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vidual interests of the mine-owners or miners to the extent that the state may impose reasonable affirmative duties with respect to the mining and sale of coal.

Hence, it would seem that, subject to the above-mentioned conditions, the business of producing coal³³ and perhaps of selling coal otherwise than by the producers³⁴ may now properly be held to have "ceased to be *juris privati* only" and to have "become affected with a public interest."³⁵

The facts seem to establish between the coal producers and a permissible class of the public a relation indistinguishable, for present purposes, from the relation existing between the recognized public utilities and patrons. If so, then, according to the better view,³⁶ there arises from this relation, irrespective of the wills of the parties,³⁷ such affirmative duties as, under the preponderant public opinion, the law thinks proper to impose upon those producing coal, in order to secure, with the least sacrifice of interests and with the sacrifice of the least important interests, not only the public interest but the social interests and the individual interests involved in this class of business. To hold so is quite in accord with the modern salutary tendency toward a socialization of the law³⁸ at the expense of the extreme individualism of the law which particularly during the prevalence of the now disfavored doctrine of *laissez faire*, so often sacrificed the ultimate and more important social interests at the shrine of the immediate but less weighty individual interests.

—T. P. H.

NATURE OF JUDGMENT IN THE SUPREME COURT WHEN A VERDICT IS SET ASIDE ON THE GROUND THAT A CONTRARY VERDICT SHOULD HAVE BEEN DIRECTED IN THE LOWER COURT.—It seems to be conceded that the original and long prevailing practice in West Virginia, upon setting aside a verdict in the Supreme Court upon

³³ American Coal Mining Co. v. Special Coal, etc. Commission, 268 Fed. 563 (1920); State v. Howatt, *supra*.

³⁴ See Jones v. City of Portland, 245 U. S. 217 (1917). See 33 HARV. L. REV. 838. But see Opinions of the Justices, 182 Mass. 605, 66 N. E. 25 (1904). Compare Halter Hardware Co. v. Boyle, 263 Fed. 134 (1920); United States v. Cohen Grocery Co., 255 U. S. 81 (1921).

³⁵ See Thomas P. Hardman, "The Right of a State to Restrain the Exportation of Its Natural Resources," 26 W. VA. L. QUAR. 1, 16-18.

³⁶ Inter Ocean Publishing Co. v. Associated Press, 184 Ill. 438, 56 N. E. 822 (1900); State v. Nebraska Telephone Co., 17 Neb. 126, 22 N. W. 237 (1885); McCarter v. Firemen's Ins. Co., 74 N. J. Eq. 372, 73 Atl. 80 (1909). See Wyman, "The Law of the Public Callings as a Solution of the Trust Problem", 17 HARV. L. REV. 156, 217; BEALE & WYMAN, RAILROAD RATE REGULATION, 2 ed., ch. 1. But see *contra* authorities cited in footnote 8.

³⁷ See ROSCOE POUND, THE SPIRIT OF THE COMMON LAW, 29.

³⁸ See ROSCOE POUND, THE SPIRIT OF THE COMMON LAW, ch. 1, especially at p. 7; ch. 5, especially at p. 129; ch. 8, especially at p. 195.

the ground that a motion in the lower court to direct a contrary verdict had been improperly overruled, was always to remand the cause to the lower court for a new trial.¹ *Maupin v. Insurance Co.*,² decided in 1903, seems to have been the first case in which a new trial was refused and final judgment was entered above. Then came a series of cases³ in which final judgment was entered above, interrupted by another series⁴ in which the cause was remanded for a new trial. The latter cases in turn were succeeded by *Weeks v. Railway Co.*,⁵ in which final judgment was entered above, with Judge Poffenbarger and Judge Robinson dissenting. Judge Robinson's dissenting opinion seems to have been called forth particularly because of his impatience with the apparent tendency of the court to reverse itself upon the question involved. In the next case decided, *Hurley & Son v. Railway Co.*,⁶ which seemingly is the last case carrying any protest in the nature of a dissent, the pendulum swings again and the cause is remanded for a new trial. The Weeks Case seems to have been the last case in which final judgment was entered above. In the comparatively recent case of *Ross v. Railway Co.*,⁷ where the cause was remanded for a new trial, it is intimated that final judgment might have been entered above if the court could have seen clearly that a better case could not have been made on a new trial. However, it seems in the later cases to have been the uniform policy of the court, as exemplified in *Patterson v. Coal Co.*,⁸ always to remand the cause for a new trial, without any inquiry as to what might be the result. There are indications that this has come to be the final, definite policy of the court, although such can not be affirmed with certainty.

