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The Motion to Strike Out the Evidence in Virginia

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THE MOTION TO STRIKE OUT THE EVIDENCE IN VIRGINIA

The motion to strike out evidence in Virginia may be directed against a particular item of evidence, the testimony of a particular witness, or it may be used to strike all the evidence. This article deals with the motion to strike out all the evidence of one of the parties to the litigation. The scope of the article includes an examination of the motion to strike, a comparison to the demurrer to the evidence, to the directed verdict and to the motion for summary judgment and finally, to the use of the motion to strike as used in the Court of Chancery in Virginia and the Federal Courts. The importance of the motion to strike is emphasized by the role it individually plays in these other motions. The motion to strike itself is one of the main procedural methods in use today in Virginia to take a question of law from the deliberation of the jury and in its place substitute the judgment of the court.

THE MOTION TO STRIKE OUT THE EVIDENCE

In *Green v. Smith*,[1] the court stated the criterion for the application of the motion to strike. "A motion to strike out all the evidence of the adverse party is very far-reaching and should never be entertained where it does not plainly appear that the trial court would be compelled to set aside any verdict for the party whose evidence it is sought to strike out." In a majority of jurisdictions the test for granting a motion to strike the evidence is the so-called "reasonable minds" test. If reasonable minds could reasonably come to but one conclusion on the evidence, the court should direct the jury to find according to that one reasonable conclusion. In Virginia Rule 3:20 of the Virginia Supreme Court of Appeals seems to arrive at the reasonable minds test by providing that if it appears upon sustaining a motion to strike the evidence, that the moving party is entitled to judgment, the court shall enter judgment in his favor. If any material fact is genuinely in dispute, however, this cannot be done.[2]

A motion to strike out the evidence made at the conclusion of the plaintiff's evidence in chief, but before the defendant has testified, should not be sustained unless it is very plain that the court would be compelled to set aside a verdict for the plaintiff upon a consideration

1. 153 Va. 675, 679, 151 S.E. 282 (1930).

2. PHELPS, HANDBOOK OF VIRGINIA RULES OF PROCEDURE IN ACTIONS AT LAW 226 (1959).

of the evidence strictly as upon a demurrer to the evidence in light of the fact that the defendant has seen fit not to testify and subject himself to cross-examination.[3] In considering the motion to strike the plaintiff's evidence, all inferences which the jury might fairly draw from the plaintiff's evidence must be drawn in his favor.[4] Trial courts in considering motions to strike the plaintiff's evidence should in every case where there is doubt on the question overrule the motion. The use of the motion as a means to defeat the plaintiff's action should be confined and applied only to those cases in which it is conclusively apparent that the plaintiff has proven no cause of action against the defendant.[5]

The motion to strike may be made at the conclusion of the taking of the plaintiff's evidence in chief or at the conclusion of the taking of the evidence of both parties. If the motion to strike is made at the conclusion of the taking of the plaintiff's evidence and is overruled, if the defendant then introduces his evidence, as he may do, he should then renew his motion at the conclusion of the taking of all the evidence or his original motion to strike will be deemed to have been waived.[6] The Federal Rules of Civil Procedure also apparently call for a renewal under Rule 50 (b).[7]

By Virginia's Supreme Court of Appeals Rule 1:11[8]—Striking the Evidence—if the court sustains a motion to strike the evidence of either party in a civil case being tried before a jury, or the evidence of the Commonwealth in a criminal case, the court may then discharge the jury and enter judgment in favor of the moving party. If the court overrules a motion to strike the evidence and there is a hung jury, and if the court is of the opinion that it erred in denying the motion to strike, it may enter judgment in favor of the moving party. *Turk v. Clark*[9] answered a further procedural question on the motion to strike. Where both parties move to strike the evidence, the case is taken from the jury and the court determines the facts and enters final judgment. "In theory both parties are requesting the court to decide that as a matter of law they are entitled to a final judgment. If each is honest

