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Trial Practice -- Hearings for a New Trial -- Right of Trial Court to Take Testimony Outside the Record and to Deny the Right of Cross Examination

John Mark Tapley

possible to draw since it will extend only to the affected area, but where this emergency boundary is not present some difficulty will be encountered. It remains to be seen how the court will handle an extension which is not so universally conceded by the medical experts to be the "usual practice of surgeons."

The general rule still subsists that "every human being of adult years and a sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."[35] To this the North Carolina court quickly would add, however, that once the general permission is given, the doctor may operate as good surgery demands, correcting also certain other situations even if no dire emergency is present. The limiting boundaries are still to be delineated.

WILLIAM P. SKINNER, JR.

Trial Practice—Hearings for a New Trial—Right of Trial Court to Take Testimony Outside the Record and to Deny the Right of Cross Examination

In North Carolina,[1] as in many other jurisdictions,[2] the trial court has the inherent power to set aside a verdict and order a new trial.[3] Where there is no question of law or legal inference involved in a motion for a new trial, it is addressed to the sound discretion of the trial judge whose ruling, in the absence of abuse, is not reviewable on appeal.[4] This power is considered essential for the orderly administration of justice since the judge is in a position to observe the trial objectively and protect the proceedings from unfair influences which may never appear in the record.[5] Since the judge may exercise his discretion and give no reasons

[35] Schloendorff v. N. Y. Hospital, 211 N. Y. 125, 129; 105 N. E. 92, 93 (1914) (a much quoted phrase of Justice Cardozo).

[1] Bird v. Bradburn, 131 N. C. 488, 42 S. E. 936 (1902).

[2] Common law authority of a trial court to set aside a verdict and order a new trial is inherent in all courts of common law in the United States. 39 AM. JUR., *New Trial* § 4 (1942).

[3] This common law power has been partially codified in N. C. GEN. STAT. §1-207 which specifically sets out the trial courts' right to set aside a verdict and grant a new trial upon exceptions, insufficient evidence, or for excessive damages.

[4] Muse v. Muse, 234 N. C. 205, 66 S. E. 2d 689 (1951); Pruitt v. Ray, 230 N. C. 322, 52 S. E. 2d 876 (1949).

[5] Speaking of the judge's duty to set the verdict aside when he perceives that justice has not been done, the court said: "His discretion to do so is not limited to cases in which there has been a miscarriage of justice by reason of the verdict having been against the weight of the evidence (in which, of course, he will be reluctant to set his opinion against that of twelve), but he may perceive that there has been prejudice in the community which has affected the jurrors, possibly unknown to themselves, but perceptible to the judge—who is usually a stranger—or a very able lawyer has procured an advantage over an inferior one, an advantage legitimate enough in him, but which has brought about a result which the judge sees is contrary to justice. In such, and many other instances which would not

for his decision,[6] what is encompassed in such a case is never completely known; nevertheless, if from the proceedings his actions are arbitrary and capricious he may be reversed.[7] An insight into the discretionary boundaries of a trial judge can be found in the recent case of *Williams v. Stumpf*.[8]

This case involved the issue of whether the defendant had revoked his offer to purchase the plaintiff's home before plaintiff's acceptance had been communicated. The jury found for the defendant, and the plaintiff moved to set aside the verdict and for a new trial asserting (1) errors and (2) that the verdict was contrary to the weight of the evidence—both matters of record. On the following day a hearing was held on this motion in which the court called two witnesses to the stand as witnesses of the court. The first witness was an employee of the real estate company which had undertaken to sell the house for the plaintiff, and had handled the transaction. Under questioning by the court, this witness testified that he had communicated the acceptance several days before the withdrawal. At the close of this testimony defendant's counsel requested the right to cross examine the witness. The court denied this request. "This is an action of the Court, nobody else's. I am doing this on the theory as to whether or not I decide in my discretion to set the verdict aside. It is not a part of the record, not a part of the trial. This witness wasn't on the witness stand." Counsel then stated his reasons to the court. He wanted testimony concerning the witness's numerous conversations with the plaintiff's counsel.[9] Moreover, he asserted that before the trial the witness had been unable to tell him when the communication was actually made. The judge apparently felt it was unjust to allow defendant's counsel to cross examine the witness when in all probability he would get an opportunity to do so on the new trial.

