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The Power of the Court to Grant a New Trial on Conflicting Evidence

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of acts which the tort-feasor is engaged to perform. It is worthy of note that the early English cases which established the majority rule, and which the American courts have followed, were decided before the doctrine extending a principal's liability was fully developed,[9] also that the majority rule, even where it is followed, has not always met with the approval of the courts.[10] This leads one to believe that had the doctrine extending the principal's liability been established at the time of the early cases the courts would have taken a different course. It is submitted that the Supreme Court in overruling the Friedlander Case adopted the sounder rule. A bill of lading is negotiable in a sense. The railroads, knowing this, entrust an agent to issue such bills. The limits of the agent's authority are in his own peculiar knowledge, even to the extent that should the consignee attempt to investigate he would in most cases have to inquire of the very agent who issued the bill of lading. Under such circumstances the carrier should be held liable.

—R. H. PENDLETON.

THE POWER OF THE COURT TO GRANT A NEW TRIAL ON CONFLICTING EVIDENCE.—The trial court granted a new trial to the defendant, after a verdict in favor of plaintiff who was suing for personal injuries sustained while a passenger on defendant's motor bus. The testimony for the plaintiff was, in effect, that the driver of the motor bus was driving rapidly in an attempt to pass a car in front, and while about to pass it, the Bowlby car appeared in the opposite direction causing the driver to swerve to the right so abruptly that plaintiff's arm which was in the window sill was projected through, and severed when the two cars came in contact. The defendant's testimony was a denial of this. Also, the defendant contends that the testimony of the Bowlbys that they did not see the bus until they were passing the car in front of it is inconsistent with plaintiff's claim that the bus was on the left side of the road. The defendant further contends that, as the physical facts show contact only with the rear of the Bowlby car and the front of the bus, this raises doubt as to whether the bus swerved

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[9] Barwick *v.* Eng. Joint Stock Bank, L. R. 1867, 2 Exch. 259; Grant *v.* Norway, 10 C. B. 665 (1851); Coleman *v.* Ricks, 16 C. B. 104 (1847).

[10] Whitechurch *v.* Cavanaugh, 1902 A. C. 117; Nat. Bank *v.* Chicago, etc., R. Co., 44 Minn. 224, 46 N. W. 342, 9 L. R. A. 263 (1890).

to the right at the moment of the collision. The Supreme Court affirmed the judgment of the trial court on the ground that that court is entitled to peculiar respect when it grants a new trial on conflicting evidence, and its order will not be reversed unless plainly wrong. *Haggar* v. *Monongahela Transport Company,* 146 S. E. 49 (W. Va. 1928).

The principal case raises an interesting question as to two apparently conflicting legal principles. The first principle, which is well settled law in West Virginia, is that the judgment of a trial court on a verdict is entitled to peculiar weight especially where such trial court disproves the verdict, and grants a new trial. *Sigler* v. *Beebe,* 44 W. Va. 587, 30 S. E. 76; *Martin* v. *Thayer,* 37 W. Va. 38, 16 S. E. 489. On the other hand there is that legal principle which is almost sacred in Virginia, and West Virginia law, namely, that the jury and not the court are exclusively the judges of the weight of testimony, or inferences and deductions from facts proven. *State* v. *Cooper,* 26 W. Va. 338; *State* v. *Thompson,* 21 W. Va. 741; *Gwynn* v. *Schwartz,* 32 W. Va. 487, 9 S. E. 880; *State* v. *Sullivan,* 55 W. Va. 597, 47 S. E. 267; *Stone* v. *First National Bank of Clendenin,* 72 W. Va. 171, 77 S. E. 969; *State* v. *Jankowski,* 102 W. Va. 234, 134 S. E. 919; *Tucker Sanatorium, Inc.* v. *Cohen,* 129 Va. 576, 106 S. E. 355; *Norfolk and Portsmouth Belt Line Railway* v. *Sturgis,* 117 Va. 532, 85 S. E. 572. It is difficult to know which principle to apply when the evidence is conflicting because undoubtedly there are some cases where the trial court may grant a new trial in the face of inconsistent testimony. This is true although the court may not pass on the credibility of witnesses which is a question solely within the jury's province. *Coalmer* v. *Barrett,* 61 W. Va. 237, 56 S. E. 385. West Virginia has clearly decided that the granting of a new trial rests in the sound discretion of the court, and that the trial court has no power to grant new trials without legal grounds therefor. *Hodge* v. *Charleston Interurban Railway Company,* 79 W. Va. 174, 90 S. E. 161; *Coalmer* v. *Barrett, supra.* The court in *Gilmer* v. *Sydenstricker,* 42 W. Va. 52, 24 S. E. 566, said that the call to set aside a verdict "must be very loud and plain." The court may not set aside a verdict upon a mere conjecture or belief that injustice has been done, or that the court, if a juror, would have decided differently. *Henderson* v. *Hazlett, et al.,* 75 W. Va. 255, 83 S. E. 907. The verdict must be plainly contrary to law and evidence to constitute a legal ground, a slight weight or preponderance not being sufficient. *Coalmer* v. *Barrett, supra.* Notwithstanding this rule, the court in *Coalmer* v. *Barrett* says that a verdict depending solely on conflicting oral evidence will not be set aside on the ground it is contrary to the weight of the evi-

