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Motion to Set Aside the Verdict: Evidence Deficiencies

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COMMENT

MOTION TO SET ASIDE THE VERDICT: EVIDENCE DEFICIENCIES

1. The Motion In General

After the verdict has been rendered in a trial court in Virginia, there are many paths open to the party against whom the verdict has been rendered. One of these paths is the motion to set aside the verdict of the jury on the grounds that it is contrary to the evidence or without evidence to support it, and to enter up final judgment for the moving party.[1] This motion has had a long and interesting history in the courts of the state of Virginia. We shall begin with a brief study of the use and effect of the motion prior to 1919, then move on to its increased use and effects from the revision of the Virginia Code in 1919 to the motion as it is used in the Virginia Courts in 1964.

Prior to the revision of the Code in 1919 the motion to set aside the verdict on the grounds that it was contrary to the evidence (or without evidence to support it) was merely another means by which the dissatisfied party could obtain a new trial. The motion could result in no other action. The law as it stood prior to 1919 was to the effect that when the verdict of a jury in a civil action was set aside by a trial court upon the grounds that it was contrary to the evidence (or without evidence to support it), a new trial had to be granted. The most serious difficulty offered by the motion in this early period was the proper definition of the phrases "contrary to the evidence" and "without evidence to support it." [2]

With the important revision of the Virginia Code in 1919, the motion to set aside the verdict because contrary to the evidence (or without evidence to support it) became more significant in the field of courtroom law. In 1919 the Code Revisors Committee recommended and the Virginia General Assembly adopted, a statute which materially altered the effect of a motion to set aside a verdict because contrary to the evidence or without evidence to support it. The statute read as follows:

> When the verdict of a jury in a civil action is set aside by a trial

1. Burks, Pleading and Practice 616 (4th ed. 1952).

2. Burks, Pleading and Practice 604 (4th ed. 1952).

> court upon the ground that it is contrary to the evidence, or without evidence to support it, a new trial shall not be granted if there is sufficient evidence before the court to enable it to decide the case upon its merits, but such final judgment shall be entered as to the court shall seem right and proper. If necessary to assess damages which have not been assessed, the court may empanel a jury at its bar to make such assessment, and then enter such final judgment.
>
> Nothing in this section contained shall be construed to give to trial courts any greater power over verdicts than they now have under existing rules of procedure, nor to impair the right to move for a new trial on the ground of after discovered evidence.[3]

The object of this section, the revisors said, was to put an end to the action, thereby putting the losing party to his writ of error. In this way they felt they would avoid the unnecessary delay and expense of a second trial. Since by its terms this statute allowed a court to set aside a verdict handed down by a jury and enter a final judgment of its own, it was only a matter of time before its constitutionality was questioned. For was this not in effect a denial of the right to be tried by jury? In June 1921 this question was presented to the Virginia Supreme Court of Appeals in the case of *Forbes and Company v. Southern Cotton Oil Company*.[4] The court, after considering the matter of the constitutional guarantee of the right to trial by jury, upheld the statute. The court said its decision was influenced by several factors. One of these was the fact that the members of the Revision Committee of the Code of 1919 had been carefully selected for their work. It was presumed that they gave the statute their careful consideration in drafting and submitting it to the General Assembly, including their deliberate judgment as to its constitutional validity. Adding to this the factor of the legislature's judgment in adopting it, the court felt that ". . . this court ought not to pronounce the section unconstitutional unless it is plainly so—so plainly as to leave no doubt on the subject." [5]

The Revisor's Committee of 1919 felt that this statute would also take effect in another form, that of a substitute for the demurrer to the evidence. Since the motion to strike the evidence has evolved in Virginia, it has almost completely replaced the demurrer to the evidence. Therefore we will contrast this motion with the motion to set aside the verdict because contrary to the evidence or without evidence to support

