UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 14 | Number 1 Article 17

12-1-1935

Federal Practice -- Judgment Non Obstante Veredicto on the Evidence

Kenneth W. Young

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

 Part of the Law Commons

Recommended Citation

Kenneth W. Young, *Federal Practice -- Judgment Non Obstante Veredicto on the Evidence*, 14 N.C. L. Rev. 97 (1935).
Available at: http://scholarship.law.unc.edu/nclr/vol14/iss1/17

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

by our fourth canon of descent.[39] It has been applied most often in determining the devolution of ancestral property where the heir took the same estate by devise that he would have taken by descent, and then died intestate, survived only by collateral relatives of equal degree on both the paternal and maternal side and both claiming the estate as heirs at law. If the heir took by purchase, all the relations would take; if he took by descent under the operation of the doctrine of worthier title, only those heirs of the blood of the transmitting ancestor would take.

THOMAS H. LEATH.

Federal Practice—Judgment Non Obstante Veredicto on the Evidence.

Plaintiff brought an action in a federal court in New York to recover damages for personal injuries incurred while he was in the defendant's employ. At the close of the evidence, the defendant moved for a dismissal of the complaint because the evidence was insufficient to support a verdict for the plaintiff, and also moved for a directed verdict in its favor on the same ground. The trial court reserved its decision on both motions, submitted the case to the jury subject to its opinion on the questions reserved, and received a verdict for the plaintiff. Thereafter, the court held the evidence sufficient, the motions ill-grounded, and entered judgment for the plaintiff on the verdict. On appeal the Circuit Court of Appeals held the evidence insufficient and reversed the judgment with a direction for a new trial.[1] Defendant obtained certiorari in the Supreme Court[2] which modified the judgment of the Circuit Court to direct a dismissal on the merits, and the judgment as so modified was affirmed.[3] The practice of reserving rulings on questions of law and taking verdicts subject to the rulings was a well-established practice at common law and carried with it the authority to make such ultimate disposition of the cause as the court might see fit. Thus, since the Seventh Amendment[4] to the Federal Constitution refers to the rules of the common law in 1791, at the enactment of the Amend-

[39] N. C. CODE (1935) §1654(4).

[1] Redman v. Baltimore & Carolina Line, Inc., 70 F. (2d) 635 (C. C. A. 2nd, 1934).

[2] Baltimore & Carolina Line, Inc. v. Redman, 293 U. S. 541, 55 Sup. Ct. 89, 79 L. ed. 88 (1934).

[3] Baltimore & Carolina Line, Inc. v. Redman, 55 Sup. Ct. 890 (U. S. 1935).

[4] U. S. CONST. Amend. VII ("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.").

ment,[5] this procedure was not a re-examination of the findings of fact by a jury and a rendering of judgment contrary thereto such as would make it invalid under that Amendment.

Originally at common law a judgment *non obstante veredicto* could be granted only on the application of the plaintiff[6] under matter apparent of record;[7] hence, it was just one species of judgment on the pleadings, but available only to the plaintiff in the action. This rule has been relaxed, however, to allow either the plaintiff or the defendant to make such motion, and the rule as modified has been recognized by the federal courts.[8] Whereas, at common law such a judgment could be granted upon matter apparent of record, it could not be granted because the verdict was against the weight of the evidence.[9] This rule of the common law has been changed in some states by statute so that either the trial or the appellate court may grant judgment *non obstante veredicto* in certain circumstances where the verdict is found to be unsupported by the evidence.[10] The practice in such states was for a time approved and followed in the federal courts,[11] but it appears now settled that a federal court may not enter such judgment regardless of such statutes. The leading case on this point is that of *Slocum v. New York Life Insurance Company,* the Supreme Court, speaking through Mr. Justice Van Devanter, holding that this practice of re-examining the

[5] Capital Traction Co. v. Hof, 174 U. S. 1, 19 Sup. Ct. 580, 43 L. ed. 873 (1899) (Amendment VII, U. S. Constitution, refers to the common law of England, the rules of which allow a re-examination of the findings of the jury only by a new trial granted by the trial court, or when ordered by an appellate court for error in law).

