it has been held proper for counsel to state that before the adoption of a new constitution the doctrine of assumption of risk would have prevented a recovery in the case, but that the new constitution allowed a recovery and then proceed to read the law allowing recovery from the court's instructions.[13] Nor does it follow that argument over the meaning of an instruction will constitute error. In *Diggs v. Lail,*[14] the court had instructed the jury that one who negligently inflicts personal injury on another is responsible for all the ill effects which "naturally and necessarily" follow the injury. Defendant then argued that the injury was not caused by the accident because the injury did not naturally and necessarily follow the accident. Plaintiff responded that the instruction "doesn't mean that." Defendant claimed error because plaintiff had attacked the instructions. The holding was, however, that plaintiff had not intended to attack the instruction, but merely to question the interpretation defendant had given to it. In any event, the incident appeared to be trivial and, if error, not such as to require reversal.

III.

Argument Outside the Record

As a general rule, it may be stated that remarks of counsel in final argument should be confined to the record.[15] Where logical inferences and deductions can be made it is

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[12] Lane Bros & Co. v. Bauserman, 103 Va. 146, 48 S.E. 857 (1904).

[13] Chesapeake & O. Ry. v. Rowsey's Adm'r., 108 Va. 632, 62 S.E. 363 (1908).

[14] 201 Va. 871, 114 S.E.2d 743 (1960), *rev'ing* on other grounds.

[15] Virginia Electric & Power Co. v. Decatur, 173 Va. 153, 3 S.E.2d 172 (1939), *rev'ing* on other grounds.

sometimes difficult to determine whether or not a particular argument is within the record, that is based on the evidence. Yet there are, in Virginia cases, numerous instances of counsel's arguing matters which clearly have no relationship whatever to the facts produced by the evidence. It is obvious that the results of a former trial of the same case ordinarily have no relevancy to a retrial of the case and that argument of such, if the court does not admonish the jury to disregard it, will constitute error.[16]

The same principle applies when counsel seeks to advise the jury as to what may or may not be done with a verdict. In *Lynchburg Traction & Light Co.* v. *Guill*,[17] where counsel argued to the jury that the verdict should be liberal in favor of the plaintiff, for if a small verdict were found the court could not increase it, whereas if a large verdict were rendered, the court could reduce it to what was considered a proper amount, the Supreme Court of Appeals remarked that counsel should be content in asking for a verdict based on the law and the evidence without suggestions which might serve to put in peril an otherwise righteous verdict. Nor are matters which counsel may think are "matters of common knowledge," but which have no foundation in the evidence, proper as a subject for argument. For example, where the trial court sustained an objection to defendant's counsel making the argument that electric trains, as a "matter of common knowledge" were the best and safest for preventing fires, the Court in affirming the trial court's ruling pointed out that the evidence was confined to the locomotive which had set the fire and that there was no evidence suggesting that electric trains were more safe than others for preventing fires.[18]

Even where there is evidence in the record of the general subject matter of counsel's argument, the argument will not be permitted to be grossly illogical nor will it be permitted to be of such speculative nature that it invades

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[16] Taylor v. Mallory, 96 Va. 18, 30 S.E. 472 (1898).

[17] 107 Va. 86, 57 S.E. 644 (1907).

[18] Norfolk Southern R.R. v. Fentress, et al., 127 Va. 87, 102 S.E. 588 (1920).

the province of the jury. In *Baker-Matthews Lumber Co., Inc.* v. *Lincoln Furniture Mfg. Co.*,[19] counsel was prohibited by the trial court from making the argument that certain correspondence, which had been introduced into evidence, along with the contract on which the suit was based, suggested an intent to repudiate the contract. In denying an assignment of error on this point, the Supreme Court of Appeals found nothing in any of the evidence, including the contract, to provide a factual basis for such argument. In short, here counsel was not permitted to make non sequitur argument. Of similar import is *Certified T. V. and Appliance Co., Inc.* v. *Harrington*,[20] where in final argument, plaintiff's counsel used a blackboard to list the items of plaintiff's damages, among which was a per diem estimate of damages for pain and suffering. The trial court overruled defendant's objection. In reversing, the Court found no error in the use of the blackboard so long as the figures placed on it are supported by the evidence. But in regard to figures evaluating pain and suffering, it was said:

> To permit Plaintiff's counsel to suggest and argue to the jury an amount to be allowed for pain, suffering, mental anguish and disability calculated on a daily or other fixed basis, allows him to invade the province of the jury and to get before it what does not appear in the evidence. . .The estimates of counsel may tend to instill in the minds of the jurors impressions not founded on the evidence. Verdicts should be based on deductions drawn by the jury from the evidence presented and not the mere adoption of calculations submitted by counsel.[21]

A much closer case, though one still embodying elements of speculation, is presented when counsel makes use of analogy and in so doing attempts to put the jury in the place of one of the parties by the use of "you" in his remarks. In *Phillips v. Fulghum*,[22] for example, plaintiff's attorney drew an an-

[19] 153 Va. 14, 149 S.E. 517 (1929).
[20] 201 Va. 109, 109 S.E.2d 126 (1959).
[21] *Id.* 201 Va. at 114-115; 109 S.E.2d at 131.
[22] 203 Va. 543, 125 S.E.2d 835 (1962).

nalogy between a fictitious employee and employer, the employee having injuries like plaintiff's, and then proceeded to describe the suffering the employee would have. In so doing, liberal use of "you" was employed, ostensibly to have the jury imagine it was plaintiff. In condemning this type of argument, though not in the circumstances finding it reversible error, the Supreme Court of Appeals reasoned that since "you" was used in a hypothetical sense and not addressed to the jury personally, it was not prejudicial because it did not appear to have affected the verdict.

