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Recent Cases

RECENT CASES

ADOPTION—Foreign adoption repugnant to Virginia public policy with no treaty right violated. *Doulgeris* v. *Bambacus, Administrator,* 203 Va. 670, 127 S.E. 2d 145 (1962).

At the age of fourteen, the appellant was adopted under Greek law by an elderly couple. They were in poor health and in need of someone to care for them. The adoption was simply an arrangment for the convenience of the adoptive parents, but it was in keeping with the public policy of Greece. It was consented to by the natural father of the appellant, but without regard to its effect upon her interest and welfare. The appellant offered no evidence to show that she had ever lived with her adoptive parents or had ever recognized them as such.

The appellant wished to inherit from the son of her adoptive parents, and she claimed that she was his adopted sister under Greek law. She urged that Virginia recognize the Greek adoption because of the treaty between the United States and the Kingdom of Greece which guaranteed to Greek nationals treatment no less favorable than that accorded in like situations to nationals of any third country.

Under the local law of Virginia the primary consideration in an adoption proceeding is the welfare and best interest of the child. Both the adopting and the natural parents must consent to the adoption unless consent is unobtainable or withheld to the detriment of the child in the opinion of the court. Va. Code Ann. 1950 § 63-351 (Cum. Supp. 1960); *Harmon* v. *D'adamo,* 195 Va. 125, 77 S.E. 2d 318 (1953); *Newton* v. *Wilson,* 201 Va. 1, 109 S.E. 2d 105 (1959). If the child is fourteen years of age, he must also give his consent. An investigation is made of the adopting parents to see if they are financially able to care for the child. Thus, the fundamentals of the Greek adoption procedure conflict with Virginia's public policy of adoption, and in Virginia the essential requirements of Virginia law must be met. Without noting any distinction between the concept of public policy in the internal law of Virginia and the concept of public policy in

conflict of laws, the Virginia Supreme Court of Appeals held that foreign law or rights based thereon will not be given effect or enforced if contrary to the settled public policy of the forum. *Toler* v. *Oakwood Smokeless Coal Corp.,* 173 Va. 425, 4 S.E. 2d 364 (1939).

The Virginia court violated no treaty right by refusing to recognize the Greek adoption. *Kolovrat* v. *Oregon,* 364 U. S. 812, 81 S. Ct. 44 (1961), demonstrates the treaty's guarantee that nationals of the most favored nation are entitled to inherit on the same basis as American next of kin, but *Todok* v. *Union States Bank,* 281 U. S. 449, 50 S. Ct. 363 (1930) points out that such treaties are not construed as placing aliens on a better footing than United States citizens.

Although the appellant's adoption was proper in the Kingdom of Greece, it was repugnant to the public policy of Virginia which is for the protection of the best interest of the child, and it could not be recognized. The treaty upon which the appellant relied gave her no preferred rights.

JAMES D. DAVIS

CRIMINAL PROCEDURE . . . Recidivist convictions: Failure to apply recidivist statute to persons convicted out-of-state not a denial of equal protection of the law. *Sims* v. *Cunningham,* 203 Va. 347, 124 S.E. 2d 221, *cert. denied,* 83 S. Ct. 68 (1962).

The petitioner, thrice sentenced to the penitentiary for violation of Virginia penal laws, was sentenced to an additional ten years under the Virginia recidivist statute. This statute, Va. Code Ann. § 53-296 (1950), provides ". . . if it shall come to the knowledge of the Director of the Department of Welfare and Institutions . . ." that a prisoner has been previously sentenced two or more times for a like punishment in the United States, and such information is confirmed by a finding of the Circuit Court of the City of Richmond, the prisoner may be sentenced to such additional time as the court deems proper.

The petitioner, having been convicted only in Virginia, contended that the administrative application of the statute denied him equal protection of the law in violation of the Fourteenth Amendment to the Federal Constitution. His contention was founded upon the consistent and long continued practice by Virginia officials of failing to apply the recidivist provision to persons who had been convicted of committing previous crimes in states other than Virginia. The Supreme Court of Appeals of Virginia, sustaining the conviction, held that there had been no constitutional violation.