3. Gray v. Van Zaig, 185 Va. 7, 37 S.E.2d 751 (1946).
4. Hoover v. J. P. Neff & Son, 183 Va. 56, 31 S.E.2d 265 (1944).
5. BURKS, PLEADING AND PRACTICE § 284 (4th Ed. Boyd 1952).
6. Virginia Elec. & Power Co. v. Mitchell, 159 Va. 855, 164 S.E. 800, 167 S.E. 424 (1932); Rawle v. McIlheney, 163 Va. 735, 117 S.E.2d 214, 98 A.L.R. 930 (1934).
7. FED. R. CIV. P. 50 (B).
8. VA. SUP. CT. OF APPEALS RULES OF PRACTICE AND PROCEDURE 1:11.
9. 193 Va. 774, 71 S.E.2d 172 (1952).

in his contention there is some reason for saying that one or the other is right. Such a rule is highly artificial, however, and is likely to lead to unnecessary technical errors with respect to the effect of simultaneous motions by the parties. This Virginia practice is not followed under the Federal Rules." [10]

If either party desires to apply for a writ of error from the judgment of the court, assigning as error the ruling of the trial court on the motion to strike out the evidence, he must except to the ruling of the trial court at the time it was made; after judgment he must then make the evidence, the motion to strike, and the ruling of the trial judge therein a part of the record. He then proceeds to apply for a writ of error as in any other civil case.[11] If the writ of error is granted, the following situations may be presented.[12] Where the trial court erroneously sustained the motion to strike and entered judgment for the moving party, the case should be remanded for a new trial.[13] Where the trial court properly overrules the motion to strike and there is a verdict against the moving party, there is no error as far as the ruling of the trial court on the motion to strike is concerned, and the judgment of the trial court should be affirmed unless there was some other assignment of error.[14] Finally, where the trial court improperly overrules the motion to strike and there was a verdict against the moving party, the Supreme Court of Appeals would enter judgment in favor of the party originally making the motion. If the motion to strike should have been sustained, the party whose evidence ought to be struck out has failed to prove any case in law against the moving party and therefore final judgment should be entered for the moving party.[15]

The Demurrer to the Evidence and the Motion to Strike

A motion to strike out irrelevant evidence or evidence improperly admitted is always proper. If evidence is relevant to the issue, although entitled to but little weight, it is generally admissible, and a motion to reject when offered, or to strike it out after it had been received,

10. *Supra* note 2 at 69 (Cum. Supp. 1962).

11. Va. Sup. Ct. of Appeals Rules of Practice and Procedure 5:1.

12. Barksdale v. Southern Ry. Co., 152 Va. 604, 148 S.E. 683 (1929).

13. Green v. Smith, 153 Va. 675, 151 S.E. 282 (1930); Buchanan v. Wilson, 159 Va. 49, 165 S.E. 422 (1932); Catron v. Burchfield, 159 Va. 60, 165 S.E. 499 (1932); Mears v. Accomac Banking Co., 160 Va. 311, 168 S.E. 740 (1933); Bray v. Boston etc., Corp., 161 Va. 686, 172 S.E. 296 (1934).

14. *Supra* note 6.

15. Jones v. Massie, 158 Va. 121, 163 S.E. 63 (1932).

is inapplicable. If relevant, but not deemed sufficient to maintain the issue joined, the opposing party should enter a demurrer to the evidence and not move to strike out. This was the early Virginia doctrine which held that a motion to strike out was not equivalent to a demurrer to the evidence.[16] This doctrine, however, has been ignored by the Virginia Supreme Court of Appeals and has been overruled by the subsequent decisions of the court. "It is now well settled in Virginia that a motion to strike out all the evidence may be used whenever a demurrer to the evidence by the defendant will lie, or it plainly appears that the trial court would be compelled to set aside any verdict found for the plaintiff as being without evidence to support it." [17]

The court in *Dudley v. Guthrie* held that although the use of the motion to strike out the evidence is sanctioned under Virginia procedure, the motion should not be granted unless it is very plain that the court would be compelled to set aside a verdict for the plaintiff, considering the evidence *strictly* as upon a demurrer thereto.[18] The motion to strike is a substitute for a demurrer to the evidence and will lie whenever a demurrer to the evidence could be used.[19] If a demurrer to the evidence should be sustained, the motion to strike out the evidence should be sustained but not otherwise.[20]

The motion to strike and the demurrer to the evidence, although used under similar circumstances, have several important differences which should be thoroughly examined. Unlike a demurrer to the evidence, a motion to strike out all the evidence is not a pleading. Therefore it is not per se a part of the record until lodged with the clerk of the court under Rule 5:1 Sec. 3 (a).[21] If either party desires to have the ruling of the trial court on the motion to strike reviewed on writ of error, exception should be taken thereto. All the evidence and the exception should be made a part of the record as required by the applicable Virginia Rules of Court.[22]

