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EDITORIAL NOTES

RENDITION OF FINAL JUDGMENTS BY TRIAL COURTS ON MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND ON MOTIONS FOR A NEW TRIAL

An interesting and important procedural question was decided by the Court of Appeals of Ohio in the case of *Lehman v. Harvey*.¹ The defendant moved for a directed verdict at the end of the plaintiff's evidence, and again at the conclusion of the entire case. These motions were overruled by the trial court and the jury brought in a verdict for the plaintiff. The defendant, thereupon, filed two motions: (1) for judgment notwithstanding the verdict, (2) for a new trial. The trial court found there was no evidence to support a material averment of the petition and granted the motion for judgment notwithstanding the verdict. The court of appeals, affirming the judgment of the lower court,

¹45 Ohio App. 215, 187 N. E. 28 (1933).

held: (1) The court, on a motion for judgment notwithstanding the verdict, is confined to a consideration of statements in the pleadings.² Since the petition stated a cause of action, the motion for judgment notwithstanding the verdict should have been overruled. (2) The trial court, however, upon the motion by the defendant for a new trial, had power to enter *final* judgment for the defendant. On error to the Supreme Court of Ohio the petition in error was dismissed for the reason that no debatable constitutional question was involved.³

Formerly at common law a judgment *non obstante veredicto* could be granted only in favor of the plaintiff. The remedy of defendant was to have the judgment arrested. Gradually, however, this rule was relaxed, either by judicial decision or by statute, and it became established that either party might make use of this motion.⁴ A few courts still adhere to the rule that the motion is available only to an unsuccessful plaintiff to attack a verdict as being inconsistent with the defendant's pleaded admissions.⁵ At common law a party, to avail himself of a motion *non obstante veredicto*, had to present his motion before judgment was entered on the verdict. Even under statutory modifications broadening the common law rules regulating the motion, it is uniformly held, unless the time for making the motion is specifically covered by statute, that it must be made before judgment is entered and failure to do so within such time is fatal.⁶ Where a North Dakota statute provided for alternative motions for judgment notwithstanding the verdict and for a new trial, available either before or after judgment, it was held that a motion for judgment notwithstanding the verdict made separately without a motion for a new trial had to be made before judgment.⁷ It was well settled at common law that the court in disposing of the motion could not

²OHIO GEN. CODE § 11601.

³Lehman v. Harvey, 127 Ohio St. 159, 187 N. E. 201 (1933).

⁴Kirk v. Salt Lake City, 32 Utah 143, 89 Pac. 458 (1907); Olson v. Ottetail Power Co. *et al.*, 256 N. W. 246 (N. D. 1934).

⁵King v. Kaw-Mo Wholesale Grocer Co., 188 Mo. App. 235, 175 S. W. 77 (1915); First Nat. Bank of Ziegler, Ill. v. Dunbar, 72 S. W. (2d) 821 (Mo., 1934); David v. Gilbert *et al.*, 85 Colo. 184, 274 Pac. 821 (1929).

⁶Olson v. Ottetail Power Co. *et al.*, *supra* note 4.

⁷*Supra* note 6.

go back of the pleadings and consider the sufficiency of the evidence.⁸

The modern development of the motion for judgment *non obstante veredicto* centers about the case of *Slocum v. New York Life Insurance Company* decided by the Supreme Court of the United States in 1913.⁹ Here the trial court, when all the evidence was in, refused to direct a verdict for the defendant and the jury returned a general verdict for the plaintiff. The circuit court of appeals found as a matter of law that a verdict ought to have been directed for the defendant, and entered judgment for the defendant under a Pennsylvania statute permitting final judgment to be granted under such circumstances. On appeal all of the justices of the Supreme Court agreed that the trial court should have directed a verdict for the defendant, but the majority held that the circuit court of appeals had no power to direct a final judgment for the defendant in conformity with the Pennsylvania statute, since such procedure contravened the Seventh Amendment of the Constitution of the United States which declares that, "No fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law."

Persons interested in procedural reform were surprised at this holding and sought to aid in bringing about a rehearing of the case, but a rehearing was refused.¹⁰ The decision was referred to as a "public misfortune,"¹¹ and as preserving the right to two trials by jury.¹² In a case decided the same year the Supreme Judicial Court of Massachusetts refused to follow the rule of the *Slocum* case.¹³ This it could do since the Seventh Amendment

⁸*Slocum v. New York Life Insurance Co.*, 228 U. S. 364 (1913); Note, 1913 A ANN. CAS. 1019.

⁹*Supra* note 8.

