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Appeal and Error-Jury Trial-Power of Appellate Court to Reverse and Enter Final Judgement without Granting a New Trial

APPEAL AND ERROR—JURY TRIAL—POWER OF APPELLATE COURT TO REVERSE AND ENTER FINAL JUDGMENT WITHOUT GRANTING A NEW TRIAL.—Plaintiff brought action to recover $1,840 allegedly due on a lease contract as back rent and reconditioning expenses. Defendant answered in general denial and affirmatively pleaded oral modification of the lease and admitted liability for $300, which amount was tendered into court. No motion was made for a directed verdict; the jury found for defendant, and judgment was entered by the trial court against the plaintiff. On appeal to the Supreme Court, the

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16 Cases concerning the Post Office Department are not the only ones which have upheld the complete delegation of conducting hearings to subordinates. De Cambra v. Rogers (1903), 189 U. S. 119, 23 S. Ct. 519 (Orders issued by the Secretary of Interior conclusively presumed to be valid even though all the Secretary did was to sign the order.) Immigration cases, relating to both exclusion (Quon Quon Poy v. Johnson (1927), 273 U. S. 352, 47 S. Ct. 346) and deportation (Vajtauer v. Commissioner of Immigration (1927), 273 U. S. 103, 47 S. Ct. 302), have declared valid orders issued by the Secretary of Labor when all he had was a report from an extra-legal Board of Review. In United States v. Standard Oil Company of California (1937), 20 F. Supp. 427, the court distinguishes the first Morgan case on the basis that the instant case was one dealing with appellate review, but it makes this statement, "Executive officers may rely on the assistance of others. Even where the duty 'to hear' in the first instance is imposed upon the head of a department, the evidence may be heard by others. And the conclusion will none the less be that of the head of the department, provided he adopts it as his own."

judgment was reversed with direction to enter judgment for plaintiff in the amount of $300. A judgment contrary to law may be reversed without remanding for a new trial where further litigation is unnecessary and unwarranted. *Lesh v. Johnson Furniture Co.* (Ind. 1938), 14 N. E. (2d) 537.

Entry of judgment contrary to jury verdict immediately raises the question of the extent and limitations of the right to trial by jury. In the process of judicial construction of this constitutional guarantee the status of judgments *non obstante verdicto* has undergone complete metamorphosis in federal courts. Originally at common law such a judgment was available in trial courts only on application of the plaintiff,[1] but this was later extended to allow either the plaintiff or defendant to make the necessary motion[2] though it could not be granted merely because the verdict was against the weight of the evidence.[3] In contrast, many states by statute allowed not trial courts alone, but, also, appellate courts to grant judgments *non obstante verdicto* where the verdict was found unsupported by the evidence.[4] This practice of state courts was then followed in federal courts of appeal for a time,[5] but the landmark Slocum case[6] held that the rendering of final judgment contrary to a verdict of the jury violated the Seventh Amendment even though done in accordance with state statute. In line with this much criticized decision[7] the federal courts consistently held that even where a directed verdict should have been ordered on the basis of insufficient evidence to warrant submission to a jury they could on appeal only remand for a new trial.[8]

The next step was again resort to state practice; the federal trial courts assumed the power to enter judgments *non obstante verdicto* by taking verdicts subject to reserved questions of law, "with the assent of the jury" to enter different judgment if necessary.[9] Appellate courts were in consequence of the trial court's reservations enabled to reverse without remanding for a new trial. The Supreme Court, though occasion presented itself, refused to rebuke this

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[1] German Insurance Co. v. Frederick (1893), 58 F. 144.

[2] United States v. Gardner (1904), 133 F. 285.

[3] Perkins v. Northern Pacific Ry. Co. (1912), 199 F. 712. Originally the motion raised only the question of the sufficiency of the pleadings to support the verdict, but was later extended to permit defective pleadings to be cured by the evidence.

[4] Mass. G. L. Ch. 23, Sec. 130. Also, see Bothwell v. Boston Elevated Railway (1913), 215 Mass. 467, 102 N. E. 665.

[5] Smith v. Jones (1910), 181 F. 819.

[6] Slocum v. New York Life Insurance Co. (1913), 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879. The Supreme Court here held by a margin of five to four that on reversal, if issues of fact are involved, there must be a new trial even though the verdict must be directed in the new trial.

[7] Thorndyke, "Trial By Jury in the U. S. Courts," (1913), 26 Harvard L. Rev. 732. "The declaration of a 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 that a party was entitled at the trial."

[8] Young v. Central Ry. Co. (1914), 232 U. S. 602, 34 S. Ct. 451, 58 L. Ed. 750.

[9] Page v. United Fruit Co. (1925), 3 F. (2d) 747. Under statute cited in note 4 above the federal court here followed the practice of instructing on motion for a directed verdict that the jury must return an alternative verdict upon which the District Court, the Circuit Court of Appeals, or the Supreme Court might enter judgment if it later ruled the evidence insufficient as a matter of law.

practice.[10] In the Redman case[11] the Court finally explicitly recognized an exception to the Slocum decision by permitting federal appellate courts, in states adopting by statute or judicial approval the practice of reserving rulings on motions for directed verdicts, to reverse and render judgment on the merits, rather than remand for a new trial. Under Congressional grant of authority[12] the new Federal Rules of Civil Procedure[13] extend the doctrine of the Redman case and provide for reserved rulings on motions for directed verdicts, thus making available to all federal courts, irrespective of state practice, procedure for judgments *non obstante verdicto.*

