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Abstracts of Recent Cases

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the same result may be reached by a grant or devise "to A and B for life, remainder to the survivor."

Under the present West Virginia law a joint tenancy may still be created replete with all the common law incidents, and it would appear that the holding in the principal case would be contrary had that case arisen in this jurisdiction. Whether a tenancy in common with rights of survivorship may be created in this jurisdiction would seem to be a question in need of an answer.

W. E. M.

ABSTRACTS

EVIDENCE—RES IPSA LOQUITUR—"MODERN VIEW" APPLIED.—*P*, while doing her marketing, selected a carton of *D*'s product and placed it in her push cart. Almost immediately she was struck by flying glass from an exploding bottle of *D*'s product which remained upon the shelf and was not touched by *P*. The products had been delivered to the market and placed upon the shelf by *D*'s employee. There was no attempt made to prove that the bottle was mishandled by persons other than *D*'s employees. *Held*, that an inference of negligence arose from the application of the res ipsa loquitur rule, although actual control of the bottle had passed from *D*. *Ferrell v. Royal Crown Bottling Co.*, 109 S.E.2d 489 (W. Va. 1959).

Generally it may be stated that it is necessary to prove three elements before the doctrine of res ipsa loquitur is applicable: (1) Plaintiff must prove that he was without fault, (2) That he was injured by an instrumentality which was within the exclusive control of the defendant, (3) That the accident would not have happened in the ordinary course of events if the defendant had used due care. *Pope v. Edward M. Rude Carrier Corp.*, 138 W. Va. 218, 75 S.E.2d 584 (1953).

The principal case marks the first time West Virginia has applied the doctrine to bottle explosion cases when the defendant was not in exclusive control of the bottle at the time of the accident.

The principal case followed the so-called "modern view" to the effect that exclusive control by the defendant is not necessary as long as the plaintiff can prove that no person was probably negligent in handling the instrumentality subsequent to its leaving defendant's control.

It is believed that the result of the principal case is just, but perhaps the court should require the plaintiff to prove more than

that no one else was probably negligent after the instrument left the defendant's control.

A. M. P.

EVIDENCE—MISCONDUCT OF JUROR—GROUNDS FOR NEW TRIAL.—Action by *P* to recover damages under a wrongful death statute for the death of her husband, *H*, as a result of his electrocution while engaged in erecting a television antenna. *H* was helping a television serviceman, *F*, in erecting the antenna. In so doing, *H* and *F* made preliminary tests to be sure the antenna would not come into contact with the high voltage wires strung by *D* over *H*'s property, but, when they attempted to raise the antenna. *H* was killed as a result of coming into contact with the energized wires. The jury, in reply to special interrogatives, decided that: (1) *H* was not guilty of contributory negligence; (2) That *D*'s negligence was the proximate cause of *H*'s death; and (3) That the antenna had not come into actual contact with the electric line. Judgment was rendered for *P*. It was later discovered that one of the jurors, *N*, had, during deliberation, read a book on electricity, paying particular attention to the arcing and jumping characteristics of electricity, which were not discussed at the trial. *N* discussed his readings with the other jurors and some admitted that they had paid attention to his statements. Held, that *N*'s misconduct might have influenced the jury's verdict and prevented a fair trial, therefore, the court reversed the judgment for *P* and ordered a new trial. *Thomas v. Kansas Power & Light Co.*, 340 P.2d 379 (Kan. 1959).

The general rule is that misconduct of a juror during a trial, such as obtaining evidence by personal efforts and relaying it to the other members of the jury, when such evidence was not received in open court, is grounds for a new trial if the misconduct is found to be prejudicial to the complaining party. *Watkins v. Baltimore & O. R. R.*, 130 W. Va. 272, 43 S.E.2d 219 (1947).

West Virginia has a statute which requires jurors to disclose such information if it is relative to a fact in issue. "A juror knowing anything relative to a fact in issue shall disclose the same in open court, but not to the jury out of court; and the court shall inform the jury of this provision." W. VA. CODE ch. 56, art. 6, § 18 (Michie 1955).

This section has been held to be merely directory and a party must request the court to read this section to the jury. *Truex v.*

South Penn Oil Co., 62 W. Va. 540, 59 S.E. 517 (1907); *State v. Poindexter*, 23 W. Va. 812, 1 S.E. 227 (1884).

It appears, however, that even though neither party requests the court to read the above section of the code to the jury, if misconduct is subsequently discovered, the complaining party is entitled to a new trial if the misconduct was prejudicial to him and the aggrieved party timely brought the misconduct to the court's attention.

