

311 U.S. 243
MONTGOMERY WARD & CO. v.
DUNCAN.

No. 30.

Argued Nov. 12, 1940.

Decided Dec. 9, 1940.

1. Courts ⇨385(1)

Where defendant moved for judgment notwithstanding verdict for plaintiff and in the alternative for new trial on grounds not appropriate to the motion for judgment, and motion for judgment was granted, but judgment was reversed on appeal, defendant's argument in the trial court that motion for new trial should not be decided because it passed out of existence on granting of motion for judgment would not preclude defendant on ground of "election" from urging in Supreme Court that case should be remanded by the Circuit Court of Appeals for disposition of the motion for new trial. Federal Rules of Civil Procedure, rule 50(b), 28 U.S.C.A. following section 723c.

See Words and Phrases, Permanent Edition, for all other definitions of "Election".

2. Courts ⇨353

Under federal rule, grant of motion for judgment notwithstanding the verdict did not effect an automatic denial of alternative motion for new trial. Federal Rules of Civil Procedure, rule 50(b), 28 U.S.C.A. following section 723c.

3. Courts ⇨353, 354

The federal rule permitting motion for judgment or motion for judgment joined with motion for new trial, or motion for new trial in the alternative, was adopted for purpose of speeding litigation and preventing unnecessary retrials, but it does not alter the right of either party to have a question of law reserved upon decision of which the court might enter judgment for one party in spite of a verdict in favor of the other. Federal Rules of Civil Procedure, rule 50(b), 28 U.S.C.A. following section 723c; U.S.C.A. Const. Amend. 7.

4. Courts ⇨353

The federal rule permitting motion for judgment or motion for judgment joined with a motion for new trial, or motion for new trial in the alternative, merely renders

unnecessary a formal reservation of a question of law, but it adds nothing of substance to rights of litigants theretofore existing through a more cumbersome procedure. Federal Rules of Civil Procedure, rule 50(b), 28 U.S.C.A. following section 723c.

5. New trial ⇨5

At common law, a motion for judgment notwithstanding the verdict did not preclude a motion for new trial, and the latter motion might be presented after the former had been denied.

6. Courts ⇨353

The federal rule permitting motion for judgment or motion for judgment joined with motion for new trial or motion for new trial in the alternative was not intended to alter the existing right to move for new trial theretofore recognized by statute. Federal Rules of Civil Procedure, rule 59(a, b), 28 U.S.C.A. following section 723c; Jud.Code § 269, 28 U.S.C.A. § 391.

7. Courts ⇨354

Under federal rule, a motion for judgment notwithstanding the verdict cannot be granted unless as a matter of law the opposing party failed to make a case and, therefore, a verdict in movant's favor should have been directed. Federal Rules of Civil Procedure, rule 59(b), 28 U.S.C.A. following section 723c.

8. Courts ⇨353

A motion for new trial may invoke the court's discretion in so far as it is based on claim that verdict is against weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to movant, and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or in instructions. Federal Rules of Civil Procedure, rule 59(b), 28 U.S.C.A. following section 723c.

9. Courts ⇨353, 354

The federal rule providing that a motion for new trial may be joined with motion for judgment or that a new trial may be prayed for in the alternative, does not confine trial judge to initial choice of disposing of either motion, the exercise of which charge precludes consideration of remaining motion, but rather the phrase "in the alternative" means that the things to which it refers are

to be taken not together but one in the place of the other. Federal Rules of Civil Procedure, rule 59(b), 28 U.S.C.A. following section 723c.

See Words and Phrases, Permanent Edition, for all other definitions of "In the Alternative".

10. Courts ⇨353, 354

The federal rule permitting a motion for new trial to be joined with motion for judgment notwithstanding the verdict, or motion for new trial in the alternative contemplates that either party to the action may have the trial judge's decision on both motions if both are presented. Federal Rules of Civil Procedure, rule 59(b), 28 U.S.C.A. following section 723c.

11. Courts ⇨353

Where a motion for judgment notwithstanding the verdict is made and new trial is prayed for in the alternative, if the trial court errs in granting the motion for judgment, the movant is entitled to have his motion for new trial considered in respect of asserted substantial trial errors and matters appealing to the discretion of the judge. Federal Rules of Civil Procedure, rule 59(b), 28 U.S.C.A. following section 723c.

12. Courts ⇨353, 354

The federal rule permitting motion for judgment or motion for judgment joined with motion for new trial or motion for new trial in the alternative should be administered so as to accomplish all that is permissible under its terms. Federal Rules of Civil Procedure, rule 59(b), 28 U.S.C.A. following section 723c.