[6] German Ins. Co. v. Frederick, 58 Fed. 144 (C. C. A. 8th, 1893); U. S. v. Gardner, 133 Fed. 285 (C. C. A. 9th, 1904).

[7] Sternberg v. First National Bank, 280 Fed. 863 (C. C. A. 9th, 1922).

[8] U. S. v. Gardner, 133 Fed. 285 (C. C. A. 9th, 1904).

[9] Perkins v. Northern Pac. R. Co., 199 Fed. 712 (C. C. A. 9th, 1912).

[10] 12 PURD. PA. STAT. (1929) §681 ("Wherever, upon the trial of any issue, a point requesting a binding instruction has been reserved or declined, the party presenting the point may within the time prescribed for moving for a new trial, or within such other or future 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 *non obstante veredicto* upon the whole record; whereupon it shall be the duty of the court, if it does not grant a new trial, to so certify the evidence, and to enter such judgment as should have been entered upon that evidence, at the same time granting the party against whom the decision is rendered an exception to the action of the court in that regard. From the judgment thus entered either party 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 as shall be warranted by the evidence taken in that court."); N. Y. CIVIL PRACTICE ACT (1931) §§459, 461.

[11] Keiper v. Equitable Life Ass. Society, 159 Fed. 206 (C. C. E. D. Pa. 1908); Baltimore & Ohio R. Co. v. McCune, 174 Fed. 991 (C. C. A. 3rd, 1909); Fries-Breslin Co. v. Bergen, 176 Fed. 76 (C. C. A. 3rd, 1909); Smith v. Jones, 181 Fed. 819 (C. C. A. 3rd, 1910); Cornette v. Baltimore & Ohio R. Co., 195 Fed. 59 (C. C. A. 3rd, 1912).

findings of the jury was not recognized at common law, and hence was invalid under the Seventh Amendment.[12]

The principal case appears to make an exception to the broad rule laid down in the Slocum case and its effect is to recognize the constitutional validity of at least one method of obtaining judgment *non obstante veredicto* on the evidence in the federal courts. Thus, the practical effect of the instant decision is that a litigant in a federal court can secure judgment *non obstante veredicto* based on the evidence, and avoid a new trial, only when the state in which the federal court is sitting has adopted, by statute or by judicial approval, the common law practice of reserving rulings. The difference thus drawn, between a judgment *non obstante veredicto* on the evidence based on a reserved ruling on a motion for a directed verdict and such judgment based on a motion first made after a verdict is taken, is an insubstantial one.[13] Such a reservation is but a formality of interest to the historian of procedure. While it is better to have the form of judgment *non obstante veredicto* on the evidence in federal courts recognized by the instant case than none, can not the Supreme Court provide for litigants a broader relief from the needless expense and inconvenience of repeated new trials? Two methods of providing such relief appear available. The Supreme Court could abandon the "deadhand" of the common law in its interpretation of the Seventh Amendment and hold that the Amendment does not prohibit a judgment *non obstante veredicto* on the ev-

[12] 228 U. S. 364, 33 Sup. Ct. 523, 57 L. ed. 879 (1913) (the defendant's motion for a directed verdict having been denied, the court entered judgment on a verdict for the plaintiff; the Circuit Court of Appeals, relying upon the Pennsylvania statute, reversed this judgment with a direction to enter judgment for the defendant. *Held,* judgment of the Circuit Court of Appeals modified so as to direct a new trial); Pedersen v. Del., L. & W. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L ed. 1125 (1913); Young v. Central R. Co. of N. J., 232 U. S. 602, 34 Sup. Ct. 451, 58 L. ed. 750 (1914); Myers v. Pittsburg Coal Co., 233 U. S. 184, 34 Sup. Ct. 559, 58 L. ed. 906 (1914); Fidelity Title & Trust Co. v. Dubois Electric Co., 253 U. S. 212, 40 Sup. Ct. 514, 64 L. ed. 865 (1920); Eberhart v. U. S., 204 Fed. 897 (C. C. A. 8th, 1913); Evans v. Lehigh Coal & Navigation Co., 205 Fed. 638 (S. D. Pa. 1913); Engomeon v. Chicago, St. P., M. & O. R. Co., 210 Fed. 897 (C. C. A. 8th, 1914); Union Pac. R. Co. v. U. S., 219 Fed. 437 (C. C. A. 8th, 1915); Glynn v. Krippner, 60 F. (2d) 406 (C. C. A. 8th, 1932).