As compared with federal practice, the state courts have been more liberal in permitting appellate courts to reverse without remanding for a new trial. By statutory change of the common law under which the courts could only affirm or reverse, many states extend the power to enter final judgment on appeal. This relieves court congestion and puts an end to litigation without unconstitutional denial of jury trial.[14] The North Dakota statute, strictly construed by its courts, allows the appellate courts to make findings of fact, but not where the case was tried by a jury or where a jury, though waived, might rightfully have been claimed.[15] Alabama enlarges the scope of the appellate courts' power by allowing them to make findings and enter judgment in any case where there was in fact no jury,[16] even in criminal cases,[17] but rendition of judgment is discretionary with the courts.[18] Inspired by the example of England which gives appeal courts full discretionary power to receive evidence on questions of fact and to draw inferences preceding final judgment thereon,[19] California by constitutional amendment and statute has accorded appellate courts the discretionary power to take additional evidence prior to final judgment.[20]

Even though not expressly provided in the various statutes that cases tried to a jury are not included, it is universally held that if findings of fact were made by a jury the constitutional jury safeguards prohibit the appellate court

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10 Northern Ry. Co. v. Page (1927), 274 U. S. 65, 47 S. Ct. 491, 71 L. Ed. 929.

11 Baltimore & Carolina Line v. Redman (1935), 295 U. S. 654, 55 S. Ct. 890.

12 28 U. S. C. A., Sec. 723 (b).

13 Rule 50 (b). Reservation of Decision on Motion. "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." See Gavit, "New Federal Rules and Indiana Procedure," 13 Indiana L. Jl. 343.

14 Bothwell v. Boston Elevated Railway (1913), 215 Mass. 467, 102 N. E. 665.

15 Baird v. Abraham (1927), 55 N. D. 348, 213 N. W. 733; N. D. Comp. Laws (Supp. 1926), Sec. 7846.

16 Cochran v. Leonard (1920), 204 Ala. 163, 85 So. 693; Ala. Code (1928) Sec. 9502.

17 Corcoran v. State (1921), 18 Ala. App. 202, 89 So. 835.

18 Ex parte Kemp (1919), 203 Ala. 467, 83 So. 485.

19 Winterbotham & Co. v. Sibthorp (1918), 1 K. B. 625. Held, appellate court may make its own findings, and give final judgment, although a jury made findings in the trial court.

20 Cal. Const. Art. VI, Sec. 4¾; Cal. Code Civ. Proc., Sec. 956a. See Tupman v. Haberkern (1929), 78 Cal. Dec. 409, 280 P. 970 and note in 3 Southern California L. R. 351, for statutory construction indicating the limits of powers of appellate courts to make findings and reverse on appeal.

from substitution of its own findings on appeal.[21] Thus protraction of equity cases may be prevented with or without statutory authority to make independent findings of fact on appeal as a basis for final judgment; in some states this has been extended to actions at law.[22] But when state constitutions guarantee the right of jury trial it is essential that such procedure be restricted to cases where the jury was waived or the trial court was authorized to direct a verdict.[23]

Indiana has provided for weighing evidence on appeal,[24] but exclusion of cases "triable to a jury" from operation of the statute is held to make the provision applicable to equity suits only.[25] Under further practice statutes,[26] without violation of the jury trial guarantee, the Indiana courts have permitted reversal without remanding for new trial when all the facts necessary to a complete and final determination of the cause are in the record either upon special findings,[27] agreed statement,[28] documentary evidence,[29] or by answers to interrogatories submitted to the jury,[30] where justice does not require a new trial.

The decision of the Court in the instant case is entirely in accord with the spirit of the new Federal Rules of Civil Procedure. It should be the policy of the law to end litigation, but with justice for all litigants. The substance of a trial by jury consists in the determination of issues of fact raised by competent evidence produced in support of the allegations only where the jury might reasonably find for the party who produced that evidence. There is no denial of the right of jury trial where the court is entitled to direct a verdict on the failure of the litigant to produce sufficient evidence to raise and support a material issue of fact. Nor is there such a denial where the Court has reversed only to the extent of the liability admitted by the pleadings. It is useless multiplication of judicial work to remand for a new trial where the trial court had failed to direct a verdict which should have been directed.

J. W. C.

BILLS AND NOTES—PRESENTMENT OF A DOMICILED NOTE—PAYMENT TO ONE OTHER THAN THE HOLDER AS CONSTITUTING DISCHARGE.—Defendant company

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21 Mirich v. T. J. Forschner Contracting Co. (1924), 312 Ill. 343, 143 N. E. 846.

22 Donohue v. Conley (1927), 85 Cal. App. 15, 258 P. 985; In Hebert v. New Orleans Public Service (1929), 10 La. App. 341, 119 So. 575, the Louisiana court held that it is the appellate court's duty to render such judgment as, in its opinion, should have been rendered by the court in the first instance, whether the case turns upon an issue of fact or of law.

23 See note 21.

24 1933 Burns 2-3229.

25 Mills v. Thomas (1924), 194 Ind. 648, 144 N. E. 412. See note in 1933 Burns 2-2502; 2-2503; 2-3234. 8 Indiana L. Jl. 195, concerning the inherent power of appellate courts to make final disposition of equitable actions.

27 Bedford Quarries Co. v. Thomas (1902), 29 Ind. App. 85, 63 N. E. 880.

28 Haskell & Barbour Car Co. v. Prezezdziankowski (1908), 170 Ind. 1, 83 N. E. 626. In Sherrod v. Lawrenceburg School City (Ind., 1938), 12 N. E. (2d) 944, the Supreme Court reversed judgment for $648, with instructions to enter judgment for appellant for $855, and costs, the facts not being in dispute.

29 G. W. Conwell Bank v. Kessler (1932), 94 Ind. App. 256, 180 N. E. 625.

30 Catterson v. Hall (1906), 37 Ind. App. 341, 76 N. E. 889.