The decision disposed of the second major attack on the constitutionality of Virginia's administration of the statute. In *Chewning* v. *Cunningham,* 368 U. S. 443, 82 S. Ct. 498 (1962), the first such attack, the Supreme Court of the United States held the "potential prejudice" inherent in a recidivist trial to be so great that the Due Process Clause of the Fourteenth Amendment requires that the accused have the assistance of counsel. This holding necessitated an abrupt change in Virginia procedure and immediately resulted in new trials for approximately sixteen hundred convicts. In view of these ramifications it is important to realize the effect of the Equal Protection Clause in recidivist cases and to appreciate the true basis of the principal case.

In *Sims* v. *Cunningham, supra,* the Virginia court, holding that there was no denial of equal protection, apparently rested this conclusion on three grounds. First, equal protection of the law ". . . cannot be used to demand protection . . . in the commission of a crime"; second, the failure to proceed against out-of-state repeaters could result ". . . from mere laxity in the administration of the law" rather than being an intentional act of discrimination; and third, failure to enforce the statute against foreign repeaters resulted from the Director of Welfare and Institutions not having the requisite "knowledge" of the out-of-state convictions.

The first and second grounds are not wholly satisfying. In holding that Sims could not use the Constitution to "demand protection . . . in the commission of a crime" the court equated the petitioner's claim of discriminatory treatment with that

of a murderer claiming denial of equal protection on the ground that others have murdered with impunity. In *Goodman* v. *Kunkle,* 72 F. 2d 334, 336 (7th Cir. 1934), *cert. denied,* 293 U.S. 619, 55 S. Ct. 218, it was held that habitual criminality is not a crime but a state of being. See also *Graham* v. *West Virginia,* 224 U.S. 616, 624, 627, 32 S. Ct. 583 (1934). Thus, it would seem clear that the petitioner was not trying to invoke the Constitution to aid in the furtherance of a crime. The petitioner specifically urged that the administrative policy arbitrarily created two classes, Virginia repeaters and foreign repeaters, and that he, as a member of the former class, was a subject of discrimination. A concurring justice felt this argument to be immaterial because the petitioner was in no way harmed by this practice. Although it is not specifically spelled out, these observations intimate that the petitioner had no standing to challenge this practice.

The famous case of *Skinner* v. *Oklahoma,* 316 U.S. 535, 541, 62 S. Ct. 1110 (1942) refutes the foregoing observations by distinguishing the Virginia court's "murder analogy" and rendering impotent the suggestion of "no harm to the petitioner". In *Skinner* v. *Oklahoma, supra,* the United States Supreme Court ended the discriminatory practice under the habitual criminal statute of sterilizing offenders guilty of larceny while excluding those guilty of embezzlement. The court stated "[w]hen the law lays an unequal hand on those who have *committed intrinsically the same quality of offense* . . . it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." (Emphasis added.) In view of this statement it would seem that the Virginia court failed to face the issue of class discrimination.

The second ground is also somewhat unstable. In support of the petitioner's contention that the Virginia policy was intentional discrimination rather than inadvertence, it was established that the present procedure has prevailed for over one hundred years. The court concluded "[i]t may be mere laxity in the administration by the department, but mere laxity, no matter how long continued, is not . . . a denial of

equal protection of the law." This sustained policy has prompted the observation that "[a]t least such action would appear to be a planned laxity." Note, *Recidivism and Virginia's "Come-Back" Law,* 48 Va. L. Rev. 597, 621 (1962).

The third ground for the decision held that the Director did not have the requisite statutory "knowledge". This ground makes the case rest on a firmer basis. In order to secure a conviction under the recidivist statute, it is necessary that the convicting court have before it authenticated records of the out-of-state convictions. The Director does not have and has never had in his possession any such records. His information consists solely of reports of out-of-state convictions forwarded to him by the Federal Bureau of Investigation. The Virginia court implied that the "knowledge" contemplated by the statute was documented information, at least more than "hearsay and rumors" which are not susceptible to use as evidence.

