

escaped injury by the exercise of ordinary care. Upon this question reasonable men could come to only one conclusion. There was, therefore, nothing for submission to the jury. *McGill v. Company*, 70 N. H. 125, 128; *Waldron v. Railroad*, 71 N. H. 362, 364. In accordance with the stipulation upon which the case was transferred, it should be entered: Neither party, no further action for the same cause.

*Exception overruled.*

All concurred.

Hillsborough, }  
May 4, 1915. }

JOSEPH LEMAY v. HONORE DEMERS.

Where there is no evidence concerning the defendant's financial condition, a statement in argument which in effect informs the jury that he is a person of slender means exceeds the limits of legitimate advocacy, and furnishes ground for setting aside the verdict unless the objectionable remarks are withdrawn, the jury are instructed not to consider them, and the presiding justice finds that the trial was not rendered unfair.

CASE, for negligence. Trial by jury and verdict for the defendant. Transferred from the September term, 1914, of the superior court by *Chamberlin, J.*

The action was brought to recover for injuries received in a collision between motor cycles operated by the plaintiff and the defendant. In closing argument the defendant's counsel used the following language: "I think I need say nothing more. The man was injured. We are not concerned in his injuries in this case outside of the sympathy we have for him, that anybody would have for him, in his injury. But when he comes to Honore Demers and says, 'Demers, out of your little estate I want the whole of it [at this point counsel for the plaintiff objected and claimed an exception] to the extent of what I claim in my writ,' or whatever he may say about that as to how much he wants, under those circumstances we say, when you come into court you must come with clean hands."

The *ad damnum* in the writ was \$5,000. There was no evidence as to the amount of the defendant's estate, whether it was much

or little, or whether he had any property, except as might be inferred from the fact that he was a loom-fixer and ran a shop in the motor cycle and bicycle business in Manchester. In the charge to the jury no special reference to the exception was made. They were instructed in the usual way not to consider any unwarranted inferences drawn by counsel from the evidence, and that the fact that the parties were man against man made no difference. The defendant's counsel did not withdraw any part of the objectionable remarks, and the court did not instruct the jury to disregard them.

*Osgood & Osgood* (Anson C. Osgood orally), for the plaintiff.

*Jones, Warren, Wilson & Manning* (Mr. Manning orally), for the defendant.

PLUMMER, J. The natural tendency of the objectionable remarks was to arouse sympathy for the defendant and render the trial unfair. It was an improper attempt to get before the jury a statement of fact favorable to the defendant and prejudicial to the plaintiff, which was not in evidence and, if it had been offered, would have been excluded. The case is not to be distinguished from *Caverhill v. Railroad*, ante, 330, in which counsel for the plaintiff argued "that the verdict asked was not a very serious matter to the railroad, 'taking from them a few coppers, . . . but it means a good deal to her.'" This was held to exceed the limits of legitimate advocacy, and the court said: "The argument was plainly intended to mislead the jury and to lay before them facts which could not be in evidence. Whether it was easy or difficult for the defendants to pay, whether the amount claimed was to them mere loose pocket-change, 'a few coppers,' or their entire estate, were matters foreign to the issues before the jury." So in the case at bar, whether the defendant's estate was little or large, or whether it would take all of it to pay the verdict that the plaintiff might obtain, were matters in no way germane to the issues on trial. When exception was taken to the improper statement, it was incumbent upon the defendant to withdraw it, obtain an instruction to the jury not to consider it, and a finding of fact from the presiding justice that the trial was not rendered unfair thereby. *Bullard v. Railroad*, 64 N. H. 27, 32; *Story v. Railroad*, 70 N. H. 364. No such action

having been taken by the defendant, it cannot be said that the trial was not rendered unfair by the improper and prejudicial argument.

*Plaintiff's exception sustained: new trial granted.*

All concurred.

Grafton, }  
May 4, 1915. }

EDWIN B. PALMER v. CHARLES H. DIMICK.

Where an interrogatory of counsel in cross-examination embodies a prejudicial statement of fact unwarranted by any evidence then in the case and inadmissible upon any issue on trial, a verdict in his favor will be set aside unless the objectionable remark is withdrawn, the jury are instructed not to consider it, and the presiding justice finds that the error did not render the trial unfair.

Where an objectionable statement by counsel in cross-examination has been retracted and its prejudicial effect eliminated, a reiteration of the remark in closing argument is a violation of the law of the trial and sufficient cause for reversal, in the absence of a specific finding that the jury were not influenced thereby.

CASE, for slander. Trial by jury and verdict for the plaintiff. Transferred from the October term, 1915, of the superior court by *Sawyer, J.*

The alleged slander consisted of remarks by the defendant reflecting upon the honesty of the plaintiff in his business dealings. It appeared in evidence that one Heaton, who was a witness for the defendant, had previously sued the plaintiff for stealing two notes from him, and that that action had been tried before a master, who had filed his report, but that no judgment had been rendered thereon. During the cross-examination of Abbott, who had shown some bias for the defendant, reference was made to the suit *Heaton v. Palmer*, when the plaintiff's counsel asked "We have got that tried and got a decision?" and the witness replied "Yes." Counsel for the defendant excepted, whereupon the court said to the jury "Strike it out of your minds, gentlemen," and the plaintiff's counsel remarked "Strike it out; it is of no consequence."

In his closing argument, the plaintiff's counsel used the following language, to which the defendant excepted: "Edwin C. Abbott was another man who testified; says he was always good friends [with