¹⁰Am. Bar Ass'n Rep. 1913 p. 546, 561.

¹¹Thorndike, *Trial By Jury in the United States Courts*, 26 HARV. L. REV. 732, 737 (1913). "The decision of the majority of the court is a public misfortune, because it destroys a simple means of enforcing, without the expense, delay, and uncertainty of a new trial, a right to which the decision shows a party was entitled at the trial."

¹²Thayer, *Judicial Administration*, 63 U. OF PA. L. REV. 585, 588 (1915).

¹³*Bothwell v. Boston Elevated Ry. Co.*, 215 Mass. 467, 102 N. E. 665 (1913).

limits the power of the federal government only.¹⁴ As late as 1931 there was an attempt by a federal district court to have the Supreme Court change its holding in the *Slocum* case. The court granted a motion for judgment *non obstante veredicto* on the ground that it should have directed a verdict and failed to do so.¹⁵ The court of appeals, reversing the judgment in the district court, stated, "The dissenting opinion in the *Slocum* case seems to us, as it seemed to the trial judge, convincing. But it is a dissenting opinion. While laymen may think a decision of the Supreme Court which is not unanimous is less authoritative than one that is, courts cannot give countenance to that misconception. . . . When a question has been decided by the Supreme Court, it is, so far as the inferior federal courts are concerned, a question no longer."¹⁶

In spite of the strong adverse criticism of writers and judges, the rule laid down in the *Slocum* case has become the settled rule of the federal courts.¹⁷ However, the state courts have uniformly held that their statutes, with provisions similiar to the Pennsylvania statute discussed in the *Slocum* case, are constitutional, and have shown no disposition to follow the lead of that case in interpreting the right of trial by jury as guaranteed by their constitutions.¹⁸ Even in actions which have arisen under the Federal Employers Liability Act in state courts judgments notwithstanding the verdict have been entered following the

¹⁴*Minn. & St. Louis R. R. Co. v. Bombolis*, 241 U. S. 211, 36 Sup. Ct. 595 (1916).

¹⁵*Glynn v. Krippner*, 47 F. (2d) 281 (D. C. Minn., 1931).

¹⁶*Glynn v. Krippner*, 60 F. (2d) 406, 409 (C. C. A. 8th, 1932).

¹⁷*Meyers v. Pittsburgh Coal Co.*, 233 U. S. 184, 34 Sup. Ct. 559 (1914); *Fidelity Title Co. v. Dubois Electric Co.*, 253 U. S. 212, 40 Sup. Ct. 514 (1919); *Pedersen v. Delaware, etc. R. R. Co.*, 229 U. S. 146, 33 Sup. Ct. 648 (1914).

¹⁸*Wayland v. Lathan*, 89 Cal. App. 55, 264 Pac. 766 (1928); *Commercial Ins. Co. v. Scammon*, 123 Ill. 601, 14 N. E. 666 (1888); *Borg v. Chicago, R. I. P. Ry. Co.*, 462 Ill. 348, 44 N. E. 722 (1896); *Vandenberg v. Kaat*, 252 Mich. 187, 233 N. W. 220 (1930); *Kernan v. St. Paul City Ry. Co.*, 64 Minn. 312, 67 N. W. 71 (1896); *Williams Yellow Pine Co. v. Henley*, 155 Miss. 893, 125 So. 552 (1930); *Olson v. Ottertail Power Co. et. al.*, 256 N. W. 246 (N. D., 1934); *Dalmas v. Kemble*, 215 Pa. 410, 64 Atl. 559 (1906); *Gunn v. Union R. Co.*, 27 R. I. 320, 62 Atl. 118 (1905); *Forbes & Co. v. Southern Cotton Oil Co.*, 130 Va. 245, 108 S. E. 15 (1921); *Campbell v. Weller*, 25 Wyo. 65, 164 Pac. 831 (1917).

state procedure¹⁹ and appellate courts have entered final judgments where the trial court should have directed a verdict.²⁰ Where there are no statutory enactments governing the motion, it is generally held that the common law rule, that in disposing of the motion the court cannot go back of the pleadings and consider the sufficiency of the evidence, is applicable.²¹ Several states, including Ohio, have codified this rule.²² A few courts have held that the procedural statutes of their states impliedly exclude motions for judgment notwithstanding the verdict.²³ Texas courts hold that the motion is foreign to their practice,²⁴ and that a motion to set aside the verdict and grant a new trial is the proper procedure.²⁵

Control and guidance by the court are fundamental in our system of trial by jury. The judge was never meant to be a dictator, nor on the other hand was he meant to be a mere umpire in a battle of wits. His function is to insure that justice shall be done. This is a very obvious to everyone, yet it is often lost sight of in the maze of technicalities surrounding legal procedure. Rules governing motions are not so inflexible that the courts, or the legislatures, finding new conditions demanding new procedure, cannot vary their procedure so long as the variance does not affect fundamental constitutional guarantees.²⁶ It seems that

¹⁹*Marshall v. Chicago, R. I. & P. Ry. Co.*, 133 Minn. 461, 157 N. W. 638 (1916).