In essence then, the petitioner's argument resolves into a question of whether a failure of the Director to take steps to procure authenticated records of out-of-state convictions, after having knowledge of their probable existence, is a denial of equal protection of the law. The real question is whether such a failure is unreasonable discrimination.

The statute placed no affirmative duty on the Director to obtain "knowledge" of the foreign convictions, and to obtain the information invisioned by the statute would have involved a tedious and expensive operation of collecting authenticated records of out-of-state convictions. Furthermore, costly positive action here would not have aided the petitioner in effectuating his right to challenge, as was the situation in the now famous case of *Griffin* v *Illinois,* 351 U.S. 12, 76 S. Ct. 585 (1956). In light of these circumstances, the practice does not appear unreasonable. Therefore, there is no constitutionally prohibited discrimination.

ROBERT W. MANN

EVIDENCE—Litigant's testimony must be read as a whole. *Virginia Electric & Power Company* v. *Mabin,* 203 Va. 490, 125 S.E. 2d 145 (1962).

In 1922 the Virginia Supreme Court of Appeals laid down the rule in *Massie* v. *Firmstone,* 134 Va. 450, 114 S.E. 652, that a party is bound by his own testimony once he has given it on direct examination. The litigant's cause of action may not rise above his own statements.

The case of *Massie* v. *Firmstone, supra,* seems to stand for two basic propositions. First, if a litigant testifies to some fact that would preclude his recovery he is irrevocably bound by that testimony. Second, once the party has so testified he will not be permitted to contradict or correct his previous statements. The litigant is bound by his previous admissions despite the fact that such testimony may have been given under the stress of extensive cross examination. A party is bound by statements requiring expert knowledge even though the litigant is unqualified to give such testimony and his own expert witnesses specifically contradict his statements.

The rule of *Massie* v. *Firmstone* has been subject to modification. In *Vaughan* v. *Eatoon,* 197 Va. 459, 89 S.E. 2d 914 (1955), the court held that the plaintiff's testimony concerning the speed of a motor vehicle was merely an estimate by the party and not binding. In a case involving an automobile collision, the court stated that events occurring just prior to a crash in which the party is injured are confused and distorted in his mind, and he may be unable to give an accurate account of all that took place. *Crew* v. *Nelson,* 188 Va. 108, 49 S.E. 2d 326 (1948). Also see *Burruss* v. *Suddith,* 187 Va. 473, 47 S.E. 2d 546 (1948). In order for a party to be barred from recovery, his statements must show beyond a reasonable doubt that he has no cause of action against his adversary. *Edmonds* v. *Mecklenburg Electric Cooperative,* 197 Va. 540, 90 S.E. 2d 188 (1955). See also *Clayton* v. *Taylor,* 193 Va. 555, 69 S.E. 2d 424 (1952); *Waller* v. *Waller,* 187 Va. 25, 46 S.E. 2d 42 (1948); *Bircherds Dairy* v. *Randall,* 180 Va. 311, 23 S.E. 2d 229 (1942); *Kirkorian* v. *Daily,* 171 Va. 16, 197

S.E. 442 (1938); *Tignor* v. *Virginia Electric & Power Company,* 166 Va. 284, 184 S.E. 234 (1936). For other jurisdictions see Annot. 169 A.L.R. 798 (1944) and McCormick, *Evidence* sec. 243 (1954).

In the recent case of *Virginia Electric & Power Company* v. *Mabin,* 203 Va. 490, 125 S.E. 2d 145 (1962) the plaintiff, while trying to repair a gutter, crawled under a wire which had been negligently installed without insulation. The plaintiff crawled under the wire at a point where it was about one foot above and behind him. The wire came in contact with the plaintiff and threw him to the ground.

