

1934

FEDERAL PRACTICE-ENTRY OF JUDGMENT NOTWITHSTANDING VERDICT ON UNDISPUTED EVIDENCE

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Recommended Citation

FEDERAL PRACTICE-ENTRY OF JUDGMENT NOTWITHSTANDING VERDICT ON UNDISPUTED EVIDENCE,
32 MICH. L. REV. 411 (1934).

Available at: <https://repository.law.umich.edu/mlr/vol32/iss3/17>

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FEDERAL PRACTICE — ENTRY OF JUDGMENT NOTWITHSTANDING VERDICT ON UNDISPUTED EVIDENCE — In an action on a contract the plaintiff claimed the entire contract price as damages on the theory of an anticipatory breach by the defendant. The trial court, however, on the undisputed facts, instructed the jury that the plaintiff could recover only the damages suffered prior to the first day of the present term of court. *Held*, by the Circuit Court of Appeals, that the trial court should have instructed the jury to return a verdict for the plaintiff for the entire contract price, but that a new trial was not necessary and the cause should be remanded to the trial court with directions to enter judgment for the plaintiff for that sum. *Barneby v. Collier, Inc.*, (C. C. A. 8th, 1933) 65 F. (2d) 864.

In holding that in a case tried before a jury with a verdict for a certain amount as damages the court may enter an absolute judgment for a different amount if the trial court should have directed a verdict for the latter sum, the court in the principal case seems to run counter to the decision of the United

States Supreme Court in *Slocum v. N. Y. Life Insurance Co.*¹ In that case it was decided that the Seventh Amendment² to the federal Constitution prevents the correction of errors of law in instructing the jury by any other method than a new trial, and that the federal courts have no power to enter a judgment notwithstanding a verdict based on the evidence, even though a different verdict could have been directed. Of the cases cited by the Circuit Court of Appeals to sustain its holding, only one, *Insurance Co. v. Piaggio*,³ appears to be in point. The *Piaggio* case, however, was decided in 1872, which was many years before the *Slocum* case. And in 1888, in a case similar to the *Piaggio* case the Supreme Court held that under the Seventh Amendment a new trial was necessary.⁴ The rule of the *Slocum* case is law in the federal courts today. Other circuit courts of appeal having before them cases similar to the principal case have followed the *Slocum* case.⁵ The *Slocum* case has been much criticised by judges⁶ and others⁷ because it requires a new trial by jury in many cases where the only function of the jury would be to return a verdict directed by the court, and thus prolongs litigation without benefit to the parties. This judicial attitude has naturally resulted in ingenious efforts on the part of the courts to distinguish the *Slocum* case from the case in hand with the consequence that there are several decisions which are difficult to reconcile with it.⁸ It is submitted that the holding in the principal case, although the *Slocum* case is not mentioned, is typical of such decisions.

B. A. U.

¹ 228 U. S. 364, 33 Sup. Ct. 523 (1912).

² The Seventh Amendment: "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."

³ 16 Wall. (83 U. S.) 378 (1872).

⁴ *Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. 696 (1888).

⁵ Action for fraud against two defendants. Verdict for plaintiff apportioned damages between the two defendants, instead of assessing full damages against each. Held, because of the *Slocum* case a judgment for full damages could not be entered against both defendants but a new trial was necessary. *Ohio Valley Bank v. Greenebaum Sons Bank & Trust Co.*, (C. C. A. 4th, 1926) 11 F. (2d) 87. See also *Royal Bank of Canada v. Universal Export Corp.*, (C. C. A. 2d, 1926) 10 F. (2d) 669.

⁶ *Glynn v. Krippner*, (C. C. A. 8th, 1932) 60 F. (2d) 406; *Moran v. Washington Ry. & Elec. Co.*, (App. D. C. 1931) 49 F. (2d) 679.

⁷ Thorndike, "Trial by Jury in United States Courts," 26 HARV. L. REV. 732 (1913).

⁸ *Forged Steel Wheel Co. v. Lewellyn*, 251 U. S. 511, 40 Sup. Ct. 285 (1920); *American Lbr. & Mfg. Co. v. Ins. Co.*, (C. C. A. 7th, 1930) 45 F. (2d) 504.