One sure way for counsel to stray from the evidence in final argument is to direct his remarks in a disparaging manner to other counsel, to the corporate officers of one of the parties, to the wealth of the other party, or to the "interest" of witnesses when there is no evidence of such. This type of argument is often classified as "inflammatory and prejudicial", but it is also frequently condemned as not being based on the evidence. Out-of-court actions of opposing counsel, for example, do not ordinarily provide any proof of the issues of a case. In *Bragg* v. *Hammack*,[23] defendant's attorney was attempting to make the point that a certain letter denying libelous statements had been obtained by intimidation. In the course of his argument he stated, "Can you imagine, gentlemen of the jury, anything that would be more liable to intimidate this poor old decrepit lady [defendant] than for a lawyer of Mr. Revercomb's [plaintiff's attorney] appearance, of his reputation, to have walked into her house on Sunday morning. Think of it. . .You remember the girl under the influence of Mr. Revercomb and Dr. Bragg gave him a paper saying the only reason she left home was the work was too much for her to do. What a fabrication they got her to sign." On appeal the holding was that the import of the language used was to intimate that the papers in question were secured in an improper manner, and since there was no evidence to furnish a basis for the statement, its only effect could have been to influence the jury. Similarly, where plaintiff's attorney argued, "The higher officers of this company [defendant] who are

[23] 155 Va. 419, 155 S.E. 683 (1930).

responsible for the management of this company and who alone will feel with others whatever verdict you may render. . .", the Supreme Court of Appeals held that the effect was to prejudice the jury against the officials and thus cause the jury to render a verdict large enough to punish the officials rather than to compensate plaintiff for the injuries he had received.[24] Correspondingly, unless punitive damages are recoverable, the wealth of a defendant is immaterial and irrelevant. Thus, in a case where the issues did not allow punitive damages, plaintiff's counsel erred in telling the jury that defendant had $69,000,000 worth of stock and that its stock was selling for $145.00 per share. Not only was sure information irrelevant, it was without foundation in the evidence.[25]

It frequently happens that in defending damage suits, an employee of the defendant is called as a witness. It is, of course, within the power of the jury to weigh the testimony of this witness in the light of his employment, and decide whether or not he is worthy of belief. But can counsel bring this point home forcibly to the jury in final argument? Surely he may if there is some evidence in the record indicating the witness' interest, and surely he may remind the jury that the witness is employed by defendant if that fact has been introduced into evidence. But it does not follow that counsel may argue that the witness testified as he did because he would have been discharged or suspended from his employment had he testified otherwise. Of course if it does appear as a matter of record that such witness had been threatened with his job in order to obtain his testimony, there is proper foundation for impeachment. Without it, however, the argument is improper, prejudicial and grounds for reversal.[26],[27]

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[25] Virginia Electric & Power Co. v. Jayne, *supra*, note 3.

[24] Norfolk-Southern R.R. v. Tomlinson, 116 Va. 153, 81 S.E. 89 (1914).

[26] Norfolk & W. R.R. v. Eley, 152 Va. 773, 148 S.E. 678 (1929).

[27] See Nugent v. Nugent, 156 Va. 753, 159 S.E. 185 (1931) for a case recognizing the right of counsel to comment on the weight of evidence of the mental condition of the donor of property given by a qualified expert.

Notwithstanding, the foregoing rule is not without its exceptions. The discretion of the trial court and the latitude allowed counsel are conditioning factors. *Sands & Co., Inc.* v. *Norvell*[28] is illustrative of these factors. Here plaintiff's attorney said, in final argument, that the agents of defendant had done wrong in handling plaintiff as they had, and that he was not surprised that one of the agents was no longer in the employ of defendant, for no one would want to employ anyone who had brought about the conditions resulting in the law suit. Defendant objected that there was no evidence in the record that the agent had been discharged. Plaintiff countered with the observation that the jury had the evidence and could draw its own conclusion. The court admonished the jury to decide the case on the basis of the evidence and not by argument of counsel unless supported by the evidence. In refusing to find error, the Supreme Court of Appeals stressed the latitude of counsel and the fact that, in the ordinary case, the discretion of the trial court is decisive of questions of this kind.

It follows from what has been said that where there is evidence in the record, counsel may discuss it. In so doing he is not limited to a mere review. It is proper for him to characterize the evidence in a logical manner. On direct examination, for example, a witness had testified that the train whistle had been blowing for a long time. Then in response to the inquiry (the facts giving rise to the case having happened on December 24), "Did it sound like it had Christmas in its bones?" — the witness replied, "It sounded like it had about a gallon in its bones." In final argument, plaintiff's attorney referred to this testimony as "hilarious." Defendant's objection to plaintiff's argument was held to be without merit, the Court stating, in effect, that the evidence (which was given without objection) showed that the conduct in question tended to be noisy, or merry, or even hilarious, and that there was nothing in the record to indicate that the use of the term in any way influenced the jury.[29]

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[28] 126 Va. 384, 101 S.E. 569 (1919).

[29] Director General of Railroads v. Gordon, 134 Va. 381, 114 S.E. 668 (1922).

Not only may counsel characterize the evidence in a logical manner, he may draw conclusions and inferences so long as he does not mistake the facts upon which they are based. In a case where a motorman had testified that he had formed the habit of looking into a certain area of the vehicle he was driving, it was held proper for counsel to comment in final argument as follows: "Here is the motorman, who said he always looked in this space every time before he pulled out; that it was a matter of habit. He knew and I know and you know why he looked up in there; it was because he knew that people went up in there, and he was looking to see. . ." This argument was, of course, calculated to show negligence on the part of the motorman—that he knew passengers were riding on the car in an unsafe place, and thus was related directly to an issue of the case. It therefore escaped the condemnation of being labeled as speculative argument.[30]

It has been stated previously that counsel may not engage in speculative argument relative to the question of damage for pain and suffering from physical injury.[31] Yet if there are "facts" in the record, even though such facts are based on opinion, a well-drawn inference will not be classified as speculation. Where, therefore, there was evidence of a hiatus hernia claimed to have resulted from an accident, and competent testimony described such hernia as a permanent injury unless corrected by surgery and, further, that surgery would be risky and undesirable, counsel was permitted to argue with the aid of a chart that the injury was a permanent one.[32]

If counsel may argue, relative to the question of damages, that an injury is permanent, does it follow that he may inform the jury of the amount for which he is suing? It has long been the rule in Virginia that a trial court may tell the jury that the verdict may not exceed the amount plaintiff claims. But until recently it has not been decided

[30] Burr v. Virginia Ry. & Power Co., *supra*, note 4.

