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# Evidence (Survey of Virginia Case Law - 1955)

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# EVIDENCE

**Good Character of Accused Not Basis for Reasonable Doubt of Guilt.** In *Harper* v. *Commonwealth*,[1] the defendant, convicted of assault and battery, cites as error the refusal of the trial court to grant an instruction that an established reputation of good character will alone create a reasonable doubt as to the guilt of an accused. The Court speaking through Chief Justice Hudgins held there was no error, the matter having been decided previously in *Owens* v. *Commonwealth*,[2] where it was said, "We have several times disapproved the phraseology of that portion of the instruction which would have told the jury that evidence of the previous good character of the accused may be sufficient to create a reasonable doubt as to his guilt or innocence." The Court in that same case laid down the proper instruction as to character as follows:

> "The character of a prisoner when proven whether good or bad, is a fact to be considered by the jury, but its weight as affecting the guilt or innocence of a prisoner is a matter for the determination of the jury in connection with the other facts proven in the case."

It is not essential for the jury to be told that evidence of good character was a matter for their consideration, because if it had not been proper for their consideration its presentation would not have been allowed.[3]

**Circumstantial Evidence and Its Use In a Criminal Case.** Van Dyke[4] appealed his conviction of malicious wounding by the use of circumstantial evidence. The Court stated that "It has long been held that circumstantial evidence is legal and competent in criminal cases, and if it is of such a convincing character as to exclude every reasonable hypothesis other than that the accused is guilty, it is entitled to the same weight as direct testimony."[5] When a conviction is sought upon circumstantial evidence alone such evidence is to be acted upon with the utmost caution, and

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[1] 196 Va. 723, 85 S.E.2d 249 (1955).
[2] Owens v. Commonwealth, 186 Va. 689, 43 S.E.2d 895 (1947).
[3] James v. Commonwealth, 192 Va. 713, 66 S.E.2d 513 (1951).
[4] Van Dyke v. Commonwealth, 196 Va. 1039, 86 S.E.2d 848 (1955).
[5] Langley v. Commonwealth, 99 Va. 807, 37 S.E. 339 (1900).

before a verdict of guilty will be sustained every fact necessary to establish the guilt of the accused must be proved beyond a reasonable doubt.[6]

The rule in Virginia is that where circumstantial evidence is relied upon to support a conviction the burden is upon the Commonwealth to show that time, place, motive, means and conduct concur in pointing out the accused as the perpetrator of the crime.[7] This has been slightly modified in that proof of motive does not establish the guilt, nor want of it establish the innocence of the accused; that while such proof of motive is not necessary, it is a factor to be considered bearing only upon the question as to whether or not the accused committed the crime.[8]

**Principles of Corroboration.** Three years prior to his wife's death, G. W. Clay conveyed to his wife two tracts of land and this suit[9] was brought against her heirs to enforce an alleged oral promise to devise the land back to him should he survive her. The promise was never mentioned to anyone else during her lifetime nor was there any will found at her death and there was no conclusive evidence that she ever executed a will. In these circumstances the husband's testimony as to the promise and the preparation of the will is not sufficient corroboration. The Court stated that the character and sufficiency of the corroboration should be guaged and appraised by the fact sought to be proved. Just what is necessary to be corroborated must not be overlooked.[10] Whether corroboration exists and the degree and quality required are to be determined by the facts and circumstances of the particular case. When a confidential relationship existed between the parties at the time of the transaction relied on, a higher degree of corroboration is required than in ordinary transactions.[11]

**Credibility of a Lay Witness As To Estimate of Distance.** Lowe was injured and his car demolished when he was allegedly forced off the road by a truck driven by Barb who was

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[6] Abdell v. Commonwealth, 173 Va. 458, 2 S.E.2d 293 (1939).
[7] Dean v. Commonwealth, 32 Grat. (73 Va.) 912 (1879).
[8] Ferrell v. Commonwealth, 177 Va. 861, 14 S.E.2d 293 (1941).
[9] Clay v. Clay, 196 Va. 997, 86 S.E.2d 812 (1955).
[10] Crump v. Gilliam, 190 Va. 935, 59 S.E.2d 72 (1950).
[11] Nicholson v. Shockey, 192 Va. 270, 64 S.E.2d 813 (1951).

