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PRACTICE AND PROCEDURE - RESERVATION OF DECISION ON MOTION FOR DIRECTED VERDICT AS MEANS OF AVOIDING UNNECESSARY NEW TRIALS

PRACTICE AND PROCEDURE — RESERVATION OF DECISION ON MOTION FOR DIRECTED VERDICT AS MEANS OF AVOIDING UNNECESSARY NEW TRIALS — What may be done to remedy the situation if a jury brings in a verdict in favor of a party against whom a verdict should have been directed? This question becomes pertinent in view of the fact that judges, while hard pressed by counsel in the heat of trial, frequently wrongfully deny a motion for directed verdict and submit the case to the jury.[1] One obvious remedy is the granting of a new trial by the trial judge, or by an appellate court after reversal. But this practice has proved eminently unsatisfactory, for it submits the aggrieved party to the delay, annoyance, and cost of a re-litigation which will undoubtedly end in his favor anyway if the memories of his witnesses have not become dulled by the passage of time. Furthermore, it is no untruth to say that a new trial at least offers a temptation to an unscrupulous party, defeated on the appeal, to manufacture evidence to conform with an appellate court's opinion.[2] In addition, it clogs further already overburdened court dockets.

Another device now open in this predicament is the fairly common statutory judgment on the evidence notwithstanding the verdict. Under this procedure either trial or appellate court may enter a final judgment for the party in whose favor the verdict should have been directed at the trial, thus correcting the error without recourse to a bothersome new trial. This method represents a comparatively recent extension of the common law motion for judgment *non obstante veredicto*, which could traditionally be made only by the plaintiff and which at any rate searched only the sufficiency of the record and not the evidence.[3] It is well settled that in the absence of a statute the motion cannot be made to search the evidence to see if it is legally sufficient, eleven states hav-

[1] Thayer, "Judicial Administration," 63 UNIV. PA. L. REV. 585 (1915).
[2] Thayer, ibid., at 600.
[3] 11 ENCYC. PL. & PR. 917 (1898).

ing refused to extend it because of lack of statutory authority.[4] Minnesota was the pioneer in the passing of legislation to avoid new trials by broadening the scope of the common law motion to cover the evidence at the trial, that state's first law being passed in 1895. This statute provided for an alternative motion for judgment on the evidence notwithstanding the verdict or for a new trial, and allowed both the trial and appellate courts to consider the motion.[5] At least sixteen other states have followed the example of Minnesota in allowing judgment *non obstante* to be extended to the evidence.[6] Unlike the common law motion this new development in practice is generally resorted to by the defendant, although there are a few cases where it has been utilized by the plaintiff.[7]

The desirable trend away from use of the new trial evidenced by these statutes received somewhat of a set-back by the five-to-four deci-

[4] *Arizona*, Bryan v. Inspiration Consol. Copper Co., 23 Ariz. 541, 205 P. 904 (1922); *Arkansas*, Jackson v. Carter, 169 Ark. 1154, 278 S. W. 32 (1925); *Illinois*, The Tribune Co. v. The Dunlap Mfg. Co., 201 Ill. App. 408 (1916); *Iowa*, Stevens v. City of Chariton, 184 Iowa 59, 168 N. W. 310 (1918); *Kentucky*, Baskett v. Coombs, Admr., 198 Ky. 17, 247 S. W. 1118 (1923); *Oklahoma*, Bank of Commerce of Sulphur v. Webster, 70 Okla. 68, 73, 172 P. 943 (1918); *Oregon*, Kelly v. Stout Lumber Co., 123 Ore. 647, 263 P. 881 (1928); *North Carolina*, Christian v. Yarborough, 124 N. C. 72, 32 S. E. 383 (1899); *Tennessee*, National Life & Accident Ins. Co. v. American Trust Co., 17 Tenn. App. 516, 68 S. W. (2d) 971 (1933); *Utah*, Kirk v. Salt Lake City, 32 Utah 143, 89 P. 458, 12 L. R. A. (N. S.) 1021 (1907); *West Virginia*, Paxton Lumber Co. v. Panther Coal Co., 83 W. Va. 341, 98 S. E. 563 (1919).