13. Courts ⇨353, 354

Where a party moves for judgment notwithstanding the verdict and for new trial in the alternative, the trial judge should rule on the motion for judgment but whatever his ruling thereon, he should also rule on motion for new trial indicating the grounds of his decision. Federal Rules of Civil Procedure, rule 50(b), 28 U.S.C.A. following section 723c.

14. Courts ⇨406(1, 2)

Where a party moves for judgment notwithstanding the verdict and for new trial in the alternative, if the trial judge denies judgment notwithstanding the verdict and

also denies a new trial, judgment on the verdict stands, and losing party may appeal from judgment entered thereon, assigning as error both refusal of judgment notwithstanding the verdict and errors of law in the trial, whereupon the appellate court may reverse the judgment and itself enter judgment notwithstanding the verdict, or may reverse and remand for a new trial for errors of law. Federal Rules of Civil Procedure, rule 50(b), 28 U.S.C.A. following section 723c.

15. Courts ⇨405(12)

Where a party moves for judgment notwithstanding the verdict and for new trial in the alternative, if the trial judge grants judgment notwithstanding the verdict and denies motion for new trial, the party who obtained verdict may appeal from that judgment, the trial judge's order being essentially an "order nisi," since it is subject to review. Federal Rules of Civil Procedure, rule 50(b), 28 U.S.C.A. following section 723c.

See Words and Phrases, Permanent Edition, for all other definitions of "Order Nisi".

16. Courts ⇨405(17)

Where a party moves for judgment notwithstanding the verdict and for new trial in the alternative, if the trial judge grants judgment notwithstanding the verdict and denies motion for new trial, the movant may cross-assign error in the opposing party's appeal, to rulings of law at the trial, so that if the appellate court reverses order for judgment notwithstanding the verdict, it may pass on errors of law which movant asserts nullify the judgment on the verdict. Federal Rules of Civil Procedure, rule 50(b), 28 U.S.C.A. following section 723c.

17. Courts ⇨405(12), 406(2)

Where a party moves for judgment notwithstanding the verdict and for new trial in the alternative, if the trial judge enters judgment notwithstanding the verdict and in the alternative grants a new trial on any of the grounds assigned therefor, disposition of motion for new trial would not ordinarily be reviewable and only action in entering judgment would be ground of appeal, whereupon if the judgment is reversed, the case, on remand, would be governed by the trial judge's award of new trial. Federal Rules of Civil Procedure, rule 50(b), 28 U.S.C.A. following section 723c.

18. Courts 6-406(2)

Where defendant moved for judgment notwithstanding verdict for plaintiff, and in the alternative for new trial, and motion for judgment was granted, without a ruling in the alternative, but judgment was reversed by the Circuit Court of Appeals, cause should have been remanded to the District Court to hear and rule on motion for new trial. Federal Rules of Civil Procedure, rule 50(b), 28 U.S.C.A. following section 723c.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

Action by Luther M. Duncan, employee, against Montgomery Ward & Co., employer, for injuries allegedly sustained as result of a fellow-servant's negligence. Judgment for defendant notwithstanding a verdict for plaintiff, 27 F.Supp. 4, was reversed by the Circuit Court of Appeals with directions, 108 F.2d 848, and defendant brings certiorari.

Judgment of Circuit Court of Appeals ordered modified.

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Messrs. John A. Barr, of Chicago, Ill., and J. Merrick Moore, of Little Rock, Ark., for petitioner.

Mr. Edward H. Coulter, of Little Rock, Ark., for respondent.

Mr. Justice ROBERTS delivered the opinion of the Court.

In this case we are called upon to determine the appropriate procedure under Rule

50(b) of the Federal Rules of Civil Procedure.¹

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To recover damages for personal injuries, respondent (hereinafter spoken of as plaintiff) brought action against petitioner (hereinafter spoken of as defendant), pursuant to an Arkansas statute declaring that corporations should be liable for injuries to an employe attributable to the negligence of a fellow employe. The complaint alleged that the plaintiff, while in the defendant's service, had been so injured. The answer denied the plaintiff was an employe of the defendant; denied he was injured in the manner described or by the negligence of his co-employe, and set up assumption of risk. At the close of the evidence upon the trial, the defendant moved for a directed verdict. The motion was denied and the jury returned a verdict for plaintiff on which judgment was entered. Within ten days the defendant filed its written motion in the following form:

"Comes the defendant, Montgomery Ward & Company, and files its motion praying that the jury's verdict herein and the judgment rendered and entered thereon be set aside and judgment entered herein for the defendant notwithstanding the verdict, and its motion for a new trial in the alternative, and as grounds therefor states:"

Thereunder, in heading A, it set out nine reasons in support of the motion for judgment, four of which were general, to the effect that the verdict was contrary to law, to the evidence, to the law and the evidence, and that the court erred in refusing to direct a verdict. Four challenged the sufficiency of the evidence as to negligence, as to the existence of the employe-

¹ 308 U. S. Appendix, p. 63; U.S.C.A. Tit. 28, following section 723 c. "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 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 return-

in order to accomplish this it was necessary for the court to reserve the question of law raised by a motion to direct a verdict.⁶ The practice was an incident of jury trial at common law at the time of the adoption of the Seventh Amendment to the Constitution.⁷

[4] Rule 50(b) merely renders unnecessary a request for reservation of the question of law or a formal reservation and, in addition, regulates the time and manner of moving for direction and of moving for judgment on the basis of the refusal to direct. It adds nothing of substance to rights of litigants heretofore existing and available through a more cumbersome procedure.

[5,6] A motion for judgment notwithstanding the verdict did not, at common law, preclude a motion for a new trial.⁸ And the latter motion might be, and often was, presented after the former had been denied. The rule was not intended to alter the existing right to move for a new trial theretofore recognized and confirmed by statute.⁹ It permits the filing of a motion for judgment

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in the absence of a motion for a new trial or the filing of both motions jointly or a motion for a new trial in the alternative.

[7,8] Each motion, as the rule recognizes, has its own office. The motion for judgment cannot be granted unless, as matter of law, the opponent of the movant failed to make a case and, therefore, a verdict in movant's favor should have been directed. The motion for a new trial may invoke the discretion of the court in so far as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the

party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury.

[9] We are of opinion that the provision of the rule,—“A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative”—does not confine the trial judge to an initial choice of disposing of either motion, the exercise of which choice precludes consideration of the remaining motion. We hold that the phrase “in the alternative” means that the things to which it refers are to be taken not together but one in the place of the other.¹⁰

[10,11] The rule contemplates that either party to the action is entitled to the trial judge's decision on both motions, if both are presented. A decision in favor of the moving party upon the motion for judgment ends the litigation and often makes it possible for an appellate court to dispose of the case without remanding it for a new trial. If, however, as in the present instance, the trial court erred in granting the motion the party against whom the verdict went is entitled to have his motion for a new trial considered in respect of asserted substantial trial errors

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and matters appealing to the discretion of the judge. In this case the reasons assigned in support of the motion for a new trial were in both categories. The grounds assigned for a new trial have not been considered by the court. In the circumstances here disclosed the uniform practice in state appellate courts has been to remand the case to the trial court with leave to pass upon the motion for new trial.¹¹

The plaintiff urges that, whereas the rule was intended to expedite litigation, to

⁶ *Baltimore & C. Line v. Redman*, supra, 295 U.S. page 659, 55 S.Ct. page 892, 79 L.Ed. 1636.

⁷ *Ibid.*, 295 U.S. page 660, 55 S.Ct. page 893, 79 L.Ed. 1636.

⁸ *Thompson*, *Trials*, (2d) Ed. § 2726; *Brannon v. May*, 42 Ind. 92; *Stone v. Hawkeye Ins. Co.*, 68 Iowa 737, 28 N.W. 47, 56 Am.Rep. 870; *Tomberlin v. Chicago, etc., Ry. Co.*, 211 Wis. 144, 148, 246 N.W. 571, 248 N.W. 121.

⁹ See Rule 59(a) U.S.C.A. following

section 723c; cf. *Judicial Code* § 269, as amended, 28 U.S.C. § 391, 28 U.S.C.A. § 391.

¹⁰ The word “alternative” may be used properly in this sense. See *Webster's International Dictionary*, Second Edition.

¹¹ *Bryan v. Inspiration Consol. Copper Co.*, 24 Ariz. 47, 206 P. 402; *Estate of Caldwell*, 216 Cal. 694, 16 P.2d 139; *Hayden v. Johnson*, 59 Ga. 104; *Chicago & N. W. Ry. Co. v. Dimick*, 98 Ill. 42; *Daniels v. Butler*, 175 Iowa, 439, 155 N.