[31] Certified T. V. and Appliance Co., Inc. v. Harrington, *supra*, note 20.

[32] Phillips v. Fulghum, *supra*, note 22.

whether or not counsel could inform the jury as to the exact amount. In a case of first impression on this point, the Supreme Court of Appeals has held that counsel may do so—that it is absurd to allow the court to tell the jury that the verdict may not exceed a certain amount then deny counsel the right to tell the jury what the amount is. If there is any danger of such information adversely affecting the jury, the court may instruct the jury that mention of the amount sued for is not evidence and should not be considered in arriving at the amount, if any, of the award.[33] If nothing else, this opinion should have the effect of preventing juries from bringing in verdicts in excess of the amount plaintiff claims, thus avoiding an occasional remittur or new trial.

While argument must be based on the evidence introduced at trial, there are two instances in Virginia law where counsel have been permitted to base argument on matters which are not evidence within the usual meaning of the term. Prior to the adoption of the Rules, where a demurrer to plaintiff's evidence was overruled, and judgment was entered for plaintiff, plaintiff's counsel was permitted to argue, relative to the amount of damages, that so far as the jury was concerned, the demurrer to the evidence was a practical admission of defendant's negligence. The Supreme Court of Appeals held that there was nothing here to prejudice the defendant. The fact that this case [34] was reversed on other grounds may, in part, explain the holding. Otherwise, under the present Rules of Court, the case seems to have little relevance. But what of the unique situation where testimony is erroneously excluded and counsel nonetheless proceeds to argue as though the evidence had been admitted? Such was the situation in *Richmond Ice Co.* v. *Crystal Ice Co.*[35] Here, in an action for rent,

[33] *Id.* Observant counsel noting this holding may now be tempted to ask on voir dire this question: "Plaintiff is suing in this case for $50,000. If he proves injuries to this amount by a preponderance of the evidence, under the law as given to you by the court would you be willing to award him this sum?" Will this question be considered an unreasonable extension of the rule? If not will it be grounds for challenge for cause if a juror answers "no" to it?

[34] Michael v. Roanoke Mach. Works, 90 Va. 492, 19 S.E. 261 (1894).

[35] 103 Va. 465, 49 S.E. 650 (1905).

the trial court sustained an objection to a question asked by plaintiff designed to bring out the fact that the premises in question were rented merely to get rid of an objectionable competitor. Notwithstanding the trial court's ruling, plaintiff's counsel argued to the jury that the premises were rented to get rid of a competitor. In refusing to find error in this argument, the Supreme Court of Appeals pointed out that the trial court in overruling the objection to the argument had stated that if its attention had been directed to a certain statute relative to the measure of damages to be awarded to a tenant in case of rented premises being demolished without his fault,[36] the objection to the question asked the witness would not have been sustained. Further, since there was evidence showing the purpose for which the premises were rented, it was material to argue the amount of rent reduction, if any, to which the tenant was entitled. It appears, then, that one may argue on the basis of evidence which has erroneously been excluded from the record, but it also appears that there is safety in having other evidence in the record to form a foundation for the argument.[37]

IV.

Inflammatory and Prejudicial Argument

Argument which is not based on the evidence is often condemned as prejudicial, although it may not necessarily

[36] VA. CODE § 2455 (1904).

[37] Baker-Matthews Lumber Co. v. Lincoln Furniture Mfg. Co., Inc., 148 Va. 413, 139 S.E. 254 (1927) is illustrative of the point that remarks made in opening statement must be directed to matters which are admissible as evidence. Here in an action for breach of contract, it was alleged that defendant had cancelled an order from plaintiff; that plaintiff sold the lumber and charged defendant the difference. With his declaration (motion for judgment) plaintiff had filed a letter to the effect that the fact that the market had declined should have no bearing on the case. Then in opening statement, defendant told the jury that defendant had received shipments from other suppliers and that it would have accepted the order from plaintiff if it had been shipped. The Supreme Court of Appeals denied plaintiff's claim of error, stating that the letter insinuated defendant's motive in asking for cancellation of the contract (which defendant had done), and that defendant had a right to repel the insinuation, the evidence tending to show cancellation resulted from defendant's plant being still under construction on the delivery date. Thus the rules governing counsel in opening statement basically parallel the rules governing final argument.

be inflammatory. Thus while many of the cases discussed in this portion deal with argument for which there is no basis in the evidence, most of them also deal with statements which appeal to sympathy, contain vituperation or are intemperate. Such argument has been the subject of firm disapproval and, as a general rule, is not tolerated.

> It may be that to this intemperate attack upon the defendant company the remarkable verdict of the jury is to be attributed, for it is against the weight of the evidence . . . We have frequently had occasion to allude to this bad habit of too many attorneys, who in the excitement of the contest ignore or forget that in a tribunal engaged in the investigation and determination of facts upon which the rights of the litigants depend, passion, prejudice and vituperation have no proper place; that the privilege and highest duty of counsel should be to aid the court and the jury by accuracy, learning, reason and persuasion to interpret the evidence so as to ascertain the truth; and that violent denunciations are a hindrance and not an aid thereto, which should not be permitted in a court of justice. The trial courts should firmly and unflinchingly restrain such indulgences. When they fail to do so and verdicts are induced thereby, they will and should be set aside.[38]

Still, as in the class of cases dealing with argument which is outside the record, counsel is allowed latitude, and a reversal will be ordered only when the evil of the argument cannot be corrected by the trial judge.

