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Code Practice: Reservation of Right to Go to Jury

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RESERVATION OF RIGHT TO GO TO THE JURY UPON MOTION FOR DIRECTED VERDICT BY ALL PARTIES

Section 270.26 of the Wisconsin Statutes provides:

> "Whenever in a jury trial all the parties, without reservation, move the court to direct a verdict, such motions, unless otherwise directed by the court before discharge of the jury, constitute a stipulation waiving a jury trial and submitting the entire case to the court for decision".[1]

This statute re-establishes in this state the common law rule which was rejected by our Supreme Court in the case of Hite vs. Keene, the court saying:

> "This court has never adopted the rule that a motion for a directed verdict by both parties is equivalent to a stipulation that all the issues therein be disposed of by the court and has no disposition to do so now".[2]

The common law rule also prevailed in the Federal Courts prior to the adoption of the Rules of Civil Proceedure by the Supreme Court in 1938. The rule there was that where plaintiff and defendant respectively requested peremtory instructions, they thereby assumed the facts to be undisputed and in effect submitted to the trial judge the determination of the inferences properly to be drawn from them,[3] unless they reserved their right to go to a jury, if the court should regard the facts as disputed. Where such reservation was properly made the court could not ignore it and assume to find the facts from the evidence as though the case had been unconditionally submitted.[4]

The two leading cases in the Federal Courts are the Beutell case[5] and the Santa Fe case.[6] Mr. Justice White stated in the former case:

> "As . . . both parties asked the court to instruct a verdict both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law. This was necessarily a request that the court find the facts, and the parties are therefore concluded by the finding made by the court,

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[1] Wis. Stat., 1945 Sec. 270.26; Court Rules, 245 Wis. viii (1944).
[2] Hite v. Keene, 149 Wis. 207; 134 N.W. 383 (1912).
[3] Beutell v. Magone (1895) 157 U.S. 154, 15 Sup. Ct.. Rep. 566, 39 L.Ed. 654; Oppenheimer v. Harriman Nat. Bank and Trust Co., (1937), 301 U.S. 206, 57 S.Ct. 719, 81 L.Ed. 1042. Swift and Co. v. Columbia Ry., Gas and Electric Co., C.C.A.S.C.(1927), 17 F. 2nd 46 Stratton's Independence v. Howbert, D.C. Colo. (1912), 207 F. 419. Fed. Life Ins.. Co. v. Rumpel, C.C.A. Mich. (1939), 102 F.2nd 120. See also Blackburn Const. Co. v. Cedar Rapids Nat. Bank, C.C.A. Okl. (1930), 37 F 2nd 865, certiorari denied 281 U.S. 755, 50 S. Ct. 409, 74 L. Ed. 1165.
[4] Empire State Cattle Co. v. Atchison, Topeka and Santa Fe Ry. Co., (1907) 210 U.S. 1, 28 S.Ct. 607. Sampliner v. Motion Picture Patents Co. (1920) 254 U.S. 233, 41 S. Ct. 79, 65 L.Ed. 240.
[5] Beutell v. Magone (1895) 157 U.S. 154, 15 S.Ct. 567, 39 L.Ed. 654.
[6] Empire State Cattle Co. v. Atchison, Topeka and Santa Fe Ry. Co. (1907) 210 U.S. 1, 28 S.Ct. 607.

upon which the resulting instruction of law was given. The facts having been thus submitted to the court, we are limited in reviewing its action, to the consideration of the correctness of the finding on the law, and must affirm if there be any evidence in support thereof".[7]

In the Sante Fe case Mr. Justice White clarified and modified the Beutell case by saying:

"It was settled in Beutell vs Magone . . . that where both parties requested a peremptory instruction and do nothing more, they thereby assume the facts to be undisputed and in effect submit to the trial judge the determination of the inferences proper to be drawn from them. But nothing in that ruling sustains the view that a party may not request a peremptory instruction, and yet, upon the refusal of the court to give it, insist by appropriate requests, upon the submission of the case to the jury, where the evidence is conflicting or the inferences to be drawn from the testimony are divirgent . . . .
From this it follows that the action of the trial court in giving the peremptory instruction to return a verdict for the railway company cannot be sustained merely because of the request made by both parties for a peremptory instruction in view of the special requests asked on behalf of the plaintiffs".[8]

The rule as laid down in the Beutell case and the Santa Fe case has been expressly abrogated by Federal Rule 50 (a) which provides that:

". . . A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts . . ." [9]

The common law rule never had received universal recognition in the state courts, among the states objecting to this doctrine are Vermont, Illinois, and New Jersey. The Vermont Supreme Court in refusing to follow it said:[10]

"There is nothing novel about this practice, for the parties in civil cases can always by agreement substitute the court for the jury. *But the mere fact that each party to a cause moves for a verdict in his favor does not amount to a consent that the case shall be taken from the jury. One who claims that the evidence is all his way does not waive the right to claim that at least, some of it is his way, and that right is not affected by the fact, that the other party moves that a verdict be directed in his favor*".[11]

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[7] Supra note 5.
[8] Supra note 6.
[9] Fed. Rule 50.
[10] Fitzsimmons v. Richardson, Twigg and Co., (1913) 86 Vt. 229, 84 Atl. 811 Accord: Woodsville, etc., Bank v. Rogers 82 Vt. 468, 74 Atl. 85; Wolf v. Chicago Sign Printing Co. (1908) 233 Ill. 501, 84 N.E. 614; Hayes v. Kluge (1914) 86 N.J. L/657, 92 Atl. 358.
[11] Fitzsimmons v. Richardson, Twigg and Co., (1913) 86 Vt. 229, 84 Atl. 811.

It seems to the writer that the reasoning of the Vermont Court is sound. The common law rule which was reinstated in Wisconsin by section 270.26 of the Wisconsin Statutes constitutes a trap making it unsafe for a party to move for a directed verdict when the other party has so moved and is a useless restriction upon the right of trial by jury. Section 270.26 should be abrogated and Rule 50(a) of the Federal Rules adopted in its stead. This would place Wisconsin in the sound position that it was after the decision of our Supreme Court in the Hite case which rejected the common law rule.[12]

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[12] Hite v. Keene, (1912) 149 W. 207, 134 N.W. 383.