On direct examination, the plaintiff testified that he knew of the wire and realized that if it were not insulated he would be injured by it. He further stated that he did not know that it was uninsulated nor that it carried high voltage electricity. On cross examination, the plaintiff stated that he "must have raised up a little bit for that wire to have hit me from the distance I was from it . . ." but that he did not raise up into the wire on purpose. He stated that he raised up only about six inches.

The court reaffirmed the rule of *Massie* v. *Firmstone, supra,* and stated on pages 493 and 494:

". . . this rule must, of necessity, be subject to a qualification, so that a litigant with a meritorious claim or defense will not be cast out of court because of some single, isolated statement which, when taken out of context . . . appears to be conclusive against him.

"This qualification to the rule requires that a litigant's testimony be read as a whole. A damaging statement made in one part of his testimony must be considered in the light of an explanation of such statement made in a later part of his testimony."

Consequently, a party's testimony must be read as a whole allowing each individual statement to be modified or contradicted by the facts as collectively given. While this does allow a certain latitude to the party testifying, it would seem justified by the protection afforded the deserving plaintiff from

the skilled cross-examiner and from the party's own inability to testify clearly to the actual facts.

LYNN B. OWENS

PLEADING AND PRACTICE—Plaintiff's counsel may inform the jury of the amount prayed for by the plaintiff. *Phillips* v. *Fulghum,* 203 Va. 543, 125 S.E. 2d 835 (1962).

The plaintiff was seriously injured when the automobile in which she was a passenger was struck from the rear by an automobile driven by the defendant. The plantiff brought an action for personal injuries. Counsel for the plaintiff referred to the *ad damnum* clause of the motion for judgment in both his opening and closing arguments. The defendant's counsel objected both times. Counsel based his objection on the fact that the request for $35,000 in damages was not evidence in the case and was without probative value. The court overruled the objections.

On appeal the defendant relied heavily upon *Simmons* v. *Adams,* 202 Va. 926, 121 S.E. 2d 379 (1961). In that case the trial court instructed the jury that their verdict should not exceed $15,000, the amount sued for. The Supreme Court of Appeals reversed and remanded the case stating that an instruction in this form was likely to be misleading and prejudicial to the defendant. Chief Justice Eggleston in delivering the opinion in the principal case said:

> We are invited to extend the holding in the *Simmons* case and say that reference by counsel for the plaintiff to the amount sued for by their client was likely to be misleading and prejudicial to the defendant and should not have been permitted. We decline that invitation for two reasons: In the first place reference to the amount sued for by counsel for the plaintiff is not likely to have the same effect upon the jury as reference thereto coming from the court itself. In the next place, it would be illogical, if

not absurd, to say that the jury should be instructed that the amount of their award, if any, should not be in excess of the amount sued for and then not told what that amount is.

In refusing to extend the *Simmons* rule the court held that counsel for the plaintiff could advise the jury of the amount sued for. Counsel for the defendant may have the jury instructed that such amount mentioned is not evidence.

The Virginia Supreme Court of Appeals was confronted with a split of authority in deciding the principal case. The Supreme Courts of Pennsylvania and New Jersey hold that counsel for the plaintiff cannot bring to the attention of the jury the amount sued for. *Porter* v. *Zeuger Milk Co.,* 136 Pa. Super. 48, 7 A. 2d 77, 78 (1939) and *Botta* v. *Brunner,* 26 N.J. 82, 138 A. 2d 713, 60 A.L.R. 2d 1331 (1957). The court chose to follow the contrary and majority view allowing counsel to tell the jury the amount sued for. *Williams* v. *Williams,* 87 N.H. 430, 182 A. 172 (1935); *Aetna Oil Co.* v. *Metcalf,* 298 Ky. 706, 183 S.W. 2d 637 (1944); *Shockman* v. *Union Transfer* Co., 220 Minn. 334, 19 N.W. 2d 812 (1945); *J. D. Wright and Son Truck Line* v. *Chandler,* 231 S.W. 2d 786 (Tex. 1950); *Roussin* v. *Blood,* 90 N.H. 391, 10 A. 2d 224 (1939); *Freeman* v. *Manhattan Cab Corp.,* 150 N.Y.S. 2d 674 (1956); *Jimmy's Cab, Incorporated v. Isennock,* 225 Md. 1, 169 A. 2d 425 (1961).

