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Rule 3:21

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Turning to the determination of the existence of another adequate remedy for the appellees, it seems that this was clearly a question for the court which had not been previously determined. The court reached a result which this writer believes it can justify; however, it seems reasonable to say that the court might have reached the opposite result and justified it by an expansion and more thorough examination of the appellee's argument that the statutory remedy was not adequate for this situation.

In the case of *Whited* v. *Fugate, supra,* we seem to have a clear case for the application of a writ of mandamus. Here the court said: "For the reasons stated in the case of *Hall* v. *Stuart, supra,* . . . the petition . . . for a mandamus should have been granted," and with no further discussion granted the mandamus. This would certainly lead one to believe that the court is implying that here is a "clear" situation for the application of mandamus.

These two cases seem to help clarify the court's position on the granting of mandamus. The first case seemed to come close to justifying a need for mandamus, but the argument for it was not strong enough for the Supreme Court. The second case presented a need, sufficiently strong, to have the court grant the writ.

T. H. F.

PROCEDURE—RULE 3:21

In a recent case,[1] the Virginia Supreme Court of Appeals has interpreted for the first time Rule 3:21 of the Rules of Court. The interpretation made by the Court was one of a most restrictive nature and, judging from the facts of the case, may have thwarted justice. It is true that the Rule was given a definitive interpretation, but the binding analysis, as fixed by the Court, was not warranted in the face of the liberal policy which is the trend in this country whenever procedural problems are involved. Rather than proceed under this modern view, the highest Court in Virginia has chosen instead to remain with the conservative element.

In the present case, which arose from an automobile accident, the final judgment was pronounced and entered on March 17,

[1] Harvey v. Chesapeake & Potomac Telephone Co., 198 Va. 213, 93 S.E.2d 309 (1956).

1955. On April 7, 1955, which was the twenty-first day after the entry of final judgment and within the twenty-one day period as computed by the statutory provision,[2] the plaintiff filed with the clerk of court a paper designated by him to be a motion to set aside the verdict. The grounds for such a motion were that a witness who was summoned, but not called, had made improper remarks to members of the jury. On the same day the defendant was notified that the plaintiff would present the motion to the court on April 11, 1955, which was twenty-five days after the entry of judgment. An affidavit was lodged with the clerk on May 4, 1955. The trial court overruled the motion on June 29, 1955, stating that it had not been made timely. The plaintiff noted an exception to the adverse ruling and entered a notice of appeal and assignment of error on July 7, 1955, which was eighty-two days after the entry of final judgment.

In deciding this point, the Court ruled that the purpose of Rule 3:21[3] was the same as that of Section 17-31,[4] whose purpose was, namely, to expedite final determination of all litigation. The statute did not contemplate the mere filing of a paper with the clerk to have the effect of extending the time prescribed; therefore, the Rule did not. After the final judgment is entered, only the trial court, by proper order entered within the twenty-one day period, is authorized to change it. As the clerk's only duty is to receive legal papers and note thereon the time of receipt, he has no authority to extend the time period.

To reach its decision on this point, the Court relied heavily on *Bridges* v. *Commonwealth*[5] which interpreted the now obsolete statute. It reaffirmed its finding in that case wherein it was held that when a final judgment has been entered, the trial court loses all jurisdiction and power to reopen and change the order unless it, in its discretion and with reasonable language used within the

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[2] Va. Code §1-13(3) (1950).

[3] Rules of Court 1950. Rule 3:21 provides that all final judgments remain under the control of the trial court and are subject to be modified or vacated for twenty-one days after the date of entry and no longer.

[4] Va. Code §17-31 (1950) provides that all judgments or decrees entered during any term of court shall become final at the end of the term or at the expiration of fifteen days after their rendition, whichever shall first happen.

[5] 190 Va. 691, 58 S.E.2d 8 (1950).

prescribed period, undertakes further to consider and adjudicate the matters decided.

It is the contention of this writer that the strict interpretation placed upon the Rule is unwarranted because of the apparent differences between it and the previous statute. The purpose of the Rule is to give the trial court greater freedom, even after the judgment becomes final, to rectify any mistake that has been made if found within the allowed period. The purpose of the statute, as announced by the Court, was to bring to a swift conclusion all litigation. Even so there was a period between the entry of the judgment and the time that it became final in which the trial court could operate to modify or vacate its judgment. There is no mention in the statute of any discretionary power placed on the trial court to change a judgment once entered. The Supreme Court, however, interpreted the statute liberally as being within the contemplation of the legislature to allow discretionary action.

As interpreted in this case, there is no mention of any limitation nor any boundary placed upon the trial court to guide it in the granting or refusing of the motion. From the language of the Court, it is arguable that the entire matter is absolute. The only alternative in such a situation as this is for a new trial as prescribed by statute.[6] This would involve costly litigation as well as adding another case to the already overcrowded docket. The better result would be to have a summary proceeding as is provided for in other jurisdictions.

To prevent this problem from arising again, it is advocated by this writer that an amendment be added to the Rules of Court. This amendment should allow broad discretion in the trial court, but its power should be restricted in such a manner that an aggrieved party may institute a motion to have the verdict set aside on certain enumerated grounds.

As an illustration of the type of Rule that should be adopted, it is recommended that the Federal Rule[7] be used as a model. For the following reasons, the procedure used in that system allows a motion by the aggrieved party for relief: (1) mistake, inadvertance, surprise, excusable neglect; (2) newly discovered evidence which

[6] Va. Code §8-352 (1950).
[7] Rule 60(b), 28 U.S.C. (1952).

by the exercise of due diligence could not have been discovered previously; (3) fraud by the adverse party; (4) the judgment is void; (5) the judgment has been satisfied; (6) any other reason justifying relief. The evidence which must be produced at the hearing would have to be more than cumulative. Its nature must be such that if it had been produced at the trial, the outcome would have been materially altered. The motion must be made within a reasonable time but in no event should it exceed a period of one year from the entry of the final judgment.

The adoption of such an amendment would in no way affect the finality of the judgment nor suspend its operation. If the motion were sustained, the money paid to the plaintiff in satisfaction of this judgment would be held in trust for the moving defendant. The effect of such a rule would be to place before the trial court matters which, if they had been presented at the original trial, could possibly have produced a different verdict. The purpose of such a rule would be to prevent recurrence of the situation which presented itself in the *Harvey* case. If this recommendation is enacted, it would become an easy matter in proper cases to get before the trial court where exceptions could be taken. With this rule, the absolute discretion now vested in the trial court could be reviewed by the highest court in the Commonwealth and would provide another liberal and forward moving step in the overall trial procedure.

J. E. M.

RECORDATION OF DEED OF TRUST AS INQUIRY NOTICE

The Supreme Court of Appeals of Virginia in *Chavis* v. *Gibbs*[1] has been able to delineate its definition of notice in respect to purchasers of property under the requirements of the Virginia Recording Act.[2]

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[1] 198 Va. 379, 94 S.E. 2d. 195 (1956).

[2] Va. Code §55-96 (1950), which states: "Every such contract in writing, and every deed conveying any such estate or term, . . ., when the possession is allowed to remain with the grantor, shall be void as to all purchasers, for valuable consideration *without notice* not parties thereto and lien creditors, until and except from the time it is duly admitted to record . . . . ., but the mere possession of real estate shall not of itself constitute notice to purchasers thereof for value of any interest or estate therein of the person in possession [Emphasis added]."