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Mandamus--Eminent Domain

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to be given the evidence. This being so, then the importance of producing a homicide weapon is a matter of fact, not law, to be determined by the jury.

Habitual Criminals—Jury Trial

The petitioner, *P*, was convicted of a felony punishable by an indeterminate prison sentence. Pursuant to the habitual criminal statutes an information was filed by the State charging that *P* had previously been convicted of a felony and imprisoned. *P* denied being the same person named in the information. The court, without informing *P* of the necessity of impaneling a jury to try the issue of identity, proceeded without a jury to try the issue raised by the information. The court held the charges in the information to be correct and added an additional five years to *P*'s indeterminate sentence. In his habeas corpus petition *P* alleged that because the court did not impanel a jury to determine the issue of identity the court was without jurisdiction to impose the additional sentence. *Held*, void as to the additional sentence, but the petitioner must serve the remainder of his indeterminate sentence. The right to trial by jury in habitual criminal proceedings is of such character that it cannot be waived. Habitual criminal proceedings providing for additional punishment of felons are wholly statutory. Thus courts have no inherent or common law power or jurisdiction in such proceedings. It is generally held that statutes in derogation of common law are strictly construed in favor of the felon. The statute, W. VA. CODE ch. 61 art. 11 § 19 (Michie 1966), specifically states that when the identity alleged in an information is at issue, a jury *shall* be impaneled to determine the issue. This clearly confers jurisdiction, in such matters, upon the jury and not upon the court acting in lieu of a jury. The court has consistently held habitual criminal statutes to be mandatory and jurisdictional. *Ringer v. Boles*, 157 S.E.2d 554 (W. Va. 1967).

The narrow holding of this case is that in the habitual criminal statutes the word *shall* means *must* and the lower court must follow, to the letter, the procedure set out in the statute.

Mandamus—Eminent Domain

In an original proceeding in mandamus, the petitioner sought to compel the State Road Commissioner to institute against the petitioner a proceeding in eminent domain in order to ascertain and

determine damages to his property resulting from nearby highway construction. The petitioner alleged that in the construction of the highway the respondents caused streams and drains to be diverted from their natural courses and failed to provide adequate drainage facilities for carrying away the increased run-off of the surface waters thereby causing petitioner's land to be flooded. In reply, the respondent contended that it was the obligation of the City of Huntington and the petitioner to provide for proper drainage and that if any damaged was caused by the construction, the liability would fall upon the contractor and not upon the respondent, *Held*, writ of mandamus awarded. *State ex rel. Lynch v. State Road Commission*, 157 S.E.2d 329 (W. Va. 1967).

In holding for the petitioner the court stated that in such a proceeding in mandamus it is not the duty of the court to determine whether or not the respondent had actually caused damage to the petitioner's land. The court declared that if a showing of probable damage could be made then this would be sufficient to entitle the petitioner to have his grievance judicially determined in a proceeding in eminent domain.

Torts—Liability of a Railroad

P, an employee of the Weirton Steel Company, was injured when a boxcar connected to *D*'s train collided with a building on Weirton's property in which *P* was working. It was undisputed that the proximate cause of the collision was a defective track switch which *D*'s train passed over.

In 1927 *D*, the Pennsylvania Railroad, and the Weirton Steel Company had entered into a side track agreement whereby Weirton was to construct, own, and maintain all of the railroad tracks upon its property. The defective switch was located upon a side track covered in this agreement. The trial court held that the railroad's side track agreement, although a valid contract between the parties, did not relieve *D* railroad of its duty to maintain in a safe condition the tracks and switches with which it operates. *Held*, affirmed. *Sommerville v. The Pennsylvania Railroad*, 155 S.E.2d 865 (W. Va. 1967).

In reaching its decision the court relied partially on the holding in *Carrico v. West Virginia C. and P. Railroad Company*, 39 W. Va. 86, 19 S.E. 571 (1894), which decided that a railroad company