3. VA. CODE ANN. § 8-352 (1950) (Replacement Volume 1957).
4. 130 Va. 245, 108 S.E. 15 (1921).
5. *Id.* at 257.

it, for it was felt that this motion could and would be used as a substitute. It has been held in Virginia that in a civil case the defendant or the plaintiff have an option in testing the sufficiency of their opponents evidence. They may make a motion to strike the evidence at the conclusion of the opponent's evidence or at the conclusion of all the evidence, or they may await the verdict of the jury and then make a motion to set aside the verdict because contrary to the evidence (or without evidence to support it).[6] The question then arises as to which of the motions is to be pursued. To determine which motion would be best suited to counsel's intended purpose, the individual facts of each case must be examined. Courts are more apt to say that a jury could not have drawn a particular inference from the evidence had it been submitted to them, than if they are to set aside a verdict after the jury had already drawn the inference. But the motion to strike the evidence indicates a possible weakness in the case presented and will give counsel's adversary an opportunity to take a nonsuit or to introduce additional evidence. If, however, counsel waits, not making the motion to strike and the jury finds against him; if his adversary has failed to prove his case and he moves to set aside the verdict; it is too late for his adversary to do anything.[7] There are advantages to each motion, and as it was stated before, the selection must depend on the individual facts of the case. In regard to their appropriateness as a vehicle for testing the sufficiency of the evidence, it has been held that each is separate and distinct. As the court said in *Gabbard v. Knight* ". . . whether or not there has been a motion to strike the evidence, the motion to set aside the verdict because contrary to the evidence may be used as an appropriate means of testing the sufficiency of the evidence." [8]

II. When Should A Verdict Be Set Aside Under 8-352?

It was distinctly stated in the writing of the statute in the 1919 Code, that the courts would have no greater power over verdicts than they had before the enactment of the statute. Therefore, before a court could proceed under the new statute, it had to determine whether it could have properly set aside a verdict under the law as established by court decisions prior to the enactment of this statute. Again the old question of defining the terms "contrary to the evidence" or "without evidence to support it," haunted the courtroom. Since there was no statutory law

6. Seinsheimer Co. v. Greenaway, 159 Va. 528, 166 S.E. 539 (1932).
7. Burks, Pleading and Practice 606 (4th ed. 1952).
8. 202 Va. 40, 116 S.E.2d 73 (1960).

on the subject, past court decisions helped to determine how to define these elusive terms. *Jackson v. Wickham*[9] was one of the most decisive cases in solving the problem. The court stated that they felt that where a case had been properly submitted to a jury and a verdict fairly rendered, this verdict should be given great weight in determining whether or not it should be set aside. They felt that unless manifest injustice had been done, or unless the verdict was plainly not warranted by the evidence, the jury verdict must stand.

If there is:

1. A conflict of testimony on a material point or;
2. If reasonable fair-minded men may differ as to the conclusions of fact to be drawn from the evidence or;
3. If the conclusion is dependent upon the weight to be given the testimony;

then the verdict of the jury is final and conclusive and cannot be disturbed by either the trial court or the Supreme Court of Appeals.[10] It is not enough that there is a great preponderance of the evidence against the verdict, or that the judge, had he been on the jury, would have decided differently. There must be an obvious deviation from right and justice before a court will be justified in setting aside a jury's verdict.[11] In the aforestated list of factors, it was stated that if the conclusion was dependent upon the weight to be given to the testimony, then the jury verdict must stand. In a recent Virginia case, *Cloutier v. Virginia Gas Distribution Corporation*,[12] it was decided that in determining whether the verdict was contrary to the evidence (or without evidence to support it), that the court must to some extent, pass on the weight of the evidence. The court does not, however, sit as a jury and it is not the court's duty to pass on the preponderance of the evidence. Also the court may not set aside a verdict supported by testimony of which there is no reason to discredit.[13] Exactly how far may the court go in determining whether the jury's verdict is contrary to the evidence or without evidence to support it? There is no statement defining the exact limit to which the trial court or the Supreme Court of Appeals may go, but it has

9. 112 Va. 128, 70 S.E. 539 (1911).
10. BURKS, PLEADING AND PRACTICE 609 (4th ed. 1952).
11. Sydnor & Huntley v. Bonifant, 158 Va. 703, 164 S.E. 403 (1932).
12. 202 Va. 646, 119 S.E.2d 234 (1961).
13. McOuown v. Phaup, 172 Va. 419, 2 S.E.2d 330 (1939).

