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Procedure, Section II - Issue for Jury (Survey of Virginia Case Law - 1955)

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Section II.—Issue for Jury, Instructions, Prejudicial and Invited Error, Qualification of Jurors, Quotient Award.

Issue for Jury. In determining the sufficiency of issues for submission to jury, recent Virginia decisions have been distinguished by the absence, rather than presence, of any departure from the well-settled principles of rules of Virginia procedure.

In but one case, *Fletcher's Admn.* v. *Horn and Thompson*, 197 Va. 317, 89 S.E.2d 89 (1955), did members of the court voice dissenting opinions. The remaining cases, though occasionally subjected or subject to discussions of theoretical merit, fall neatly into the generally accepted procedural patterns.

Fletcher's Admn. v. *Horn and Thompson* presented an action for damages which arose from a collision between two motor vehicles. It was held that the court might properly strike from the record "indefinite and relative" testimony tending to show excessive speed by the defendant since there was no proof that the defendant's alleged speed was the cause of the collision. The position of the vehicles after the collision was not deemed admissible in evidence to show speed as a cause,[1] and, since the defendant's testimony was not otherwise disputed, no issue was presented for jury determination. The decision is supported by the principle that it is for the court, not the jury, to determine the admissibility of evidence,[2] although there appears to have been a too-fine distinction drawn between evidence which is insufficient for admission and that which is insufficient as conclusive proof.

In contrast is the case of *Crist* v. *Washington, Virginia and Maryland Coach Co.*, 197 Va. 642, 85 S.E.2d 213 (1955), where it was held for the jury to determine whether evidence of the jolt of a common carrier, which was the alleged cause of plaintiff's injury, indicated a sudden or violent jolt, imposing liability upon the carrier, or merely a slight and ordinary jolt from which no liability would result.[3]

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[1] Buchanan v. Miller, JJ., dissented to this ruling, maintaining that physical factors were properly jury considerations for the determination of their appropriate evidential weight.

[2] Norfolk & W.R.Co. v. Harman, 104 Va. 501, 52 S.E. 368 (1905).

[3] Richmond Greyhound Lines v. Ramos, 177 Va. 20, 12 S.E.2d 789 (1941).

In presenting to the jury the question of the defendant's negligence in *Boland* v. *Love*, 222 F.2d 27 (1955), where the defendant, a resident of the District of Columbia, allowed his employee, known to be untrustworthy and unqualified to drive, access to an automobile, the United States Circuit Court of Appeals of the District of Columbia, obtaining jurisdiction on diversity of citizenship,[4] held that, since the particular conduct involved in the facts of the case presented a question of the standard constituting ordinary care which neither Virginia statute nor final appellate court decision had established, the Federal Court should apply the law of the Forum, the District of Columbia. The question of negligence and its causal connection to the plaintiff's injury were accordingly submitted to the jury.

The issues presented in five additional 1955 cases were refused submission to a jury on less controversial grounds than those relied upon in *Fletcher's Admn.* v. *Horn and Thompson.*

In *Dickerson* v. *Miller*, 196 Va. 659, 85 S.E.2d 275 (1955), the court held the benefit derived by an employer from the overtime services of an employee to be sufficient consideration for transportation furnished to exclude the employee from the provisions of the Virginia guest statute, Code of Virginia (1950), Section 8-641.1, when injured due to the ordinary negligence of his employer in operating a motor vehicle. As a matter of law, such consideration, when bargained for and not merely incidental, renders the injured person a "paying passenger" under the terms of the statute and entitled him to a recovery for his injury from a tort-feasor who has failed to exercise ordinary care.

Hopson v .*Goolsby*, 196. Va 832, 86 S.E.2d 149 (1955), and *Lambert* v. *Nehi Bottling Company*, 196 Va. 949, 86 S.E.2d 156 (1955), declared pedestrians and motorists, respectively, guilty of contributory negligence as a matter of law when, as stated in the opinion of *Hopson* v. *Goolsby*:

> . . . a person having a duty to look 'carelessly undertakes to cross without looking, or, if looking, fails to see or heed traffic that is obvious and in dangerous proximity and continues on into its path, he is guilty of negligence as a matter of law'.[5]

[4] The plaintiff was a resident of Virginia.
[5] 196 Va. 832, 839, 86 S.E.2d 122, 124 (1955).

Chesapeake and Ohio Railway Company v. *Hanes*, 196 Va. 806, 86 S.E.2d 122 (1955), and *Southern Railway Company* v. *Wilson*, 196 Va. 883, 86 S.E.2d 53 (1955), involve the same principle upon which *Hopson* v. *Goolsby* was decided. Variations arose in the application of the principle as a result of diverse statutory provisions.

In *Chesapeake and Ohio Railway* v. *Hanes*, the deceased was held contributorily negligent as a matter of law when she drove upon a railroad grade crossing in the face of an oncoming train. An issue for jury determination had been presented in deciding whether the mandatory signal[6] had been given by agents of the defendant-railway company during the approach of its engine.