On appeal, the North Carolina Supreme Court was faced with the

furnish a legal ground to set aside the verdict, the discretion reposed in the trial judge should be brought to bear to secure the administration of exact justice." Bird v. Bradburn, 131 N. C. at 489, 42 S. E. at 937 (1902).

[6] Bird v. Bradburn, 131 N. C. 488, 42 S. E. 936 (1902).

[7] "The discretion of the judge to set aside a verdict is not an arbitrary one to be exercised capriciously or according to his absolute will, but reasonably and with the object solely of preventing what may seem to him an inequitable result. The power is an inherent one, and is regarded as essential to the proper administration of the law. It is not limited to cases where the verdict is found to be against the weight of the evidence, but extends to many others. While the necessity for exercising this discretion, in any given case, is not to be determined by the mere inclination of the judge, but by a sound and enlightened judgment in an effort to attain the end of all law, namely, the doing of even and exact justice, we will not supervise it, except, perhaps, in extreme circumstances, not at all likely to arise; and it is therefore practically unlimited." Ellen Settlee v. Charlotte Electric Ry., 170 N. C. 365, 367, 86 S. E. 1050, 1050 (1915).

[8] 243 N. C. 434, 90 S. E. 2d 688 (1956).

[9] The witness had told counsel that he discussed the case with plaintiff's counsel numerous times. Counsel also pointed out that plaintiff's counsel did thousands of dollars worth of business for the witness's employer.

questions of whether or not the trial court had abused its discretion by refusing the defendant's counsel the right to cross examine the witness and by going outside the record for testimony in order to determine whether in its discretion the verdict should be set aside. The court expressed regret that the defendant had been denied the right to cross examine the witness and then said:

> "Although there is no evidence that anything improper took place during the trial, nevertheless the court has power to set aside the verdict as against the greater weight of the evidence. However, it is questionable whether the court should take additional testimony or base its decision only on that which the jury considered."

This issue on which the court is doubtful was the main ground on which the defendant based his appeal, yet the court held that such was not reversible error, giving no reasons therefor. When a trial judge is faced with the question of whether or not to set the verdict aside he enters into a difficult area. The usual sanctity that attaches to a jury verdict, the personal feelings of the presiding judge, and the rights of the parties on both sides to a fair and impartial jury trial are involved. Consequently, where a vital issue presents itself in this area it should not be ignored. It is important in this discussion, as far as the equities of the particular case are concerned, to be certain that when a trial judge exercises his discretion he rules on the motion before him. It is obvious that the trial judge's actions on the hearing in this case negate any idea that errors had been committed during the trial, and the court found none. Furthermore it is not plausible that the trial court called the witness to the stand on the basis of newly discovered evidence. There is no doubt that if the plaintiff had moved for a new trial on such ground the court would have ruled against him. Plaintiff would have had the burden of showing that the testimony offered was not cumulative, *i.e.*, merely additional evidence of same kind, to the same fact litigated, and that the testimony, if desired, could not have been secured at the trial by the exercise of proper diligence.[10] This he could not have done, since the witness was in court during the trial and was readily available. As no errors or irregularities occurred at the trial and the additional testimony does not fall in the category of newly discovered evidence, there is no doubt that the trial judge made his extrajudicial investigation in order to rule on the plaintiff's motion.

The answer to the propriety of the trial court's action in going outside the record may be found in the various formulae established to aid a court in deciding whether a verdict is contrary to the weight of the evi-

[10] Alexander v. Cedar Works, 177 N. C. 536, 98 S. E. 780 (1919).

dence. It has been said that the trial court should not disturb a verdict of the jury where the evidence is such that different minds may reasonably and fairly come to different conclusions;[11] or where if he were a juror he would have decided differently;[12] or where on the same facts he would have arrived at a different conclusion.[13] These rules contemplate on their face that the only evidence to be considered is that which was before the jury, and the majority of courts so hold when the motion is based on the record,[14] as it was in this case. To hold otherwise and allow a judge to weigh the evidence against the verdict by looking at evidence adduced before and after the verdict, is to permit him to infringe on the jury's function of determining the credibility of witnesses, weighing the testimony and finding the facts. Such invasion is not condoned.[15] The command of our constitution that jury trial ought to remain sacred and inviolate cannot be adhered to when the trial judge may set aside the decision of the jury as against the weight of probative matter legally before it by consideration of unchecked testimony never before the jury. New trials will not be granted where such action would amount to a substitution of the court's verdict for that of the jury.[16] An Okla-