making a right-hand turn into the street on which Lowe was approaching.[12] Barb testified that he was never out of his proper lane, that the two vehicles did not touch, and that he was unaware that Lowe suffered a mishap after both vehicles had swerved to avoid a collision. This testimony was not rendered incredible because of the fact that Barb's estimates of distances and speeds were not mathematically exact. The testimony of a lay witness as to his estimates of distance in feet and yards should not be considered to be mathematically exact. Such testimony at best is an approximation involving estimates, best judgments and opinions. This kind of evidence is peculiarly for a jury. If a witness has given incorrect estimates of distances where events are happening quickly, this is a matter to be considered by the jury in weighing the testimony. It is not ground for holding that his entire testimony is incredible, unworthy of belief and as a matter of law to be excluded.[13] Likewise the testimony of the investigating officer as to his estimate of distance which differed slightly from the true measured distance was not so inherently incredible as to be excluded and the verdict of the jury in favor of Barb was reinstated by the Court.

**Credibility and Weight of Evidence Are for the Jury.** Plaintiff administrator recovered a judgment for $15,000 against defendant railway for the wrongful death of his decedent, who was killed when the automobile driven by her was struck at a grade crossing by one of defendant's trains.[14] Plaintiff's contention was that the failure to give crossing warnings required by statute, proximately caused the collision. On conflicting evidence the jury was entitled to find that the signals were not given. In particular, the testimony of an eye witness at the crossing that he did not hear any signals could not be disregarded as purely negative in character. No other witness saw this alleged eyewitness at the scene and his testimony was vigorously attacked as inherently incredible in that he had a chance to warn the decedent, stopped on the tracks as to her danger and did not, made no attempt to signal the engineer as to her peril and left the scene without inquiring as to whether the decedent was killed or injured. It was

[12] Barb v. Lowe, 196 Va. 1014, 86 S.E.2d 854 (1955).
[13] Saunders v. Hall, 176 Va. 526, 11 S.E.2d 592 (1940).
[14] C. & O. Railway Co. v. Hanes, Adm'r., 196 Va. 806, 86 S.E.2d 122 (1955).

also proven that this eyewitness had been convicted of a misdemeanor involving moral turpitude, evidence of such conviction being admissible as bearing on his credibility.[15] Despite all this the weight and credibility of his testimony were for the jury and a verdict based on such evidence will not be reversed, although the case was reversed on other grounds.

**Evidence of Other Offenses, Inadmissible To Show Disposition To Commit Crime Charged.** The defendant was found guilty of attempted rape and sentenced to death.[16] The prosecuting witness testified that she was attacked after she alighted from a bus. Over objection the trial court allowed another witness to testify that a man whom she identified as defendant chased her earlier in the evening as she waited for a bus a block away. The Court found this to be prejudicial error. The accepted rule to be derived from the case is that evidence which shows or tends to show the accused guilty of the commission of other offenses at other times is inadmissible if its only relevance is to show the character of the accused or his disposition to commit an offense similar to that charged; but if such evidence as tends to prove any other relevant fact of the offense charged, and is otherwise admissible, it will not be excluded merely because it also shows him to be guilty of another crime.[17] The principle behind the inadmissibility of such evidence is that it is a distinct charge, which the prisoner was not called on to defend, which he could not be prepared to defend, and which had no such necessary connection with the transaction then before the court as to be inseparable from it.[18] The accused comes to trial to meet the specific charge against him, not to vindicate or to explain every collateral charge that may be made in the course of the introduction of the evidence,[19] and the court accordingly reversed the lower court's decision.

**Experiment Made Under Different Conditions From Those of the Accident, Not Admissible.** As Hampton was driving after dark his car went out of control on a sharp left-

[15] Taylor v. Commonwealth, 180 Va. 413, 23 S.E.2d 139 (1942).
[16] Day v. Commonwealth, 196 Va. 907, 86 S.E.2d 23 (1955).
[17] Walker v. Commonwealth, 1 Leigh (28 Va.) 374 (1829).
[18] *Ibid.*
[19] Limbough v. Commonwealth, 149 Va. 383, 140 S.E. 133 (1927).

