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# Necessity of Motion for New Trial When Verdict Directed

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NECESSITY OF MOTION FOR NEW TRIAL WHEN VERDICT DIRECTED.—It has been a fundamental rule of procedure in West Virginia, emphasized by decisions, both early and late, too numerous to mention,[1] that when a case has been tried before a jury, no appellate relief involving exclusively trial error can be sought in the Supreme Court of Appeals unless a motion in the trial court to set aside the verdict has first been made and acted upon. Justification of this rule is based on the assumption that, in the course of a trial by jury, the court must rule hurriedly on objections interposed, in order that the case may be submitted to the jury without delay, and rence may commit errors which it will concede on due deliberation and, by granting a new trial, prevent the delay and expense of a writ of error to obtain the same result.

> "The rulings of the court during the trial are often necessarily hastily made, and if a motion is made for a new trial on the ground of erroneous rulings made at the trial, the court may at his leisure critically review his rulings, and, if convinced that they were erroneous, will correct them in the only manner he can by setting aside the verdict and granting a new trial, and thus save to the parties the expense of a writ of error."[2]

[1] See State v. Phares, 24 W. Va. 657 (1884); Danks v. Rodeheaver, 26 W. Va. 274 (1885); Hinton Milling Co. v. New River Milling Co., 78 W. Va. 314, 88 S. E. 1079 (1916).

[2] State v. Phares, *supra* n. 1.

The West Virginia court has recognized two notable exceptions to the general rule: first, when the court tries the case *in lieu* of a jury;[3] and second, when there is a demurrer to the evidence.[4] A case in which there is a demurrer to the evidence is similar to a case tried by the court *in lieu* of a jury, in the respect that in each case the issues are decided by the court without the aid of a jury. But when there is a demurrer to the evidence, only the issues are taken away from the jury for decision by the court and the jury is still required to return a verdict fixing the amount of the damages. Wherefore, although there be a demurrer to the evidence, if either party desires to seek appellate relief with reference to the damages, he must first move in the lower court to set aside the verdict.[5]

In cases coming within either of these exceptions, of course, opportunities for the commission of trial error are largely eliminated. There are no instructions to the jury, no argument of counsel to the jury, no verdict, and no jury to be influenced by improper remarks or acts—collectively, the most fruitful sources of trial error. The introduction of improper evidence bearing upon the issues is not reversible error, because the issues are to be tried by the court, and the court can be depended upon, after the due deliberation which it may exercise, to disregard the improper evidence and decide the issues solely upon the proper evidence introduced.[6] In such cases, practically the only situation left where it might be logical to seek a new trial on the basis of trial error committed prior to the submission of the case to the court for decision is where the introduction of proper evidence is refused, and a new trial would be necessary for its introduction.[7] In cases tried by the court *in lieu* of a jury, this contingency is largely obviated by the practice of admitting any evidence the propriety of which, though doubtful, is not entirely remote, with the intention that the court, on final consideration of the evidence after due deliberation, may reject improper evidence in deciding the

[3] Capital City Supply Co. v. Beury, 69 W. Va. 612, 72 S. E. 657 (1911).

[4] Proudfoot v. Clevenger, 33 W. Va, 267, 10 S. E. 394 (1889); Finance Company of America v. Bailey, 106 W. Va. 651, 146 S. E. 723 (1929).

[5] First National Bank of Pineville v. Sanders, 77 W. Va. 716, 88 S. E. 187 (1916).

[6] Nutter v. Sydenstricker, 11 W. Va. 535 (1877); State v. Thacker Coal & C. Co., 49 W. Va. 140, 38 S. E. 539 (1901).

[7] See Peabody Insurance Co. v. Wilson, 29 W. Va. 528, 2 S. E. 888 (1887); Fink v. Scott, 105 W. Va. 523, 143 S. E. 305 (1928).

issues. Hence, generally, when there is a demurrer to the evidence or the court tries the case *in lieu* of a jury, if a party is aggrieved by the decision of the court, it is because the decision is not warranted by the evidence; ordinarily, it is because the decision is contrary to the weight of the evidence. Why is it that no motion for a new trial is necessary in such a case as a prerequisite to seeking appellate relief, while if, in a similar case, the issues are decided by a jury, a party must make a motion to set the verdict aside before he can object in the appellate court that the verdict is contrary to the evidence?

If the reasons, as stated in *State v. Phares* and other cases, on which the general rule requiring the motion to be made when the issues are decided by a jury are sound, then the two exceptions to the rule must be based on the supposition that, when the court tries a case *in lieu* of a jury or there is a demurrer to the evidence, the court, in considering the weight and effect of the evidence, does not act hastily, and likely would not change its view if a motion for a new trial were made, and such a supposition is not illogical. When the court tries a case *in lieu* of a jury, it may take plenty of time for deliberation after the submission of the case before deciding the issues. In fact, it is not necessary that the trial take place wholly at a single term of court.[8] When there is a demurrer to the evidence, after return of the verdict fixing the amount of the damages, the jury is discharged and the court can take time to deliberate upon a decision of the issues.