Prior to the Maupin Case, the practice of remanding for a new trial seems to have been accepted so uniformly that there was no occasion for the formulation of any rule to guide the procedure. In this case it is said that final judgment will be entered above "unless [the court is] satisfied that it will work injustice." Likewise in the Anderson Case, "where it does not appear that injustice

¹ *Knight v. Cooper*, 36 W. Va. 232, 14 S. E. 999 (1892). This seems to be conceded even in the dissenting opinions of Judge Brannon, who was strongly opposed to remanding the cause for a new trial.

² 53 W. Va. 557, 45 S. E. 1003 (1903).

³ *Anderson v. Tug River Coal, etc., Co.*, 59 W. Va. 301, 53 S. E. 713 (1906); *Ruffner Brothers v. Insurance Co.*, 59 W. Va. 432, 53 S. E. 943, 115 Am. St. Rep. 924 (1906); *McMillan v. Coal Co.*, 61 W. Va. 531, 57 S. E. 129, 11 L. R. A. (N. S.) 840 (1907).

⁴ *Diddle v. Casualty Co.*, 65 W. Va. 170, 63 S. E. 962, 22 L. R. A. (N. S.) 779 (1909); *Hoylman v. Kanawha etc. Ry. Co.*, 65 W. Va. 264, 64 S. E. 536, 22 L. R. A. (N. S.) 741 (1909); *Soward v. Car Co.*, 6 W. Va. 266, 66 S. E. 329 (1909).

⁵ 68 W. Va. 284, 69 S. E. 805 (1910).

⁶ 68 W. Va. 471, 69 S. E. 904 (1910).

⁷ 76 W. Va. 197, 85 S. E. 180 (1915).

⁸ 87 W. Va. 177, 104 S. E. 491 (1920).

will result from so doing"; and in the Ruffner Case, "where it does not appear that injustice will be done thereby." This language is very general and indefinite, but the import of it seems to be that to enter final judgment above is the general rule, while to remand the cause for a new trial is the exception. Judge Poffenbarger delivered a very strong dissenting opinion in the Ruffner Case. He was very plainly opposed, on general principles, to entering final judgment above under any circumstances. As a result of his opposition, came the second series of cases mentioned, which were remanded for a new trial. However, the majority of the court seemed unwilling to accede to his view that a new trial should be granted in all instances. The limit of their relaxation in this direction seems to have been reached in a restatement of the rule announced in the previous cases, the later statement being that the court "will remand the case for a new trial unless this court can see clearly that the plaintiff cannot better his case upon another trial." Substantially the same language is used in the Soward Case. It is plainly possible, and perhaps probable, that the same practical results would be reached under either statement of the rule. Likely the instance which the court had in mind under the earlier statement where it would have been unjust to refuse a new trial was a case where it appeared that the plaintiff might make a better case on another trial. However, it seems to the writer that the later statement reflects a new attitude of the court, to the effect that as a general rule the cause will be remanded for a new trial and that only in exceptional cases will final judgment be entered above. If this is the true attitude, it shows a direct reversal of the former rule and exception, and was a substantial step toward an absolute rule for reversal and new trial in all instances. It is doubtful whether the hybrid statement of the rule occurring in the later Weeks Case indicates a reversion to the attitude taken in the Maupin, Anderson and Ruffner cases. It is believed that the present attitude of the court may best be conjectured by reviewing briefly the reasons stated as the basis of the rule.

In *Maupin v. Insurance Co.*, Judge Brannon, speaking for the court, says

"This motion is in no wise different from a demurrer to evidence, and upon that final judgment is always given."

The same view is again expressed in the Anderson Case. Unless authorities can be cited to sustain this statement of Judge Brannon

in the application which he attempts to make of it, it may be disregarded as a pure attempt to beg the question. That authorities which Judge Brannon may have had in mind as sustaining his contention, although tending to do so in the generality of their statements, in fact do not sustain his argument, is sufficiently explained by Judge Poffenbarger, in his dissenting opinion in the Ruffner Case, where he says:

“While the courts and text-writers say a motion to exclude, or direct a verdict, is equivalent to a demurrer to the evidence, they do not mean that it is in all respects equivalent thereto, but only that in determining whether it shall be sustained or overruled the principles governing a demurrer shall apply.”⁹

It is believed that any statements in the West Virginia cases prior to the Maupin Case referring to a similarity between a motion to direct a verdict and a demurrer to the evidence have only the meaning ascribed to them by Judge Poffenbarger, and refer only to the evidence which may be considered by the court and the weight which shall be given to it. That the court later did make a distinction between a motion to direct a verdict and a demurrer to the evidence, whether or not through the influence of Judge Poffenbarger, is indicated in the Soward Case, where it is said that, “if instead of an instruction to find for the defendant there had been a demurrer to evidence,” all would have united in entering final judgment above for the defendant. Moreover, when a verdict directed for the defendant has been set aside, the West Virginia court has always remanded the case for a new trial; but when the court reverses a judgment for the demurrant, judgment is entered above for the demurree. This shows an incontrovertible distinction, and likely is the very consideration which causes defendants in certain instances to prefer a motion to direct rather than a demurrer to the evidence. Thus the defendant avails himself of an opportunity to prolong litigation, as long as it does not go to suit him, and throws himself open to the very criticism which Judge Brannon urges against the plaintiff on a motion to direct. The later, and seemingly the final, attitude of the court is stated in *Ross v. Railway Co.*, where Judge Robinson speaks for the court:

“Though it may have been error to overrule defendant’s motion to exclude plaintiff’s evidence, defendant offering none, still

⁹ P. 446. It is interesting to note that the controversy which is the subject of this discussion prevailed not far from the time when the court was having no little difficulty in settling the status of demurrers to the evidence. See 27 W. Va. L. QUAR. 236.

we do not have the case on demurrer to the evidence calling for final judgment here. Nor can we see clearly that plaintiff may not make a better case on another trial. Notwithstanding conflict in our decisions, the proper practice is to award new trial in such case. *Hoylman v. Railway Co.*, 65 W. Va., 264."

Does Judge Robinson mean to say that, if the court had clearly seen that the plaintiff could not have made a better case upon another trial, final judgment would have been entered above for the defendant? It is believed not. The language clearly indicates that the court had finally adopted Judge Poffenbarger's views as to the distinction between a demurrer to the evidence and a motion to direct a verdict, and that the court could not, in the absence of a demurrer to the evidence, which dispenses with a verdict, render final judgment in a case where there was no verdict. It is believed that he mentions the fact that the plaintiff may possibly make a better case on another trial simply as an additional reason for remanding, and as a reason which will justify remanding under either line of the conflicting decisions. Thus the final result in the controversy seems to have been based upon procedural principles, and procedural principles would seem to demand that the case be remanded for a new trial in all instances. It has already been mentioned that such seems to be the present policy of the court. It remains to inquire briefly into the propriety of such a policy.

An argument frequently advanced by Judge Brannon in favor of entering final judgment above is the fact that to do so would "put an end to litigation." Perhaps Judge Poffenbarger's reply to this argument is sufficient when he says that the proper function of the courts is not arbitrarily to put an end to litigation, but to entertain it patiently until justice is meted out. Conceding that Judge Brannon in his statements referred to *unnecessary* litigation, it may be replied that all litigation is *necessary* until it is *regularly* disposed of. Furthermore, it does not necessarily follow that remanding a hopeless case for a new trial will lead to further litigation. Likely, in nearly all such instances, the plaintiff will realize that a second trial would be futile and will take a nonsuit or suffer a discontinuance. If he finds that he can make a better case on a second trial, there likely will not be any great injustice in letting him have it. In fact, as already noted, it is likely that in most instances the defendant resorts to a motion to direct a verdict, in preference to a demurrer to the evidence, in order that he himself, if the Supreme Court should rule against him, may be able

to prolong the litigation by another trial in the lower court. Hence, giving the plaintiff an equal right may tend to draw the defendant to a demurrer to the evidence, and thus to end litigation. In his dissenting opinion in the Ruffner Case, Judge Poffenbarger states three considerations which make it unfair to the plaintiff to enter final judgment above in favor of the defendant: (1) It deprives him of the opportunity to take a nonsuit, which he would have had if the motion to direct had been sustained in the lower court instead of in the Supreme Court. (2) It likewise deprives him of the opportunity which he has in the trial court, when the motion is sustained, to ask the privilege of reopening his case and of introducing additional evidence. (3) It enables the defendant to have three chances, one before the court and two before the jury, while the plaintiff has but one, a chance before the court. Space will not permit the discussion of various considerations occurring to the writer which detract from the practical value of these arguments in favor of the plaintiff; but conceding them even small weight, they may constitute sufficient practical reasons why the case should be remanded for a new trial, unless some substantial objection can be urged in favor of the defendant. However, since no substantial reason can be urged why the defendant would suffer an injustice in having such cases remanded for a new trial, it is believed that the controversy should be determined in harmony with the general trend of our principles of procedure; and it is submitted that these principles demand that the cause in every instance be remanded for a new trial.