> [Counsel's] liberties in argument are large, but they are not unlimited. He has no right to testify in the argument nor to assume that there is evidence which has no existence, nor to urge a decision which is favorable to his client by arousing sympathy exciting prejudice, or upon any grounds which is illegal. Sometimes

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[38] Eagle, Star and British Dominions Ins. Co. v. Heller, 149 Va. 82, 112; 140 S.E. 315, 323 (1927).

> the impropriety is so serious in character that its evil effect cannot be corrected by the trial judge.[39]

Subject to proper objection being made,[40] reversible inflammatory argument is something other than a casual remark. It tends to excite and inflame, to focus strong attention on irrelevancies or to lead a jury to decide the case solely on moralistic grounds. So condemned was an argument by plaintiff's attorney to the effect that defendant's employees who had testified against defendant were afraid they would lose their jobs; that counsel for defendant rode in private and palace cars when they came to court; that the mind could not grasp the resources of the defendant, while plaintiff was poor, and that defendant would hardly feel the loss of the amount sued for; and that in estimating the damages the jury could take into account that defendant had taken many exceptions and would appeal if the verdict went against it.[42] The same applied when plaintiff's attorney argued, in response to defendant's argument that he did not think the jury would let plaintiff get away with his threat to ruin defendant, ". . .give me the judgment and I'll guarantee it will not ruin [defendant]; I'll guarantee it will not hurt [defendant]."[43] The same disapproval was voiced where plaintiff's counsel argued, "That man that did the flagging, I believe he has been with the railroad company, to be safe, anywhere from 20 to 25 years and if he hadn't told somebody he went out there and flagged this traffic he would have lost his job. That is how much interest he had in it. I am sure he would be fired. He ought to have been fired anyway."[44]

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[39] Atlantic Coast Realty Co. v. Robertson's Ex'r, 135 Va. 247, 263; 116 S.E. 476, 481 (1923).

[40] See Part VI of this Article.

[41] Crosswhite v. Barnes, 139 Va. 471, 124 S.E. 242 (1924).

[42] Southern Ry. v. Simmons, 105 Va. 651, 55 S.E. 459 (1906), *rev'ing* on other grounds.

[43] Goble v. Bingler, 177 Va. 641, 15 S.E.2d 33 (1941).

[44] Chesapeake & O. Ry. v. Folkes, 179 Va. 60, 18 S.E.2d 309 (1942). *Cf.*, Norfolk & W. Ry. v. Eley, *supra*, note 26, for a case emphasizing argument about discharging defendant's employees as having no foundation in the evidence in contrast to being inflammatory and prejudicial.

Worthy of special mention as illustrative of argument which has been characterized as inflammatory is *Seymour* v. *Richardson*.[45] This case has come to be known as the "Golden Rule" case and is important because it demonstrates that a remark which calls for basic human kindness on the part of the jury may incur the displeasure of reviewing courts. Here, in closing argument, counsel for plaintiff said, "All Mrs. Richardson asks you gentlemen to do when you retire to your jury room is to apply the Golden Rule. 'Do unto her as you wish that you would be done.' " This does not appear to be of the stuff of which vituperation or otherwise inflammatory argument is made, but nonetheless the court admonished that it should not be repeated in the new trial ordered only on the issue of damages:

> The important rule so attempted to be invoked was designed to regulate the conduct of the men among themselves before they bring their controversy to a jury. The function of the jury is to decide according to the evidence, not according to how its members might wish to be treated.[46]

While argument may be inflammatory and prejudicial, if it is provoked by the remarks of opposing counsel, the Supreme Court of Appeals is likely not to consider it grounds for reversal. Where plaintiff's attorney argued, "My friend [opposing counsel] says that when a cab is concerned one's imagination runs wild. It don't have to run wild. The cab runs wild," the Court stated the following rule:

> It is apparent that the statement to which objection was made was provoked by the prior statement of counsel for the defendant, quoted by plaintiff's counsel. Such being the case, we do not think it can be held that the reply made by plaintiff's counsel was so far out of bounds as to justify a new trial in any event. . .[47]

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[45] 194 Va. 709, 75 S.E.2d 77 (1953), *rev'ing* on other grounds.

[46] *Id.*, 194 Va. at 715; 75 S.E.2d at 81.

[47] Diamond Cab Co. v. Jones, 162 Va. 412, 418; 174 S.E. 675, 678 (1934).

Of similar import is *Brann* v. *F. W. Woolworth Co., Inc.*[48] Here defendant's counsel argued that plaintiff assumed defendant was rich and that he would get damages regardless of the evidence; that plaintiff's counsel was emotional; and plaintiff was exaggerating damages as everyone did. In something of a sarcastic attempt to "turn the other cheek," plaintiff's attorney stated that defendant's counsel had always been a fair judge; that he was not representing corporations when plaintiff's attorney first came to the bar; but that now he had been representing corporations for so long that he thought plaintiff should go to defendant and apologize to the store manager for falling on the ice the manager had placed in front of the store. The same result was announced in *McGregor, Adm'r.* v. *Bradshaw*,[49] where, in an action against two defendants, the court instructed the jury that a verdict could be returned against both. Then, in final argument one of the defendant's attorneys maintained the evidence afforded no basis for bringing in a verdict against one any more than the other. This was answered by plaintiff's attorney stating that neither defendant would be hurt by one penny if a verdict were rendered for plaintiff. Here the court did not condemn plaintiff's argument as inflammatory or prejudicial, but said *if* it were, it was provoked by defendant's remarks.