hand curve, struck a stump and came to rest on the left side of the road. Decedent Hampton was thrown into the road opposite the stump. Defendant Lane, who was following Hampton, rounded the curve and failed to see Hampton's body, which his car struck and dragged some distance. The only claim of negligence on the part of the defendant is that by the exercise of ordinary care in keeping a reasonable lookout, he should have seen Hampton's body on the road and avoided striking it.[20] To sustain this claim of negligence the decedent's father, over the objection of the defendant, was permitted to testify that on the day before the trial during daylight, he drove his truck around the same curve at the same speed and in the same direction as the two cars involved in the accident and that an object lying on the hard surface opposite the stump was visible to him for a distance of 203 feet before reaching it. The purpose of his testimony was to show that the body of young Hampton, as it lay opposite the stump was visible to Lane for that distance, had he been keeping a proper lookout. The Court held it was error to admit this evidence as the experiment and observation were made under conditions quite different from those existing at the time of the accident. The experiment was made during daylight, while the accident occurred on a dark night. Also at the time of the experiment the witness was on the lookout for an object which he knew had been placed on the highway for the purpose of being seen, while under the circumstances of the accident the defendant was unaware of the presence of his friend's body in the road. Plainly, under such circumstances, the evidence of this test and observation was improper.[21]

**One Financially Interested in a Case May Be Called as an Adverse Witness.** In this case involving the Virginia wrongful death statute, the defendants contended that the lower court erred in refusing to permit them to call decedent's widow as an adverse witness.[22] The defendants failed procedurally to put the alleged error properly before the court. As the case was remanded on other grounds the court said that upon a new trial the defendants should be permitted to examine the decedent's widow

[20] Lane v. Hampton, Adm'r., 197 Va. 46, 87 S.E.2d 803 (1955).
[21] Doss v. Roder, 187 Va. 231, 46 S.E.2d 434 (1948).
[22] Matthews v. Hicks, Adm'r., 197 Va. 112, 87 S.E.2d 629 (1955).

as an adverse witness. Va. Section 8-291 of the 1950 Code pertaining to adverse witnesses was construed in *Butler* v. *Parrocha*[23] as follows:

> "The only conclusion to be drawn from the language of the Act and the context of the words, 'having an adverse interest', is that the legislature intended to include first a party to the litigation, and second, a person, though not a party, who had a financial or other personal interest in the outcome."

**Party Bound By His Own Testimony.** In this case[24] the defendant Von Roy made statements which obviously showed his negligence; however, he defended and won an acquittal by the jury which on motion the trial court set aside. In affirming the action of the trial court, the Court repeated a principle often stated by the Court: No litigant can successfully ask a court or jury to believe that he has not told the truth. His statements of fact and the necessary inferences therefrom are binding upon him. He cannot be heard to ask that his case be made stronger than he makes it, where as here, it depends upon facts within his own knowledge and as to which he has testified.[25]

**Uncontradicted Testimony of Defendant Need Not Be Accepted By Jury If Improbable.** The defendant was convicted of second degree murder and sentenced to 15 years in the penitentiary.[26] Among assignment of errors before the Court the defendant questioned whether the evidence was sufficient to support the verdict in that the defendant was uncontradicted in his testimony as to how the homicide occurred. The Court stated that the jury was not required to believe the defendant's testimony as to how the killing occurred simply because he said it happened that way and no witness testified to the contrary. The jury had the right and the duty to reject his testimony if from its contradictions, or from the improbability of his story and his manner of relating it, or because of the attending facts and circumstances there was reason to believe that he was not speaking the truth.[27]

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[23] Butler v. Parrocha, 186 Va. 426, 43 S.E.2d 1 (1947).
[24] Von Roy v. Whitescarver, 197 Va. 384, 89 S.E.2d 346 (1955).
[25] Massie v. Firmstone, 134 Va. 450, 114 S.E. 652 (1922).
[26] Farrow v. Commonwealth, 197 Va. 353, 89 S.E.2d 312 (1955).
[27] Randolph v. Commonwealth, 190 Va. 256, 56 S.E.2d 226 (1949).

**Plaintiff Bound By Adverse Witness Testimony.** Plaintiff was injured when the car which he was driving collided with a train operated by N & P Belt Line R.R.[28] The only evidence as to the statutory signals being given by the railroad was the negative testimony of the plaintiff which was without probative value and the testimony of the engineer of the train who was called as an adverse witness by plaintiff. The Court held that when a plaintiff calls a defendant as an adverse witness, while he may not be bound by such of the witness's statements as may be in conflict with the evidence introduced on plaintiff's behalf, he is bound, and the court and jury are bound, by so much of the clear, logical testimony of the witness as is reasonable and uncontradicted.[29] The negative evidence of the plaintiff on the issue as to whether or not the bell was ringing is insufficient to contradict the positive testimony of the engineer and the plaintiff is accordingly bound by such evidence.

