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Judgment Notwithstanding the Verdict

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cedure was changed but slightly by the adoption of the Code by the various States. The writer takes the position that the savings of expense to litigants, the elimination in whole or in part of the congested dockets of the courts, as well as the interest of the public, dictate a wider joinder – if not entire freedom thereof.

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JUDGMENT NOTWITHSTANDING THE VERDICT[1]

What is done in a situation where a jury brings in a verdict for one party when a verdict should have been directed in favor of the other party? The most common answer is for the trial judge or the appellate court to grant a new trial. But such a practice is very unsatisfactory The party for whom the verdict should have been directed in the first instance is subjected to a lengthy delay He is burdened with the expenditure of time and effort in addition to the cost of re-litigation of a case which will undoubtedly end in his favor if he still has tab on his witnesses and their memories have not dulled with the passage of time. Also, it is not unthinkable that the other party may well have time enough for some unscrupulous lawyer to manufacture new evidence to conform to the appellate court's opinion.

Under the present practice in Kentucky an error of the trial court in overruling a motion for a directed verdict can only be corrected by the trial court or the appellate court's granting of a new trial.[2] The only exception is that a judgment *non obstante verdicto* can be granted by the appellate court upon the pleadings. Ordinarily, a directed verdict is proper in a case where the proof is insufficient to disclose any controversy as to the controlling facts of the case, or where there is a lack of proof supporting one or more of the material factors of the cause of action propounded so that the case requires only

[1] The Latin term for judgment notwithstanding the verdict, used mostly at the common law, is *non obstante veredicto.* The literal translation of *non obstante* is notwithstanding, and thus the modern name for the same motion is judgment notwithstanding the verdict. It is also very common parlance with lawyers and judges to use the initials n.o.v. for *non obstante veredicto* and the terms will be used interchangeably in this note.

[2] Weikel v. Alt, 234 Ky. 91, 27 S.W 2d 684 (1930); Baskett v. Coombs Admr., 198 Ky. 17, 247 S.W 1118 (1923); Sheffield-King Milling Co. v. Sorg, 180 Ky. 539, 203 S.W 300 (1918); L. & N. Ry. Co. v. Johnson, 168 Ky. 351, 182 S.W 214, L. R. A. 1916D, 514 (1916); Connecticut Fire Ins. Co. v. Moore, 154 Ky. 18, 156 S.W 867 (1913); L. & N. Ry. v. Paynter s Admr., 26 Ky. L. Rep. 761, 82 S.W 412 (1904); Mast. Crowell & Kirkpatrick v. Lehman, 100 Ky. 464, 38 S.W 1056 (1897).

an application of the law to the facts proved or admitted.[3] In cases where a directed verdict is proper and has not been granted and a new trial is inadequate, is there a more sufficient remedy for the situation? The procedure in some states, as under the Federal Rules[4], is to allow the trial court or the appellate court to correct such an erroneous ruling by sustaining the motion after the verdict is rendered. The adoption of such a rule would provide for a motion for judgment notwithstanding the verdict. If the trial court finds it should have sustained the prior motion for a directed verdict, it may then sustain that motion by ruling upon it. Should the trial court overrule the motion, the appellate court may order the verdict directed for the party for whom it should have been directed in the first instance. Such a right will undoubtedly save the expense of a new trial where the court rules that the evidence presented would not authorize a verdict as a matter of law In short, Rule 50 (b) of the Federal Rules of Civil Procedure provides a simple means of enforcing, without the expense, delay and uncertainty of a new trial, a right to which the record shows that a party was entitled at the trial.

Only the plaintiff was entitled to a judgment *non obstante veredicto* at common law[5] Many states have changed the common law rule so that now such a motion may be entered by either plaintiff or defendant, when it is clear from the pleadings, notwithstanding a verdict for the adverse party, that the moving party should have a judgment.[6] In Kentucky either party may move for a judgment notwithstanding the verdict. This is so provided in the code, which states, "Judgment shall be given for the party whom the pleadings entitle thereto, though there may have been a verdict against him."[7] However, this right may be lost through the trial court's errors prior to refusal to grant the motion for judgment. For example, in *Connecticut Fire In-*

[3] 53 AM. JUR. 267. "It is the province of the court to aid the jury in the right discharge of their duty, even to the extent of directing their verdict where the insufficiency or conclusive character of the evidence warrants such a direction. The exercise by the court of the authority to determine whether or not a plaintiff has produced evidence which is sufficient in law to sustain a judgment in his favor is the very essence of judicial power. Thus, courts of general jurisdiction exercising common law powers have inherent power to direct verdicts when the facts are admitted." (See cases cited.)

[4] FED. R. CIV. P. 50 (b) (1948).