There is a group of cases in Virginia law where counsel have made inflammatory and prejudicial arguments yet which are not reversed because the trial court has cured the error by admonishing the jury to disregard the argument. Such actions on the part of the trial court are considered sufficient if there is not a manifest probability that the inflammatory argument has been prejudicial to the adverse party,[50] where it does not appear that the verdict has been

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[48] 181 Va. 213, 24 S.E.2d 424 (1943). *Cf.*, Bragg v. Hammack, *supra*, note 23, where castigating opposing counsel was chiefly characterized as argument not based on the evidence.

[49] 193 Va. 787, 71 S.E.2d 361 (1952).

[50] Washington & O. D. Ry. v. Ward's Adm'r., 119 Va. 334, 89 S.E. 140 (1916); Third Buckingham Community, Inc. v. Anderson, 178 Va. 478, 17 S.E.2d 433 (1941); Norfolk Southern Ry. v. Harris, 190 Va. 966, 59 S.E.2d 110 (1950).

affected by the prejudicial remarks,[51] where in general the court has not abused its discretion,[52] and where offending counsel has, upon objection, withdrawn the argument.[53] Nonetheless, in the heat of trial, counsel may fail to move the court for an admonishing instruction, thus waiving his objection.[54] It is important, therefore, to describe the following arguments as error-producing if not cured by cautionary instructions.

> To show a witness' bias, plaintiff's attorney undertook, on cross-examination, to ask about an adverse comment made by the witness concerning a coroner's verdict. To defendant's objection that plaintiff was attempting to get improper remarks before the jury, plaintiff's attorney replied: "I am going to show the bias of this witness, not when the jury is locked in the room out of sight, but when the jury hears the evidence. . ." [55]

> Where counsel argued that certain witnesses were employees of the defendant; that they were now testifying falsely out of a sense of loyalty to the employer (after they had explained discrepancies in testimony given at prior hearing on the basis that then they were testifying out of a sense of duty to a fellow employee); and that all of defendant's witnesses were under the domination of defendant.[56]

> "Where defendant characterized one of plaintiff's witnesses as "zealous" and said he did not know why he was so zealous. To which plaintiff's attorney replied, "I know why Hall was so zealous. He saw this man [de-

[51] Miller v. Jones, 174 Va. 336, 6 S.E.2d 607 (1940); County School Board of Orange County v. Thomas, 201 Va. 608, 112 S.E.2d 877 (1960).

[52] Cape Charles Flying Service, Inc. v. Nottingham, 187 Va. 444, 47 S.E.2d 540 (1948).

[53] Montgomery Ward & Co. v. Nance, 165 Va. 363, 182 S.E. 264 (1935).

[54] See Part VI of this Article.

[55] Washington & O. D. Ry. v. Ward's Adm'r., *supra* note 50.

[56] Norfolk Southern Ry. v. Harris, *supra*, note 50. *Cf.*, cases cited at notes 26 and 44.

fendant] coming up at such a rapid rate of speed. He probably felt like I would. He felt like he wanted to take a gun and shoot him." [57]

Where plaintiff's attorney argued: "We respectfully leave it in your hands and we are confident that when you have assessed all the evidence in this case in the light of the Court's instructions in such amount that if you should ever meet him in the street in later life you cannot say I did not do you justice." [58]

Where plaintiff's counsel argued: ". . .it could have been your child; it could have been the child of any one of your friends or acquaintances just as well as the child of Mr. and Mrs. Nottingham." [59]

Where in an action for libel and slander, plaintiff's attorney argued that defendant "kicked him down further" by filing a plea of justification stating that the allegedly libelous words were true.[60]

Yet it is not true that the admonition of the trial court to disregard inflammatory and prejudicial remarks will always completely cure the error. The case of *P. Lorrilard Co., Inc.* v. *Clay*,[61] is illustrative of an instance where cautionary instructions are partially ineffective in the light of compounded error and a resulting excessive verdict. Here plaintiff's attorney made remarks to the effect that the defense of contributory negligence was outworn (which he withdrew on objection); that machines were more expensive than flesh and blood, that men could always be gotten, but that it would cost money to buy new machines, and that if the jury allowed his client to go from the courtroom without compensation, they would be guilty of the character of act which is bringing on anarchy in this country (which the judge admonished the jury to disregard upon defendant's

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[57] Miller v. Jones, *supra*, note 51.
[58] County School Board of Orange County v. Thomas, *supra*, note 51.
[59] Cape Charles Flying Service, Inc. v. Nottingham, *supra*, note 52.
[60] Montgomery Ward & Co. v. Nance, *supra*, note 53.
[61] 127 Va. 734, 104 S.E. 384 (1920).

objection); and that the case was one where class was pitted against class—labor against capital (which the court, upon defendant's objection, admonished the jury not to consider). On appeal defendant argued that the court's admonishing the jury to disregard was ineffective and the Supreme Court of Appeals agreed. Basing the decision squarely on the size of the verdict, it was pointed out that the award of $15,000 was excessive in light of the evidence that plaintiff had returned to work at an increase in wages. Still, the court did not reverse! It merely reduced the verdict to $10,000 and affirmed the court below. It must be concluded that the Supreme Court of Appeals has ultimate faith in a jury's ability to follow admonishing instructions of trial judges.

V.

The Mention of Insurance

Unless an insurance company is a party to a law suit, mention of the fact that one of the parties is protected by liability insurance is ordinarily prohibited. Yet expressions of this rule vary in extremes. At least one jurisdiction sometimes views the "real party in interest" as the insurance company, and considers it "fraudulent" to conceal this fact from the jury.[62] Other jurisdictions consider the mention of insurance so prejudicial that it is per se grounds for a mistrial.[63] The rule in Virginia, however, lies between these extremes. Here the mention of insurance is considered to be irrelevant and inadmissible, but, depending on the circumstances, may or may not constitute reversible error.[64] Subject, of course, to proper objection being made [65] where

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[62] Jessup v. Davis, 115 Neb. 1, 211 N.W. 190 (1926); *Cf.*, Height v. Nelson, 157 Neb. 641, 59 N.W.2d 576 (1953) indicating error if not related to any issue in the case.