**Blood Analysis, Identification of Sample.** The defendant was involved in a collision and charged with driving under the influence of intoxicants.[30] He demanded and received a blood test. An analysis of a blood test alleged to be that of the defendant was introduced by the Commonwealth over the objection of the defendant that such analysis could not be positively identified as coming from the sample of defendant's blood. Several persons had participated in the preparation, mailing and examination of the sample and an unbroken chain could not be established as to the identity of the particular sample. In proving identity legal presumption may of course be relied on unless rebutted, e.g., that articles regularly mailed are delivered in substantially the same condition in which they were sent[31] and that an analysis made by an official in the regular course of his duties was properly made.[32] But where the substance analyzed has passed through several hands the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis.[33] It is rudimentary that a specimen taken from a human body

[28] Norfolk, Etc. R.R. Co. v. Mueller Co., 197 Va. 533, 90 S.E.2d 135 (1955).
[29] Saunders v. Temple, 154 Va. 714, 153 S. E. 691 (1930).
[30] Rodgers v. Commonwealth, 197 Va. 527, 90 S.E.2d 257 (1955).
[31] Schacht v. State, 154 Neb. 858, 50 N.W.2d 78 (1951).
[32] 20 Am. Jur. *Evidence*, §170-1, pp. 174-178 (1939).
[33] Brown v. State, 156 Tex. Cr. 144, 240 S.W.2d 310 (1951).

for the purpose of analysis must be identified before such specimen or any analysis made from it attains standing as evidence of the condition of the person whose conduct is questioned. Without identification there is no connection between the two.[34]

**When the Testimony of a Party Is Binding.** Plaintiff recovered a jury verdict for personal injuries which the lower court set aside on the ground that plaintiff was guilty of contributory negligence as a matter of law.[35] This action of the trial court was based on testimony of the plaintiff that she saw the defendant's car at the intersection five or six car lengths away and traveling rather fast, approximately thirty-five miles per hour. Thinking she had time to cross in safety she increased her speed and entered the intersection where the collision occurred. The defendant's counsel argued that her testimony as to distance and speed is binding upon her and that she cannot make her case any stronger than her own recital of the facts, a familiar doctrine.[36] In a personal injury case if the plaintiff, a person of average intelligence and in possession of his faculties, while detailing the circumstances of the accident, clearly and unequivocally testifies to facts which show as a matter of law that he has no case, he is bound thereby and cannot recover. Whether such has been the effect of the litigant's testimony must be determined from a fair reading of it as a whole, and not merely by reference to isolated statements which are adverse to his claim.[37] Unless testimony of the litigant shows clearly and unequivocally that he has no case, or where fair-minded men may differ as to the effect of his testimony, the litigant is not concluded thereby, and in such situations his testimony is to be considered by the jury along with all of the other evidence in the case.[38]

The Court in reversing the trial court said that extracts from her testimony are not sufficient but that her testimony on the whole must be examined. Further, testimony of the parties as to such distance and speed are mere estimates made in fleeting moments and related months later. Such estimates are mere cir-

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[34] McGowan v. Los Angeles, 100 Cal.App.2d 386, 223 P(2) 862 (1950).
[35] Vaughan v. Eatoon, 197 Va. 459, 89 S.E.2d 914 (1955).
[36] Massie v. Firmstone, 134 Va. 450, 114 S.E. 652 (1922).
[37] Tignor v. Virginia Electric Co., 166 Va. 284, 84 S.E. 234 (1936).
[38] Tennes v. Tennes, 320 Ill. App. 19, 50 N.E.2d 132 (1943).

cumstances to be considered by the jury in weighing testimony.[39] Her testimony viewed in this light and read together does not show contributory negligence as a matter of law and the verdict of the jury was reinstated.