Notwithstanding what Judge Brannon says by way of *dicta* in his various opinions as to what ought to be, under our uniformly prevailing practice, if any of the cases cited had been submitted to a jury without any motion having been made to direct a verdict, and a verdict had been returned in favor of the plaintiff, the Supreme Court, in setting such verdict aside, would have remanded the case for a new trial without raising any question as to the propriety of such procedure. The West Virginia Supreme Court has recognized only two legitimate methods in the trial court of taking a case away from the jury as to trial of facts: (1) by a demurrer to the evidence; (2) by waiver of the jury by both parties on the record.¹⁰ If the Supreme Court, in the absence of both these conditions, can enter a final judgment which is not based on a verdict, why can not the trial court do so? Why does the trial court not,

¹⁰ The right being a constitutional right, express waiver is required, *Salzer v. Schwartz*, 88 W. Va. 569, 107 S. E. 298 (1921).

instead of directing the jury to bring in a defined verdict, simply dismiss the jury and render judgment without a verdict? We have one case where the trial court attempted to do substantially this very thing, and the Supreme Court said that it could not be done. In *Holt v. Otis Elevator Co.*,¹¹ a peremptory instruction to find for the defendant was refused. A verdict for the plaintiff was later set aside—at the plaintiff's own motion, it is true—and the court, being of the opinion that it had wrongly refused the peremptory instruction, undertook to correct its mistake and enter judgment for the defendant without reinstating the verdict. It is true that this procedure was described as rendering judgment *non obstante veredicto*, but in fact it was not, since the verdict had been set aside. The West Virginia court has frequently and emphatically said that a trial court,¹² or the Supreme Court,¹³ can not enter judgment *non obstante veredicto* merely because the evidence is insufficient to sustain a verdict. Yet that is *substantially* what the Supreme Court does when it sets aside a verdict because it is not sustained by the evidence and enters final judgment without a verdict. In the one instance, the verdict is disregarded; in the other instance, it is obliterated. That is the only practical difference. Again, the West Virginia court has uniformly recognized the necessity of a verdict of some sort as prerequisite to judgment, in refusing to compel a plaintiff to suffer an involuntary nonsuit at the trial, and compelling the defendant in such cases to resort to a motion to direct a verdict on insufficiency of the evidence.¹⁴ It may be said that a directed verdict is a mere formality, and hence only a formal prerequisite to judgment. Nevertheless, if a formality, its necessity, as a procedural factor, has never been dispensed with in the trial courts, and there is no reason why the appellate court should have any greater liberty. Judge Brannon frequently says, in justification of entering final judgment above, that the statute¹⁵ authorizes the Supreme Court, in such cases, to enter the judgment which the trial court should have entered. Such a thing would be impossible. The trial court should have directed a verdict and then should have entered a judgment based on the directed verdict. The Supreme Court can not manufacture a directed verdict on which to enter its judgment. All that it can do is to enter

¹¹ 78 W. Va. 785, 90 S. E. 333, L. R. A. 1917 A, 1194 (1916).

¹² *Idem*, and cases cited; *Shafer v. Trust Co.*, 82 W. Va. 618, 97 S. E. 290 (1918).

¹³ *Zinn v. Cabot*, 88 W. Va. 118, 106 S. E. 427 (1921).

¹⁴ *Carrico v. Railway Co.*, 35 W. Va. 389, 394, 14 S. E. 12 (1891); *Marcus v. McClure*, 63 W. Va. 215, 59 S. E. 1055 (1907); 4 MINOR, INSTITUTES, 782, and cases cited.

¹⁵ W. Va. CODE, ch. 135 § 26.

a judgment not based on any verdict. Upon the whole, it is believed best to be consistent, even with reference to formalities, especially when to do so will serve to emphasize the policy of the court not to interfere with a right recognized to be as fundamental as that of trial by jury.

—L. C.

THE NATIONAL CONFERENCE OF BAR ASSOCIATIONS.—On August 25, 1920, the Section of Legal Education and Admissions to the Bar, of the American Bar Association, passed a resolution constituting the Chairman, Elihu Root, and six other members to be appointed by him, a special committee, to report to the next annual meeting of the section, "their recommendations in respect to what, if any, action can be taken by the Section or by the Association to create conditions which will tend to strengthen the character and improve the efficiency of those admitted to the practice of law."¹ This committee, of which Mr. George E. Price, of Charleston, West Virginia, was a member, enlisted the aid of the state boards of bar examiners, the state and local bar associations, the faculties of the law schools, and members of the bar throughout the states. They also made use of the exhaustive study of the subject of legal education, carried on by the Carnegie Foundation for the Advancement of Teaching over a period of years, and embodied in the publication "Training for the Public Profession of the Law," issued in 1921.²

The committee reported to the section at the 1921 meeting of the American Bar Association, and recommended the adoption of the following resolutions:³

(1) The American Bar Association is of the opinion that every candidate for admission to the bar should give evidence of graduation from a law school complying with the following standards:

(a) It shall require as a condition of admission at least two years of study in a college.

(b) It shall require its students to pursue a course of three years duration if they devote substantially all of their working time to their studies, and a longer course, equivalent in the number of working hours, if they devote only a part of their working time to their studies.

(c) It shall provide an adequate library available for

¹ 45 REPORTS OF AMERICAN BAR ASSOCIATION, 465.

² BULLETIN No. 15, The Carnegie Foundation for the Advancement of Teaching.

³ 46 REPORTS OF AMERICAN BAR ASSOCIATION, 687.