[63] Birmingham Elect. Co. v. Carver, 255 Ala. 471, 52 So.2d 200 (1951); Northern Ariz. Supply Co. v. Stinson, 73 Ariz. 109, 238 P.2d 937 (1952).

[64] See Walker v. Crossen, 168 Va. 410, 191 S.E. 753 (1937) for suggestions as to how far counsel may go in mentioning insurance on voir dire examination.

[65] P. Lorrilard Co. v. Clay, *supra*, note 61; Bloxom v. McCoy, 178 Va. 343, 17 S.E.2d 401 (1941).

attempts to put the mention of insurance before the jury are deliberate and repeated, a mistrial should be declared. In *Rinehart & Dennis Co., Inc.* v. *Brown*,[66] plaintiff's counsel, in opening statement, informed the jury that the defendant was only nominal, that the real defendant was an insurance company. Defendant's objection was sustained, and the court admonished the jury to disregard the remark. Then, on cross-examination, counsel for plaintiff asked an officer of defendant whether defendant carried insurance. Again objection was sustained and the jury was admonished that insurance was irrelevant to the case. Finally, in summing up, counsel again attempted to get the mention of insurance before the jury, but was stopped by the trial court. At no time did the trial court grant defendant's motions for a mistrial. In reversing a verdict for plaintiff, the Supreme Court of Appeals stated:

> It is too manifest to need argument, and indeed is conceded everywhere that the fact that a defendant is insured against accident can throw no light on whether or not he has been negligent in a given case. Consequently, evidence of insurance is irrelevant and inadmissible in an action against a defendant for a negligent injury . . . What is the effect, however, of getting such evidence before the jury over the objection of defendant?
>
> Ordinarily it must appear that defendant has been prejudiced, and one way to determine this is to look at the amount of the verdict. But examination of the size of the verdict is not the only way to discover the prejudice. There may be cases where the evidence does not warrant any recovery by plaintiff or the evidence leaves it doubtful that plaintiff is entitled to recover. In such cases the verdicts should be set aside. . . .But even in a case where the right of the plaintiff to recover is doubtful, the trial court should be alert to prevent any adventitious advantage that may turn the scales. The de-

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[66] 137 Va. 670, 120 S.E. 269 (1923).

> termination of the issue should not be prejudiced by improper evidence . . . which may affect the result.[67]

Nor will the theory that mention of the insurance is part of the res gestae or that it may constitute a statement against interest suffice to make it relevant and material. For example, in opening statement plaintiff's attorney said he'd prove that defendant told plaintiff at the scene of the accident that he had insurance and that the insurance company would pay all of the damages. Then on direct examination plaintiff testified as to what defendant had said about the insurance. Finally on cross-examination plaintiff asked defendant if he had not made the statement to which plaintiff testified. At each of these instances defendant objected, moved the matter be stricken and moved for a mistrial. Reversing, because of the trial court's failure to grant defendant's motion for mistrial, the Court stated:

> Any account of the transaction made at the time by the defendant is a part of the res gestate, but the statement that he had insurance is not an account of the transaction. The alleged statement of the defendant that it was his fault is admissible as evidence and there was a proper and legal way to get it before the jury with the omission of the suggestion of the insurance. This, however, was not adopted. It was the declared intention of plaintiff's counsel to get it in not as part of the res gestae but as substantive proof, and this was with the approval of the trial court.[68]

Even when the carrying of insurance is mandatory, as in the case of commercial carriers, the mention of insurance

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[67] *Id.*, 137 Va. at 675-6; 120 S.E. at 271-272. In Gilbert v. Gulf Oil Corp., 175 F.2d 705 (4th Cir. 1949), the trial court admitted hearsay evidence and then counsel for defendant stated that the real defendant was not Gulf but the local distributor who had indemnified Gulf; further, that the real plaintiffs were out-of-state insurance companies. In spite of a cautionary instruction, the Court of Appeals reversed.

[68] Lanhan v. Bond, 157 Va. 167, 176-1, 160 S.E. 89, 92 (1931).

is prohibited. In *Worrell* v. *Worrell*,[69] plaintiff passenger was injured while riding on a bus (the driver being plaintiff's father). Plaintiff wished to stipulate that defendant had notified the insurance company, as he was required to do, and that the suit was being defended by the insurance company. This the trial court refused to permit. The Supreme Court of Appeals affirmed the trial court on this point, emphasizing that while the presence of liability insurance does not affect the merits of the cause of action against the insured, it does lessen the effect of the liability on the wrongdoer.

Notwithstanding the strict attitude expressed in the foregoing cases relative to the mention of insurance, if such mention is provoked it will not be grounds for reversal. Such an instance appears in *Majestic Steam Laundry, Inc.* v. *Puckett*.[70] Here, in closing argument, defendant's counsel referred to one witness as a police officer from Detroit "down here" to go into defendant's pockets. Plaintiff's attorney replied, "If you give me a verdict for $11,000 I won't go into Mr. Bradley's pocket for one cent of it." Defendant, of course, thought this was a rather furtive way of informing the jury that it was backed by liability insurance. But in view of defendant's remarks, the error was held to have been invited.[71]

To constitute reversible error, it must further appear that the mention of insurance is other than casual. Mere surmise, for example, does not constitute a mention of insurance. Thus where a photographer in being questioned about some pictures he had taken said that he gave them to named persons who happened to be well known insurance

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[69] 174 Va. 11, 4 S.E.2d 343 (1939). It obviously follows that if such stipulations cannot be allowed to reach the jury, the jury's being informed that there is insurance in the case from sources outside the courtroom will constitute error. In Dozier v. Morrissette, 198 Va. 37, 92 S.E.2d 366 (1956) an insurance agent's advising the jury on the courthouse green that both parties were insured constituted error.