Missouri, which has considered the problem extensively, has shifted from the Pennsylvania view to the majority view. The most recent cases hold that the plaintiff's counsel may inform the jury of the *ad damnum* clause, but that it is improper to allow counsel to state the amount for the first time in his closing argument. *Domijan* v. *Harp,* 340 S.W. 2d 728 (Mo. 1960); *Goldstein* v. *Fendelman,* 336 S.W. 2d 661 (Mo. 1960). Note also: *Bales* v. *Kansas City Public Service,* 328 Mo. 171, 40 S.W. 2d 665 (1931); *Shepard* v. *Harris,* 329 S.W. 2d 1 (Mo. 1959); 88 C.J.S. Trial § 192 (1955).

For authority concerning counsel's argument stating a per diem basis for calculating damages see Payne, *Personal*

Injury Damage Arguments, University of Richmond Law Notes 1:230, Spring 1961.

N. Leslie Saunders, Jr.

SALES: SUPPLIERS OF CHATTELS—Retailer who fails to disclose true manufacturer and sells as his own product assumes the manufacturer's liability for negligence in manufacture if vendee relies upon and reasonably believes the vendor to be the manufacturer. The passage of time alone does not confer immunity on a negligent manufacturer. It merely is one factor to be considered in the question of liability. *Carney* v. *Sears, Roebuck & Company,* 309 F. 2d 300 (4th Cir., 1962).

The plaintiff purchased a six foot wooden stepladder from Sears, Roebuck & Company and used it a few times a month for about sixteen months. During the seventeenth month a faulty rivet holding a cross brace which secured the two sides together gave way, causing the ladder to collapse with the plaintiff on it. The plaintiff suffered physical injury from the fall and brought action for damages against Sears, Roebuck & Company.

The court found no breach of express warranty or of implied warranty of fitness for a particular purpose, but it did find that the vendee reasonably believed and relied upon the vendor as the manufacturer, and it held that this reasonable reliance imposed upon the vendor the liability of a manufacturer. The court also found that the breach of duty amounting to negligence was not nullified by the sixteen months of occasional use.

The case follows established patterns in most respects, but it seems to have contributed two significant elements to the law of suppliers of chattels. It is, of course, well established that a manufacturer is liable to an injured ultimate consumer for negligence in manufacture which is the proximate cause of the injury. This rule was laid down by Judge

Cardoza in *MacPherson* v. *Buick Motor Company,* 217 N.Y. 382, 111 N.E. 1050 (1916), and courts in the forty odd years since then have made it well nigh universal. It is almost as well established that a retailer who sells products known to be made by another is not liable for negligence in manufacture of which he is reasonably unaware. He is not required to open sealed containers, take goods apart, or even conduct any examination or inspection at all if it would normally be regarded as unnecessary. *Kratz* v. *American Stores Co.,* 359 Pa. 335, 59 A. 2d 138 (1948); *Zesch* v. *Abrasive Co. of Philadelphia,* 353 Mo. 558, 183 S.W. 2d 140 (1944); *Sears, Roebuck & Co.* v. *Marhenke,* 121 F. 2d 598 (9th Cir., 1941). But after going down these well traveled paths the court blazes two new trails in interpreting Virginia law.

The decision appears to establish the principle that a retailer will find himself liable to an uninformed purchaser who reasonably relies upon his being the manufacturer when the retailer chooses to advertise without disclosing the real manufacturer and when he uses in his advertising a trade name with which he alone is identified. This principle has been followed generally in other jurisdictions: *Lill* v. *Murphy Door Bed Co. of Chicago,* 290 Ill. App. 328, 8 N.E. 2d 714 (1937); *Blickman* v. *Chilton,* Tex. Civ. App., 114 S.W. 2d 646 (1938); *Dow Drug Company* v. *Nieman,* 57 Ohio App. 190, 13 N.E. 2d 130 (1936). See also *Simmons* v. *Richardson Variety Stores,* 1 Storey 80 (Del.), 137 A. 2d 747 (1957), where the lack of holding out as a manufacturer by the retailer prevented the customer's recovery. The retailer may believe this type of advertising is most effective, but he will have to realize that it carries with it a risk of liability not normally borne by a retailer.