[5] MINN. GEN. LAWS (1895), c. 320. This law was amended several times and may now be found in 2 MINN. STAT. (Mason 1927), § 9495. The history of the Minnesota legislation is set forth in SUNDERLAND, CASES ON TRIAL AND APPELLATE PRACTICE 436, n. 77 (1924).

[6] *California*, CODE CIV. PROC. (Deering 1931), § 629; *Colorado*, Fincher v. Bosworth & Co., 77 Colo. 496, 238 P. 38 (1925); *Idaho*, 1 IDAHO CODE (1932), § 7-224, changing decision against its extension to the evidence in Prairie Flour Mill Co. v. Farmers' Elev. Co., 45 Idaho 229, 261 P. 673 (1927); *Kansas*, Advance-Rumely Thresher Co. v. West, 108 Kan. 875, 196 P. 1061 (1921); *Louisiana*, Lehon v. New Orleans Pub. Serv., Inc., 10 La. App. 715, 123 So. 172 (1929); *Massachusetts*, Bothwell v. Boston Elev. Ry., 215 Mass. 467, 102 N. E. 665 (1913); *Michigan*, 3 COMP. LAWS (1929), § 14531. The anomalous Michigan procedure will be considered infra. *North Dakota*, Richmire v. Andrews & Gage Elev. Co., 11 N. D. 453, 92 N. W. 819 (1902); *Pennsylvania*, PA. STAT. (Purdon 1931), tit. 12, § 684; *South Dakota*, State v. Smith, 47 S. D. 216, 197 N. W. 231 (1924); *Texas*, Spence v. Nat. Life & Acc. Ins. Co., (Tex. Civ. App. 1933) 59 S. W. (2d) 212; *Virginia*, Vandenbergh & Hitch v. Buckingham Apt. Corp., 142 Va. 397, 128 S. E. 561 (1925); *Vermont*, Tarbell v. Grand Trunk Ry., 94 Vt. 449, 111 A. 567 (1921); *Washington*, Roe v. Standard Furn. Co., 41 Wash. 546, 83 P. 1109 (1906); *Wisconsin*, Hay v. City of Baraboo, 127 Wis. 1, 105 N. W. 654 (1906); *Wyoming*, REV. STAT. (1931), § 89-2605.

[7] Fincher v. Bosworth Co., 77 Colo. 496, 238 P. 38 (1925); Fishburne v. Robinson, 49 Wash. 271, 95 P. 80 (1908); Fargo Loan Agency v. Larson, 53 N. D. 621, 207 N. W. 1003 (1926).

sion handed down by the United States Supreme Court in the well-known case of *Slocum v. New York Life Insurance Co.*,[8] decided in 1913. The high tribunal there had under consideration the constitutionality of a Pennsylvania statute of 1905 [9] as applied in the federal courts under the terms of the Conformity Act.[10] This statute allowed a party, when his request for binding instructions had been denied by the trial court, to have the evidence made part of the record, and to have judgment notwithstanding the verdict entered upon it either by the trial or appellate court, if the evidence should so warrant. Speaking for the majority of the court, Van Devanter, J., held that though in the principal case the federal district court had clearly erred in denying defendant's motion for directed verdict, which error had been corrected by the circuit court under the Pennsylvania procedure by entering judgment for the defendant *non obstante*, still the case must be remitted for a new trial, inasmuch as this method when used in the federal courts was a violation of the right to jury trial as set forth in the Seventh Amendment of the Federal Constitution.[11] The majority of the Court, scouting the idea that they were only upholding procedural niceties, in substance decided that where there are issues of fact made by the pleadings,[12] no matter what the state of the evidence, the facts are to be tried by the jury, and that while a court may properly aid the jury by granting a directed verdict, nevertheless it has no authority to dispense with a verdict upon which a final judgment must be based or to overrule it once given, unless as a concomitant a new trial is granted either by the trial or reviewing court. Judgment *non obstante* on the evidence, the court pointed out, was not authorized by the spirit of the common law practice at the time of the passing of the Federal Constitution, the usual criterion for determining the purview of the jury trial clause, and therefore it was unconstitutional.

