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FEDERAL COURTS-RULES OF CIVIL PROCEDURE-CONSTRUCTION OF RULE 50 (b)

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FEDERAL COURTS—RULES OF CIVIL PROCEDURE—CONSTRUCTION OF RULE 50 (b)—This action was brought in a South Carolina state court and removed to the federal district court on grounds of diversity of citizenship. After the evidence of both parties had been presented, the court denied defendant's motion for a directed verdict. Thereafter, the jury returned a verdict for the plaintiff. Although defendant filed a motion for a new trial on grounds of newly discovered evidence which the court denied, he did not move to have the verdict and judgment set aside and to have judgment entered in his favor as he might have done under Rule 50 (b) of the Federal Rules of Civil Procedure.[1] Upon defendant's appeal to the Fourth Circuit Court of Appeals, the

[1] 28 U.S.C. (1940), following § 723 c, Federal Rules of Civil Procedure, Rule 50 (b) reads: "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is 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. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned

court found that the admission of certain evidence offered by plaintiff was prejudicial error, and that without it, plaintiff's proof was not sufficient to go to the jury; consequently, the court reversed and directed that judgment be entered for the defendant,[2] apparently finding its authority in Rule 50 (b).[3] On certiorari to the United States Supreme Court, *held*, reversed. Rule 50 (b) does not authorize an appellate court of the United States to direct a judgment notwithstanding the verdict if no motion for such judgment has been made in the district court within ten days after the jury's discharge. Justice Black delivered the opinion of the court. *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 67 S. Ct. 752 (1947).

Justice Black gives two reasons why the construction of Rule 50 (b) adopted by the circuit court of appeals is incorrect. First, he states that when a trial court feels after the return of the verdict that it erred in its refusal to direct a verdict, Rule 50 (b) permits it either to enter judgment notwithstanding the verdict or to order a new trial. He feels that this discretion is best exercised by the trial court which has seen and heard the witnesses, and that the trial court would be deprived of it if the appellate court is permitted to direct entry of judgment in cases where no motion for judgment notwithstanding the verdict was made below. His second reason is that the plaintiff has a qualified right to dismiss[4] and if the motion to direct is renewed in the trial court, he may exercise this right before the court directs against him; but if the motion is not renewed in the trial court, and the appellate court directs entry of judgment, then plaintiff loses his chance to ask for dismissal. Before the principal case, three other circuit court of appeals decisions which were reversed by the Supreme Court on other grounds seemed to support the construction of Rule 50 (b) adopted below. In the first of these, *Conway v. O'Brien*,[5] decided in the second circuit, the opinion was written by Judge Learned Hand who reasoned that since Rule 50 (b) provided that when a motion for a directed verdict was denied or for any reason not granted, the court was held to have submitted the question to the jury subject to a later determination of the legal questions raised by the motion, failure to vacate the ruling on the motion had the same effect as an express denial of a motion for judgment notwithstanding the verdict. The second decision, *Berry v. United States*,[6] was by the same

the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

[2] West Virginia Pulp & Paper Co. v. Cone, (C.C.A. 4th, 1946) 153 F. (2d) 576 at 582 the court stated: "Though no motion for judgment notwithstanding the verdict (non obstante veredicto) was made in the lower court by the defendant, we think, on the strength of the reasons discussed and the authorities cited in United States v. Halliday, . . . we have the power, (under Rule 50 (b) of the Federal Rules of Civil Procedure 28 U.S.C.A. following section 723 c) instead of ordering a new trial, to direct the entry of judgment by the lower court in favor of the defendant."

[3] 28 U.S.C. (1940) following § 723 c, Federal Rules of Civil Procedure, Rule 50 (b).

[4] Id. Rule 41 (a) 2.

[5] (C.C.A. 2d, 1940) 111 F. (2d) 611.

[6] (C.C.A. 2d, 1940) 111 F. (2d) 615.

court without a discussion of the procedural problem. The third case, *United States v. Halliday*,[7] was decided by the Fourth Circuit Court of Appeals. The opinion was written by Judge Dobie who also wrote the opinion of the court in the principal case. He saw nothing in Rule 50 (b) to restrict the power of an appellate court as indicated by the decision in *Baltimore & Carolina Line v. Redman* "to direct the entry of judgment by the lower court in favor of the defendant, rather than to order the granting of a new trial, when the orderly administration of justice seemed to require it" [8] even in cases where the ruling below was in favor of the plaintiff and no post verdict motion for judgment had been made. Certainly, in any case where a motion for a directed verdict has been denied below and an appellate court finds that the motion should have been granted, some court must determine whether, in the interests of justice, judgment should be entered or a new trial granted. Conceivably, this determination could be made by either the trial or the appellate court even in cases where no motion for judgment notwithstanding the verdict was made below.[9] By the principal case, the Supreme Court clearly indicates that unless the trial court first rules on the question by disposing of the motion for judgment notwithstanding the verdict, the appellate court is without power to order a judgment entered below.

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[7] (C.C.A. 4th, 1941) 116 F. (2d) 812.

[8] Id. at 816.

[9] For a commentary on this problem written before the principal decision, see 4 Federal Rules Service 934 (1941).