²⁰*Gulf S. I. R. Co. v. Hales*, 140 Miss. 829, 105 So. 468 (1925).

²¹*Foster v. Leftwick*, 52 Okla. 28, 152 Pac. 583 (1915); *St. L. S. F. Ry. Co. v. Bell*, 134 Okla. 251, 273 Pac. 243 (1928); *David v. Gilbert et al.*, 85 Colo. 184, 274 Pac. 821 (1929); *Southern Products Co. v. Franklin Coil Hoop Co.*, 183 Ind. 123, 106 N. E. 872 (1914); *Kirk v. Salt Lake City*, 32 Utah 143, 89 Pac. 458 (1907); *Citizens Trust Co. v. Service Motor Car Co.*, 154 Tenn. 507, 297 S. W. 735 (1927). But see *Neil v. Metropolitan Casualty Ins. Co. of New York*, 135 Tenn. 28, 185 S. W. 501 (1916).

²²OHIO GEN. CODE § 11601; *Manning v. Orleans*, 42 Neb. 712, 60 N. W. 953 (1894); *Bertin & Lepori v. Mattison et al.*, 80 Ore. 359, 157 Pac. 153 (1916).

²³*Prairie Flour Mill Co. v. Farmer's Elevator Co. et al.*, 45 Idaho 229, 261 Pac. 673 (1927); *Best v. Beaudry*, 62 Mont. 485, 205 Pac. 239 (1922).

²⁴*Hayes v. G. A. Stowers Furniture Co.*, 180 S. W. 149 (Tex. Civ. App., 1915).

²⁵*Hicks et al. v. Armstrong et al.*, 142 S. W. 1195 (Tex. Civ. App. (1912).

²⁶"The highly artificial rules of procedure at common law which prevailed in England when the seventh amendment was adopted have long since been abandoned in that country, and in nearly all of the United States, in favor

any proper aid to the judge in carrying out his duties of control and guidance is justifiable so long as it does not deprive the litigants of their right to have the jury pass on the facts in the case.²⁷ The Pennsylvania statute considered in the *Slocum* case, and the other state statutes of like import, do not seem to encroach upon the province of the jury.²⁸ It has been held that a statute taking away from the courts the right to direct a verdict is unconstitutional since it contravenes the constitution which lodges the judicial power of the state in the courts.²⁹

Few of the constitutions of the states contain provisions similar to that of the Federal Constitution to the effect that, "no fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law." Most of the constitutions state merely that, "the right of trial by jury shall be inviolate."³⁰ It is arguable that the states

of a simpler and less technical procedure. In our own state, while we have preserved the inviolability of the right of trial by jury, in this regard conforming to the first part of the seventh amendment of the federal constitution, we have not irrevocably bound ourselves to the ancient rules of procedure at common law by adopting any constitutional provision similar to that contained in the second half of the seventh amendment, upon which the decision in the *Slocum v. N. Y. Life Ins. Co.* turned." *Peterson v. Ocean Electric Ry. Co.*, 161 App. Div. 728, 146 N. Y. S. 604, 610 (1914).

²⁷"Litigation should never be protracted where this, with due regard to the rights of parties, can possibly be avoided. *Interest rei publicae ut sit finis litium* is a maxim so old that its origin is hidden in remote antiquity, and the policy which it inculcates is so essential as not to admit of question or dispute." *Harris v. Hull, Ex'r*, 70 Ga. 831, 839 (1883).

²⁸"What the judge may do is still the same in substance, but the time when he may do it is enlarged so as to allow deliberate review and consideration of the facts and the law upon the whole evidence. If upon such consideration it shall appear that a binding direction for either party would have been proper at the close of the trial, the court may enter judgment later with the same effect. But, on the other hand, if it should appear that there was conflict of evidence or a material fact, or any reason why there could not have been a binding direction, then there can be no judgment against the verdict now. As already said, there is no intent in the act to disturb the settled line of distinction between the provinces of the court and the jury." *Delmas v. Kemble*, 215 Pa. 410, 64 Atl. 559, 560 (1906).