A trenchant and excellent opinion written by now Chief Justice Hughes, speaking for the dissident Holmes, Hughes, Lurton, and Pitney, J.J., pointed out:[13]

[8] 228 U. S. 364, 33 S. Ct. 523 (1913).

[9] PA. LAWS (1905), c. 198, now PA. STAT. (Purdon 1931), tit. 12, § 684. For text see infra, n. 27.

[10] 28 U. S. C., § 724.

[11] "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and 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."

[12] The plea in the principal case was the formal one of non-assumpsit, making it difficult to tell from the pleadings what the actual issues were. See Thorndike, "Trial by Jury in United States Courts," 26 HARV. L. REV. 732 at 734 (1913).

[13] Slocum v. N. Y. Life Ins. Co., 228 U. S. 364 at 400, 33 S. Ct. 523 (1913).

"The serious and far-reaching consequences of this decision are manifest. Not only does it overturn the established practice of the Federal courts in Pennsylvania in applying, under the Conformity Act, the provisions of the state law, but it erects an impassable barrier—unless the Constitution be amended—to action by Congress along the same line for the purpose of remedying the mischief of repeated trials and of thus diminishing in a highly important degree the delays and expense of litigation."

This decision came as a distinct surprise in view of the fact that the same statute had previously been held constitutional not only by the Pennsylvania court,[14] but also in several cases in the lower federal courts,[15] in one of which certiorari had been denied by the Supreme Court.[16]

Even with respect to the federal courts, despite the foreboding note of Mr. Justice Hughes' dissent in the *Slocum* case and his feeling that the majority opinion effectually and completely barred the way to procedural reform, legal writers were quick to sense a way to get around that result. Shortly after this case there appeared in legal periodicals two articles, by Ezra R. Thayer and J. L. Thorndike respectively,[17] both of them inveighing against the decision, but suggesting that a different result might perhaps have been reached had the Pennsylvania statute provided for reservation by the trial judge of his decision on the motion for directed verdict, and the submitting to the jury of the case, but with leave reserved with the assent of the jury to enter an alternative verdict if the trial or appellate court's decision on the reserved motion so demanded. It was pointed out that this method, which had been in its general features used by the English courts for many years prior to the passage of the Judicature Act, solved the prin-

[14] Dalmas v. Kemble, 215 Pa. 410 at 412, 64 A. 559 (1906), in which the court referred to the procedure as one of the practical reforms for facilitating business without impairing settled legal principles, in which Pennsylvania has always been in the fore.

[15] Smith v. Jones, (C. C. A. 3d, 1910) 181 F. 819; Cornette v. Baltimore & Ohio R. R., (C. C. A. 3d, 1912) 195 F. 59.

[16] Fries-Breslin Co. v. Bergen, (C. C. Pa. 1909) 168 F. 360, (C. C. A. 3d, 1909) 176 F. 76, certiorari denied in 215 U. S. 609, 30 S. Ct. 410 (1909). Oddly enough, the constitutionality of these statutes has not often been attacked in the state courts as a violation of jury trial clauses in state constitutions. In addition to the Pennsylvania court only Minnesota apparently had passed on this issue prior to the Slocum decision, and had found their statute constitutional. Kernan v. St. Paul Ry., 64 Minn. 312, 67 N. W. 77 (1896). Since the Slocum case it seems only Massachusetts has been presented with the problem, and the court of that state, while making express reference to the Slocum decision, declined to follow its authority. Bothwell v. Boston Elev. Ry., 215 Mass. 467, 102 N. E. 665 (1913).

[17] Thayer, "Judicial Administration," 63 UNIV. PA. L. REV. 585 (1915), and Thorndike, "Trial by Jury in United States Courts," 26 HARV. L. REV. 732 (1913).

cipal objection of the court in the *Slocum* case that a verdict once rendered could not be disregarded by a court without a new trial, inasmuch as under this method the verdict even if changed is still a verdict which the jury has authorized, and is therefore not disregarded by the court.