A second important difference, which existed prior to 1961, was

16. Buchanan v. Wilson, 159 Va. 49, 56, 165 S.E. 422 (1932).

17. Green v. Smith, 153 Va. 675, 151 S.E. 282 (1930); See also, Richardson v. Appalachian Elec. Power Co., 163 Va. 394, 175 S.E. 727 (1934); Hoover v. J. P. Neff & Son, 183 Va. 56, 31 S.E. 2d 265 (1944); Stockton v. Charlottesville, 178 Va. 164, 16 S.E.2d 376 (1941); Boulevard Apartments v. Evans, 177 Va. 315, 14 S.E.2d 310 (1941); Ward v. Clark, 163 Va. 770, 177 S.E. 212 (1934).

18. 192 Va. 1, 63 S.E.2d 737, (1951).

19. *Supra* note 1.

20. Barnes v. Mabry, 186 Va. 243, 42 S.E.2d 304 (1947).

21. *Supra* note 11.

22. *Supra* note 5 at 510.

that unlike a demurrer to the evidence, the motion to strike need not be in writing and was made orally to the court and the grounds therefore assigned. There was no question of joinder by the party in the motion to strike as would be the case in a demurrer to the evidence, where evidence was sought to be struck out. The motion was simply argued before the court as in the case of other motions made during the trial. However, by Virginia Supreme Court of Appeals Rule 1:3, as amended in 1961, it was specifically provided that "all motions, except for the qualification of attorneys at law to practice in this Court, shall be in writing and shall not be argued orally except by special leave of the Court." [23] This rule does not affect procedure in the trial courts and oral argument is retained.

Green v. Smith points up an additional difference between the motion to strike and the demurrer to the evidence. "Upon an adverse ruling by the court the defendant is entitled to have submitted to the jury both the question of the plaintiff's right to recover and the measure of recovery, while a demurrer to the evidence finally takes away from the jury all considerations of the plaintiff's right of recovery and submits it to the court." [24] In essence, the defendant may take the opinion of the court on the sufficiency in law of the plaintiff's evidence to maintain his cause of action without losing his right to have the jury pass on the merits of the plaintiff's claim.[25]

On a demurrer to the evidence, while it is true that the defendant must set out the grounds of his demurrer with considerable particularity,[26] yet the defendant will attempt to state them as generally as he can. The plaintiff may fail to discover the real weakness in his case that the defendant relies on until the argument on the demurrer, but this does not take place until the jury has retired from the courtroom to assess the damages subject to the ruling of the court on the demurrer to the evidence. At this point in the trial it is too late for the plaintiff to take a voluntary nonsuit if he thinks he can better his position in another trial, or to introduce additional evidence, or to amend his declaration.[27] On the other hand, the motion to strike out the evidence is argued before the jury retires to consider its verdict, and the real ground for the motion can be adduced by the plaintiff on the argument. Therefore the plaintiff will be in a position to amend his

23. VA. SUP. CT. OF APPEALS RULES OF PRACTICE AND PROCEDURE 1:3.
24. *Supra* note 1.
25. *Supra* note 5 at 512.
26. VA. CODE ANN. § 8-140 (1950) (REPL. VOL. 1957).
27. Cooper v. Norfolk Southern Ry. Co., 125 Va. 73, 99 S.E. 606 (1919).

declaration, introduce additional evidence or take a voluntary nonsuit.[28] Objections made under the motion to strike give rise to benefits for both the plaintiff and defendant and on the whole it would seem there is less risk of a miscarriage of justice under the motion to strike than under the cumbersome and harsh procedure of the demurrer to the evidence.