been agreed that the verdict of the jury is entitled to great weight and respect. Though the court may have overruled a prior motion to strike the evidence, when reviewing the evidence on a motion to set aside the verdict because contrary to the evidence (or without evidence to support it), the court may disregard the evidence if it is clearly inconsistent or incredible. It may best be summed up by stating that the Virginia Courts usually will not set aside a jury's verdict unless it appears to be ". . . 'plainly against the weight of the evidence', meaning 'palpably erroneous' or 'without sufficient evidence'; or 'against the evidence', practically synonymous terms alternately used in the decided cases." [14]

III. When Should The Court Enter Final Judgment On A Motion To Set Aside The Verdict Under 8-352?

According to the statute, ". . . a new trial shall not be granted if there is sufficient evidence before the court to enable it to decide the case upon its merits, but such final judgment shall be entered as to the court shall seem right and proper." [15] In most of the cases passing on the question since the statute was enacted, no distinction has been drawn between the power of the court to set aside a verdict and grant a new trial and that of setting aside the verdict and entering final judgment. So in determining whether to grant a new trial or to enter a final judgment, the court does not look at the evidence as it would on a demurrer to the evidence. Instead the court will examine the evidence as it would on a motion to strike, and will examine it as a whole and will to some extent, have to pass on the weight of the evidence. The Virginia Courts have tended to allow more latitude in setting aside a verdict and granting a new trial, than in setting aside a verdict and entering a final judgment. This latitude results from the fact that a new trial will merely leave the question to another jury, while a final judgment constitutes a decision on the merits and ends the action. Therefore, it would seem that before a Virginia Court would set aside a verdict and enter final judgment, they would have to be assured of two things. The first being that the party whose verdict is being set aside has clearly failed to prove his case, and secondly that he probably could not do so if he was provided another trial.[16] In compliance with the statute, the Court must determine

14. Cardwell v. Norfolk & W.R. Co., 114 Va. 500, 77 S.E. 612 (1913).

15. Va. Code Ann. § 8-352 (1950) (Replacement Volume 1957).

16. Burks, Peading and Practice 615 (4th ed. 1952).

whether there is sufficient evidence for a decision on the merits to be reached; for if there is not, then the party must be granted a new trial.

This section is the heart of 8-352 and by proper use has been of great aid both to lawyers and to the judicial system. For it has as its creators envisioned, eliminated unnecessary delays and expenses of a second trial when one is uncalled for. No longer is the motion to set aside the verdict because contrary to the evidence (or without evidence to support it) a mere device for obtaining a new trial. It now serves as a method to guarantee a speedy end to litigation, which before had served only to bog down the judicial system.

IV. Power Of The Court To Impanel A Jury To Assess Damages

"If necessary to assess damages which have not been assessed, the court may impanel a jury at its bar to make such assessment, and then enter such final judgment." [17]

In *Kirn v. Bembury*,[18] a 1935 Virginia case, it was stated that the trial court had been granted the express power to set aside a verdict and confine the issues to be tried, to the quantum of damages, in a proper case under section 8-352. Though this power is expressly granted by the Code, the Virginia Courts have been extremely hesitant to use it. The reason behind this hesitancy is the question of a proper distinction between liability and the amount of damages. The judges seem to feel that only rarely will the questions of inadequacy or adequacy of damages and of liability be so distinct that a new trial or a jury assessment after verdict set aside and before final entered, could be limited to the issue of damages, and not prejudice one of the parties to the suit.[19] In a 1934 Virginia case,[20] the members of the Supreme Court of Appeals set down their views on the subject of a new trial or assessment at the bar before final judgment, limiting them to the question of damages. In this case the plaintiff brought suit against the defendant for both personal property injuries sustained by her in an automobile accident, which she claimed was a result of defendant's negligence. At the close of plaintiff's evidence, defendant made a motion to strike on the grounds that the evidence offered showed that plaintiff's driver was guilty of negligence chargeable to plaintiff, which contributed to the causes of the accident. This motion was overruled. After excepting, defendant

17. Va. Code Ann. § 8-352 (1950) (Replacement Volume 1957).
18. 163 Va. 891, 178 S.E. 53 (1935).
19. Note, *New Trial On the Issue of Damages In Virginia*, 41 Va. L. Rev. 269 (1955).
20. Rawle v. McIlhenny, 163 Va. 735, 177 S.E. 214 (1934).

