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COMMENTS

REVIEW OF FINDINGS BY THE DISTRICT COURT OF THE UNITED STATES

What foundation should be laid for review of findings by a Federal Court in an action at law? This is often a troublesome question for the trial lawyer and the purpose of this article is to consider the case of *Muentzer et al, v. Los Angeles Trust and Savings Bank* 3F (2nd) 222, in our Circuit. This case holds that a review of findings can be had without any motion for finding in favor of the losing party having been made at the trial. The decision, however, is really dictum as the case was affirmed, and the following matters should be taken into consideration in determining how far the decision can be relied upon.

Until 1865 when a case was tried before the court without a jury the judge was in effect an arbitrator and no question could be raised as to his findings. Then Congress enacted what we now know as Sections 649 and 700 R. S. (Secs. 1587 and 1668 Comp. St. 1916). Congress here provided that the parties might stipulate for trial by the court in the Circuit Court and when they did so "the rulings of the court in the progress of the trial of the cause, if excepted to at the time" might be reviewed. During the existence of both the Circuit and District Courts even under this statute decisions by the District Court were not reviewable, because the statute made provision only as to Circuit Courts. Since the abolition of the Circuit Court and the transfer of its function to the District Court it is believed that Sections 649 and 700 R. S. now have application to the District Courts and a review may be had of findings in the District Court on a ruling of the court "in the progress of the trial of the cause, if excepted to at the time." Appellate procedure being of statutory origin must be in accordance with the statute and a review cannot be had except by compliance with the statute.¹ This was not only well settled in the Supreme Court but in the various Circuit Courts of Appeal, including the Seventh Circuit.²

The decision in *Muentzer v. Bank, supra*, is based largely on an amendment to Sec. 269 of the Judicial Code³ which provides in cases of review the "court shall give judgment after an examination of the

¹ *Martinton v. Fairbanks*, 112 U. S. 670; 5 S. Ct. 321. *Stanley v. Board*, 121 U. S. 535; 7 S. Ct. 1234. *Wilson v. Merchants, etc., Co.*, 183 U. S. 121; 22 S. Ct. 54. *Boardman v. Toffey*, 117 U. S. 271; 6 S. Ct. 734. *Garwood v. Scheiber*, 246 Fed. 74; C. C. A. 9 C. *National Surety Co. v. Am. etc., Ry. Co.*, 145 Fed. 34 C. C. A. 6 C. *White v. Chase*, 201 Fed. 896 C. C. A. 8 C. *Phoenix Securities Co. v. Dittmar*, 224 Fed. 892 C. C. A. 9 C. *Sierra Land Co. v. Desert Power Co.*, 229 Fed. 982 C. C. A. 9 C.

² *Streeter v. Chicago, etc.*, 133 Fed. 124 C. C. A. 7 C. *Raymer v. Netherwood*, 257 Fed. 284 C. C. A. 7 C. (Expressly overruled in *Muentzer v. Bank, supra*.)

³ Act. Feb. 26, 1919 Comp. St. Am. Supp. 1919 Sec. 1246.

entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.”

This provision our Circuit Court of Appeals in effect holds in the Muentzer case is a repeal of Sec. 700 R. S. *supra* and authorizes the court to review questions to which no exception was taken at the trial. The amendment to Sec. 269 of the Judicial Code was apparently not debated; and it seems the only expression of the purpose of Congress shows that the purpose of the amendment was “judgment shall be rendered upon the merits without permitting reversals for technical defects in the procedure below and without presuming that any error which may appear had been of necessity prejudicial to the complaining party.”⁴ Thus it will be seen the purpose of Congress as expressed in this report was to facilitate affirmance of judgments. Such has been the purpose of similar statutes in our States; and, it it submitted, the language used in the amendment indicates that purpose. The decision in the *Muentzer v. Bank* case construes the act to facilitate reversals by permitting review of a question not reserved below as required by Sec. 700 R. S.

Over a year after the amendment to Sec. 269 Judicial Code the Supreme Court said, in a case before it, that as there had been no exception taken during the trial a general finding was conclusive upon all matters of fact and the review was limited to the sufficiency of the complaint.⁵

On January 5, 1925 the Supreme Court reversed a decision of the Circuit Court of Appeals, wherein the Circuit Court of Appeals had reversed a District Court in a suit against the United States on a soldier's insurance policy.⁶ The ground of the decision was that, as the trial in the District Court was before the Judge, the Circuit Court of Appeals erred in reversing the District Court on account of failure of proof. While certain technical distinctions may be made between these two Supreme Court cases and the Muentzer case, yet they do manifest that the Supreme Court is not conscious that the amendment to Sec. 269 in anywise affects the prior law relative to review of the proof in a trial before the Court.

A number of recent cases in the various Circuit Courts of Appeal have held that the amendment to Sec. 269 does not do away with the exception at the trial required by Sec. 700 R. S.⁷ *Muentzer v. Bank, supra*, was expressly noticed in a case in the 8th Circuit, in which ex-

⁴ House Report No. 913, 65th Congress, 3rd Session.

⁵ *Vicksburg Co. v. Anderson Co.*, 256 U. S. 408, 415; 41 S. Ct. 524, 527.

⁶ *Law v. United States*, 266 U. S. 494; 45 S. Ct. 175.

⁷ *Westfall v. United States* 2F (2nd) 973; C. C. A. 6 C. *Feinberg v. United States*, 2F (2nd) 955, 956; C. C. A. 8 C. *Deupree v. United States*, 2F (2nd) 44, 45; C. C. A. 9 C. *Edwards v. United States*, 7F (2nd) 357; C. C. A. 8 C.

Senator Kenyon sat as Judge.⁸ At the time of the decision in *Muentzer v. Bank*, *supra*, there were some courts inclined to the view that the amendment to Sec. 269 did do away with the necessity of an exception in order to preserve the right of review and possibly *Muentzer v. Bank*, *supra*, may represent a reform in procedure; but it is submitted that in the case of trials before the court the procedure and right of review are entirely statutory and no court can set aside the requirements of Congress in this regard.

In order therefore to preserve the right of review of the proof in an action at law tried by the Court the following steps should be carefully taken:

First. Execute a written stipulation between the parties expressly waiving a jury and agreeing to the trial before the Court and file the same before beginning the trial.

Second. At the conclusion of the evidence during the trial and before the finding, make an appropriate motion for finding in your favor and during the trial save an exception to the overruling thereof.

Then of course the question saved is not whether the trial court should have found as it did but whether there was any evidence to support the finding as the finding has the same effect as a verdict of the jury.

Special findings are not a matter of right in the Federal Court; but, if they are made, there can be under Sec. 700 R. S. the additional question, "Are the facts specially found sufficient to support the judgment?"

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⁸ *Allen v. Cartan Company* 7F (2nd) 21 C. C. A. 8 C.