Jones v. Hanbury[29] extends the application of the motion to strike by a more liberal interpretation after the evidence of both parties has been presented. A motion to strike out made at the close of the plaintiff's evidence should not be sustained unless it is very plain that the court would be compelled to set aside a verdict for the plaintiff upon a consideration of the evidence strictly as upon a demurrer to the evidence and in light of the fact that the defendant has seen fit not to testify and subject himself to cross-examination. "Where a motion to strike out is made after all the evidence for both parties has been introduced, a somewhat more liberal rule is sometimes applied for the consideration of evidence in passing upon the motion."[30] The more liberal rule is that the evidence will be viewed as on a motion to set aside the verdict as contrary to the evidence. This seems to imply that the court will view the evidence strictly as on a demurrer to the evidence only where the motion to strike is made at the conclusion of plaintiff's evidence in chief and where the facts and circumstances of the case lie within the knowledge of the defendant, or of both the plaintiff and the defendant. The court believes that in such case, particularly as the defendant has seen fit not to testify and thus subject himself to a cross-examination, the strict demurrer to the evidence rule should be applied, but when this is not the case, the evidence should be viewed more on an analogy to a motion to set aside the verdict as contrary to the evidence rather than to a demurrer to the evidence.[31]

The Motion for a Directed Verdict

The motion to strike the evidence has had significant influence on the motion for a directed verdict. Virginia Code Sec. 8-218 originally prohibited the court from directing a verdict. As a result the motion to strike the evidence developed to perform the essential function of the prohibited motion for a directed verdict. "The motion to strike was

28. *Supra* note 5 at 513.
29. 158 Va. 842, 164 S.E. 545 (1932).
30. *Id.* at 846.
31. *Supra* note 5 at 514.

soon held by the Court of Appeals of Virginia to be tantamount to a motion for a directed verdict and it was granted under procedures and principles identical in all important respects to those followed in states permitting the motion for a directed verdict." [32] As declared in *Small v. Virginia R., etc., Co.*,[33] Sec. 8-218 was passed for the express purpose of prohibiting the application of a doctrine of harmless error to the mandatory direction of verdicts. Under this section even in a case where no other verdict could have been properly rendered, and the error might therefore have been regarded as harmless, yet a peremptory instruction directing the verdict was regarded as prejudicial and reversible error.[34]

Where the court simply struck out the evidence offered by a party because no verdict could be properly rendered, thereon sustaining the contention of the party moving to strike the evidence, it did not direct a verdict in violation of Sec. 8-218.[35] This section forbade the trial court from directing a verdict, but under Virginia practice it was still possible to accomplish the same results: a demurrer to the evidence may be interposed; evidence may be stricken out; the trial court may set aside the verdict and in a proper case give final judgment; the trial court may decline to give any instruction where the evidence would not sustain a verdict, and it may in substance direct a verdict by stating in an instruction a hypothetical case and telling the jury if they so believe, to find accordingly.[36]

The 1958 amendment to Sec. 8-218 provides: "In no action tried before a jury shall the trial judge give to the jury a peremptory instruction directing what verdict the jury shall render unless the trial judge shall have granted a motion to strike the evidence of the plaintiff or defendant, in which case the judge may direct a verdict in conformity with his ruling on the motion to strike." [37] The motion to strike has thus become a necessary precedent to the motion to direct a verdict in Virginia. *Turner v. Burford Buick Corporation*[38] effectively summarized the inter-relation of the two motions. The court declared that because of the requirements of amended sec. 8-218 it was improper for a court to direct a verdict for the plaintiff without a prior striking of the defendant's evidence, even though the evidence showed

32. *Id.* at 507 n. 77.
33. 125 Va. 416, 99 S.E. 225 (1919).
34. *Ibid.*
35. Barksdale v. Southern Ry. Co., 152 Va. 604, 148 S.E. 683 (1929).
36. Davis v. Rodgers, 139 Va. 618, 124 S.E. 408 (1924).
37. VA. CODE ANN. § 8-218 (1958 AMEND.).
38. 201 Va. 693, 112 S.E.2d 911 (1960).

that the defendant was guilty of negligence as a matter of law. Rule 3:20 of the Virginia Supreme Court of Appeals, providing for summary judgment upon the sustaining of the motion to strike, now provides the procedure to be followed under this situation.[39] Thus in Virginia the motion for summary judgment has effectively surplanted the directed verdict but the sustaining of the motion to strike is still required before the motion for summary judgment will be granted.

