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## Juries--Prejudicial Conduct--Separation

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identical facts. In a recent Virginia case,<sup>9</sup> the Griffin Case was cited, but the court said:

"We could not follow either the reasoning or the ruling in the case for which ruling the court did not cite a well considered case as sustaining it. On the other hand the decided cases to which we have adverted, both English and American and the text books written by eminent law writers concur in holding that the right of subjacent support is not waived by the sale of 'all' the coal with the right to mine and remove it."

The latter part of this statement is supported by abundant authority.<sup>10</sup>

There seems to be a slight relaxation by the West Virginia court on the doctrine of subjacent support. Recent cases affirm the general rule, but make no great departure from the established rule as to what constitutes waiver. In *Hall v. Harvey Coal & Coke Co.*<sup>11</sup> the deed stated that "We do bargain, sell, grant and hereby convey the coal and all minerals in and upon the hereinafter described tract." The court held that such words do not evince the waiver of the right of subjacent support. The court distinguished the case from the Griffin Case, saying that in the latter the word "all" modified the word coal, while in the late case "all" modified minerals. By differentiating the cases the court impliedly clings to the doctrine of the Griffin Case. However, the case definitely affirms the general rule, but postpones to a later date the declaration that the grant of "all coal" does not evince the extinguishment of the right of subjacent support.

—C. P. H.

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JURIES—PREJUDICIAL CONDUCT—SEPARATION.—Indictment for a felony. A verdict of guilty was rendered. It was urged that the separation of one juror from the others to go home for his night-shirt was prejudicial conduct. *Held*, the affidavit of the juror cleared all doubt as to his conduct. *State v. Driver*, 107 S. E. 189 (W. Va. 1921).

The common law rule in regard to the separation of a jury was that separation *per se* annulled the verdict. *McCaul's Case*, 1 Va. Cas. 271; *Overbee's Case*, 1 Rob. (Va.) 756. But the strictness of this rule has been tempered with the progress of time. In civil cases, now, the jury may separate during recesses and adjourn-

<sup>9</sup> *Stonegap Colliery Co. v. Hamilton*, *supra*, note 1.

<sup>10</sup> See *supra*, note 1.

<sup>11</sup> See *supra*, note 1.

ments of the court, after being admonished not to converse about the case. *Fields v. Dewitt*, 71 Kan. 676, 81 Pac. 467. Various standards of a more requiring nature are applied in criminal cases. It has been held, that the mere temporary separation of the jury is not sufficient to constitute reversible error. *People v. Douglass*, 4 Cow. (N. Y.) 26, 15 Am. Dec. 332; *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550. A few courts place the burden on the prisoner to show that he was prejudiced. *Davis v. State*, 3 Tex. App. 91; *Gott v. People*, 187 Ill. 249, 58 N. E. 293. The rule applied in felony and capital cases by the United States Supreme Court and fifteen states including West Virginia, is, that where there has been an improper separation of the jury, and the verdict has been against the prisoner, prejudice will be presumed and must be rebutted by the state or a new trial will be granted. *Mattox v. United States*, 146 U. S. 140; *State v. Robinson*, 20 W. Va. 713; *State v. Clark*, 51 W. Va. 457, 41 S. E. 204. This presumption of prejudice may be rebutted by affidavit of members of the jury. *Commonwealth v. McCauley*, 156 Mass. 49, 30 N. E. 76. In West Virginia, the testimony of the jurors is receivable to disprove or explain the separation, but not to show the motives by which they were actuated, or that the separation had no influence on the verdict. *State v. Clark, supra*. In the principal case, the separation was explained to the satisfaction of the court by the affidavit of the juror, and was correctly ruled not to be prejudicial.

—R. J. R.

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CRIMINAL LAW—PISTOL TOTTING.—Accused was arrested while carrying in his hand a grip containing a 38 caliber pistol fully loaded with cartridges. *Held*, section 7 of Chapter 148 of the Code of 1913 forbidding any unlicensed person to carry about his person a pistol, etc., has been violated. *State v. Blazovitch*, 107 S. E. 291, (W. Va. 1921).

The decisions in other states upon similar facts under like or similar statutes are quite divergent, and show an irreconcilable conflict of opinion. A Virginia case held that the carriage of a pistol incased in a scabbard, in a pair of saddlebags, carried in the hands of the accused was not a violation of a statute forbidding the carrying of "concealed weapons about one's person," the court saying that such statutes must be construed most favorably for the