[5] Judgment non obstante veredicto was used at common law by the plaintiff when the answer by the defendant admitted a cause of action for the plaintiff, but set up matter insufficient to avoid the claim of the plaintiff. If a verdict for the plaintiff was not supported by the pleadings the remedy of the defendant was to move to arrest the judgment. Freeman, Judgments 17 (5th ed. 1925); See notes 12 L.R.A (N.S.) 1021 (1908); 1916E L.R.A. 829 (1916).

[6] Hill v. Ragland, 114 Ky. 209, 70 S.W 634 (1902); See note, 12 L.R.A. (N.S.) 1021 (1908).

[7] KY. CODE CIV. PRAC. ANN. sec. 386 (Carroll's 1948).

surance Company v *Moore*,[8] which was an action on a policy for fire insurance, there was no allegation of loss in the plaintiff's petition nor was there any evidence offered by the plaintiff to cure the defect. The defendant made a motion for a peremptory instruction for a directed verdict at the close of the evidence and it was denied by the trial court. The jury then returned a verdict in favor of the plaintiff. The defendant moved for a judgment *non obstante*, which the trial court also denied. Upon appeal, the court held that although the defendant's motion for the peremptory should have been sustained it could not render a judgment notwithstanding the verdict, but only grant a new trial for the error of the court in refusing the peremptory [9] The defendant was put to the time and expense of a new trial when he would have been relieved of the burden if the appellate court could have entered the judgment for him notwithstanding the verdict to the contrary The plaintiff had his day in court, but as a result of the insufficiency of the power of the appellate court, he had his day in court *twice* upon the same cause of action.

The only cases to which the code provision concerning judgment notwithstanding the verdict applies in Kentucky are cases on the pleadings; for instance, where the petition fails to state a cause of action and such failure is not cured by the answer, or the evidence fails to establish liability on the defendant. In cases such as these even though a verdict is rendered for the plaintiff, the defendant is entitled to a judgment n. o. v [10] The Kentucky court, as the courts of other jurisdictions, being reluctant to change the settled common law rule by judicial decision, has not extended the motion n. o. v to search the evidence in the absence of statutory authority

In *Baskett and Held* v *Coombs Administrator*[11] the defendants were being sued for negligence and in their answer made a plea of contributory negligence which the plaintiff failed to controvert by reply or otherwise. At the conclusion of the evidence for the plaintiff, defendants moved for a peremptory instruction which was refused. After the trial they made a motion for a judgment notwithstanding the verdict which was also overruled. On appeal it was held that the defendant's motion should have been granted by the trial court. Could the appellate court have corrected this error by granting a judgment n. o. v., it would have saved further crowding of the already overwrought dockets. But instead it said.

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[8] 154 Ky. 18, 156 S.W 867 (1913).
[9] Cases cited note 1 *supra*.
[10] Slusher v. Hubble, 254 Ky. 595, 72 S.W 2d 39 (1934).
[11] 198 Ky. 17, 247 S.W 1118 (1923).

> "As the plea of contributory negligence was not denied, it is clear that the motion for peremptory should have been sustained, but it does not follow that the motion for a judgment notwithstanding the verdict also should have prevailed. I has long been the rule in this state that where a party asked for a peremptory instruction, which, because of the condition of the pleadings, should have been granted, he is not entitled to a judgment notwithstanding the verdict, but only a new trial for the error of the court in refusing the peremptory."[12]

Sheffeld-King Milling Company v *Sorg*[13] was a case involving action for the refusal of a buyer to accept flour. The only defense was a plea of fraud coupled with a counterclaim for damages growing out of a prior shipment of flour and there was no evidence to support either the defense or the counterclaim. Plaintiff asked for a peremptory instruction which was refused. On return of the verdict in favor of the defendant, plaintiff moved for a judgment notwithstanding the verdict, and also a new trial. Both motions were overruled. The appellate court agreed that plaintiff should have been given the peremptory instruction, and was now entitled to a new trial only and not to a judgment notwithstanding the verdict. This is another clear case where under federal rule 50 (b) unnecessary re-litigation could have been avoided.

Such a practice, whereby the appellate court may enter judgment *non obstante veredicto* where the trial court should have directed a verdict, but did not, and a verdict was returned in favor of the other party, have not always been looked upon with favor, even in the federal courts. Pennsylvania passed a law in 1905[14] which allowed 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. The question of constitutionality of this statute came before the Supreme Court of the United States in 1903 in the case of *Slocum* v *New York Life Insurance Company.*[15] By a vote of 5 to 4, with Mr. Justice Van Devanter speaking for the majority, the court held that the Constitution of the United States forbade the application to a trial in the federal court of Pennsylvania the statute permitting the entry of judgment for a defendant when the trial court ought to have directed that very judgment, but had erroneously refused to do so. A verdict should confessedly have been ordered at the trial as a matter of law; nevertheless, according to the decision of the

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[12] *Id.* at 18, S.W at 1119.
[13] 180 Ky. 539, 203 S.W 300 (1918).
[14] PA. LAWS (1905), c. 198, now 12 PA. STAT. ANN. sec. 684 (Purdon 1931).
[15] 228 U.S. 364 (1912).