[70] 161 Va. 524, 171 S.E. 491 (1933).

[71] *Accord*, Maryland Casualty Co., Inc. v. Kelly, 45 F.2d 788 (4th Cir. 1930).

agents in the area, the Court held that in reality there had been no mention of insurance.[72] The same result obtains where mention of insurance is made unintentionally and it appears that substantial justice has been done. Where, therefore, defendant's attorney asked a doctor whether or not another doctor was consulting on the case, and the witness replied by reading a letter from the consultant, "This is an insurance case and although I am unable to find any real difficulty, I would appreciate you seeing her in consultation," a motion for mistrial was denied, and the denial of the motion was affirmed on appeal because the mention of insurance appeared to have been unresponsive and fragmentary.[73] And, of course, if the mention of insurance is not made in the presence of the jury, no prejudice can result.[74]

There are two instances in Virginia jurisprudence, however, where direct mention of insurance may be made. The first is where the record shows that the action is for the benefit of the insurance company. In *Norfolk & Portsmouth Belt Line R. R.* v. *Jones*,[75] the action was originally brought in the name of the administrator of an estate. Thereafter, on the motion of the defendant, the court ordered the style of plaintiff be amended to read as in the name of the administrator and "for the benefit of [X] Ins. Co. as its interest might appear." Defendant then made objection to plaintiff's attorney stating, in opening statement, that the action was for the benefit of the widow and son. While finding that counsel had not stated the whole truth, and that the jury had a right to know what the record showed, the Court held the error to be incidental and not affecting the final judgment.

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[72] Gaines v. Campbell, 159 Va. 504, 166 S.E. 704 (1932).

[73] Simmons v. Boyd, 199 Va. 806, 102 S.E.2d 292 (1958). This is a 4-3 decision, the dissenters considering the mention of insurance being prejudicial in the light of shallow proof of plaintiff's injuries and the fact that the verdict was for the full amount of the suit. Armstrong v. Rose, 170 Va. 190, 196 S.E. 613 (1938) is in accord with the majority opinion.

[74] Kiser v. Suthard, 162 Va. 456, 174 S.E. 687 (1934).

[75] 183 Va. 536, 32 S.E.2d 720 (1945).

The second instance permitting mention of insurance is where the presence of insurance is necessary to show interest or bias of a witness. *Highway Express Lines, Inc.* v. Fleming [76] is illustrative. Here defendant produced an insurance agent to testify at trial. The agent proceeded to contradict five of plaintiff's witnesses. The question then arose as to whether plaintiff could inform the jury that the witness was an insurance agent for the purpose of showing his bias. The trial court granted plaintiff's request, and, in affirming, the Supreme Court of Appeals resolved the dilemma as follows:

> In this Scylla-and Charbdis dilemma most courts have attempted to concede something to each of the opposing principles, i.e., by allowing the question when properly asked either of a juror on his voir dire or of a witness to establish his interest or bias. 2 Wigmore on Evidence, 3d Ed., sec. 282 a.[77]

In brief, as the Court said, in deciding whether or not defendant was negligent, the jurors had to determine what weight to give the witness, and were entitled to know his interest or bias and his relation to the party ultimately liable.

VI.

Procedural Aspects

It sometimes happens that error is claimed because the trial court has refused to permit adequate time for final argument. But the holdings are uniform that the time allowed is within the sound discretion of the trial court and its ruling will not be disturbed on appeal unless an abuse of discretion clearly appears. Thus where the evidence is brief and the instructions clear and simple, it is not error to limit counsel to 50 minutes per side.[78] On the other hand,

[76] 185 Va. 666, 40 S.E.2d 294 (1946).

[77] *Id.*, 185 Va. at 672, 40 S.E.2d at 298.

[78] Brown, Admr. v. Peters, Adm'r., 202 Va. 382, 117 S.E.2d 695; Cohen v. Power, 183 Va. 258, 32 S.E.2d 64 (1944). The same rule of discretion applies to the time allowed for argument on instructions. Seaboard Air Line Ry. v. J. E. Bowden & Co., 144 Va. 154, 131 S.E. 245 (1926).

it is an abuse of discretion to limit counsel to 30 minutes when the witnesses are many (five for plaintiff, ten for defendant), where the issues are complicated and where the instructions are lengthy (three at request of plaintiff, six at request of defendant). And in such instances it will not constitute a waiver of the point because counsel has failed to request additonal time, it appearing that such request would have been futile.[79] Ordinarily, however, the proper method for preserving such point for appeal is to request additional time when the time allotted proves to be too short, and to note an exception to an adverse ruling on the request.[80]

When it comes to preserving the record for appeals claiming error for improper argument, it is fundamental that the language complained of must appear in the record.[81] And it is equally as important that the reasons for the trial court's action on objections to improper argument appear in the record in order for the reviewing court to intelligently decide the matter.[82]

The method of properly getting the objections into the record is simple. The rule may be succinctly stated as follows: The proper practice is to make objection when the remark is made, the court requested to discharge the jury and declare a mistrial or to instruct the jury to disregard the improper remarks and note exceptions to any adverse rulings of the court.[83] In the application of this rule it must be noted that it is mandatory that objection be made [84] and that exception be taken to an adverse ruling.[85] To these requirements there are no exceptions except in most unusual circumstances.[86] Probably the most common error, though, is not the failure to make objection or the failure to save

[79] Jerrell v. Norfolk & P. Belt Line R.R., 166 Va. 70, 184 S.E. 196 (1936).
[80] Cohen v. Power, *supra*, note 77.
[81] Norfolk & W. R.R. v. Shott, 92 Va. 34, 22 S.E. 811 (1895).
[82] Lemons v. Harris, 115 Va. 809, 80 S.E. 740 (1914), *supra*, note 11.
[83] Chesapeake & O. Ry. v. Foulkes, *supra*, note 44.
[84] Brann v. F. W. Woolworth Co., Inc., *supra*, note 48.
[85] Majestic Steam Laundry, Inc. v. Puckett, *supra*, note 70.
[86] Cooke v. Griggs, 183 Va. 851, 33 S.E.2d 764 (1945).

an exception, but the failure to make objection at the time the improper remarks are made. It cannot be too strongly stated that the time to make the objection is *when* the offending words are stated. The reason is obvious: this is the only time the trial court has an opportunity to make a direct ruling on the objection.[87] If the objection is not made until the case is submitted to the jury [88] or until after verdict,[89] it comes too late.