[11] Jackson v. Walker, 126 Conn. 294, 10 A. 2d 763 (1940); Harvath v. Tontini, 126 Conn. 462, 11 A. 2d 846 (1940); Downes v. United Electric Ry., 80 R. I. 382, 97 A. 2d 107 (1953); Arlia v. United Electric Ry., 64 R. I. 460, 13 A. 2d 242 (1940); Viereg v. Southwestern Wisconsin Gas Co., 212 Wis. 394, 248 N. W. 775 (1933).

[12] Ellett v. Carpenter, 173 Va. 191, 3 S. E. 2d 370 (1939); Harris v. Howerton, 169 Va. 647, 194 S. E. 692 (1938).

[13] Delvin v. Piechoski, 374 Pa. 639, 99 A. 2d 346 (1953); Caroll v. City of Pittsburgh, 368 Pa. 436, 84 A. 2d 505 (1951).

[14] Vose v. Mayo, 28 F. Cas. No. 17,009, 3 Cliff 484 (C. C. Me. 1871); Cole v. Wilcox, 99 Cal. 549, 34 Pac. 114 (1893); Dreary v. Shields, 54 Cal. App. 2d 795, 129 P. 2d 935 (1942); Norton v. Lynds, App. 24 S. W. 2d 183 (1930); Whallen's Ex'rs v. Moore, 248 Ky. 348, 58 S. W. 2d 601 (1933); Kirby v. Mafox Realty Corp., 71 N. Y. S. 2d 124, 272 App. Div. 889 (1947); Loucks v. Pierce, 341 Ill. App. 253, 93 N. E. 2d 372 (1951); Patanyi v. Davis, 336 Pa. 476, 9 A. 2d 430 (1939). The last two cases cited indicate that the error might have been cured if the outside evidence had been presented in open court with the right to cross examine. 66 C. J. S., *New Trial* § 161 (1950). Extrajudicial investigations are analogous to situations where the judge knows facts which did not appear in the record and the question arises as to whether or not such knowledge should be used to set aside the verdict. The answer is that such knowledge should not be considered. "It is a settled maxim, that a judge has a private and a judicial knowledge. But he cannot give a judgment upon his private knowledge; for he is obliged to give it according to law and what is proved. If he has a private knowledge of a fact, he may be sworn as a witness, and then the parties have an opportunity to examine and cross examine him, and to introduce explanatory or counteracting proof." Gillespie v. Doty, 160 Miss. 684, 692, 135 So. 211, 212 (1931).

[15] Rayburn v. Crocker, 31 Ala. App. 542, 19 So. 2d 554 (1944); Castleberry v. Morgan, 28 Ala. App. 20, 178 So 823 (1938). "But in exercising the power, the court should be careful not to infringe the right of trial by jury in matters which have been left to them by the law." 28 Ala. App. at —, 178 So. at 824.

[16] American Cooler Co. v. Fay & Scott, 20 F. Supp. 782 (N. D. Me. 1937); Cruz v. City of New York, 41 N. Y. S. 2d 367, affirmed, 43 N. Y. S. 2d 665, 179 Misc. 1031 (1943), appeal dismissed, 73 N. Y. S. 2d 495 (1947); Turner v. Carey, 227 S. C. 298, 87 S. E. 2d 871 (1955); Stone & Clamp, General Contractors v. Holmes, 217 S. C. 203, 60 S. E. 2d 231 (1950).

homa court expressed these views more succinctly when it said:

> "Manifestly, the determination of whether the verdict was contrary to the evidence depended solely upon the evidence; and for the court to investigate and advise itself as to the facts of the case by reference to any other source than matters of common knowledge, which it might take into consideration in weighing the evidence, was not inconformity with the analogies and fixed principles of law. On the record we quite understand the desire of the trial judge to be informed as to the facts in the case by independent investigation. But such investigation by the court as to the facts is not consonant with the right of trial by jury upon evidence introduced in open court and in the presence of parties.
>
> "There is, perhaps, little, if any, authority directly decisive of the question involved. At least we have been cited to none, but it is clear that the anologies of the law, as well as the specific basis on the motion that the 'verdict was contrary to the evidence,' require that the determination of that 'contrariety,' if it exists, should be determined from consideration of the evidence alone."[17]

Assuming that the trial judge in the *Williams* case was correct in going outside the record—and it would seem he was not—was it proper to deny counsel the right to cross examination? Where the motion for a new trial is based on evidence outside of the record, such as newly discovered evidence, perjured testimony, misconduct of jurors and other irregularities certain safeguards are required. If any merit is to be given to matters outside the record they must be supported by proof.[18] This is generally done by affidavits;[19] though this evidence may be rebutted in most jurisdictions by the use of counter affidavits.[20] The affidavits may be based on perjured testimony, or sworn to by witnesses unworthy of credit, or they may allege grounds for new trial which have no existence.[21] Counter affidavits serve to point up these defects, and by so doing, the chances of a second litigation being granted on unreliable grounds are reduced. Where witnesses have taken part in such hearing and their testimony does not amount to an affidavit for newly discovered evidence, the majority of cases have allowed their testimony to be rebutted by cross examination.[22] The Supreme Court of the state of Wash-

[17] Picket v. Chicago R. I. & P. Ry., 169 Okl. 123, 125, 36 P. 2d 284, 287 (1934).
[18] 39 AM. JUR., *New Trial* § 198 (1942).
[19] *Ibid.*
[20] Chrisco v. Yow, 153 N. C. 434, 69 S. E. 422 (1910); MCINTOSH, N. C. PRACTICE AND PROCEDURE IN CIVIL CASES (1929); ANN. CAS. 1912 D 1303.
[21] People v. Sing Yow, 145 Cal. 1, 78 Pac. 235 (1904).
[22] Brundizi v. Lehigh Valley R. R., 212 N. Y. Supp. 250, 214 App. Div. 400 (1925); Maxlip Realty Corporation v. Loesch, 187 N. Y. Supp. 135 (1921); Magley v. Masonic Temple Assn. of Columbus, 80 Ohio App. 520, 77 N. E. 2d 98 (1947). In the *Loesch* case the plaintiff moved to set aside the verdict because of the alleged

ington has put it this way:

> "While there can be no question of the power and right of a court to allow an examination of a witness orally instead of by affidavit on the hearing of a motion for a new trial, it is nevertheless one of the most important rights relating to the production of evidence, in both civil and criminal cases, that the party against whom such witness testifies shall have the right of cross examination. . . ."[23]

This is equality and fairness to both parties, and at the same time a more complete and truthful set of facts are produced. Even if the judge in the *Williams* case was correct in going outside the record, the facts would differ from the discussion here only in that the judge called the witness and conducted the questioning. This would not be sufficient reason to deviate and discard methods of proof. The defendant should have been allowed the right of cross examination.[24] The examination conducted

misconduct of a juror. The trial court, after affidavits had been submitted, questioned the juror at a hearing before opposing counsel. The attorney for the defendant, in whose favor the verdict had been rendered, made certain objections and was promptly excluded from the court room, the judge remarking, "This is an ex parte hearing to determine whether a contempt has been committed." The supreme court felt that such action was immaterial if the hearing was held to determine whether or not the juror was guilty of misconduct, inasmuch as the defendant had no interest in the contempt proceedings. "On the other hand, if that testimony was taken for the purpose of determining the motion to set aside the verdict, the defendant was vitally interested in the hearing, and had an undoubted right to be present thereat, to object to an examination of the juror for the purpose of impeaching the verdict of the jury, and in addition had the right to question the juror himself in order to sustain that verdict." 187 N. Y. Supp. at 137.

[23] State v. Ward, 135 Wash. 482, 485, 238 Pac. 11, 12 (1925).