A. M. P.

CREDITORS RIGHTS—GRATUITOUS SERVICES BY AN INSOLVENT DEBTOR.—*H*, the husband of *D*, has been in the sole employment of *D* for 5 years during which time he has received no pecuniary remuneration for his services. Prior to this employment, *P* had acquired a judgment against *H* but due to *H*'s insolvency *P* now seeks to recover from *D* the value of the gratuitous services rendered by *H* to *D*. Judgment was rendered for *P*, and cross-appeals were taken. *Held*, that an insolvent debtor could give his services away to his wife and that his creditors would have no claim against her for the value of such services. *Studds v. Fidelity & Deposit Co.*, 267 F.2d 875 (4th Cir. 1959).

Until the case of *Childress v. Fidelity & Cas. Co.*, 194 Va. 191, 72 S.E.2d 349 (1952), Virginia had adhered to the minority view and had allowed the creditors of the insolvent debtor to recover the value of the gratuitous services from the wife. *Penn v. Whitehead*, 53 Va. (12 Gratt.) 74 (1855).

West Virginia is contra to Virginia in this area of the law and still follows the minority. In West Virginia, a husband may conduct a business, owned by his wife, without remuneration, but if owing to his skill and labors large profits accrue over and above the necessary business and family expenses, a court of equity will apportion such excess between the wife and the husband's creditors. *Bogges v. Richards's Adm'r.*, 39 W. Va. 567, 20 S.E. 599 (1894).

A. M. P.

EVIDENCE—ADMISSIBILITY OF OPINION EVIDENCE BY A LAYMAN.—*D* was convicted of unlawfully transporting more than one gallon of alcoholic liquor in an automobile. At the trial *S*, a constable, testified he heard a "bang" and upon turning around he saw *D*'s

car move forward and strike his own car, and although S's car was parked against the curb and in gear with the emergency brake drawn, it was knocked forward a distance of about four feet by the impact. S's testimony was very important in establishing that there was intentional movement of the car which was a necessary element of the crime and which was denied by D. Held, that even though S was not an expert his opinion was admissible because the facts were such that it would be impossible otherwise to present them to the jury with the same force and clearness as they appeared to S. *State v. Taft*, 110 S.E.2d 727 (W. Va. 1959).

Lay opinion evidence as a general rule is not admissible, however, when the facts are such that they could not be presented to the jury with the same force and clearness as they appeared to the observer such lay opinion is admissible. *Kunst v. City of Grafton*, 67 W. Va. 20, 67 S.E. 74 (1910).

West Virginia courts have not always used the same criterion in determining whether an opinion by a layman should be admitted. This statement can be best justified by setting forth several examples. In *State v. Welch*, 36 W. Va. 690, 15 S.E. 419 (1892), a lay witness was permitted to give his opinion that certain stains were blood and that a depression in a bed was caused by a person's head. The rule used in this case was whether the facts observed by the witness could be described to the jury as precisely as they appeared to the witness.

Opinion as to what caused a slip on certain land was permitted in the *Kunst* case, *supra*. A lay witness was allowed to testify as to what caused a building to fall since it was impossible to tell the jury all the facts, which produced his impression. *Walker v. Stro-snyder*, 67 W. Va. 39, 67 S.E. 1087 (1910).

The criterion of admissibility in *Cline v. Norfolk & Western Ry. Co.*, 69 W. Va. 436, 71 S.E. 705 (1911), allowed the opinions if the things upon which the observations were based could not be brought into court. Testimony as to the speed of another vehicle was allowed in *State v. Statler*, 86 W. Va. 425, 103 S.E. 345 (1920). A witness was permitted to give his opinion as to what caused a car to derail since the exact situation could not be conveyed to the jury. *Thomas v. Monongahela Valley Traction Co.*, 90 W. Va. 681, 112 S.E. 228 (1922).

Lay testimony was permitted in *State v. Waters*, 104 W. Va. 433, 140 S.E. 139 (1927) as to the stage of pregnancy of a young

girl. The court followed the rule as expressed in the Kunst case, *supra*. A lay witness was allowed to testify as to the health of a person before and after an accident, since the jury could not be furnished the data upon which the witness based his conclusions. *Curfman v. Monongahela West Penn Pub. Serv. Co.*, 113 W. Va. 85, 166 S.E. 848 (1932).

It is suggested that perhaps a more workable solution to the problem of admissibility of opinion evidence by layman would be to view this as a question for the discretion of the trial judge rather than attempt "rule" making.

A. M. P.