It was not until last June that an opportunity was presented to prove just how accurate were the predictions of these two writers. A New York statute [18] providing for essentially this procedure and followed by a federal district court was brought before the United States Supreme Court in the case of *Baltimore & Carolina Line v. Redman.*[19] In this case the federal district court, after verdict had been taken for the plaintiff subject to the court's disposition of the defendant's motion for directed verdict, ultimately in exercising its reserved power overruled the motion and entered judgment on the verdict. The circuit court of appeals, while deciding that the lower court had committed reversible error in not granting defendant's motion, declined to enter final judgment for defendant, but instead sent the case back for a new trial. It was urged by the defendant on its appeal to the Supreme Court that the circuit court of appeals should have entered a final judgment in his favor, for that was what the district court would have been required to do under the New York procedure if it had decided the reserved motion as the circuit court of appeals held it should have. The appellee insisted, however, that the New York statute fell within the scope of the *Slocum* decision and was therefore unconstitutional. Mr. Justice Van Devanter, the same judge who wrote the Court's decision in the *Slocum* case, speaking again for the Court held that this method was part of the American common law practice at the time of the adoption of the Constitution,[20] and therefore was no infringement of the right to jury trial, so that it might be safely adhered to by the federal courts. Consequently the Court held that the circuit court of appeals should have dismissed the complaint and entered final judgment for the defendant. The opinion did not justify the practice on the grounds suggested by the two comments as being without the bounds of the *Slocum* case, but rather stressed the historical argument and the fact that here the Court decided only a question of law, while in addition the parties, being present and not objecting to the procedure, might be deemed to have consented. While the result obtained is obviously commendable,

[18] N. Y. CIV. PRAC. ACT (Cahill 1931), § 461, "Where upon the trial of an issue by a jury, the case presents only questions of law, the judge may direct the jury to render a verdict subject to the opinion of the court. Notwithstanding that such a verdict has been rendered, the judge holding the trial term may set aside the verdict at the same term and direct judgment to be entered for either party, with like effect and in like manner as if such a direction had been given at the trial."

[19] (U. S. 1935) 55 S. Ct. 890.

[20] Chinoweth v. Lessee of Haskell, 3 Pet. (28 U. S.) 92 (1830).

it might be pointed out in passing that the question which the Court decided under the *Slocum* case procedure was also one of law; in fact it was exactly the same question as to whether the evidence was legally capable of supporting the verdict. The consent argument too was a weak one, in view of the fact that under the New York statute the trial judge had the right to follow the practice in his own discretion, nothing being said to make it optional upon the consent of the parties.

Apparently only a very few American states have thus far adopted by statute the time-saving method of reservation of decision on a directed verdict motion, and while all of these statutes aim at the same general result as did the common law practice, in procedure they vary somewhat, so that they may well be classified into three separate groups. Before considering these categories it might be well to examine the English common law procedure. The practice there, dating back to the early eighteenth century, was for the judge to take a verdict but to reserve leave to enter the verdict according to the directions which it might afterwards appear should have been given at the trial.[21] However, it was necessary for him in reserving the question to secure the express assent of the jury, in order that the verdict ultimately entered might be their verdict.[22] The first group of American statutes, which comprises the aforementioned New York statute, an identical one in Wyoming,[23] and a similar one in Wisconsin,[24] differs mainly from the English common law practice in that a verdict is taken subject to the judge's opinion on the reserved question of law without bothering to secure any assent from the jury. The Supreme Court in the *Baltimore & Carolina Line* case probably felt that this assent was only a technicality in actual practice, and that the essential common law procedure and purpose were preserved, being thus much less disposed to hew to narrow technicalities than they were in the *Slocum* case. The second type of statute, that which both Thayer and Thorndike had in mind, is the pioneer statute which exists in Massachusetts.[25] This method

[21] Dublin, Wicklow & Wexford Ry. v. Slattery, 3 App. Cas. 1155 at 1204-1208 (1878).