[24] "It is true upon petition for new trial the strict rules concerning the protection of witnesses, and the right of confrontation and cross examination are not applied, but there are legal limits to the procedure to be adopted. The judicial rules safeguarding proof in court are founded upon sound reason, and are not to be departed from without reason." Huey v. West Ossipee Mines, 81 N. H. 103, 106, 122 Atl. 334, 336 (1923). An analagous area is the right to argue the merits of a motion for a new trial. The answers have varied. It has been held error to refuse to hear argument on such a motion. Kansas Atchison R. R. v. Consolidated Cattle Co., 59 Kan. 111, 52 Pac. 71 (1898). Other jurisdictions have held that it is within the trial courts' sole discretion. Collins v. Nelson, 41 Cal. App. 2d 107, 106 P. 2d 39 (1940); Morel v. Semoniam, 103 Cal. App. 490, 284 Pac. 694 (1930); Teems v. Burel, 60 Ga. App. 826, 5 S. E. 2d 405 (1939). Sovereign Camp of Woodmen of the World v. Luthan, 59 Ind. App. 290, 107 N. E. 749 (1915). New York and Wisconsin have taken the middle position on this question and have held that there is no error to refuse to hear oral arguments where the motion is based on the record. The reason given is that the judge who has presided over the trial in many instances is completely possessed of all the facts and law, and therefore an argument would be a waste of time. Sweeney v. Mayor Etc. of New York, 17 N. Y. Supp. 797 (1892); Schuster v. State, 80 Wis. 107, 49 N. W. 30 (1891). Despite these divergent viewpoints there seems to be unanimity of opinion where the motion for new trial has been made by the court itself. Those jurisdictions which have considered this particular point have held that it was a deprivation of due process not to give the parties notice and an opportunity to be heard. "Opportunity for a litigant to present his views as to the matters instantly before the court which may affect his rights is the very foundation stone of our procedure." Hoppe

by a judge normally will not be adequate, because he has neither the strong interest nor the full knowledge that is required for effective cross examination.[25] A verdict is at stake. It is a substantial right,[26] born of evidence, that has been subjected to a system of procedural checks and balances, and its merit deliberated and judged by twelve men. The elaborate process of the law which produced it should provide the basic right of cross examination to protect it.

New trials are not favored in the eyes of the law and should not be granted in an arbitrary manner. It is felt that the methods used in the *Williams* case were not based on logic and reason and should have been considered an abuse of discretion. This case results in giving the trial court an unusual amount of control over the regulation of a hearing for a new trial. Perhaps the court feels that it is a wiser policy to give the trial court a wide latitude in such hearing and that their expressed disapproval of the proceedings in the *Williams* case would be enough to prevent its recurrence. However, it would seem that until a firmer stand has been taken on the issues involved this case establishes a dangerous precedent.

JOHN MARK TAPLEY.

Unemployment Insurance—Availability for Suitable Work—Effect of Claimant's Refusal to Work on Sabbath

Claimant, a textile worker of thirteen years' experience, became interested in the Seventh Day Adventist Church, and, as a result, became convinced that she should not work on the Sabbath, which, in the Seventh Day Adventist Church, is from sundown Friday until sundown Saturday. On at least one Sabbath, she was excused from work by her employer, but on another Friday, she stayed away from her employment without permission and was discharged for such absence. Within a week she filed a claim for benefits under the Employment Security Act. During her period of unemployment, she sought work in other mills in the area but restricted her availability to the first shift, the only shift that would not interfere with her Sabbath, and freely admitted that she would not consider employment which would require her to work on her Sabbath.

The Employment Security Commission held that the claimant was not disqualified from receiving unemployment benefits by the circumstances of her discharge, that she was able to work and that she had made

v. St. Louis Public Service Co., 361 Mo. 402, 406, 235 S. W. 2d 347, 350 (1950); Southern Arizona Freight Lines v. Jackson, 48 Ariz. 509, 63 P. 2d 193 (1936); *Re* Murray's Estate, 238 Iowa 112, 26 N. W. 2d 58 (1947); Anno., 23 A. L. R. 2d 846 (1952).

[25] 5 WIGMORE, EVIDENCE § 1368 n. 1 (3d ed. 1940).

[26] Edwards v. Hood Motor Co. 235 N. C. 269, 69 S. E. 2d 550 (1952); Bundy v. Sutton, 207 N. C. 422, 177 S. E. 420 (1934).