[13] The rule in the *Slocum Case* has been subjected to much criticism: Thorndyke, *Trial by Jury in the United States Courts* (1913) 26 HARV. 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."); Glynn v. Krippner, 47 F. (2d) 281 (D. C. Minn. 1934) (Federal District Judge Sanborn, disregarded the opinion of the Supreme Court in the *Slocum Case,* and granted a judgment *non obstante veredicto* on the evidence in favor of the plaintiff, saying, "What possible justification is there for denying the court the right, after trial and verdict, to grant the judgment which they should have granted during the trial, where only questions of law were involved? . . . The only thing that is lacking is the presence of a jury, which performs no function whatever, so far as the questions of law are concerned.").

idence, on a motion first made after a verdict is taken, thus leaving the federal courts free to conform to the prevailing state practice sanctioning such procedure.[14] On the other hand, if it is thought that the common law test of the meaning of the right by trial by jury should be retained, the Supreme Court might, under the recent congressional grant of authority to make rules of procedure to govern the federal courts in actions at law,[15] promulgate a rule providing for reserved rulings on motions during the trial, thus making available in all the federal courts, irrespective of the practice of the state wherein sitting, the procedure for judgments *non obstante veredicto* on the evidence approved by the instant case.

KENNETH W. YOUNG.

Gaming—Conflict of Laws—Statutory Liability of Winner for Penalties.

In Georgia there is a statute which authorizes the loser in a gambling transaction to bring suit at any time within six months for the recovery of the amount lost, and if he neglects to bring this action within the allotted period any person may sue the winner and recover the amount involved in the wager, one-half for himself and one-half for the county educational fund.[1] With this statute as the basis of his action the plaintiff alleged that in 1930 the defendant entered into a gambling contract in Fulton County, Georgia, with Lloyds Insurance Co. of London, England, the forfeit to be $2500 in case "Bobby" Jones won the four major golf championships during that year; that Jones won the four championships; that the money was paid; and that although six months had expired the loser had not brought suit to recover its loss. The appellate court reversed the lower court's ruling which sustained the defendant's demurrer on the ground that the allegation that the contract was made in Georgia was sufficient to give the court jurisdiction.[2]

[14] It has been pointed out that such an interpretation is an unnecessary one: Scheidt v. Dimick, 70 F. (2d) 558, 564 (C. C. A. 1st, 1934) (Mr. Justice Morton, dissenting, said, "I do not think that the Constitution prohibits improvements in the machinery for administering justice or restricts our procedural methods to those in use in the days of hand looms and sailing ships."); Funk v. U. S., 290 U. S. 371, 384, 54 Sup. Ct. 212, 216, 78 L. ed. 369, 376 (1933) (Mr. Justice Sutherland, speaking for the majority, said, "An adoption of the common law in general terms does not require, without regard to local circumstances, an unqualified application of all its rules; the rules have been controlling in this country only so far as they are suited to and in harmony with the genius, spirit and objects of American institutions; the rules of the common law considered proper in the eighteenth century are not necessarily so considered in the twentieth.").

[15] 48 STAT. 1064, 28 U. S. C. A. §723b (1934 Supp.).

[1] GA. CODE ANN. (Michie, 1926) §4256.

[2] Tatham v. Freeman, 180 S. E. 871 (Ga. 1935).