The failure of the plaintiff to exercise due caution in ascertaining the approach of a train was held a bar to his recovery for injuries in *Southern Railway Company* v. *Wilson*, 196 Va. 883, 86 S.E.2d 53 (1955), since signals by the Railway Company were not mandatory, but merely permissive under the municipal ordinances of the city of Charlottesville. Since the statute does not provide that contributory negligence shall be considered in mitigation of damages except in the case of mandatory signal statutes, the question of the negligence of the Railway was not considered. These two cases of comparable factual situations were brought to different conclusions, procedurally, by the statutory provisions pertaining to contributory negligence in one and the silence on the matter of contributory negligence in the other, which gave application to the Virginia common law rule of contributory negligence as a bar to recovery.

Instruction—Prejudicial Error.

> If a misdirection, or other error, of the court appear in the record it is presumed to have affected the verdict of the jury . . . unless it plainly appears from the whole record that the error did not and could not have affected the verdict.[7]

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[6] Virginia Code 1950, §56-416, providing for the doctrine of comparative negligence in cases where mandatory warning signals are omitted by operators of any railroad engine upon its approach to the grade crossing of any public highway.

[7] Southern R. Co. v. Forgery, 105 Va. 599, 54 S.E. 477 (1906).

In *Spence* v. *Miller*, 197 Va. 477, 90 S.E.2d 131 (1955), the statement of a trial judge, made upon the defendant's objection to cross-examination, that the defendant seemed reluctant to give straight-forward answers, was held to constitute prejudicial error.

Similarly, in order to avoid prejudicial error upon proper objection by the party aggrieved, the word "shall" as used in an instruction on the measure of damages for death by wrongful act[8] should be substituted with permissive words such as "may" or "can" or a phrase such as "are allowed to"[9] to prevent jurors from attaching undue weight to instructions intended to denote factors for the jurors to consider in ascertaining damages.

The failure of the court to instruct the jury on the duties imposed upon motorists by Section 46-244, Code of Virginia (1955), giving the right of way to pedestrians walking within any clearly marked crosswalk is prejudicial error. *Marshall* v. *Shaw*, 196 Va. 678, 85 S.E.2d 223 (1955).

In *Greear* v. *Noland Company*, 197 Va. 233, 89 S.E.2d 49 (1955), it was held that a refusal to sustain objection to immaterial evidence, harmful to the plaintiff's action, tended to convey to the jury that the plaintiff's recovery was dependent upon the jurors' invalidation of such immaterial evidence. A mere statement by the lower court that a recovery could not be barred by facts presented in the immaterial evidence was not considered sufficient to constitute the required, specific direction to disregard the evidence.

A qualification to the rule of prejudicial error as stated in *Southern R. Co.* v. *Forgery*, appeared in *Hodges Manor Corp.* v. *Mayflower Corp.*, 197 Va. 344, 89 S.E.2d 59 (1955) where error in instructing the jury that they could take into account the reasonable cost of improvements made necessary by the defendants' acts when measuring damages did not constitute prejudicial error since the defendants suggested no other theory of damages and, themselves, offered instructions adopting the same theory.

Invited Error. The rule that an error which was invited, or introduced, by the party seeking reversal will not constitute a

[8] Va. Code §8-633 (1950).
[9] Gough v. Shaner, 197 Va. 572, 578, 90 S.E.2d 171, 176 (1955).

ground for reversal[10] formed the basis of the court's decision in *Boward* v. *Leftwich*, 197 Va. 227, 89 S.E.2d 32 (1955), where, upon the instance of the plaintiff, the jurors were instructed that the defendant's liability, if any, would be based upon a showing by the plaintiff of willful and wanton negligence. No objection was made to the resultant placing of burden and the parties were thereby bound to the erroneous instruction. A similar case was *Hilton* v. *Fayen*, 196 Va. 860, 86 S.E.2d 40 (1955), where the defendant acquiesced in plaintiff's erroneous instruction.

In Van Dyke v. *Commonwealth*, 196 Va. 1039, 86 S.E.2d 848 (1955), the same rule was held applicable to a criminal prosecution for malicious wounding when counsel for the defendant failed to preserve his exception to the court's refusal of the defendant's instruction.

Qualification of Jurors—Quotient Awards. Under Section 8-199, Code of Virginia (1950), it is provided that the relationship of a "party" to a civil cause to a member of the jury is ground for the disqualification of that juror. In *Petcosky* v. *Bowman*, 197 Va. 240, 89 S.E.2d 4, it was decided that this provision does not include in the word "party" a counsel who may be related to one of the jurors, and that the common law rule by which relationship to counsel does not disqualify a juror should be applied in such cases. In the instant case the objection to the juror was made after the juror was sworn and was thus excluded under the express terms of Section 8-201, Code of Virginia (1950).

Of interest is the ruling of the court in *Virginia Electric etc., Co.* v. *Pickett*, 197 Va. 269, 89 S.E.2d 76, which extends the rule governing quotient awards of condemnation commissioners in eminent domain proceedings. In both, the invalidity must arise from a previous agreement among the jurors to be bound by the quotient derived.[11] Here, the finding of the commissioners was based upon a subsequent, not an antecedent, agreement to adopt the figures derived by quotient as fair and just—hence, the validity of the finding was upheld.

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[10] Shiflett v. Com., 143 Va. 609, 130 S.E. 777 (1925); Levy v. Davis, 115 Va. 814, 80 S.E. 791 (1914); Norfolk & W.R.Co. v. Mann, 99 Va. 180, 37 S.E. 849 (1901).

[11] Washington Luna Park Co. v. Goodrich, 110 Va. 692, 66 S.E. 977 (1910).