On the matter of liability after a period of use courts have been prone to find no liability where it was shown that the product had been in trouble-free use for a substantial period of time. "The principle that the danger must be imminent does not change, but the things subject to the principle do change." *MacPherson* v. *Buick Motor Company, supra,* at page 1053. However, *Lill* v. *Murphy Door Bed Company of*

Chicago, supra, held that the lapse of time would not preclude recovery since at the time the accident did occur it was the result of the seller's negligence. The *Sears* decision, however, appears to say that the manufacturer who has negligently built an admitted flaw into his product cannot escape liability by showing an extended period of trouble-free use alone. If it is found that the flaw is one which would naturally work its way to the point of causing a failure after some usage far short of the normal life expectancy of such a product, then this finding is also an element that must be considered in determining liability.

ARTHUR S. MARIS

TAXATION—Payment received by an employee from his employer as reimbursement for the loss sustained on the sale of his home is taxable as additional compensation. *Bradley* v. *Commissioner of Internal Revenue,* 39 T. C. 64 (1963).

The petitioner was employed in Delaware. In April, 1957, he accepted employment with a Richmond firm and offered his Delaware home for sale. He moved to Richmond and commenced his duties on May 1, 1957 while his family remained in Delaware until the home could be sold. The petitioner went to Delaware on week-ends to see his family. His efforts to sell the property were not immediately successful, and he was concerned. Real estate appraisers had valued the property at between $22,000 and $24,000.

Two months passed, and the project for which the petitioner had been hired as a key man was not proceeding as well as the employer had expected. Therefore, in order to relieve the petitioner's anxiety over his unsold residence, the employer guaranteed that the petitioner would receive $23,500 on the sale of the Delaware property and promised to reimburse him for any loss resulting from sale at a lower figure.

The petitioner received but refused an offer of $19,000 for the home. However, on March 18, 1958, after several months of declining real estate prices, the petitioner sold the home

for $18,500. On April 1, 1958, the employer made a payment of $5,000 to the petitioner pursuant to its guarantee. The assessment of income tax on this payment was contested by the petitioner.

The petitioner contended that the amount received was part of the amount realized from the sale and was not taxable as additional compensation under Section 61(a)(1) of the Internal Revenue Code of 1954. The items which constitute "gross income" under Section 61 (a) include:

"(1) Compensation for services, including fees, commissions and similar items;

(3) Gains derived from dealings in property."

The petitioner argued that the payment clearly came within Section 61(a)(3) and should accordingly be treated under the provisions of Section 1001 of the Internal Revenue Code of 1954 for determining gain or loss from the sale of property. This conclusion was supported by *Otto Sorg Schairer,* 9 T.C. 549 (1947), where a similar reimbursement was considered. In *Schairer* the taxpayer had been an employee for ten years. His employer directed him to move his residence nearer to his place of employment. The employer agreed to reimburse him for any loss resulting from the sale of his former home. The taxpayer sold the residence and suffered a loss for which he was duly reimbursed. The Tax Court held that the amount received should be treated as part of the amount realized on the sale of the residence rather than as additional compensation.

The petitioner conceded that *Schairer* would not be applicable were the payment made as an inducement to accept employment as in the case of *Arthur J. Kobacker,* 37 T.C. 882 (1962). The petitioner further conceded that it was easily inferred that the payment was made as an inducement to accept employment when the employee was a "new employee," but in the principal case the petitioner was not a new employee since he had been employed for two months when the guarantee was made. This conclusion is supported by *John E. Cavanagh,* 36 T.C. 300 (1961), in which the Tax Court held that an employee for five weeks was not a new

employee. The petitioner maintained that *Schairer* was therefore clearly controlling.