proceeded to introduce evidence on his behalf. At the conclusion of introduction of evidence by both parties, defendant did not renew his motion to strike. The case was submitted to the jury and a verdict of $1500 was awarded the plaintiff. No motion to set aside was made by the defendant, but plaintiff so moved on the grounds that the damages were inadequate and insufficient in amount. The court granted the plaintiff's motion over the defendant's protests and empaneled a jury to assess the damages. This jury returned a verdict assessing the damages at $5000. Defendant moved to set aside this verdict. The Supreme Court of Appeals upheld the verdict stating that the right of plaintiff to have a verdict in his favor set aside over defendant's objection on the grounds of inadequacy of damages, did not depend solely upon evidence of damage he had suffered. Both the cause for the return of an inadequate verdict and the state of evidence relative to liability of defendant, have a bearing on the right of plaintiff to have a favorable verdict set aside for inadequacy. The court goes on to list five classifications turning upon the evidence relating to the liability of the defendant. The five classes they established were,

Where:

1. Evidence is insufficient to support a verdict adverse to defendant.
2. Evidence is insufficient to sustain a verdict finding defendant not liable.
3. Preponderance of evidence is against plaintiff's right to recover, though there is evidence to support a verdict against the defendant.
4. Preponderance of evidence is in favor of plaintiff's recovery but there is evidence to support verdict finding defendant not liable.
5. Conflicting evidence—no preponderance—evidence is sufficient to support a verdict in favor of either.

Classifications 1 and 3 are almost unanimously accepted as situations where the court would refuse to set aside a verdict on grounds of inadequacy; 2, 4, and 5 are situations where the courts agree a verdict may be set aside for inadequacy and a new trial limited to damages. So it would seem that under 8-352 the court might well in situations 2, 4, and 5 set aside the verdict and empanel a jury at its bar to assess the damages before entering final judgment. In the exercise of this power, however, the court must make certain that the jury's misconduct or misconception

from which the inadequacy of the verdict resulted, has not extended to its determination of liability.

The *Rawles* case seemed to settle the law in Virginia on the question of the power of the court to set aside a verdict and limit the issue to the question of damages. In 1952, however, members of the Virginia Bar received notice that this question was still unanswered. In the case of *Wright v. Estep*,[21] a motion to set aside the verdict and limit the question to damages was overruled. The Court said that the damages were substantial but inadequate, and that a new trial must be held on all the issues; since it appeared from the verdict that the jury was materially influenced by the issue of liability. This decision was in direct conflict with the *Rawles* case, where the motion was upheld and the question limited to that of damages. Here the Court also said that the damages were substantial but inadequate, but that merely because there was no preponderance of evidence, either way was not sufficient reason to require a retrial of all issues.

The two cases cannot be reconciled. The only conclusion to be drawn is that in Virginia, the doctrine of allowing the Court to empanel a jury at its bar to assess damages, has been seriously restrained. This doctrine seems meritorious and its use should be encouraged rather than discouraged. It was meant to curb the expense and delay of an unnecessary second trial on all the issues, and if the circumstances indicate its use, counsel while being mindful of the restraints placed upon it, should not hesitate to use it in the best interests of his client.

V. When A New Trial Should Be Granted

". . . A new trial shall not be granted if there is sufficient evidence before the court to enable it to decide the case upon its merits, . . ." [22]

From the very words of this statute it is obvious that a new trial will be granted only if there is insufficient evidence to enable a decision on the merits. If the evidence is insufficient, section 8-352 should not be invoked, and if the motion is made for final judgment the trial court must overrule the motion.[23] In the case of *Kirn v. Bembury*,[24] defendant was estopped by a statutory rule from obtaining the benefit of evidence, introduced without objection, which proved his innocence. In considering the motion to set aside under 8-352, the court stated that:

21. 194 Va. 332, 73 S.E.2d 371 (1952).
22. Va. Code Ann. § 8-352 (1950) (Replacement Volume 1957).
23. Branning Mfg. Co. v. Norfolk-Southern R. Co., 138 Va. 43, 121 S.E. 74 (1924).
24. 163 Va. 891, 178 S.E. 53 (1935).

> When the record shows that because of an inadvertent failure of defendant to comply with some technical rule of procedure he has been estopped from fully developing the question of his liability, there is not sufficient evidence, within the meaning of the statute, before the Court to enable it to pass upon the 'merits of the case'.[25]

The Court then went on to say that if the verdict should be set aside under such circumstances, the issues submitted to another jury should not be limited to the question of damages. Then too, if the motion is made to set aside, and no request is made for final judgment, the Court is not denied the right to enter a final order, but it should make sure it is a proper case.