dence, but that the court must go beyond the question of the credibility of witnesses and find documentary evidence, uncontroverted evidence, facts, and circumstances which considered with the conflicting oral testimony constitute such weight or preponderance. Applying these rules to the principal case the court has invaded the province of the jury unless there are facts and circumstances which result in a clear preponderance of the evidence, there being no documentary or uncontroverted evidence. With the exception of two contentions, the evidence consists of a simple affirmation on one side, and a denial on the other. First it is contended that the testimony of the Bowlbys that they did not see the bus until they were passing the car in front is inconsistent with plaintiff's claim that the bus was on the left side of the road. This is not a recognized fact that cannot be controverted. It is perfectly possible that the bus could have been on the left side of the road but was not noticed by the Bowlbys until they were passing the car in front. The contention is not a necessary logical deduction, but evolves itself into the simple choice of believing or not believing the witnesses, and is therefore a question for the jury. Besides the jury are exclusively the judges of the weight of testimony, or the inferences and deductions from facts proven. *State* v. *Cooper, supra.* It is also contended that the physical facts showing contact only between the rear of the Bowlby car and the front of the bus raises serious doubt as to whether the bus swerved to the right at the moment of the collision as the plaintiff claims. On the contrary, this would seem to substantiate the plaintiff's evidence. To automobile drivers it is a known fact that a small car can be steered to the right or the left much more quickly than a larger car. Supposing that the bus driver and the driver of the Bowlby car began steering to the right at approximately the same time, the small car could be turned almost cross ways with reference to the road while the bus was being swerved more slowly to the right, and the natural thing would be for the rear of the small car to be struck by the front of the bus. The court seemed to attach much weight to these two contentions. At the most they are issues of fact dependent on oral testimony without any conclusive physical facts to turn the balance. The court cited *Reynolds* v. *Tompkins,* 23 W. Va. 229, and *St. Clair* v. *Jaco, et al.,* 95 W. Va. 5, 120 S. E. 188, to sustain the proposition that when a trial court set aside a verdict and grants a new trial on conflicting evidence, its judgment is entitled to peculiar respect because of the opportunity of the court to observe the witnesses and the evidence. Unless further explained this doctrine is likely to lead to dangerous results in that the courts may fail to remember the great significance attached to a jury's verdict. *Reynolds* v.

Tompkins was cited in *Wilson* v. *Johnson,* 72 W. Va. 742, 79 S. E. 734. The court there recognized the rule but said it must be properly interpreted and applied. The court further said that the rule could not be used to cover errors of the trial court in abusing its reasonable discretion in awarding new trials by invading the province of the legal triers of fact, and because differing from them in the inferences or conclusions arising from conflicting oral evidence substitute its judgment for that of the jury. The case of *St. Clair* v. *Jaco,* et al., was an action for personal injuries received in an automobile accident. The Supreme Court sustained the judgment of the trial court awarding a new trial on the ground that an order setting aside a verdict where material evidence was not in the record should be sustained unless wrongful invasion of the province of the jury appears. The court said as a rule a verdict on conflicting evidence should generally stand, but the circumstances of each case determine which of the two legal principles should prevail, citing *Wilson* v. *Johnson, supra,* with approval. In the last analysis then, the power of a trial court to upset a verdict is a sound discretion which should be controlled by legal principles, and if great weight should be given to the trial court's judgment, it should be remembered the jury's verdict is equally entitled to great respect.

—CLARA DWIGHT WHITTEN.