²⁹*Thoe v. Chicago, M. & St. P. Ry. Co.*, 181 Wis. 456, 195 N. W. 407 (1923). For a discussion of directed verdicts and demurrers to evidence see *Hopkins v. Nashville C. & St. L. Ry.*, 96 Tenn. 409, 34 S. W. 1029 (1896).

³⁰2 THOMPSON, TRIALS (2d ed. 1918) § 2226.

meant by their constitutional provisions as to trial by jury just what the framers of the United States Constitution meant. It, therefore, would seem from this point of view that the state courts are dealing, intrinsically, with the same problem when they are passing on the constitutionality of their statutes with provisions regulating motions *non obstante veredicto* and the power of the appellate courts to enter final judgment where the lower court should have directed a verdict. The states, almost without exception, take the broad practical view of the dissenting opinion in the *Slocum* case, under a policy well set forth by the court in the *Forbes & Co. v. Southern Cotton Oil Co.* "The object of the statute is to put an end to litigation, to obviate repeated trials and the delay and expense of litigation, and to remove the temptation to perjury by patching up the weak places disclosed at a former trial, not by after-discovered evidence, but by the same witnesses relied upon at the former trial."³¹

The second question passed upon by the Court of Appeals of Ohio in the case of *Lehman v. Harvey*³² was whether the trial court could render *final* judgment for the defendant on a motion for a new trial, where it should have directed a verdict for the defendant and failed to do so. As has been pointed out, a motion for judgment notwithstanding the verdict was not available, since upon such motion the statute of Ohio requires that a court shall be confined to a consideration of the pleadings. The court, therefore, had to consider whether upon common law principles, in the face of the Ohio statute defining a new trial,³³ it should broaden the effect of a motion for a new trial and make it serve as the basis for final judgment without a new trial of the facts before another jury.

Historically, a motion for a new trial was introduced on account of the severity of the judgment of attain, and the main object of the motion was to correct errors of the jury, not of the court. At common law no writ of error lay from the decision on a motion

³¹130 Va. 245, 108 S. E. 15, 24 (1921).

³²*Supra* note 1.

³³"A new trial is a re-examination, in the same court, of an issue of fact, after a verdict by a jury, a report of a referee or master, or a decision by the court." OHIO GEN. CODE § 11575. The term "new trial" means a rehearing of the case from the beginning. *Dayton & Union R. Co. v. Dayton & Muncie Traction Co.*, 72 Ohio St. 429, 74 N. E. 195 (1904).

for a new trial.³⁴ The object of the motion was to have the verdict rendered in the case set aside, so that there might be a re-examination of the issues of fact involved in the case, and the judge might again charge the jury as to those issues of fact.³⁵

There is another line of authority, exemplifying the modern trend, which holds that the office of a motion for a new trial is not alone to secure another hearing, but to present the errors complained of for correction, if possible, without another hearing. Under this conception it is permissible, on motion for a new trial, for the losing party to question the action of the court in refusing him peremptory instructions. The cases holding this view have extended the office of the motion for a new trial—unjustifiably in the light of the historical development of the motion, but justifiably in the light of modern day needs. Under the modern doctrine the trial court is given an opportunity to correct the error made in refusing to direct a verdict, or to give peremptory instructions, and to avoid burdening the higher courts with the work of correcting errors which the trial court could have corrected.³⁶

Many courts, consistent with the development of the motion for a new trial, have held that final judgment cannot be granted on such motion.³⁷ It has been held that in an equity case where there is a motion for a new trial and the court changes its mind,

³⁴Kearney v. Snodgrass and others, 12 Ore. 311, 7 Pac. 309 (1885); Zaleski v. Clark, 45 Conn. 401 (1877).

³⁵Warner *et al.* v. Goding, 91 Fla. 260, 107 So. 406 (1926).

³⁶Barnes v. Noel, 131 Tenn. 131, 174 S. W. 276 (1915); Memphis St. Ry. Co. v. Johnson, 114 Tenn. 632, 88 S. W. 469 (1905); Merriman v. Coca Cola Bottling Co. of McMinnville, 68 S. W. (2d) 149 (Tenn. 1933); Gammon v. Abrams, 53 Wis. 323, 10 N. W. 479 (1881). The Oregon courts concede that ordinarily a trial court exceeds its power upon a motion for a new trial by setting aside a verdict in whole or in part and entering a final judgment without a new trial, but its action in so doing will not be reversed where on the facts, as to which there must be practically no conflict, a verdict should have been directed, as a new trial would be an obviously futile thing. Herndobler v. Rippen, 75 Ore. 22, 126 Pac. 140 (1915); Hughes v. Holman, 110 Ore. 415, 223 Pac. 730 (1924).