Equally as important as making timely objection is the requirement that the court be requested to declare a mistrial. This may be so even were the court has, upon motion, instructed the jury to disregard objectionable remarks. Otherwise the question is demed to have been waived.[90]

Of course, the mere fact that objections are fully, correctly and timely made, and exceptions saved to adverse rulings does not guarantee appellant success on appeal. Here the harmless error doctrine may rise to haunt him. In Virginia this doctrine is based on statute [91] and is usually invoked when the Supreme Court of Appeals considers a cautionary instruction by the trial court to have been effective in removing the prejudice resulting from improper argument.[92] But the statute is not a cure-all for improper argument. It is applied only when it appears from the entire record that a fair trial has been had:

> . . .The statute contains no presumption that an error is harmless. It only applies where it plainly appears

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87 Bloxom v. McCoy, *supra*, note 65.

88 Armstrong v. Rose, *supra*, note 73; Piccolo v. Woodford, 184 Va. 432, 35 S.E.2d 393 (1945), *supra*, note 10; Burks v. Webb, 199 Va. 296, 99 S.E.2d 629 (1957).

89 Southern Ry. v. Simmons, 105 Va. 651, 55 S.E. 459 (1906); P. Lorrilard Co., Inc. v. Clay, *supra*, note 61; Southern Ry. v. Johnson, 151 Va. 345, 146 S.E. 363 (1928).

90 Diamond Cab Co. v. Jones, *supra*, note 47; Gable v. Bingler, *supra*, note 43; Virginia State Fair Ass'n. v. Burton, 182 Va. 365, 28 S.E.2d 716 (1944); Hargrow v. Watson, Adm'r., 200 Va. 30, 104 S.E.2d 37 (1958).

91 VA. CODE ANN. § 8-487 (1950).

92 P. Lorrilard Co., Inc. v. Clay, *supra*, note 61.

> that a fair trial on the merits has been had and that substantial justice has been reached. . . .[93]

In deciding whether or not substantial justice has been reached, so as to apply the harmless error doctrine, recourse is often had to the size of the verdict. But it is erroneous to so limit application of the rule, for such partakes of that genius which comes only from hindsight. Thus if it appears that no verdict for the prevailing party would have been rendered but for the improper argument, the verdict will be set aside regardless of its amount.[94]

VII.

Conclusions.

By and large, it is difficult to find anything to quarrel about in the Supreme Court of Appeals' handling of cases involving improper argument. Perhaps *Certified T. V. and Applicance Co., Inc.* v. *Harrington,*[95] bends a bit too far backward in holding that actual estimations for pain and suffering damages may not go to the jury. Since, as the Court says, no concrete value can be placed on such damages, what is wrong with counsel's attempting to give the jury some frame of reference for the job? The trial court's usual instructions will inform the jury that argument of counsel is not evidence and that it is the judge of the amount of damages to be given. It is difficult to believe that the average jury will believe that counsel's estimate of such damages is the only, the controlling, figure on the subject.

And, from another viewpoint, perhaps some of the cases considering the mention of insurance inadvertant and casual so as not to require reversal bend too far in favor of the harmless error doctrine.[96] The mention of insurance is not

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[93] Dozier v. Morrisette, *supra,* note 69, 198 Va. at 41, 92 S.E.2d at 369.

[94] Norfolk & W. Ry. v. Eley, 152 Va. 773, 148 S.E. 678 (1929), *supra,* note 26; Gilbert v. Gulf Oil Corp., *supra,* note 67.

[95] 201 Va. 109, 109 S.E.2d 126 (1959), *supra,* note 20.

[96] Gaines v. Campbell, *supra,* note 72; Simmons v. Boyd, *supra,* note 73.

only, in most cases, immaterial and irrelevant, it is by its very nature prejudicial. It is too easy for a jury, when the question of actual liability is close, to resolve this issue in favor of the plaintiff because it knows that defendant, having insurance, will not personally be financially hurt. And even where the issue of liability is not close, juries may be inclined to compensate injured persons because they know that impersonal, distant insurance companies will bear the cost. Yet such criticism must be tempered in the light of the facts that most juries probably assume that one or the other of the parties is insured because of a great deal of newspaper discussion of compulsory insurance laws, and because of the expense involved in the granting of new trials which likely would have the same result as the case on appeal.

One comment can be made with certainty: the harmless error doctrine, while it can, and often does, save a case from reversal is too slippery a concept to rely upon as an excuse for deliberately interjecting improper argument into a trial. What at the time may seem mild, and corrective by cautionary instructions, may prove, when the record is finally assembled, to be one of a number of improper statements which when viewed as a whole are indeed prejudicial.

None of this means that the "good old days of oratory" are gone forever from the courtrooms. There is still room for direct, vigorous and forceful argument within the rules announced by the Court. As far as "persuasion" is concerned, trial counsel will do well to remember some fundamental concepts. Juries respect judges and are likely to seek refuge in instructions if and when they become confused by arguments of counsel which have no relevancy or logical connection to the evidence they have heard. Finally, perhaps the best means of persuasion is good, sound, logical exposition—explanation of the facts. Emotions after all are fleeting things. Excited passion and sympathy soon give way to more even tenors of thought. But reasoned conviction, based on facts, on logic, and on law is lasting and permanent. Convince the jury, and the case is won—won permanently.