Though the granting of a new trial on all the issues by a motion to set aside under 8-352 does not fulfill its prime purpose (that of obtaining a speedy end to costly litigation), many times the motion under 8-352 will result in this end. For the Courts in Virginia have tended to "be sure" before entering a final judgment under this statute.

VI. Effect Of This Section On Appeal

The familiar maxim, "a jury's verdict is entitled to great weight and respect", is evident in the cases brought before the courts on appeals from decrees rendered under 8-352.

In a recent Virginia case the fact that a verdict which has been disapproved by the trial judge is not entitled to the same weight as one that has been approved by him, was reiterated.[26] With the great weight and respect given a jury's verdict added to the approval of the trial court, the appellate court is in a position which requires that in almost every case, the verdict be upheld.[27] In considering a verdict on appeal, the appellate court must proceed under section 8-491 of the Virginia Code.[28] When read in connection with 8-352, this section clearly refers to a judgment in support of a jury verdict.

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25. *Id.* at 904.

26. Cloutier, Adm'r v. Gas. Corp., 202 Va. 646, 119 S.E.2d 234 (1961).

27. Holloman v. Com., 138 Va. 758, 120 S.E. 852 (1934).

28. Va. Code Ann. § 8-491 (1950) (Replacement Volume 1957). When in a case at law, civil or criminal, is tried by a jury and a party excepts to the judgment or action of the court in granting or refusing to grant a new trial on a motion to set aside the verdict of a jury on the ground that it is contrary to the evidence, or when a case at law is decided by a court or judge without the intervention of a jury and a party excepts to the decision on the ground that, it is contrary to the evidence and the evidence, not the facts is certified, the judgment of the trial court shall not be set aside unless it

If on appeal, it is found that the trial court improperly set aside the verdict, it will be reinstated by the appellate court.[29] If a new trial was granted under 8-352, and no appeal was taken, and at the close of the second trial a motion under 8-352 was made, and thence appealed; what position will the appellate court take? The Virginia Supreme Court of Appeals answered this question in the case of *Hogg v. Plant.* There Judge Burks said:

> . . . we have adopted as a rule of practice what was formerly provided by section 3-484 of the Code of 1887, that when there have been two trials in the lower court we will look first to the evidence and proceedings on the first trial, and if we discover that the court erred in setting aside the verdict on that trial, we will set aside and annul all proceedings subsequent to the said verdict and enter judgment thereon.[30]

VII. In Summary

That part of the Virginia Code now known as section 8-352, has led a long and useful life since its inception in 1919. From the question of its constitutional validity to the question of how far the court may go in examining the evidence on a motion to set aside under it, the statute has grown. It has admirably fulfilled the expectations of its creators. It serves as a worthwhile adjunct to the modern motion to strike the evidence and is still aiding the Virginia legal system in avoiding the unnecessary delays and expenses of a second trial.

It seems to the author that the Virginia Courts have used 8-352 to its full advantage with one important exception. The courts have been extremely hesitant to use the power conferred by this statute in respect to the question of damages. This hesitancy has only served to impede the advantages incurred by the proper use of the powers granted under the statute. Merely because liability is not clear cut and the damages awarded are inadequate is not sufficient reason to refuse to use the power granted under 8-352. If both the jury and the trial court feel that the question of liability has been fairly decided, why shouldn't a new trial be limited to the question of damages? It is the author's hope that in the future

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appears from the evidence that such judgment is plainly wrong or without evidence to support it.

29. Gregory v. Seaboard Airline R. Co., 142 Va. 750, 128 S.E. 272 (1925).

30. 145 Va. 175, 182, 133 S.E. 759 (1926); *accord* Eubank v. Hayden, 202 Va. 634, 119 S.E.2d 328 (1961).

the Virginia Courts will not shy away from the power to limit the question to that of damages; but will fully utilize this power which will result in the desired effect of avoiding unnecessary and costly litigation. Only then will the Virginia Court system receive the full benefits granted both to them and the citizens of Virginia, by the Revisors of the Virginia Code in 1919 in adopting statute 8-352.

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