The petitioner further contended that, since the evidence was clear that all of the arrangements for compensation had been satisfactorily agreed upon before employment began, the amount paid "was never intended as additional compensation" and could not be taxed as such.

In its opinion the court was frank in admitting that it could not see any practical distinction between the principal case and *Schairer*. However, the court felt that since 1947 when *Schairer* was decided "the complexion of the law has materially changed on the subject of what is and what is not compensation."

The case which the court deemed decisive of the issue was *Commissioner* v. *Lo Bue,* 351 U.S. 243, 76 S.Ct. 800 (1956). In that case an employer under a stock option plan sold stock to an employee at less than the fair market value. The issue was whether the transaction constituted a gift or compensation. The Supreme Court held that the bargain sale represented payments made as a direct inducement to greater services and said, "When assets are transferred by an employer to an employee to secure better services they are plainly compensation." The Tax Court failed to attach any significance to the fact that *Lo Bue* turned on the gift versus compensation question while in the principal case the issue was compensation versus gain derived from the sale of property with no argument being advanced by the petitioner that the payment represented a gift.

The holding seems to stand for the proposition that a payment in whatever form made pursuant to a guarantee given by an employer to an employee, be he an old or a new employee, if made as an inducement for better performance on the part of the employee, is compensation and taxable under Section 61(a)(1).

WILLIAM I. BANDAS
R. KENNETH WHEELER

TORTS—Federal Tort Claims Act excepts liability for negligent misrepresentation. *United States* v. *Neustadt,* 366 U.S. 696, 81 S. Ct. 1294 (1961).

The plaintiff brought an action against the government under the Federal Tort Claims Act as a purchaser of a home on which a federally insured mortgage was issued. At the request of the seller, an appraisal was made of the residential property by an agent of the Federal Housing Administration. The seller delivered to the buyer a written statement of the value placed on the property by the FHA appraiser, and the purchase price was established partly on the basis of this appraisal. Shortly after the purchaser took possession of the house, substantial cracks appeared in the interior walls and ceilings in all of the rooms and in the cinder blocks in the basement walls. It was then found by FHA officials that cracks were appearing in the exterior walls, the one story sun porch was separating from the east wall, and the foundation was settling in an unusual manner. By drilling a hole through the concrete floor of the basement, government inspectors found that these conditions were caused by the character of the subsoil which contained a type of clay that quickly disintegrated when exposed to water. It was determined that the underpinning of the foundation would require the expenditure of several thousand dollars.

The U.S. District Court of Virginia at Alexandria entered judgment for the purchaser in the sum of $8,000. The Circuit Court of Appeals, 281 F. 2d 596 (1960), affirmed. The U.S. Supreme Court, with Mr. Justice Douglas dissenting, reversed, holding that a provision in the Act, 28 U.S.C.A. section 2680(h), excepting claims arising from misrepresentation or deceit applied to claims arising from negligent as well as willful misrepresentation.

Subsection (h) of section 2680 contains ten additional torts which are specifically excepted from those torts in which recovery is allowed against the federal government. It is interesting to note that all of these other actions are intentional torts. The Supreme Court in *United States* v. *Neustadt, supra,*