The motion to strike has not played a parallel role of importance in the development of the motion to set aside the verdict. The motion to set aside the verdict as a test of the sufficiency of the evidence is permitted by Virginia Code Sec. 8-352. "In a civil case a defendant has the option of making a motion to strike the evidence of the plaintiff from the case, demurring to the evidence, or awaiting the verdict of the jury." [40] The sufficiency of the evidence may be challenged by a motion to strike, but may also be challenged by a motion to set aside the verdict, even though no motion to strike has been made.[41] The motion to strike, therefore, is not a necessary precedent to the motion to set aside the verdict.

The Motion for Summary Judgment

The sustaining of a motion to strike is also one ground upon which summary judgment may be granted in Virginia. "Either party may make a motion for summary judgment at any time after the parties are at issue. If it appears from the pleadings, if any, in the proceedings, or upon sustaining a motion to strike the evidence, that the moving party is entitled to judgment, the court shall enter judgment in his favor . . ." [42]

Under early Virginia practice if the court sustained the motion to strike, the case was nevertheless submitted to the jury,[43] but as all the evidence of one of the parties had been struck out, and therefore could not be considered by the jury, their verdict had to be for the party whose motion to strike had been sustained. A different verdict would be set aside by the trial court and a final judgment would be entered for the party prevailing on the motion to strike.[44] Under Rule 1:11[45] of the Virginia Supreme Court of Appeals, "if the court sustains a

39. Va. Sup. Ct. of Appeals Rules of Practice and Procedure 3:20.
40. Va. Code Ann. § 8-352 (1950) (Repl. Vol. 1957).
41. Gabbard v. Knight, 202 Va. 40, 116 S.E.2d 73 (1960).
42. *Supra* note 39.
43. *Supra* note 13.
44. *Ibid.*
45. *Supra* note 8.

motion to strike the evidence of either party in a civil case being tried before a jury . . . then the court *may* discharge the jury and enter judgment in favor of the moving party." Thus it might seem permissive to send the case to the jury even after the motion to strike has been sustained. However, Rule 3:20 of the Supreme Court of Appeals, providing for summary judgment, must be read in conjunction with Rule 1:11 when the motion to strike has been sustained. "If it appears, . . . upon sustaining a motion to strike the evidence, that the moving party is entitled to judgment, the court shall enter judgment in his favor." [46] The court may therefore, upon sustaining the motion to strike, take the case from the jury under a motion for summary judgment and prevent the case from reaching the jury. If the court overrules the motion to strike, the trial continues as if the motion had not been made. The case is submitted to the jury and they return their verdict as in the trial of any civil case.

Summary judgment is an important part of any rule simplifying pleading because it prevents parties from trying to make an issue when in fact they have no real claim or defense.[47] The 1957 amendment to Rule 3:20 changing "the admissions, if any, in a deposition" to "the admissions, if any, in the proceedings" and providing for a summary judgment on the sustaining of a motion to strike the evidence, substantially improved the effectiveness of the rule in this respect.[48] In *Carwile v. Richmond Newspapers*,[49] a case prior to the 1957 amendment, the court declared that the motion for summary judgment was not intended as a substitute for a demurrer to the evidence or a motion to strike. If this case had been strictly applied it would have made the summary judgment rule largely ineffective since it would strictly limit the scope of this rule. The 1957 amendment to Rule 3:20 recognized this and included the motion to strike within the limits of the rule.[50]

As previously pointed out, the 1957 amendment to the summary judgment rule permitted the court to grant such a judgment upon sustaining a motion to strike the evidence. The problem of the power of the court in this respect was also clarified by the 1958 amendment in 8-218 of the Virginia Code which permits the court to direct a

46. *Supra* note 39.

47. CLARK, CODE PLEADING 556-567 (2nd ed., 1947).

48. *Supra* note 2 at 254.

49. 196 Va. 1, 82 S.E.2d 588 (1954).

50. *Supra* note 2 at 255.

verdict where a motion to strike the evidence has been granted.[51] *Clark v. Kimmarch*,[52] indicated the desirability of using summary judgment when a motion to strike was granted. Here there was no evidence that the operator of an automobile was the owner's agent. The court held a motion to strike was in effect asking for a summary judgment, and the court had power to enter it even though no verdict had been returned as to the owner. Plaintiff argued without success that there was no basis for a judgment for the defendant owner since there was no verdict on the question.