³⁷Loy v. McDowell, 85 Okla. 286, 205 Pac. 1089 (1922); Houston v. Roach, 11 Ky. L. Rep. 52 (1889); Schein v. Epstein, 110 S. C. 433, 96 S. E. 905 (1918); Wichita Falls Traction Co. v. Cook, Judge, *et al.*, 122 Texas 446, 60 S. W. (2d) 764 (1933); Thomas v. Kansas City Elevated Ry. Co., 76 Kan. 141, 90 Pac. 816 (1907); Rankin v. Oates, 183 N. C. 517, 112 S. E. 32 (1922).

the court can only grant a new trial and cannot render final judgment.³⁸ Where a jury was waived, it was held that the trial court could not of its own motion set aside its general finding for one party without granting a new trial.³⁹

A Virginia statute provides for final judgment on a motion for a new trial.⁴⁰ (It will be noted that there is no essential difference between this statute and those mentioned under motions for judgment *non obstante veredicto*. The same general purpose underlies each, and the same constitutional question is presented.) The courts, construing this statute, hold that if no evidence is offered, or none that would warrant a jury in finding a verdict in accordance therewith, then the rights of the parties become a question of law, and there is no controversy to be determined by a jury and the constitutional guaranty does not apply.⁴¹ Peremptory instructions directing a verdict are forbidden by statute in Virginia. It was argued, therefore, that the statute providing for final judgment on a motion for a new trial must be invalid. It was held that the legislature might well say that at the time of the trial the judge, since he had at that time no opportunity to weigh and consider, should not give instructions. However, after the verdict, the judge, with time to examine authorities and deliberately review all the evidence, could determine whether the duty rested on him to set aside the verdict of the jury.⁴²

It has been held, in line with the reasoning of the *Slocum* case, that this Virginia statute may not be followed by a federal court in view of the Seventh Amendment to the Constitution of the United States which requires a new trial on the vacation of a

³⁸Hurley v. Kennally, 186 Mo. 229, 85 S. W. 357 (1904); Hovey v. Grier *et al.*, 324 Mo. 634, 23 S. W. (2d) 1058 (1929).

³⁹Wright & Another v. Hawkins, 36 Ind. 264 (1871).

⁴⁰"When the verdict of a jury in a civil action is set aside by a trial court upon the ground that it is contrary to the evidence, or without evidence to support it, a new trial shall not be granted if there is sufficient evidence before the court to enable it to decide the case upon its merits, but such final judgment shall be entered as to the court shall seem right and proper. . . . Nothing in this section contained shall be construed to give to the trial courts any greater power over verdicts than they now have under existing rules of procedure, nor to impair the right to move for a new trial on the ground of after discovered evidence." VA. CODE (1924) § 6251.

⁴¹Forbes & Co. v. Southern Cotton Oil Co., 130 Va. 245, 108 S. E. 15 (1921).

⁴²Flowers v. Virginian R. Co., 135 Va. 367, 116 S. E. 672 (1923).

verdict.⁴³ A federal court may, however, reserve its ruling on a motion to dismiss the complaint on the merits. After the verdict is brought in the court may dismiss the complaint, but it must not set aside the verdict.⁴⁴ If the dismissal of the complaint was erroneous, judgment could then be entered by the appellate court on the reinstated verdict and a new trial avoided. This procedure is not in violation of the Seventh Amendment since the court expressly refuses to set aside the verdict of the jury. There is no re-examination of the facts tried by the jury.⁴⁵

The result reached in the case of *Lehman v. Harvey* is sound. However, it seems rather illogical for the court to grant final judgment on a motion for a new trial—something the defendant has not asked, and something which is inconsistent with the purpose of the motion. Inasmuch as civil procedure in Ohio is regulated by statute, it would appear desirable for the legislature either to provide a new form of motion by which a trial court can correct, after verdict, its error in failing to direct a verdict at the proper time, or to extend the scope of the present statute governing motions for judgment notwithstanding the verdict to permit a trial court in passing on such a motion to consider the sufficiency of the evidence.

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⁴³*Norton v. City Bank & Trust Co.*, 294 Fed. 839 (C. C. A. 4th, 1923).

⁴⁴*Clemence v. Hudson & M. Ry Co.*, 11 F. (2d) 913 (C. C. A. 2d, 1926).

⁴⁵*Hoffman et al. v. American Mills Co.*, 288 Fed. 768 (C. C. A. 2d, 1923).