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APPEAL AND ERROR - HARMLESS AND PREJUDICIAL ERROR

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APPEAL AND ERROR — HARMLESS AND PREJUDICIAL ERROR — In the trial of defendant for embezzlement, the prosecutor's opening address to the jury included a hearsay statement, regarding a tacit admission by defendant, tending to establish his guilt. Subsequently in the trial such hearsay statement was not allowed in evidence and the defendant now claims on appeal from conviction that the opening statement was prejudicial and thus he is entitled to a new trial. *Held*, that the statute governing reversals by an appellate court for prejudicial errors did not apply; and that a new trial follows as a matter of course because of a deprivation of the constitutional right to fair jury trial by the admission of the improper evidence in prosecutor's opening statement. *People v. Bigge*, 288 Mich. 417, 285 N. W. 5 (1939).

The Michigan court was operating under a statute similar to statutes existing in a majority of the states.[1] The general interpretation of such statutes is

[1] Mich. Comp. Laws (1929), § 17354: "No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." At least one-half of the states have similar statutes, providing there shall be no reversal unless alleged error complained of is prejudicial to substantial rights of adverse party, Wis. Stat. (1937), § 274.37; or "affects the merits of the judgment, decision, or decree complained of," Tenn. Code (Michie, 1938), § 10653; or, finally, "substantial justice" has not been done to such complaining party, Ohio Gen. Code (Page, 1938), § 11364.

that the appellate court will consider the whole cause from the record and evidence brought before it, and will not reverse the decision if a correction of the alleged error would not change the final result even though an erroneous ruling had been committed.[2] Courts interpreting the statute distinguish between technical errors [3] and substantial or fundamental errors [4] affecting the constitutional rights of litigants, holding that the statute applies [5] only to the technical errors committed by trial courts during the trial or by litigants during pleading; thus the fundamental errors so mentioned require a reversal per se. The technical errors are subdivided into two groups. The group requiring reversal as affecting the final outcome are denominated prejudicial technical errors [6] and often are called substantial errors.[7] The second group includes those technical errors denominated non-prejudicial or harmless errors, and thus do not require a reversal as not affecting the outcome of the case. Often, the court will put the error in one or the other of the main classifications so depicted above, depending on whether it feels the case requires a reversal per se or not, and such seems to be the majority opinion of the present Michigan case under discussion. The error committed resulted in the admission of inadmissible evidence, and would be generally considered by most courts as a mere technical error [8] and thus not grounds for reversal in and of itself. However, the principal decision changed this about and said that allowing such evidence to get before the jury was a deprivation of the constitutional right to a fair trial with all incidents thereto; or, in other words, one has a constitutional right to a fair trial, and if not

[2] Concerning alleged admission of erroneous evidence, the Indiana court, on review, said: "If the particular items . . . had been excluded . . . it is apparent, in view of remaining evidence, that the jury could not have done otherwise in the discharge of its duty to convict appellant"; and thus affirmed conviction regardless of erroneous admission of such matter. Sanderson v. State, 169 Ind. 301 at 315, 82 N. E. 525 (1907). See also Riggins v. State, 78 Fla. 459, 83 So. 267 (1919); State v. Morris, 83 Ore. 429, 163 P. 567 (1917). All these courts realize that the end of a trial should be to attain the truth, and once attained, a mere technicality should not render it void.

[3] Such technical errors are numerous and a few examples are: improper admission of evidence to prove a fact already established, Tilly v. State, 21 Fla. 242 (1885); failure of attorney to keep within time allotted for address to jury, Walker v. State, 185 Ind. 240, 113 N. E. 753 (1916); erroneous instruction though verdict right on evidence, Long v. State, 192 Ind. 524, 137 N. E. 49 (1922).

[4] Fundamental errors depriving one of constitutional right to trial by jury embodies such rights as notice, hearing, trial by fair and competent tribunal, freedom from self-incrimination, etc.

[5] People v. O'Bryan, 165 Cal. 55, 130 P. 1042 (1913), vividly sets out the limited application of the statute.

[6] Harmful charge assuming essential facts not established is reversible, Goodbread v. Thomas, 82 Fla. 411, 90 So. 156 (1921); admitting evidence of collateral crimes independent of one in question is reversible, Gafford v. State, 79 Fla. 581, 84 So. 602 (1920).

[7] The common usage by courts of term "substantial errors" when referring to prejudicial technical errors should not be confused with "substantial errors" when referring to those affecting the constitutional rights of litigants.

[8] Compare State v. Williams, 28 Nev. 395, 82 P. 353 (1905).

obtained, a reversal follows without further consideration. The dissent in the principal case asserts one has no right to a perfect trial, realizing that the purpose of this statute is to take care of just such technical error as was committed here. The fact that the statute expressly mentions errors in admission or rejection of evidence seems to sustain the view that to deny one a perfect trial by an erroneous ruling on evidence is not an invasion of a constitutional right, for if it were, reversal would necessarily follow without perusing the evidence as a whole as the statute requires in just such a case. A few courts still act automatically and in the face of such statutes continue the old practice of presuming prejudice and declaring reversals for any and all errors, while the courts of other states vacillate between following and completely ignoring the statutory provisions.[9] However, the majority of the courts in states possessing such statutes seem to be cognizant of the time, money, and excess litigation saved by acting in accordance with its provisions, and consequently do so. In considering such statutes, it is also important to note who has the burden of proving the prejudicial technical errors which would warrant a reversal. The burden usually falls on the appellant or party complaining; [10] however, some courts persist in putting the burden on the appellee in both a criminal and civil appeal and thus require him to show that the errors complained of are not prejudicial in order to warrant an affirmance.[11] The fact that the statute provides "that it shall affirmatively appear" that there be prejudicial error is some basis for placing the burden of proof on the appellant. All courts agree that appellant must show "doubt" [12] as to whether the error was prejudicial and affected the final outcome, while some of them require appellant to go further and "clearly" [13] show actual prejudice. In due regard to the purposes of the statute, it is submitted that the minority decision in the principal case is more reasonable in refusing reversal unless a correction of the technical error would warrant a change in the final outcome of the case.

[9] Vacillation by one court in one day illustrated in People v. Bonier, 179 N. Y. 315, 72 N. E. 226 (1904), which presumes prejudice and reverses; while in People v. Davey, 179 N. Y. 345, 72 N. E. 244 (1904), the same court expressly asserts that cases should not be reversed on mere technical errors.

[10] Griswold v. State, 77 Fla. 505, 82 So. 44 (1919); Cape Girardeau & Chester R. R. v. Blechle, 234 Mo. 471, 137 S. W. 974 (1911).

[11] People v. Pierce, 218 App. Div. 254, 218 N. Y. S. 249 (1926); Salisbury v. Goddard, 79 Ore. 593, 156 P. 261 (1916).

[12] Riley v. State, 95 Ind. 446 (1884); Stalcup v. State, 146 Ind. 270, 45 N. E. 334 (1896).

[13] State v. Merlo, 92 Ore. 678, 173 P. 317, 182 P. 153 (1919).