In *Freeburn v. Railroad Company*,[9] an attempt was made to have the court recognize a third exception to the general rule. In that case, the court directed a verdict in favor of the defendant and the plaintiff obtained a writ of error without having moved for a new trial in the lower court. The Supreme Court held that the propriety of directing the verdict could not be raised in the appellate court without first having made a motion for a new trial in the lower court. To the plaintiff's contention that such a case was analogous to a case in which there is a demurrer to the evidence, the court replied that "the analogy exists only to the extent of applying the same rules in ascertaining the facts proven by the evidence." This observation, it is believed, would have been a sufficient reply to the plaintiff's contention

[8] Ewart v. New River Fuel Co., 68 W. Va. 10, 69 S. E. 300 (1910).
[9] 79 W. Va. 789, 91 S. E. 990 (1917).

if the further discussion based on it had been carried to a logical conclusion; but the court contented itself with the dry, formal and technical argument that, although the jury were told peremptorily how they must decide the case, still, since there was a verdict, there was a trial by jury, instead of by the court, as in the exceptions noted above, and hence that there was no reason for differentiating this case from cases coming within the general rule. The court seems to have lost sight of the real reason for the general rule as stated in *State v. Phares* and numerous other cases. Since it happens that there is no verdict deciding the issues in cases coming within the two exceptions, it seems to have been assumed by the court that there is something mystical about the verdict itself, regardless of the manner in which it is reached, which requires a motion for a new trial as a condition precedent to appellate relief. The fact is that the logic of the general rule, as frequently stated, is concerned only with the methods of procedure leading up to the verdict, and the presence or absence of a verdict is a mere coincidence. The question is, not whether there is a verdict, but whether the court has ruled hastily upon matters leading up to the verdict. Usually these matters involve such details as introduction of evidence, submission of instructions and argument of counsel, but one of them may be, and frequently is, the propriety and weight of admitted evidence in the matter of directing a verdict. While a court may take more time to decide this important matter than is given to other details of the trial, it certainly can not take as much time as it may in a case where there is no jury waiting to be discharged, and in this respect the case of *Freeburn v. Railroad Company* can easily and logically be distinguished from a case where there is a demurrer to the evidence or where the court acts *in lieu* of a jury. It is true that in each of the three cases the court will pursue the same course of reasoning in determining what evidence shall be considered and what effect shall be given to the evidence; but in two of them, it may take time and act with deliberation in considering these things, while in one of them it must act with comparative haste.

In a recent case,[10] the Supreme Court has expressly overruled *Freeburn v. Railroad Company* and held that, where there is a directed verdict, no motion for a new trial is necessary in order to

[10] Breedlove v. Galloway, 153 S. E. 298 (W. Va. 1930).

prosecute a writ of error as to trial rulings. In justifying the later decision, the court—it is believed successfully—attacks the reasoning of the earlier case by way of demonstrating that a directed verdict is really no verdict at all and that in such an instance the case is actually tried by the court.

> "Where a case is submitted to the court in lieu of a jury, the motion to set aside the verdict is not necessary. Nor is it necessary where there is a demurrer to the evidence. This court has repeatedly recognized the fact that a motion to direct a verdict amounts to a demurrer to the evidence. Then, in view of this practice, why require a motion to set aside the verdict where it has been directed? This court in the Freeburn case makes the following observation: 'Technically there is no difference between a verdict, superinduced by erroneous instructions as to the law of the case, and a verdict rendered in obedience to a peremptory instruction. In either case the court's erroneous ruling is responsible for the verdict.' On such premise, together with the holdings of the Kentucky, Oklahoma, and Tennessee cases, hereinbefore cited, the conclusion was reached in that case that a motion for a new trial was essential to a review of the error. To our mind, the finding on the main issue in a directed verdict is just as surely a finding of the court as if the matter had been heard by it *in lieu* of a jury. The jury's action is a mere form, brought about by the fact that it had been impaneled to try the case, and does not amount to a verdict in the common acceptation of trials by jury."[11]

The futility of the reasoning in the Freeburn Case may be conceded without difficulty, but is a refutation of that reasoning alone sufficient to justify the holding in the later case? If the presence or absence of an actual verdict and the question whether the case was actually tried by a jury or by the court are not the ultimate proper tests, does the reasoning in the later case amount to anything more, so to speak, than an immaterial joinder of issue as to the false tests proposed in the earlier case? If the true test is whether the ruling complained of was made under such circumstances that it must ordinarily have been made without full deliberation, what difference should it make whether there was a verdict, or whether the court or the jury tried the case? If the true reason for the general rule is that stated in *State v. Phares* and numerous other cases, then it is believed impossible to differentiate a case where there is a directed verdict from other cases coming

[11] *Idem.*

within the rule, unless it can be assumed that the court, in acting on a motion to direct a verdict, takes substantially more time in considering the evidence, as to its propriety, effect and weight, than it does in ruling upon other trial matters. If the court does use such deliberation, then it is believed that this fact, and not the presence or absence of a verdict or the method of trial, must be stated as the true reason for any differentiation.

Whatever the difficulty of accepting the late case as a logical exception to the general rule as stated in *State v. Phares,* the rule of practice established by it may, after all, not result in calamity. It should be noted that the general rule itself is not sanctioned in some of the states. In Virginia the practice is regulated by statute.

> "The failure to make a motion for a new trial in any case in which an appeal, writ of error, or supersedeas lies to or from a higher court shall not be deemed a waiver of any objection made during the trial if such objection be properly made a part of the record."[12]

In cases where a verdict is directed for the plaintiff, as in cases where there is a demurrer to the evidence, damages are assessed by the jury as determined from the evidence introduced at the trial. Presumably, by analogy to the cases where there is a demurrer to the evidence, it would still be necessary in such cases to make a motion to set aside the verdict assessing the damages as a prerequisite to raising any objection as to the damages in the appellate court.

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[12] VA. CODE ANN. (1924) § 6254.