The Motion to Strike out Evidence in Chancery

The motion to strike out the evidence in Virginia has not been limited to actions at law but has been extended to the Chancery side of the court. In any chancery cause when a defendant moves to strike out all the evidence, upon any grounds, and such motion is overruled by the court, such defendant shall not thereafter be precluded from introducing evidence in its own behalf, and the procedure shall be the same and shall have the same effect as the motion to strike the evidence in an action at law.[53]

The Motion to Strike out Evidence under Federal Procedure

Under the Federal Rules of Civil Procedure, instead of the motion to strike the evidence, a similar principle is applied in non-jury cases under Rule 41 (b)[54] providing for dismissal of actions. "After the plaintiff, in an action tried by the court without a jury,[55] has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52 (a)."[56] Under this rule, the judge, where the case is tried without a jury, may pass on conflicts

51. *Id.* at 257.
52. 198 Va. 737, 96 S.E.2d 780 (1957).
53. Phelps, Handbook of Virginia Rules of Equity Practice and Procedure 85 (1961).
54. Fed. R. Civ. P. 41 (b).
55. Fed. R. Civ. P. 41(b) (1963 Amend).
56. *Ibid.*

of evidence and credibility of witnesses, making his function in such cases broader than under the motion to strike the evidence in Virginia.[57]

In a case tried without a jury when a motion to dismiss is made for insufficiency of the evidence, it is the duty of the court to weigh carefully the plaintiff's evidence.[58] If the court finds the plaintiff's evidence insufficient, it must render judgment on the merits for the defendant,[59] and make findings of fact as provided in Rule 52 (a) and as expressly required by Rule 41 (b).[60] Conversely, if the defendant's motion is denied, and he offers no evidence, the court may make findings of fact and conclusions of law and render judgment for the plaintiff.[61] An involuntary dismissal with prejudice should not be ordered, if on the facts it appears that any relief could be granted. The scintilla rule is not followed by federal courts, and there must be substantial evidence to support a claim for relief before the defendant will be required to defend.[62]

The motion for dismissal at the close of the plaintiff's evidence could formerly be made in a case tried by a jury as well as in a case tried without a jury. When made in a jury-tried case, this motion overlapped the motion for a directed verdict under Rule 50 (a)[63] which was also available in the same situation. *O'Brien v. Westinghouse*[64] held that the standard to be applied in deciding the motion for dismissal at the close of the plaintiff's evidence in a jury-tried case is the same as that used upon a motion for a directed verdict made at the same point; and just as the court need not make findings pursuant to Rule 52 (a)[65] when it directs a verdict, so in a jury-tried case it may omit these findings in granting the motion for dismissal. As indicated by the discussion in *O'Brien*, the overlap between Rule 50 (a) and Rule 41 (b) has caused considerable confusion. Accordingly Rule 41 (b) was amended in 1963 to provide that the dismissal at the close of the plaintiff's evidence shall apply only to non-jury cases. Hereafter the correct motion in jury-tried cases will be the motion for a directed verdict.

The motion to strike out the evidence has developed as an equivalent

57. *Supra* note 53 at 86.

58. United States v. Twentieth Century-Fox Film Corp., 137 F. Supp. 78 (D.C. Cal. 1956).

59. Bach v. Friden Calculating Mach. Co., 148 F.2d 407 (6th Cir. 1945).

60. Interborough News Co., v. Curtis Pub. Co., 127 F. Supp. 286 (D.C. N.Y. 1954).

61. Chicago and N.W. Ry. Co., v. Frochling Supply Co., 179 F.2d 133 (7th Cir 1950).

62. Carew v. R. K. O. Radio Pictures, 43 F. Supp. 199 (D.C. Cal. 1942).

63. FED. R. CIV. P. 50 (A).

64. 293 F. 2d 1 (3rd Cir. 1961).

65. FED. R. CIV. P. 52 (A).

to the demurrer to the evidence and has become an essential preliminary motion to the subsequent motion for a directed verdict and the motion for summary judgment. The single importance of this motion cannot be over-emphasized in the procedural role which has been cast upon it in the law and equity courts of Virginia. The motion to strike has become the dominant procedural technique used to withdraw a decision from the jury, where the question is one of law, and in its place to substitute the determination of the court. The wisdom of this motion is emphasized in the light of the affirmative results it has produced in rendering justice to plaintiff and defendant alike.

J. Brendel