**When Testimony of Parties Is Binding.** Directly beside a path on plaintiff's land the defendant's workmen left an open and unguarded hole. Without knowing of this, after dark, plaintiff rushed to pick up her child who had fallen in the path opposite the hole, fell and lost consciousness. When she came to her senses she was sitting on the edge of the hole, injured. She stated on cross-examination that she did not know just how the accident happened.[40] Defendant contends that if plaintiff did not know how the accident happened the jury should not have been permitted to speculate on the subject; that the burden was on the plaintiff to prove her case by a preponderance of the evidence and to show causal connection between her injury and the existence of the hole, and that plaintiff's case can be no stronger than her evidence makes it. The trial court set aside the verdict of the jury in favor of plaintiff. The Court in reinstating the jury's verdict stated that unless the testimony of the plaintiff shows clearly and unequivocally that he has no case, or where reasonable men may differ as to the effect of his testimony, then in that event the plaintiff is not concluded thereby. In such a situation the question becomes a factual one where the evidence of the plaintiff is to be considered as a whole, together with other evidence and the issue determined by the jury. The Court cited *Vaughn* v. *Eatoon*, 197 Va. 459, handed down the same day and reported in detail in this article. The doctrine of *Massie* v. *Firmstone*[41] is explained but in no way limited or modified by these two cases.

**Witness's General Reputation for Truth.** At defendant's trial for rape police officers were allowed to testify that they knew the reputation for truth of a witness, whose testimony conflicted with that of the prosecution, and that it was bad.[42] The

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[39] Sink v. Masterson, 191 Va. 618, 61 S.E.2d 863 (1950).
[40] Edmonds v. Mecklenburg Electric Cooperative, 197 Va. 540, 90 S.E.2d 188 (1955).
[41] See Note 36 *supra*.
[42] Bradley v. Commonwealth, 196 Va. 1126, 86 S.E.2d 828 (1955).

officers admitted their testimony was based primarily on what they had heard from fellow officers. The defendant contended that these officers were not competent to testify as to the reputation of the witness because they had no opportunity to know his reputation and had not discussed or heard his reputation discussed with his associates. The Court stated there was no merit in this contention and the officers' testimony was properly admitted to impeach the witness. One of the universally recognized methods of impeaching a witness is to show his bad reputation for truth and veracity in the community where he lives, or among his neighbors and acquaintances by witnesses who know that reputation.[43] The evidence of the impeaching witness must be confined to the general reputation of the witness for truth and veracity and he may not testify as to the commission of specific acts of untruthfulness or other bad conduct, though these have a bearing on veracity.[44] A witness is competent to testify as to the general reputation of another who has testified in the case, when he testifies that he knows that reputation; which is what the people in the community believe, hence if the impeaching witness is otherwise competent, the fact that he is not a personal associate of the person in question, that he is a police officer in the case are matters for the jury to consider in determining the degree of credit to be given his testimony, but it is properly admitted.

**Hearsay Improperly Admitted and Evidenced Separate Crime, Prejudicial Error To Admit.** Defendant was found guilty of transporting illegally acquired alcoholic beverages. The evidence was sufficient to support the conviction where the Commonwealth proved that as defendant fled he threw from his car a jug of bootleg whiskey. As defendant failed to offer proof that the whiskey was legally acquired he did not overcome the statutory presumption of illegal acquisition arising from the fact that the container bore no government stamps. Since this presumption was not rebutted it prevailed over the presumption of innocence. The trial court committed error however in permitting one of the arresting officers to testify that he was looking for the defendant on information that he was hauling illegal whiskey. This evidence was hearsay and clearly prejudicial in

[43] Brotherhood of R.T. v. Vickers, 121 Va. 311, 93 S.E. 577 (1917).
[44] Fenner v. Commonwealth, 152 Va. 1014, 148 S.E. 821 (1929).

that it conveyed to the jury the information that these officers had been told by other persons that the defendant was or had been engaged in the very illegal act for which he was then being tried. It was also error for the trial court to allow the Commonwealth's Attorney to cross-examine defendant as to his reckless manner of driving and to examine the arresting officers on this point, and the fact that he had narrowly avoided a collision with another car at an intersection. This evidence tended to show not only that the defendant had fled to escape arrest which is admissible, but also that he had been guilty of reckless driving, a distinct and separate offense from that for which he was being tried. It was therefore prejudicial to the defendant in that it showed that he was a violator of the law in other respects.[45]

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[45] Sturgis v. Commonwealth, 197 Va. 264, 88 S.E.2d 919 (1955).