stated on page 1298 that this section ". . . *clearly* meant to exclude claims arising out of negligent, as well as deliberate, misrepresentation." (emphasis added). In *United States* v. *Neustadt,* 281 F. 2d 596 (4th Cir., 1960), the Circuit Court made an attempt to distinguish a long line of cases supporting the proposition that liability of the government for a negligent misrepresentation was excepted by sec. 2680 (h). The court attempted to show that in these facts there was negligent performance of a duty which was not within the exception of the Tort Claims Act and relied on *Otness* v. *United States,* 178 F. Supp. 647 (D.C. Alaska, 1959). These distinctions were insufficient to compel affirmance by the Supreme Court of the United States. The Supreme Court reversed the Circuit Court of Appeals on the basis of the uniform construction of "misrepresentation" in sec. 2680(h) to include negligence. See *Miller Harness Co.* v. *United States,* 241 F. 2d 781 (2d Cir., 1957); *Anglo-American & Overseas Corp.* v. *United States,* 144 F. Supp. 635, 242 F. 2d 236 (2d Cir., 1957); *National Mfg. Co.* v. *United States,* 210 F. 2d 263 (8th Cir., 1954), *cert. denied,* 74 S. Ct. 778; *Jones* v. *United States,* 207 F. 2d 563 (2d Cir., 1953), *cert. denied,* 74 S. Ct. 518, *rehear. denied,* 74 S. Ct. 627; *Clark* v. *United States,* 218 F. 2d 446 (9th Cir., 1954); *Steinmasel* v. *United States,* 202 F. Supp. 335 (D.C.S.D., 1962); *Hungerford* v. *United States,* 192 F. Supp. 581 (D.C. Cal., 1961); *United States* v. *Van Meter,* 149 F. Supp. 493 (D.C. Cal., 1957).

The principal case points out the fact that the method of specifically enumerating excepted torts rather than making the distinction in terms of negligent and intentional torts leaves something to be desired. A reading of the opinion of the Circuit Court of Appeals presents a question as to the fairness of this method and the results which it requires.

GERALD RUBINGER

TORTS—Landowner or occupant liable only upon proof of gross negligence when defective condition on premises causes injury to licensee. *Smith* v. *Allen,* 297 F. 2d 235 (4th Cir., 1961).

A licensee on the premises of a Virginia landowner was injured due to a defective condition existing thereon. The federal court in reaching its decision determined that the rule of *Boggs* v. *Plybon,* 157 Va. 30, 160 S.E. 77 (1931), was applicable. This Virginia case held that the driver of an automobile was responsible to his guest passenger only for gross negligence. The Virginia court in rendering its opinion in the *Boggs* case followed the leading case of *Massaletti* v. *Fitzroy,* 228 Mass. 487, 118 N.E. 168 (1917). This gross negligence rule was later codified by the Virginia legislature and is now Va Code Ann. 1950 § 8-646.1 (Cum. Supp. 1962). Massachusetts later extended the rule of the *Massaletti* decision and in *Comeau* v *Comeau,* 285 Mass. 578, 189 N.E. 588, 92 A.L.R. 1002 (1934), decided that a landowner is liable to his social guest for gross negligence only. The federal court assumed that the Virginia court would again follow the decisions handed down by the Massachusetts court. This view was taken despite the fact that one decision of the Virginia Supreme Court of Appeals had expressly refused to extend the gross negligence rule beyond cases involving motor vehicles. *Walthew* v. *Davis, Adm'r.,* 201 Va. 557, 111 S.E. 2d 784 (1960). The Virginia court in the *Walthew* opinion stated on page 560 that the statute (§ 8-646.1) applies in its terms to the operation of motor vehicles and the decision to extend it to the operation of aircraft is one to be made by the legislature.

The federal court quoted verbatim from the RESTATEMENT TORTS, § 342 (1956) which sets forth the duty owed by a landowner to a licensee in regard to conditions existing on the premises. Then the court, after deciding that the plaintiff was to be treated as a gratuitous licensee (licensee in Virginia), failed to apply the law which it had deemed applicable. Certain statements by the court indicated that it felt that there could be liability of the landowner to the

licensee under the Restatement section for defective conditions of which he should have known, but the Restatement clearly requires that the landowner must have actual knowledge of the existing defect before any duty arises.

The federal decision stands for the proposition that a landowner is liable to a social guest for injuries resulting from defective conditions on his premises only if he is guilty of gross negligence. It also implies that a duty between the landowner and the licensee arises when the landowner should know of the defective condition on his land. While the federal court blazes its own trail, it would seem that the Virginia court will probably continue to follow the theories laid down in *Walthew* v. *Davis, Adm'r., supra,* and the RESTATEMENT, TORTS, § 342 (1956).

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