Supreme Court, Pennsylvania could not by statute do the very thing the trial judge should have done without violating the Seventh Amendment of the Federal Constitution which guarantees the right of trial by jury [16]

Not long after the decision, Ezra R. Thayer and J. L. Thorndike,[17] wrote articles in legal periodicals suggesting how a different result might have been reached. They thought that, had the Pennsylvania statute provided first for a reservation by the trial judge of his decision on the motion for directed verdict and then for a submission of the case to the jury with leave reserved by the consent of the jury, to enter an alternate verdict if the trial or appellate court's decision so demanded, then the constitutional objection would be avoided. In this way, the verdict, even though changed, is still the verdict which was authorized by the jury and therefore not a verdict disregarded by the trial or appellate court.

Essentially the very procedure suggested by the writers was enacted in a New York statute.[18] The case of *Baltimore & Carolina Line* v *Redman*[19] presented the constitutionality of this statute to the Supreme Court. In the federal district court, the jury returned a verdict for the plaintiff after the defendant's motion for a directed verdict. The circuit court of appeals held that the district court committed a reversible error in not granting the defendant's motion but declined to enter final judgment for the defendant, and instead, sent the case back for a new trial. On appeal to the Supreme Court the defendant argued that the circuit court of appeals should have entered a final judgment in his favor since 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 plaintiff urged that the statute came within the scope of the *Slocum* case and so was unconstitutional. The same judge who delivered the opinion in the Slocum case did so in this case holding the New York statute constitutional. The court did not hold the law good upon the grounds suggested by the two comments, but rather upon historical grounds, declaring that this method was part of the American common law practice at the time of the adoption of the Constitution[20] and was not an infringement of the right of trial

[16] "In suits at common law, where the value of the 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."

[17] Thayer, *Judicial Administration*, 63 Univ. Pa. L. Rev. 585 (1915); Thorndike, *Trial by Jury in the United States Courts*, 26 Hav. L. Rev. 732 (1913).

[18] N.Y. Civ. Prac. Act Sec. 461 (Cahill 1931).

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

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

by jury· thus it could be safely adhered to in the federal courts. It was held that the circuit court of appeals should have dismissed the complaint and entered a final judgment for the defendant.

It may be argued that judgment *non obstante veredicto* might prevent justice. The plaintiff may gather new evidence to be presented at the new trial or the error may have been a technicality of the pleadings.[21] Mr. Justice Hughes ably answered this objection in his dissenting opinion in the *Slocum* case (which later became law). He said.

> "It is said, however, that a new trial affords opportunity to a plaintiff to better his case by presenting evidence which may not have been available before. But we are not dealing with an application for a new trial upon the ground of newly discovered evidence, or with the principles controlling an application of that sort. We are concerned with the question of whether a party has a constitutional right to another trial, simply because the trial court erred in its determination of a question of law which was decisive of the case made. Had the trial court done what the court says it should have done, it would have directed a verdict for the defendant, and if the jury, simply following the instruction of the trial court, had so found, final judgment would have been entered and no new trial would now be granted. Still the jury would not have passed upon any question of fact, but would simply have obeyed the judge. The opportunity to better the case on a second trial would probably be as welcome, but it would not be accorded. I am unable to see any basis for a constitutional distinction which raises a constitutional right to another trial in the one case and not in the other."[22]

It is urged that when Kentucky adopts its new code rule 50 (b) of the Federal Rules, or its equivalent, be incorporated. Without such practice, when a new trial is granted where a judgment n. o. v should have been given, the judicial system is giving what Thayer said, " is not merely the right of trial by jury, but the right of *two trials by jury*"[23] This practice, if adopted in Kentucky would save many litigants the great expense and the time involved in a new trial, and would also save the courts from seriously overcrowded dockets. As Justice Hughes said:

> "We have here a simplification of procedure adopted in the public interest to the end that unnecessary litigation may be avoided. The party obtains the judgment which in law he should have according to the record."[24]

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[21] Louisville & Nashville Railroad Co. v. Johnson, 168 Ky. 351, 182 S.W 214 (1916); Mast, Crowell & Kirkpatrick v. Lehman, 100 Ky. 464, 38 S.W 1056 (1897).

[22] 228 U.S. 364 at 427 (1912).

[23] Thayer, Judicial Administration, 63 Univ. Pa. L. Rev. 585, 588 (1915).

[24] See note 24 *supra.*