[22] Mead v. Robinson, 1 Barnes 451, 94 Eng. Rep. 999 (1744).

[23] WYO. REV. STAT. (1931), 89-2604.

[24] WIS. STAT. (1931), 270.25.

[25] 2 MASS. GEN. LAWS (1932), c. 231, § 120.

"When exceptions to any ruling or direction of a judge are alleged, or any question of law reserved, in the course of a trial by jury, and the circumstances are such that, if the ruling or direction at the trial was wrong, the verdict or finding ought to have been entered for a different party or for larger or smaller damages or otherwise than as was done at the trial, the justice may reserve leave, with the assent of the jury, so to enter the verdict or finding, if upon the questions of law so raised the court shall decide that it ought to have been so entered. The leave reserved, as well as the findings of the jury upon any particular questions of fact sub-

differs from the first in that it requires notice to the jury not only that the verdict may be changed but also as to the exact verdict which may later be entered, so that in effect an alternative verdict is secured. Furthermore, the jury's express assent is required as at common law. The third type of statute allowing a judge to reserve his opinion on a motion for directed verdict exists in the so-called "Empson Act" [26] in Michigan and also in another part of the same Pennsylvania statute which was under discussion in the *Slocum* case.[27] These last two statutes represent a commingling of the influences of both the reservation statutes and the strict judgment *non obstante* statutes where the directed verdict has been denied outright. While they follow the reservation method in that the judge may reserve his decision on a motion for directed verdict rather than make a definite ruling, still they fall within the other category in that no notice to the jury that their verdict may be disregarded is required, nor is their assent, and furthermore the moving party is required to make a further motion for judgment *non obstante* if he desires a final disposition of the case, which is not necessary under the reservation method. It is evident that this practice does not incorporate the true reservation procedure in that the Michigan court has held that it may be followed when the decision on the directed verdict motion was not reserved, but instead the motion was overruled.[28]

While, as has been pointed out, but few states have so far provided by express statute for the reservation system of avoiding new trials,

mitted to them, shall be entered in the record of the proceedings, and if upon the questions of law it shall be decided, either by the same court or by the appellate court, that the verdict or finding ought to have been entered in accordance with the leave reserved, it shall be entered accordingly. . . . When so entered, the verdict shall have the same effect as if it had been entered at the trial."

Thus under this method it is possible to take a verdict for plaintiff, and have the judge raise the amount later as was done in Dittmar v. Norman, 118 Mass. 319 (1875).

[26] 3 MICH. COMP. LAWS (1929), § 14531.

[27] PA. STAT. (Purdon 1931), tit. 12, § 684.

"Whenever upon the trial of any issue a point requesting binding instructions has been reserved or declined, and the jury have disagreed, the party presenting the point may, within the time prescribed for moving for a new trial, or within such other or further time as the court shall allow, move the court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record, and for judgment in his favor upon the whole record; whereupon it shall be the duty of the court, unless it shall be of opinion that the case should be retried, to so certify the evidence, and to enter such judgment, if any, as under the law should have been entered upon that evidence at the time of trial, at the same time granting to the party against whom the judgment is rendered an exception to the action of the court in that regard. From the judgment thus entered the party against whom it is entered may appeal to the Supreme or Superior Court, as in other cases, which shall review the action of the court below, and enter such judgment, if any, as should have been entered by the court below upon that evidence."

[28] Day v. Grand Rapids Ry., 218 Mich. 215, 187 N. W. 246 (1922).

the Supreme Court's opinion in the *Baltimore & Carolina Line* case gives new hope that this method may be used by state courts as well as by the federal courts without legislative authorization, inasmuch as that decision held that the reservation procedure was authorized by the common law. Indeed, it is to be expected that a rule regulating this procedure will be incorporated in the new federal rules, now in process of formulation. Certainly it is also to be hoped that the courts will not prove laggard in heeding the possibilities evident in this decision, and that they may readily adopt this means now at hand in a concentrated effort to effect a reduction in the number of costly and stultifying retrials of jury cases.

R. L. P.